# UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: SPHERE OF APPLICATION AND GENERAL PROVISIONS

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I. INTRODUCTION

Principles of International Commercial Contracts drafted by the International Institute for the Unification of Private Law, also known as UNIDROIT or the Rome Institute (hereinafter UNIDROIT Principles or PICC), constitute the latest

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2. UNIDROIT was created in 1926 under the auspices of the League of Nations. Presently it is an independent international institution composed of 56 state members with a seat in Rome.

For an outstanding and comprehensive work about the UNIDROIT Principles, see MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW (1994) [hereinafter BONELL, INT'L REST.]; MICHAEL JOACHIM BONELL, UN 'CODICE' INTERNAZIONALE DELL' DIRITTO DEI CONTRATTI. I PRINCIPI UNIDROIT DEI CONTRATTI COMMERCIALI INTERNAZIONALI (1995) [hereinafter UN CODICE] (extending the content of
effort at making the substantive law applicable to international commercial contracts uniform. The Principles are framed, together with other texts of international character, in the Uniform Law of International Commerce. This Uniform Law aims to reduce uncertainties as to which law will apply in a given case by supplanting alternatives to it. The fact that it seeks to be the only applicable law is expected to increase confidence among contracting parties overall if the instruments that comprise the Uniform Law are neutral and flexible in their content and application, as they are in most cases.

the original English version). The full versions of the 'blackletter rules' are published in Bonnell’s book in English, French, Italian, Spanish, German, Arabic, Chinese, and Russian. Bonell is, without a doubt, one of the strongest proponents of the UNIDROIT Principles.


3. It is said that this new ius commune is being replaced by a resurgence of a new lex mercatoria: “There is a current running between the two poles of internationality and nationality which has become a sign of our times—the universal globalness of today’s world.” (“Nacionalidad e internacionalidad son los dos polos entre los que transcurre una corriente que se ha convertido en uno de los signos de nuestro tiempo: la universalidad ‘global’ de hoy.”); see Manuel Olivencia, Nationalidad e internacionalidad dell Derecho Mercantil, in Discurso leído el día 16 de mayo de 1993 en el acto de su recepción pública a la Real Academia Sevilla de Legislación y Jurisprudencia 12 (1993). Thus, there has been a resurgence of a new lex mercatoria with a scope that extends far beyond that of national commercial laws. This phenomenon is one of the more important structural aspects of the transformation that the field of economic private law is undergoing. Rafael Illescas Ortiz, Las Mutaciones Contemporáneas del Derecho Privado de la Economía: Aspectos Estructurales, in 2 ESTUDIOS EN HOMENAJE A JORGE BARRERA GRAF 940 (1989).

In relation to the UNIDROIT Principles, Klaus Peter Berger’s words are quite apt: “Diese Regelungspolitik trifft sich mit dem Grundansatz der Protagonisten eines transnationalen Wirtschaftsrechts oder einer modernen lex mercatoria, wie sie von Goldman, Fouchard, Kahn und Schmitthoff in den sechziger Jahren entwickelt wurde und heute von einer Reihe von Autoren vertreten wird.” Klaus Peter Berger, Die UNIDROIT-Prinzipien für Internationale Handelsverträge, 94 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSHISTORISCHE WISSENSCHAFT 218, 220 (1995); see also Hernany Veytia, The Requirement of Justice and Equity in Contracts, 69 Tul. L. Rev. 1191, 1192 (1995). “The UNIDROIT Principles also constitute a source of guidance for judges and arbitrators deciding disputes involving international contracts, in much the same manner as the lex mercatoria has historically been used.” Id.

4. In relation to this terminology see Luis Fernandez de la Gandara & Alfonso Calvo Caravaca, El Derecho Mercantil Internacional: ¿Una nueva categoría sistematica? 16 CUADERNOS DE DERECHO Y COMERCIO 89 (1995); see also Arthur Rosett, Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law, 40 Am. J. Comp. L. 683 (1992) (describing the different forms that this Uniform Law may take) Id.
The Uniform Law includes the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter Convention or CISG).\(^5\) That text is essential to this study, since the UNIDROIT Principles have been deeply influenced by the Convention.\(^6\) The flexibility which the instruments of the Uniform Law reclaim is more pronounced in the UNIDROIT Principles than in the Convention: The latter is an international treaty which states may incorporate as national law, while the Principles are a set of rules without binding character for either individuals or states. This could be deemed a disadvantage, but is, on the contrary, a great advantage, since the Principles can be revised easily and thus may be better adapted to the demands of international commerce.

One of the most interesting issues in the UNIDROIT Principles is their relationship to the Convention, especially in those circumstances in which both texts apply to a business transaction. Both texts of the Uniform Law influence each other mutually, the instruments being in most cases complementary. In other situations, the Principles will replace the Convention or vice versa. It may also be that reading the UNIDROIT Principles in relation to the Convention (and vice versa) will assist judges and arbitrators in their tasks of interpretation.

The Principles also show the influence of instruments which, like the Convention, were drafted by the United Nations Commission of International Trade Law (UNCITRAL).\(^7\) Other modern texts, national or international, were

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5. The Vienna Sales Convention is currently incorporated into the domestic laws of 45 states. Works previous to the adoption of the Vienna Convention are in the Official Records and in the Yearbooks of the United Nations Commission of International Trade Law (UNCITRAL). For a good compilation of these documents see JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS, AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS (1989).


6. See Ulrich Magnus, Die allegemeinen Grundsätze im UN-Kaufrecht, 59 RABELS ZETISCHRIFT 492-93 (1995). Magnus points out that the harmony between the Convention and the UNIDROIT Principles comes as no surprise, because the Convention could be considered the "godfather" of the UNIDROIT Principles. Id.; Denis Tallon, Damages, Exemption Clauses and Penalties, 40 AM. J. COMP. L. 675 (1992) (asserting it is obvious that the "CISG is not a perfect model"). Id. In many cases the UNIDROIT Principles amplify or modify the regulations of the Convention and, of course, deal with some issues not even handled by the Convention.

7. UNCITRAL was created in 1966 by Resolution 2205 (XXI) of the ONU General Assembly. For a discussion of UNCITRAL, see UNCITRAL, The United
also taken into account in drafting the Principles.\textsuperscript{8} Among the national and provincial texts considered, the Uniform Commercial Code of the United States (hereinafter U.C.C.) and the Civil Codes of Algeria (1975), the Netherlands (1992) and Quebec (1994) have been of particular influence.\textsuperscript{9} Among the influential international texts were two prepared by the International Chamber of Commerce (ICC): International Commercial Terms 1990 (INCOTERMS 1990)\textsuperscript{10} and the Uniform Rules on Documentary Credits of 1993.\textsuperscript{11}

Given that the drafting of the UNIDROIT Principles, unlike that of the Convention, did not involve individual states but rather practitioners, it is surprising that they took more than fourteen years to draft.\textsuperscript{12} This slowness may be justified, however, by the fact that the UNIDROIT Principles are a general code intended to be applicable to any kind of international commercial contract. One-hundred-twenty Articles, divided into seven Chapters, resulted from this ambitious plan. These Chapters regulate most of the issues that can affect a contract during its existence: General Provisions (Chapter 1), Formation (Chapter 2), Validity (Chapter 3), Interpretation (Chapter 4), Content (Chapter 5),

\textsuperscript{Nations Commission on International Trade Law (2d ed. forthcoming United Nations Publication).}


\textsuperscript{9.} Id.


\textsuperscript{11.} ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS Pub. 500 (1993) [hereinafter UCP].

\textsuperscript{12.} UNIDROIT work, initially named "Progressive Codification of International Trade Law," started in the early 1970s. The first session took place in 1974. At that time, the field work was planned and generally restricted to contracts law, including the law of the sales contract.

By 1975, drafts of Uniform Rules based on the formation of contracts and their interpretation were ready. See Michael Joachim Bonell, The UNIDROIT Initiative for the Progressive Codification of International Trade Law, 27 INT'L & COMP. L.Q. 431 (1978). Both the Uniform Rules and the interpretation were drafted on the basis of the 1964 Uniform Law on Formation of International Sales Contract (ULF) and, of course, took into account the legal differences among the diverse legal systems. Id. In 1980, a special working group was set up with the object of preparing a first draft with commentaries in light of the Convention text. After several drafts, the final text was approved in 1994. UNIDROIT Principles, supra note 1, at vii.

Performance (Chapter 6), and Non-Performance (Chapter 7). Chapters 6 and 7 are also divided into sections. Moreover, the Principles contain a Preamble, a fact of some importance since it specifies the purposes of the Principles and in so doing defines their scope of application. This Article will focus exclusively on the Preamble and Chapter 1 (General Dispositions). The author will also make some references to other parts of the Principles, especially Chapter 2 (Formation of Contracts), in order to better understand the Principles and how they should be interpreted.

As mentioned above, the UNIDROIT Principles are configured as a general code for international commercial contracts and use terminology very familiar to civil law lawyers. Nevertheless, comparison to the Restatements of U.S. common law seems more accurate. The UNIDROIT Principles, by their manner of presentation, their objectives, and their content, more closely resemble the Restatement of Contracts, even the U.C.C., than they do the Codes of civil law.

13. This Chapter was one of the most difficult to draft and to approve. See Marcel Fontaine, Content and Performance, 40 AM. J. COMP. L. 645 (1992) (pointing out that interpretation of “hardship” was problematic). Regarding the term “hardship,” see Dietrich Maskow, Hardship and Force Majeure, 40 AM. J. COMP. L. 657-74 (1992).


16. RESTATMENT (SECOND) CONTRACTS (1981) [hereinafter RESTATMENT] (taken into account when the UNIDROIT Principles were drafted).


The U.S. legal system, through the Restatement of Contracts and the U.C.C., perfectly reflects the tension between classic contract law, represented by the Restatements and the case law from which they are derived, and the new criteria introduced by the U.C.C. The Restatements of Contracts are part of the Restatement of the Law, created by the American Law Institute. After several modifications, the present text, which is accompanied by commentaries and examples, was published in 1981, see supra RESTATMENT, note 16. On the other hand, the U.C.C., which can be amended by the states, has been adopted by every state except Louisiana. The U.C.C.,
law countries, apart from the manner in which they were drafted.\textsuperscript{18} To some degree, even their manner of drafting adopts the orientations of the Restatements since each Article has illustrations and a title, e.g. PICC Article 2.5 (Rejection of Offer).

Both the U.S. Restatements and the Principles include comments that, though not binding, are of great help in clarifying the drafters' intentions. The Convention, on the contrary, has no such comments. This is despite the fact that the UNCITRAL Secretariat prepared a comment section in the previous draft, the 1978 Draft on Convention on Contracts for the International Sale of Goods,\textsuperscript{19} which hardly changed in its present incarnation as the Vienna Sales Convention. The Vienna scholars frequently use the comments to this 1978 Draft to support their opinions. However, these comments should be used with care not only with regard to the Principles but also with regard to the Convention. The comments of the Secretariat with respect to the Convention should not be viewed as sacred because in some cases, a point of view adopted may be greatly influenced by the legal origin of the drafters, or may even reflect opinions of delegates which were not incorporated in the final draft. In the case of the Principles, the comment sometimes reflects the opinions of its authors.\textsuperscript{20} Notwithstanding these shortcomings, in both cases, consultation of comments is necessary since, like the Restatement, has a commentary which is not adopted by the states but is nonetheless of great importance. U.C.C. (1995).

\textsuperscript{18} See BONELL, INT'L REST., supra note 2, at 27. "In general the UNIDROIT Principles are drafted more in the style of the European codes than in the notoriously more elaborate fashion typical of Common law statutes." \textit{Id.}  

\textsuperscript{19} See OFFICIAL RECORDS, supra note 5.  

\textsuperscript{20} See Comment to UNIDROIT Principles art. 1.8, supra note 1, § 4, at 21 (substantially similar to Article 9 of the CISG). Article 1.8 indicates that

[only in exceptional circumstances] may usages of a purely local or national origin be applied without any reference thereto by the parties. Thus, usages existing on certain commodity exchanges, or at trade exhibitions or ports should be applied provided that they are regularly followed with respect to foreigners as well. \textit{Id.} In the comment to Article 9 of the CISG in the Vienna Sales Convention, Bonell states:

However, the new formulation of Article 9(2) should not be understood to prevent in all cases usages of a purely local or national origin from being applied without any reference thereto by the parties. One exception, for example, should be the applicability of usages existing at certain commodity exchanges, trade exhibitions or ports, provided that they are regularly followed also with respect to trade with foreigners.

though not binding, they are very illustrative of an Article’s scope and meaning.\textsuperscript{21}

There are also some similarities between the objectives of the Restatements and those of the UNIDROIT Principles. The Restatements of Contracts are part of the Restatements of the Law, which the American Law Institute created with the idea of compiling general common-law principles.\textsuperscript{22} Although they are not legally binding, they provide persuasive authority.\textsuperscript{23} The UNIDROIT Principles, likewise, are a set of principles shared among different legal systems. They seek to elaborate a nonbinding uniform commercial code in matters related to international contracts. They are for voluntary application, but may be persuasive authority in litigation. Thus, they may act as an international “Restatement” of general principles for international commercial contracts.\textsuperscript{24} However, as we will see, the objectives of the Principles are even more ambitious.

During the process of the Principles’ development, the drafters remained cognizant of the diversity of legal systems. For this reason, the working group included representatives of all the major legal systems of the world. The group was composed of leading experts in the fields of contract law and international trade law.\textsuperscript{25} The Principles were intended to constitute a neutral text which would give the contracting parties equal and fair treatment, a text which would be flexible and adaptable not only to the specific features of different international

\textsuperscript{21} For this reason, it appears that Professor Bonell exaggerates when he indicates, “[t]he comments are an integral part of the UNIDROIT Principles, all the more so as sometimes they not only explain but to a certain extent even supplement the black letter rule.” \textit{See} BONELL, INT’L. REST., \textit{supra} note 2, at 27.
\textsuperscript{22} \textit{See RESTATMENT, supra} note 16.
\textsuperscript{24} \textit{See} UNIDROIT Principles, \textit{supra} note 1, at vii.
\textsuperscript{25} \textit{Id.} A review of the members of the Working Group confirms the diverse legal origins and idioms of the members, as well as their relationship to the Uniform International Commercial Law and, in particular, to the Vienna Sales Convention. The members are the most important commentators on the Vienna text. \textit{See Why? What? How? supra} note 1, at 1130-31.

On one side of the Working Group were the ‘traditionalists,’ rather reluctant to depart from long-established principles, particularly if these principles formed part of their own legal system; on the other side were the ‘innovators’ more open to recent developments, even when these developments belonged to a foreign legal system and were not yet generally accepted.

commercial contracts, but also to the rapid and continuous changes in international trade.26

Another attempt to codify general contract principles should be mentioned before we start to study the sphere of application of the UNIDROIT Principles. It is an effort restricted to the states of the European Community, which through the founding of an ad hoc commission called the Commission of European Contract Law (or “The Lando Commission,” after its President), strove to create a document called the Principles of European Contract Law.27 This Commission was composed of jurists from Community states unaffiliated with their governments. The Principles of European Contract Law have “notes” for every Article which point out the differences among the legal systems of the European Community. The UNIDROIT Principles have influenced the rules of that text, since approximately one-third of the members of The Lando Commission have also been members of the working group charged with developing the UNIDROIT Principles.28

26. See Hernany Veytia, Los Principios ante la problem tica de la Ley aplicable a los contratos mercantiles en materia internacional in “PRINCIPI I CONTRATI COMMERCIALI INTERNAZIONALI” E IL SISTEMA GIURIDICO LATINOAMERICANO 59 (Michael Joachim Bonell & Sandro Schipani eds., 1996) [hereinafter Bonell & Schipani] “estos Principios estan absolutamente influenciados y fundados en los prinicipia es decir en el sentido con n (que con frecuencia en el comercio internacional es el menos con n de los sentidos).” Id.

For examples of rules of the UNIDROIT Principles designed to comply with special needs of international commercial practice, see BONELL, INT’L REST., supra note 2, at 50-54 (explaining how rules reflect the different social and economic conditions in some parts of the world). Id.


28. See Storme, supra note 14, at 311 (comparing both texts and coming to a clear conclusion: the General Provisions and the Sphere of Application are very similar); see also Arthur Hartkamp, The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law, 2 EUROPEAN REV. PRIVATE L. 341 (1994); Defining the Sphere, supra note 15, at 1229 (comparing these European Principles with the U.S. RESTATEMENTS).

Regarding the relationship between the European Principles and the UNIDROIT Principles, see E. Allan Farnsworth, Closing Remarks, 40 AM. J. COMP. L. 699, 701
II. PREMABLE OF THE UNIDROIT PRINCIPLES: PURPOSE OF THE PRINCIPLES

The Preamble of the Principles (Purpose of the Principles) indicates their scope. Other objectives that guided the drafters are not expressly mentioned in the Principles, but can be deduced from the text as a whole and from its international character. In general, the fundamental target of reducing the uncertainty surrounding the law applicable to contracts is coupled with the goal of creating a legal body of general application independent of the legal, economic, or political origin of the persons involved in international trade. In the following pages, special attention is paid to the purposes of the Principles as they have been set out in the Preamble. A simple reading would lead to the conclusion that the Principles were self-sufficient in character, but this would be incorrect. Thanks to the efforts of UNIDROIT, the international business community relies heavily on the Principles’ diverse set of norms in drafting their contracts, in applying the norms to their contracts, and in interpreting other international instruments. However, one must not make the error of thinking that the Principles will completely replace other relevant international norms with deep roots in the international commercial arena, such as the INCOTERMS 1990 or the Vienna Convention. The reciprocal influence between the Vienna Convention and the UNIDROIT Principles will assist practitioners in understanding the provisions, principally in reference to their object of serving as an aid to, or instrument of, interpretation.

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n.3 (1992) (stating that “they have a somewhat incestuous relationship”). Id.; Ole Lando, supra note 25, at 161 n.1 (stating that the European Principles have a precise aim: to serve as a basis for a European Code of Contracts). Id.

29. For the history of the Preamble, see Gonzalo Parra Aranguren, Aspectos de Derecho Internacional Privado de los Principios para los Contratos Mercantiles Internacionales Elaborados por el UNIDROIT, 91 REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y POLÍTICAS §§ 23-26, at 176-78 (1994); see also Bonnell & Schipani, supra note 26, at 35-43.

30. See Luiz Olavo Baptista, The UNIDROIT Principles for International Commercial Law Project: Aspects of International Private Law, 69 Tul. L. Rev. 1209, 1217 (1995). Without referring to the Vienna Convention specifically, Luiz Olavo Baptista points out in a general discussion that the UNIDROIT Principles “shall be interpreted and, therefore, the object of the interpretation; in the other, they shall be its instrument.” Id. Subsequent references will be to this article because the ideas are the same as in other translations. See Bonell & Schipani, supra note 26, at 23.
A. The Principles as General Rules for the International Commercial Contracts

The Preamble states, "[t]hese Principles set forth general rules for international commercial contracts." This statement lacks specificity and requires further detail.

1. The Principles Set Forth General Rules for Contracts

The purpose of the Principles is very clear. They intend to promulgate a valid set of norms for every international commercial contract, norms which are common to existing national legal systems and are best adapted to the special requirements of international commercial transactions. The Principles' norms are directed toward elaborating a uniform code on international contracts, adaptable and acceptable not only to every legal, political, and economic system, but also to every contract that could be configured with an international and commercial character. This is indicated by drafters' efforts to detach themselves from the weight of their diverse legal traditions. Despite this, the fact that parties could apply the Principles to contracts that are not necessarily international or commercial broadens their scope of applicability: the codification of a general theory of contractual obligations. It is then a sort of ius commune, confirmed in the comment to the Preamble: "there is nothing to prevent private persons from agreeing to apply the Principles to a purely domestic contract." This option makes sense, since, on the one hand, the regulation of the Principles is valid for every commercial contract, international or not. On the other hand, in the private contracting sphere, the principle of freedom of contract governs, such

31. The Principles of European Contract Law are applied "as general rules of contract law in the European Communities." UNIDROIT Principles, supra note 1, art. 1.101. Presumably, the UNIDROIT Principles aim to be applicable to every contract, international or not, commercial or not.
32. UNIDROIT Principles, supra note 1, §4, at 3 (comment to the Preamble); Why? What? How?, supra note 1, at 1143-44 (indicating that for this reason the UNIDROIT Principles could be considered as a sort of "ius commune" for parties, judges, or arbitrators). Id.
33. UNIDROIT Principles, supra note 1, §2, at 2.
34. See, e.g., 2 JOSE PUIG BRUTAU, COMPENDIO DE DERECHO CIVIL 1 (1994). The concept of obligation is the juridical or legal duty that exists between the obligor and the obligee. Id.
35. UNIDROIT Principles, supra note 1, § 3, at 2-3 (comment to the Preamble); Ferrari, Defining the Sphere, supra note 15, at 1237. Ferrari could not be clearer that "with reference to their 'direct' application, the UNIDROIT Principles can be considered as much 'Principles of General Contract Law' as they can be considered 'Principles of International Commercial Contracts,' at least as long as they do not take the form of a binding instrument, such as a convention." Id.
that the parties are free to choose the rules they consider to be most convenient given their interests. However, there is one limitation: agreements are subject to the mandatory rules of the country whose law governs the contract.36

2. The Principles as Applied to Commercial Contracts

The Principles limit their sphere of application to contracts considered to be commercial. From this point of view, the Principles are an integral part of the Uniform Law, which tries to obtain substantive uniformity of international commercial contracts. Even though the Principles refer to commercial contracts, they do not specify what kind of contracts would be included within their scope.37 This is problematic because, on the one hand, there are legal systems with

36. UNIDROIT Principles, supra note 1, art. 1.4.

37. See UNIDROIT Principles, supra note 1, § 2 at 2 (pointing out that, nevertheless, the concept of "commercial" contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services but also other types of economic transactions, such as investments and/or concession agreements, and contracts for professional services) Id.; E. Allan Farnsworth, Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws, 3 TUL. J. INT’L & COMp. L. 47 (1995) (correctly indicating, in relation to this question, that the UNIDROIT Principles are likely to have their greatest impact in connection with international contracts for services, because the Convention occupies the field of the international sale of goods). Id.

The Convention does not define "goods" (in Spanish "mercaderfas" and in French "marchandises"), but the distinction which some countries, such as Spain, make between civil and commercial contracts could help clarify this concept. This distinction has resulted in two Codes, such that it is necessary to provide careful definitions regarding what is considered civil or commercial. However, CISG Article 1.3 does not support two different Codes but states that "neither the nationality of the parties nor the civil or the commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention." United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18 Annex 1 (1980) [hereinafter CISG]. Article 1.3 is, then, a set of rules that is neither commercial nor civil, but its own regime applied when certain conditions are met. Id. Nevertheless, the situations regulated by the CISG basically correspond with those that are considered commercial under systems that recognize this dual character of contracts. This becomes especially apparent if we consider that consumer transactions are excluded from the Vienna Convention’s sphere of application and from any other text created by UNCITRAL or UNIDROIT. See CISG, supra art. 2(a). An exception in Article 2(a) of the CISG includes consumer transactions when it states "unless the seller, at any time before or at the conclusion of the contract neither knew nor ought to have known that the goods were bought for any such use." In relation to the exclusion of the energy contracts from the sphere of application of the Convention see Peter Winship, Energy Contracts and the United Nations Sales Convention, 25 TEX. INT’L L. J. 363 (1990).
parallel regulations applicable to contracts depending upon whether they are civil or commercial—for instance, Articles 325-326 of the Spanish Commercial Code, as well as relevant French, German, and Austrian laws. On the other hand, some legal systems, apart from some special rules, recognize only one system of regulation, directed most often to fulfilling the specificities of commercial transactions—for instance, the Swiss and Italian legal systems. Nevertheless, the comment suggests, the Principles do not seek to encourage a “battle between the codes,” but rather to exclude consumer transactions from their scope. This is consistent with the trend in Uniform Commercial Law to exclude from its sphere of influence transactions with consumers. The main reason for excluding these transactions is the desire not to interfere with mandatory domestic rules designed to protect the so-called weaker party in a contractual relation. It is evident that in the Uniform International Commercial Law, there is no weaker party—or, at least, the differences between the parties are not as severe as they may frequently be in consumer transactions.

One of the definitions of “consumer” in the comment to the Preamble requires further reflection: a consumer is a party who enters into the contract other than in the course of his or her trade or profession. This definition is particularly important in the context of Spanish domestic contracts, in which it may not be clear whether the characterization of a transaction as a purchase/investment refers to a commercial or a civil contract. Purchase/investment could be understood as referring to those sales made by merchants which are not the object of further resale by the buyer, a condition necessary for a sale to be considered commercial under Article 325 of the Spanish Commercial Code.39

38. Regarding the distinction between these two kinds of contracts see Francisco Vicent Chuliá, Delimitación del Concepto de Compraventa Mercantil, 500 REVISTA CRITICA DE DERECHO INMOBILIARIO, 75 (1974); see also José Luis García Pita y Lastres, Compraventa Mercantil y Derecho de los Consumidores (De Nuevo sobre la calificación mercantil de la reventa), 14 Cuadernos de Derecho y Comercio 11 (1994).


40. See COD DES OBLIGATIONS (CO) arts. 187-215 (1911); CODICE CIVILE (C.C.) arts. 1510-19 (1942) (Italy).

41. UNIDROIT Principles, supra note 1, § 2, at 2.

42. See Rafael Illescas Ortiz, El Derecho Uniforme del Comercio Internacional: Elementos de Base [The Uniformity of Law in International Commerce: Elements of Its Basis], 2 ESTUDIOS DE DERECHO MERCANTIL EN HOMENAJE AL PROFESOR MANUEL BROSETA FONT 1788 (1995) (indicating this trend is consistent with the implicit business and professional character of the Uniform Rules’ sphere of application).

43. UNIDROIT Principles, supra note 1, §2, at 2.

44. 2 FRANCISCO VICENT CHULIÁ, COMPENDIO CRITICO DE DERECHO MERCANTIL 86 (3rd ed. 1990).
Commercial Code. It may also be understood as referring to a sale of business equipment, e.g., the sale of a computer, furniture, a packaging machine, and so forth. Even though the Spanish Supreme Court (Tribunal Supremo) is uncertain as to the nature of this kind of sale in the purely domestic field, there is a distinct trend in international trade to regulate purchase/investment sales in their rulings. For that reason, the Convention excludes contracts for sales of goods bought for personal, family, or household use—strictly speaking, consumer transactions. Thus, CISG Article 2(a) is very clear and seems to raise two kinds of considerations. On the one hand, it suggests that consumer transactions are beyond the scope of the Convention; on the other hand, it suggests that the cases known as purchase/investments are regulated by the Convention as well as by the UNIDROIT Principles.

In any case, the choice of the word “mercantiles” in the Spanish version should be praised. It clearly indicates a preference for commercial transactions, excluding from the Principles contracts with consumers and contracts that, particularly under the Spanish Civil or Commercial Code, are considered non-commercial under legal systems which adopt a double categorization of sales contracts.

3. The Principles as Applied to International Contracts

The comment states that the Principles do not adopt any criteria for a contract to be considered international. The comment nevertheless calls attention to the fact that the concept of “international” contracts should be given the broadest possible interpretation so as to ultimately exclude only those situations where no

45. SPANISH COMMERCIAL CODE art. 325 (stating that “Sera mercantil la compraventa de cosas muebles para revenderlas, bien en la misma forma que se compraron, o bien en otra diferente con animo de lucrarse en la reventa”). Id.

46. However, they usually state that it is a civil contract. See Cándido Paz-Ares, La Mercantilidad de la Compraventa para uso o Consumo Empresarial REVISTA DE DERECHO MERCANTIL 175-76, 248 (1985).

47. CISG, supra note 37, art. 2(a).

48. See Vicent Chulfa, supra note 38, at 86-87 (arguing that the latter are civil); but see Paz-Ares, supra note 46, at 245 (arguing that they are commercial).

49. Regarding the UNIDROIT Principles, see Alejandro Garro, The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration, 3 Tul. J. Int’l & Comp. L. 93, 101 (1994) (stating that the “Principles may apply to contracts which most Civil law systems have traditionally categorized as civil or non commercial”). Id.

50. This is in contrast to some legal systems in which the international character of the contract is defined in various ways, for example, when the contracting parties’ businesses are in different states. See CISG, supra note 37, art. 1.
international element at all is involved—in other words, where all relevant elements of the contract in question are connected with one country only.\textsuperscript{51}

B. Application of the Principles by the Express Agreement of the Parties

The second paragraph of the Preamble states, "[The Principles] shall be applied when the parties have agreed that their contract be governed by them."\textsuperscript{52} This is without a doubt the best advice that can be given to parties participating in any international transaction. If one wishes the Principles to apply, it is best to say so expressly without using vague or ambiguous statements about one’s intentions. The comment to the Preamble recommends combining the adoption of the Principles with an arbitration agreement, since arbitrators are not as constrained by mandatory rules of domestic law as courts are.\textsuperscript{53}

One of the drawbacks of the UNIDROIT Principles is their newness. Because of this, contracting parties may not be familiar with them, and consequently, may not apply them to their contracts. This could hinder their future development. Nevertheless, positive development is anticipated, especially as the Principles are applied by arbitrators.

C. Application of the Principles to the Contract as \textit{Lex Mercatoria}

Paragraph 3 of the Preamble indicates that "[t]hey may be applied when the parties have agreed that their contract be governed by 'general principles of law,' the 'lex mercatoria' or the like."\textsuperscript{54} Paragraph 2 uses the word "shall" rather than "may," which is used in Paragraphs 3 through 6 of the Preamble. It then recommends to tribunals that the Principles apply when the parties want their contracts to be regulated by expressions such as \textit{lex mercatoria} or general principles of law.\textsuperscript{55} From these different expressions, one can infer that the drafters’ purpose was to recognize the automatic application of the Principles to contracts where that is the will of the

\textsuperscript{51} UNIDROIT Principles, \textit{supra} note 1, § 1, at 2. For the rationale for limiting the scope of the UNIDROIT Principles to ‘international’ contracts only, see BONELL, INT’L REST., \textit{supra} note 2, at 30-31.
\textsuperscript{52} See UNIDROIT Principles, \textit{supra} note 1, at 1.
\textsuperscript{53} \textit{Id.} §§ 3-4 at 2-3.
\textsuperscript{54} \textit{Id.} at 1.
\textsuperscript{55} \textit{Id.} The last paragraph states that this recommendation is directed towards national legislators.
parties. This consequence is independent of the fact that the applicable law may require the contract to be linked to a national law. Professor Ferrari points out that the effectiveness of the parties' choice of the UNIDROIT Principles will differ depending on whether their choice of the applicable law is restricted to domestic law (Kollisionsrechtliche Parteiautonomie) or whether their agreement intends the UNIDROIT Principles to become applicable (materiellrechtliche Parteiautonomie). The effect of the choice raises no problems regarding the latter, but it may in relation to the former. If the parties choose the Principles as the governing law, national judges might only recognize this as a mere incorporation of contract forms. In that case, their choice would be recognized under freedom of contract, but could be invalidated by the rules of the forum law or the applicable law. Nevertheless, even in those situations, the Principles, at a minimum, will constitute contract clauses. This will not diminish their value because in international contracts, freedom of contract prevails. Besides, contracts with arbitration clauses will not be constrained by national law since arbitrators are not so constrained. Therefore, arbitrators could apply the UNIDROIT Principles with reduced regard for domestic rules, including mandatory rules under national law (as long as such mandatory rules are not within the scope of "international public policy").

Similar problems exist regarding the application of the Principles as lex mercatoria. For example, courts may find it difficult to apply the Principles as lex mercatoria. First of all, this concept is generally identified as a source of unwritten law; moreover, the drafters' wishes to configure the Principles clearly as lex mercatoria may not coincide with the real role of the Principles. For that


In relation to the application of the UNIDROIT Principles to countries that are part of MERCOSUR, see Siegbert Rippe in Bonell & Schipani, supra note 26, at 51.

58. See Ferrari, Defining the Sphere, supra note 15, at 1231-32 nn.44-45 (indicating that this has been recognized by French and Dutch legislators); see also Ole Lando, Assessing the role of the UNIDROIT Principles in the Harmonization of Arbitration Law, 3 Tul. J. Int'l & Comp. L., 129, 135 (1994). Lando also indicates that the UNCITRAL Model Law on International Commercial Arbitration provides that the parties may select lex mercatoria. Id. For consideration of the UNIDROIT Principles as a new lex mercatoria, see Berger, supra note 3, at 224, 235.

59. See Ugo Draetta, Principi UNIDROIT Per I Contratti Internazionali E Progetto Di Codice Europeo Dei Contratti Due Proposte A Confronto DIRITTO DEL COMMERCIO INTERNAZIONALE, Luglio-Dicembre 1994, No. 8.3-4, at 682. Draetta
reason, the Principles will only be applied when the parties have expressly decided they will constitute the normative body of law regulating the agreement. This may lead to conflict of law problems, as has already been pointed out.  

On the contrary, it does not appear that the Principles can be applied, or at least not automatically, when the parties have agreed that their contract will be governed by "general principles of law," *lex mercatoria,* or something similar, such as international commercial usages. The Principles are not usages, nor can it be said that they have legislative force behind them. Certainly, some of the provisions reflect the usual manner of operating in the international commercial arena. Others, however, could never be used in this way since they propose to reconcile varying principles and rules that derive from different legal and political concepts. However, it should be recognized that the Principles may eventually become recognized as *lex mercatoria* by practitioners of international trade. On the other hand, even though from a strictly legal viewpoint, a complete link between the Principles and the *lex mercatoria* is not appropriate, application of the Principles by national judges should be supported. In this sense I agree with Professor Garro when he suggests the following reasons for the Principles to be expressively states, "Si tratta, in sostanza, del più serio sforzo finora compiuto di precisare i contenuti della *lex mercatoria.*" See also Catherine Kessedjian, *Un Exercice de Rénovation des Sources du Droit des Contrats du Commerce International: Les Principes Proposés para l' Unidroit,* 4 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 658 (1994) (indicating that the parties' choice of the UNIDROIT Principles could be considered an implicit indication that the *lex mercatoria* apply, with the expression "*lex mercatoria,*" the drafters seek to eliminate, or at least, to reduce its vagueness) *Id.;* Javier Lete Achirica, *Los Principios de UNIDROIT Sobre los Contratos Comerciales Internacionales* [The Principles of UNIDROIT Regarding International Commercial Contracts], ACTUALIDAD CIVIL, February 11, 1996, at 129; see also Steffens in Bonell & Schipani, *supra* note 26, at 46.  

60. *See supra* part II.C.  
61. *See UNIDROIT Principles,* *supra* note 1, arts. 1.2, 1.7, 5.3, & 7.4.9(1).  
62. *Id.* arts. 2.2, 2.4, & 7.4.9(2).  

[a]s general principles of law, the UNIDROIT text will only be accepted when the legal community—and not merely the some 20 or so experts responsible for drafting the UNIDROIT text, no matter how skilled and famous these lawyers may be—has recognized that the UNIDROIT document states principles which underlie most legal systems and are generally accepted. The Principles will only be part of the *lex mercatoria* if they are recognized as such by the business community and its arbitrators. Since the Principles have just been launched, it is too early to assess this possibility.  

*Id.;* see also Richard Hyland, On Setting Forth the law of Contract: A Foreword, 40 AM. J. COMP. L. 541, 542 (1992) (correctly defining the UNIDROIT Principles as "an attempt to formulate the current consensus concerning the contract rules that are most appropriate for international trade").  

*Id.*
applied as *lex mercatoria*: 1) the parties may wish to submit their contract to a set of rules not connected with a national law; 2) the well-defined rules contained in the Principles reduce uncertainty and indefiniteness; and 3) the rules of the Principles are specifically tailored to international commercial disputes. 64

This future development of the Principles is not implausible given that the Convention is being applied by arbitrators as *lex mercatoria*. 65 For example, tribunals have distorted the applicable conditions of the Convention (CISG Article 1). Consequently, they have applied the Convention with the understanding that "the Vienna Convention norms represent the general character of the sale of goods law in all legal systems"—even though in one case none of the states in which the parties had their places of business were contracting states. 66 The Convention has also been applied as trade usage. It is therefore not surprising that a decision of the ICC indicates that the Convention cannot be applied to a given case as *lex mercatoria*, since it did not offer any remedy in that case. 67 The ICC has also applied the Convention with the understanding that it represents general principles of international trade practice, including the principle of good faith. 68 These decisions confirm that, even though the Convention restricts its scope to sale of goods contracts, its norms could be applied to every kind of international commercial contract, and even national ones, because it regulates the obligations and rights of the parties in a manner typical of contract law. Consequently, one can say that, like the first paragraph of the Preamble, the Convention sets forth general rules for international as well as national commercial contracts. Good evidence of this statement is the fact that the UNIDROIT Principles, which apply to any international commercial contract and not only to contracts of sale, follow the Convention text almost literally, especially with respect to the rules of Chapter 2 on Formation of Contracts. 69

65. It may be that arbitrators will be influenced by the fact that the Convention has been incorporated as national law in a diverse group of states, including developed and developing countries; countries with centralized and with free market economies; and Eastern and Western countries.
68. Summary in Bulletin de la Cour Internationale d'Arbitrage de la CCI, noviembre 1995, vol.6, n 2, at 73 et seq. *See also* Court Constituzionale, 19 November 1992 (465) (Italy).
69. *See, e.g.*, UNIDROIT Principles, *supra* note 1, arts. 2.2 (CISG, *supra* note 37, art. 14(1)), 2.3 (CISG art. 15), 2.4 (CISG art. 16), 2.5 (CISG art. 17), 2.6 (CISG art. 18(1) & (3)), 2.7 (CISG art. 18(2)), 2.8 (CISG art. 20), 2.9 (CISG art. 21), 2.10 (CISG art. 22), & 2(11) (CISG arts. 19(1) & (2)).
Some examples may clarify the role of the UNIDROIT Principles as *lex mercatoria*. The influence of the Convention on the UNIDROIT Principles is well known. Some of their norms are clearly inspired by the Convention. This is especially true of Chapter 2 which is partially dedicated to the Formation of International Contracts, which, except for some minor variations, is an exact copy of the corresponding portion of the Convention text. This seems to mean that the UNIDROIT Principles have to be interpreted as taking into account the legislative history of the whole text of the Convention. In other words, the UNIDROIT Principles may be useful as a tool to interpret and supplement the Uniform Law.

Let us suppose that in an international transaction some doubts are raised about the interpretation of a statement in an offer such as “you have twenty days to accept the offer.” This statement is vague under the UNIDROIT Principles as well as under the Convention because it is not clear whether the intention of the offerer is to establish a deadline to accept the offer or to indicate a time at which point the offer will become irrevocable. The phrase is ambiguous because CISG Article 16(2)(a)\(^70\) was drafted ambiguously as a part of a compromise between different legal concepts.\(^71\) The UNIDROIT Principles have not succeeded in

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70. *See* CISG, *supra* note 37, art. 16(2). “However an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable.” *Id.*

71. In common-law systems, specifically in the U.S., the general rule is that a party is free to revoke an offer until the contract is concluded. The time fixed for acceptance does not mean the offer is irrevocable unless consideration is present. This rule was first established in 1789 in the leading case law and continued in later cases. *See* Payne v. Cave, 3 Term Rep.653, 100 E.R.492 (1789); Oxford v. Davies, 12 C.B., N.S.748 (1862); Dickinson v. Dodds, L.R.2 Ch.d.463 (1876); *see also* JOHN E. MURRAY, *ON CONTRACTS* 112-13 (3rd ed., 1990). The strictness of this doctrine is tempered by the fact that the offeror's power of revocation ends when the acceptance is sent by mail or telegraph; that is, when the contract is concluded by virtue of the “mailbox rule.” Adams v. Lindsell (1818) 1.B.Ald. 681E.R.250; *RESTATEMENT, supra* note 16, §63.

In civil law systems, a distinction should be made between German and Latin systems. In the former, an offer is irrevocable from the instant of its dispatch, whether or not the offer has a fixed time by which it must be accepted. *See* GERMAN CIVIL CODE, *supra* note 39, art. 145. The German Civil Code states: “Wer einem anderen die Schiessung eines Vertrags anträgt, ist an den Antrag gebunden, es sei denn, dass er die Gebundenheit ausgeschlossen hat.” *Id.; see also* AUSTRIAN CIVIL CODE, *supra* note 39, art. 862.3. In contrast, there is no rule on this issue in the Spanish legal system, so the Vienna Sales Convention’s rule is fully applicable. In any case, scholars have stated that the general rule is that offers may be freely revoked until the conflict is concluded, and a fixed time for acceptance does not make an offer irrevocable.

After this short exposition of comparative law, it is obvious that the Latin systems’ approach was not discussed during the Diplomatic Conference held in Vienna.
overcoming this difficulty\textsuperscript{72} and have reproduced CISG Article 16(2)(a).\textsuperscript{73} The inference is unavoidable: if at this point, the Principles—and also the Convention—can show evidence of a frustrated attempt to find an acceptable solution to fixing a time for acceptance of an offer, how could the Principles be considered as \textit{lex mercatoria} or as “general principles of law” or “usages or customs?” It is clearly impossible to attribute this role to them.

Second, consider the contrary—regard the Principles in some circumstances as \textit{lex mercatoria}. Take, for example, two Articles. First, PICC Article 1.7 (Good Faith and Fair Dealing), located in the section enumerating the General Provisions of the Principles, establishes an obligation on the parties’ part to act in accordance with good faith and fair dealing in international trade. This standard of conduct must be observed for the duration of the contract period, including the formation process. This express recognition confirms the existence of a general principle in international trade, a principle which is a part of some national legal systems.\textsuperscript{74} Second, PICC Article 7.4.9 (Interest for Failure to Pay Money) also recognizes an international, but not a national, usage or general principle: the right to interest when a sum is due.

We have already mentioned that national courts are not very inclined to apply the Principles as \textit{lex mercatoria} when the parties have submitted their contract to

\textsuperscript{72} See, e.g., Perillo, \textit{supra} note 15, at 285 (stating that the UNIDROIT Principles continues this ambiguity). \textit{Id.}

\textsuperscript{73} See, e.g., UNIDROIT Principles, \textit{supra} note 1, art. 2.4 (revocation of the offer). The English text is an exact copy of the English version of the Convention. The Spanish version of Article 2.4(a) departs, without any justification, from the Spanish version of the Convention. This is unfortunate because the ambiguous meaning of the fixed time of acceptance is changed in substance. Thus, Article 2.4(2) of the UNIDROIT Principles indicates: “En todo caso, la oferta no podar revocarse: (a) si en ella se indica que es irrevocable, ya sea s~alando un plazo fijo para su aceptaci{\textsuperscript{u}}n o por darlo a entender de alguna otra manera.”

While the Spanish version of the Vienna Convention is not clear as to the meaning of the fixed time for acceptance, the Spanish draft of the UNIDROIT Principles seems more specific: that is, it suggests that the fixed time of acceptance makes the offer irrevocable during that time. As evidence of this point see Alejandro Garro, \textit{The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG}, \textit{69 Tul. L Rev.} 1149, 1167 n.5 (1995). Garro, the Spanish translator of the Principles, points out in one of his articles, “[b]oth the CISG and the UNIDROIT Principles raise an inference of irrevocability of an offer that states a fixed time for acceptance.” \textit{Id.}

\textsuperscript{74} See ALDO FRIGNANI, \textit{TRATIATO DI DIRITTO COMMERCIALE E DI DIRITTO PUBBLICO DELL’ECONOMIA. IL CONTRATTO INTERNAZIONALE 154} (1990); UGO DRA\textsuperscript{e}TTA, \textit{IL DIRITTO DEI CONTRATTI INTERNAZIONALI LA FORMAZIONE DEI CONTRATTI} 30 (1984); Bernardo Cremades, \textit{The Impact of International Arbitration in the Development of Business Law}, \textit{31 Am. J. Comp. L.} 526 (1983).

It should be taken into account that the role of the good-faith principle as a standard of conduct under the Vienna Convention is not clear.
expressions of that kind. However, it seems likely that arbitrators will not be so disinclined. Ferrari indicates that, in applying the Principles as *lex mercatoria*, the problem of deciding if it, or the general principles, could be considered as the source of law may arise. This, as a trend, favors application of the Principles. However, the problem may not center on this issue but on the question of whether the UNIDROIT Principles could be considered as *lex mercatoria*. This seems not to be very problematic when we look at some decisions. In effect, arbitrators recognize *lex mercatoria* as the law applicable to the contract. In this respect it is helpful that the arbitrators, unlike national judges, are not constrained to search for the applicable law. For example, Article 13.5 of the ICC Rules of Conciliation and Arbitration authorizes arbitrators to apply the norms that they deem convenient, including the *lex mercatoria*. Recently, in a dispute between an Austrian seller and a German buyer, it was noted that, between merchants, it is normal that the seller, in cases of a delay in payment, turn to the rate of interest of his own state. The tribunal held that application of PICC Article 7.4.9 would lead to the same solution.

Lastly, the UNIDROIT Principles may also be valid as a point of doctrinal reference where parties have expressly agreed to it or where the Principles are to be applied as *lex mercatoria*. This leads us to another case in which the Principles may be applied.

75. Ferrari, *Defining the Sphere*, supra note 15, at 1230, 1231 nn.42-43 (giving the decisions of tribunals that have recognized the efficacy of electing the *lex mercatoria* as the law governing the contract). *Id.*


78. UNIDROIT Principles, supra note 1, art. 7.4.9 (Interest for Failure to Pay Money) (paralleling CISG, *supra* note 37, art. 78). Article 7.4.9 states:

The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

*Id.*
D. Application of the Principles Instead of National Law

Paragraph 4 of the Preamble states: "[The Principles] may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law." The comment stresses that this should be considered a last resort, justified where it is absolutely impossible to establish the relevant rule of the applicable law, or whenever the research involved would entail disproportionate effort and/or cost. This application of the Principles, as reflected in the formation of both the rule and the comment, is sensible. Nevertheless, we doubt again that national judges would apply the Principles in such cases, though their application by arbitrators seems more probable.

E. Application of the Principles as a Means to Interpret and Supplement International Uniform Law Instruments

The Preamble indicates that "[The Principles] may be used to interpret or supplement international uniform law instruments." This role of the UNIDROIT Principles should be treated with great care because of the risk of turning to them before using general principles, such as those derived from the Convention, to determine if there is a gap to be filled. At the same time, the UNIDROIT Principles (as ultima ratio) have the advantage of making applicable a set of rules which per suam naturam should be similar to the relevant rule of the applicable law that cannot be determined, since the UNIDROIT Principles were drafted in order to reflect concepts found in many, if not all, legal systems.

79. Id. § 5 at 4; Ferrari, Defining the Sphere, supra note 15, at 1232-33. Ferrari indicates that in countries like England:

[T]his issue is dealt with by resorting to the lex fori, whereas in other countries, such as Germany, the dilemma is solved by making recourse to the rule of law that is most similar to the one that cannot be determined. The recourse to the UNIDROIT Principles (as ultima ratio) has the advantage of making applicable a set of rules which per suam naturam should be similar to the relevant rule of the applicable law that cannot be determined, since the UNIDROIT Principles were drafted in order to reflect concepts found in many, if not all, legal systems.

Id.; see also BONELL, INT'L REST., supra note 2, at 145-47.

80. UNIDROIT Principles, supra note 1, at 1.

81. See BONELL, INT'L REST., supra note 2, at 44 "[...] the UNIDROIT Principles deal with a number of matters which are either completely excluded or not sufficiently covered in CISG." Bonell continues by saying that the UNIDROIT Principles have included new rules that are not in the Convention (or, this author would add, at least are not expressly stated). If what Bonell says may be taken literally, we could not consider as 'new' Article 2.1 PICC (Manner of formation): "A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement." The last part of this Article has not taken form in a specific provision but scholars, judges, and arbitrators have not taken this to be an impediment to recognizing those manners of formation. In contrast, the chapter of the UNIDROIT Principles dedicated to the validity of the contract could be considered
filling such gaps is one of the most important roles the UNIDROIT Principles may play because of the incomplete or fragmentary nature of international texts. Taking the Convention as a model again,\textsuperscript{82} CISG Article 7 is entrusted with avoiding national laws when an issue is not sufficiently covered by the Convention.\textsuperscript{83} Resolution of such cases should be found by searching the general principles on which the Convention is based; only if it is not possible to find such principles should one have recourse to national law. Unfortunately, CISG Article 7, which has been reproduced by almost all the international instruments of Uniform Law, has one inconvenience: there is no list in the Convention saying what those general principles are. This is not, however, an obstacle to finding them in the Convention, and it would still be preferable to search the Convention than to turn to the UNIDROIT Principles or to national law.\textsuperscript{84} In any case, interpretation should be made in accordance with the principles stated in CISG Article 7: internationality, uniformity and good faith. Deciding whether the Convention fills a gap is one of the interpreter’s most arduous tasks. Nevertheless, a special effort should be made to find a solution in the Uniform Law. The ideal situation would be to avoid “easy” recourse to the UNIDROIT Principles. Only when it is impossible to find a solution under the Convention either by analogy or by general principles should the UNIDROIT Principles be applied.

Bearing this in mind, consider the interrelation between the UNIDROIT Principles and the Convention. The fact that the regulations embodied in the UNIDROIT Principles depart in some respects from those of the Convention may be misleading with respect to interpretation of the Convention. In particular, this fact could influence the solution that arbitrators or courts find in a specific case. to be “new.” Of course, as Bonell points out, one of the reasons for adding new rules to the UNIDROIT Principles is that they are not restricted to contracts of sale. \textit{Id.} at 46.

82. Nevertheless, the influence of the UNIDROIT Principles would not only be developed in relation to the Convention, but generally speaking, also in those texts which are framed in the Uniform Law, be they drafted by the “formulating agencies” or not.

83. CISG, \textit{supra} note 37, art. 7 states:

\begin{quote}
1) In the interpretation of these Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. 2) Questions 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.
\end{quote}

\textit{Id.}

84. Garro, \textit{supra} note 73, at 1155-56 (pointing out that “[t]he potential use of the UNIDROIT Principles as a means of interpreting and supplementing the CISG must be examined first in light of CISG Article 7(2)”).
Again, some examples will clarify this point. CISG Article 78 establishes a right to interest when a sum is due. This right, as we have already pointed out, has also been adopted by the UNIDROIT Principles, reflecting a usage amply recognized in international trade. Unlike the UNIDROIT Principles, the Convention does not state a rate of interest because CISG Article 78 was part of a compromise in the Convention to deal with the conflict among diverging religions' views of "interest." Thus, if the lack of a rate of interest is a gap in the Convention, the solution should be found within that text. One must attempt to find a general principle, with the objectives of achieving as much uniformity as possible between the application of the Convention and the legislative history of CISG Article 78, while avoiding a solution based in national law applicable by virtue of the choice of law rules. By applying the general principle in CISG 57(l)(a)—"If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller at the seller's place of business"—one can extract a general principle according to which payment of any sum due must be done in the "sphere of control" of the creditor. It is not then difficult to ascertain that the law where the creditor has his place of business will determine the rate of interest.

This solution has two undeniable virtues: in the first place, it avoids recourse to national law and achieves the objective of an interpretation within the confines of the Convention. In the second place, it avoids possible distortions in the application of the Convention by resorting to the UNIDROIT Principles as a component of the general principles of the Convention (CISG Article 7(2)). In contrast, Professors Garro and Bonell are of the opinion that instead of applying national law, PICC Article 7.4.9(2) could be applied. However, while there is a relationship between the Principles and the Convention, in this case the two are unrelated. UNIDROIT members managed to draft an Article concerning the rate of

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85. CISG, supra note 37, art. 78: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74." Id.
86. UNIDROIT Principles, supra note 1, art. 7.4.9.
87. The latter solution is generally adopted by the case law. See Mª del Pilar Perales Viscasillas, La Determinación del Tipo de Interés en la Compraventa Internacional [The Determination of the Type of Interest in International Dealing], 43 CUADERNOS JURIDICOS 5 (1996).
88. Although the question has no express solution in the Convention, CISG Article 57(l)(a) has been understood to mean that the place of payment of the damages is the one specified by the place where the creditor has his place of business: Oberlandesgericht (hereinafter OLG) Dusseldorf, 2 July 1993 (17 U 73/93) (Germany), Recht der International Wirtschaft, 1993, n 39.
89. Bonnell, Int'l Rest., supra note 2, at 114-15 (indicating that the UNIDROIT Principles will be applied to establish the dies a quo in the Convention, the initial time when the payment is due); Garro, supra note 73, at 1156-57 (offering his weighty opinion that the dies a quo could also be found in the Convention); Perales Viscasillas, supra note 87, at 8-9.
interest, a goal which could not be accomplished during the drafting of the Convention, since it proved impossible to come to an agreement. For this reason, the rate of interest is a question with no clear solution under the Convention, whether it be determined on the basis of the general principles of the Convention (CISG Article 7.2) or, on the contrary, under the rules of private international law. In any case, the solution adopted by UNIDROIT may help to bring about the uniform application of the Convention, because the rate of interest in the Convention has raised many problems of interpretation among tribunals and scholars. It is, then, an issue in need of standardized criteria under the Convention.

Another example may be found in Part II of the Convention (Formation of Contracts), specifically, in the regulation concerning the problem known as "battle of the forms." CISG Article 19 contains a regulation about counteroffers. When the reply to an offer contains additions, limitations or other modifications, it cannot be deemed as an acceptance but as a counteroffer. The principle known as the "mirror image rule" is then adopted. Paragraph 2 of CISG Article 19 tones down the previous rule stating, on the contrary, that only additional or different terms that materially alter the terms of an offer constitute a counteroffer. As a tool for interpretation, Paragraph 3 of CISG Article 19 establishes a list of elements deemed to alter the terms of an offer. The issue in the Convention is what rules should apply to this situation.

Although CISG Article 19 applies when there is a contradiction between terms of an offer and the reply to it contained in documents other than forms, the same cannot be said where the general clauses contained in the forms exchanged between the offerer and the offeree contradict. The resolution of the "battle-of-the-forms" problem is one of the most controversial questions under the Convention.

90. See Perales Viscasillas, supra note 87, at 6.
91. Id. at 5 (analyzing the different opinions of the scholars and case law).
92. See CISG supra note 37, art. 19. The text of CISG Article 19 is as follows:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one's party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Id.
93. Id.
There are deep differences among commentators as to how such issues are to be resolved. The basic questions in this context are: Is the contract concluded? If so, what are the terms of the agreement? There are two schools of thought. One group of scholars maintains that the battle-of-the-forms falls outside the scope of the Convention and that, because it is a question of contract validity, the solution must be found under the relevant domestic law in accordance with CISG Article 4(a). Another group of scholars maintains that the problem should be solved under the norms of the Convention, but disagree as to which norms should be applied.

Among the latter group, some authors are convinced that the battle-of-the-forms is a gap-filling issue governed by the Convention. They argue that the solution should be found in accordance with CISG Article 7 and that priority must be given to the general principles of the Convention in order to solve a question not expressly settled by it. Pursuant to this approach, applying a good-faith principle could lead to a solution similar to the U.S. knock-out rule of U.C.C. section 2-207(3), the German “partiell Dissens” rule of BGB Articles.


95. CISG, supra note 37. Basically two points of view support the Article 7 gap-filling theory. One view is that it is a gap-filling measure because the delegates to the Vienna Diplomatic Conference rejected a Belgian proposal which sought to adopt a solution based on the knock out rule. OFFICIAL RECORDS, supra note 5, §§ 87-103 at 288-89; see, e.g., Jan Hellner, The Vienna Convention and Standard Form Contracts, in INTERNATIONAL SALES OF GOODS 342 (Peter Volken & Petar Sarcevic eds., 1986). The second point of view is that in the battle-of-the-forms scenario, acceptance by conduct pursuant to CISG Article 18(3) is not a valid way to indicate assent to an offer under terms that contradict the original offer. Frans van der Velden, Uniform International Sales Law and the Battle of Forms, in UNIFICATION AND COMPARATIVE LAW IN THE THEORY AND PRACTICE 241-43 (1984); Christine Moccia, The United Nations Convention on Contracts for the International Sale of Goods and the "Battle-of-the-forms," 13 FORDHAM INT'L L.J. 649, 667 (1989-90); Francois Vergne, The "Battle-of-the-forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods, AM. J. COMP. L. 253, 255-56 (1985); JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALE UNDER THE 1980 UNITED NATIONS CONVENTION 238-39 (2d ed. 1991) [hereinafter HONNOLD, UNIFORM LAW]. Honnold states, “Last-shot theories have been rightly criticized as casuistic and unfair. They do not reflect international consensus that justifies importing them into the Convention.” Id.

96. U.C.C. § 2-207 (Additional Terms in Acceptance or Confirmation) states:

1. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an
154 and 155,\(^97\) or PICC Article 2.22. This approach holds that the terms of the contract are those with which the parties substantially agree, the rest cancel each other out, and, basically, the norms of Part III of the Convention will replace them. A variation of this theory holds that when there is a battle of the forms, CISG Article 19 is tacitly excluded.\(^98\)

acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

\(^{97}\) In German law, this rule was strictly applied. See BÜRGERLICHES GESETZBUCH [BGB] art. 150.2 (F.R.G.). "Eine Annahme unter Erweiterungen, Einschränkungen oder sonstigen Änderungen gilt als Ablehnung verbunden mit einem neuen Antrage."

Other authors take the position that the solution may be found under the specific norms of the Convention, without calling into play its general principles. In the typical battle-of-the-forms scenario, this is likely to lead to application of the "last shot rule." Under this view, the exchange of forms as offer and acceptance is comprehensively regulated in Part II of the Convention (Formation of Contracts). If there is a reply to an offer by a form with material alterations, it is not an acceptance but a rejection of the offer (CISG Articles 19(1) and (3)) coupled with a new offer (CISG Article 14(1)). As a new offer, it could be accepted in any way provided in CISG Article 18, including silence or inaction. Such a counteroffer may be accepted by conduct of the type described in Article 18, Paragraphs 1 and 3. Generally, the contract is concluded when the buyer accepts delivery of goods; the terms of the contract will be those of the counteroffer. Thus, the terms of the party who fires the last shot win the battle.

The UNIDROIT Principles regulate the counteroffer hypothesis in PICC Article 2.11 (Modified Acceptance) in more or less the same terms as CISG Articles 19(1) and (2). However, they have not adopted a rule similar to the one stated in CISG Article 19(3). The battle-of-the-forms scenario has its own Article under the UNIDROIT Principles located at the end of the Chapter. PICC Article 2.22 (Battle of forms) adopts the knock-out rule.

Kehl No. 3 C 925/93 (F.R.G.) (citing Professor Schlechtriem on this precise point and appearing to adopt this thesis).

99. See CISG, supra note 37, art. 7.

100. MA DEL PILAR PERALES VISCASILLAS, LA FORMACIÓN DEL CONTRATO DE COMPRAVENTA INTERNACIONAL DE MERCADERÍAS chs. VII & IX, 700 n.90 (1996) (presenting authors who support the application of the last shot rule). This author also supports the application of the last-shot rule. Id. at 696 n.84.

101. See CISG, supra note 37, art. 18. Article 18 states:

1. A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not itself amount to an acceptance. . .

3. However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Id.

102. The following German decisions have applied the last-shot rule to a conflict of standard terms under the 1964 Hague Formation Convention (ULF): Judgment of Dec. 7, 1978, OLG Hamm No. 2 U 35/78; Judgment of Oct. 18, 1982, OLG Hamm No. 2 W 29/82; Judgment of July 14, 1976, LG Landshut No. HK 0 135/75.

103. UNIDROIT Principles, supra note 1, art. 2.22.
The fact that the Convention does not have a specific rule regarding the battle-of-the-forms issue, whereas the UNIDROIT Principles do, may suggest that the Convention does not provide an answer to this problem. A national judge or arbitrator could therefore be tempted to apply a solution such as the one stated in PICC Article 2.22 in order to supplement the Convention. This situation could occur if the tribunal is unaware of the objectives of the Convention and the legislative history of CISG Article 19 and let themselves be influenced by the aversion some of the Convention scholars had to the application of the last-shot rule. An additional problem is determining which regulation should apply when the Convention and the Principles form part of the same contract. One must differentiate between two situations:

a) The parties expressly indicate in their contracts that the UNIDROIT Principles apply, but say nothing about the Convention. In this case, if the Convention applies, then both texts govern the transaction. Nevertheless, the prevailing rules will be those of the UNIDROIT Principles, since the Convention allows for departure from its contents if the parties wish (CISG Article 6).

b) The parties expressly agree in their contract to apply both the Principles and the Convention. In this case, the rules that prevail are those of the Convention by virtue of the principle lex specialis derogat legi generali. This principle could also be applied in relation to the previous situation since the national judge or arbitrator—especially the former—could consider the Convention more adequate not only because it is lex specialis but also because it is the national law of the contracting states.

The situations just described show that the role of the UNIDROIT Principles as a means of interpreting and supplementing other international instruments should be considered with care, but without creating an obstacle for the complementary influence of the Convention and the Principles. In other words, the UNIDROIT Principles may be used to interpret or supplement the Convention and vice versa. An example of this again may be found in CISG Article 19. As noted above, PICC Article 2.11 (Modified Acceptance) has not adopted a paragraph akin to CISG Article 19(3), probably because this provision is very controversial. Furthermore, it is very difficult to interpret.

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

Id.

104. Scholars have also supported this approach. See Garro, supra note 73, at 1169-70 (considering the application of the Principles to the Convention acceptable).

105. See Perillo, supra note 15, at 288 (comparing CISG Article 19 with PICC Article 2.22). "The 'battle-of-the-forms' receives innovative and generally sound treatment in Principles." Id.; Perales Viscasillas, supra note 100, at 696 n.84 (discussing the Vienna scholars).

106. In relation to this hypothesis see Kessedjian, supra note 59, at 664-65.

107. See Perales Viscasillas, supra note 100, at 657.
Nevertheless, the comment to PICC Article 2.11 is consistent with the list of terms provided in CISG Article 19(3). At this stage, the Convention can be seen to have influenced the Principles in the opposite sense, as the one forgotten by the Preamble. Thus, the Convention may be useful to interpret or supplement the UNIDROIT Principles.

The Convention continues to influence the Principles in relation to PICC Article 2.11. The UNIDROIT Principles, through the comment to PICC Article 2.11, take an approach very similar to the missing part of Article 17.3 of the 1978 Draft Convention on International Sales Contracts. PICC Comment 2 points out, "[a]n important factor to be taken into account in this respect is whether the additional or different terms are commonly used in the trade sector concerned and therefore do not come as a surprise to the offerer." This statement, without doubt, has been influenced by Article 17.3 of the 1978 Draft:

Additional or different terms relating, inter alia, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offerer."

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108. UNIDROIT Principles, art. 2.11, supra note 1, § 2, at 42 (comment to Article 2.11). The comment states:

What amounts to a 'material' modification cannot be determined in the abstract but will depend on the circumstances of each case. Additional or different terms relating to the price or mode of payment, place and time of performance of a non-monetary obligation, the extent of one party's liability to the other or the settlement of disputes, will normally, but need not necessarily, constitute a material modification of the offer.

Id.; see also Garro, supra note 73, at 1167-68. BONELL, INT'L REST., supra note 2, at 48-49. Bonell points out that this Comment explains the separation of the Principles from the Convention. In the Convention, the determination of which terms should be deemed to materially alter the offer should be determined on a case-by-case basis, because the list of CISG Article 19(3) is merely illustrative ("among other things") and because it is a presumption ("are considered") about the materiality of those terms which can be derogated. Id.

109. The words in italics were omitted during the Diplomatic Conference because they concern a subjective element difficult to submit to a norm. See A/CONF.97/C.1/SR.10 in OFFICIAL RECORDS, supra note 5, §§ 50-52, at 286. The fact of this omission may mean that CISG Article 19(3) has an objective character. But cf. Salvador Durany Pich, Sobre la necesidad de que la aceptación coincida en todo con la oferta: el espejo roto, ANUARIO DE DERECHO CIVIL 1088 n.3 (1992) (stating that CISG Article 19 is impervious to subjective elements).
The opposite direction of influence is also possible, and of course desirable, since the Principles may become "a 'backbone of common principles'" necessary to achieve uniformity and harmonization of international commercial law, despite their nonbinding character," and "the centerpiece of international conventions." A good example of the Principles' influence on the Convention is the ruling on precontractual liability in the latter. In the Convention, it may be that the pre contractual liability section is a gap-filler, except in those situations contemplated by CISG Article 16(2) (Irrevocability of the Offer), without there being a general principle therein. Consequently, by virtue of CISG Article 7(2), a solution should be found in national law. This undesirable result could be overcome by applying the UNIDROIT Principles, particularly Articles 2.15 (Negotiations in Bad Faith) and 2.16 (Duty of

110. Defining the Sphere, supra note 15, at 1234 (citing Ole Lando). Ferrari gives as an example a German decision that interpreted the ULIS in light of the Vienna Sales Convention. This author, however, is not sure that it is possible to compare the influence of the Convention over the ULIS with the influence of the Principles over other international instruments. It should not be forgotten that, on the one hand, at the time of that decision, Germany was part of the Vienna Convention, even though the ULIS had not yet entered into force; and on the other hand, the Vienna Convention was drafted especially to take the rules contained in the ULIS (and also in the ULF) into account.

111. Garro, supra note 73, at 1155.

112. See also Bonell, Int'l Rest., supra note 2, at 111-13 (providing further examples)


114. UNIDROIT Principles, supra note 1, art. 2.15 (Negotiations in Bad Faith) states:

(1) A party is free to negotiate and is not liable for failure to reach an agreement. (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party. (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

Id.
This would lead to uniform application in all transactions governed by the Uniform Commercial Law, especially when the diverse national legal systems disagree on issues connected with notions of precontractual liability, such as damages or the concept of "good faith." In light of these conclusions, it is no surprise when Professor van Houtte points out that "one of the great innovations of the UNIDROIT Principles is that they provide standards for conducting negotiations."116

The same result can be reached regarding contracts with standard terms. In such contracts, some problems may arise related to the validity of so-called "surprising terms," defined by PICC Article 2.20 (Surprising Terms) as terms contained in standard terms which are of such a character that the other party could not reasonably have expected them.117 PICC Article 2.20 has no counterpart in the Convention, so application of the Principles would be desirable, even though within the Convention the same solution may be reached by applying the "reasonable expectation" principle.118

Finally, the Convention has influenced the UNIDROIT Principles insofar as the Principles have some articles that were merely proposals in the Convention. A good illustration is PICC Article 2.12 (Writings in Confirmation):

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.119

115. See also Why? What? How?, supra note 1, at 1115; UNIDROIT Principles, supra note 1, art. 2.16 (Duty of confidentiality) states:

Where the information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

116. van Houtte, supra note 63, at 377.
117. UNIDROIT Principles, supra note 1, art. 2.20. This seems to be influenced by the "Überraschende Klauseln" of ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] art. 3 (Aus.).
118. PERALES VISCASILLAS, supra note 100, chs. VII & VIII.3.
119. UNIDROIT Principles, supra note 1, art. 2.21.
During the 1978 discussions on CISG Article 19, the intention was to regulate the writings in confirmation in an additional paragraph in that article.\textsuperscript{120} This demonstrates that Article 19 was intended to regulate both the counteroffer and the writing-in-confirmation in a similar manner. This makes sense, because the latter may be deemed, in some circumstances, as acceptance with modifications.\textsuperscript{121} The proposal was as follows:

If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation [which are not printed] become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party].\textsuperscript{122}

This proposal was rejected as the delegates generally considered that any modifications to the contract after its conclusion should require agreement of the parties in accordance with the present CISG Article 29, which regulates modification of contracts.\textsuperscript{123} The conclusion to be reached is that the missing disposition has been adopted practically in its entirety by UNIDROIT.

Moreover, this example illustrates that the Writing in Confirmations section under the Principles is not a gap-filler to the Convention.\textsuperscript{124} Thus, it is not an issue that should be supplemented by UNIDROIT Principles,\textsuperscript{125} but one that may be considered as either an acceptance with material modifications or as an offer of modification to be regulated by CISG Article 29 and by the rules of Part II of the Convention, especially CISG Article 19.
F. Application of the Principles as a Model for National and International Legislators

The final role of the Principles is contained in Paragraph 6 of the Preamble: "They may serve as a model for national and international legislators.”

It is still too soon to predict how the Principles will influence national and international legislators. Professor Bonell indicates that a draft of the UNIDROIT Principles was an important source of inspiration for new national and provincial codifications in Holland, Quebec, and Mexico.126 Professor Parra Aranguren also points out the important role the Principles played in the recent Inter-American Convention on the Law Applicable to International Contracts, adopted in Mexico in 1994.127 This function, developed in the Preamble of the UNIDROIT

126. Why? What? How?, supra note 1, at 1141. Until now, scholars and international institutions have been making great efforts to extend awareness of the UNIDROIT Principles through translations of the Principles and symposia organized on the topic. See, e.g., Contract Law in a Changing World, Symposium at Miami University School of Law, in 40 AM. J. COMP. L. 541 (1992); see Bonell & Schipani, supra note 26; see also Dominique Bureau, Les Nouveaux Principes UNIDROIT: Colloque de L’Institut de la CCI, Paris, 20-21 Octobre 1994,” in 4 REVUE DE L’ARBITRAGE 787 (1994); Federico Pernazza, Il Progetto UNIDROIT sui Principi di Contratto Internazionale e L’Unità Specificità del Sistema Giuridico Latino-Americano, DIRITTO DEL COMMERCIO INTERNAZIONALE, No. 8.2 (1994). Pernazza discusses the Seminar held in Rome, Dec. 13-14, 1994, which was organized by the “Centro di studi e ricerche di diritto comparato e straniero del Consiglio Nazionale delle Ricerche e dal Centro di studi latin-american dell’ Università di Roma “Tor Vergata” in cooperation with the “Asociación de estudios sociales latino-americanos,” and under the auspices of UNIDROIT. The contributions to this Seminar have recently been published; Symposium: UNIDROIT Principles of International Commercial Contracts, JURISTEN ZEITUNG, Feb. 16. 1996, at 191-92 (giving information about the Symposium held in the headquarters of UNIDROIT on Oct. 6-7 1995). Finally, an Inter-American Congress will be held Nov. 6-9, 1996, in the University of Carabobo in Valencia, Venezuela. A New Approach to International Commercial Relations: The Unidroit Principles of International Commercial Contracts, organized by the International Institute for the Unification of Private Law (UNIDROIT), Center of International Studies of Law (Faculty of Law of Carabobo University), Ministry of Foreign Relations, Republic of Venezuela, Inter-American Development Bank, Multilateral Investment Fund, Government of Carabobo and Secretariat of Economic Development.

127. Parra Aranguren, supra note 56, ¶¶ 29-31, at 179-80 (referring to Article 9.2 of the Inter-American Convention); see Friederich K. Juenger, The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons, 42 AM. J. COMP. L. 381, 391 (1994). Juenger indicates that the compromise in Article 9.2 of the Inter-American Convention “allows decisionmakers to dispense with a tedious investigation into the subtleties of conflicting laws and to rely instead on the rules laid down in the UNIDROIT Principles.” Id. As he explains, Article 9.2 is part of a compromise between traditionalists and innovators. The latter group, represented by U.S. delegates, proposed the following Article: “If the parties
Principles, also exists in other instruments of the Uniform Commercial Law. The CISG, as well as the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods 1964 (ULF) and the Convention relating to a Uniform Law on the International Sale of Goods 1964 (ULIS), have strongly influenced reforms or proposed reforms to some states' contract laws. Thus, the Codification of Dutch Contract Law (Burgerlijk Wetboeks) has been greatly influenced by the Uniform Law of Sales. The same may be said of the proposals the German Committee presented in August 1991 for the reform of German contract law. Professor Peter Schlechtriem says that, due to this influence, the role of the Uniform Law is confirmed and reinforced as a sort of lingua franca among scholars with different backgrounds, and also serves as a model for developing and transforming domestic contract law. On the other hand, the Argentinean Civil Code Project introduced and modified some provisions in order to coordinate them with the rules of the Vienna Sales Convention. It explains in its notes that it is inconvenient to have different rules for the conclusion of international and domestic contracts.

The Uniform Commercial Law texts also influence the national legal systems by way of the Model Laws, drafted by UNCITRAL. In this way, the important role of these Model Laws is amply confirmed by the UNCITRAL Model Law on International Commercial Arbitration, which has influenced the drafting process of more than twenty different national laws.

have not selected the applicable law, or if this election proves ineffective, the contract shall be governed by the general principles of international commercial law accepted by international organizations." Id. This proposal was finally reformed, taking its present shape in the text. Id. For the proceedings from this Conference see Alejandro Garro, Unification and Harmonization of Private Law in Latin America, 40 AM. J. COMP. L. 587 (1992).


129. Id.

130. Id.

131. Id. at 5. At a national level, the Principles may be particularly useful to those countries that lack a developed body of legal rules relating to contracts and that intend to update their laws to current international standards, at least in respect to foreign economic relations. Id.; see also UNIDROIT Principles, supra note 1, § 7, at 5 (Comment to the Preamble).


133. Id. at 14; see John A. Manwaring, Reforming Domestic Sales Law: Lessons to be Learned from the International Convention on the Sale of Goods, in ACTES DU COLLOQUE SUR LA VENTE INTERNATIONALE 139-70 (Louis Ferret & Nicole Lacasse eds., 1989) (discussing the situation in Canada).

134. See Status of The Conventions, Mar. 25, 1996. Australia, Bahrain, Bermuda, Bulgaria, Canada (by the Federal Parliament and by the Legislatures of all Provinces
Of the Principles most capable of influencing international legislators, this author prefers Chapter 3 (Validity). A draft of UNCITRAL was intended to be based on a Draft of Uniform Law on Validity prepared by UNIDROIT. The idea was finally abandoned because the situations connected with validity issues did not arise as frequently in international commercial transactions as they did in consumer transactions. Accordingly, if UNCITRAL tried to include a section on the validity of contracts, it would be possible—and therefore also highly recommended—to use Chapter 3 of the UNIDROIT Principles as a model. In addition, the efforts of UNIDROIT to govern questions such as the ones articulated in Chapter 3—mistake, error, fraud, threat, and gross disparity, questions which have not been regulated by other international instruments—should be praised.

In the Convention, CISG Article 4 refers issues related to validity to the applicable national law. It is then difficult for national tribunals or arbitrators to consider applying the UNIDROIT Principles. However, it may be convenient for tribunals to first apply the UNIDROIT Principles instead of going to national law, since the UNIDROIT Principles have many advantages. Consequently, this author would defend the proposition that the Principles ought to supplement the Convention.

Moreover, the Principles not only supplement the Convention, they also help to interpret it, since the Convention regulates some issues related to validity. For example, the Convention expressly regulates open-price contracts, as well as impliedly regulating situations in which price is determined by one of the parties or by a third party. To illustrate this point, let us review the approaches taken in the two main types of legal systems, civil law and common law, focusing on the Spanish and the U.S. legal systems. Questions of validity of contracts in the Spanish system have constituted an impediment to their valid conclusion. However, in the system embodied by the U.C.C., if nothing is said as to the price in the contract, a reasonable price functions as a gap-filling term. In addition, it is permissible for one of the parties or even a third party to fix the price.

It may thus be seen that those questions receive a different treatment depending on the significance that these legal systems confer upon the validity or

and Territories), Cyprus, Egypt, Finland, Guatemala, Hong Kong, Hungary, India, Kenya, Mexico, Nigeria, Peru, the Russian Federation, Scotland, Singapore, Tunisia, Ukraine, and, in the U.S. (California, Connecticut, Oregon, and Texas) have all been influenced by the Model Law.

135. UNIDROIT Principles, supra note 1, ch. 3.
136. For instance, mistake, fraud, error, and threat.
137. See Garro, supra note 73, at 1158-60, 1172 (regarding the influence of the Principles over the Convention); see also Ulrich Drobnig, Substantive Validity, 40 AM. J. COMP. L. 635 (1992).
138. See CISG, supra note 37, art. 55, for open price contracts. In relation to the methods of price determination, see PERALES VISCASILLAS, supra note 100, at 348-52.
139. See CODIGO CIVIL [C.Civ.] art. 1445 (Spain).
140. U.C.C. §2-305(1).
141. U.C.C. §2-305(2) & 2-305(1)(c).
the materiality of certain contract terms—approaches so different as to require the loosening of the meaning of the term "validity" from its meaning in national law.

Consequently, the term "validity" must be examined in light of the Convention. Thus, given the fact that CISG Article 4 points out that the Convention governs only the formation of the contract of sale, the rights and obligations of the seller and the buyer arising from such a contract should be taken into account. CISG Article 4 seems clear as to its meaning and scope; the validity of contracts is beyond it. On the one hand, the Convention omits any reference to issues arising out of international sales contracts not related to formation, so such issues should be resolved in accordance with the agreement of the parties or, subsidiarily, with the national law. On the other hand, the Convention governs the formation of the contract as well as the rights and obligations of the seller and buyer. Notwithstanding the clear formulation within that text, the application of CISG Article 4 is impeded by three factors: 1) the Convention does not give a definition for the term "validity"; 2) the diverse national legal systems are not unanimous when classifying issues connected with the validity of the contract, as noted; and 3) some situations connected with validity are regulated by both the Convention and national law. The clearest example of the latter factor is CISG Article 55, which applies exclusively to validly concluded contracts.

Finally, where it is obvious that the Convention and national laws conflict, the Convention applies. Thus, if we correctly interpret CISG Article 4, when it says that the Convention governs only the formation of the contract of sale and that in particular it is not concerned with the validity of the contract, this appears to mean that the Convention regulates contract formation comprehensively. This would seem to include those issues mentioned within, or even those whose regulation could be derived from, the general principles of Part II. Moreover, "validity" under CISG Article 4 should be interpreted in accordance with the Uniform Law, rather than in relation to national law, its characterization being loosened from that of national laws.

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142. See supra part II.F.
143. See CISG, supra note 37, art. 55 states:

When a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Id.

144. See OFFICIAL RECORDS, supra note 5, § 2, at 17; see also Hellen B. Hartnell, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, 18 YALE J. INT'L L. 1 (1993).
145. This author is in complete agreement with Honnold, see HONNOLD, UNIFORM LAW, supra note 95, § 62 at 111, and particularly §§ 72-73 at 121. For the Spanish
It is then my position that an interpretation of "validity" connected with the Convention is necessary so that all issues expressly governed by it, such as the elements that form the offer (quantity and price, especially), are transformed into conditions leading to the valid conclusion of the contract. 146 This thesis is precisely supported by the UNIDROIT Principles. Chapter 3 of the Principles explains that, in the sphere of the Convention, issues related to validity that the drafters sought to abandon to national law—and which now could be governed by the UNIDROIT Principles—are governed by Chapter 3.

Evidence of this lies in the fact that situations related to the validity of the price—open-price contracts or the fixing of the price by a third person or by one of the parties—are governed by the Principles in Chapter 5 (Content) and not by Chapter 3 (Validity). 148 I am referring to the role the Principles play in interpreting what should be included under the term “validity” under the Convention. This does not mean that PICC
Article 5.7, especially Paragraph 1, applies as a rule of interpretation of CISG Articles 14 and 55.149

In conclusion, the role of the Principles as a model to national or international legislators may also be extended to parties drafting contracts, a role forgotten by the drafters of the Principles.150 Professor Garro points out some other possible functions of the Principles. They may be useful when the parties: 1) have not chosen any law to govern their contract; 2) when there are gaps in the domestic law chosen by the parties or in the law determined by rules of private international law; and 3) when the applicable domestic law, determined by rules of private international law, are manifestly inadequate.151 For the first role, one must differentiate between courts and arbitrators, since the latter would likely admit such an application. The second role certainly has some problems, as Garro recognizes.152 In this case, it would be necessary to investigate whether the omission in national law is intentional or not. It is also possible to go against the will of the parties, since they may prefer the application of national law to the Principles. Nevertheless, this role does not present problems in the context of the Convention, since it then becomes part of the legal regime of a state. The civil and commercial codes of Spain, which have practically no rules dealing with the formation of contracts, illustrate this. In Spain, it is possible to say that Part II of the Convention (Formation of Contracts) concerns norms directly applicable by reason of analogy.153 Lastly, the third role stated by Professor Garro should be carefully considered. Even though it is true that both the UNIDROIT Principles and the rules of the Convention are better suited to international commercial trade, it is no less true that, when legislators haven’t expressly derogated a norm and judges cannot override its application, the operation of an old norm could be restricted as much as possible.

149. Garro, supra note 73, at 1172, 1178-79. Garro seems to acknowledge this when he suggests that the statement in CISG Article 55, “when a contract has been validly concluded,” refers to the question of when this occurs in national law. But see Alejandro Garro, Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods, 23 INT’L LAW. 443, 463 (1989). Regarding the inconvenience of referring the issue to national law, rather than to the Convention, and in general regarding the interpretation of CISG Articles 14 and 55, see PERALES VISCASILLAS, supra note 100, at 315 et seq.

For an analysis of the determination of price under the UNIDROIT Principles see Alejandro Garro, El ‘contenido’ del contrato bajo los Principios de UNIDROIT aplicables a los contratos comerciales internacionales: su impacto en el MERCOSUR, in Bonell & Schipani, supra note 26, at 193.


152. Id.

153. PERALES VISCASILLAS, supra note 100, at 124-32.
III. GENERAL PROVISIONS OF THE PRINCIPLES

The principal function of the General Provisions of the UNIDROIT Principles comes into play regarding the rest of the Chapters, Chapters 2 through 7, including the Preamble. This function comes into play whether the parties decide to adopt the Principles in whole or only in part.\textsuperscript{154} One could then say that if the parties, when choosing one part of the Principles, remain silent regarding the applicability of PICC Chapter I, it would be applied unless the parties have explicitly modified or excluded some provisions of Chapter I in their contracts (which like other provisions of the Principles, are usually of a non-binding character.)

Even though it would seem that the above argues against the nonmandatory nature of the Principles or even their application with the previous agreement of the parties, it is the most logical approach. The General Provisions aim to recognize a whole set of common provisions amply recognized in international trade—principles that will guide judges, arbitrators, and the contracting parties in the application and interpretation of contracts. The General Principles in Chapter I function as a mechanism for protecting the parties from possible abuses and excesses. Consequently, they establish intrinsic and extrinsic limits to the contract.

Nine of the ten Articles in Chapter I of the Principles incorporate the liberal ideology of the UNIDROIT Principles as rules governing commercial transactions:\textsuperscript{155} freedom of contract;\textsuperscript{156} freedom of form and proof;\textsuperscript{157} \textit{pacta sunt servanda};\textsuperscript{158} primacy of the mandatory rules;\textsuperscript{159} the dispositive nature of the Principles;\textsuperscript{160} internationality and uniformity;\textsuperscript{161} good faith and fair dealing;\textsuperscript{162} primacy of the usages and practices;\textsuperscript{163} and the principle of.\textsuperscript{164} The last disposition does not establish a principle, except as will be pointed out below;\textsuperscript{165} it only tries to define some terms.\textsuperscript{166}

\begin{itemize}
  \item \textsuperscript{154} See UNIDROIT Principles, supra note 1, §2 at 13 (Comment to PICC Article 1.5 (Exclusion or Modification by the Parties)).
  \item \textsuperscript{155} See di Majo, supra note 15, § 3 at 613.
  \item \textsuperscript{156} UNIDROIT Principles, supra note 1, art. 1.1.
  \item \textsuperscript{157} Id. art. 1.2.
  \item \textsuperscript{158} Id. art. 1.3.
  \item \textsuperscript{159} Id. art. 1.4.
  \item \textsuperscript{160} Id. art. 1.5.
  \item \textsuperscript{161} UNIDROIT Principles, supra note 1, art. 1.6.
  \item \textsuperscript{162} Id. art. 1.7.
  \item \textsuperscript{163} Id. art. 1.8.
  \item \textsuperscript{164} Id. art. 1.9.
  \item \textsuperscript{165} See discussion infra part III.I.
  \item \textsuperscript{166} UNIDROIT Principles, supra note 1, art. 1.10.
\end{itemize}
A. Principle of Freedom of Contract

The UNIDROIT Principles begin by announcing the principle of freedom of contract. PICC Article 1.1 (Freedom of Contract) states that "[t]he parties are free to enter into a contract and to determine its content."\(^{167}\)

PICC Article 1.1 requires little comment since it only makes explicit a generally recognized principle of international trade. By virtue of freedom of contract, the parties can conclude a contract as well as fix its contents in the form they deem most convenient. This principle also undergirds PICC Article 1.5, which permits the parties to modify or derogate any provisions of the Principles.

This freedom of contract has some limits. Three are found in the General Dispositions: a) mandatory rules, national or international, that apply;\(^ {168}\) b) the duty to act in good faith and fair dealing;\(^ {169}\) and c) limitations on contract usages and practices.\(^ {170}\) Another limitation to this freedom of contract is found in Chapter 2.\(^ {171}\) PICC Article 2.15 extends the freedom of the parties to the precontractual stage, the stage previous to the offer, by recognizing that "a party is free to negotiate and is not liable for failure to reach an agreement."\(^ {172}\) At the same time, PICC Article 2.15 restrains that freedom by penalizing parties that act in bad faith.\(^ {173}\) The last express limitation in the Principles appears in the comment to PICC Article 1.1: economic sectors where there is no competition.\(^ {174}\)

Aside from those limits expressly recognized in the Principles, clauses drafted by parties as expressions of their intent must comply with the basic principles that govern the UNIDROIT Principles.\(^ {175}\) Consequently, the validity of those clauses should be determined in accordance with the general principles of the UNIDROIT text.\(^ {176}\)

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167. Id. art. 1.1.
168. Id. art. 1.4.
169. Id. art. 1.7.
170. Id. art. 1.8.
171. UNIDROIT Principles, supra note 1, art. 2.
172. Id. art. 2.15(1).
173. Id. art. 2.15.
174. Id. § 2, at 7 (Comment to PICC Article 1.1).
175. Among others, the duty to act in good faith. See Id. arts. 1.7 & 2.15.

Los “essentia” del negocio de compraventa se habrán de considerar inderogables y que se exigirá que las cláusulas extrañas se sometan o adapten al esquema legal. También en el mismo texto de la Ley Uniforme se destacan algunos artículos por su importancia, de modo que ellos mismos, conforme a la propia naturaleza de la norma que formula, parecen afirmar su condición imperativa dentro del ordenamiento
B. Principles of Freedom of Form and Proof

Principles of freedom of form and proof are designed along the same lines as the other instruments of the Uniform International Commercial Law. PICC Article 1.2 (No Form Required) states that “[n]othing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses.” These provisions regarding freedom of form and proof, because of where they appear in the Convention, apply to both the conclusion and performance stages of the contract, including its modification or termination.

PICC Article 1.2’s flexible statement makes it possible to use computer messages as proof, such as the exchange of will declarations by EDI (Electronic Data Interchange) or by electronic mail (e-mail), and any other proof that the contract has been electronically concluded.

Parties can exclude or modify both principles (freedom of form and proof), a possibility that PICC Article 1.5 recognizes. Unlike the Convention, which places important limitations on this freedom of form and proof, the UNIDROIT Principles have not considered it necessary for the written form requirements of some states to be satisfied, since the “users” of the Principles are not within the states, but are practitioners in international commercial trade. Consequently, the Principles are more flexible than the Convention, particularly since the latter’s requirements have already been incorporated into national law.

C. Principle “Pacta Sunt Servanda”

PICC Article 1.3 (Binding Character of Contract) indicates that “[a] contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms, by agreement, or as otherwise provided in these Principles.”

A contract, if it has been concluded in accordance with the rules of Chapter 2 and concluded validly, in compliance with the norms of Chapter 3 (Validity) or

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nacional. Unas veces por tratarse de reglas sobre la formación del contrato; otras por reflejar criterios de justicia o de equidad, en consideración a los contratantes y hasta de los terceros, y de tal valor que repugna pueden ser derogados por la voluntad privada. De esta forma, indirectamente, la Ley Uniforme será fundamento y causa de importantes limitaciones a la autonomía de la voluntad y podrá determinar la nulidad de algunas de las cláusulas que las partes hayan pactado contra lo en ella dispuesto.

Id.

177. See CISG, supra note 37, art. 96.
178. See PERALES VISCASILLAS, supra note 100, at 109-13 (comparing the states that made a declaration under CISG art. 96 in relation to the Vienna Convention).
179. UNIDROIT Principles, supra note 1, art. 1.3.
mandatory rules of national law, is binding upon the parties.\textsuperscript{180} The contracting parties are then obliged to comply with the terms of the contract. The contract may only be modified if the parties satisfy the conditions for modification established in the contract, or, if the contract specifies no such conditions, the norms of the Principles.\textsuperscript{181}

This principle, solidly accepted by diverse national legal systems, is limited in its application by some rules in the UNIDROIT text which aim to achieve a fair balance between the parties:\textsuperscript{182} PICC Article 2.20 (Surprising Terms),\textsuperscript{183} PICC Article 3.10 (Gross Disparity),\textsuperscript{184} PICC Article 4.6 (Contra proferentem rule),\textsuperscript{185} PICC Article 6.2 (Hardship),\textsuperscript{186} and PICC Article 7.1.7 (Force Majeure).\textsuperscript{187}

\section*{D. Principle of Primacy of the Mandatory Rules}

This principle is stated in PICC Article 1.4 (Mandatory Rules) in the following way: "Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law."\textsuperscript{188}

This principle, like the previous one, is fully supported and accepted in international trade, at least by courts, although it is not expressly recognized in other areas of the Uniform International Commercial Law.\textsuperscript{189} It is a principle that restricts the freedom of parties by preventing them from derogating from the mandatory rules (\textit{ius cogen}) of the applicable law. Examples of such mandatory

\begin{itemize}
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{181} \textit{See Id.} § 2, at 10 (Comment to PICC Article 1.3 referring to the following Articles of the PICC: 3.10 (2), 3.10 (3), 3.13, 5.8, 6.1.16, 6.2.3, 7.1.7, 7.3.1 and 7.3.3). It also points out that the contract may affect third persons with whom they have not dealt. \textit{Id.} § 3 at 10.
\item \textsuperscript{182} \textit{See Michael Joachim Bonell, "Policing" the Contract Against Unfairness under the UNIDROIT Principles for International Commercial Contracts DIARIO DEL COMERCIO INTERNAZIONALE NO. 8.2, at 251-67 (1994). Bonell refers to the following objectives of the UNIDROIT Principles: "Policing the Bargaining Behaviour"; "Policing the Substance of the Agreement"; and "Policing the Combination of Procedural and Substantive Unfairness: Gross Disparity."
\item \textsuperscript{183} UNIDROIT Principles, \textit{supra} note 1, art. 2.20.
\item \textsuperscript{184} \textit{Id.} art. 3.10.
\item \textsuperscript{185} \textit{Id.} art. 4.6.
\item \textsuperscript{186} \textit{Id.} art. 6.2.
\item \textsuperscript{187} \textit{Id.} art. 7.1.7.
\item \textsuperscript{188} \textit{See UNIDROIT Principles, \textit{supra} note 1, at 10.
\item \textsuperscript{189} \textit{See, e.g.,} CISG, \textit{supra} note 37 (containing no disposition similar to PICC Article 1.4). PICC, \textit{supra} note 1, art. 1.4.
\end{itemize}
rules are found in foreign exchange regulations, import-export licenses, and regulations pertaining to restrictive trade practices.\textsuperscript{190} This principle, in addition to acting as a limit to the parties' freedom, has another limitation connected with the role developed by the UNIDROIT Principles. When the parties choose the Principles as the law governing their contract, a problem arises: do the UNIDROIT Principles completely exclude national laws applicable to the contract? If so, the consequence will be that neither national judges nor arbitrators will be compelled to apply mandatory rules of national law. This conflicts with the principle of the supremacy of the mandatory rules: the parties' choice of the UNIDROIT Principles does not displace mandatory rules of national law. However, this statement should be qualified, since it is common for such mandatory rules to be based only on rules of public order. (Scholars and tribunals have even distinguished between national and international public order.) Also, it must be taken into account that arbitrators, unlike national judges, have to consider trade usages but are not compelled to observe national law rules, assuming the arbitrators have the powers of \textit{ambiables compositeurs}.\textsuperscript{191} For this reason, the Principles (as opposed to national law) could apply to the entire contract in every case of arbitration if it is understood that the Principles' function (as the drafters of the Principles intended, as they state in the Preamble) as \textit{lex mercatoria} or general principles of law. If the arbitration is \textit{ex aequo et bono}, the Principles may be applied as the governing law by the arbitrators, who are free to use autonomous standards.\textsuperscript{192}

\begin{quote}
190. See \textit{Id.} § 3 at 11 (Comment to PICC Article 1.4); \textsc{Bonell, Int'l Rest., supra} note 2, at 59-60, 138-45.

191. See \textsc{Bonell, Int'l Rest., supra} note 2, at 130. Bonell states:

The only way of attacking the award would be to prove that by applying the UNIDROIT Principles the arbitrators basically acted as \textit{ambiables compositeurs} and thereby exceeded the scope of their mandate: the chances of succeeding with such an argument are, however, becoming more and more remote in view of the fact that there has recently been a number of court decisions from several countries according to which even awards referring to unspecified 'general principles of law' or the '\textit{lex mercatoria}' are not to be considered as decisions \textit{ex aequo et bono}, but rather as being based on law.

\textit{Id.; see} Giardina, \textit{supra} note 57, at 553. Giardina thinks that it is possible that some legislators consider the Principles to be "rules of law."

192. See \textsc{van Houtte, supra} note 63, at 382-83; \textsc{Van Houtte} also points out that arbitrators are the natural authority for the interpretation and application of the UNIDROIT Principles. \textit{Id.} at 383; \textit{Why? What? How?}, \textit{supra} note 1, at 1144-45. \textit{see also} Garro, \textit{supra} note 49, at 108; Lando, \textit{supra} note 58.
\end{quote}
E. Principle of the Dispositive Nature of the UNIDROIT Principles

PICC Article 1.5 (Exclusion or Modification by the Parties) follows a strong trend in the international commercial arena. The nonmandatory nature of instruments that are part of the Uniform International Commercial Law is the general rule in international trade. It is not surprising that PICC Article 1.5 closely follows CISG Article 6. The former expressly states, "[t]he parties may exclude the application of these Principles or derogate from or vary the effect of any other of their provisions, except as otherwise provided in the Principles." Even though this principle is highly favorable insofar as it recognizes the principle of the freedom of contract, its formulation is contradictory. The recognition of parties' ability not to apply the Principles shows the drafters' intention of establishing a set of rules of immediate application to a given contract. However, in this author's opinion, the Principles govern a given contract when the parties have agreed to submit it to them. The Principles' lack of coherence regarding this particular point is due to their being modeled on CISG Article 6 without having taken into account the different natures of the Convention and the UNIDROIT Principles. CISG Article 6 also recognizes the parties' freedom not to apply the Convention, which makes sense since the Convention needs no express or implicit agreement of the parties in order to be applied. The Principles, in contrast, are only applied when the parties expressly incorporate them into their contract. Thus, the reference in PICC Article 1.5 permitting the parties not to apply the Principles contradicts its general rule of applying the Principles.

193. For this reason, Parra Aranguren points out that the lack of binding force per se makes it difficult to understand Article 1.5 of the PICC. Nevertheless, the author tries to give it coherence. See Parra Aranguren, supra note 56, ¶ 28 at 178.


It is true that given the particular nature of the UNIDROIT Principles any statement to the effect that they are not compulsory may at first sight look rather redundant. However, to appreciate fully the importance of the principle laid down in Art.1.5 it has to be seen in a broader context, i.e. in the light of all the possible ways in which the UNIDROIT Principles may be used in practice.

Id. The author continues by noting that the UNIDROIT Principles may also be applied by judges and arbitrators or serve as a model to international and national legislators. Id. In relation to the Principles' application by judges or arbitrators, the statement of PICC Article 1.5 is still contradictory, since the fact that the parties can exclude the Principles does not affect their applicability by courts and arbitrators. Regarding the second role, though it is true that Principles may serve as a model for future legislators, to remind national or international legislators that the parties have freedom of contract is superfluous and redundant, since this principle is so well-established in international and national commercial contract law. Id.

195. See UNIDROIT Principles, supra note 1, at 1 (Preamble).
their nature. This is the case unless one considers that the Principles govern a contract when the parties have agreed to apply some *lex mercatoria*, general principles of law, or the like, which does not occur automatically.\footnote{196}{See supra part II.C.}

To achieve the same effect as the Convention under the Principles, it would have been necessary for the document to have been drafted as a binding instrument, such as a Convention.\footnote{197}{Carlos Esplugues, *Los Principios Aplicables a los Contratos Mercantiles en Materia Internacional Elaborados por el Instituto Internacional para la Unificación del Derecho Privado (UNIDROIT)*, 45 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 615 (1993). He states that “UNIDROIT no ha buscado elaborar un conjunto de preceptos con una función claramente indicativa. Estamos, pues, ante un ejemplo de la denominada Soft law.” Id.}

Without doubt, it would have been difficult for them to have been approved and would have reduced their flexibility in attempting reforms of the Principles.

Consequently, PICC Article 1.5 is useful in recognizing that the parties may exclude or derogate provisions thereof—that is, it recognizes the nonmandatory character of the Principles. Even though PICC Article 1.5 does not state that the parties may tacitly derogate or modify the provisions of the Principles, the comment states:

> there is an implied exclusion or modification when the parties expressly agree on contract terms which are inconsistent with provisions of the Principles and it is in this context irrelevant whether the terms in question have been negotiated individually or form part of standard terms incorporated by the parties in their contract.\footnote{198}{The legislative history of CISG Article 6 indicates that an earlier version of the article, which adopted a form similar to as ULIS Article 3, allowed tacit modification or exclusion. However, these references did not survive in the Convention because they were understood to be unnecessary. For that reason, any of the provisions of the Convention may be explicitly or tacitly excluded or modified.}

The legislative history of CISG Article 6 indicates that an earlier version of the article, which adopted a form similar to as ULIS Article 3, allowed tacit modification or exclusion. However, these references did not survive in the Convention because they were understood to be unnecessary.\footnote{199}{UNIDROIT Principles, supra note 1, § 2 at 12-13 (Comment to PICC Article 1.5).}\footnote{200}{Michael Joachim Bonell is in agreement with the Vienna scholars. *Article 6 - Parties’ Autonomy, in Commentary on the International Sales Law: The 1980 Vienna Sales Convention* 51 (Cessaro Massimo Bianca, et. al. eds., 1987); Rolf Herber, *Ausschluss, Abweichung oder Änderung durch Parteiabrede, in Caemmerer & Schlechtriem, supra note 98. But see Isaak Dore & James E. de Franco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT’L L.J. 49, 53 (1982) [hereinafter Dore & DeFranco].}
PICC Article 1.5 has some limits. The most important is the mandatory character of some provisions of the Principles, provisions easily recognized because either they have been drafted with mandatory language or because the mandatory character of the provision follows from the content and purpose of the provision itself, for example PICC Article 7.1.6 (Exemption Clauses). In the Convention, there is only one provision with an expressly mandatory character. That is CISG Article 96 as it relates to CISG Article 12 (Declaration of a State Related to the Written Form of the Contract). Nevertheless, one can derive from the Convention the contracting parties’ inability to exclude or vary (at least tacitly) CISG Article 7 (parallel to PICC Article 1.6), CISG Article 8 (parallel to PICC Articles 4.1 and 4.2), and CISG Article 9 (parallel to PICC Article 1.8).

F. Principles of Internationality and Uniformity

Other classic principles include those of internationality and uniformity in the application and interpretation of instruments of Uniform International Commercial Law. These principles are enunciated in PICC Article 1.6


201. See UNDROIT Principles, supra note 1, § 3, at 13 (Comment to PICC Article 1.5).

202. CISG, supra note 37, arts. 12 & 96.

203. Id. art. 7.

204. UNIDROIT Principles, supra note 1, art. 1.6.

205. CISG, supra note 37, art. 8.

206. UNIDROIT Principles, supra note 1, arts. 4.1 & 4.2.

207. CISG, supra note 37; art. 9.

208. UNIDROIT Principles, supra note 1, art. 1.8; see PERALES VISCASILLAS, supra note 100, at 77 n.66 (discussing the Vienna scholars).

209. The first two international commercial texts prepared by UNCITRAL, the Convention on the Limitation Period in the International Sale of Goods, June 14, 1974, and the Convention on the Carriage of Goods by Sea, 1978 [hereinafter Hamburg Rules] have articles related to their interpretation. Articles 7 and 3 indicate that, in the interpretation and application of those texts, regard must be given, respectively, to their international character and to the need to promote uniformity. Those articles—unlike their parallel in the Vienna Convention—do not say anything about the need to observe principles of good faith in international transactions. This feature was added after those texts were approved during the drafting of the Vienna Convention.

The rule regarding interpretation of the Vienna Convention has been reproduced in several texts. For example, see Article 4 of the United Nations Convention on
(Interpretation and Supplementation of the Principles) with the following formulation: "(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application."

Without repeating the ideas—quite applicable here—already discussed in other works on CISG Article 7, some particularities of the UNIDROIT Principles in relation to other texts of the Uniform Law merit comment. I refer to the good-faith principle, which I will discuss in the next section. I refer also to the fact that the UNIDROIT Principles are more precise than other international documents, such as the Convention, regarding the decision to separate rules of interpretation of the Principles (PICC Article 1.6) from those regarding interpretation of the contract itself (Chapter 4). This distinction, however, should not be incisive, because principles of internality and uniformity may be useful in interpreting contracts. Paragraph 2 of PICC Article 1.6 (Interpretation and Supplementation of the Principles) regulates issues related to gap-filling provisions of the Principles: "issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles." Once again, the UNIDROIT Principles

International Bills of Exchange and International Promissory Notes of 1988; Article 3 of the UNCITRAL Model Law on Electronic Commerce of 1996; and Articles 4 and 6 of the UNIDROIT Conventions on International Factoring and Leasing of 1988, which reproduce Article 7 of the CISG; and Article 5 of the UNCITRAL Convention on Independent Guarantee and Stand By Letters of Credit of 1995.

The UNIDROIT Principles resemble the first instruments created by UNCITRAL more than those of the Vienna Convention, since the former do not expressly adopt the principle of good faith as a means of interpretation, but instead, as a standard of conduct. The 1980 Rome Convention on the Applicable Law also follows a rule of interpretation similar to that of the UNIDROIT Principles. See Alfonso Calvo Caravaca, La ley aplicable a los contratos internacionales (el Convenio de Roma de 19 de Junio de 1980) [The Law Applicable to International Contracts] 43 DERECHO DE LOS NEGOCIOS 1 (1994); Miguel Virgós Soriano, La Ley aplicable a los contratos internacionales: la regla de los vínculos más estrechos y la presunción basada en la prestación característica del contrato [The Law Applicable to International Contracts: the Rule of the Strictest Bonds and the Presumption Based in the Service Characteristic of the Contract], in 4 ESTUDIOS JURIDICOS EN HOMENAJE 5290-309 (Aurelio Menéndez ed., 1996).

The new law, di Riforma del Sistema Italiano di Diritto Internazionale Privato, Legge, No. 218 (1995) (Italy), recognizes these universal principles in Article 2.2 (Convenzioni Internazionali). "1. Le disposizioni della presente legge non pregiudicano l' applicazione delle convenzioni internazionali in vigore per l' Italia. 2. Nell' interpretazione di tali convenzioni si terrà conto del loro carattere internazionale e dell' esigenza della loro applicazione uniforme." Id. art. 2.2; see also Sergio M. Carbone, Commentary in 4 Rivista di diritto internazionale privato e processuale, 912-23 (1995).

210. UNIDROIT Principles, supra note 1, art. 1.6

211. Rather than repeating ideas discussed elsewhere, see PERALES VISCASILLAS, supra note 100, at 86-94.
are consistent with the Uniform Law trend of achieving a method of application and interpretation which is as independent from national laws as possible. For this reason, a solution should be found in underlying general principles before resorting to national laws.\textsuperscript{212}

Unlike the Convention, the Principles do not mention national law as a subsidiary recourse for cases in which an underlying principle could not be found.\textsuperscript{213} Nevertheless, before resorting to the applicable national law, resorting

\begin{itemize}
\item 212. Neither the Vienna Convention nor the UNIDROIT Principles have a list of those underlying or general principles. Nevertheless, it is not difficult to deduce some of these principles from the texts. In both texts, among the most important principles are reasonableness, or the rule of reason, and the \textit{favor contractus} principle. See \textit{Why? What? How?}, supra note 1, at 1137 (regarding the principle of \textit{favor contractus}); see also BONELL, INT'L REST., supra note 2, at 65; Vincente Fortier, \textit{Le contrat du commerce international à l'aune du raisonnable}, 2 JOURNAL DU DROIT INTERNATIONAL 315 (1996) (regarding the rule of reason and comparing \textit{in extenso} the Vienna Convention and the UNIDROIT Principles).

See also BONELL, INT'L REST., supra note 2, at 39. Bonell indicates that, before resorting to the underlying principles, an answer should be sought by analogy, confirming his ideas in relation to Article 7 of the CISG. Gap-filling by analogy constitutes a method for finding a solution to a legal problem when the body of law does not provide an answer. It consists of applying a solution expressly provided in the text to a similar problem. This method is well-known in civil law systems, for example, see C. Civ. art. 4.1 (Spain). Jean Hellner, \textit{Gap-Filling by Analogy}. \textit{Art. 7 of the U.N. Sales Convention in Its Historical Context}, FESTSKIFT TILL LARS HJERNER 219 (1990) (discussing the use of this approach in interpreting the Vienna Convention).

213. The case law on the Vienna Sales Convention has declared that the regulation of the following issues should be left to national law. See ICC 7197/1992 (Aus.) (issues involving penalty clauses); ICC 6653/1993 (Fr.) (the question of who should prove the lack of conformity of goods); Judgment of Aug. 23, 1994, No. ICC 7660/JK (Aus.) (indicating that "Art. 39 of the Convention does not specify the time period in which a purchaser who has notified the other party of the defect has to claim his rights because of such defects. . . . This question is subject to the national law"); Judgment of Nov. 1995, 6 REVUE DE LA COUR INTERNATIONALE D'ARBITRAGE DE LA CCI 70 (Fr.). \textit{But see} Judgment of Sept. 9, 1993, Commercial Tribunal of the Zurich Canton, No. HG930138. U/HG93 (Switz.) (indicating that Articles 38 and 39 of the CISG implicitly require the buyer to prove the lack of conformity, as well as to communicate it).

Issues related to compensation: some courts have stated on the basis of Article 4 of the CISG that compensation is not governed by the CISG; see Judgment of Sept. 17, 1993, OLG Koblenz [trial court], No. 2 U 1230/91 (F.R.G.); Judgment of Sept. 17 1993 (2 U 1230/91), 1993 RECHT DER INTERNATIONAL WIRTSCHAFT 934-38 (F.R.G.); Judgment of Aug. 21, 1995, OLG Stuttgart [trial court], No. 5 U 195/94, 2 IPRAX 139-40 (1996) (F.R.G.) (indicating that the compensation is not governed by the Convention (Article 4 CISG)). Other courts have stated on the basis of CISG Article 7 that compensation is not governed by the CISG. See, e.g., Judgment of June 9, 1995, OLG Hamm [trial court], No. 11 U 191/94, 4 IPrax 269-70 (1996) (F.R.G.); see also Peter Schlechtriem, \textit{Aufrechnung durch den Käufer wegen Nachbesserungsaufwand—}
In the same way, tribunals have understood that: the rules of the Vienna Convention are not applicable to the sale of shares of a closely-held Hungarian company to a German one. See Judgment of Dec. 20, 1993, Arbitration award, (Az Vb 92205) (Hung.); see also Alexander Vida, Keine Anwendung des UN-Kaufrechtüberinkommens bei Übertragung des Geschäftsanteils einer GmbH, 1 IPRAX, 52-53 (1995) (Vienna Convention rules do not apply to international distribution contracts, but do apply to contracts of sales concluded on the basis of distribution agreements). See Judgment of July 16, 1992, Gerechtshof Amsterdam [Court of Appeals], (550/92 SKG), 1992 NEDERLANDS INTERNATIONAL PRIVAATRECHT 420 (Neth.); Judgment of Sept. 17, 1993, OLG Koblenz [trial court] (2 U 1230/91), 1993 RECHT DER INTERNATIONAL WIRTSCHAFT, 934-38 (F.R.G.); and Judgment of Mar. 19, 1996, Metropolitan Tribunal, (Hung.); see also Jean Thieffry, La Convention de Vienne et les contrats de distribution, 19 DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 63 (1993) (indicating that rules of the Vienna Convention related to the Formation of Contracts are not applicable to distribution contracts); the Convention does not govern a contract by which one party was in charge of making a market survey, since it is not a “good.” See Judgment Aug. 26, 1994, OLG K’in [trial court] 1994 RECHT DER INTERNATIONAL WIRTSCHAFTSRECHT 970 (F.R.G.); (the Convention does not apply to a contract by which a German party was put in charge of the design of a computer program for a party located in France. This decision is very interesting because it declared that this situation could be governed by the Convention if it were a standard program and not, as it happened, a custom program). See Judgment of Oct. 16, 1992, OLG K’in [trial court], (F.R.G.); see also Tom Vizquez Lepinette, An lisis critico de las disposiciones generales de la Convenci6n de Viena sobre compraventa internacional de mercaderlas in REVISTA DE DERECHO MERCANTIL 1064-65 (1995); L. Scott Primak, Computer Software: Should the U.N. Convention on Contracts for the International Sale of Goods Apply? A Contextual Approach to the Question, 11 COMPUTER LAW J. 213 (1991) (favoring applying the Vienna Sales Convention to both sales contracts of computer software and software licensing). The above-mentioned decision, Judgment of Sept. 17, 1993, OLG Koblenz [trial court], (2 U 1230/91) (F.R.G.) (indicating that a sales contract of a “chip” (a component of computer hardware) is governed by the Convention because it could be deemed a “good”).
to general principles extracted from other international instruments, such as the Convention, would be best. 214 It is not clear why the drafters of the UNIDROIT Principles omitted this, especially when the Preamble states the contrary role expressly: “UNIDROIT Principles may be used to interpret or supplement international uniform law instruments.” 215 Accordingly, this shortcoming in the Principles is regrettable. For the reasons stated above, the text is not self-sufficient, despite its comprehensiveness.

G. Principles of Good Faith and Fair Dealing

The recognition of the principle of good faith and fair dealing 216 as an express principle of interpretation of the UNIDROIT Principles and as a

214. Contra UNIDROIT Principles, supra note 1, § 4, at 15-16 (Comment to PICC Article 1.6 insisting on resorting to national law in cases in which the parties have agreed to it). Scholars also forget the possibility of using general principles, and consequently, demand the application of national law. See Lando, supra note 58, at 132, Garro, supra note 49, at 102.

215. See UNIDROIT Principles, supra note 1, at 1 para. 5 (Preamble).

216. Reference to fair dealing has been influenced by the U.S. legal system. Courts in the U.S. have been reluctant to explicitly formulate a general duty of good faith and fair dealing regarding the precontractual stage, according to the RESTATEMENT, supra note 16, §205. U.C.C. § 1-203 provides that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” This section does not address the precontractual stage. Id. In the last few years, courts have started to change their attitude in favor of the admission of good faith and fair dealing requirements in the formulation stage of the contract, at least as a principle that encourages mutual confidence between the parties. See Dore & De Franco, supra note 200, at 60. In contrast, a change of this kind in the English law does not seem likely at this point. Roy Goode, England, in FORMATION OF CONTRACTS AND PRECONTRACTUAL LIABILITY, at 59, ICC Pub. No. 440/9 (1990); see also Jeffrey Sutton, Methodology in Applying Uniform Law for International Sales (Under the United Nations Convention) (Vienna 1980), in LAW AND AUSTRALIAN LEGAL THINKING IN THE 1980s: A COLLECTION OF THE AUSTRALIAN CONTRIBUTIONS TO THE 12TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW: 18-27, 96 (1986); Robert Lake, American Developments in Precontractual Liability: Negotiating in Good Faith, DIRITTO DEL COMMERCO INTERNAZIONALE No. 51, 542 (1991).

Thus, both scholars and tribunals have recognized this new approach to good faith, at least in advanced stages of the negotiation. E. Allan Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 COLUM. L. REV. 217, 253 (1987). Regarding the good faith principle in the UNIDROIT Principles, Farnsworth points out that “in the international community, the United States plays a dual role with respect to good faith and fair dealing. In the first place, it is a leader among Common Law countries. In the second, it occupies the
mandatory standard for the parties to follow is one of the greatest and most appropriate innovations of the Principles, especially if placed in context with other international instruments such as the Convention. The drafters of the UNIDROIT Principles were aware of the compromise that surrounded discussions of good faith during the Convention. One can see that they were aware of this because, instead of copying CISG Article 7, they decided to put the issue back into its place. Accordingly, they have extracted good faith from the interpretative principles and relocated it in an independent disposition with a mandatory character ("[t]he parties may not exclude or limit this duty," PICC Article 1.7.1). At the same time, they placed “good faith” in its natural context ("[e]ach party must act in accordance with good faith and fair dealing in international trade"). These principles of good faith and fair dealing are applied throughout the life of the contract: during the preliminary negotiations (before the offer), during the formation stages (the exchange of offer and acceptance that leads to the contract’s conclusion), and lastly, during the performance phase. PICC Article 1.7.1

intermediate and moderate position between the English and the civilians.” Farnsworth, supra note 37, at 54.

It is encouraging that an Australian tribunal, judging a termination clause in a contract for construction of a gas station, made express reference to the good-faith principle of CISG Article 7 as a precedent to national law. See Judgment of March 12 [Court of Appeals] 26 N.S.W.L.R. 234 (1992) (Austl.).

In the sphere of application of the Vienna Sales Convention, the behavior of a party was recognized and sanctioned because it was deemed to be inconsistent with the good faith requirement of Article 7(1) of the CISG. Judgment of Feb. 22, 1995 Cour d' Appel de Grenoble, Cass. Com. [Supreme Court] (France).

217. See PERALES VISCASELLAS, supra note 100, at 91-94.


219. See Berger, supra note 3, at 229-30. Regarding the good-faith principle in the UNIDROIT Principles, Berger points out that both “the fair dealing in international trade” and the “fairness in the marketplace” principles are recognized. Thus, he concludes, “In jedem Fall ist der in Art.1.7 UNIDROIT-Prinzipien enthaltene Grundsatz von ‘good faith and fair dealing’ stets im Sinne eines von nationalen Besonderheiten gelösten und damit ‘internationalisierten’ und zugleich auf die Besonderheiten bestimmter Handelszweige bezogenen Standards zu verstehen.” Id.

See also Perillo, supra note 15, at 287. Considering this principle in connection with his state law, Perillo indicates that the time has come for a new examination of U.S. common law in light of the doctrine recognized in Article 1.7 of the PICC and in light of its acceptance as a principle of international commercial contracts. Id.; see Farnsworth, supra note 37, at 60-61. Reflecting on the good-faith principle, Farnsworth indicates that “[c]ivil law lawyers demonstrate an unsettling tendency to use the doctrine of good faith as a cloak with which to envelop other doctrines. . . . One can only hope that this will not happen under the Principles.” Id.; Arthur S. Hartkamp, Judicial Discretion Under the New Civil Code of the Netherlands, 40 AM. J. COMP. L. 551 (1992) (reviewing the concept of good faith in the new Civil Code of the Netherlands).
works in conjunction with Article 2.15 (Negotiations in Bad Faith) and 2.16 (Duty of Confidentiality). This new placement of good faith must not induce one to think that it is not a principle of interpretation of the UNIDROIT Principles.\footnote{220} 

**H. Principle of the Primacy of the Usages and Practices**

This principle is also well-accepted in the international commercial arena. The instruments of the Uniform Law give a prominent role to the agreed usages, the practices established between the parties, and international usages or customs.\footnote{221} These three figures have one common effect. Apart from serving as a guide to interpretation of parties' statements and conduct, they bind the contracting parties. However, the binding force is different: because it was agreed upon by the parties, because an expectation derived from previous behavior is created,\footnote{222} and finally, because the efficacy of the usage rests on the law, it is established as a legal presumption. In any case, usages and practices become part of the contract's content throughout the formation process.

All these motives are gathered together in PICC Article 1.8 (Usages and Practices):

1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves;
2. The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.\footnote{223}

\footnote{See, also Bonell, Int'l Rest., supra note 2, at 79-90 (indicating some examples of the influence of the good-faith principle in the UNIDROIT text).}

\footnote{220. See also UNIDROIT Principles, supra note 1, § 3 at 15 (Comment to PICC Article 1.6), § 1 at 16 (Comment to PICC Article 1.7).}

Friederich K. Juenger, *Listening to Law Professors Talk About Good Faith: Some Afterthoughts*, 69 TUL. L. REV. 1253, 1257 (1995). It has even been said that the principle of good faith in the UNIDROIT Principles “has once again resumed a supranational role as part and parcel of the new *lex mercatoria*.” Id.; Arthur Hartkamp, *The Concept of Good Faith in the UNIDROIT Principles for International Commercial Contracts*, 3 TUL. J. INT'L & COMP. L. 65 (1995). In contrast, Hartkamp, commenting on the role of good faith in the UNIDROIT Principles, remarks upon their interpretative role in relation to Articles 4.1 and 4.2 of the PICC. He indicates other functions as well; a supplementing function (PICC art. 5.2) and a derogating or restrictive function (PICC arts. 6.2.3; 7.1.6 & 7.4.13). Id.

\footnote{221. See, e.g., CISG, supra note 37, art. 9.}

\footnote{222. UNIDROIT Principles, supra note 1, § 2 at 19-20 (Comment to PICC Article 1.8 indicating that behavior during only one previous transaction between the parties will not normally suffice to establish a duty). This consideration is extended to the Vienna Convention also, so I assume that the UNIDROIT Principles supplement the CISG.}

\footnote{223. Id. art. 1.8}
PICC Article 1.8, like others in the Principles, again tracks CISG Article 9. In both the Convention and the UNIDROIT Principles, "a regulation sufficiently flexible to adapt constantly to the ever-changing technical and economic conditions of cross-border trade" is achieved by recognizing the preponderant role of usages. The UNIDROIT Principles are a sensible improvement upon CISG Article 9(2), the parallel to PICC Article 1.8 (2). This improvement results from the broad wording, hence the total international recognition of usage. This recognition has been obtained, first, by suppressing usages that the parties knew or ought to have known, and secondly, by suppressing the presumption that application of international usages is derived from a tacit incorporation of it in the contract. Accordingly, unlike CISG Article 9(2), in which recognition of international usage is obscured by its tacit application, the Principles are clear when recognizing international usage without any further conditions.

The Principles have also improved upon the Convention in that the former expressly impedes the application of international usages when it is not reasonable to do so. Nevertheless, it is not difficult to reach the same result in the Convention by applying one of its underlying principles: the rule of reason. Lastly, the Vienna Convention, unlike the UNIDROIT Principles, expressly indicates that the parties may stipulate to terms contrary to international usage. Although PICC Article 1.5 allows modification or derogation of any of its dispositions, this possibility is less apparent in PICC Article 1.8, due to the fact that it seems to have a mandatory character: "the parties are bound." Nevertheless, the same result can be reached as under the Convention. For example, let us assume the existence of a trade usage by which the annual interest rate for a past-due sum rises to 12%—as it has been understood under the Convention—while the parties have agreed on an interest rate of 9%. It is clear that the international usage has been displaced by the agreement of parties who wish to apply a lower rate of interest. This conclusion, which seems to be very clear in the light of both the Convention and the Principles, is not, however, adopted by the commented-upon court decision which applied the rate of interest recognized

226. See Bonell, Int'l Rest., supra note 2, at 63-64. Comparing both, Bonell indicates that "[i]n this respect there is no difference in substance between Art.1.9 (2) of the UNIDROIT Principles and CISG Art.9(2), the changes introduced by the former being purely cosmetic." Id.
227. CISG, supra note 37, art. 6.
by international trade usages. Accordingly, the court indicated that, "even though the Vienna Convention does not fix an interest rate, it imposes the application of the usages of trade, to which it assigns a higher hierarchy over the provisions of CISG Article 9."229 It should be noted that the Argentinean case is contradictory because a previous ruling, related to a credit of a Spanish party against an Argentinean party, points out that:

[t]he Convention amply recognizes the principle of freedom of contract (Article 6) insofar as the parties may even completely or partially displace the provisions of the Convention. For this, I [the judge] consider that the agreed annual interest of 24% in the registered pledge contract (contrato de prenda con registro), should also be admitted . . . ."230

I. The "Reaching" Principle

The reaching principle, recognized by the UNIDROIT Principles as determinative of the moment at which any communication becomes effective, has been taken from CISG Article 24. The reaching principle is located in PICC Article 1.9 (Notice), which also adopts important rules. Specifically, it dedicates four paragraphs to regulating some aspects related to notices sent by parties. This disposition could be deemed as one of the most important ones within the General Dispositions since it applies to all the stages of the life of the contract. Accordingly, it applies to both the precontractual and the contractual phases.

In relation to notice per se, PICC Article 1.9, Paragraphs 1 and 4 indicate two elements which should be taken into account. The first one makes reference to the means by which a communication may be given, pointing out that, "[w]here a notice is required it may be given by any means appropriate to the circumstances."231 It does not specify what the "means" should be, obviously reflecting the principle of freedom of contract, but it does indicate that it must be appropriate, or reasonable.232 The second element includes in the concept of

229. The original text states that: "si bien la Convención de Viena no fija tasas de interés, impone la aplicación de los usos del comercio internacional, a los que asigna una jerarquía superior a las mismas normas de la Convención (art.9)."

230. Translation is by the author. The original text states that: "La Convención recepta en su forma más amplia la autonomía de la voluntad material (art.6), al punto que las partes pueden incluso dejar de lado en parte o totalmente las normas de la Convención. Por ello considero que los intereses pactados al 24% anual en el contrato de prenda con registro, deben ser también admitidos . . . ."

231. UNIDROIT Principles, supra note 1, arts. 1.9(2) & (3).

232. Id. § 1, at 22 (Comment to PICC Article 1.9). The Comment states that, "[w]hich means are appropriate will depend on the actual circumstances of the case, in particular on the availability and the reliability of the various modes of communication, and the importance and/or urgency of the message to be delivered." Id.
notice "a declaration, demand, request or any other communication of intention." Accordingly, this concept includes not only typical declarations of importance during the formation process—offer and acceptance—but also all sorts of communications given throughout the contract period, for instance, the notification of the assignment of a price contract to a third party. Both Paragraphs 1 and 4 of PICC Article 1.9 have been taken from CISG Article 27, which also adopts a generic concept of notice by requiring notice in a manner appropriate to the circumstances.

PICC Article 1.9, Paragraphs 2 and 3, recognize and define the reaching principle. PICC Article 1.9 (2) states, "[a] notice is effective when it reaches the person to whom it is given," pointing out in Paragraph 3 that, "[f]or the purpose of Paragraph (2) a notice 'reaches' a person when given to that person orally or delivered at that person's place of business or mailing address." Both Paragraphs have clearly been inspired by CISG Articles 23 and 24, which are located in part II (Formation of Contracts) of the Uniform Law on Sales text.

It is apparent that UNIDROIT Principles follow the Convention in adopting the reaching principle, a principle equally well-defined in the Convention. Accordingly, PICC Article 1.9 (2) and (3) should be interpreted in accordance with the legislative history of the Convention. The conclusion could not be other than that the reaching principle is adopted as a general rule; that is, the theory or system of information for oral communications, and the reception or receipt theory for written statements.

It is also traditional practice to examine issues related to the parties' language in conformity with the reaching principle of CISG Article 24 or PICC Article 1.9. Some decisions on this issue exist: OLG Frankfurt 28 April 1981 (5 U 119/80) (Germany), in relation to ULF, held that the contract was not concluded because the reply to the offer was made in a different language from that established during the negotiations. Recently, in Convention case law, Amtsgericht (AG) Kehl, 6 October 1995 (3 C 925/93) (Germany) indicated that general conditions that have been sent in a language different from the one used during negotiations could be imposed on one of the parties.

There are some exceptions to the general rule established by PICC Article 1.9 (2), which usually adopts the expedition or dispatch theory. Most of these exceptions are in Chapter 2 of the Principles Formation of the Contract. The comment to Article 1.9 coupled with the parties' adoption of the dispatch principle indicates that:

233. Id. art. 1.9(4).
234. See Judgment of Feb. 8, 1995 OLG Hamm, No. 11 U 206/93 (Germany) (indicating that this issue is not regulated by the 1980 Vienna Sales Convention).
235. For the legislative history of CISG Article 24, see PERALES VISCASILLAS, supra note 100, at 220-54.
236. Id. at 235-38 & 240-52; but see UNIDROIT Principles, supra note 1, 2, at 24 (Comment to PICC Article 1.9 indicating that the reception theory has been adopted).
237. See PERALES VISCASILLAS, supra note 100, at 235-38.
the parties are of course always free expressly to stipulate the application of the dispatch principle. This may be appropriate in particular with respect to the notice a party has to give in order to preserve its rights in cases of the other party's actual or anticipated non-performance when it would not be fair to place the risk of loss, mistake or delay in the transmission of the message on the former. This is all the more true if the difficulties which may arise at international level in proving effective receipt of a notice are borne in mind.  

This comment has an explanation, again derived from the Convention. It has been observed that the Convention follows the reaching principle as a general rule for Part II (Formation of the Contract).  

In contrast, the general rule for Part III of the Convention (Sale of Goods) is the dispatch theory. The difference between the Convention and the UNIDROIT Principles is clear enough. The latter adopts the same theory—the reaching theory—for all their provisions, while the former adopts different rules for each stage of the contract. Notwithstanding this difference, both texts adopt a flexible point of view by indicating exceptions to the general rule. That is, the exceptions to the reaching principle in Part II of the Convention—and also in the UNIDROIT Principles—have the same raison d'être as the exceptions to the dispatch theory in Part III. They try not to impose more obligations on the party that has complied with its duties—the transmission risk of the will declarations.

J. Definitions

The last disposition of the General Provisions of the UNIDROIT Principles is dedicated to defining some terms that appear within them. Unlike other dispositions of this part, PICC Article 1.10 does not adopt a general principle except with regard to the last definition, which adopts the "principle of the tangible reproduction of the information," recognized unanimously in international trade. PICC Article 1.10(a) defines "court." This definition requires few comments, because both arbitral tribunals and courts are included. PICC Article 1.10(b) defines "place of business" which is relevant when a party has more than one. The Principles reproduce CISG Article 10 when they indicate

238. UNIDROIT Principles, supra note 1, § 3, at 23 (Comment to PICC Article 1.9).
239. See supra part III.I.
240. The Principles of the European Commercial Contracts also follow the Vienna Convention more than the UNIDROIT Principles. But see Hartkamp, supra, note 28, at 344-45.
241. UNIDROIT Principles, supra note 1, art. 1.10 (defining court, writing, obligor and obligee).
that, where a party has more than one place of business, the relevant ‘place of business’ is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract. The Convention establishes in Article 10(b) that when a party does not have a place of business, reference is to be made to its habitual residence. The UNIDROIT Principles have not adopted this. It is not clear why the drafters of the Principles did not consider habitual residence to be relevant. The reason may be the commercial character which the drafters have attempted to give the Principles, such that situations in which the parties do not have a place of business will rarely arise. However, this could happen; in such cases, the Convention will supplement the UNIDROIT Principles.

PICC Article 1.10(c) defines “obligor and obligee.” “‘Obligor’ refers to the party who is to perform an obligation and ‘obligee’ refers to the party who is entitled to performance of that obligation.” The comment points out that the terms ‘obligor’ and ‘obligee’ are used irrespective of whether the obligation is nonmonetary or monetary.

PICC Article 1.10(d) defines “writing.” In the UNIDROIT Principles, writing means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form. The comment elaborates, indicating that writing includes not only a telegram and a telex (in clear reference to CISG Article 13), but also any other mode of communication that meets the above-stated requirements. PICC Article 1.10(d) certainly improves upon CISG Article 13, which is more hesitant to


Regarding the determination of the place of business in the ULIS, see Daniela Memmo, La ‘sede do affari’ secondo la disciplina uniforme sulla vendita internazionale nella più recente giurisprudenza della Corte federale tedesca, 2 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 755-61 (1983).

243. UNIDROIT Principles, supra, note 1, § 4, at 25 (Comment to PICC Article 1.10).
recognize modern means of communication other than telegrams and telexes.\textsuperscript{244} The Convention drafters' lack of attention has changed in the rest of the instruments elaborated by the international organizations, in which the trend is to include the most modern means of communication in the concept of writing, \textsuperscript{245} such as fax, EDI, and E-mail.

\section*{IV. CONCLUSION}

The Principles of International Commercial Contracts, drafted by UNIDROIT, constitute one of the most serious efforts at unifying the law of international commercial contracts. They form a comprehensive text with more than a hundred articles. The objects of this study were the Preamble (Sphere of Application) and the General Dispositions of the UNIDROIT Principles.

Part I of this study focused on the purposes of the UNIDROIT Principles as stated by their drafters. These purposes include, among others, to set forth general rules for international commercial contracts, to serve as a model to international and national legislators, and to apply as \textit{lex mercatoria}. Part II was dedicated to the General Dispositions of the Principles, which play an important role. They apply to whole chapters of the Principles, because they set forth the general principles of the UNIDROIT text—that is, form and proof, freedom of contract, and good faith and fair dealing.

Both the Preamble and the General Dispositions are studied in light of other international instruments. This work focused particularly on the Vienna Convention because the UNIDROIT Principles reveal the clear and deep influence of the Vienna Convention. Furthermore, study of the Preamble and the General Dispositions lead this author to the conclusion that there is a reciprocal influence.

\begin{thebibliography}{9}
\bibitem{CISG} CISG, \textit{supra} note 37, art. 13 (indicating that "[t]he concept of writing includes telegram and telex").
\bibitem{UNIDROIT} \textit{See} UNIDROIT Convention on International Factoring, art. 1.4 (1988). Article 1.4 has a concept similar to the Vienna Sales Convention but is more elaborate because the article includes "any other telecommunication capable of being reproduced in a tangible form," an idea that has also been adopted by Article 1.0 of the PICC; UNCITRAL Model Law on International Commercial Arbitration, art. 7.2 (1985). Article 7.2 shows the need for arbitration agreements to be in writing. Such an agreement is considered to be in writing "if it is contained \ldots in an exchange of \ldots other means of telecommunication which provide a record of the agreement." \textit{Id.; see also} UNCITRAL Model Law on Electronic Commerce, art. 6 (1996); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, art. 4.3. Article 4.3 states: "[W]hen the customer and the operator have agreed to communicate electronically, a document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message." \textit{Id.}
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between those texts; that is, the UNIDROIT Principles can interpret and supplement the Vienna Convention and vice versa. The interrelation between these international uniform texts requires further consideration.

First, according to CISG Article 7, judges and arbitrators must avoid “easy” recourse to UNIDROIT Principles when it is possible to fill the gap utilizing the Convention, even when the Principles provide an express solution. Rather, deep investigation of the Convention is needed to find the text’s general principles. If this is impossible, recourse to the UNIDROIT Principles would be a better solution than recourse to the national law in order to achieve the goals of uniform interpretation and application of the Convention. And on the contrary, when there is a need to fill a gap in the UNIDROIT Principles without general principles to resolve the issue, recourse is to be had to those general principles which can be derived from the Convention or other uniform international instruments.

Second, it is important to know the legislative history of the Convention when studying the interplay between it and the UNIDROIT Principles. The legislative history is fundamental to understanding the Convention drafters’ intentions regarding what is included in its sphere of application. If the intention was to completely exclude a given matter, then recourse to UNIDROIT Principles needs no further investigation. But if the drafter’s intention was the contrary, investigation of the matter in light of the Convention is needed.

Application of the Principles to the contract as *lex mercatoria* also requires further considerations. This author disagrees with the drafter’s intentions. The UNIDROIT Principles are not usages; nor can it be said that a legislative force exists behind them. But it should be recognized that the UNIDROIT Principles may be applied as *lex mercatoria* by judges and arbitrators.