Commercial Contracts, UNIDROIT Principles

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Content type: Encyclopedia entries

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

A. The UNIDROIT Principles: Origin, Nature, and Content

1. The present state of the law governing international commercial contracts is far from satisfactory. Despite the unprecedented growth in the volume of trade, and the development of increasingly integrated markets, cross-border transactions continue to a large extent to be subject to domestic laws which may not only vary considerably in content, but are often ill-suited for the special needs of international trade.

2. It is true that for some time now States have been adopting an increasing number of international conventions in the fields of both private international law and substantive law with a view to eliminating the uncertainties arising out of the coexistence of different national legal systems. Yet despite some successes, particularly in the fields of intellectual property (→ Intellectual Property, International Protection), transport (→ Traffic and Transport, International Regulation), and sales law (→ Uniform Sales Law), the overall results of the unification process by legislative means are rather disappointing. International conventions often risk remaining a dead letter, or nearly so; moreover, even if they enter into force they are normally rather fragmentary in character and difficult to revise in order to meet subsequent changes in the technical or economic environment.

3. The UNIDROIT Principles of International Commercial Contracts (hereinafter the ‘UNIDROIT Principles’) represent a new approach to international contract law. They are a non-legislative codification or ‘restatement’ of the general part of the law of international commercial contracts prepared by a group of independent experts from all the major legal systems and geo-political areas of the world, without the formal involvement of governments. Consequently, unlike legislative instruments such as the United Nations Convention on Contracts for the International Sale of Goods (‘CISG’), the UNIDROIT Principles are not intended to be ratified by States and to become integral part of the respective domestic laws. However they differ from other internationally widely used soft law instruments, such as the International Commercial Terms (‘INCOTERMS’) or the Uniform Customs and Practices relating to Documentary Credits (‘UCP’) issued by the International Chamber of Commerce (‘ICC’), as they have been produced under the supervision of, and finally adopted by, an intergovernmental organization such as the International Institute for the Unification of Private Law (→ UNIDROIT). Moreover and more important, while most international uniform law instruments, be they of legislative or non-legislative nature, are restricted to particular types of transactions (sales; leasing; factoring; carriage of goods by sea, road, or air, etc.) or to specific topics (delivery terms; modes of payment, etc), the UNIDROIT Principles have a much broader scope as they deal with international commercial contracts in general, including long-term and relational contracts, with respect to which they provide a comprehensive normative framework covering virtually all the most important problems which may arise in the context of the formation and performance of individual transactions.

4. First published in 1994, the UNIDROIT Principles are now in their second edition (2004) in which not only new chapters have been added but also some revisions made to take into account electronic commerce. The UNIDROIT Principles 2004 consist of a preamble and 185 articles divided into 10 chapters on general provisions, formation including authority of agents, validity, interpretation, content including third-party rights, performance including hardship, non-performance and remedies, set-off, assignment of rights, transfer of obligations and assignment of contracts, and limitation periods. Each article is accompanied by comments and, where appropriate, by factual illustrations intended to explain the reasons for the black letter rule and the different ways in which it may operate in practice.

5. The UNIDROIT Principles represent a mixture of both tradition and innovation. In other words, while as a rule preference was given to solutions generally accepted at international level (‘common core’ approach), exceptionally solutions best suited to the special needs of international trade were preferred even though they represented a minority view at domestic law level (‘better rule’ approach).

B. The Purposes of the UNIDROIT Principles

6. Even though the UNIDROIT Principles may be applied in practice only by virtue of their persuasive value, they may—and actually do—play a considerable role in a number of different contexts.
1. The UNIDROIT Principles as the Rules of Law Governing the Contract

7 According to their preamble, the UNIDROIT Principles ‘... shall be applied when the parties have agreed that their contract be governed by them’ (para. 2, emphasis added), and ‘... may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like’ (para. 3, emphasis added) or ‘... when the parties have not chosen any law to govern their contract’ (para. 4).

8 One may think of a variety of situations in which parties—be they powerful ‘global players’ or small or medium businesses—wish to avoid the application of any domestic law and prefer instead to ‘de-nationalize’ their contract by subjecting it to a genuinely neutral ‘a-national’ or transnational legal regime. In the past for this purpose the parties had no other choice than generally to refer to ‘generally accepted principles of international commercial law’, the ‘lex mercatoria’ or the like, leaving it to the adjudicating body to determine what in each given case was the precise meaning of such rather vague formulas. This solution has met with considerable criticism on account of its unpredictability if not arbitrariness. Indeed, not only is the number of such generally accepted principles rather limited (pacta sunt servanda; resus sicus statutum; Treaty, Fundamental Change of Circumstances, the prohibition of → abuse of rights, the prohibition of → unjust enrichment, the right to damages for breach of contract etc), but their precise meaning is hardly understood everywhere in the same manner. A valid alternative may now be the recourse to an easily accessible and comprehensive restatement of international contract law such as the UNIDROIT Principles. And indeed, recent experience shows that in actual practice parties more and more often agree on the UNIDROIT Principles as the law governing their contract. Increasingly a number of model contracts prepared by international agencies such as the ICSID or the → International Trade Centre UNCITRAL (ITC) in the field of commercial agency, distributorship, joint ventures, etc contain a reference to the UNIDROIT Principles either as the exclusive lex contractus or in conjunction with other sources of law, for example a particular domestic law, general principles of law prevailing in a given trade sector, or usages.

9 What still remains to be seen is whether, and if so to what an extent, under the relevant rules of private international law parties are permitted to choose a soft law instrument such as the UNIDROIT Principles as the law governing their contract in lieu of a particular domestic law.

10 In the context of international commercial arbitration (→ Commercial Arbitration, International) the answer is nowadays generally in the affirmative: Art. 28 (1) UNICITRAL Model Law on International Commercial Arbitration (→ United Nations Commission on International Trade Law (UNCITRAL)) expressly states that ‘[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute’ (emphasis added), and similar provisions may be found in the forty or so domestic arbitration laws enacted world wide on the basis of the UNICITRAL Model Law on International Commercial Arbitration.

11 By contrast, as far as court proceedings are concerned, the traditional and still prevailing view is that the parties’ freedom of choice is limited to a particular domestic law, with the result that a reference to the UNIDROIT Principles will be considered as a mere agreement to incorporate them into the contract, and as such can bind the parties only to the extent that they do not affect the mandatory provisions of the lex contractus (cf also for further references Reithmann and Martiny 79-91).

12 However, recently there have been some developments suggesting that such a view, clearly influenced by a State-based concept of law, is more and more put in question.

13 Thus, the Inter-American Convention on the Law Applicable to International Contracts (Done 17 March 1964) [1964 33 ILM 732; ‘Mexico Convention’] refers in two places—precisely in Arts 9 (2) and 10—to legal sources of an a-national or supra-national character (→ Supranational Law) for the purpose of the determination of the lex contractus, thereby justifying the conclusion that under the Mexico Convention the UNIDROIT Principles may well be applied as the law governing the contract at least if expressly chosen by the parties. Furthermore, a reference to the possibility for parties to agree on the applicability of the UNIDROIT Principles can now be found even in the official comments to the United States Uniform Commercial Code. More precisely, Comment 2 to § 1-302, as revised in 2001, states that ‘... parties may vary the effect of [the Uniform Commercial Code’s] provisions by stating that their relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions ... [such as eg] the UNIDROIT Principles of International Commercial Contracts ...’. Finally, in a draft Regulation of 15 December 2005 (COM(2005) 650 final) intended to replace the 1980 Rome Convention on the Law Applicable to Contractual Obligations ([19 June 1980] OJ L266/1] the Commission of the European Communities proposed to insert in Art. 3 Rome Convention on party autonomy a new paragraph 2 to read ‘[the parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally ...’ as pointed out in the explanatory notes, 2[the ... words used would authorise the choice of the UNIDROIT Principles ... while excluding the lex mercatoria, which is not precise enough, or private codifications not adequately recognised by the international community ... ’. Unfortunately, the innovative proposal put forward by the Commission has met strong reservations on the part of the Member States apparently concerned about the risk of excessive legal uncertainty deriving from the choice of a-a-national principles and rules as the law governing the contract, as compared to the alleged certainty and predictability of the choice of a particular domestic law. As a result the proposed paragraph was deleted from the final version of Art. 3 (cf Regulation [EC] 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations [2008] OJ L177/16 (Rome I)), with only the mention in the recitals that ‘[this Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention’ (cf Recital 13). It is to be hoped that sooner or later governments will realize that the UNIDROIT Principles, far from being just a loose set of a few poorly drafted principles, in fact represent ‘a codification of high quality and homogeneity in contents which in many respects even surpasses the quality of traditional national legal orders’ (Vischer 211).

14 Turning to practice, of the 178 or so decisions referring in one way or another to the UNIDROIT Principles reported in the UNILEX database (edited by a group of international scholars directed by the author of this contribution), more than a third—albeit awards—apply the UNIDROIT Principles as the rules of law governing the substance of the dispute.

15 In some cases the UNIDROIT Principles were expressly chosen by the parties either as the sole legal basis for the decision by the arbitral tribunal or in conjunction with other sources of law. Interestingly enough, more often than not the parties had agreed on the application of the UNIDROIT Principles only after the commencement of the arbitral proceedings, sometimes on the suggestion of the arbitral tribunal itself.

16 In other cases the UNIDROIT Principles were applied where the parties had agreed that their contract would be governed by, and/or the arbitral tribunal would decide the merits of the dispute in accordance with, no further specified principles and rules of supra-national or transnational character, such as the ‘general principles of the lex mercatoria’, ‘general principles of international contract law’, ‘general...
principles of equity', and 'laws and rules of natural justice'. The recourse by the arbitral tribunal to the UNIDROIT Principles was justified on the ground that they constitute a particularly authoritative and reliable expression of the principles and rules in question. Only in a few cases was the application of individual provisions of the UNIDROIT Principles expressly excluded because the arbitral tribunal considered them not yet sufficiently accepted by the international legal and business communities.

17 Finally, there are also cases where the arbitral tribunal applied the UNIDROIT Principles as the rules of law governing the substance of the dispute even in the absence of any choice-of-laws clause in the contract or where the choice-of-laws clause was manifestly invalid because the parties had made a reference to non-existing legal sources as the law governing their contract. In so doing, the arbitral tribunal normally relied on the relevant statutory provisions or arbitration rules, according to which—to quote the language used in Art. 17 ICC Rules of Arbitration—'[i]t shall apply the rules of law which [it] determines to be appropriate' (Art. 17 (1) second sentence) and 'in all cases [it] shall take account of ... the relevant trade usages' (Art. 17 (2)).

2. The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law Instruments

18 The UNIDROIT Principles may also play a role in interpreting and supplementing international uniform law instruments, and indeed para. 5 of the preamble expressly provides that '[t]hey may be used to interpret or supplement international uniform law instruments'.

19 Since the UNIDROIT Principles have not been adopted in the form of an international treaty nor are they incorporated as such in any domestic law, it still remains to be seen how their use as a means of interpreting and supplementing other international uniform law instruments can be justified in the absence of any reference to them by the parties.

20 Art. 7 CISG states that '[i]n the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application ...' (Art. 7 (1) and that '[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based ...'. (Art. 7 (2)). Similar formulae are to be found in other recent international conventions (see eg Art. 7 United Nations Convention on the Assignment of Receivables in International Trade [done 12 December 2001, not yet entered into force] [2002] 41 ILM 777; Art. 5 Convention on International Interests in Mobile Equipment [done 16 November 2001, entered into force 1 April 2004] 2307 UNTS 285; Art. 2 UNGA Res 63/122 ‘United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea’ [11 December 2008] UN Doc A/R.S/63/122).

21 Yet even in the absence of any specific language to this effect it is nowadays widely recognized that international uniform law instruments should be interpreted and supplemented according to autonomous and internationally uniform principles, and that recourse to domestic law should only be a last resort.

22 In the past such autonomous principles and rules had to be found by the judges and arbitrators themselves on an ad hoc basis. Now that there are the UNIDROIT Principles, can they, and if so to what extent, be used for this purpose?

23 Opinions among legal scholars are divided. On the one hand there are those who categorically deny such a possibility not only on account of the private and non-binding nature of the UNIDROIT Principles, but also, at least with respect to instruments adopted prior to the publication of the UNIDROIT Principles, on the basis of the rather formalistic argument that, coming later, the latter could in no case be of relevance to the former (in this sense see for example Herber 7 and 9). On the other hand there are those who definitely assert the possibility of using the UNIDROIT Principles as a means of interpreting and supplementing international uniform law instruments on the ground that they represent 'general principles of international commercial contracts' and as such without further qualification meet the requirements of Art. 31 (3). (see eg Vienna Convention on the Law of Treaties (1969) (1155 UNTS 331); or, more specifically, of Art. 7 (1) and (2) CISG (so eg Garro 1984–95 1153).

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

25 Turning to actual practice, it is worth noting that despite scholarly doubts and reservations as to the possibility of using the UNIDROIT Principles to interpret or supplement the CISG, both judges and arbitrators do not seem too troubled by theoretical justifications when resorting to the UNIDROIT Principles for this purpose.

26 Significantly, only in a few cases has recourse to the UNIDROIT Principles been justified on the ground that the individual provisions invoked as gap-fillers could be considered an expression of a general principle underlying both the UNIDROIT Principles and the CISG. Thus, only in two occasions Art. 7.4.9 (2) UNIDROIT Principles, according to which the applicable rate of interest is the average bank short-term lending rate to prime borrowers prevailing at the place for payment for the currency of payment, has been referred to in order to fill the gap in Art. 78 CISG on the ground that it could be considered an expression of the general principle of full compensation underlying both the UNIDROIT Principles and the CISG (cf Awards SCH 4328 and SCH 4368 of 15 June 1984 in Schlechtren). Likewise, recourse to Art. 6.1.6 UNIDROIT Principles to determine under CISG the place of performance of the seller's obligation to return the price unduly paid by the buyer, has only been justified on the ground that this provision expressed in general terms the principle underlying also Art. 57 (1) CISG, ie that monetary obligations have to be performed at the obligee's place of business (see Gaëc des Bauches v Tesco Ten Eisten Cour d'Appel Grenoble [23 October 1996]; abstract in English and excerpts from the French full text in Bonell [2002] 419).

27 On other occasions Art. 7.4.9 (2) UNIDROIT Principles on the applicable rate of interest was applied with no further justification at all (see eg ICC Award of December 1996 No 8767), or because it itself was considered 'one of the general principles according to Art. 7 (2) CISG' (see ICC Award of 1956 No 8128).

28 Still other decisions equate, with no further explanation, the UNIDROIT Principles in their entirety with the general principles underlying the CISG and so justify the application of individual provisions of the UNIDROIT Principles to interpret or supplement the CISG (see eg ICC Award of December 1997 No 8817).

29 Yet there are decisions which go even further and apply the UNIDROIT Principles not merely as general principles underlying the CISG,
but because they amount to “trade usages ... in international trade widely known” and are therefore applicable according to Art. 9 (2) CISG (eg Award No 229/1996 of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry of 5 June 1997, abstract in Bonell [2002] 463), or because they—as emphatically stated—reflect “a world-wide consensus in most of the basic matters of contract law” or may even be considered “a restatement of the commercial contract law of the world [which] refines and expands the principles contained in the United Nations Convention” (so Court of Appeal of New Zealand of 27 November 2000, Yoshimoto v Canterbury Golf International Ltd).

30 To be sure, in some of these latter cases the UNIDROIT Principles were applied not to fill internal gaps in the CISG but to find a solution to questions outside the scope of the CISG, such as the validity of penalty clauses and the possibility to reduce their amount if grossly excessive. Yet from using the UNIDROIT Principles in this way it is only a short step to applying them in conjunction with the CISG as a sort of lex mercatoria, even where the CISG is not applicable at all.

31 In any case, what is important is that whatever the theoretical justification for their application, the use of individual provisions of the UNIDROIT Principles as a tool for interpreting and supplementing the CISG has generally led to satisfactory results. This may not be surprising when the UNIDROIT Principles were invoked merely to confirm a solution already expressly provided for in the CISG. It is less obvious in other cases—which are the majority—where the UNIDROIT Principles were used in order to justify one of several possible interpretations under the CISG, let alone to settle questions which are not dealt with at all in the CISG.

3. The UNIDROIT Principles as a Means of Interpreting and Supplementing Domestic Law

32 According to paragraph 6 of the preamble of the UNIDROIT Principles, “[t]hey may be used to interpret or supplement domestic law”.

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

34 What still remains to be seen is, first, whether the use of the UNIDROIT Principles as a means to interpret and supplement a particular domestic law is restricted to international disputes or should be admitted also in a purely domestic context; second, whether the UNIDROIT Principles may even be invoked to justify a solution which, though conforming to current international standards, contradicts an express statutory provision (or the prevailing case-law) of the domestic law in question.

35 While the answer to the first question is definitely in the affirmative, at least as far as transactions between businesses are concerned, the second question is more difficult. On the one hand, there can be no doubt that in general, if the applicable domestic law provides a clear cut solution to the issue at stake, it should not be permitted to depart from it in favour of a different solution provided by the UNIDROIT Principles, unless there is an explicit request to this effect by the parties. On the other hand, exceptionally, a different approach may be justified in those cases where the strict application of a particular provision of the relevant domestic law would—to quote the language used in Art. 6.2 (2) Dutch Civil Code—“... be unacceptable according to criteria of reasonableness and equity”. Reference may be made, for instance, to a domestic law whose statutory rate of interest for payments in arrears is considerably higher than that of other countries. The rate in question may or may not be justified with respect to payments in the local currency, but is likely to appear exorbitant where payments are to be made in a foreign currency which is negotiated on the international financial markets at a much lower rate. In such a case it may be appropriate to interpret the law fixing the rate in question narrowly so as to restrict its application to payments in the local currency and to replace it by Art. 7.4.9 (2) UNIDROIT Principles whenever payment is to be made in a foreign currency (for a notice of two unpublishable arbitral awards in this sense see Bonell [2005] 244 fn 195).

36 Turning to actual practice, in almost half of the reported decisions—which again include also court decisions—the UNIDROIT Principles were used as a means of interpreting and supplementing the otherwise applicable domestic law. More important, the domestic laws governing the individual contracts in the cases in question were far from being only those of less developed countries or countries in transition to a market economy. Indeed, they included inter alia the laws of Australia, England, Finland, France, Greece, Italy, the Netherlands, New Zealand, Switzerland, and the State of New York, thus confirming that even highly sophisticated legal systems do not always provide clear and/or satisfactory solutions to the special needs of current international commercial transactions, while the UNIDROIT Principles may actually offer such a solution (for a critical analysis of actual decisions see Bonell [2005] 294–300).

37 To be sure, more often than not the reference to the UNIDROIT Principles had no direct impact on the decision of the merits of the dispute at hand, and individual provisions of the UNIDROIT Principles were cited essentially to demonstrate that the solution adopted under the applicable domestic law was in conformity with current internationally accepted standards and rules.

38 Yet in a number of the courts and arbitral tribunals resorted to the UNIDROIT Principles in support of the adoption of one of several possible solutions under the applicable domestic law, or in order to fill a veritable gap in the latter.

39 Most of the cases in question concerned international disputes, but there are also decisions referring to the UNIDROIT Principles which related to disputes of a purely domestic character.

40 Only on a few occasions was the interpretation of the applicable domestic law in accordance with the UNIDROIT Principles, though invoked by one of the parties, ultimately rejected on the ground that the domestic law in question was absolutely clear on the issue at stake and/or the different solution provided by the UNIDROIT Principles considered to be less convincing.

4. The UNIDROIT Principles as a Model for National and International Legislators

41 In view of their intrinsic merits as an international re-Statement of modern contract law, the UNIDROIT Principles may also serve as a model to both national and international legislators (see para. 7 of the preamble).
The UNIDROIT Principles may be particularly useful to those countries in which a sufficiently developed body of legal rules relating to contracts in general has so far been lacking and which intend to proceed to the elaboration of a comprehensive codification (see also Codification and Progressive Development in International Law) in this field so as to update their law, at least with respect to foreign economic relationships, so as to meet current international standards. Nor is the situation too different in those countries which used to have a well-defined legal system, but which after the recent changes in their socio-political structure needed to rewrite their laws, in particular those relating to economic and business activities. Yet the impact of the UNIDROIT Principles on the law reform process underway in the different countries, far from being confined to specific geo-political regions, in fact extends to all parts of the world including long established and highly developed legal systems (further references in Vogenaue and Kleinhöfer 68–77).

In some cases—as in the preparation of the new Civil Code of the Russian Federation—the UNIDROIT Principles have been chosen as one of the sources of inspiration even before the publication of their first edition in 1994. In the following years the UNIDROIT Principles were chosen as a model for the new Civil Codes of Estonia and of Lithuania, both of which entered into force in 2001. Other significant examples are the proposals for the reform of the rules on interpretation of legal acts published in 1996 by the Scottish Law Commission and the proposal for the reform of the general rules on commercial contracts in the Spanish Commercial Code published by the Comisión General de Codificación in 2004. Also the German legislature, in preparing the reform of the law of obligations of the German Civil Code which entered into force in 2002, took into account, though eventually only to a limited extent, the UNIDROIT Principles.

Outside Europe mention may be made above all of the Chinese Contract Law of 1999, widely inspired not only by the CISG but also by the UNIDROIT Principles, the project for the modernization and harmonization of contract law in the context of the Economic co-operation Organization (“ECO”) set up in 1965 by Iran, Pakistan, and Turkey, and similar projects underway in Mongolia and in Vietnam. Also the successive drafts for the revision of Art. 2 Uniform Commercial Code of the United States contained references to individual provisions of the UNIDROIT Principles. Most recently, the Council of Ministers of the Organisation pour l’Harmonisation en Afrique du Droit des Affaires (“OHADA”) requested UNIDROIT to assist OHADA in the preparation of a uniform contract law based on the UNIDROIT Principles, and in 2004 an Avant-projet d’Acte Uniforme sur le Droit des Contrats prepared by Marcel Fontaine with consultation with the legal communities of the various Member States of OHADA has been submitted to the competent organs of OHADA for consideration.

To be sure, the examples of the Lithuanian Civil Code or the new draft Spanish Commercial Code let alone the Draft OHADA Uniform Contract Law, large parts of which have literally been taken from the UNIDROIT Principles, are rather exceptional. Normally the influence of the UNIDROIT Principles has been neither exclusive nor necessarily predominant. Moreover, a particular solution provided by the UNIDROIT Principles may well have been accepted as a model in one country while decidedly rejected in another; a typical example are the provisions on hardship (cf. Arts 6.2.1–6.2.3 UNIDROIT Principles) which have been incorporated with only minor modifications in the Civil Code of the Russian Federation to cop with the dramatic changes in the socio-economic and legal setting that followed the collapse of the Soviet regime, while after an intense debate they were rejected by the Chinese legislature for fear that the courts would not apply them properly.

On the other hand, the model function of the UNIDROIT Principles is not limited to law reform projects in civil law jurisdictions. Indeed, also in common law jurisdictions courts increasingly refer to the UNIDROIT Principles in support of a more internationally oriented approach to be taken by the judge-made common law with respect to specific issues of general contract law. Suffice it to mention the relevance that with express reference to the UNIDROIT Principles, and to the CISG, Australian courts have on several occasions accorded the principle of good faith (bona fide) both in contract negotiations and in contract performance, and the significant role that courts in New Zealand and England have recently attributed to the UNIDROIT Principles and to the CISG in support of a liberal interpretation of contracts, and of the admissibility of evidence of pre-contractual negotiations to interpret written agreements.

Moreover, the UNIDROIT Principles have recently been used as a model also in the preparation of international legal instruments. Thus, both the ICC Force Majeure Clause 2003 and the ICC Hardship Clause 2003 (see for both Debattista) have been inspired, at least in part, by Arts 7.1.7, 6.2.1, 6.2.2, and 6.2.3 UNIDROIT Principles, respectively. Likewise, the ITCContactual Joint Venture Model Agreements published in 2004 by the International Trade Centre UNCTAD/WTO openly state that Arts 18 and 19 dealing with hardship and force majeure, respectively, have been inspired by the corresponding provisions of the UNIDROIT Principles.

C. Future Perspectives

In view of the extremely favourable reception of the UNIDROIT Principles, in practice it has been suggested to promote them from their present status as a mere soft law instrument by transforming them into binding legislation. However, while it is rather unlikely that governments will, at least in the near future, be willing to embark upon such a far reaching project such as the adoption of the UNIDROIT Principles by an international convention, one can think of less radical but maybe even more appropriate ways to increase their authoritative character.

A first step in that direction is the recent endorsement of the 2004 edition of the UNIDROIT Principles by UNCITRAL (see Report of the United Nations Commission on International Trade Law; Fortieth Session [25 June–12 July and 10–14 December 2007] paras 209–13) which, by unanimously recognizing their value and recommending their use in practice as indicated in the preamble, will certainly enhance their prestige and popularity worldwide. Other ways to further promote the UNIDROIT Principles would be a formal recommendation by UNCITRAL to use them to interpret and supplement the CISG within the limits and on the conditions laid down in Art. 7 CISG, and recognition—in the form of a binding treaty or, alternatively, of a model law, or a simple recommendation—by the Hague Conference on Private International Law of the right of the parties to an international commercial contract to choose the UNIDROIT Principles, and other similar soft law instruments generally recognized at international level, as the law governing their contract.

The most far reaching proposal is to adopt the UNIDROIT Principles in the form of a model law either on their own, or as part of a more ambitious project such as a ‘Global Commercial Code’. Such a code, intended to consolidate existing international uniform law instruments, for example the CISG, the various transport law conventions, INCOTERMS, and UCP could refer to the UNIDROIT Principles as the ‘general contract law’ applicable with respect to the specific contracts covered by the Code to matters not expressly settled, unless the parties have excluded the UNIDROIT Principles by choosing another law or otherwise.

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