UNIVERSITY OF ROMA TRE-UNIDROIT 5TH ANNUAL INTERNATIONAL ARBITRATION LECTURE

UNIDROIT Principles of International Commercial Contracts: From Scepticism to Confidence?

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I. INTRODUCTION

Over the course of my career, I have had the privilege of delivering a number of public lectures around the world, but it is a particular pleasure to be here in Rome amidst its splendour and weight of history. I am very grateful to Secretary General Tirado of UNIDROIT and Professor Zoppini of Roma Tre for having extended the invitation to me to address this distinguished audience.

The purpose of these remarks is to consider whether one might fairly conclude that the scepticism with which the UNIDROIT Principles of International Commercial Contracts (the "**UNIDROIT Principles**") were first received, largely, but not exclusively, in the common-law world, has evolved into a confident acceptance. I will hint at my conclusion by putting in place a question mark.

II. THE BASIS FOR SCEPTICISM VIS-À-VIS THE UNIDROIT PRINCIPLES

Four years after the Principles were published in 1994, the late Lord Mustill, Michael Mustill, mused that few would welcome an article on the *lex mercatoria* by an English lawyer: "The common lawyer", he said, "will not look kindly on an addition to the extensive literature on what he will regard as a non-subject, having no contact with reality save through the medium of a handful awards which could well have been rationalised more convincingly in terms of established legal principles. Conversely, a scholar nurtured in other disciplines may well anticipate yet another reactionary response to any doctrine lying outside the tradition of Anglo-Saxon jurisprudence."

It was with those remarks that he began his seminal article: "The New *Lex Mercatoria*, the First 25 Years", which appeared in Arbitration International in 1998. His conclusion was that the answer to the questions: "Does *the lex mercatoria* provide the businessman with a set of rules which is sufficiently accessible and certain to permit the efficient conduct of his transactions? Is it manifestly superior, in its content and methodology, to established national systems of commercial law? If so, is its superiority so obvious that it can now be said to have imposed itself, whether by the very fact of its existence or by a notion of implied consent, on the international business community as a whole, and on all transactions in which it is not expressly excluded? In short, has the *lex mercatoria* stolen the international commercial scene, pushing national laws into the wings?" was "No" – or at least "Not yet."

He continued: "What the future holds is hard to forecast. The *lex* has established a tenacious academic foothold in Continental Europe, and its cause is being vigorously promoted elsewhere. ... On the other

[1] The author acknowledges the invaluable contributions to this paper made by Avv. Niccolò Landi of Studio Legale Landi, Milan, and Mr Agustin Spotorno LL.M of Queen Mary, University of London.

hand, there appears to be no sign that the *lex* is gaining a foothold in ordinary day-to-day business, through the medium of an express choice. It has not yet been put to the test by enforcement proceedings in jurisdictions where the most resistance is likely to be encountered. The conscious decision of those who framed the UNCITRAL Model Law to adopt the expression 'the law determined by the conflict of laws rules which [the arbitral tribunal] considers applicable' in Article 28(2), in preference to looser words such as 'the rules of law', must have been a great disappointment to mercatorists, and, if the Model Law is reproduced on any scale in national legislation, it will be a serious obstacle to the growth of the *lex*. It may also be sensed that the tide of economic opinion is hardly running in its favour. Essentially, the *lex mercatoria* is a doctrine of *laissezfaire*. In very many parts of the world it is considered that the exercise of free consent by individual parties must be subordinated to broader economic and political considerations bearing on international trade. Furthermore, the disfavour with which 'transnational' groups or corporations are now regarded in some quarters cannot but hinder the general acceptance of a doctrine whose legitimacy is seen, rightly or wrongly, as derived at least in part from the existence of such bodies.

In addition, it is impossible to overlook the change in the character of arbitration which has occurred during recent decades. In the past, it might have been possible without excessive idealism to see arbitration as a vehicle for the pacific settlement of disputes, producing awards which would be honoured either because it did not occur to the loser to do anything else, or because a default would have exposed him to the censure of his peers and to a damaging loss of reputation. We now live in a harsher world. Winning is what matters. Whether because of a change in commercial attitudes or simply because the stakes are so much higher, many arbitrations are now fought as intensely and with as much zeal for taking every available advantage, whether procedural or otherwise, as any action in court. No longer can it be taken for granted that awards will be honoured. In such a climate, one must ask whether the foundations of the *lex mercatoria* are sound enough to sustain the blasts to which it may be subjected. Lord Mustill may have been a proud Yorkshireman, but he was not one of the curmudgeonly variety beloved of caricature. He sought to soften the message, saying: “I would not wish to end in such a negative vein. Two final suggestions may be more constructive. First, the growth and strengthening of international commercial arbitration; which everyone in the field strives to promote, is not dependent on a solution to the problems here discussed. In most instances, the parties and the arbitrator need never look beyond the contract and the facts to arrive at the outcome of a dispute. There is no call for recourse to law at all; or if there is, the principle is so clear as to be taken for granted. In very many cases the applicable law is nominated by the contract. Even if it is not, and even if the members of a tribunal come from different legal backgrounds, it is rare to find that their instinctive reactions to a situation diverge sufficiently to demand a formal appraisal and resolution. If a contract appears insufficiently explicit to furnish a direct statement of the parties' rights, duties, powers, and liberties, then the arbitrators will construe it and fill the gaps in it by recourse to their own knowledge of how commerce works in practice, and of how commercial men in the relevant field express themselves. Whether an arbitrator who approaches the matter in this way feels it necessary to employ the *lex mercatoria* or some established technique of a national system, such as the implication of a term, or whether he does not rationalise what he is doing, but simply goes ahead and does it, is unlikely to make any difference in all but a small minority of cases. What is important is that the arbitrator should keep constantly in mind that he is concerned with international commerce, with all the breadth of horizon, flexibility, and practicality of approach which that demands. In keeping these features constantly in the public eye, the mercatorists perform a most valuable function.

Finally, the person whose interests lie at the heart of the *lex mercatoria* as of all commercial arbitration, is the businessman. All the debates proceed upon rival assumptions about his opinions

and wishes on this or that topic. Yet all the literature is written by lawyers. Perhaps the time has now arrived for the contestants to call a truce, and for the businessman to speak for himself."

Well the businessman might not yet have spoken in the manner in which Michael anticipated, but that article triggered quite a debate. Scholars of the eminence of Berthold Goldmann and Emmanuel Gaillard were not long in waiting to join the fray.

In 2001, Emmanuel Gaillard noted that the heated debate about *lex mercatoria* had moved on.[2] Rather than a focus upon the existence of rules other than those found in a given legal system, with the potential to be adopted by parties and arbitrators, he believed that the argument had shifted to a question of whether *lex mercatoria* was defined by its content or by its sources (he argued for the latter) and whether it should be restricted to a list or understood as a method.

He suggested that lists, such as that of UNIDROIT, had come to be presented as "the principal, if not the only component of *lex mercatoria*." Why? Because lists were simple to use and imported clarity in place of vagueness. Second, they offered a predictability of outcome valued by parties in international commerce, but they were, by definition, limited by their content. Gaillard favoured a comparative law approach by which the substantive solution to the legal issue at hand was derived not from a particular law selected by a traditional choice of law process, but "from a comparative law analysis which will enable the arbitrators to apply the rule which is the most widely accepted, as opposed to a rule which may be peculiar to a legal system or less widely recognised" having regard to the intentions of the parties, whether their submissions were supported by a widely accepted rule or indicative of the idiosyncracies of a particular legal system and, if so, whether that widely accepted rule was of sufficiently broad acceptance as to be susceptible to categorisation as a general principle of law. Lists, even if updated, could give rise to differences of approach, which an arbitral tribunal would have to resolve. But he conceded the point that in the absence of ambiguity or conflict, the task of an arbitral tribunal having to decide on the basis of transational rules would be "enormously facilitated' by the presence of a list. Since Gaillard set out these propositions in 2001, the UNIDROIT Principles have been updated three times to meet identified concerns and lacunae, most recently in relation to long-term contracts.

The pervasive scepticsm to which Lord Mustill alluded was largely based upon issues of principle:

He put it this way:

> *Indeed, we doubt whether a lex mercatoria even exists, in the sense of an international commercial law divorced from any State law: or, at least, that it exists in any sense useful for the solving of commercial disputes.*[3]

And Klaus Peter Berger reflected that:

[2] Professor Emmanuel Gaillard: *Transnational Law: A Legal System or a Method of Decision Making?*: Arbitration Int'l Vo.17, No.1, 2001.

[3] M.J. MUSTILL - S. BOYD, *The Law and Practice of Commercial Arbitration in England*, Butterworths: London and Edinburgh, 2nd ed., 1989, p. 81.

> *One of the major arguments of those who oppose the lex mercatoria doctrine has always been that this transnational approach to decision-making serves to circumvent rules and Principles of a public policy nature"*.[4]

But there was also a scepticism born out of practicality in that, first, the Principles were regarded as an academic construct. As Busch observed:

> *Criticism of the Principles is regularly encountered in the international literature. For example, Haazen Kessdjian and M.V. Polak are among those who doubt whether the commercial world is waiting with bated breath for the Lando Principles and the UNIDROIT Principles. Haazen points out in this connection that both commissions consist almost entirely of leading academics, which has in his view, encouraged a rather sceptical attitude on the part of those engaged in trade at a practical level. In his opinion, a degree of skepticism is justified when academics get together, without consulting or adequately consulting legal practitioners, trade associations and so forth, in order to draw up a uniform scheme which they maintain is exceptionally practical. According to Haazen, is therefore to be seen whether these two sets of Principles, which are full of vague standards, are actually what traders and legal practitioners desire or need*".[5]

Before this audience, best, perhaps, to adopt the 'Sir Humphrey' defence: "That may be so, Minister, but I could not possibly comment."

For his part, Benedettelli stated:

> *It would be, however, an over-simplification to draw the further conclusion*]*that arbitral tribunals can simply ignore state private international law, in particular the private international law in force in states which are in some way connected with the arbitration at hand"* and "*While legal systems of a non-state nature can certainly be conceived (…) experience shows that the international business community mostly relies on the power of states to enforce its contracts, including arbitration agreements, and related decisions, including awards.*[6]

Second the Principles were simply not well known, much less understood, by the business community. Again, it was Benedettelli, who noted:

> *UNIDROIT's perception [is] that the international business and legal communities had not yet fully grasped what the Principles could potentially offer to the practice of cross-border contracts and dispute resolution. In particular, it was felt that entrepreneurs and counsel were not yet fully aware that the Principles could find application in a variety of different ways.".*[7]

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[4] K.P. BERGER, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts, The American Journal of Comparative Law*, Vol. 46, No. 1 (Winter, 1998), p. 148.
[5] D. BUSCH, *Indirect Representation in European Contract Law*, 2005, Kluwer Law International, p. 207.
[6] M. BENEDETTELLI, *Applying the UNIDROIT Principles in International Arbitration: An Exercise in Conflict, Journal of International Arbitration*, Volume 33 (2016), p. 756.
[7] M. BENEDETTELLI, *cit.*., p. 654.

And now, 20 years on, an English lawyer, albeit one of a lesser legal pedigree than Michael Mustill has the advantage of that intervening period to consider the role of the UNIDROIT Principles as a force for change.

It is undeniable that the Principles are increasingly seen as a source of inspiration by national legislatures in the context of proposals for the reform of their contract laws. But they are also adopted to govern contracts between parties (and the substance of their disputes), especially when cross-border elements are involved or in those cases in which the disputing parties come from different legal backgrounds.

As Professor Bernardini has noted:[8]

> *The progressive, but steady, use of the* [UNIDROIT Principles] *in the field of international contracts is confirmed by the decisions of national courts and arbitral tribunals that have used their application in a number of ways …*

To date, in the UNILEX database[9], the total number of decisions in which the UNIDROIT Principles have been applied is 451, 258 of which are domestic court judgments and 193 are arbitral awards. Data do not yet exist for 2014-2018, but enquiries of UNILEX made for the purposes of this paper reveal that there are a further some 50 cases awaiting uploading to the database. The details, to the extent that they are now available, are as follows, starting with the recorded court judgments:

Year	Cases
1994:	3
1995:	6
1996:	16
1997:	14
1998:	16
1999:	12
2000:	14
2001:	19
2002:	22
2003:	22
2004:	25
2005:	16
2006:	17
2007:	22
2008:	25
2009:	34
2010:	30
2011:	20
2012:	28
2013:	31
2014:	20

[8] *Undroit Principles and International Investment Arbitration* In *Rev. dr. unif*., Vol. 19, 2014, p. 561.

[9] http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311. Although this database is not complete, it remains the "*most comprehensive, and best structured, collection of opinions relating to the* [UNIDROIT Principles]." (RALF MICHAELS, *The UNIDROIT Principles as Global Background Law*, [2014] Unif. Law. Rev. 643).

2015: 12
2016: 9
2017: 7
2018: 2

The 193 arbitral awards so far recorded on the database are distributed as follows:

Year	Cases
1994:	3
1995:	5
1996:	14
1997:	10
1998:	12
1999:	11
2000:	12
2001:	15
2002:	16
2003:	15
2004:	18
2005:	7
2006:	4
2007:	6
2008:	10
2009:	9
2010:	4
2011:	1
2012:	6
2013:	6

It is interesting to note that on the main page of the UNILEX website, the following disclaimer is displayed:[10]

> *Users are reminded that since most of the decisions relating to the UNIDROIT Principles are arbitral awards which are not published, the total number of decisions referring in one way or another to the UNIDROIT Principles is considerably greater than the figures indicated in this database.*

Thus, it may be that the judgments and awards published in the UNILEX database represent only the tip of the iceberg.

The UNILEX analysis would suggest that the UNIDROIT Principles - a highly flexible "soft law" instrument, the purpose of which is to provide a set of rules which can be applied to all types of international commercial contracts[11] - is playing a part in the globalisation of an adapting contract

[10] *Ibid*.

[11] In the Partial Award in ICC case No. 7110, June 1995, the UNIDROIT Principles were defined as "*a restatement of international legal principles applicable to international commercial contracts made by a distinguished group of international experts coming from all prevailing legal system of the world, without the intervention of States or*

law, seeking to keep pace with the constantly changing character of international commerce and the demands of Michael Mustill's reticent businessman. Eckart Brödermann has described the UNIDROIT Principles as:

> *An ingenious tool for cross-border contract drafting and dispute resolution on neutral ground.*[12]

For reasons that I will develop shortly, however, the Principles may be on their way to being an internationally recognised '*point de repere*', but they are by no means the only one.

III. THE FOURTH (2016) EDITION OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

The UNIDROIT Principles do not form a "law"[13] as they only partly codify the law of contracts and obligations[14], and they do not exhaustively determine the content of the *lex mercatoria*.[15] They are binding only to the extent they do not conflict with mandatory provisions of applicable national laws.

The function of the UNIDROIT Principles is explained in the Preamble:

> *These Principles set forth general rules for international commercial contracts.*
> *They shall be applied when the parties have agreed that their contract be governed by them.*
> *They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like.*
> *They may be applied when the parties have not chosen any law to govern their contract.*
> *They may be used to interpret or supplement international uniform law instruments.*
> *They may be used to interpret or supplement domestic law.*

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governments". See also the Introduction to the 1994 edition of the UNIDROIT Principles: "*UNIDROIT's initiative goes in that direction*" [towards an] "*elaboration of an international restatement of general principles of contract law*". (https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016).

[12] See ECKART BRÖDERMANN, *The Future for Cross-Border Contracts: In Combination with Arbitration Clauses, the UNIDROIT Principles of International Commercial Contracts provide a Practical-Proven Bridge between Common and Civil Law*, Kluwer Arbitration Blog (March, 25 2018) Available at http://arbitrationblog.kluwerarbitration.com/2018/03/25/future-cross-border-contracts-combination-arbitration-clauses-unidroit-principles-international-commercial-contracts-provide-practice-proven-bridge-common-civil.

[13] Or, as it was put by BERTHOLD GOLDMAN "*an autonomy legal order*", as cited by ABUL MANIRUZZAMAN, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration*, in *American University International Law Review*, 1999, No. 14, p. 670. See FRANÇOIS PERROT, *Is There a Need for Consistency in International Commercial Arbitration?* in *Precedent in International Arbitration* (eds Emmanuel Gaillard & others). This is not to say that the UNIDROIT Principles could not be used solely and exclusively to resolve a commercial dispute. It means that they are detached from all other domestic laws and regulations of a national legal system which often influence the outcome of a particular decision, such as labour law, consumer law, securities laws, among others, including their mandatory provisions.

[14] It has been contended that the UNIDROIT Principles are the product or even the "source" of the *lex mercatoria.* See LOUKAS MISTELIS, *General Principles of Law and Transnational Rules in International Arbitration* [2011] WA&MR 201.

[15] According to GOLDMAN, the *lex mercatoria* is also comprised of: standard form of contracts, international trade usages, arbitration laws and rules, professional codification, practice of state courts and arbitral tribunals and customs and uncodified usages. For GAILLARD, the UNIDROIT Principles would fall under the definition of transnational rules rather than *lex mercatoria.* For RALPH MICHAELS (fn. 9), however, the attempt to characterise the UNIDROIT Principles as a "*new lex mercatoria*" is ill-fated not just theoretically but also empirically; for this Author, they are "*a restatement of a global general contract law and their function is that of a global background law*".

They may serve as a model for national and international legislators.

On 9 May 2017, the International Institute for the Unification of Private Law (UNIDROIT) published the fourth (2016) edition of the UNIDROIT Principles of International Commercial Contracts, which includes the amendments and additions to the 2010 edition of the Principles, elaborated by the Working Group of the UNIDROIT Secretariat and adopted by the Governing Council at its 95th session (Rome, 18-20 May 2016).

The main objective of the new edition of the UNIDROIT Principles - which consists of 211 Articles - is to take better into consideration the special needs of long-term contracts.

As clearly stated in the Introduction of the 2016 edition of the UNIDROIT Principles[16]:

> "*When approving previous editions of the UNIDROIT Principles of International Commercial Contracts, the Governing Council emphasised the need for the Secretariat to monitor the use of the Principles in actual practice and to inquire with the international legal and business communities whether new topics should be considered for inclusion in future editions.*
> ….
> *The 2016 edition of the UNIDROIT Principles is not intended as a revision of the previous editions. As amply demonstrated by the extensive body of case law and bibliographic references of the UNILEX Database, the UNIDROIT Principles continue to be well received generally and have not given rise in practice to any significant difficulties of application*."

In fact, the ambit of the amendments made in the latest edition is limited to the Preamble and to Comments of six provisions.[17]

IV. THE BASIS FOR CONFIDENCE ON THE UNIDROIT PRINCIPLES

> *The change of paradigm* [towards UNIDROIT's privatized unification of the law] *is accompanied by a change in attitude of domestic courts vis a vis the international arbitral process, thus creating a favorable climate for the application of transnational rules such as the* [UNIDROIT] *Principles.*[18]

> *The UNIDROIT Principles are likewise increasingly being relied on by lawyers and business persons as a guide in the negotiating and drafting of international commercial contracts. Most*

[16] https://www.unidroit.org/unidroit-principles-2016/unidroit-principles-2016-over

[17] See https://www.unidroit.org/unidroit-principles-2016/unidroit-principles-2016-over: The majority of alterations were made to the Comments, in particular on the Preamble (amendments to Comment 2) and Articles 1.11 (addition of a new Comment 3), 2.1.14 (amendments to Comments 1-3 and addition of a new Comment 4), 2.1.15 (amendments to Comment 2 and addition of a new Comment 3), 4.3 (amendments to Comment 3 (which has become Comment 4) and addition of a new Comment 3), 4.8 (amendments to Comments 1-3), 5.1.3 (amendments to the Comment (which has become Comment 1) and addition of a new Comment 2), 5.1.4 (addition of a new Comment 3), 5.1.7 (amendments to Comments 2-3), 5.1.8 (amendments to the Comment (which has become Comment 1) and addition of a new Comment 2), 7.1.7 (addition of a new Comment 5), 7.3.5 (amendments to Comment 3 and addition of a new Comment 4), 7.3.6 (amendments to Comment 1), and 7.3.7 (amendments to Comments 1-2).

[18] K.P. BERGER, *cit.*, p. 149.

importantly, arbitrators and judges are more and more frequently resorting to the UNIDROIT Principles in resolving transnational commercial disputes.[19]

Since then, the UNIDROIT Principles have been more and more often referred to by arbitral tribunals when settling contractual disputes.[20]

[Also] *The use of PICC is progressively receiving application in arbitration both in investment contract cases and investment treaty cases.*[21]

One reason why the UNIDROIT Principles are increasingly relied upon as a reference point may lie in the interest of arbitrators to ensure that they make:

the award more understandable or more palatable to the parties of the arbitration, who very often come from totally different cultural and legal backgrounds. The comparative method extends the function of the arbitrator or "cultural interpreter" into the post-award stage of the arbitration. This, in turn, will avoid problems when it comes to the enforcement of the award or will even lead to voluntary compliance with the award in the pre-enforcement stage.[22]

UNIDROIT Principles are often referred to, in order to "strengthen" a decision, even in circumstances in which a governing law has been specified by contract, in order to seek to preclude a subsequent attack upon the award.

As mentioned, references to the Principles in obiter are frequent in the practice of international arbitration and play the important function of strengthening the legitimacy of arbitral decisions. Also, see Finazzi Agrò, 'The Impact of the UNIDROIT Principles in International Dispute Resolution in Figures, 16 Rev. dr. unif. 719 (2011)' stating that this is the case for 33 awards out of the 159 awards which were reported in 2011 on the UNILEX database.[23]

But what does seem to emerge from the available statistics is that it is still rare for a case to be decided upon an application of the UNIDROIT Principles alone.

Scherer points out that:

Abundant case law shows that arbitrators refer to [the UNIDROIT Principles] to validate a decision reached under the domestic law selected by the parties… arbitral tribunals have used the [UNIDROIT Principles] to support national provisions regarding rules of interpretation, the principle of good faith, nominalism, price determinability, qualification of losses, loss of profit, mitigation of damages, and hardship. The [UNIDROIT Principles] have also been used to support tribunals' decisions about the agreement of the parties regarding the law applicable to the contract, and even about whether a valid, binding contract existed.[24]

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[19] M.J. BONELL, *The UNIDROIT Principles in practice*, 2006, Transnational Publishers, Inc., p. xvi.
[20] M. BENEDETTELLI, *ibid*., p. 653.
[21] P. BERNARDINI, *UNIDROIT Principles and International Investment Arbitration*, *Rev. dr. unif*, Vol. 19, 2014, p. 516.
[22] K.P BERGER, *cit*., p. 132.
[23] M. BENEDETTELLI, *cit*., p. 682 and fn. 106.
[24] M. SCHERER, in VOGENAUER & KLEINHEISTERKAMP, *Commentary on PICC*, Oxford, 2009, pp. 99-100.

In relation to the question about the "regular" reference to the UNIDROIT Principles, Benedettelli notes that:

> *(…) opinions on the actual use of the Principles are rather divided, but a study of all 266 judicial and arbitral decisions reported as of 31 Aug. 2011 in the UNILEX database shows that the Principles are referred to by courts and arbitral tribunals around the world in the adjudication of a variety of disputes, not only in the field of sale contracts… empirical evidence suggests that parties almost never freely opt for lex mercatoria instruments, including the Principles.* See also, *P. Mayer, The Role of the UNIDROIT Principles in ICC Arbitration Practice, ICC Supplement 105, 106 (2002) (out of the 600 awards rendered in 1999–2000 under the ICC Rules only fourteen applied the Principles); Bonell, supra n. 2, at 476 (cases in which the parties choose in their contract the Principles alone as lex contractus are still rare).*[25]

THE USE OF THE UNIDROIT PRINCIPLES BY ARBITRAL TRIBUNALS

V.A *THE POWER OF THE ARBITRATORS TO APPLY THE UNIDROIT PRINCIPLES*

The UNIDROIT Principles will apply directly if parties choose to adopt them for their contract or they have agreed that it will be governed by *general principles of law*, the *lex mercatoria* or the like. They may also apply indirectly[26] if the parties do not provide for a substantive law to govern their contract as well as, occasionally, to complement a particular domestic law the parties may have chosen.[27]

> *However, in practice, arbitral tribunals may themselves decide to refer to the UNIDROIT Principles as an aid to the interpretation of contract terms and conditions; or even as a standard to be observed - for instance, in the negotiation of a contract.*[28]

In 2002, in an arbitration under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the arbitral tribunal, having decided that no common intention as to the adoption of a particular national system of law could be found, decided as follows:[29]

> *This leads the Tribunal to conclude that the issues in disputes between the parties should primarily be based, not on the law of any particular jurisdiction, but on such rules of law that have found their way into international codifications or such like that enjoy a widespread recognition among countries involved in international trade … the only codification that can be considered to have this status is the UNIDROIT Principles of International Commercial Contracts … The Tribunal determines that the rules contained therein shall be the first source employed in reaching a decision on the issues in dispute in the present arbitration.*

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[25] M. BENEDETTELLI, *cit*., p. 669, fn. 62.

[26] In some cases, the arbitral tribunal would be bound to follow the conflict of law rules of the *lex loci arbitri* (See Swiss Federal International Arbitration Act, Article 187. Decision on the merits) and only thereafter may take into account the trade usages and transnational rules.

[27] In this latter case, the UNIDROIT Principles would be applied to adapt and reconcile an outdated national law to the current and modern practices of international commerce.

[28] BLACKABY-PARTASIDES, in *Redfern and Hunter on International Arbitration*, 2009, Oxford, p. 223.

[29] Cited by BLACKABY-PARTASIDES, *cit*., p. 223.

An arbitral tribunal has considerable latitude to determine the law applicable to the substance of a dispute in contrast to a municipal State court, which is required to apply the conflict of law rules of its own jurisdiction, if that is the place of arbitration. The question of whether an arbitral tribunal is authorized to apply the UNIDROIT Principles depends not on the self-declared scope of application of the UNIDROIT Principles, but rather on the *lex arbitri* governing the arbitration.[30]

Gaillard points out that certain laws entitle arbitrators to apply "rules of law" instead of, or in addition to, a particular domestic law.[31] This language is usually interpreted as allowing arbitrators to apply private sets of rules that do not have the status of laws, including the UNIDROIT Principles.[32]

An arbitrator's entitlement to apply "rules of law" may be stated explicitly in the *lex arbitri*:

> Article 56 (*in fine*) of the Law No. 131 of 31 December 2013 (Panama Arbitration Law)
>
> *In all cases, the arbitral tribunal shall decide the dispute in accordance with the contract provisions and will consider the usages of trade applicable to the subject-matter. In addition, the Principles of the International Institute for the Unification of Private Law (UNIDROIT) relative to International Commercial Contracts will be applicable to international arbitrations.*

This power may be granted implicitly, insofar as the *lex arbitri* allows parties to submit their dispute to private sets of arbitration rules, which permit arbitrators to apply "rules of law" rather than "laws" only:

> s.46(1)(b) of the English Arbitration Act 1996
>
> *(1) The arbitral tribunal shall decide the dispute-*

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[30] SCHERER, in VOGENAUER & KLEINHEISTERKAMP, *Commentary on PICC*, Oxford, year 2009, pp. 82-83. It should be noted that the definition of *lex arbitri* (*i.e.* the laws and rules governing international arbitration procedure) encompasses both the *internal lex arbitri* (rules governing the internal proceedings e.g. ICC, LCIA Rules, etc.) and the *external lex arbitri* (national arbitration law of the seat governing the external support and supervision to the arbitral proceedings by national courts). See LOUKAS MISTELIS, *Reality Test: Current State of Affairs in Theory and Practice Relating to Lex Arbitri* [2006] 17 Am Rev Int'l Arb, 155. A noteworthy example is provided by England and Wales, where section 46(3) of the English Arbitration Act 1996 does not allow the tribunal to apply "rules of law" but rather "conflict of laws rules" that it considers appropriate. However, art. 22.5 of the 2014 LCIA Arbitration Rules provides that the tribunal shall apply the "rules of law" that it considers appropriate. Therefore, in the case of a London-seated arbitration with no chosen substantive law and with LCIA Rules as *internal lex arbitri* and English Arbitration Act as – inevitably applicable – *external lex arbitri*, one may wonder whether the arbitrator should apply "rules of law" or "conflict of laws rules" instead. The solution lies in the fact that s. 46(3) is not a mandatory rule under English law and is not listed as such under Schedule 1 "*Mandatory Provisions of Part 1*" of the English Arbitration Act 1996. This permits the conclusion that in such a case, an arbitrator would be in a position to apply the UNIDROIT Principles as "rules of law" applicable to the merits in accordance with the LCIA Rules.

[31] GAILLARD, *Du bon usage du droit comparé dans l'arbitrage international*, [2005] *Rev arb* 375, 376. In other cases, such as England and Wales, the 1996 EEA is less flexible – though still more flexible than rules to which judges are bound. See 46(1)(c) allowing the arbitrators to choose the "conflicts of laws rules" *that it considers appropriate*. See also same approach in 2006 UNCITRAL Rules, art 28 (2).

[32] CORDERO-BEHN, *The relevance of the Unidroit Principles in Investment Arbitration*, in *Unif. L. Rev.*, 2014, p. 12: "*There is little doubt that the [UNIDROIT Principles] may be considered to be 'rules of law' that may be chosen by the parties to govern their dispute, whether the arbitration is subject to the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules, or institutional arbitration rules*".

(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or

(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. (emphasis added) …

While nothing prevents the parties from choosing institutional rules to govern their internal proceedings (for instance, LCIA Rules or ICC Rules), which contain the more flexible "rules of law" approach, in the event of a failure by the parties to agree the substantive law applicable to the merits, s. 46(3) of the Act provides:

(3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Article 42(1) of the ICSID Convention

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) ***and such rules of international law as may be applicable***. (emphasis added)

Article 1511 of the French Code of Civil Procedure

Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies ou, à défaut, conformément à celles qu'il estime appropriées. Il tient compte, dans tous les cas, des ***usages du commerce***. (emphasis added)

Article 14.5 of the LCIA Arbitration Rules 2014

The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or ***rules of law as the Arbitral Tribunal may decide to be applicable*** (emphasis added)

Article 22.3 of the LCIA Arbitration Rules

The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or ***rules of law*** *which it considers appropriate*. (emphasis added)[33]

Article 21.1 of the 2017 Rules of the ICC International Court of Arbitration provides that:

[33] CORDERO-BEHN, *cit.*, p. 9: "*An investment arbitration governed by institutional commercial arbitration rules will allow the tribunal to have a broader discretion in deciding the appropriate law than would a tribunal under the ICSID Convention or the UNCITRAL Arbitration Rules*".

The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

Article 28 of the UNCITRAL Model Law on International Commercial Arbitration (2006)

(1) The 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. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.*

(2) Failing any designation by the parties, the arbitral tribunal shall apply the ***law*** *determined by the conflict of laws rules which it considers applicable.* (emphasis added)[34]

Even if the *lex arbitri* leaves the parties free to choose the UNIDROIT Principles as the "rules of law" applicable to the contract, this does not allow a derogation from the relevant mandatory rules of the law governing the dispute. In fact, an arbitral award may be annulled, and its enforcement precluded, if the arbitral tribunal fails to apply these mandatory rules.

V.B *THE USE OF THE UNIDROIT PRINCIPLES TO INTERPRET OR SUPPLEMENT INTERNATIONAL UNIFORM LAW*

Article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) provides that:

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.* (emphasis added)

There are compelling reasons why the UNIDROIT Principles may assist in the interpretation of the CISG. For instance, in relation to the duty of good faith, given the decision not to incorporate such general principles within the CISG due to differences of approach, particularly between the civil and common law systems and due to the occasional opacity of the concept, the UNIDROIT Principles can provide concrete, practical examples of the application of the obligation.

But the UNIDROIT Principles can also assist in developing or deriving other general principles underlying the CISG.[35]

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[34] SURAL, *Respecting the Rules of Law: the Unidroit Principles in National Court and International Arbitration*, (2010) 14 Vj 258: "*Due to this difference in the terminology, it is accepted that the parties may choose UNIDROIT Principles as applicable 'rules of law' and the UNIDROIT Principles can be applied independently from any national law*". See also Article 840 of the Italian Code of Civil Procedure; Article 187 VIII of the Swiss Federal Act on Private International law; Section 27 of the SCC Rules and UNCITRAL Arbitration Rules (2013).

[35] The use of the UNIDROIT Principles is of particular assistance in interpreting the CISG and filling the gaps in its provisions. The CISG contains a number of provisions which are affected by vagueness, brevity of expression and/or omission. The reason for this is explained by MICHAEL BRIDGE: time-constraints in the treaty-making process and the need for 'compromises' sometimes led to brevity of expression concealing disagreements (e.g. the excessively broad generality of the "interest rule" in art. 78 CISG). Furthermore, the difficulty of amending the CISG by "diplomatic

The reference to "general principles" in the CISG has been relied upon by arbitral tribunals to apply the UNIDROIT Principles:[36]

> *In several ICC cases, arbitral tribunals relied on Art. 7.4.9(2) [of the UNIDROIT Principles] to determine the interest rate applicable to the amount awarded in damages, an issue which is not addressed in the CISG. Other areas in which the [UNIDROIT Principles] may usefully complement the CISG include the definition of notions such as the general duty to act in good faith … and the general principle according to which a monetary obligation is to be performed at the obligee's place of business. … [The UNIDROIT Principles] have also been used to interpret or supplement other instruments of international uniform law, including the Uniform Law on the Formation of Contracts for the International Sale of Goods of 1 July 1964 (ULF).*

V.C *THE USE OF THE UNIDROIT PRINCIPLES AS THE APPLICABLE LAW*

In an award rendered under the rules of the Milan National and International Arbitration Chamber in 1996, the arbitral tribunal applied a number of the provisions of the UNIDROIT Principles. The contract did not contain a choice of law clause. At the outset of the arbitral proceeding, the parties agreed that the dispute would be settled in conformity with the UNIDROIT Principles tempered by recourse to equity.[37] In its decision, the Arbitral Tribunal applied 11 of the UNIDROIT Principles' articles, in some cases invoking the accompanying Comments.[38]

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conference" (unlike the UNIDROIT Principles which may be open to revision much more readily than the CISG itself), reaffirms the utility of the UNIDROIT Principles in the articulation of unstated principles underlying the CISG. See MICHAEL BRIDGE, *The CISG and the UNIDROIT Principles of International Commercial Contracts* [2014] Uniform Law Review - Revue de droit uniforme, online. pp. 1-20. ISSN 1124-3694. Available at http://eprints.lse.ac.uk/60473 [Accessed 8 September 2018]

[36] SCHERER, *cit.*, p. 96. See Arbitral Award, December 1996, ICC case (Zurich) No. 8769, available at http://www.unilex.info/case.cfm?id=397: "*Claimant is entitled to interest on the sums awarded pursuant to Art. 78 of the Vienna Convention. Art. 78 Vienna Convention does not specify a particular interest rate. The sole Arbitrator considers it appropriate to apply a commercially reasonable interest rate (see Art. 7.4.9. subs. 2 Unidroit Principles).*"

[37] Also, in an award rendered in a Buenos Aires-seated arbitration, the underlying contract (for the sale of shares between a Chilean company and the shareholders of an Argentinean company) did not provide for a governing law to be applied to the merits, although the parties agreed on the tribunal's acting as *amiable compositeur*. Despite the parties having made specific reference to Argentinean law provisions in their claims, the arbitral tribunal decided to apply the UNIDROIT Principles, claiming that they represented "*usages of international trade, reflecting the solutions of different legal systems and of international contract practice*". This was also supported (according to the tribunal) by Article 28.4 of the Model Law: "*In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction*" - which according to the arbitral tribunal meant that those international practices should prevail over any domestic law. See *ad hoc* Arbitration held in Buenos Aires, Award (Dec. 10, 1997), UNIFORM L. REV 178 (1998).

[38] Award dated 1 December 1996, CAM case No. A-1795/51, available at http://www.unilex.info/case.cfm?id=622. In particular, the arbitral tribunal cited to Articles 1.3 of the Principles in order to affirm the binding character of the parties' original agreement; to Articles 4.1 and 4.2 in order to interpret a party's written declaration as a notice of termination; to Article 7.3.1 in order to exclude the right to terminate the contract for an event with respect to which the parties had made express provision for the renegotiation of the contract should it occur; to Article 7.3.5 in order to confirm the validity of a contract term which, in the event of termination, expressly granted to the principal the right to restitution of promotional material and to the agent the right to a commission for orders so far received; to Articles 7.4.1 and 7.4.2 in order to affirm the aggrieved party's right to full compensation for the harm it sustained as a result of the other party's non-performance, but to exclude compensation for emotional suffering and distress, the aggrieved party being a corporate entity; to Articles 7.4.3 and 7.4.4 in order to exclude compensation for the costs incurred by the aggrieved party for the purchase of a house in the place where the contract was to be performed; to Article 7.4.9 to grant, as a last resort, interest at the statutory rate

In the ICC Case No. 10,114, both parties agreed that Chinese law was the law governing the merits of the dispute, but at the same time they requested the arbitral tribunal to apply the UNIDROIT Principles as an expression of international practice. As a consequence, the arbitral tribunal declared that it would base its decision on Chinese law and on "*international practices, including UNIDROIT Principles*".[39]

In some cases, arbitral tribunals have applied the UNIDROIT Principles as the applicable law although they were not chosen by the parties.

In the award rendered in 2001 by the Arbitration Institute of the Stockholm Chamber of Commerce in case No. 117/1999, the arbitral tribunal applied the UNIDROIT Principles supplemented by Swedish law, effectively recognizing the importance of the UNIDROIT Principles as an international standard setter. Here, the UNIDROIT Principles:

> *were used as a primary source of rules of law to determine the rights and obligations of parties, to be supplemented, at need, by Swedish law. … the tribunal's decision to apply the UNIDROIT Principles is not only doctrinally correct but it is also sensible. Where there is no agreement by the parties nor potential consensus between them, neutral, developed and sophisticated rules of law should be applied as the most appropriate. Whether this particular case is also a victory for supporters of the lex mercatoria is rather an academic question. In fact, the tribunal arrived at the application of the UNIDROIT Principles by operation of the Arbitration Rules applicable.*[40]

In the ICC case No. 9,797, the arbitral tribunal, after declaring that the by-laws of the Respondent company failed to provide guidelines for its decision, applied the UNIDROIT Principles affirming that:[41]

> *The UNIDROIT Principles of International Commercial Contracts are a reliable [source] of international commercial law in international arbitration for they "contain in essence a restatement of those 'principes directeurs' that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice".*

In PCA case No. 45,863,[42] Claimant commenced arbitral proceedings on the basis of an arbitration agreement in a lease agreement. It contained a choice of law clause according to which, the lease agreement was to be interpreted and applied according to the headquarters agreement between Respondent and the Government of the Italian Republic and to "*the recognized principles of international commercial law*" to the exclusion of Italian law. In their submissions, both Claimant

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fixed by the law of the State of the currency of payment; and to Article 7.4.13 in order to uphold a contract term providing for a higher rate of interest for the delay in the payment of certain specific debts.

[39] ICC Case No. 10,114, Award dated March 2000, available at http://www.unilex.info/case.cfm?id=696.

[40] MISTELIS, *Unidroit Principles Applied as "Most Appropriate Rules of Law" in a Swedish Arbitral Award, Uniform Law Review / Revue de droit uniforme*, vol. VIII (2003-3) pp. 634 and 640.

[41] ICC case No. 9797, Award dated 28 July 2000, available at http://www.unilex.info/case.cfm?id=668.

[42] Arbitral Award PCA 45863; Tribunal: Professor August Reinisch (Presiding Arbitrator), Avv. Filippo Canu and Professor Brigitte Stern (co-arbitrators); available at http://www.unilex.info/case.cfm?id=1640.

and Respondent made numerous references to individual provisions of the UNIDROIT Principles 2004 in support of their arguments. The arbitral tribunal, noting that the Parties had not expressly agreed on the application of the UNIDROIT Principles as the rules of law governing the substance of their dispute, concluded that "*the UNIDROIT Principles may indeed be regarded as indicative of recognized principles in the field of international commercial law*". With respect to one issue, the arbitral tribunal expressly based its decision only on the UNIDROIT Principles. Indeed, in deciding whether a counter-claim made by Respondent was time-barred as Claimant contended, in reliance upon the three-year limitation period provided for in the UNIDROIT Principles, the arbitral tribunal decided to base its decision on the relevant provisions of the UNIDROIT Principles, noting that:

> [t]*here are two approaches with respect to the influence of the passage of time on rights. Limitation periods may be considered as a matter of procedural law in which case 'the passage of time extinguishes rights and actions' or as a matter of substantive law in which case 'either the obligation is extinguished (strong effect) or the obligation continues to exist but the obligor is granted a right to refuse performance (weak effect)' (cf. COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL CONTRACTS (PICC) 1085 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009)*" and that "[w]*hile, in some legal systems, the invocation of a period of limitation will render a claim inadmissible (thus pre-empting the jurisdiction of the adjudicator), in other legal systems, the invocation of a period of limitation leads to the substantive extinction of a claim (thus requiring the adjudicator to reject a claim on the merits).*

the Tribunal concluded that:

> [t]*he UNIDROIT Principles have adopted the weak substantive approach pursuant to Article 10.9 under which (i) the time-barred right still exists; (ii) the expiry of the limitation period must be asserted to have effect; and (iii) the time-barred right may still be relied on as a defence. (cf. Michael Joachim Bonell, UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law, 9 UNIF. L. REV. N.S. 5, 28-29 (2004).*

V.D *THE USE OF THE UNIDROIT PRINCIPLES TO INTERPRET OR SUPPLEMENT THE APPLICABLE DOMESTIC LAW*

I have already alluded to Professor Scherer's observation as to the extent to which arbitrators reference the UNIDROIT Principles as validation of a decision reached under the domestic law selected by the parties and to support' decisions about the agreement of the parties regarding the law applicable to the contract, or even as to whether a valid, binding contract existed.[43]

ICC Arbitral Award, October 1998 (Geneva) on interest rate:[44]

> *tout débiteur qui est en demeure pour le paiement d'une somme d'argent doit l'intérêt moratoire de 5% par l'an. Rien dans la Convention ne permet d'admettre que les parties avaient l'intention d'exclure le droit au paiement d'intérêts en cas de demeure. Une telle exclusion aurait du reste été difficile à réconcilier avec les usages du commerce international dont se font l'écho, entre*

[43] SCHERER, *cit.*, pp. 99-100.
[44] ICC case No. 9333, available at http://www.unilex.info/case.cfm?id=400.

autres, la Convention des Nations Unies sur les contrats de vente internationale de marchandises (Convention de Vienne), ***ou encore les Principes Unidroit pour les contrats commerciaux internationaux****, évoqués par l'auteur précité* (emphasis added).

ICC Arbitral Award, August 2000, on rules of interpretation:[45]

While finding that Swiss law applies, the Arbitral Tribunal is however aware that the issue of fraud and misrepresentation would not be adjudicated otherwise were Indian law to be found to apply on these issues. Indeed, as has been said already, the avoidance of a contract for willful deception is a common understanding of all civilized jurisprudence. ***For example, article 2.15(2) of the Unidroit Principles provides that "a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party". Article 3.8 provides for avoidance of a contract by a party in case of fraudulent misrepresentation or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the other party should have disclosed. Article 3.9 provides for the avoidance by reason of a threat leading a party to conclude the contract.*** *Further, principles of justice, equity and good conscience will be legitimately applied by the Arbitral Tribunal for the purpose of determining the scope and manner of applying the law, and what should be the nature and extent of the relief to be granted, as those principles are referred to in Swiss law*. (emphasis added).

ICC Arbitral Award, July 1995, on nominalism:[46]

the principle of nominalism is a general principle of transnational law. It is laid down not only in Swiss court (decisions and doctrinal writings […] ***but also in An. 6.1.9(3) of the Unidroit Principles of International Commercial Contracts****, allowing the obligor in make payment of a money debt expressed in a currency other than that of the place for payment in the currency of that place at the rate of exchange prevailing there when payment is due (Unidroit (ed.), Principles of International Commercial Contracts, 1994, at 127).* (emphasis added).

V.E *THE USE OF THE UNIDROIT PRINCIPLES IN INVESTMENT TREATY ARBITRATION*

Cordero-Moss and Behn write that:[47]

To varying degree, investment arbitration is open to the application of sources such as 'rules of law' and international law, independently or in combination with national law (which under certain circumstances can include the [UNIDROIT Principles]. …

The comprehensive set of investment arbitration cases referencing the [UNIDROIT Principles] show that they have been used as 'rules of law' applicable to the dispute in one case, as a source of international law in one case, as a corroboration of international law in three cases, and as a corroboration of national law in five cases.

[45] ICC case No. 9651, available at http://www.unilex.info/case.cfm?id=692.
[46] ICC case No. 8240, available at http://www.unilex.info/case.cfm?id=629.
[47] CORDERO-BEHN, *cit.*, pp. 1 and 3.

That said, the use of the UNIDROIT Principles in investment arbitration cases is less frequent than in disputes arising out of international commercial contracts. AUGUST REINISCH explains that investment disputes are usually brought by investors which have invoked investment treaties, alleging breaches of international substantive – and concrete – standards such as fair and equitable treatment, full protection and security, non-discrimination obligations, most-favored nation, national treatment or uncompensated expropriation.[48]

The UNIDROIT Principles as 'rules of law' applicable to the dispute

In *Lemire v. Ukraine*,[49] the arbitral tribunal applied the UNIDROIT Principles to the substance of the dispute, affirming that, due to a negative inference that the parties did not want a national law to apply[50], it was empowered to apply rules of international law, with particular regard to the UNIDROIT Principles.[51]

The UNIDROIT Principles as a source of international law

In the SCC case *Petrobart v. Kyrgyz Republic*,[52] the arbitral tribunal applied the UNIDROIT Principles:

> *as a rule of international law, without explaining, however, to what extent they expressed a generally recognized principle of law. … In this case, the [UNIDROIT Principles] are being applied directly as a rule of international law with no analysis as to whether Article 7.4.9 reflects a general principle of law and thus a source of international law applicable to the dispute*".[53]

The UNIDROIT Principles as corroborative of international law

In the *ad hoc* UNCITRAL arbitration *Eureko v. Poland*, based on the Netherlands-Poland BIT, the arbitral tribunal referred to the UNIDROIT Principles as an example of a source recognizing the principle of the exception of non-performance:[54]

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[48] AUGUST REINISCH, *The Relevance of the UNIDROIT Principles of International Contracts in International Investment Arbitration* [2014] Unif. L. Rev. 609.

[49] *Joseph Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011.

[50] The dispute arose from an alleged breach of a settlement agreement in connection with a previous award under the ICSID Additional Facility. The settlement agreement was not governed under any domestic law. According to the tribunal the parties to it were unable to reach an agreement as to whether US law or Ukrainian law should be applicable. However, the parties made extensive use of the UNIDROIT Principles incorporating provisions thereof to the settlement agreement. The tribunal decided to apply the UNIDROIT Principles to decide the dispute, considering them as part of international law. Furthermore, the settlement agreement contained a heading named "Principles of Interpretation and Implementation of the Agreement" which contained provisions very similar to those found in the UNIDROIT Principles.

[51] *Ibid*. The tribunal in this case cited the Preamble of the UNIDROIT Principles stating that a reference of the parties to general principles of law or to *lex mercatoria* may lead to the application of the UNIDROIT Principles.

[52] *Petrobart v. Kyrgyz Republic*, SCC Arbitration, Award, 29 March 2005.

[53] CORDERO-BEHN, *cit.*, pp. 18-19.

[54] *Eureko v. Poland*, Ad Hoc UNCITRAL Arbitration, Partial Award, 19 August 2005, available at https://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf. CORDERO-BEHN, *cit.*, p. 21: "*In the Eureko award, the tribunal offered an illustration of the principle by making reference to the [UNIDROIT Principles]".*

177. Without deciding whether the exception of nonperformance is a maxim of interpretation or a rule of international law, the Tribunal is of the view that the exception cannot assist the Claimant because it essentially applies to cases of simultaneous or conditional performance.

178. ***For example, Article 7.1.3 of the UNIDROIT principles of International Commercial Contracts provides that, "Where the parties are to perform simultaneously, either party may withhold performance" if the other party is not willing and able to perform.***

179. The exception of non-performance thus relates to the simultaneous performance of particular obligations, i.e. mutuality, which is exactly the case with Article 1 of the First Addendum. (emphasis added).

The *Gemplus* & *Talsud v. Mexico* cases were based on the France-Mexico BIT and the Argentina-Mexico BIT respectively.[55] In deciding the evidentiary standard for awarding lost profits under international law, the arbitral tribunal cited the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts for the principle that there must be a relative and reasonable level of certainty about future income streams. To support and corroborate this principle, the arbitral tribunal mentioned the UNIDROIT Principles:

(13-88) It may be noted that Article 7.4.3(1) of the UNIDROIT Principle requires a "reasonable degree of certainty" for establishing compensation for future harm, thereby further confirming that the requirement for certainty in proving a claimant's claim for compensation is relative and not incompatible with an award of compensation for loss of opportunity, nor is the latter necessarily linked to an arbitrator's power to decide ex aequo et bono …

The Tribunal notes the UNIDROIT Principles for the general proposition that lost profit is an accepted and well-established component in assessing compensation…[56].

(13-90) It would be possible to illustrate these general principles from several other national legal systems (both common law and civilian); but it is unnecessary to do so here because, first, such principles are broadly re-stated in the UNIDROIT Principles; and, second, the Tribunal is in no doubt that similar principles form part of international law, as expressed in the ILC Articles. Moreover, the law applicable in this case is not English, Mexican, Canadian or any other national law.

Cordero-Moss and Behn point out that:[57]

> *In this case, the tribunal used the [UNIDROIT Principles] to corroborate a general principle of law that clearly forms a part of international law as expressed in the ILC Draft Articles: the certainty of harm principle. The analysis of international law was corroborated first by a reference to English law and then by a reference to the [UNIDROIT Principles] as a substitute or proxy for a comparative analysis of national legal systems.*

[55] *Gemplus & Talsud v. Mexico*, ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010.
[56] This statement is in fn. 9 at p. 62.
[57] CORDERO-BEHN, *cit.*, p. 24.

El Paso Energy v. Argentine Republic was a case based on the 1991 USA-Argentina BIT in which the arbitral tribunal, taking as its principal point of reference the International Law Commission's ("ILA's") Draft Articles on Responsibility of States for Internationally Wrongful Acts referred to the UNIDROIT Principles as corroborative of the existence of a general principle of law on the preclusion of wrongfulness in certain situations:[58]

> *That there is a general principle on the preclusion of wrongfulness in certain situations can hardly be doubted, as is confirmed by the UNIDROIT Principles on International Commercial Contracts, a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems. Article 6(2)(2) of these Principles, dealing with "hardship," provides that events causing hardship must be "beyond the control of the disadvantaged Party." Article 7(1)(6) on "exemption clauses" prescribes that a party may not claim exemption from liability "if it would be grossly unfair to [exempt it] having regard to the purpose of the contract." Finally, Article 7(1)(7), relating to "force majeure" (vis maior) excuses non- performance of a contract:*
>
> > *"... if that Party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences."*
>
> *Exemption from liability for non-performance or other forms of relief are therefore excluded under the UNIDROIT Principles if the Party claiming it was "in control" of the situation or if it would be "grossly unfair" to allow for such exemption.*

The UNIDROIT Principles as corroborative of national law

In some cases, investment arbitration tribunals have referred to the UNIDROIT Principles as a corroboration of the applicable national law.

In *AIG Capital Partner & CJSG Tema Real Estate v. Kazakhstan*,[59] a case based on the USA-Kazakhstan BIT, the arbitral tribunal awarded the claimant US$ 5.9 million for Kazakhstan's expropriation of its investment in a real estate development project. With regard to the principle of mitigation of damages, the arbitral tribunalstated:

> *Mitigation of damages, as a principle, is applicable in a wide range of situations. It has been adopted in common law and in civil law countries, as well as in International Conventions and other international instruments – as for instance in Article 77 of the Vienna Convention and Article 7.4.8 of the UNIDROIT Principles for International*

[58] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 623. The tribunal referred to the UNIDROIT Principles as "*a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems*". Also, the tribunal reached the conclusion that the principle preventing a State from invoking an exception due to necessity when said state contributed to the situation of necessity in the first place was a general rule of international law. The tribunal went even further to analyse whether the general principle could fall under art. 38 (1) (c) of the ICJ Statute in the sense of a "*general principle of law recognized by civilized nations*".

[59] *AIG Capital Partner & CJSG Tema Real Estate v. Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, para. 10.6.4.

Commercial Contracts. It is frequently applied by international arbitral tribunals when dealing with issues of international law.

In *African Holding Company & Société Africaine de Construction au Congo v. La République Démocratique du Congo*,[60] the arbitral tribunal referred three times to the UNIDROIT Principles as general principles of contract law corroborating Congolese law:

- with reference to the principle that a contract need not be in writing and that it may be proven by other evidence: "*les contrats ne doivent pas nécessairement être conclus par écrit aux termes de la législation congolaise ou du droit international. En fait, l'article 1.2 des Principes d'UNIDROIT relatifs aux contrats du commerce international dispose expressément qu'un contrat ne doit pas nécessairement être conclu ou constaté par écrit et qu'il peut être prouvé par tous moyens, y compris par témoins*";

- on the principle that the existence of a contract can be inferred from the conduct of the parties and affirming that the conduct of the parties sufficiently evidenced the existence of a construction contract held: "*On parvient à la même conclusion en examinant l'affaire sous l'angle des Principes d'UNIDROIT visés plus haut, en particulier du fait qu'aux termes de l'article 2.1.1, un contrat peut aussi se déduire du comportement des parties qui indique suffisamment leur accord, ce qui est tout à fait le cas ici bien qu'aucun texte écrit n'ait été produit*.";

- with regard to the principle that non-performance by one party to a contract is considered a default on its obligations by that party: "*Le Tribunal conclut à cet égard que la nature du différend concerne le fait que des travaux ont été exécutés sous contrat et que leur coût n'a pas été réglé pendant une longue période de plus de quinze ans. Que la RDC ait officiellement refusé de payer ou ait gardé le silence, est sans importance pour la nature du différend. Le fait est que la RDC a manqué à ses obligations aux termes du contrat, ce qui se rattache donc à une situation d'inexécution envisagée à l'article 7.1.1 des Principes d'UNIDROIT. Aux termes de ce même article, l'inexécution comprend l'exécution défectueuse ou tardive*".

In *Carl Sax v. City of Saint Petersburg*,[61] the arbitral tribunal relied on the UNIDROIT Principles to corroborate the principle stated in Article 395 of the Russian Civil Code which allows the applicable rate of interest to be determined according to the jurisdiction where the prevailing party resides.

In *Mohamed Abdulmohsen Al-Kharafi & Sons v. Lybia*,[62] the arbitral tribunal resorted to the UNIDROIT Principles to corroborate some provisions of Lybian law. In particular, the reference was made to Articles 7.4.2 on full compensation and to Article 7.4.3 on the certainty of harm principle.

In the ICSID arbitration *Suez v. Argentina*[63], reference was made to the UNIDROIT Principles in the dissenting opinion of Argentina's appointed arbitrator, PEDRO NIKKEN, in support of an asserted

[60] *African Holding Company & Société Africaine de Construction au Congo v. La République Démocratique du Congo*, ICSID Case No. ARB/05/21, *Sentence sur la Déclination de Compétence et la Recevabilité*, 29 July 2008, paras. 32-35.
[61] *Carl Sax v. City of Saint Petersburg*, Ad Hoc UNCITRAL Arbitration, Award, 30 March 2012.
[62] *Mohamed Abdulmohsen Al-Kharafi & Sons v. Lybia*, Ad Hoc UNCITRAL Arbitration, Award, 22 March 2013.
[63] *Suez, Sociedad General de Aguas de Barcelona & Vivendi Universal v. Argentina & AWG Group v. Argentina*, ICSID Case No. ARB/03/19 and Ad Hoc UNCITRAL Arbitration, Decision on Liability, Separate Opinion, 30 July 2010.

obligation to renegotiate under Argentine Law and to support his conclusion that this obligation was not extraordinary.[64]

In sum, the UNIDROIT Principles can be used to corroborate national law but "*it is not* [the UNIDROIT Principles]*'s function to override a rule of national law in case of contrast between the regulation contained in the law and in the provisions of the* [the UNIDROIT Principles]".[65]

In summary, the available decisions are indicative of an increasing reference to the Principles as evidence of general principles referable to international law in investor – state disputes, albeit that they were initially conceived for, and applied to, the field of international commercial contracts, are now cited.

V. THE USE OF UNIDROIT PRINCIPLES BY NATIONAL COURTS

The UNIDROIT Principles have been considered by national courts in the context of the interpretation of terms and phrases, but perhaps that is as far as it goes.

In *Bottling Companies v. Pepsi Cola Panamericana*, the Supreme Court of Venezuela turned to the UNIDROIT Principles to assist in the interpretation of the word "*international*".[66] The case concerned a contract between two Venezuelan companies, which stipulated that any disputes which might arise should be submitted to arbitration in New York under the ICC Arbitration Rules. When one of the parties invoked the arbitration clause, the other party objected that it was invalid and insisted that jurisdiction remained vested in the ordinary Venezuelan courts, because the dispute was not of an international character.

Confirming the decision of the Tribunal of Caracas, the Supreme Court of Venezuela rejected the argument and upheld the validity of the arbitration clause. Its decision was based on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and on the 1975 Inter-American Convention on Commercial Arbitration, both of which had been ratified by Venezuela and which expressly affirmed the binding nature of an agreement whereby parties to an international commercial contract decide to submit any dispute which might arise to arbitration. The Court concluded that while both of the parties were Venezuelan companies, the application of the two Conventions was nevertheless justified as one of the companies was in fact a subsidiary of a United States company. The Court therefore concluded that the dispute was international in character. In support of this broad interpretation of the concept of international contract in accordance with Article 1 of the 1975 Inter-American Convention on Commercial Arbitration, the Court referred, among others, to the Preamble, Comment 1 of the UNIDROIT Principles, which states that "[…] *the concept of 'international' contracts should be given the broadest possible interpretation, so as to ultimately exclude only those situations where no international element at all is involved, i.e. where all the relevant elements of the contract in question are connected with one country only*."

[64] *Ibid.*, fn. 35.
[65] CORDERO-BEHN, *cit.*, p. 36.
[66] Available at http://www.unilex.info/case.cfm?id=643.

In *Cavendish Square Holding BV v Talal El Makdessi / Parking Eye Ltd v Beavis*,[67] the Supreme Court of the United Kingdom addressed the question as to whether the English penalty rule, which is increasingly criticised even within the English legal community as antiquated and anomalous, should be abrogated as one of the parties submitted the Court should do. The Court affirmed that:

> [w]*e rather doubt that the courts would have invented the rule today if their predecessors had not done so three centuries ago*" but it pointed out that "*this is not the way in which English law develops, and we do not consider that judicial abolition would be a proper course for this court to take*.

The Court went on to state that:

> *the penalty rule is not only a long-standing principle of English law, but is common to almost all major systems of law, at any rate in the western world* […],

In this context, the Court specifically mentioned not only the common law jurisdictions, including the United States, but also the civil codes of France, Germany (for non-commercial contracts only), Switzerland, Belgium and Italy, as well as:

> *influential attempts to codify the law of contracts internationally, including the UNIDROIT Principles of International Commercial Contracts (2010) (article 7.4.13), and the UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (article 6)* […].

In *Rock Advertising Limited v MWB Business Exchange Centres Limited*,[68] the Supreme Court of the United Kingdom acknowledged that the question as to whether the parties could effectively modify the content of a contract orally on the ground that such oral agreement would amount to an implicit derogation of the "No Oral Modification" clause in the agreement, was still controversial under English law. Ultimately, it opted for the negative solution, and in so doing referred, inter alia, to Article 29 of the CISG and Art. 2.1.18 of the UNIDROIT Principles (defining the two instruments as "*widely used codes*"[69]), both providing the same solution.

These cases do not demonstrate any particular appetite to derogate from English law in favour of the Principles and they are in line with *Chartbrook*, which remains the leading authority on the point.

In *Chartbrook Limited v Persimmon Homes Limited*,[70] Lord Hoffmann pointed out that:

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[67] Judgment of the Supreme Court, 5 November 2015, *Cavendish Square Holding BV v Talal El Makdessi / Parking Eye Ltd v Beavis*, available at http://www.unilex.info/case.cfm?id=1933.

[68] Judgment of the Supreme Court, 5 November 2015, *Rock Advertising Limited v MWB Business Exchange Centres Limited*, [2018] UKSC 24, available at http://www.unilex.info/case.cfm?id=2147.

[69] "*These widely used codes suggest that there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation*" (para. 13); "*It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct*." (para. 16).

[70] Judgment of the House of Lords, 1 July 2009, *Chartbrook Limited v Persimmon Homes Limited*, [2009] UKHL 38, available at http://www.unilex.info/case.cfm?id=1512.

> *Supporters of the admissibility of pre-contractual negotiations draw attention to the fact that Continental legal systems seem to have little difficulty in taking them into account. Both the UNIDROIT Principles of International Commercial Contracts (1994 and 2004 revision) and the Principles of European Contract Law (1999) provide that in ascertaining the "common intention of the parties", regard shall be had to prior negotiations: articles 4.3 and 5.102 respectively. The same is true of the United Nations Convention on Contracts for the International Sale of Goods (1980). But these instruments reflect the French philosophy of contractual interpretation, which is altogether different from that of English law. As Professor Catherine Valcke explains in an illuminating article …, French law regards the intentions of the parties as a pure question of subjective fact, their volonté psychologique, uninfluenced by any rules of law. It follows that any evidence of what they said or did, whether to each other or to third parties, may be relevant to establishing what their intentions actually were. There is in French law a sharp distinction between the ascertainment of their intentions and the application of legal rules which may, in the interests of fairness to other parties or otherwise, limit the extent to which those intentions are given effect. English law, on the other hand, mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be. One cannot in my opinion simply transpose rules based on one philosophy of contractual interpretation to another, or assume that the practical effect of admitting such evidence under the English system of civil procedure will be the same as that under a Continental system* […]

A further example of the reluctance of the courts to adopt the Principles is to be found in a decision of the Tribunal of Padua, which considered that:[71]

> *According to Italian conflict of law rules parties are free to choose the applicable law but in so doing they must choose a particular domestic law. A reference by the parties to non-State rules of supranational or transnational character such as the lex mercatoria, the UNIDROIT Principles or CISG in cases where the Convention as such is not applicable cannot be considered a veritable choice of law by the parties but amounts to an incorporation of such rules into the contract with the consequence that they will bind the parties only to the extent that they do not conflict with the mandatory rules of the applicable domestic law.* (emphasis added).[72]

VI. CONCLUSORY REMARKS

There is now a corpus of evidence that the UNIDROIT Principles are increasingly referenced in the field of international commercial arbitration. There is a number of instances, too, in which they have been cited authoritatively in the field of international investment arbitration. Arbitrators and the courts are demonstrating an increasing receptiveness to the UNIDROIT Principles, but analysis of the available data suggests that it is generally in the context of an exercise to corroborate a decision based

[71] Tribunal of Padua, Este Branch, 11 January 2005, available at http://www.unilex.info/case.cfm?id=1004.

[72] See also, Article 4 of the Uniform Law on International Sale of Goods: "*The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to the Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law*." (emphasis added).

upon the application of domestic or international law. Cases in which the UNIDROIT Principles were found to be the primary source of a determinative finding remain relatively rare.

The reality is that the extent to which the UNIDROIT Principles have found acceptance among the international arbitral community is not yet true of the courts in many jurisdictions. More to the point, the international business community has still to embrace them. That in the context of the terms of a Preamble which provides that the Principles "***shall*** *be applied when the parties have agreed that their contract be governed by them*" is distinctly limiting. If there is a reluctance to incorporate them expressly, one is left with the possibility that they will be adopted on an *ad hoc* basis thereafter. Seemingly the businessman of whom Lord Mustill wrote with such prescience 20 years ago has yet to find his voice.

The auguries are not entirely favourable. Writing in 2001, one commentator suggested that:

> "(…) *we are now in a mutually pervasive age where national boundaries lose their meaning. For a global order to be established to govern business transactions 'ignorant' of national boundaries, such a legal order must first free the business world from the dogmas that heretofore have shaped the traditional legal orders. This calls for a resurgence of the rule of reason at a delocalised level, away from sovereign-based legal positivism*.[73]

Sadly, the rule of reason in the age of Trump is an oxymoron. We find ourselves in a period of global trade and political uncertainty, which few, if any of us, have seen before. The UNIDROIT Principles hark back to a time dominated by open cross-border trade, when an aspiration to a ubiquity of application seemed a perfectly reasonable aim. In the course of the last 20 years, they have gained acceptability. The task now is to establish and advocate their relevance.

[73] K. SONO, *The Rise of Anational Contract Law in the Age of Globalization*, 75 *Tulane Law Review* 2001, p. 1185 *et seq.* (p. 1186) in M.J Bonell, *cit.* p. 4 fn.