The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law

Michael Joachim BONELL*

Résumé

Ce texte porte sur les Principes d'UNIDROIT et l'harmonisation de la vente internationale de marchandises. Dans la première partie, l'auteur traite de la difficulté d'en arriver à un texte uniforme sur la vente internationale de marchandises et des conséquences qui en ont découlé étant donné les différences qui existaient entre les systèmes juridiques, sociaux et économiques au moment de la négociation de la Convention de Vienne. L'auteur étudie également l'approche innovatrice qui a prévalu lors de la rédaction des Principes d'UNIDROIT visant à promouvoir un texte s'appliquant à l'ensemble des contrats et représentant, non pas une tentative d'uniformisation des droits nationaux, mais plutôt une réaffirmation de l'existence d'un droit international des contrats. Dans la deuxième partie, l'auteur examine la caractère

Abstract

This paper deals with the UNIDROIT Principles and the harmonization of international sale of goods. The first part deals with the problem of creating a single text governing the international sale of goods and with the ensuing consequences, due to the existing differences between the legal, social and economic systems of the various countries when the Vienna Convention was negotiated. The author also looks at the innovative approach that prevailed for the writing of the UNIDROIT Principles aimed at developing a text that would apply to all contracts and that would represent a reassertion of the existence of an international law of contracts rather than an attempt at streamlining the laws of various countries. The second part deals with the complementary nature of the Vienna Convention and of the UNIDROIT Principles,

Professor of Law, University of Rome I "La Sapienza", Consultant, UNIDROIT.

complémentaire de la Convention de Vienne et des Principes d'UNIDROIT, et ce, en distinguant les contrats de vente internationaux selon qu'ils sont régis ou non par la Convention de Vienne.

making a distinction between the international contracts governed by the Vienna Convention, and those that are not.

Table of Contents

It is no exaggeration to say that both the *U.N. Conventions on Contracts for the International Sale of Goods* (CISG) and the *UNIDROIT Principles of International Commercial Contracts* represent landmarks in the process of international unification of law. CISG, unanimously adopted in 1980 by a diplomatic Conference with the participation of representatives from 62 States and 8 international organisations, has been ratified by 60 countries from the five continents, including almost all the major trading nations[1]. The UNIDROIT Principles, published in 1994, are likewise a world-wide success: translated into over two dozen languages, they are not only the subject of a substantial body of legal writings, but are increasingly being used in international contract practice and dispute resolution[2].

The present paper will focus on the relationship between CISG and the UNIDROIT Principles in the context of international sales contracts. In particular I shall demonstrate that, far from being competitors, they may indeed complement one another. This is true not only in cases where CISG is not applicable, but also with respect to sales contracts governed by CISG where the UNIDROIT Principles may be used to interpret and supplement CISG.

However, before embarking on this analysis, I cannot but stress the vital role Canada has played in the preparation of both these instruments. Two eminent colleagues in particular – Ron Ziegel and Paul-André Crépeau – deserve being mentioned in this respect. Ron Ziegel, head of the Canadian Delegation to the Vienna Diplomatic Conference, was definitely one of the key figures in the negotiations for the adoption of CISG; on his part, Paul-André Crépeau, was and continues to be, also thanks to his unique insight into both common law and civil law systems, a driving force within the Working Group for the preparation of the UNIDROIT Principles.

---

1 For the list of the Contracting States, as well as more than 500 cases and an exhaustive bibliography on CISG, see: Internet website [http://www.unilex.info].

2 For some 70 decisions referring in one way or another to the UNIDROIT Principles as well as an exhaustive bibliography, see: M.J. BONELL (ed.), *The UNIDROIT Principles in Practice* (2002).

I. CISG and the UNIDROIT Principles: International Uniform Sales Law *vs* "Restatement" of General Contract Law

When back in 1929 Ernst Rabel launched the idea of preparing uniform rules on international sales contracts, it was taken for granted that the envisaged rules were to be prepared in the form of a binding instrument. Even after the poor reception of the two 1964 Hague Sales Conventions, when in 1968 UNCITRAL decided to make a fresh start, the legislative option was the only conceivable one[3].

Yet the option in favour of uniform legislation inevitably restricted the drafters' room for manoeuvre. Due to the differences in legal tradition and at times, even more significantly, in the social and economic structure prevalent in the States participating in the negotiations, some issues had to be excluded at the outset from the scope of CISG, while with respect to a number of other items the conflicting views could only be overcome by compromise solutions leaving matters more or less undecided.

Thus, some categories of sale – among which are also transactions of considerable importance in international trade practice, such as sales of shares and other securities, of negotiable instruments and money, of ships and aircraft – are expressly excluded from its scope[4]. But also in regard to ordinary sales contracts a number of important issues have not been taken into consideration. CISG itself expressly mentions the validity of the contract, the effect of the contract on the property in the goods[5] and the liability of the seller for death or personal injury caused by the goods to the buyer or any other person.[6] In addition, one may recall, for instance, the conclusion of the contract through an agent, the problems arising from the use by one or both of the parties of standard terms, or the impact which the different kinds of State control over the import and/or export of certain goods or the

---

3 For a discussion of some of the reasons for this preference, see: M.J. BONELL, *An International Restatement of Contract Law*, 2nd ed., p. 62 and 63 (1997).

4 Art. 2 CISG.

5 Art. 4 CISG.

6 Art. 5 CISG.

exchange of currency may have on the contract of sale as such or on the performance of any of its obligations.

Of the provisions laying down not too convincing compromise solutions between conflicting views, some openly refer the definite answer to the applicable domestic law[7]. Others use the technique of a main rule immediately followed by an equally broad exception, thereby leaving the question open as to which of the two alternatives will ultimately prevail in each single case[8]. Others still hide the lack of any real consensus by an extremely vague and ambiguous language[9].

The UNIDROIT Principles represent a totally new approach to international trade law. First of all, on account of their scope which, contrary to that of all existing international conventions including CISG, is not restricted to a particular kind of transaction but covers the general part of contract law[10]. Moreover, and more importantly, the UNIDROIT Principles – prepared by a private group of experts which, though acting under the auspices of a prestigious Institute such as UNIDROIT, lacked any legislative power – do not aim to unify domestic law by means of special legislation, but merely to "re-state" existing international contract law. Finally, the decisive criterion in their preparation was not just which rule had been adopted by the majority of countries ("common core approach"), but also which of the rules under consideration had the most persuasive value and/or appeared to be particularly well suited for cross-border transactions ("better rule approach").

---

7 *Cf.*, *e.g.*, Art. 12 and 96 CISG with respect to the formal requirements of the contract; Art. 28 CISG concerning the possibility of obtaining a judgment for specific performance; Art. 55 CISG with respect to the possibility of a sales contract being validly concluded without an express or implied determination of the price.

8 *Cf.*, *e.g.*, Art. 16 CISG dealing with the revocability of the offer; Art. 39 (1), 43 (1) and 44 CISG as to the notice requirement in case of delivery of non-conforming goods or goods which are not free from third parties' rights; Art. 68 CISG concerning the transfer of risk where the goods are sold in transit.

9 *Cf.*, *e.g.*, the reference to good faith in Art. 7(1) CISG; the definition of "fundamental breach of contract" in Art. 25 CISG; Art. 78 CISG concerning the right to interest on sums in arrears.

10 On the possibility of the UNIDROIT Principles playing the role of general contract law otherwise allotted to a national law, see: M. BRIDGE, *The International Sale of Goods: Law and Practice*, p. 54 *et seq.* (1999).

Yet precisely because the UNIDROIT Principles were not conceived as a binding instrument they could address a number of matters that had either been completely excluded or insufficiently regulated by CISG.

Thus, in the chapter on formation, new provisions were included on the manner in which a contract may be concluded, on writings in confirmation, on the case where the parties make the conclusion of their contract dependent upon reaching an agreement on specific matters or in a specific form, on contracts with terms deliberately left open, on negotiations in bad faith, on the duty of confidentiality, on merger clauses, on contracting on the basis of standard terms, on surprising provisions in standard terms, on the conflict between standard terms and individually negotiated terms and on the battle of forms[11].

Further, a whole chapter on validity was added which moreover is not restricted to the classical cases of invalidity, *i.e.* the three defects of consent such as mistake, fraud and threat, but also addresses the much more controversial issue of "gross disparity"[12].

Equally new are, among others, the *contra proferentem* rule, the provision on linguistic discrepancies and that on supplying an omitted term in the chapter on interpretation[13], the provision on implied obligations in the chapter on content[14]; those on payment by cheque or other instruments, on payment by funds transfer, on currency of payment, on the determination of the currency of payment where it is not indicated in the contract, on the costs of performance, on the imputation of payments, on public permission requirements and on hardship in the chapter on performance[15]; the provisions on the right to performance, on exemption clauses, on the case where the aggrieved party contributes to the harm, on interest rates and on agreed payment for non-performance in the chapter on non-performance[16].

---

11 *Cf.* UNIDROIT Principles, Art. 2.1, 2.12, 2.13, 2.14, 2.15, 2.16, 2.17, 2.19, 2.20, 2.21 and 2.22, respectively.

12 *Cf. id.*, Art. 3.4-3.9 and 3.10, respectively.

13 *Cf. id.*, Art. 4.6, 4.7 and 4.8, respectively.

14 *Id.*, Art. 5.2.

15 *Cf. id.*, Art. 6.1.7-6.1.9, 6.1.10, 6.1.11, 6.1.12, 6.1.14-6.1.17 and 6.2.1 and 6.2.3, respectively.

16 *Cf. id.*, Art. 7.2.1-7.2.5, 7.1.6, 7.4.7, 7.4.9 and 7.4.13, respectively.

II. CISG and the UNIDROIT Principles: Two Complementary Instruments

A. International Sales Contracts not Governed by CISG

Notwithstanding the world-wide acceptance of CISG, there might still be sales contracts not governed by CISG. According to Article 1 CISG, this is the case whenever at least one of the parties is not situated in a Contracting State or the rules of private international law of the forum lead to the application of the law of a non-Contracting State. In all such cases the UNIDROIT Principles may be applied as an alternative set of internationally uniform rules, either because of an express choice to this effect by the parties themselves or because the contract is governed by "general principles of law", "*lex mercatoria*" or the like, and the UNIDROIT Principles are considered to be a particularly authoritative expression thereof.

In actual practice, more and more cases are being reported in which the UNIDROIT Principles have been applied as *lex contractus* of international sales contracts which do not fall within the scope of CISG.

In one case the parties themselves had expressly chosen the UNIDROIT Principles as the law governing their contract[17]. The case concerned a sales contract entered into between a Hong Kong export company and a Russian trade organisation. The contract did not contain any choice of law clause, but when the dispute arose, the parties agreed that the Arbitral Tribunal should apply the UNIDROIT Principles to resolve any questions not expressly regulated in the contract.

In two other cases the UNIDROIT Principles were applied even without any express reference to them by the parties.

One is the ICC Award No. 8502[18] concerning a contract for the supply of rice entered into between a Vietnamese exporter and

---

17 See: Award No. 116 of 20 January 1997 rendered by the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (for an abstract, see: M.J. BONELL (ed.), *op. cit.*, note 2, p. 481).

18 ICC Award No. 8502 of 1996, *ICC International Court of Arbitration Bulletin* 72-74.

French and Dutch buyers. The contract did not contain any choice of law clause. The Arbitral Tribunal decided to base its award on "trade usages and generally accepted principles of international trade" and to refer "in particular to the 1980 Vienna *Convention on Contracts for the International Sale of Goods* (Vienna Sales Convention) or to the Principles of International Commercial Contracts enacted by UNIDROIT, *as evidencing admitted practices under international trade law*" (emphasis added). The individual provisions it then referred to were Articles 76 CISG and 7.4.6 (*Proof of harm by current price*) of the UNIDROIT Principles.

Yet another example is the award rendered by an *ad hoc* Arbitral Tribunal in Buenos Aires in 1997[19]. The case concerned a contract for the sale of shares between shareholders of an Argentine company and a Chilean company. The contract did not contain a choice of law clause and the parties authorized the Arbitral Tribunal to act as *amiable compositeur*. Notwithstanding the fact that both parties had based their claims on specific provisions of Argentine law, the Tribunal decided to apply the UNIDROIT Principles. The Tribunal held that the UNIDROIT Principles constituted "*usages of international trade reflecting the solutions of different legal systems and of international contract practice*" (emphasis added), and that as such, according to Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration, they should prevail over any domestic law[20]. The individual provisions of the UNIDROIT Principles applied to the merits of the case were Articles 3.12 (*Confirmation*), 3.14 (*Notice of avoidance*) and 4.6 (*Contra proferentem* rule).

Yet it is particularly in the context of so-called "State contracts" that the UNIDROIT Principles are frequently applied even in the absence of an express reference by the parties.

A first example is provided by the ICC Partial Awards in Case No. 7110[21]. The dispute concerned contracts for the supply of equipment concluded between an English company and a Middle

---

19 Award of 10 December 1997 (for an abstract, see: M.J. BONELL (ed.), *op. cit.*, note 2, p. 463).

20 Art. 28(4) provides that "[i]n 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."

21 For abstracts of the three partial awards rendered in 1995, 1998 and 1999 respectively, see: (1999) 10, nº 2 *ICC International Court of Arbitration Bulletin* 39-57.

Eastern governmental agency. While most of the contracts were silent as to the applicable law, some did refer to settlement according to "rules of natural justice". In a first partial award dealing with the applicable law, the Arbitral Tribunal, by majority, held that the parties had intended to exclude the application of any specific domestic law and to have their contracts governed by general principles and rules which enjoy wide international consensus. According to the Arbitral Tribunal such "*general rules and principles* [...] *are primarily reflected by the UNIDROIT Principles*" (emphasis added), and in the other partial awards dealing with substantive issues it referred to Articles 1.7 (*Good faith and fair dealing*), 2.4 (*Revocation of offer*), 2.14 (*Contracts with terms deliberately left open*), 2.18 (*Written modification clause*), 7.1.3 (*Withholding performance*) and 7.4.8 (*Mitigation of harm*) of the UNIDROIT Principles, considering them all to be expressions of generally accepted principles of law.

Other examples are ICC Awards No. 7375 and No. 8261 relating to contracts for the supply of goods between a United States company and a Middle Eastern governmental agency[22], and between an Italian company and another Middle Eastern governmental agency[23], respectively. In both cases the contracts were silent as to the applicable law. The Arbitral Tribunal, assuming that neither party was prepared to accept the other's domestic law, decided in the first case to apply "*those general principles and rules of law applicable to international contractual obligations* [...], *including* [...] *the UNIDROIT Principles, as far as they can be considered to reflect generally accepted principles and rules*" (emphasis added), while in the second it declared that it would base its decision on the "terms of the contract, supplemented by general principles of trade as embodied in the *lex mercatoria*" and eventually applied some individual provisions of the UNIDROIT Principles with no further explanation.

Finally mention may be made of ICC Award No. 7365[24]. The case concerned contracts for the delivery of sophisticated military

---

22 ICC Award No. 7375 of 5 June 1996: *cf.* (1996) 11 *Measley's International Arbitration Report* A-1 *et seq.*; (1997) *Unif. L. Rev.* 598.

23 ICC Award No. 8261 of 27 September 1996 (for an abstract, see: M.J. BONELL (ed.), *op. cit.*, note 2, p. 443).

24 ICC Award No. 7365 of 5 May 1997 (for an abstract, see: M.J. BONELL (ed.), *op. cit.*, note 2, p. 491).

equipment, entered into in 1977 between a U.S. corporation and the Iranian Air Force. The contracts contained a choice-of-law clause in favour of the law of the Government of Iran in effect at the date of the contracts, but when the dispute arose the parties eventually agreed to the supplementary application of "general principles of international law and trade usages". The Arbitral Tribunal declared that as to the contents of such general principles and rules it would be guided by the UNIDROIT Principles and indeed, when deciding the merits of the case, on a number of occasions based its solutions, exclusively or in conjunction with similar rules to be found in Iranian law, on individual provisions of the UNIDROIT Principles such as Arts 5.1 - 5.2 on express and implied obligations, 6.2.3(4) (*Effects of hardship*), 7.3.6 (*Restitution*) and 7.4.9 (*Interest for failure to pay money*).

It is worth noting that the award was challenged by the U.S. corporation before the District Court, S.D. California precisely on the ground, among others, that the Arbitral Tribunal, by resorting to the UNIDROIT Principles, whereas the parties had only referred to "general principles of international law" as the rules applicable to the substance of the dispute, had exceeded the scope of the submission to arbitration thereby violating Article V(1)(c) of the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. However the Court expressly rejected this argument, thereby confirming the Arbitral Tribunal's implicit assumption that the UNIDROIT Principles represent a source of "general principles of international law and usages" to which arbitrators may resort even in the absence of an express authorisation by the parties[25].

B. International sales contracts governed by CISG

On account of its binding nature, CISG will normally take precedence over the UNIDROIT Principles whenever the requirements for its application are met.

It is true that according to Article 6 CISG parties may exclude the Convention wholly or in part. While there may be cases where

---

25 *Cf. Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 29 F.Sup.2d 1168; for a comment, see: Michael Joachim BONELL, "A Significant Recognition of the UNIDROIT Principles by an United States Court", (1999) *Unif. L. Rev.* 651.

parties choose to replace individual Articles of CISG by the corresponding provisions of the UNIDROIT Principles which they consider to be more appropriate, an exclusion of CISG in its entirety in favour of the UNIDROIT Principles is, at least for the time being, rather unlikely. As a matter of fact, parties do quite often exclude CISG, but this is generally because they are afraid of the uncertainties surrounding the application of any novel instrument. In such cases, they will prefer the safety of domestic law rather than venture into the application of something as novel as the UNIDROIT Principles, whatever their intrinsic merits.

It remains to be seen, however, what will happen if the parties, either because they are not aware of the existence of CISG, or because they do not know that their contract falls within the scope of application of CISG, refer to the UNIDROIT Principles as the applicable law, without expressly excluding CISG. The view has been expressed that such reference is tantamount to a tacit exclusion of CISG as a whole, just as occurs, for example, if the parties choose the law of a non-Contracting State or refer to principles and rules typical of the non-unified domestic law of any State, whether or not a party to CISG[26]. This argument, however, is difficult to accept. There is not the same degree of incompatibility between the UNIDROIT Principles and CISG as exists between CISG and the domestic law of whichever State: on the contrary, they are both instruments of international origin which, apart from their different scope, at most differ in specific provisions. It follows that reference to the UNIDROIT Principles as the law governing the contract cannot be construed as indicating the parties' intention to exclude CISG in its entirety; the sole consequence of such reference is that, within the limits of party autonomy according to Article 6 CISG, the UNIDROIT Principles will prevail over any conflicting provision of CISG. CISG, however, will continue to govern the individual contract as the applicable law; hence all issues peculiar to sales contracts and as such neglected by the UNIDROIT Principles, such as for instance the seller's liability for defective goods, and the specific remedies granted to the buyer, will be governed by CISG, not by the otherwise applicable domestic law, as would be the case if CISG were to be completely excluded by the parties.

---

26 K. BOELE-WOELKI, "The Principles and Private International Law. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts", (1996) *Unif. L. Rev.* 652, 670.

1. The UNIDROIT Principles as a Means of Interpreting and Supplementing CISG

Yet even in cases where the international sales contract is governed by CISG, the UNIDROIT Principles may serve an important purpose.

According to Article 7(1) CISG, "[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 [...]", while Article 7(2) states 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 [...]"[27].

In the past the principles and criteria for the proper interpretation of CISG have had to be found by the judges and arbitrators on an *ad hoc* basis. After publication of the UNIDROIT Principles the question arises whether, and if so, to what extent they can be used as a means of interpreting and supplementing CISG.

Opinions among legal scholars are divided. On the one hand, there are those who categorically deny that CISG can be interpreted on the basis of the UNIDROIT Principles, invoking the rather formalistic and not necessarily convincing argument that, as the latter were adopted later in time than the former, they cannot be of any relevance[28]. On the other hand, there are those who, perhaps too enthusiastically, justify the use of the UNIDROIT Principles as a means of interpreting or supplementing CISG on the mere ground that they are "general principles of international commercial contracts"[29]. The correct solution would appear to lie between these

---

27 Only in the absence of such general principles does the same article permit as a last resort reference to the domestic law applicable by virtue of the rules of private international law.

28 See: F. SABOURIN (Quebec), in Michael Joachim BONELL (ed.), *A New Approach to International Commercial Contracts: the UNIDROIT Principles of International Commercial Contracts*, The Hague, Kluwer Law International, 1999, p. 245.

29 See: J. BASEDOW (Germany), in M.J. BONELL (ed.), *op. cit.*, note 28, p. 149 and 150. For a similar view, see: K.-P. BERGER, *The Creeping Codification of the* Lex Mercatoria, The Hague, Kluwer Law International, 1999, p. 182.

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 even pre-existing international instruments such as CISG; on the other hand, in order for individual provisions to be used to fill gaps in CISG, they must be the expression of general principles underlying also CISG[30].

Among the provisions of the UNIDROIT Principles which might serve to clarify rather ambiguous provisions of CISG, reference has been made to Article 7.1.4(2), which states that the right to cure is not precluded by notice of termination, in connection with Article 48 CISG; Article 7.1.7(4), which expressly indicates the remedies not affected by the occurrence of an impediment preventing a party from performance, in connection with Article 79(5) CISG; and Article 7.3.1(2), which specifies the factors to be taken into account for the determination of whether or not there has been a fundamental breach of contract, in connection with Article 25 CISG[31].

As to the provision of the UNIDROIT Principles to be used to fill veritable gaps in CISG, reference has been made to Articles 2.15 and 2.16 on negotiation in bad faith and breach of a duty of confidentiality, respectively; Article 6.1.6(1)(a) stating the general principle according to which a monetary obligation is to be performed at the obligee's place of business; Articles 6.1.7, 6.1.8 and 6.1.9 which provide an answer to the questions, likewise not expressly settled in CISG, of whether, and if so under what conditions, the seller is entitled to pay by cheque or by other similar instruments, or by a funds transfer, and in which currency payment is to be made; Article 7.4.9(1) and (2) on the time from which the

30 See also, for further references: M.J. BONELL, *op. cit.*, note 3, p. 75-82. More recently: F. FERRARI, in Peter SCHLECHTRIEM (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG*, 3rd ed., 2000, p. 138 (No. 64); C.W. CANARIS, "Die Stellung der 'UNIDROIT Principles' und der 'Principles of European Contract Law' im System der Rechtsquellen", in J. BASEDOW (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht*, Tübingen Mohr Siebeck, 2000, p. 5 *et seq.*, at page 28.

31 See also, for further references: M.J. BONELL, *op. cit.*, note 3, p. 76 and 77.

right to interest accrues and the rate of interest to be applied; and 7.4.12 on the currency in which to assess damages[32].

Turning to actual practice, it is worth noting that courts and arbitral tribunals have so far generally taken an extremely favourable attitude to the UNIDROIT Principles as a means of interpreting and supplementing CISG.

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 general principles underlying also CISG.

Thus, in two awards of the International Court of Arbitration of the Federal Chamber of Commerce of Vienna[33], the sole arbitrator applied Article 7.4.9(2) of the 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, in order to fill the gap in Article 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 CISG. Likewise the Court of Appeal of Grenoble[34], in referring to Article 6.1.6 of the UNIDROIT Principles to determine under CISG the place of performance of the seller's obligation to return the price unduly paid by the buyer, stated that this provision expressed in general terms the principle underlying also Article 57(1) CISG, *i.e.* that monetary obligations have to be performed at the obligee's place of business.

On two other occasions, Article 7.4.9(2) of the UNIDROIT Principles on the applicable rate of interest was applied with no

---

32 See also, for further references: *id.*, p. 77-82.

33 *Cf.* Schiedsspruche SCH 4318 and SCH 4366 of 15 June 1994: see them published in the original German version in Recht der internationalen Wirtschaft 1995, p. 590 *et seq.*, with note by P. SCHLECHTRIEM (p. 592 *et seq.*); for an English translation, see: M.J. BONELL (ed.), *op. cit.*, note 2, p. 351-361.

34 *Cf.* Grenoble, 23 October 1996 (for an abstract, see: M.J. BONELL (ed.), *op. cit.*, note 2, p. 411-416.

further justification at all[35], or because it was considered "*one of the general principles according to Art. 7(2) CISG*" (emphasis added)[36].

Finally, in other cases the Arbitral Tribunal went even further by stating in general terms that it would apply "the provisions of [CISG] *and its general principles, now contained in the UNIDROIT Principles* [...]"[37] or that in applying CISG it was "informative to refer to [the UNIDROIT Principles] *because they are said to reflect a world-wide consensus in most of the basic matters of contract law*" (emphasis added)[38]. The individual provisions of the UNIDROIT Principles applied in these two cases were Articles 1.8 on usages and 7.4.8 on mitigation of harm, and Articles 2.17 on merger clauses, 2.18 on written modification clauses and 4.3 on the relevant circumstances in contract interpretation, respectively.

2. UNIDROIT Principles and CISG Side by Side

In view of the more comprehensive nature of the UNIDROIT Principles, parties may well wish to apply them in addition to CISG for matters not covered therein. To this effect, they may include a clause in the contract which might read as follows:

---

35 *Cf.* ICC Award No. 8769 of December 1996, *ICC International Court of Arbitration Bulletin* 75. For a similar approach, see also: ICC Award No. 8908 of 1998, *ICC International Court of Arbitration Bulletin* 83-87 (at page 87): after having pointed out that "Art. 78 [CISG] [...] does not lay down the criteria for calculating the interest" and that "[i]nternational case law presents a wide range of possibilities in this respect", the Arbitral Tribunal, though without expressly mentioning Art. 7.4.9(2) of the UNIDROIT Principles, concluded that "amongst the criteria adopted in various judgments, the more appropriate appears to be that of the rates generally applied in international trade for the contractual currency [...] in concrete terms, since the contractual currency is the dollar the the parties European, the applicable rate is the 3-month LIBOR on the dollar, increased by one percentage point, with effect from the due date not respected up until full payment has been made."

36 *Cf.* ICC Award No. 8128 of 1995, in *J.D.I.*1996.1024, note by D. Hasher, 1028; (1997) *Unif. L. Rev.* 810.

37 *Cf.* ICC Award No. 8817 of December 1997, *ICC International Court of Arbitration Bulletin* 75-78.

38 *Cf.* ICC Award No. 9117 of March 1998, *ICC International Court of Arbitration Bulletin* 96-101.

> *This contract shall be governed by CISG, and with respect to matters not covered by this Convention, by the* UNIDROIT *Principles of International Commercial Contracts.*

A similar provision has been included in the International Trade Centre UNCTAD/WTO *Model Contract for the International Commercial Sale of Perishable Goods* (1999), Art. 14 ("*Applicable Rules of Law*") of which states:

> *In so far as any matters are not covered by the foregoing provisions, this Contract is governed by the following, in descending order of precedence: The United Nations Convention on Contracts for the International Sale of Goods; the* UNIDROIT *Principles of International Commercial Contracts, and for matters not dealt with in the above-mentioned texts, the law applicable at* [....] *or, in the absence of a choice of law, the law applicable at the Seller's place of business through which this Contract is to be performed.*

The difference between the role attributed to the UNIDROIT Principles under such a clause and the role which, as has been shown, they may play under Article 7(2) CISG is, at least in theory, clear. Under Article 7(2), the UNIDROIT Principles merely serve to fill in any lacunae to be found in CISG, *i.e.* to provide a solution for "[q]uestions concerning matters governed by [CISG] which are not expressly settled in it [...]" and with respect to which recourse to domestic law is permitted only as a last resort. By contrast, by virtue of a parties' reference to the UNIDROIT Principles of the kind described above, the latter are intended to apply to matters actually outside the scope of CISG and which otherwise would fall directly within the sphere of the applicable domestic law.

Given the non-binding nature of the UNIDROIT Principles, the impact of such a reference is likely to vary according to whether a domestic court or an arbitral tribunal is seized of the case.

Domestic courts will tend to consider the parties' reference to the UNIDROIT Principles as a mere agreement to incorporate them into the contract and to determine the law governing that contract on the basis of their own conflict-of-law rules[39]. As a result, they will apply the UNIDROIT Principles only to the extent that the latter do not affect the provisions of the proper law from which the parties may not derogate. This may be the case, for instance, with the rules on contracting on the basis of standard terms (*cf.* Art. 2.19 and

---

39 For more on this point, see: M.J. BONELL, *op. cit.*, note 3, p. 180 *et seq.*

2.22) or on public permission requirements (*cf.* Art. 6.1.14 and 6.1.17). On the other hand, the rules relating to validity (*cf.* Chapter 3) or to the court's intervention in cases of hardship (*cf.* Art. 6.2.3) will only be applied to the extent that they do not run counter to the corresponding provisions of the applicable domestic law.

The situation is different if the parties agree to submit their disputes arising from the contract to arbitration. Arbitrators are not necessarily bound to base their decision on a particular domestic law[40]. Hence they may well apply the UNIDROIT Principles not merely as terms incorporated in the contract, but as "rules of law" governing the contract together with CISG irrespective of whether or not they are consistent with the particular domestic law otherwise applicable. The only mandatory rules arbitrators may take into account, also in view of their task of rendering to the largest possible extent an effective decision capable of enforcement, are those which claim to be applicable irrespective of the law otherwise governing the contract ("*loi d'application nécessaire*"). Yet the application, along with the UNIDROIT Principles, of the mandatory rules in question will as a rule not give rise to any true conflict, given their different subject-matter[41].

*

* *

The foregoing remarks amply demonstrate that even in the context of international sales contracts CISG and the UNIDROIT Principles are not alternatives but complementary instruments.

This is only too evident with respect to international sales contracts lying outside the scope of application of CISG. In such cases, the UNIDROIT Principles represent a set of internationally uniform rules which the parties may – and actually increasingly do – choose as the *lex contractus*, or which arbitral tribunals may – and actually increasingly do – apply as an expression of "general principles of law", the *lex mercatoria* or the like.

---

40 See: M.J. BONELL, *op. cit.*, note 3, p. 183 *et seq.*

41 One of the few potential examples of such conflict may be where arbitrators have to decide between the law of the place of payment imposing the payment in local currency and the different solution provided for in the UNIDROIT Principles that otherwise governs the contract.

Yet even with respect to international sales contracts governed by CISG, the UNIDROIT Principles may play an important role. In the absence of an express reference by the parties, they may be – and actually increasingly are being – used, though not indiscriminately, as a means of interpreting or supplementing CISG. In the presence of an express reference by the parties, the UNIDROIT Principles may moreover apply to matters outside the scope of CISG and which otherwise would fall within the sphere of the applicable domestic law.

In conclusion it may well be said that both CISG and the UNIDROIT Principles are the right instruments at the right time: each one has its own *raison d'être*.