

UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law

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INTRODUCTION

When deciding in 1994 to publish the *Principles of International Commercial Contracts*, the Governing Council of UNIDROIT stressed the need to monitor their use “with a view to a possible reconsideration of them at some time in the future.”¹

The immediate success of the UNIDROIT Principles worldwide prompted UNIDROIT as early as 1997 to resume work “with a view to the publication of an enlarged second edition of the Principles.”² To this end, a new Working Group was set up composed of seventeen members chosen with a view to ensuring, on the one side, the widest possible representation of all the major legal systems and regions of the world, and on the other hand, the highest professional qualifications.³ Some of the members had already participated in the Working Group which had prepared the 1994 edition of the UNIDROIT Principles, while for the first time a number of international organisations and arbitration centres were invited to attend the Working Group’s sessions as observers. As a result, representatives of the United Nations Commission on International Trade Law (UNCITRAL), the ICC International Court of

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¹ UNIDROIT 1994 – C.D. (73) 18, at 22.

² UNIDROIT 1997 – C.D. (76) 17, at 24.

³ The members of the Working Group were Luiz Olavo BAPTISTA (Brazil), Paul-André CREPEAU (Canada), Samuel K. DATE-BAH (Ghana), Adolfo DI MAJO (Italy), Aktham EL KHOLY (Egypt), E. Allan FARNSWORTH (United States of America), Paul FINN (Australia), Marcel FONTAINE (Belgium), Michael P. FURMSTON (United Kingdom), Arthur S. HARTKAMP (The Netherlands), HUANG Danhan (People’s Republic of China), Camille JAUFFRET-SPINOSI (France), Alexander S. KOMAROV (Russian Federation), Ole LANDO (Denmark, Chairman of the Commission on European Contract Law), Peter SCHLECHTRIEM (Germany) and Takashi UCHIDA (Japan). The author of this paper had the honour to act as Chairman of the Working Group.

Arbitration, the Milan Chamber of National and International Arbitration and the Swiss Arbitration Association actively participated in the Working Group's deliberations.⁴

Exactly ten years after the appearance of the first edition of the UNIDROIT Principles, the new edition (hereinafter: the UNIDROIT Principles 2004) was unanimously approved by the Governing Council in April 2004⁵ and is already available in the English and French language versions.⁶

After an account of how, over the years, the UNIDROIT Principles have been used in practice (I), the most significant innovations of the UNIDROIT Principles 2004 will be examined (II). In this context, attention will also be given to the problems which may arise from the fact that the UNIDROIT Principles 2004 are no longer limited to contract law strictly speaking but deal with tri-partite relationships, such as agency and assignment, or with topics traditionally regulated by mandatory rules, such as limitation periods (III). Finally, the UNIDROIT Principles 2004 will be compared to the Principles of European Contract Law (hereinafter: the European Principles) in order to see whether the two instruments are a duplication or serve distinct purposes (IV).

I. – USE OF THE UNIDROIT PRINCIPLES IN PRACTICE

If – as is nowadays generally recognised – uniform law is not an end in itself but has to serve a specific purpose in practice,⁷ the preparation of a single uniform law instrument represents only a first, albeit important, step. What ultimately really matters is that the instrument in question does not remain a dead letter but is actually applied in practice. While this is pertinent with respect to legally binding instruments such as international conventions, it applies even more so to non-binding or “soft law” instruments, such as the UNIDROIT Principles, which will be applied in practice only by virtue of their persuasive value.⁸

Ten years after their publication, it is fair to say that the success of the UNIDROIT Principles has exceeded the most optimistic expectations.

⁴ For UNCITRAL, Gerold HERRMANN (1998-2000) and Jernej SEKOLEC (2001-2003); for the ICC International Court of Arbitration, Horacio GRIGERA NAÓN (1998-2000) and Anne Marie WHITESELL (2001-2003); for the Milan Chamber of National and International Arbitration, Giorgio SCHIAVONI (1998-2003); for the Swiss Arbitration Association, François DESSEMONTET (1998-2003).

⁵ UNIDROIT 2004 – C.D. (83) 24, item 7.

⁶ The volume may be ordered at unidroit.rome@unidroit.org. The text of the black letter rules alone is reproduced, in English and French, in this issue of the Review, p. 124.

⁷ Thus expressly M. EVANS, “Uniform Law: A Bridge Too Far?”, in 3 *Tulane Journal of International and Comparative Law* (1995), 145 *et seq.* (at 159); similarly H. KÖTZ, “Rechtsvereinheitlichung – Nutzen, Kosten, Methoden, Ziele”, in *RabelsZeitschrift* 1986, 1 *et seq.* (at 11 *et seq.*).

⁸ As the Governing Council of UNIDROIT stated in its Introduction to the 1994 edition of the Principles, “[they] are not a binding instrument and [...] in consequence their acceptance will depend upon their persuasive authority [...] The Council is confident that those to whom the UNIDROIT Principles are addressed will appreciate their intrinsic merits and derive full advantage from their use.”

1. Reception by academic circles

Right from the start, the UNIDROIT Principles were the subject of numerous seminars and colloquia all over the world.⁹ Moreover, there is a boundless body of scholarly writings on the UNIDROIT Principles in general or on individual chapters or provisions thereof; even more important, comments are generally positive.¹⁰

A significant confirmation of this was the XVth International Congress of Comparative Law of the *Académie Internationale de Droit Comparé* held in Bristol in 1998, a special session of which was dedicated to the UNIDROIT Principles.¹¹ Invited to consider the UNIDROIT Principles from the viewpoint of their own legal systems in order to highlight convergences and divergences in content, some twenty National Reporters, though from countries of quite different legal traditions and/or socio-economic structures, concluded that relatively few provisions of the UNIDROIT Principles openly conflict with the respective domestic laws, while the remainder are perfectly consistent with them and in a number of cases represent a useful complement or clarification.¹²

Last but not least, the UNIDROIT Principles have been included in the course programmes and/or teaching materials of a great many law schools and universities world-wide. This means that they are considered a good example of the use of the comparative method to identify in the area of general contract law the most commonly adopted solutions (“common core approach”) or those best suited to the special needs of international trade (“better rule approach”).

2. Model for national legislators

As to the different ways in which the UNIDROIT Principles are being used in practice, it may be mentioned first of all that a number of national legislators have chosen the UNIDROIT Principles as one of the sources of inspiration for the reform of their domestic contract laws.

⁹ For an account of the major events during the first years following publication of the UNIDROIT Principles see M.J. BONELL, *An International Restatement of Contract Law*, 2nd ed. (1997), 231-233.

¹⁰ For an exhaustive bibliography on the UNIDROIT Principles in general as well as on the individual chapters thereof, see M.J. Bonell (ed.), *The UNIDROIT Principles in Practice – Case Law and Bibliography on the Principles of Commercial Contracts*, Transnational Publishers, Inc., Ardsley, New York, 2002, 11-24, 36-41, 43-44, 71-73, 125-126, 163, 183, 201, 257-258, 281, 295, 313-314.

¹¹ Cf. M.J. Bonell (ed.), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts* (1999), containing the General Report by M.J. BONELL and the National Reports by G. MOENS – L. COHN – D. PEACOCK (Australia), M. FONTAINE (Belgium), HUANG Danhan (People’s Republic of China), J. LOOKOFKY (Denmark), B. FAUVARQUE-COSSON (France), J. BASEDOW (Germany), B. IZADI (Iran), A. MORDECHAI RABELLO (Israel), G. ALPA (Italy), R. YAMASHITA (Japan), H. VEYTIA (Mexico), F. DE LY (The Netherlands), F. SABOURIN (Quebec), P.M. COSMOVICI – R. MUNTEANU (Romania), CH. RAMBERG (Sweden), F. WERRO – E.M. BELSER (Switzerland), M. FURMSTON (England), A. ROSETT – M.W. GORDON (United States) and LE Net (Vietnam).

¹² See in this sense among others the National Reports of Australia (p. 52), Belgium (p. 56 *et seq.*), Denmark (p. 78), Germany (p. 144), Iran (p. 164), Israel (p. 171), Quebec (pp. 246, 248, 253, 255, 257, 259 and 265), Sweden (p. 327), Switzerland (pp. 375-376) and Vietnam (p. 421).

In some cases, this occurred even before their publication in 1994. The most important example is that of the new Civil Code of the Russian Federation of 1995, in the preparation of which the UNIDROIT Principles – *rectius*: the preliminary drafts of the UNIDROIT Principles – played an important role and some of their provisions, such as those on hardship, were taken on almost literally.¹³

More recently, the UNIDROIT Principles have been chosen as a model for the new Civil Codes of Estonia¹⁴ and of Lithuania,¹⁵ both of which entered into force in 2001, and for the new Hungarian Civil Code currently under preparation.¹⁶ Yet the UNIDROIT Principles have also constituted, together with other uniform law instruments such as the *United Nations Convention on Contracts for the International Sale of Goods* (CISG), an important term of reference in the reform of the law of obligations of the German Civil Code (BGB), which entered into force in 2002.¹⁷

Outside Europe mention may be made above all of the Chinese Contract Law of 1999, widely inspired by the UNIDROIT Principles,¹⁸ or of the projects for the modernisation and harmonisation of contract law in the context of the Economic Cooperation Organisation (ECO) set up in 1985 by Iran, Pakistan and Turkey.¹⁹ Also, in the successive drafts for the revision of Article 2 of the Uniform Commercial Code of the United States, there are references to individual provisions of the UNIDROIT Principles.²⁰ Most recently, at the formal request of the Council of Ministers of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA), UNIDROIT agreed to assist OHADA in the preparation of a *Uniform Act on Contracts* based on the UNIDROIT Principles.²¹

¹³ Cf. A.G. DOUDKO, "Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia", in *Unif. L. Rev. / Rev. dr. unif.*, 2000, 483 et seq.

¹⁴ See the information sent by the Estonian Minister of Justice to the Secretary General of UNIDROIT on 8 June 1995.

¹⁵ Cf. V. MIKELINAS, "Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience", in *Unif. L. Rev. / Rev. dr. unif.*, 2000, 243 et seq.

¹⁶ See the intervention of Professor Harmathy at the 83rd session of the Governing Council, in UNIDROIT 2004, C.D. (83) 24, item 7.

¹⁷ Cf. P. SCHLECHTRIEM, "10 Jahre CISG – Der Einfluss des UN-Kaufrechts auf die Entwicklung des deutschen und internationalen Schuldrechts", in *Internationales Handelsrecht* 2001, 12 et seq.

¹⁸ Cf. ZHANG Yuqing – HUANG Danhan, "The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: A Brief Comparison", in *Unif. L. Rev. / Rev. dr. unif.*, 2000, 429 et seq. – The UNIDROIT Principles are playing an important role also in the current preparation of a new contract law: see the intervention of Mr ZHANG Yuqing at the 83rd session of the Governing Council, in UNIDROIT 2004, C.D. (83) 24, item 7.

¹⁹ Cf. B. IZADI, "Harmonisation of Commercial Law Contract Law in the ECO Region: a Role for the UNIDROIT Principles", in *Unif. L. Rev. / Rev. dr. unif.*, 2001, 301 et seq.

²⁰ Cf. A. ROSETT, "Improving the Uniform Commercial Code", in *Centro di studi e ricerche di diritto comparato e straniero: Saggi, conferenze e seminari* No. 29, Rome (1997).

²¹ OHADA, which was established in 1993, currently has 16 Member States in (mainly) franco-phone Western and Central Africa; Professor Marcel FONTAINE, member of the Working Group for the preparation of the UNIDROIT Principles, has been appointed as the expert responsible for this project which is being financed by the Swiss Government. For further details see *Unif. L. Rev. / Rev. dr. unif.*, 2003, 682.

3. Guideline for contract negotiation

Also in view of the fact that the UNIDROIT Principles are available in virtually all the principal languages of the world,²² they play an increasingly important role in assisting parties in negotiating and drafting cross-border contracts.

Obviously, it is hard to provide precise data in this regard. However, some interesting information has emerged from two inquiries carried out in 1996 by UNIDROIT and in 1999 by the Center for Transnational Law (CENTRAL) among interested professional circles (business persons; lawyers; in house counsel; arbitrators).²³

Two thirds of those who replied to the UNIDROIT questionnaire²⁴ had used the UNIDROIT Principles when negotiating and drafting international commercial contracts. One third of these indicated that the UNIDROIT Principles had permitted them to overcome linguistic barriers. Another third had used them as a guideline for the identification of the main legal issues to be addressed in each case. The remainder had used them as a model in drafting individual contract provisions.

With respect to the last mentioned function, a significant example taken from actual practice is the settlement agreement contained in a recent ICSID award.²⁵ In that agreement, the parties – a U.S. investor and the Government of Ukraine –, in addition to the terms of settlement, set out some fourteen “Principles of interpretation and implementation of the Agreement”, all of which they had taken literally, with only a few minor adaptations, from the UNIDROIT Principles.²⁶

4. Choice by the parties as the law governing their contract

More and more frequently, the UNIDROIT Principles are chosen by the parties as the law governing their contract.

²² For a complete list of the various language versions available see <http://www.unidroit.org/english/publications/principles/main.htm>.

²³ To have an idea of the reliability of the two enquiries, suffice it to say that the enquiry conducted by UNIDROIT involved more than 1000 persons chosen world-wide on the basis of their particular qualifications and/or professional experience, whereas CENTRAL’s enquiry addressed a group three times as large, and that in both enquiries the percentage of replies was very high for an enquiry of this type (20% and 29% of the addressees respectively). – For further details concerning the two enquiries see M.J. BONELL, “The UNIDROIT Principles in Practice: The Experience of the First Two Years”, in *Unif. L. Rev. / Rev. dr. unif.*, 1997, 34 et seq.; K.-P. BERGER et al., “The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration – Background, Procedure and Selected Results”, in K.-P. Berger (ed.), *The Practice of Transnational Law* (2001), 91 et seq.

²⁴ The data collected by CENTRAL are more differentiated, but for present purposes may be considered basically identical to those gathered by UNIDROIT.

²⁵ Cf. *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB(AF)/98/1), in 15 *ICSID Review Foreign Investment Law Journal* (2000), 457 et seq.

²⁶ Specifically from Articles 1.7, 3.3(1), 4.1, 4.2, 4.3, 4.5, 5.3, 5.4(1), 6.2.1, 6.2.2, 6.2.3, 7.1.1, 7.1.4 and 7.1.5(1)(2)(3) dealing, respectively, with the principle of good faith and fair dealing in international trade, initial impossibility, the interpretation of contracts and unilateral statements, the duty to cooperate, the duty to achieve a certain result, hardship and its consequences, the definition of non-performance, the non-performing party’s right to cure and the setting of an additional period of time for performance.

Again, no precise data are available, but in the two above-mentioned inquiries some 25% of those who replied indicated that they had used the UNIDROIT Principles for that purpose on one or several occasions. In more than half of the cases, both parties were Western companies, while the remaining cases concerned East/West and North/South transactions. The kinds of transaction involved were mainly sales and construction contracts, but included also, though to a lesser extent, commercial agency and other distributorship agreements, transport and insurance contracts.

The UNIDROIT Principles have made their entrance even into cyberspace. COVISINT, an electronic marketplace recently set up among DaimlerChrysler, Ford, General Motors, Nissan, Peugeot and Renault for their suppliers, provides in its Membership Terms under the heading "Governing Law; Arbitration":

"The Product Agreement shall be construed in accordance with the UNIDROIT Principles of International Commercial Contracts, with the exception of Section 4.6 [*Contra proferentem* rule] which is excluded due to the difficulty of providing explicit language to cover each possible interpretation that may arise in a multi-national legal structure."²⁷

Encouraged by these developments and with a view to assisting parties wishing to provide that their agreement be governed by the UNIDROIT Principles, the Governing Council of UNIDROIT approved in 1999 two Model Clauses reading, respectively,

"This contract shall be governed by the UNIDROIT Principles [1994], [except as to Articles...]"

and

"This contract shall be governed by the UNIDROIT Principles [1994], [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]"

The two clauses, which in the UNIDROIT Principles 2004 appear in a footnote to the Preamble,²⁸ differ insofar as the first refers to the UNIDROIT Principles as the sole law governing the contract with the consequence that, subject to mandatory provisions applicable in accordance with the relevant rules of private international law,²⁹ in case of gaps in the UNIDROIT Principles the solution should whenever possible be found within the system of the UNIDROIT Principles itself,³⁰ whereas in the second clause the parties choose a particular domestic law to govern all questions not expressly settled by the UNIDROIT Principles. In both cases, however, the parties are well advised to combine their choice-of-law clause with an arbitration agreement,³¹

²⁷ Information kindly provided by Professor CH. RAMBERG.

²⁸ Cf. the footnote to paragraph 2 of the Preamble where, however, reference is no longer made to the 1994 edition but to the 2004 edition of the UNIDROIT Principles. Parties who still prefer to choose the 1994 edition as the law governing their contract are of course free to do so, but in that case they should expressly state it, since in the absence of an express reference to either of the two editions, it is presumed that the latest edition will apply.

²⁹ Cf. Art. 1.4 UNIDROIT Principles 2004.

³⁰ Cf. Art. 1.6 UNIDROIT Principles 2004.

³¹ Cf. Comment 4(a) to the Preamble of the UNIDROIT Principles 2004.

the reason being that, at least up to now, it is only in the context of international commercial arbitration that parties are entitled to choose a national principles and rules as the law governing the substance of the dispute.³²

Choice-of-law clauses of this kind have in fact been included in a number of model contracts recently published by international organisations. This is the case, for instance, of the *Model Contract for the International Commercial Sale of Perishable Goods* adopted in 1999 by the International Trade Centre UNCTAD/WTO, Article 14 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.”

Other examples are the *Model Commercial Agency Contract* and the *Model Distributorship Contract–Sole Importer–Distributor*, published by the International Chamber of Commerce in 2002,³³ and both of which in Article 24.1.A state:

“Any questions relating to this contract which are not expressly or implicitly settled by the provisions contained in this contract shall be governed, in the following order:

- (a) by the principles of law generally recognized in international trade as applicable to international [agency] [distributorship] contracts,
- (b) by the relevant trade usages, and
- (c) by the UNIDROIT Principles of International Commercial Contracts,

with the exclusion ... [of mandatory provisions]”.

Yet similar provisions are also to be found in Article 13.1 of the *Model Occasional Intermediary Contract (Non-Circumvention & Non-Disclosure Agreement)* and in Article 32 of the *Model International Franchising Contract*, published by the International Chamber of Commerce in 2000.³⁴

How widespread the perception is that in cross-border transactions parties may find it convenient to agree on the application of the UNIDROIT Principles, is demonstrated by the fact that such a possibility is even expressly referred to, though only in the context of the provision laying down the principle of freedom of contract, in the *United States Uniform Commercial Code*. Thus Comment 2 to § 1-302, as revised in 2001, states:

“[P]arties may vary the effect of [the Uniform Commercial Code’s] provisions by stating that their relationship will be governed by recognised bodies of rules or principles applicable to commercial transactions. Such bodies of rules or principles may include for

³² Cf., also for further references, BONELL, *An International Restatement ...*, *supra* note 9, 192-213.

³³ Cf. ICC Publications Nos. 644 and 646E, respectively.

³⁴ Cf. ICC Publications Nos. 619 and 557, respectively.

example those that are promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT (see e.g. UNIDROIT Principles of International Commercial Contracts) [...].”³⁵

In its Green Paper on a possible revision of the 1980 *Rome Convention on the Law Applicable to Contractual Obligations*, the Commission of the European Union goes even further. In raising the question whether Article 3 on party autonomy should be amended so as to permit parties also to choose non-state rules as the law governing their contract,³⁶ it openly declares:

“It is common practice in international trade for the parties to refer not to the law of one or other state but directly to the rules or an international convention such as the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods, to the customs of international trade, to the general principles of law, to the *lex mercatoria* or to recent private codifications such as the UNIDROIT Principles of International Commercial Contracts...”³⁷

5. Application in judicial proceedings

The UNIDROIT Principles’ by far most prominent role is the one they play in the context of international dispute resolution. Not only are they often invoked in support of arguments developed in the individual statements of claim or defence, but are more and more frequently being cited in the arbitral awards and court decisions themselves.

(a) *The UNIDROIT Principles applied as the law governing the contract*

Depending on the way in which the UNIDROIT Principles are used, the decisions may be divided into three categories.

First of all there are those – all arbitral awards – in which the UNIDROIT Principles have been applied as the law governing the substance of the dispute.

³⁵ Correspondingly Comment 3 to § 1-301, which deals with the parties’ power to choose the applicable law, states that “[t]his Section does not address the ability of parties to designate non-legal codes such as trade codes as sets of rules governing their transaction. The power of parties to make such a designation as part of their agreement is found in the principles of Section 1-302. That Section, allowing parties broad freedom of contract to structure their relations, is adequate for this purpose [...]. This is also the case with respect to the ability of the parties to designate recognized bodies of rules or principles applicable to commercial transactions. Such bodies of rules or principles may include for example those that are promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT (see e.g. UNIDROIT Principles of International Commercial Contracts).”

³⁶ To be sure, there are those who maintain that already the present version of Art. 3(1), if properly interpreted, would permit the parties to choose private codifications or “restatements” of general contract law, such as the UNIDROIT Principles or the Principles of European Contract Law, as the law governing their contract: see also for further references A.S. HARTKAMP, “Modernisation and Harmonisation of Contract Law”, in *Worldwide Harmonisation of Private Law and Regional Economic Integration, Acts of the Congress to celebrate the 75th Anniversary of the Founding of the International Institute for the Unification of Private law (UNIDROIT)*, *Unif. L. Rev. / Rev. dr. unif.*, 2003, 81 (at 86-87).

³⁷ Cf. *Green Paper on the Conversion of the 1980 Rome Convention on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation* of 14 January 2003 (COM(2002) 654 final), Comment 3.2.3, (p.) 22.

Sometimes this has been expressly requested by the parties either in the contract itself or at the beginning of the arbitration proceedings.³⁸

More often, however, the contracts merely referred to “general principles of law”, “principles of international law”, “*lex mercatoria*” or the like, and the arbitrators applied the UNIDROIT Principles on the assumption that they represented a particularly authoritative expression of similar supra-national or transnational principles and rules of law.³⁹ Significantly enough, on one occasion this approach received express confirmation by a U.S. federal court.⁴⁰

Recently there has been an increasing number of cases in which arbitral tribunals have gone even further and applied the UNIDROIT Principles – either alone or in conjunction with the otherwise applicable law – in the absence of any choice-of-law clause in the contract. In so doing, the arbitrators relied on the relevant statutory provisions or arbitration rules according to which they may – to quote the language used for instance in Article 17 of the ICC Rules of Arbitration – “apply the rules of law which [they] determine to be appropriate” and “in all cases [...] shall take account of [...] the relevant trade usages.”⁴¹

(b) *The UNIDROIT Principles as a means of interpreting and supplementing international uniform law instruments*

In a second group of decisions – including also court decisions –, the UNIDROIT Principles have been referred to as a means of interpreting and supplementing international uniform law instruments.

For obvious reasons, most of these decisions concerned the *United Nations Convention on Contracts for the International Sale of Goods* (CISG), Article 7 of which states that the Convention should be interpreted taking into account its international

³⁸ See e.g. ICC Award No. 8331 of December 1996, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 65; Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 20 January 1997, reported in Bonell, *supra* note 10, 481 *et seq.*; Award of the Arbitration Court of the Lausanne Chamber of Commerce and Industry of 25 January 2002, www.unilex.info; Award (Partial) of the Arbitration Court of the Lausanne Chamber of Commerce and Industry of 17 May 2002, in UNILEX at <http://www.unilex.info>.

³⁹ Of the numerous decisions in this sense see, e.g., ICC Award (partial) No. 7110 of June 1995, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 39; ICC Award No. 7375 of 5 June 1996, in 11 *Measley's International Arbitration Report* 1996, A-1 *et seq.*; ICC Award No. 7365 of 5 May 1997, reported in Bonell, *supra* note 10, 491 *et seq.*; ICC Award No. 9797 of 28.7.2000, in 15 *Measley's International Arbitration Report* 2000, A-1 *et seq.*

⁴⁰ Cf. U.S. District Court, S.D. California, *Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc* (1998), in Bonell, *supra* note 10, 571 *et seq.*

⁴¹ See, most recently, ICC Award No. 9875 of January 1999, in *ICC International Court of Arbitration Bulletin*, 12/2 (2001), 95 *et seq.*; ICC Award No. 10422 of 2001, in *Journal du droit international* 2003, 1142 (with note by E.[MMANUEL J.]OLIVET); Award of 2001 of the Arbitration Institute of the Stockholm Chamber of Commerce, in *Stockholm Arbitration Report* 2002, 59 (with notes by H. KRONKE and I. FERNANDEZ-ARRESTO). For further decisions in this sense, see Bonell, *supra* note 10, 32-33, and UNILEX at <http://www.unilex.info>.

character and the need to promote uniformity (paragraph 1), and that gaps should be filled whenever possible by the general principles underlying it (paragraph 2).

Despite scholarly doubts and reservations as to the possibility of using the UNIDROIT Principles for this purpose,⁴² both judges and arbitrators do not seem too troubled by theoretical justifications when resorting to the UNIDROIT Principles to interpret or supplement CISG.

Indeed, only in a few cases has the application of the individual provisions of the UNIDROIT Principles been justified on the ground that they could be considered an expression of a general principle underlying also CISG, as required by Article 7(2) CISG.⁴³

There are other decisions which, with no further explanation, equate the UNIDROIT Principles in their entirety with the general principles underlying CISG and so justify the application of individual provisions of the UNIDROIT Principles to interpret or supplement CISG.⁴⁴

There are decisions which go even further and apply the UNIDROIT Principles not merely as general principles underlying CISG but because they – as emphatically stated – reflect “a world-wide consensus in most of the basic matters of contract law”.⁴⁵

From using the UNIDROIT Principles in this way it is only a short step to applying them in conjunction with CISG as a sort of *lex mercatoria*, even where CISG is not applicable at all.⁴⁶

⁴² See on this point, also for further references, M.J. BONELL, “The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law”, in ICC/UNIDROIT (eds.), *UNIDROIT Principles of International Commercial Contracts. Reflections on their Use in International Arbitration, Special Supplement – ICC International Court of Arbitration Bulletin*, 2002, 29 et seq.

⁴³ Cf. Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien, Schiedssprüche SCH 4318 and SCH 4366 of 15 June 1994: for an English translation see Bonell, *supra* note 10, 350 et seq. and 375 et seq., respectively. For extracts of the original German version, see *Recht der internationalen Wirtschaft* 1995, 590 et seq., with a note by P. SCHLECHTRIEB (592 et seq.); for a succinct presentation in French, see I. SEIDL-HOHENVELDERN, in *Journal du droit international* (1995), 1055-1056; similarly, though with a more succinct justification, ICC Award No. 8769 of December 1996, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 75; ICC Award No. 8128 of 1995, in *Journal du droit international* (1996), 1024 et seq., at 1027.

⁴⁴ Cf. e.g. ICC Award No. 8817 of December 1997, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 75; ICC Award 8547 of January 1999, in *ICC International Court of Arbitration Bulletin*, 12/2 (2001), 57 et seq., at 59.

⁴⁵ Cf. ICC Award No. 9117 of March 1998, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 96, at 100; Award 229/1996 of 5 June 1997 and Award 302/1997 of 27 July 1999 of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, reported in Bonell, *supra* note 10, 483 et seq. and 578 et seq., respectively.

⁴⁶ Cf. ICC Award 8502 of November 1996, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 72, at 73; ICC Award 9333 of October 1998, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 102, at 104; Court of Appeal of New Zealand, *Hideo Yoshimoto v Canterbury Golf International Limited* (2000), in UNILEX at <http://www.unilex.info>.

Yet the UNIDROIT Principles have occasionally been used to interpret other international instruments as well.

Apart from a decision of the Supreme Court of Venezuela concerning the interpretation of the 1975 *Inter-American Convention on Commercial Arbitration*,⁴⁷ recently the European Court of Justice, faced with the question as to whether a claim based on pre-contractual liability fell within “matters relating to a contract” or within “matters relating to tort, delict or quasi-delict” in the sense of Article 5 no. 1 or Article 5 no. 3 of the 1968 *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, respectively, decided in favour of the latter solution⁴⁸ and in so doing followed the conclusions of the Advocate General who had based his reasoning, among others, on the UNIDROIT Principles.⁴⁹ Such a reference to the UNIDROIT Principles is all the more remarkable since, in view of the regional nature of the 1968 Brussels Convention, one might have expected a reference to the European Principles.⁵⁰

(c) *The UNIDROIT Principles as a means of interpreting and supplementing domestic law*

In a third category of decisions – which by the way represent almost half of the reported cases and again include a number of court decisions –, the UNIDROIT Principles have been used as a means of interpreting and supplementing the otherwise applicable domestic law.⁵¹

This may come as a surprise, since the possibility of using the UNIDROIT Principles for this purpose had not been expressly stated in the Preamble of the 1994 edition.⁵²

⁴⁷ Supreme Court of Venezuela, 9 October 1997, in UNILEX at <http://www.unilex.info>.

⁴⁸ Case 334/00 *Fonderie Officine Meccaniche Tacconi s.p.a. v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, in CJCE 2002, I-7357 et seq. (in French).

⁴⁹ Advocate General M.L.A. Geelhoed based his conclusions on the argument that the duty to act in good faith during the negotiations and the liability for breaking off negotiations in bad faith arises not from any agreement between the parties but is imposed by law. In support of this he referred, with no further explanation, above all to Art. 2.15(2) of the UNIDROIT Principles, according to which “a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party”, and to the Comments to this article explaining at which point in the negotiation process the parties are no longer free to break off negotiations abruptly and without justification (cf. *ibidem*).

⁵⁰ Cf. M.J. BONELL, “Pre-contractual Liability, the Brussels Jurisdiction Convention and ... the UNIDROIT Principles (Case 334/00 *Tacconi v. HWS*)”, in *Mélanges offerts à Marcel Fontaine* (2003), 359 et seq.

⁵¹ Most recently on this particular use of the UNIDROIT Principles, see K.-P. BERGER, “Vom praktischen Nutzen der Rechtsvergleichung. Die international brauchbare Auslegung nationalen Rechts”, in *Festschrift O. Sandrock*, Heidelberg 2000, 49 ss.; F. DESSEMONTET, “Use of the UNIDROIT Principles to Interpret and Supplement Domestic Law”, in ICC/UNIDROIT, *supra* note 42, 39 et seq.

⁵² Paragraph 4 of the Preamble of the 1994 edition, stating that “[the Principles] may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law”, referred to the different and rather rare cases where, because of the special character of the legal sources of the applicable domestic law and/or the cost of accessing them, the UNIDROIT Principles could be used as a substitute for the particular domestic law in question.

More important, the domestic laws governing the individual contracts in the cases in question were far from being only those of less developed countries or countries in transition to a market economy. Indeed, they included *inter alia* the laws of Australia, France, Italy, Switzerland and the State of New York,⁵³ thus confirming that even highly sophisticated legal systems do not always provide clear and/or satisfactory solutions to the special needs of current international commercial transactions, while the UNIDROIT Principles may actually offer such a solution.

(d) *The UNIDROIT Principles and their application in judicial proceedings : some general remarks*

In an attempt to draw some general conclusions concerning the case law that has developed so far with respect to the UNIDROIT Principles, a first point worth mentioning is the very number of decisions that refer in one way or another to the UNIDROIT Principles. UNILEX – the database on international case law and bibliography on CISG and the UNIDROIT Principles set up by the Rome-based Centre for Comparative and Foreign Law Studies⁵⁴ – by now contains 87 decisions of this kind; not only that, but while 69 of them are arbitral awards, 18 are court decisions, thereby contradicting the widespread belief that in view of their non-binding nature the UNIDROIT Principles can only be relevant in the context of arbitration.

Nor would it be appropriate to object that, for instance, of the total number of ICC awards rendered in the period 1996-2000 only 3% referred to the UNIDROIT Principles.⁵⁵ First of all, according to the same source of information, in 80% of the cases in question the parties had expressly chosen a particular domestic law as the law governing their contract, thereby making any reference to the UNIDROIT Principles by the arbitrators unlikely from the outset.⁵⁶ Moreover, in order to have an idea of how other uniform law instruments have been received in practice, suffice it to mention that it took CISG eight years to come into force and another four years to accumulate the first 100 decisions applying it.⁵⁷

Obviously, not all parts of the UNIDROIT Principles have proved to be of equal importance in the context of international dispute resolution. Among those most frequently applied were Article 1.7 on the duty of the parties to act in accordance with good faith and fair dealing in international trade, Chapter 4 on contract interpretation,

⁵³ Cf. recently ICC Award No. 10346 of December 2000, in *ICC International Court of Arbitration Bulletin*, 12/2 (2001), 106 *et seq.*; Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation 6 November 2002, in UNILEX at <http://www.unilex.info>; Supreme Court of The Netherlands of 2 February 2001, *ibidem*; Federal Court of Australia, *GEC Marconi Systems Ltd. V. BHP Information Technology Ltd. And Others* (2001), *ibidem*; for further decisions in this sense see Bonell, *supra* note 10, 33-35 and in UNILEX at <http://www.unilex.info>.

⁵⁴ See <http://www.unilex.info>.

⁵⁵ Thus P. MAYER, "The Role of the UNIDROIT Principles in ICC Arbitration Practice", in *ICC/UNIDROIT*, *supra* note 42, 105 *et seq.* (at 106).

⁵⁶ *Ibidem*, 108.

⁵⁷ See UNILEX at <http://www.unilex.info>.

Chapter 7, Section 3 on contract termination in case of breach, and Chapter 7, Section 4 on damages.⁵⁸

At any rate, none of the provisions contained in the UNIDROIT Principles which had occasionally been criticised as a possible source of abuse⁵⁹ have actually had this effect. This is true, in particular, of Article 3.10 on gross disparity and Articles 6.2.1 – 6.2.3 on hardship: not only did they not induce frivolous litigation but in the relatively rare cases where they were invoked by a party to avoid the contract for original gross disparity or to have it terminated or revised for supervening hardship, they more often than not served to confirm the validity of the contract or to impose performance according to the originally agreed terms.⁶⁰

Finally, it is fair to say that there were cases where the incompleteness of the UNIDROIT Principles became an issue in the sense that, though applicable, they could not provide a solution to the issue in point. This was the case in particular of disputes relating to the authority of an officer of a company⁶¹ and to the extinction of a right because of the expiry of limitation periods.⁶² Fortunately though, with the adoption of the UNIDROIT Principles 2004 covering additional topics, such shortcomings will be considerably reduced.

II. – UNIDROIT PRINCIPLES 2004 : THE INNOVATIONS

1. Additional topics rather than revision

When work on the new edition of the UNIDROIT Principles began back in 1998, it was clear from the outset that the focus was on enlargement rather than revision of the 1994 edition. On the basis of the Governing Council's mandate, the Working Group chose the following topics as priority items: authority of agents, third party rights, set-off, assignment of rights, transfer of obligations and assignment of contracts, limitation periods and waiver. At a later stage it was decided to restrict the topic of waiver to inconsistent behaviour, to add two new paragraphs to the Preamble and to have a new provision on release of rights.

⁵⁸ *Ibidem*.

⁵⁹ See in particular R. HILL, "A Businessman's View of the UNIDROIT Principles", in 13 *Journal of International Arbitration* (1996), 163 et seq.; F. BORTOLOTTI, "The UNIDROIT Principles and the Arbitral Tribunals", in *Unif. L. Rev. / Rev. dr. unif.*, 2000, 141 et seq.

⁶⁰ With respect to Art. 3.10, see ICC Arbitral Award No. 9029 of 3 March 1998, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 88; with respect to *hardship*, see ICC Award No. 8486 of 1996, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 69; ICC Award No. 9479 of February 1999, in *ICC International Court of Arbitration Bulletin*, 12/2 (2001), 60.

⁶¹ Cf. Award 302/1997 of 27 July 1999 of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, reported in Bonell, *supra* note 10, 578.

⁶² Cf. ICC Award No. 7375 of 5 June 1996, in 11 *Measley's International Arbitration Report* 1996, A-1 et seq.; ICC Award No. 7110 of April 1998, in *ICC International Court of Arbitration Bulletin*, 10/2 (1999), 54.

The working method was basically the same as that adopted for the preparation of the 1994 edition of the UNIDROIT Principles. For each chapter, a Rapporteur was appointed⁶³ with the task of preparing first of all a position paper on the basis of which the Working Group would decide the basic structure of the chapter. Subsequently, the Rapporteurs prepared preliminary drafts of both the black letter rules and the comments which were submitted to the Group as a whole and successively revised by the Rapporteurs to take into account the Group's comments and amendments. The UNIDROIT Governing Council was kept regularly informed of the advancement of the project and on a number of occasions made observations on and proposed amendments to the draft chapters.

As to the old chapters, following the decision that it would be inappropriate to proceed to a major revision thereof as their content had generally met with approval and not given rise in practice to any significant difficulties of application, only a few changes of substance were made, limited moreover, with one exception, to the comments.

The only black letter rule which was amended was Article 2.8(2) on the effect of holidays occurring during, or at the expiry of, the period of time fixed by the offeror for acceptance, and which has become a new Article 1.12 dealing with computation of time set by parties in general, with the addition of a new paragraph on the relevant time zone. As to the comments, Comment 3 to Article 1.3 was redrafted so as to take into account the presence in the UNIDROIT Principles 2004 of the new sections on authority of agents, third party rights and assignment of rights, transfer of obligations and assignment of contracts; Comments 1 and 2 to Article 1.7, respectively to include references to additional provisions in the UNIDROIT Principles 2004 constituting an application of the principle of good faith, and to address specifically the doctrine of abuse of rights; Comment 2 to Article 2.15 (now 2.1.15), to include a reference to the case where the parties have expressly agreed on a duty to negotiate in good faith,⁶⁴ finally, Comment 2 to Article 6.2.2, to delete the statement that an alteration amounting to 50% or more of the cost or the value of the performance is likely to constitute hardship.⁶⁵

⁶³ M. FONTAINE for Chapter 9 (Assignment of Rights, Transfer of Obligations and Assignment of Contracts), M. FURMSTON for Chapter 5, Section 2 (Third Party Rights), C. JAUFFRET-SPINOSI for Chapter 8 (Set-off), P. SCHLECHTRIEM for Chapter 10 (Limitation Periods), P. FINN for Art. 1.8 (Inconsistent Behaviour) and A.S. HARTKAMP for Art. 5.1.9 (Release by Agreement). The author of this paper was Rapporteur for Chapter 2, Section 2 (Authority of Agents) and new paragraphs 4 and 6 of the Preamble.

⁶⁴ Also in the light of ICC Award No. 8540 of 4 September 1996, reported in Bonell, *supra* note 10, 44.

⁶⁵ This statement contained in the 1994 edition has been criticised, among others, by H. VAN HOUTTE, "The UNIDROIT Principles of International Commercial Contracts and International Commercial Arbitration: Their Reciprocal Relevance", in Institute of International Business law and Practice (ed.), *The UNIDROIT Principles of International Commercial Contracts: A New Lex Mercatoria?*, ICC Publication No. 490/1 (1995), 181 *et seq.* (at 190).

On the other hand, it was considered necessary to see whether the 1994 edition of the UNIDROIT Principles required additions or amendments to adapt it to the increasingly important practice of electronic contracting.⁶⁶ Ultimately, it turned out that not too many changes were needed for this purpose.⁶⁷ Thus, in Articles 1.2 and 2.18 (now 2.1.18) “writing” was replaced by “a particular form”. In Article 2.8(1) (now 2.1.8) the specific reference to telegrams and letters was deleted so as to cover all means of communications, and a general rule on when the period for acceptance starts to run was adopted which would also be suitable for electronic messages. Moreover, in Chapters 1 and 2 a number of comments and illustrations were amended so as to refer specifically to electronic contracting.⁶⁸

2. The new provisions

The UNIDROIT Principles 2004 consists of the Preamble (1994 version, with the addition of paragraphs 4 and 6 as well as the footnote); Chapter 1: General Provisions (1994 version, with the addition of Articles 1.8 and 1.12); Chapter 2, Section 1: Formation (1994 version) and Section 2: Authority of Agents (new); Chapter 3: Validity (1994 version); Chapter 4: Interpretation (1994 version); Chapter 5, Section 1: Content (1994 version, with the addition of Article 5.1.9) and Section 2: Third Party Rights (new); Chapter 6, Section 1: Performance in General (1994 version) and Section 2: Hardship (1994 version); Chapter 7, Section 1: Non-performance in General (1994 version), Section 2: Right to Performance (1994 version), Section 3: Termination (1994 version) and Section 4: Damages (1994 version); Chapter 8: Set-off (new); Chapter 9, Section 1: Assignment of Rights (new), Section 2: Transfer of Obligations (new) and Section 3: Assignment of Contracts (new); Chapter 10: Limitation Periods (new).

The total number of the articles has risen from 120 to 185.

While this is clearly not the place to proceed to an in-depth analysis of the new provisions contained in the UNIDROIT Principles 2004, the following remarks are intended to highlight their most significant aspects.

(a) Preamble, Paragraphs 4 and 6

The two new paragraphs in the Preamble, stating that the UNIDROIT Principles may be applied when the parties have not chosen any law to govern their contract (paragraph 4) and that they may be used to interpret or supplement domestic law (paragraph 6), were added in the light of the practical experience with the UNIDROIT

⁶⁶ The Rapporteur on this topic was T. UCHIDA.

⁶⁷ In reaching these conclusions, the Working Group benefited greatly from the views expressed by several external experts who had been consulted on the issue: cf. UNIDROIT Principles and Electronic Commerce: Questionnaire prepared by Professors M.J. BONELL and E.A. FARNSWORTH and Replies of Professors A.H. BOSS, M.A. EISENBERG, J. GINSBURG and CH. RAMBERG (UNIDROIT 2002, Study L – Doc. 77 rev).

⁶⁸ In particular Comment 1 to Art. 1.2, Comments 1 and 4 and Illustrations 1 and 2 to Art. 1.9 (now 1.10), Comment 3 and Illustration 1 to Art. 2.1 (now 2.1.1), Comment and Illustration 2 to Art. 2.7 (now 2.1.7) and Comment to Art. 2.8 (now 2.1.8).

Principles over the last years, showing that they are increasingly applied by arbitral tribunals and, though to a lesser extent, by domestic courts for these two purposes not mentioned in the 1994 edition.⁶⁹

(b) *Articles 1.8 on Inconsistent Behaviour and 5.1.9 on Release by Agreement*

The principle of the prohibition of inconsistent behaviour or *venire contra factum proprium* is an application of the general principle of good faith as laid down in Article 1.7. Nevertheless, it was deemed appropriate to have a separate article dealing with it. This was not only because of the considerable importance of the principle in practice but also in order better to define the conditions under which it operates, *i.e.* an understanding caused by one party to the other, the other party's reasonable reliance on it, and the detriment that party would suffer as a consequence of the first party's acting inconsistently.

By virtue of Article 1.8 a right may be created, lost or modified as a direct result of the prohibition therein contained, irrespective of a corresponding intention of the party concerned. By contrast, the case in which a party wishes to release the other party from its obligation(s) is dealt with in Article 5.1.9 which states that such renunciation requires an agreement between the parties even where the first party renounces its right gratuitously.

(c) *Chapter 2, Section 2, on Authority of Agents*

The section deals with the authority of an agent to bind directly its principal in relation to a contract with a third party and is therefore concerned only with the external relations between the principal or the agent on the one hand and the third party on the other, and not with the internal relations between the principal and the agent, which continue to be governed by the otherwise applicable law.⁷⁰

The section consists of ten articles which largely correspond to the 1983 *Geneva Convention on Agency in the International Sale of Goods* (hereinafter: the Geneva Agency Convention).⁷¹ This is true in particular with respect to the effects of the acts of an agent acting within the scope of its authority: like the Geneva Agency Convention, this section rejects the distinction found in many civil law systems between "direct representation" and "indirect representation", depending on whether the agent acts in the principal's name or in its own name,⁷² and instead provides that

⁶⁹ See *supra* notes 29 and 40.

⁷⁰ Cf. Art. 2.2.1(1) and (2) UNIDROIT Principles 2004 and Comment 1 to Art. 2.2.1, pointing out that "[t]he rights and duties as between the principal and the agent are governed by their agreement and the applicable law which, with respect to specific types of agency relationships [...] may provide mandatory rules for the protection of the agent."

⁷¹ The Geneva Agency Convention, based on a draft prepared by UNIDROIT, has been ratified by five States (France, Italy, Mexico, South Africa and The Netherlands) but has not yet entered into force since to this effect at least ten ratifications are required.

⁷² Cf. Art. 2.2.1(1), last sentence, UNIDROIT Principles 2004, literally corresponding to Art. 1(4) of the Geneva Agency Convention.

for the establishment of a direct relationship between principal and third party it is sufficient that the agency is disclosed, *i.e.* the third party knows or ought to have known that the agent is acting on behalf of a principal.⁷³ Particularly in the context of commercial transactions, there are good reasons for this approach: in practice, the distinction between the agent acting (expressly or impliedly) in the name of the principal or (expressly or impliedly) in its own name but still on behalf of a principal, is often rather artificial and at any rate difficult to prove, whereas what really matters from an economic point of view is whether the third party knows or ought to have known that the person with whom it is contracting has the authority to act, and actually acts, not in its own interest but in that of another person.

Yet there are also issues with respect to which this section departs from the Geneva Agency Convention.

First of all, while the Geneva Agency Convention in cases of default by the agent grants also to an undisclosed principal a right of direct action against the third party and *vice versa*,⁷⁴ this section even in such cases sticks to the general rule according to which, where the agency is undisclosed, the contract binds only the agent and the third party.⁷⁵ This solution was justified on the ground that in international commerce, it would often contravene a party's reasonable expectations if, after entering into a contract with a person it believed to be the principal, it was subsequently confronted with another person claiming to be the principal but whose existence had until then been completely unknown to it.⁷⁶ After all, the only case where the third party has a compelling interest in suing the undisclosed principal, *i.e.* when it discovers that the person with whom it was contracting was not the owner of the enterprise but only the owner's agent, is specifically taken care of.⁷⁷

Moreover, contrary to the Geneva Agency Convention which is silent on this matter, this section deals with the case where the agent, when concluding the contract, acts in a situation of conflict of interests with the principal.⁷⁸ However, in

⁷³ Cf. Art. 2.2.3(1) UNIDROIT Principles 2004, corresponding to Art. 12, first part, of the Geneva Agency Convention (but see Art. 2.2.3(2) providing for an exception of the rule in case of so-called commission agents: similarly Art. 12, second part, of the Geneva Agency Convention).

⁷⁴ Art. 13(2) of the Geneva Agency Convention.

⁷⁵ Cf. Art. 2.2.4(1) UNIDROIT Principles 2004.

⁷⁶ Cf. UNIDROIT 1999, Study L-Misc.21, paras. 266-274; UNIDROIT 2000, Study-Misc.22, paras. 866-883. It is worth noting that not even the common lawyers of the Working Group insisted on the retention of the doctrine of undisclosed principal which, though known in their legal systems, they conceded might be inappropriate in the context of international contracting. Similar views were also expressed by the two external experts consulted on this issue: *cf.* UNIDROIT 1999, Study L – Doc. 63/Add.1, containing the comments of Professors D. DE MOTT (“I do not think that deleting this aspect of the doctrine represents a major loss ...”) and F. REYNOLDS (“[I]f the common law doctrine of the undisclosed principal were abandoned, nothing very dramatic would be lost. Like the doctrine of consideration, it tends to be taken much more seriously by civil law comparative lawyers than by common lawyers [...].”).

⁷⁷ Cf. Art. 2.2.4(2) UNIDROIT Principles 2004. For further references on this point see M.J. BONELL, “Agency”, in A. Hartkamp *et al.* (eds.), *Towards a European Civil Code*, 3rd ed. (2004), Kluwer, The Hague.

⁷⁸ Art. 2.2.7 UNIDROIT Principles 2004.

conformity with its focus on the external relationship between the principal or the agent on the one hand and the third party on the other, this section addresses only the impact which the agent's involvement in a conflict of interests may have on that external relationship, leaving issues such as the agent's duty of full disclosure vis-à-vis the principal and the principal's right to damages from the agent to the provisions to be found in other chapters of the UNIDROIT Principles or to the law governing the internal relationship between principal and agent.⁷⁹

Finally, while the Geneva Agency Convention expressly excludes from its scope organs, officers or partners of a corporation, association or partnership altogether,⁸⁰ this section takes a more pragmatic approach in this respect. By stating that it does not govern an agent's authority conferred by law,⁸¹ it makes it clear that only the authority of directors of a corporation governed by special statutory provisions of the *lex societatis* are outside its scope, whereas as long as there is no conflict between the special statutory provisions on directors' authority and the general rules on the authority of agents contained in this section, there is nothing to prevent the latter from being applied instead of the former.⁸²

(d) *Chapter 5, Section 2, on Third Party Rights*

The essence of this section is expressed right at the outset in the opening article and can be summarised as follows. First, the parties' intention to confer a right on a third party need not necessarily be stated expressly but may also be inferred from the terms of the contract and the circumstances of the case.⁸³ Second, and even more important, the parties are not only free to confer a right on a third party or to exclude the creation of any such right but, in the former case, they may subject the third party's right to any condition or limitation, including the possibility of revoking it even after the beneficiary has accepted it.⁸⁴

⁷⁹ See Comment 5 to Art. 2.2.7 referring among others to the general provision on good faith (Art. 1.7) and the chapter on damages (Arts. 7.4.1 *et seq.*) as contained in the UNIDROIT Principles.

⁸⁰ Cf. Art. 4(a) stating that "*For the purpose of this Convention [...] an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity*" (emphasis added).

⁸¹ Cf. Art. 2.2.1(3) UNIDROIT Principles 2004 stating that "[this Section] does not govern an agent's authority conferred by law [...]."

⁸² Cf. Comment 5 to Art. 2.2.1, which by way of example refers to the case where a party dealing with a foreign corporation, unaware of the special statutory provisions governing the authority of that corporation's directors, in order to establish that the corporation is bound by the contract, invokes the rule on apparent authority of agents as contained in Art. 2.2.5(2), provided that the requirements therein laid down are met.

⁸³ Cf. Art. 5.2.1(1) UNIDROIT Principles 2004.

⁸⁴ Cf. Art. 5.2.1(2) UNIDROIT Principles 2004 together with Comment to Art. 5.2.5.

(e) *Chapter 8 on Set-off*

This chapter deals with the situation, quite frequent in commercial practice, where two parties owe each other money or other performances of the same kind and one party intends to set off its obligation against the obligation of the other party, thereby avoiding unnecessary back-and-forth movement of money or goods.

The conditions for such set-off are, in general, that the two obligations are of the same kind and ascertained as to their existence and amount and that performance is due;⁸⁵ only if the two obligations arise from one and the same contract, one party may set off its obligation against the other party's obligation even if the latter is not yet ascertained either as to its existence or amount.⁸⁶

Contrary to those legal systems where set-off operates automatically or only by declaration of the court,⁸⁷ under this chapter the right of set-off is exercised by notice to the other party.⁸⁸ This solution has the merit of providing, on the one hand, legal certainty in international commercial relationships and avoiding, on the other hand, unnecessary recourse to a court.

Once set-off has been declared, the obligations of both parties are discharged as if the two reciprocal payments had been made, whereas if the two obligations differ in their amount, set-off will discharge the obligations up to the amount of the lesser obligation.⁸⁹

As to the time when set-off becomes effective, according to this section set-off operates not retroactively but prospectively, *i.e.* it takes effect at the time of notice and not as soon as the conditions for set-off have been met.⁹⁰ The reason for this solution is, again, to ensure legal certainty: it is easy to know the time of notice whereas it might be much more difficult to determine when the conditions for set-off have been met.

(f) *Chapter 9 on Assignment of Rights, Transfer of Obligations and Assignment of Contracts*

Notwithstanding its increasing importance in modern business and finance, the subject of assignment of rights and of transfer of obligations has long been neglected by the international unification process, and even the two uniform law instruments recently adopted in this field, *i.e.* the 1988 *UNIDROIT Convention on International Factoring* (hereinafter: the *UNIDROIT Factoring Convention*) and the 2001 *United Nations Convention on the Assignment of Receivables in International Trade* (hereinafter: the *U.N. Assignment Convention*) are rather restricted in scope and have not been too

85 Cf. Art. 8.1(1) UNIDROIT Principles 2004.

86 Cf. Art. 8.1(2) UNIDROIT Principles 2004.

87 For an exhaustive comparative analysis, see R. ZIMMERMANN, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002), 32 *et seq.*

88 Cf. Art. 8.3 UNIDROIT Principles 2004.

89 Cf. Art. 8.5(1) and (2) UNIDROIT Principles 2004.

90 Cf. Art. 8.5(3) UNIDROIT Principles 2004.

successful in practice.⁹¹ This chapter, consisting, respectively, of three sections on assignment of rights, transfer of obligations and assignment of contracts, represents the first attempt to lay down a comprehensive set of rules at universal level.⁹²

Section 1 covers all transfers by agreement, including transfers by way of security, from one person (the assignor) to another person (the assignee) of the assignor's right to payment of a monetary sum or other performance from a third person (the obligor).⁹³ It does not, however, include transfers of instruments such as bills of exchange, bills of lading, stocks, bonds, etc. nor transfers of rights in the course of transferring a business, to the extent that these are governed by special rules under the otherwise applicable law.⁹⁴ While expressly admitting partial assignments of monetary rights and, under certain conditions, also of non-monetary rights,⁹⁵ assignment of future rights⁹⁶ and bulk assignments⁹⁷ – all so important in commercial practice –, it lays down the principle that in order for the assignment to be effective between the assignor and the assignee, the obligor's consent is normally not required,⁹⁸ the obligor being entitled only to compensation for any additional costs caused by the assignment.⁹⁹ As to the effects of the assignment vis-à-vis the obligor, the rule is that the obligor, until it receives notice of the assignment, will be discharged by paying the assignor, while it is only after receiving such notice that it has to pay the assignee.¹⁰⁰ An assignment of monetary rights is effective notwithstanding any previous agreement

⁹¹ As of 30 April 2004, the UNIDROIT Factoring Convention had been ratified by 6 States (France, Germany, Hungary, Italy, Latvia and Nigeria) and the U.N. Assignment Convention by 3 States (Luxembourg, Madagascar and the United States of America).

⁹² Cf. M. FONTAINE, "Harmoniser le régime de la transmission des obligations", in *Liber amicorum Jacques Herbots* (2002), 131-146.

⁹³ Cf. Art. 9.1.1 UNIDROIT Principles 2004. By contrast, the scope of the U.N. Assignment Convention is restricted to the assignment of "receivables", i.e. contractual rights to payment of a monetary sum (cf. Art. 2(a)) and that of the UNIDROIT Factoring Convention to assignments of receivables arising out of a sales contract, made pursuant to a factoring contract (cf. Arts. 1(1) and 2(1) first part).

⁹⁴ Cf. Art. 9.1.2 UNIDROIT Principles 2004. Similarly Art. 4(1)(b) and (3) of the U.N. Assignment Convention.

⁹⁵ Cf. Art. 9.1.4(1) and (2) UNIDROIT Principles 2004.

⁹⁶ Cf. Art. 9.1.6 UNIDROIT Principles 2004. Similarly Article 8(1)(b).

⁹⁷ Cf. Art. 9.1.5 UNIDROIT Principles 2004. Similarly Art. 8(1) and (2) of the U.N. Assignment Convention and Art. 5 of the UNIDROIT Factoring Convention.

⁹⁸ Cf. Art. 9.1.6 UNIDROIT Principles 2004. Similarly Art. 8(1)(b) of the U.N. Assignment Convention and Art. 5 of the UNIDROIT Factoring Convention.

⁹⁹ Cf. 9.1.7(1) UNIDROIT Principles 2004 (but see the exception in Art. 9.1.7(2) concerning obligations of an essentially personal character). Similarly Art. 14 of the U.N. Assignment Convention.

¹⁰⁰ Cf. Art. 9.1.8 UNIDROIT Principles 2004 (but see Art. 9.1.3, altogether excluding the possibility of assigning non-monetary rights if the assignment would render the obligation significantly more burdensome for the obligor). More restrictive Art. 15(1) of the U.N. Assignment Convention according to which the assignment may not, without the consent of the debtor, affect the payment terms contained in the original contract.

¹⁰⁰ Cf. Art. 9.1.10 UNIDROIT Principles 2004. Similarly Art. 17(1) and (2) of the U.N. Assignment Convention and Art. 8 of the UNIDROIT Factoring Convention.

to the contrary between the assignor and the obligor:¹⁰¹ the reason for this exception to the principle of *pacta sunt servanda*, to be found also in other international instruments,¹⁰² is to favour the assignment of rights as an efficient means of financing.¹⁰³ Since a right can be assigned without the obligor's consent, the obligor may assert against the assignee all defences that it could assert against the assignor, including the right of set-off available against the assignor up to the time it received notice of the assignment.¹⁰⁴ Finally, whereas it is expressly stated that if the assignor has assigned the same right to two or more successive assignees, preference is given to the assignee who was the first to give notice,¹⁰⁵ the section does not deal with the order of priority between the assignee and subsequent attachment creditors of the assignor or the general creditors in case of the assignor's bankruptcy. The reason for this self-restraint is that since these issues involve property rights, they can hardly be dealt with satisfactorily in a soft law instrument such as the UNIDROIT Principles and are better entirely left to the otherwise applicable law.¹⁰⁶

Section 2 makes it clear first of all that any transfer of obligations requires the consent of the obligee, irrespective of whether the obligation is transferred from the original obligor to the new obligor by an agreement between the two or by an agreement between the obligee and the new obligor.¹⁰⁷ Where the obligor agrees, without the obligee's consent, with another person that the latter will perform the obligation, such an agreement is effective only between these two parties, while the obligee retains its claim against the obligor.¹⁰⁸ The obligee's consent may be given in advance, in which case the transfer of the obligation becomes effective when notice of it is given to the obligee or when the obligee acknowledges it.¹⁰⁹ When consenting to the transfer, the obligee may either fully discharge the original obligor or retain it as

¹⁰¹ Cf. Art. 9.1.9(1) UNIDROIT Principles 2004 (for a different solution for assignments of non-monetary rights see Art. 9.1.9(2)).

¹⁰² Cf. Art. 6(1) of the UNIDROIT Factoring Convention (but see Art. 6(2) according to which the assignment is not effective if the obligor is situated in a State which has made a reservation to this effect). Similarly Art. 9(1) of the U.N. Assignment Convention (which however excludes from this rule assignments of receivable arising out from financial services, construction contracts and contracts for the sale or lease of real property).

¹⁰³ See Comments 1 and 2 to Art. 9.1.9 UNIDROIT Principles 2004. See also Comment 3, stating that the reason for the adoption of a different solution with respect to assignments of non-monetary rights is that they do not have the same close relationship to credit.

¹⁰⁴ Cf. Art. 9.1.13 UNIDROIT Principles 2004. Similarly Art. 18 of the U.N. Assignment Convention.

¹⁰⁵ Cf. Art. 9.1.11 UNIDROIT Principles 2004. Similarly Art. 17(4) of the U.N. Assignment Convention.

¹⁰⁶ Cf. Comment 4 to Art. 9.1.1 UNIDROIT Principles 2004. Significantly enough, even the U.N. Assignment Convention refers on this matter primarily to the applicable domestic law to be determined in accordance with the uniform conflict of law rules laid down in Articles 22 *et seq.*, and proposes uniform substantive rules only as an optional solution contracting States may adopt (see the three alternative approaches proposed in Sections 1 – 2, 3 and 4 of the Annex to the Convention).

¹⁰⁷ Cf. Art. 9.2.1 UNIDROIT Principles 2004.

¹⁰⁸ Cf. Art. 9.2.6 UNIDROIT Principles 2004.

¹⁰⁹ Cf. Art. 9.2.4 UNIDROIT Principles 2004.

an obligor in case the new obligor does not perform properly. In the absence of any indication to this effect by the obligee, the original obligor and the new obligor are jointly and severally liable.¹¹⁰

Section 3, in providing specific rules on the assignment of a contract as a whole, makes it possible for a person (the assignor) wishing to transfer to another person (the assignee) all the rights and obligations arising out of its contract with a third person (the other party) to do so in one transfer without having to assign each right and to transfer each obligation separately, or even without having to specify them individually.¹¹¹ Since the assignment of a contract normally affects not only the assignor's rights but also its obligations vis-à-vis the other party, the consent of the other party is required.¹¹² However, in conformity with the corresponding provisions of Section 2, the other party may give its consent in advance, in which case, for the assignment of the contract to become effective vis-à-vis the other party, it is sufficient that notice of the assignment be given to it.¹¹³ Likewise, the other party may either discharge the assignor or retain the assignor as an obligor in case the assignee does not perform properly, while in the absence of any indication to this effect the assignor and the assignee are jointly and severally liable.¹¹⁴

(g) *Chapter 10 on Limitation Periods*

This chapter addresses all the principal components of any limitation regime, *i.e.* the length of limitation periods, when they begin to run, whether and under which circumstances they may be suspended or begin to run afresh, and whether they may be shortened or extended by parties' agreement, and with respect to each of them provides solutions in conformity with the most innovative trends that have recently emerged in this field world-wide.¹¹⁵ On the contrary, it is fair to say that, while the 1974 *United Nations Convention on the Limitation Period in the International Sale of Goods* (as amended by the 1980 Protocol) (hereinafter the "U.N. Limitation Convention") was of course an obligatory point of reference,¹¹⁶ there are some significant departures from it also in view of the fact that its scope is limited to sales contracts.¹¹⁷

¹¹⁰ Cf. Art. 9.2.5 UNIDROIT Principles 2004.

¹¹¹ Cf. Art. 9.3.1 UNIDROIT Principles 2004.

¹¹² Cf. Art. 9.3.3 UNIDROIT Principles 2004.

¹¹³ Cf. Art. 9.3.4 UNIDROIT Principles 2004.

¹¹⁴ Cf. Art. 9.3.5 UNIDROIT Principles 2004.

¹¹⁵ For further references and a comparative analysis of the current "international trends" in this field, see. ZIMMERMANN, *supra* note 87, 85.

¹¹⁶ The U.N. Limitation Convention is complementary to CISG and provides a comprehensive set of rules on the limitation periods with respect to international sales contracts. Notwithstanding its undoubted intrinsic merits, it has in practice met with rather limited success: so far no more than one third of the Contracting States of CISG have adopted it, among which only a few of the major trading nations, and – more importantly – it has in practice been rarely, if at all, applied by courts or arbitral tribunals.

¹¹⁷ For further references see M.J. BONELL, "Limitation Periods", in Hartkamp *et al*, *supra* note 77.

With respect to the length of the limitation periods, this chapter, like the U.N. Limitation Convention, adopts a so-called two-tier system, *i.e.* provides for a rather short “general” limitation period combined with a “maximum” cut-off period. While both sets of rules provide for a cut-off period of 10 years, the general limitation period is 3 years in this chapter¹¹⁸ and 4 years in the U.N. Limitation Convention.¹¹⁹ The difference may be regretted, but can be explained by the fact that a 3-year period has only recently become prevalent at domestic level, whereas even at the time when the U.N. Limitation Convention was adopted, a 4-year period represented, in the context of sales contracts, a compromise solution between the industrialised countries of the North, which advocated a (much) shorter period, and the less developed countries of the South, which were in favour of a (much) longer period.¹²⁰

Yet there is another, quite significant, difference between the U.N. Limitation Convention and this chapter of the UNIDROIT Principles 2004. While under the former, the general limitation period begins to run when the claim accrues, *i.e.* with respect to claims for breach of contract on the date on which the breach occurs, and with respect to claims for non-conformity of the goods on the date of delivery,¹²¹ the latter basically makes the commencement of the general limitation period dependent on the obligee’s actual or constructive knowledge of its claim.¹²² There are again both historical and substantive reasons for this difference. Indeed, the so-called accrual test not only prevailed in the past, but may still be accepted with respect to sales contracts where non-conformity of the goods can normally be established rather easily upon delivery or shortly thereafter. By contrast, the so-called discoverability test, which recently has become more common, seems definitely more appropriate at least with respect to works and service contracts – the main target of the UNIDROIT Principles – where defects may come to light years after performance.

As to the possible causes of suspension, while both sets of rules provide that the commencement of judicial or arbitral proceedings by the obligee to assert its right against the obligor causes the suspension of the general limitation period for the duration of the proceedings,¹²³ this chapter goes even further by expressly providing for the same effect also in cases of alternative dispute resolution, *i.e.* “[...] proceedings whereby the parties request a third person to assist them in their attempt to reach an

¹¹⁸ Cf. Art. 10.2(1) UNIDROIT Principles 2004.

¹¹⁹ Cf. Art. 8 of the U.N. Limitation Convention.

¹²⁰ Cf. R. LOEWE, *Internationales Kaufrecht* (1989), 199. Interestingly enough, while on that occasion also the United Kingdom called for a 6-year period, the English Law Commission is now proposing at domestic level the adoption of a general limitation period of 3 years: cf. N. ANDREWS, “Reform of Limitation of Actions: The Quest for Sound Policy”, in 57 *Cambridge Law Journal* (1998), 589 *et seq.*

¹²¹ Arts. 9(1) and 10(1)(2) of the U.N. Limitation Convention.

¹²² Art. 10.2(1) UNIDROIT Principles 2004.

¹²³ Cf. Arts. 10.5 and 10.6 UNIDROIT Principles 2004 and Arts. 5 and 6 of the U.N. Limitation Convention.

amicable settlement of their dispute".¹²⁴ Likewise, under both sets of rules the limitation period is suspended whenever the obligee is prevented from pursuing its right by an impediment such as force majeure, death or incapacity,¹²⁵ while acknowledgement by the obligor of the obligee's right or claim causes the renewal of the limitation period, with the consequence that the time which has elapsed before the acknowledgement is no longer taken into account and a new limitation period begins to run.¹²⁶

Where this chapter seems at least at first sight to depart considerably from the U.N. Limitation Convention is with respect to party autonomy. While the U.N. Limitation Convention basically excludes the possibility of any modification of the limitation periods by agreement between the parties,¹²⁷ this chapter grants the parties ample freedom to shorten or extend both the general and the maximum limitation period, the only limits being that the former cannot go below one year and the latter below 4 years or beyond 15 years.¹²⁸ However, on closer examination, the difference between the two sets of rules may not be so great in practice. Indeed, since the U.N. Limitation Convention expressly grants the parties the right to exclude the application of the Convention in its entirety,¹²⁹ if they do so, it is up to the relevant rules of private international law to determine the otherwise applicable domestic law and those rules normally grant the parties the right to make their own choice.¹³⁰

A last remark concerns the effects of the expiration of limitation periods. By providing that "[t]he expiration of the limitation period does not extinguish the right"¹³¹ and that "[f]or the expiration of the limitation period to have effect, the obligor must assert it as a defence",¹³² this chapter expressly rejects not only the procedural approach, traditionally adopted in common law systems, according to which the consequence of the obligee's inactivity over a certain period of time is that the obligee is prevented from pursuing its right in court, but also the "strong" substantive approach, peculiar to some civil law systems, whereby the effect of the

¹²⁴ Cf. Art. 10.7 UNIDROIT Principles 2004. The definition of alternative dispute resolution proceedings is taken almost literally from Art. 1(3) of the 2002 *UNCITRAL Model Law on International Commercial Conciliation*. The same Model Law contains an Art. X ("Suspension of limitation period"), the content of which basically corresponds to Art. 10.7 UNIDROIT Principles 2004.

¹²⁵ Cf. Art. 10.8 UNIDROIT Principles 2004 and Art. 15 of the U.N. Limitation Convention.

¹²⁶ Cf. Art. 10.4 UNIDROIT Principles 2004 and Art. 20(1) of the U.N. Limitation Convention.

¹²⁷ Cf. Art. 22(1) of the U.N. Limitation Convention (for minor exceptions see Art. 22(2)(3)).

¹²⁸ Cf. Art. 10.3 UNIDROIT Principles 2004.

¹²⁹ Cf. Art. 3(2) of the U.N. Limitation Convention.

¹³⁰ Cf. Arts. 3(1) and 10(1)(d) of the 1980 *Rome Convention on the Law Applicable to Contractual Obligations* stating, respectively, "[t]he contract shall be governed by the law chosen by the parties [...]" and "[t]he law applicable to the contract [...] shall govern in particular [...] prescription and limitation of actions". For similar provisions see Arts. 7 and 14(d) of the 1994 *Inter-American Convention on the Law Applicable to International Contracts*.

¹³¹ Cf. Art. 10.9(1) UNIDROIT Principles 2004 (and see also Art. 10.1(1) UNIDROIT Principles 2004 stating that "[t]he exercise of rights governed by these Principles is barred by expiration of a period of time, referred to as 'limitation period' [...]").

¹³² Cf. Art. 10.9(2) UNIDROIT Principles 2004.

lapse of time is the extinction of the obligee's right, and opts for the "weak" substantive approach, presently prevailing at international level, according to which the obligor only has the right to refuse performance.¹³³

III. – UNIDROIT PRINCIPLES 2004 : BEYOND THE BOUNDARIES OF PARTY AUTONOMY ?

While the new chapters and provisions contained in the UNIDROIT Principles 2004 definitely represent a significant enrichment of the 1994 edition, it is fair to say that some of them pose questions as to their consistency with the scope and the very nature of the UNIDROIT Principles.

As to scope, Paragraph 1 of the Preamble states that "[the] Principles set forth general rules for international commercial contracts", and indeed the 1994 edition of the UNIDROIT Principles was restricted to contract law strictly speaking, as evidenced not only by the titles of the various chapters,¹³⁴ but also by the express reference throughout the text to "contract" or "contractual obligation" and to "party" or "parties".¹³⁵

By contrast, the new chapters on set-off, on assignment of rights and transfer of obligations and on limitation periods deal with topics that belong to the law of obligations in general and indeed in their titles and throughout the text they generically refer to "rights" or "obligations", and to "first party" and "other party", to "assignor", "assignee" and "obligor", to "original obligor", "new obligor" and "obligee", and to "obligor" and "obligee", respectively.¹³⁶

While from a purely conceptual point of view, this may cause some problems with respect to the very title of the UNIDROIT Principles 2004,¹³⁷ in practice the change in scope is much less dramatic than might appear at first sight. On the one hand, even the 1994 edition of the UNIDROIT Principles contained a number of provisions the language of which is broad enough so as to be applicable in theory also to obligations of non-contractual origin,¹³⁸ and yet they were generally considered to relate to contractual obligations only.¹³⁹ On the other hand, there can be no doubt that also the new chapters under consideration are intended to apply in practice mainly, if not exclusively, to rights and obligations arising from international commercial contracts: with respect to the chapter on limitation periods this is even

¹³³ For further references, see ZIMMERMANN, *supra* note 87, 69 *et seq.*

¹³⁴ The titles "Formation", "Validity", "Interpretation", "Content", "Performance", "Non-Performance" without any further qualification clearly indicate that they all refer to "International Commercial Contracts", which is the general title of the volume.

¹³⁵ Cf. e.g. Arts. 1.1, 2.1, 3.2, 4.1, 5.1, 6.1.1, 6.2.1, 7.1.1 and 7.3.

¹³⁶ Cf. e.g. Arts. 8.1(1), 9.1.1 and 9.2.1 UNIDROIT Principles 2004.

¹³⁷ Insofar as it still refers to international commercial *contracts* (emphasis added).

¹³⁸ See e.g. Arts. 6.1.3 on partial performance, 6.1.5 on earlier performance, 6.1.7 on payment by cheque or other instruments, 6.1.8 on payments by funds transfer, 6.1.9 on currency of payments, 6.1.10 on currency not specified and 6.1.12 on imputation of payments.

¹³⁹ Cf. e.g. M. FONTAINE, "Content and Performance", in 40 *The American Journal of Comparative Law* (1992), 645 *et seq.*

expressly stated in the opening article,¹⁴⁰ but it is true also of the other chapters, as is amply demonstrated by the fact that in their comments all illustrations refer to cases involving rights and obligations of a contractual nature.

The question as to the compatibility of some of the new chapters with the nature of the UNIDROIT Principles as a soft law instrument is more serious.

According to paragraph 2 of the Preamble, “[the] Principles shall apply when the parties have agreed that their contract be governed by them,” while Article 1.4 adds that “[n]othing in these Principles shall restrict the application of mandatory rules [...] applicable in accordance with the relevant rules of private international law.”

Yet if the UNIDROIT Principles are binding on the parties to a contract only if so agreed by the latter, and even then only within the boundaries of party autonomy, how can the UNIDROIT Principles be expected to deal effectively with tri-partite relationships such as agency and assignment of rights, transfer of obligations and assignment of contracts, or with topics traditionally regulated by mandatory provisions, such as limitation periods?

To begin with – although admittedly this might not occur frequently in practice –, there is nothing to prevent a principal, or an agent acting according to the principal’s instructions, from expressly stipulating with a third party the application of the UNIDROIT Principles 2004 in general or of their provisions on authority of agents in particular,¹⁴¹ and *mutatis mutandis* the same may be said of the three parties involved in an assignment of rights, transfer of obligations or assignment of contracts. Moreover – and the experience with the 1994 edition of the UNIDROIT Principles amply confirms this ¹⁴² –, the UNIDROIT Principles 2004, including their provisions on authority of agents and on assignment of rights, transfer of obligations and assignment of contracts, may be applied in practice even in the absence of an express reference to them by the parties. Thus, in arbitral proceedings the arbitral tribunal may refer to these provisions whenever the parties have agreed that their relationship(s) be governed by “general principles of law”, the “*lex mercatoria*” or the like, or alternatively whenever the arbitral tribunals consider them to be the most appropriate rules of law under the circumstances, while both arbitral tribunals and domestic courts may refer to them as a means of interpreting or supplementing the otherwise applicable domestic law or a particular international uniform law instrument. Last but not least, the provisions on authority of agents and on assignment of rights, transfer of obligations and assignment

¹⁴⁰ Cf. Art. 10.1(1) UNIDROIT Principles 2004 (“The exercise of rights governed by these Principles is barred by the expiration of a period of time [...]”) (emphasis added).

¹⁴¹ The inverse scenario is expressly provided for by Art. 5 of the Geneva Convention, according to which “[t]he principal and the agent acting in accordance with the express or implied instructions of the principal may agree with the third party to exclude the application of this Convention or, subject to Art. 11, to derogate from or vary the effect of any of its provisions.” Similarly Art. 6 of the U.N. Assignment Convention with respect to the role of party autonomy in the context of that Convention.

¹⁴² See text *supra* Section I.2 and I.5(a)(b) and (c).

of contracts may well serve as a model to domestic or international legislators when preparing legislation in this field.

Turning to the chapter on limitation periods, this is certainly not the first case in which the UNIDROIT Principles transcend the boundaries of party autonomy.

The 1994 edition already contained provisions on topics such as fraud, threat, gross disparity, exemption clauses and penalty clauses that, at domestic level, are traditionally governed by mandatory rules, without causing any particular problems. As stated in general terms in the comments to Article 1.4,¹⁴³ in cases where the parties' reference to the UNIDROIT Principles is considered to be an agreement to incorporate them in the contract, their provisions will bind the parties only to the extent that they do not affect the rules of the applicable law from which parties may not contractually derogate, whereas in cases where the UNIDROIT Principles apply as the law governing the contract they may even prevail over the corresponding mandatory provisions of the otherwise applicable domestic law, subject only to the limits of the so-called international public policy.

Exactly the same conclusions may be drawn with respect to the provisions on limitation periods contained in the UNIDROIT Principles 2004. In other words, to the extent that the parties are free to choose the UNIDROIT Principles, including their provisions on limitation periods, as the law governing their contract, these provisions will prevail over any other limitation regime, be it of national or international origin.¹⁴⁴ By contrast, in cases where the UNIDROIT Principles merely apply as contractual terms, also their provisions on limitation periods will bind the parties only to the extent that they do not clash with the corresponding provisions of the applicable law which parties may not contractually modify. Yet even in the latter cases, there are good chances that the UNIDROIT Principles' provisions on limitation periods will apply, given the growing tendency in domestic law to grant parties ample freedom of contract in the field.¹⁴⁵

IV. – UNIDROIT PRINCIPLES 2004 AND THE EUROPEAN PRINCIPLES : SIMILAR RULES FOR THE SAME PURPOSES ?

1. Contents compared

Immediately after the publication of the 1994 edition of the UNIDROIT Principles and even before the European Principles were finalised,¹⁴⁶ the question was raised as to

¹⁴³ See Comments 2 and 3.

¹⁴⁴ With respect to limitation periods the principle of party autonomy is expressly recognised, e.g., by the 1980 *Rome Convention on the Law Applicable to Contractual Obligations* (cf. Arts. 3 and 10(1)(d)) and by the 1994 *Inter-American Convention on the Law Applicable to International Contracts* (cf. Arts. 7 and 14(d)); see also Art. 3(2) of the U.N. Limitation Convention on the parties' right to exclude the application of the Convention altogether.

¹⁴⁵ For further references, see ZIMMERMANN, *supra* note 87, 162 *et seq.*

¹⁴⁶ The European Principles, prepared by the Commission on European Contract Law chaired by O. LANDO, were published in three successive volumes: the first in 1995, edited by O. Lando – H. Beale, containing the chapters on general provisions, terms and performance of the contract, non-performance and

how these two apparently similar instruments can co-exist. Would there be room for both sets of rules or were they bound to compete with each other?

Some commentators made catastrophic forecasts. Parties and arbitrators, it was argued, would be faced with two entirely equivalent, and therefore competing, instruments, and the need to choose between two *leges mercatoriae* was seen as a veritable “nightmare scenario”.¹⁴⁷ Others went even further to anticipate – half jokingly, half seriously – that there would come a time when a special international convention would be needed to lay down rules to solve conflicts between the UNIDROIT Principles, the European Principles and, say, three additional *leges mercatoriae* originating in Asia, two in Africa and seventeen in Latin America.¹⁴⁸

Yet are these fears justified?

On closer examination, this does not seem to be the case.

To begin with, while it is true that the UNIDROIT Principles and the European Principles address basically the same issues¹⁴⁹ and are very similar in terms of formal presentation,¹⁵⁰ the two instruments definitely differ as to their scope. The UNIDROIT Principles relate specifically to international commercial contracts,¹⁵¹ while the European Principles are intended to apply to all kinds of contract, including transactions of a purely domestic nature and those between merchants and consumers.¹⁵² Moreover, while the territorial scope of the UNIDROIT Principles is universal, that of

remedies in general, and particular remedies for non-performance; the second in 2000, edited by O. Lando – H. Beale, containing a revised version of the previous chapters combined with the new chapters on authority of agents, validity, interpretation and contents and effects; the third in 2003, edited by O. Lando – E. Clive – A. Prüm – R. Zimmermann, containing additional chapters on plurality of parties, assignment of claims, substitution of new debtor and transfer of contract, set-off, prescription, illegality, conditions and capitalisation of interest.

¹⁴⁷ See in particular H. RAESCHKE-KESSLER, “Should an Arbitrator in an International Arbitration Procedure apply the UNIDROIT Principles?”, in Institute of International Business Law and Practice, *supra* note 65, 167 et seq. (at 174-175); C. KESSEDJIAN, “Un exercice de rénovation des sources du droit des contrats du commerce international: Les Principes proposés par l’UNIDROIT”, in *Revue critique de droit international privé*, 1995, 641 et seq. (at 669). In less dramatic, but still preoccupied, tones it has been observed that the question as to the precise relationship between the UNIDROIT Principles and the European Principles will be the subject of discussion for many years to come: cf. O. SANDROCK, “Das Privatrecht am Ausgang des 20. Jahrhunderts: Deutschland – Europa – und die Welt”, in *Juristen Zeitung*, 1996, 1 et seq. (at 4).

¹⁴⁸ G. HERRMANN, “The Future of Trade Law Unification”, in *Internationales Handelsrecht*, 2001, 6 et seq. (at 11).

¹⁴⁹ Except the European Principles’ chapters on plurality of parties, illegality, conditions and capitalisation of interest, which have no counterpart in the UNIDROIT Principles 2004.

¹⁵⁰ Cf. M.J. BONELL, “The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?”, in *Unif. L. Rev. / Rev. dr. unif.*, 1996, 229-246.

¹⁵¹ As expressly stated in paragraph 1 of the Preamble (“These Principles set forth general rules for international commercial contracts”) (emphasis added).

¹⁵² Cf. Art. 1.101 of the European Principles (“These Principles are intended to be applied as general rules of contract law in the European Union”) (emphasis added).

the European Principles is formally limited to the member States of the European Union.¹⁵³

In these circumstances it should not be surprising, nor cause too much concern, that the two instruments do not coincide, at least in their entirety, as to their content.

To be sure – taking as a point of reference the UNIDROIT Principles –, about two thirds of the 185 articles contained in the UNIDROIT Principles 2004 have almost literally corresponding provisions in the European Principles. As to the differences, most of these appear to be merely technical,¹⁵⁴ but others are of a “policy” nature, *i.e.* they clearly reflect the different scope of the two instruments.

Some of the differences of policy stem from the universal sphere of application of the UNIDROIT Principles as opposed to the regional vocation of the European Principles.

Thus, while the UNIDROIT Principles expressly state that they may be used as a means of interpreting and supplementing *international* uniform law instruments and as a model for national and *international* legislators (emphasis added),¹⁵⁵ the European Principles do not contain similar provisions and significantly enough state in their Introduction that “[they] will assist both the *organs of the Community* in drafting measures and the courts, arbitrators and legal advisers in applying *Community measures*” (emphasis added).¹⁵⁶ Furthermore, only the UNIDROIT Principles contain a special provision on the relevant time zone¹⁵⁷ and take into account that at a global level there exist currencies that are not freely convertible¹⁵⁸ or countries with no average commercial banking short rate or statutory rate of interest.¹⁵⁹ Finally, the UNIDROIT Principles, but not the European Principles, specifically deal with the cases, particular frequent in East-West and North-South trade relationships, where the validity of single transactions or their performance is subject to public permission requirements,¹⁶⁰ and expressly state that the expiration of the limitation period does

¹⁵³ Cf. Art. 1.101 of the European Principles (“These Principles are intended to be applied as general rules of contract law *in the European Union*”) (emphasis added).

¹⁵⁴ See, e.g., Art. 2.1.18 UNIDROIT Principles 2004 and Art. 2.106 of the European Principles, concerning the effects of so-called no oral modification clauses; Arts. 2.2.1 *et seq.* UNIDROIT Principles 2004 and Arts. 3.102 *et seq.* of the European Principles, concerning the distinction between “disclosed/undisclosed agency” and “direct/indirect representation”, respectively; Art. 7.4.4 UNIDROIT Principles 2004 and Art. 9.503 of the European Principles, concerning the amount of loss for which the non-performing party is liable.

¹⁵⁵ Cf. paragraphs 5 and 7 of the Preamble.

¹⁵⁶ Cf. O. Lando – H. Beale (eds.), *Principles of European Contract Law, Parts I and II* (2000), xxiii.

¹⁵⁷ Cf. Art. 12(3) UNIDROIT Principles 2004.

¹⁵⁸ Cf. Arts. 6.1.9(1) and 8.2 UNIDROIT Principles 2004, as compared to Arts. 7.108 and 13.103 of the European Principles.

¹⁵⁹ Cf. Art. 7.4.9(2) UNIDROIT Principles 2004, as compared to Art. 9.508(1) of the European Principles.

¹⁶⁰ Cf. Arts 6.1.14 – 6.1.17 UNIDROIT Principles 2004. Note that the UNIDROIT Principles do not address the question as to which public permission requirements should be given effect in a particular case, *i.e.* whether, in addition to those of the law of the forum, those of the *lex contractus* and possibly even those of third countries are relevant, and if so to what extent. What the UNIDROIT Principles do is to provide the criteria for determining which party has to apply for the permission, what that party has to do in

not extinguish the right,¹⁶¹ thereby taking into account the strong reservations in this respect among Islamic laws.

Other differences reside in the fact that the UNIDROIT Principles specifically address international contracts, as opposed to the European Principles which cover contracts in general, including purely domestic ones.

Thus, while in the European Principles the parties' duty to act in accordance with good faith and fair dealing is stated in general terms,¹⁶² the corresponding provision in the UNIDROIT Principles refers to "good faith and fair dealing *in international trade*" (emphasis added),¹⁶³ so as to make it clear that under the UNIDROIT Principles the two concepts are not to be construed according to the meaning generally attached to them in the domestic sphere, but in the light of the special conditions of international trade. Likewise, while the European Principles state that the parties are bound by any usage which would be considered generally applicable by persons in the same situation as the parties,¹⁶⁴ the UNIDROIT Principles restrict the applicable usages to those which are "widely known to and regularly observed *in international trade by parties in the particular trade concerned*" (emphasis added).¹⁶⁵

By far the most significant differences in "policy" derive from the fact that the UNIDROIT Principles deal only with contracts between merchants and other professionals, whereas the European Principles apply to consumer transactions as well.

Examples of provisions in the European Principles intended to take into account that in consumer transactions parties typically do not have the same bargaining power and/or negotiating skill are Article 1.102(1) stating that "[p]arties are free to enter into a contract and to determine its content *subject to the requirements of good faith and fair dealing* [...]";¹⁶⁶ Article 1.104(2) according to which a party may rely upon the law of the country of its habitual residence to establish that it would be unreasonable to interpret its conduct as consent to an agreement;¹⁶⁷ Article 2.105 according to which only individually negotiated merger clauses prevent prior statements or agreements between the parties to become part of the written contract;¹⁶⁸ Article 2.104 providing that not individually negotiated contract terms are binding only when the party invoking them has taken appropriate steps to bring them to the other party's attention and that a mere reference to such terms in the contract document is not sufficient for

carrying out its duty and, finally, what are the consequences of the permission being refused or being neither refused nor granted.

¹⁶¹ Cf. Art. 10.9(1) UNIDROIT Principles 2004.

¹⁶² Cf. Art. 1.201 of the European Principles.

¹⁶³ Cf. Art. 1.7 UNIDROIT Principles 2004.

¹⁶⁴ Cf. Art. 1.105 of the European Principles.

¹⁶⁵ Cf. Art. 1.9 UNIDROIT Principles 2004.

¹⁶⁶ Cf. Art. 1.102(1) of the European Principles, as compared to Art. 1.1 UNIDROIT Principles 2004.

¹⁶⁷ Cf. Art. 1.104(2) of the European Principles, with no counterpart in the UNIDROIT Principles.

¹⁶⁸ Cf. Art. 2.105 of the European Principles, as compared to Art. 2.1.17 UNIDROIT Principles 2004.

this purpose;¹⁶⁹ Article 4.110 permitting the avoidance of unfair terms which have not been individually negotiated;¹⁷⁰ Article 4.118(2) restricting the possibility of excluding the remedies for mistake and incorrect information;¹⁷¹ Article 6.101(2) on the effects of information about the quality or use of services or goods given by a professional supplier before the conclusion of the contract;¹⁷² and Article 8.109 on the conditions for the validity of exemption clauses.¹⁷³

By contrast, examples of provisions in the UNIDROIT Principles manifestly tailored to the special needs of commerce are Article 2.1.14 favouring the upholding of contracts with terms deliberately left open;¹⁷⁴ Articles 3.5(1)(a), 3.8 and 3.10(2) on the criteria for determining the relevant mistake and fraud or for adapting the contract in case of gross disparity,¹⁷⁵ Article 5.2.3 on the so-called Himalaya clauses,¹⁷⁶ Article 7.1.4 on the non-performing party's right to cure even after termination of the contract by the aggrieved party,¹⁷⁷ and Article 9.1.9 on the effectiveness of assignments of monetary rights notwithstanding an agreement between the assignor and the obligor prohibiting such assignment.¹⁷⁸

2. No real competition in practice

Yet it is above all the practical experience gained over the last years which amply demonstrates that there is no real competition between the UNIDROIT Principles and the European Principles.

In a recent ICC arbitral award ¹⁷⁹ the arbitral tribunal, in deciding to apply as the law governing the substance of the disputes the UNIDROIT Principles rather than the European Principles, pointed out that it was the UNIDROIT Principles which reflected the *lex mercatoria* or general principles of international contract law, whereas the European Principles constituted an academic work carried out in view of the preparation of a future European Code of Contracts and as such were not well-known to the international business community. Without entering into the merits of the decision in the case at hand – rather surprising indeed since the dispute concerned two European companies and one of the parties had expressly invoked the application of both the

¹⁶⁹ Cf. Art. 2.104(1) and (2) of the European Principles, as compared to Art. 2.1.19(1) UNIDROIT Principles 2004.

¹⁷⁰ Cf. Art. 4.110 of the European Principles, with no counterpart in the UNIDROIT Principles.

¹⁷¹ Cf. Art. 4.118 of the European Principles, as compared to Art. 3.19 UNIDROIT Principles 2004.

¹⁷² Cf. Art. 6.101 of the European Principles, with no counterpart in the UNIDROIT Principles.

¹⁷³ Cf. Art. 8.109 of the European Principles, as compared to Art. 7.16 UNIDROIT Principles 2004.

¹⁷⁴ Cf. Art. 2.1.14 UNIDROIT Principles 2004, with no counterpart in the European Principles.

¹⁷⁵ Cf. Arts. 3.5(1)(a), 3.8 and 3.10(2) UNIDROIT Principles 2004, as compared to Arts. 4.103(1)(a)(ii), 4.107 and 4.109(2) of the European Principles.

¹⁷⁶ Cf. Art. 5.2.3 UNIDROIT Principles 2004, with no counterpart in the European Principles.

¹⁷⁷ Cf. Art. 7.1.4 UNIDROIT Principles 2004, as compared to Art. 8.104 of the European Principles.

¹⁷⁸ Cf. Art. 9.1.9 UNIDROIT Principles 2004, as compared to Art. 11.301 of the European Principles.

¹⁷⁹ The award, not yet published, was rendered in 2001.

UNIDROIT Principles and the European Principles –, the general statement according to which in the context of international commercial contract and arbitration practice the UNIDROIT Principles play a much more important role than the European Principles can hardly be denied.

While no information is available concerning the actual use of the European Principles in international contract negotiation or their choice by the parties as the law governing the contract, there is only one reported decision – admittedly a very authoritative one yet significantly enough relating to a consumer transaction – that refers to the European Principles alone.¹⁸⁰ By contrast, of the 87 or so reported arbitral awards or court decisions referring in one way or another to the UNIDROIT Principles, more than 90% completely ignore the European Principles, while only four arbitral awards and three court decisions also mention the latter, mainly in support of the solution provided by the UNIDROIT Principles.¹⁸¹

Nor can these figures come as too much of a surprise.

Indeed, why should the parties or, in case of disputes, courts or arbitral tribunals outside Europe or even in transactions between a European and a non-European business person refer to the European Principles which by their own admission “are designed primarily for use in the member States of the European Union” and “have regard to the economic and social conditions prevailing in the Member States”,¹⁸² instead of the UNIDROIT Principles which were adopted by an intergovernmental organisation with universal representation such as UNIDROIT, and whose declared objective “is to establish a balanced set of rules designed for use throughout the world”?¹⁸³

Yet even within the European Union – and more than half of the reported cases actually relate to disputes between two European parties – in the context of cross-border business transactions there are good reasons to prefer the UNIDROIT Principles. To begin with, in view of the world-wide acceptance of the UNIDROIT Principles as a particularly authoritative expression of the *lex mercatoria*, why should parties or arbitrators from Europe insist on the application of the European Principles, thereby suggesting the existence of something like a “European *lex mercatoria*”¹⁸⁴ as opposed to a “global” *lex mercatoria* or the *lex mercatoria tout court*? Second, and more important, while it is true that also the UNIDROIT Principles aim at promoting good faith and fair dealing in international trade and at “policing” individual contracts against the most serious cases of unfairness,¹⁸⁵ the European Principles, covering also consumer transactions, go much

¹⁸⁰ Cf. House of Lords, *Director General of Fair Trading v. First National Bank* (2001) UKHL 52. The case basically involved the interpretation of the 1994 *Unfair Terms in Consumer Contracts Regulations* implementing in the U.K. the 1993 EEC *Unfair Contract Terms Directive*.

¹⁸¹ See UNILEX at <http://www.unilex.info>.

¹⁸² Cf. Lando – Beale, *supra* note 156, xxv.

¹⁸³ Cf. Introduction to the 1994 edition of the UNIDROIT Principles.

¹⁸⁴ Cf. Lando – Beale, *supra* note 156, xxiv.

¹⁸⁵ Cf. BONELL, *supra* note 9, 117-128; 162-168.

further and contain a number of provisions intended to protect the so-called weaker party against the mere possibility of abuse by the other party with superior bargaining power,¹⁸⁶ without even – unlike similar provisions at domestic level¹⁸⁷ – expressly restricting the scope of these provisions to consumer transactions or at least excluding their application to cross-border business transactions.

3. Future perspectives

From the outset, the main objective of the European Principles has been to serve as a basis for a future European Code of Contracts.¹⁸⁸ In their joint response to the European Commission's *Communication on European Contract Law* of 11 July 2001, the Commission on European Contract Law and the newly established Study Group on a European Civil Code chaired by Christian VON BAR recommended that the European Principles be incorporated in a more comprehensive "Restatement of European Patrimonial Law", which after a rather short transitional period of application on a voluntary basis, should ultimately be enacted as a binding Code.¹⁸⁹

Also with respect to the UNIDROIT Principles, views have been expressed to convert them into an international convention at some stage in the future.¹⁹⁰ Recently, the idea of promoting the legal status of the UNIDROIT Principles was re-launched in the context of the discussion concerning the preparation of a "Global Commercial Code" to consolidate existing international uniform law instruments (e.g. CISG, the various transport law conventions, as well as INCOTERMS, UCP, etc.).¹⁹¹ Such a Code, it is suggested, might expressly refer to the UNIDROIT Principles as the (uncodified) "general contract law"¹⁹² or even incorporate them so as to become an

¹⁸⁶ See in particular Arts. 1.102(1), 2.104, 2.105(2), 4.110, 4.118 (2) and 6.101(2): for further details cf. text *supra* Section IV.1.

¹⁸⁷ For some references see BONELL, *supra* note 9, 153 et seq.

¹⁸⁸ Cf. Lando –Beale, *supra* note 156, xxiii.

¹⁸⁹ Cf. "Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code", in *European Review of Private Law* 2002, 183-248 (at 241 et seq.). The envisaged "Restatement of European Patrimonial Law" should cover, in addition to the general law of contracts as laid down in the European Principles, the special law of particular contracts (sales; services, including financial services; personal credit securities; and contracts of lease, hire and use of property), the law of extra-contractual obligations (torts, unjust enrichment and *negotiorum gestio*), and credit securities in moveables, transfer of ownership in moveables, and trusts (cf. *Communication*, cit., 213).

¹⁹⁰ In favour, e.g., J.P. BERAUDO, "Les Principes d'UNIDROIT relatifs au droit du commerce international", in *La Semaine Juridique* 1995, I, 3842 (194); A.S. HARTKAMP, "Principles of Contract Law", in A.S. Hartkamp – M.W. Hesselink – E.H. Hondius – C.E. du Perron – J.M.B. Vranken (eds.), *Towards a European Civil Code* (1994), 37 et seq. (at 50).

¹⁹¹ The idea was first launched by G. HERRMANN, "Law, International Commerce and the Formulating Agencies – The Future of Harmonisation and Formulating Agencies: The Role of UNCITRAL" (paper presented at the Schmitthoff Symposium 2000 "Law and Trade in the 21st Century", Centre of Commercial Law Studies, London 1-3 June 2000).

¹⁹² Cf. M.J. BONELL, "Do We Need a Global Commercial Code?", in *Unif. L. Rev. / Rev. dr. unif.*, 2000, 469 et seq.; HUANG Danhan, "The UNIDROIT Principles and their Influence in the Modernisation of Contract law in the People's Republic of China", in *Unif. L. Rev. / Rev. dr. unif.*, 2003, 107 et seq. (at 117).

integral part of it and have the same binding force.¹⁹³

It is hard to say whether, and if so when, such projects and proposals will ever come to be. As of now it seems legitimate, however, to conclude that whatever the future format of the UNIDROIT Principles and the European Principles, contrary to what has been suggested,¹⁹⁴ not only is there no need to merge them into a single set of rules, but it may even be argued that to do so would be entirely inappropriate.

In view of their different scope of application, in actual practice the UNIDROIT Principles and the European Principles have never overlapped so far but have played equally important, though not interchangeable, roles. Nor is there any reason for this to change, even if one or both of them were to become a binding instrument in the future. Indeed, the day on which the European Principles become part of the envisaged European Civil Code, there will still be a need for the UNIDROIT Principles – whether in their present form or as a binding instrument – as the rules governing international commercial contracts, especially, but not necessarily exclusively, those entered into outside Europe or involving non-Europeans. On the other hand, supposing that the UNIDROIT Principles were to be converted into an international convention at some stage in the future, such a convention on account of its universal vocation would necessarily have to be restricted to international commercial contracts, with the consequence that the European Principles would continue to play an important role within the European Union if only with respect to purely domestic transactions and cross-border transactions between merchants and consumers.

CONCLUSIONS

It is in the very nature of any form of restatement of the law that it is an ongoing exercise. As has been observed when launching the project of the various Restatements of law in the United States,

“[t]here will never be a time when the work is done and its results labelled ‘A Complete Restatement of the Law’. The work of restating the law is rather like that of adapting a building to the ever-changing needs of those who dwell therein. Such a task, by the very definition of its object, is continuous.”¹⁹⁵

What is true of the Restatements in the United States is also true of similar private codifications carried out at international level, such as the UNIDROIT Principles.

For this very reason, three years after the publication of the first edition of the UNIDROIT Principles, work was taken up on a new edition.

¹⁹³ O. LANDO, “Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?”, in *Unif. L. Rev. / Rev. dr. unif.*, 2003, 123 et seq. (at 132-133).

¹⁹⁴ See in particular RAESCHKE-KESSLER, *supra* note 147, 175.

¹⁹⁵ Cf. *Report of the Committee on the Establishment of a Permanent Organisation for the Improvement of the Law Proposing the Establishment of an American Law Institute* (reproduced in *The American Law Institute 50th Anniversary (1973)*, 3 et seq. (at 45)).

In the light of the favourable reception of the first edition of the UNIDROIT Principles, the new edition was conceived primarily as an enlargement rather than a revision. Five additional Chapters have been added, while the only changes of substance made to the 1994 edition were – apart from two paragraphs in the Preamble and a further three new provisions in Chapters 1 and 2 – those necessary to adapt the Principles to the needs of electronic contracting.

Experience in the years to come will show whether also in the future the focus will be on additional topics or on improvement of the current text. By monitoring the reception of the UNIDROIT Principles in practice, especially how they are used by contracting parties and applied by judges and arbitrators, it will be possible to provide a decisive answer in this respect. The only thing that it is clear as of now is that by its very nature, the project is an on-going project so that, as pointed out by the Governing Council when adopting the UNIDROIT Principles 2004, it should remain as an on-going item on the UNIDROIT Work Programme.¹⁹⁶



LES PRINCIPES D'UNIDROIT 2004 – LA NOUVELLE EDITION DES PRINCIPES RELATIFS AUX CONTRATS DU COMMERCE INTERNATIONAL, ADOPTEE PAR L'INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE (Résumé)

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Il ne fait pas de doute que les Principes d'UNIDROIT de 1994 ont rencontré un succès dépassant les attentes les plus optimistes : dans la doctrine, auprès des législateurs nationaux (comme en témoigne le nombre de législations internes qui s'en sont directement inspirées), dans la pratique des affaires, et dans le règlement des différends.

Dès 1997, le Conseil de Direction d'UNIDROIT décidait de poursuivre les travaux en vue de doter l'instrument de nouvelles sections – et le cas échéant de revoir les dispositions de 1994 – et convoquait à cet effet un nouveau groupe de travail, composé de nombreux membres qui avaient participé au groupe antérieur et présidé également par l'auteur de cet article. Les Principes d'UNIDROIT 2004 furent adoptés à la 83^{ème} session du Conseil de Direction qui s'est tenue du 19 au 21 avril 2004.

La version de 2004 complète plus qu'elle ne modifie la version de 1994 (seul l'article 2.8.2 ayant été révisé, ainsi que certains commentaires). Des dispositions nouvelles ont été introduites portant sur le champ d'application des Principes (Préambule, paras 4 et 6), l'interdiction de se contredire (art. 1.8), la renonciation par convention (art. 5.1.9), le pouvoir de représentation (chapitre 2, section 2), les droits des tiers (chapitre 5, section 2) ; la compensation (chapitre 8), la cession de dettes, de créances et le transfert d'obligations (chapitre 9), et les délais de prescription (chapitre 10). Le nombre total d'articles est passé de 120 à 185.

¹⁹⁶ Cf. UNIDROIT 2004, C.D. (83) 24.

Observant qu'au regard des matières traitées par l'édition de 1994, certains des nouveaux chapitres pourraient certes sembler relever davantage du droit des obligations en général que strictement du droit des contrats (ainsi la prescription), l'auteur souligne que c'est cependant dans la sphère contractuelle que ces dispositions sont ici destinées à trouver application. Par ailleurs les nouvelles dispositions, dont certaines couvrent des domaines traditionnellement régis par des règles impératives de droit interne, ne posent-elles pas de façon exacerbée le problème de la compatibilité avec la nature de soft law de l'instrument, rendu applicable par le jeu de la volonté des parties ? La réponse en définitive n'est pas différente de celle qui pouvait être donnée à l'application du chapitre sur la validité du contrat par exemple. Les Principes seront appliqués soit intégralement comme loi du contrat – lorsque cela est reconnu comme possible –, soit dans les limites des règles impératives tel que le prévoit l'article 1.4.

Enfin, l'auteur revient sur les relations entre les Principes d'UNIDROIT et les Principes du droit européen du contrat, soulignant la différence de leur champ d'application, et le caractère plus académique reconnu à ces derniers, chacun de ces deux instruments trouvant sa place et son utilité propres dans l'ordre juridique.

En ce qui concerne l'avenir des Principes d'UNIDROIT, l'auteur rappelle différentes idées qui ont été exprimées : base pour une éventuelle convention internationale, ou pour l'élaboration d'un "Code de commerce global" qui fédérerait les instruments de droit uniforme existants Quoiqu'il en soit, et prenant inspiration de la vocation reconnue aux Restatements dont les Principes empruntent la philosophie, l'auteur conclut que l'élaboration des Principes d'UNIDROIT est une tâche pérenne, ce qui a été entériné par le Conseil de Direction d'UNIDROIT qui a recommandé qu'ils continuent de figurer au Programme de travail de l'Institut.

