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The CISG and the Unidroit Principles of International Commercial Contracts: Two Complementary Instruments

Michael Joachim Bonell*

I. Introduction

Without a doubt, both the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) and the Unidroit Principles represent landmarks in the process of international unification of law. The CISG, unanimously adopted in 1980 by a diplomatic Conference with the participation of representatives from 62 States and 8 international organisations, has been ratified by 70 countries from the five continents, including almost all the major trading nations.① The Unidroit Principles of International Commercial Contracts (hereinafter: Unidroit Principles), first published in 1994 and now available in a second enlarged edition of 2004, are likewise a world-wide success: translated into over two dozen languages,② they are not only the subject of a substantial body of legal writings, but are increasingly being used in international contract practice and dispute resolution.③ Moreover, the Unidroit Principles have been formally endorsed by the United Nations Commission for International Trade Law (UNCITRAL),

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* Chairman of the Working Group for the preparation of the UNIDROIT Principles.

① The only significant exceptions are India, Japan and the United Kingdom, but there are good chances that Japan will soon accede to the CISG.

② Of the 2004 edition of the Unidroit Principles there exist two Chinese versions: one edited by Mr. Zhang Yuqing, Member of the Unidroit Governing Council (ISBN 7-80181-324-3), the other edited by the Treaty and Law Department of the Ministry of Commerce (MOFCOM) (ISBN 7-5036-5166-0).

③ As of December 2007 the total number of decisions referring in one way or another to the Unidroit Principles reported in Unilex—the database collecting international case law and bibliography on both the CISG and the Unidroit Principles—are 154: *see* http: //www. unilex. info.

which at its 40th Session in 2007 unanimously recommended their use as set forth in the Preamble. ①

The present paper will focus on the relationship between the CISG and the Unidroit Principles in the context of international sales contracts. After a brief description of the nature and content of the two instruments (I), I shall demonstrate that, far from being competitors, they may indeed complement one another (II). This is true not only in cases where the CISG is not applicable (II. 1), but also with respect to sales contracts governed by the CISG (II. 2): in this latter case the Unidroit Principles may be used to interpret and supplement the CISG either because expressly referred to by the parties or even in the absence of any such reference. In discussing the various items, particular attention will be given to the growing body of case law.

II. The CISG and the Unidroit Principles: International Uniform Sales Law *vs* "Restatement" of General Contract Law

When back in 1929 the German jurist Ernst Rabel launched the idea of preparing uniform rules on international sales contracts, it was taken for granted that the envisaged rules were to be prepared in the form of a binding instrument. Even after the poor reception of the two 1964 Hague Sales Conventions, when in 1968 UNCITRAL decided to make a fresh start, the legislative option was the only conceivable one. ②

Yet the option in favour of uniform legislation inevitably restricted the drafters' room for manoeuvre. Due to the differences in legal tradition and at times, even more significantly, in the social and economic structure prevalent in the States participating in the negotiations, ③ some issues had to be excluded at the outset from the scope of the CISG, while with respect to a number of other items the conflicting views could only be overcome by compromise solutions leaving matters more or less undecided.

Thus, some categories of sale—among which are also transactions of considerable

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① *See* Report of the United Nations Commission on International Trade Law on the work of its fortieth session, Vienna, 25 June—12 July 2007 (A/62/17 Part I), *paras.* 209-213.

② For a discussion of some of the reasons for this preference, *see* M. J. Bonell, *An International Restatement of Contract Law*, 3rd ed., Transnational Publishers Inc., 2005, pp. 75-180.

③ For further details *see* M. J. Bonell, CISG, European Contract Law and the Development of Contract law Worldwide, The American Journal of Comparative Law, Vol. 56, 2007, p. 388 et seq.

importance in international trade practice, such as sales of shares and other securities, of negotiable instruments and money, of ships and aircraft—are expressly excluded from its scope. ① But also in regard to ordinary sales contracts a number of important issues have not been taken into consideration. The CISG itself expressly mentions the validity of the contract, the effect of the contract on the property in the goods② and the liability of the seller for death or personal injury caused by the goods to the buyer or any other person. ③ In addition, one may recall, for instance, the conclusion of the contract through an agent, the problems arising from the use by one or both of the parties of standard terms, or the impact which the different kinds of State control over the import and/or export of certain goods or the exchange of currency may have on the contract of sale as such or on the performance of any of its obligations.

Of the provisions laying down not too convincing compromise solutions between conflicting views some openly refer the definite answer to the applicable domestic law. ④ Others use the technique of a main rule immediately followed by an equally broad exception thereby leaving the question open as to which of the two alternatives will ultimately prevail in each single case. ⑤ Others still hide the lack of any real consensus by an extremely vague and ambiguous language. ⑥

The Unidroit Principles—which in their 2004 edition consist of a Preamble and 185 articles each of which accompanied by comments and illustrations—represent a totally new approach to international trade law. First of all, on account of their scope which, contrary to that of all existing international conventions including CISG, is not restricted to a

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① Art. 2 CISG.

② Art. 4 CISG.

③ Art. 5 CISG.

④ *Cf.*, *e. g.*, Arts. 12 and 96 CISG with respect to the formal requirements of the contract; Art. 28 CISG concerning the possibility of obtaining a judgment for specific performance; Art. 55 CISG with respect to the possibility of a sales contract being validly concluded without an express or implied determination of the price.

⑤ *Cf. e. g.*, Art. 16 CISG dealing with the revocability of the offer; Arts. 39 (1), 43 (1) and 44 CISG as to the notice requirement in case of delivery of non-conforming goods or goods which are not free from third parties' rights; Art. 68 CISG concerning the transfer of risk where the goods are sold in transit.

⑥ *Cf. e. g.*, the reference to good faith in Art. 7 (1) CISG; the definition of "fundamental breach of contract" in Art. 25 CISG; Art. 78 CISG concerning the right to interest on sums in arrears.

particular kind of transaction but covers the general part of contract law. ① Moreover, and more importantly, the Unidroit Principles—prepared by a group of experts representing all the major legal systems and/or geo-political regions of the world② which, though acting under the supervision of a prestigious Institute such as UNIDROIT, lacked any legislative power—do not aim to unify domestic law by means of special legislation, but merely to "re-state" existing international contract law. Finally, the decisive criterion in their preparation was not just which rule had been adopted by the majority of countries ("common core approach"), but also which of the rules under consideration had the most persuasive value and/or appeared to be particularly well suited for cross-border transactions ("better rule approach").

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

Examples of provisions of the Unidroit Principles which, though addressing questions falling within the scope of the CISG, have no counterpart in the CISG are, in Chapter 1, the general provision on good faith and inconsistent behaviour;③ in the chapter on formation, the provisions on the manner in which a contract may be concluded, on writings in confirmation, on the case where the parties make the conclusion of their contract dependent upon reaching an agreement on specific matters or in a specific form, on contracts with terms deliberately left open, on negotiations in bad faith, on the duty of confidentiality, on merger clauses, on contracting on the basis of standard terms, on surprising provisions in standard terms, on the conflict between standard terms and individually negotiated terms and on the battle of forms;④ in the chapter on interpretation, among others, the *contra proferentem* rule, the provisions on linguistic discrepancies and

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① The People's Republic of China was represented by Professors Huang Danhan and Zhang Yuquing.

② On the possibility of the Unidroit Principles playing the role of general contract law otherwise allotted to a national law, *see* P. A. Karrer, *Internationalization of Civil Procedure—Beyond the IBA Rules of Evidence*, in N. P. Vogt (ed.), Reflections on the International Practice of Law, Liber Amicorum for the 35th Anniversary of Bär & Karrer, 2004, p. 129; M. Bridge, *The International Sale of Goods: Law and Practice*, 2nd ed., 2007, Cambridge University Press, pp. 528-529.

③ *Cf.* Unidroit Principles 2004, Arts. 1.7 and 1.8, respectively.

④ *Cf.* Unidroit Principles 2004, Arts. 2.1.1, 2.1.12, 2.1.13, 2.1.14, 2.1.15, 2.1.16, 2.1.17, 2.1.19, 2.1.20, 2.1.21 and 2.1.22, respectively.

on supplying an omitted term;① tin the chapter on content, the provision on implied obligations②; in the chapter on performance those on payment by cheque or other instruments, on payment by funds transfer, on currency of payment, on the determination of the currency of payment where it is not indicated in the contract, on the costs of performance, on the imputation of payments, on public permission requirements and on hardship③; finally, in the chapter on non-performance, the provisions on the right to performance, on exemption clauses, on the case where the aggrieved party contributes to the harm, on interest rates and on agreed payment for non-performance. ④

As to topics dealt with in the Unidroit Principles which are not covered by the CISG but which nevertheless may become relevant also in the context of international sales contracts, suffice it to mention the authority of agents,⑤ the right to avoid a contract for mistake, fraud, threat and gross disparity,⑥ third party rights, ⑦ set-off,⑧ assignment of rights, transfer of obligations and assignment of contracts⑨ and limitation periods. ⑩

III. The CISG and the Unidroit Principles—How They May Complement Each Other

A. International Sales Contracts Not Governed by the CISG

Notwithstanding the world-wide acceptance of the CISG there might still be sales contracts not governed by the CISG. Apart from those transactions which according to Arts. 2 and 3 are outside the Convention's scope *ratione materiae* or where the Convention

① *Cf.* Unidroit Principles 2004, Arts. 4. 6, 4. 7 and 4. 8, respectively.

② *Cf.* Unidroit Principles 2004, Art. 5. 1. 2.

③ *Cf.* Unidroit Principles 2004, Arts. 6. 1. 7-6. 1. 9, 6. 1. 10, 6. 1. 11, 6. 1. 12, 6. 1. 14-6. 1. 17 and 6. 2. 1-6. 2. 3, respectively.

④ *Cf.* Unidroit Principles 2004, Arts. 7. 2. 1-7. 2. 5, 7. 1. 6, 7. 4. 7, 7. 4. 9 and 7. 4. 13, respectively.

⑤ *Cf.* Unidroit Principles 2004, Chapter 2, Section 2.

⑥ *Cf.* Unidroit Principles 2004, Chapter 3.

⑦ *Cf.* Unidroit Principles 2004, Chapter 5, Section 2.

⑧ *Cf.* Unidroit Principles 2004, Chapter 8.

⑨ *Cf.* Unidroit Principles 2004, Chapter 9, Sections 1, 2 and 3.

⑩ *Cf.* Unidroit Principles 2004, Chapter 10.

has been expressly or implicitly excluded by the parties,① according to Art. 1 CISG this is the case whenever at least one of the parties is not situated in a Contracting State or the rules of private international law of the forum lead to the application of the law of a non-Contracting State. In all such cases the Unidroit Principles may be applied as an alternative set of internationally uniform rules, either because of an express choice to this effect by the parties themselves or because the contract is governed by "general principles of law", "lex mercatoria" or the like, and the Unidroit Principles are considered to be a particularly authoritative expression thereof.

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

In a few cases the parties themselves had expressly chosen the Unidroit Principles as the law governing their contract. In one case a sales contract entered into between a Hong Kong export company and a Russian trade organisation did not contain any choice of law clause, but when the dispute arose the parties agreed that the Arbitral Tribunal should apply the Unidroit Principles to resolve any questions not expressly regulated in the contract. ② In another case a contract between a Mexican farmer and a U. S. distributor contained an arbitration clause in which the parties expressly referred to the Unidroit Principles as the law governing the substance of any potential disputes. A dispute arose when the Mexican farmer failed to deliver the goods invoking bad weather as an excuse, and the Arbitral Tribunal decided the dispute on the basis of the provisions on hardship and force majeure of the Unidroit Principles. ③

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

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① On the manifold reasons—well founded or not—which in practice may still induce parties to exclude the application of CISG, *see also for further reference* F. De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary*, in F. Ferrari (ed.), Quo Vadis CISG ?, Sellier European Law Publishers, 2005, p. 25 *et seq.*; M. Reimann, *The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care*, in Rabels Zeitschrift 2007, p. 115 et seq.

② Award No. 116 of 20 January 1997 of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (for an abstract *see* www. unilex. info).

③ Award of 30 November 2006 of the Centro de Arbitraje de México (for an abstract *see* www. unilex. info).

One is the ICC Award No. 8502① concerning a contract for the supply of rice entered into between a Vietnamese exporter and French and Dutch buyers. The contract did not contain any choice of law clause. The Arbitral Tribunal decided to base its award on "trade usages and generally accepted principles of international trade" and to refer "in particular to the 1980 Vienna Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) or to the Principles of International Commercial Contracts enacted by Unidroit, *as evidencing admitted practices under international trade law*" (emphasis added). The individual provisions it then referred to were Arts. 76 CISG and 7. 4. 6 (*Proof of harm by current price*) of the Unidroit Principles.

Another example is the award rendered by an *ad hoc* Arbitral Tribunal in Buenos Aires in 1997. ② The case concerned a contract for the sale of shares between shareholders of an Argentine company and a Chilean company. The contract did not contain a choice of law clause and the parties authorized the Arbitral Tribunal to act as *amiables compositeurs*. Notwithstanding the fact that both parties had based their claims on specific provisions of Argentine law, the Tribunal decided to apply the Unidroit Principles. The Tribunal held that the Unidroit Principles constituted "*usages of international trade reflecting the solutions of different legal systems and of international contract practice*" (emphasis added), and that as such, according to Art. 28 (4) of the UNCITRAL Model Law on International Commercial Arbitration, they should prevail over any domestic law. ③ The individual provisions of the Unidroit Principles applied to the merits of the case were Arts. 3. 12 (*Confirmation*), 3. 14 (*Notice of avoidance*) and 4. 6 (*Contra proferentem rule*).

Yet another example is the award of the Arbitration Institute of the Stockholm Chamber of Commerce of 2001. ④ Two Chinese companies and a European company had entered ionto an agreement on technology exchange and technical cooperation; the contract was silent as to the applicable law; according to the Arbitral Tribunal the parties had deliberately refrained from agreeing on the law governing their contract which was otherwise very carefully drafted; the Arbitral Tribunal held that the dispute was to be

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① ICC Award No. 8502 of 1996, excerpts in ICC International Court of Arbitration Bulletin, Vol. 10, No. 2, 1999, pp. 72-74.

② Award of 10 December 1997, in Uniform Law Review, 1998, p. 178.

③ Art. 28 (4) provides that "in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction".

④ For an abstract *see* www. unilex. info.

decided "on the basis of such rules of law that have found their way into international codifications or the like that enjoy a widespread recognition among countries involved in international trade" and ultimately applied the Unidroit Principles which it concluded had "wide recognition and set out principles of commercial relations in most if not all developed countries"; only where the Unidroit Principles didi not provide a solution should Swedish law apply.

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

A first example is provided by the ICC Partial Awards in Case No. 7110. ① The dispute concerned contracts for the supply of equipment concluded between an English company and a Middle Eastern governmental agency. While most of the contracts were silent as to the applicable law, some did refer to settlement according to "rules of natural justice". In a first partial award dealing with the applicable law, the Arbitral Tribunal, by majority, held that the parties had intended to exclude the application of any specific domestic law and to have their contracts governed by general principles and rules which enjoy wide international consensus. According to the Arbitral Tribunal such "*general rules and principles ... are primarily reflected by the Unidroit Principles*" (emphasis added), and in the other partial awards dealing with substantive issues it referred to Arts. 1.7 (*Good faith and fair dealing*), 2.4 (*Revocation of offer*), 2.14 (*Contracts with terms deliberately left open*), 2.18 (*Written modification clause*), 7.1.3 (*Withholding performance*) and 7.4.8 (*Mitigation of harm*) of the Unidroit Principles, considering them all to be expressions of generally accepted principles of law.

Other examples are ICC Awards No. 7375 and No. 8261 relating to contracts for the supply of goods between a United States company and a Middle Eastern governmental agency,② and between an Italian company and another Middle Eastern governmental

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① For abstracts of the three partial awards rendered in 1995, 1998 and 1999 respectively, *see* ICC International Court of Arbitration Bulletin, Vol. 10, No. 2, 1999, pp. 39-57.

② ICC Award No. 7375 of 5 June 1996; *cf.* 11 Measley's International Arbitration Report 1996, A-1 *et seq.*

agency,① respectively. In both cases the contracts were silent as to the applicable law. The Arbitral Tribunal, assuming that neither party was prepared to accept the other's domestic law, decided in the first case to apply "*those general principles and rules of law applicable to international contractual obligations ..., including ... the Unidroit Principles, as far as they can be considered to reflect generally accepted principles and rules*" (emphasis added), while in the second it declared that it would base its decision on the "terms of the contract, supplemented by general principles of trade as embodied in the *lex mercatoria*" and eventually applied some individual provisions of the Unidroit Principles with no further explanation.

Finally mention may be made of ICC Award No. 7365.② The case concerned contracts for the delivery of sophisticated military equipment, entered into in 1977 between a U. S. corporation and the Iranian Air Force. The contracts contained a choice-of-law clause in favour of the law of the Government of Iran in effect at the date of the contracts, but when the dispute arose the parties eventually agreed to the supplementary application of "general principles of international law and trade usages". The Arbitral Tribunal declared that as to the contents of such general principles and rules it would be guided by the Unidroit Principles and indeed, when deciding the merits of the case, on a number of occasions based its solutions, exclusively or in conjunction with similar rules to be found in Iranian law, on individual provisions of the Unidroit Principles such as Arts. 5. 1-5. 2 on express and implied obligations, 6. 2. 3 (4) (*Effects of hardship*), 7. 3. 6 (*Restitution*) and 7. 4. 9 (*Interest for failure to pay money*).

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

① ICC Award No. 8261 of 27 September 1996 (for an abstract *see* www. unilex. info).

② ICC Award No. 7365 of 5 May 1997 (for an abstract *see* www. unilex. info).

resort even in the absence of an express authorisation by the parties. ①

B. International Sales Contracts Governed by the CISG

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

It is true that according to Art. 6 CISG parties may exclude the Convention wholly or in part. While there may be cases where parties choose to replace individual articles of the CISG by the corresponding provisions of the Unidroit Principles which they consider to be more appropriate, an exclusion of the CISG in its entirety in favour of the Unidroit Principles is, at least for the time being, rather unlikely. As a matter of fact, parties do quite often exclude the CISG, but this is generally because they are afraid of the uncertainties surrounding the application of any novel instrument. In such cases, they will prefer the safety of domestic law rather than venture into the application of something as novel as the Unidroit Principles, whatever their intrinsic merits.

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

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

According to Art. 7 (1) CISG, "in the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application ...", while Art. 7 (2) states that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based ...". ②

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

Opinions among legal scholars are divided. On the one hand there are those who

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① *Cf. the Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2nd 1168; for a comment *see* M. J. Bonell, *A Significant Recognition of the Unidroit Principles by an United States Court*, Uniform Law Review, 1999, Vol. 15, pp. 651-663.

② Only in the absence of such general principles does the same article permit as a last resort reference to the domestic law applicable by virtue of the rules of private international law.

categorically deny that the CISG can be interpreted on the basis of the Unidroit Principles, invoking the rather formalistic and not necessarily convincing argument that as the latter were adopted later in time than the former they cannot be of any relevance. ① On the other hand there are those who, perhaps too enthusiastically, justify the use of the Unidroit Principles as a means of interpreting or supplementing the CISG on the mere ground that they are "general principles of international commercial contracts". ② The correct solution would appear to lie between these two extreme positions. In other words, there can be little doubt that in general the Unidroit Principles may well be used to interpret or supplement even pre-existing international instruments such as the CISG; on the other hand in order for individual provisions to be used to fill gaps in the CISG, they must be the expression of general principles underlying also the CISG. ③

Among the provisions of the Unidroit Principles which might serve to clarify rather ambiguous provisions of the CISG, reference has been made to Art. 7. 1. 4 (2), which states that the right to cure is not precluded by notice of termination, in connection with Art. 48 CISG; Art. 7. 1. 7 (4), which expressly indicates the remedies not affected by the occurrence of an impediment preventing a party from performance, in connection with Art. 79 (5) CISG, and Art. 7. 3. 1 (2), which specifies the factors to be taken into account for the determination of whether or not there has been a fundamental breach of contract, in connection with Art. 25 CISG. ④

As to the provision of the Unidroit Principles to be used to fill veritable gaps in the CISG, reference has been made to Arts. 2. 15 and 2. 16 on negotiation in bad faith and breach of a duty of confidentiality, respectively; Art. 6. 1. 6 (1) (a) stating the general

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① *See* F. Sabourin, *Quebec*, in M. J. Bonell (ed.), A New Approach to International Commercial Contracts. The Unidroit Principles of International Commercial Contracts, Kluwer Law International, 1999, p. 245.

② *See* J. Basedow, *Germany*, in M. J. Bonell (ed.), A New Approach to International Commercial Contracts. The Unidroit Principles of International Commercial Contracts, Kluwer Law International, 1999, p. 182.

③ *See, also for further references*, M. J. Bonell, *An International Restatement of Contract Law*, 3rd ed., Transnational Publishers Inc., 2005, pp. 233-235, but see now also M. Bridge, *The International Sale of Goods: Law and Practice*, 2nd ed., 2007, Cambridge University Press, pp. 538-539.

④ *See also for further references*, M. J. Bonell, *An International Restatement of Contract Law*, 3rd ed., Transnational Publishers Inc., 2005, pp. 320-322.

principle according to which a monetary obligation is to be performed at the obligee's place of business; Arts. 6. 1. 7, 6. 1. 8 and 6. 1. 9 which provide an answer to the questions, likewise not expressly settled in the CISG, of whether, and if so under what conditions, the seller is entitled to pay by cheque or by other similar instruments, or by a funds transfer, and in which currency payment is to be made; Art. 7. 4. 9 (1) and (2) on the time from which the right to interest accrues and the rate of interest to be applied; and Art. 7. 4. 12 on the currency in which to assess damages. ①

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

Significantly only in a few cases has recourse to the Unidroit Principles been justified on the ground that the individual provisions invoked as gap-fillers could be considered an expression of general principles underlying also the CISG.

Thus, in two awards of the International Court of Arbitration of the Federal Chamber of Commerce of Vienna② the sole arbitrator applied Art. 7. 4. 9 (2) of the Unidroit Principles, according to which the applicable rate of interest is the average bank short-term lending rate to prime borrowers prevailing at the place for payment for the currency of payment, in order to fill the gap in Art. 78 CISG on the ground that it could be considered an expression of the general principle of full compensation underlying both the Unidroit Principles and the CISG. Likewise the Court of Appeal of Grenoble,③ in referring to Art. 6. 1. 6 of the Unidroit Principles to determine under the CISG the place of performance of the seller's obligation to return the price unduly paid by the buyer, stated that this provision expressed in general terms the principle underlying also Art. 57 (1) CISG, i. e., monetary obligations have to be performed at the obligee's place of business.

On other occasions Art. 7. 4. 9 (2) of the Unidroit Principles on the applicable rate

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① *See also for further references*, M. J. Bonell, *An International Restatement of Contract Law*, 3rd ed., Transnational Publishers Inc., 2005, pp. 322-327.

② *Cf.* SCH 4318 and SCH 4366 of 15 June 1994. For an English translation, *see* www. unilex. info.

③ *Cf.* Cour d'Appel de Grenoble, 23 October 1996, in Uniform Law Review 1997, Vol. 13, p. 182.

of interest was applied with no further justification at all,① or because it itself was considered "one of the general principles according to Art. 7 (2) CISG"②.

Still other decisions equate, with no further explanation, the Unidroit Principles in their entirety with the general principles underlying the CISG and so justify the application of individual provisions of the Unidroit Principles to interpret or supplement the CISG.③

Yet there are awards which go even further and apply the Unidroit Principles not

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① *Cf.* ICC Award of December 1996, No. 8769 (excerpts in ICC International Court of Arbitration Bulletin, 10/2 (1999), p. 82) ("Claimant is entitled to interest on the sums awarded pursuant to Art. 78 of the Vienna Convention. Art. 78 Vienna Convention does not specify a particular interest rate. The sole Arbitrator considers it appropriate to apply a commercially reasonable interest rate (*see* Art. 7. 4. 9 sub-section 2 Unidroit Principles)"; Supreme Economic Court of the Republic of Belarus of 20 May 2003, No. 7-5/2003 and No. 8-5/2003 (for an abstract *see* www. unilex. info) (sales contract between a U. S. trading company and a state-owned enterprise of Belarus governed by CISG; Court granted U. S. company the right to the payment of the agreed price plus interest according to Article 78 CISG and with no further explanation held that "the rate of such interest is determined pursuant to Article 7. 4. 9 Unidroit Principles, *i. e.* the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment or where no such rate exists at that place, the same rate in the state of the currency of payment").

② *Cf.* ICC Award of 1995, No. 8128, in Journal de droit international 1996, p. 1024, with note by D. Hascher.

③ In this sense, *e. g.*, *see* ICC Award of December 1997, No. 8817 (excerpts in ICC International Court of Arbitration Bulletin, 10/2 (1999), p. 75) (arbitral tribunal, stating that on the basis of Art. 13 (3) of the ICC Rules of Arbitration it would apply "the provisions of CISG and its general principles, now contained in the Unidroit Principles", referred to both Art. 9 (1) CISG and Art. 1. 8 of the Unidroit Principles (now Art. 1. 9) in order to justify the binding force of a course of dealing established between the parties, and to Art. 77 CISG and Art. 7. 4. 8 of the Unidroit Principles in order to establish the aggrieved party's duty to mitigate the harm); ICC Award of January 1999, No. 8547 (excerpts in ICC International Court of Arbitration Bulletin, 12/2 (2001, p. 57 *et seq.*, at p. 59) (contract not governed by the CISG but by the 1964 Hague Uniform Laws on the International Sale of Goods (ULIS) and on the Formation of Contracts for the International Sale of Goods (ULF), which the parties had expressly chosen as the applicable law; arbitral tribunal, after stating in general terms that "in so far as ... ULIS and ULF did not cover all questions ... it felt it appropriate to turn to the Unidroit Principles which provide useful complement to fill the *lacuna* and allow to find proper solutions ...", based its decision on the main issue at stake, *i. e.* whether the buyer had the right to withhold payment because of the non-conformity of the goods delivered, on Art. 7. 1. 3 of the Unidroit Principles.

merely as general principles underlying the CISG but because they amount to "trade usages ... in international trade widely known" and are therefore applicable according to Art. 9 (2) CISG,① or because they—as emphatically stated—reflect "a world-wide consensus in most of the basic matters of contract law"② or "the international trade practice",③ or may even be considered "a restatement of the commercial contract law of

① *See* in this sense, *e. g.*, Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 5 June 1997, No. 229/1996 (for an abstract *see* www. unilex. info) (issue at stake was the validity of a contract term providing for the payment of a penalty by the buyer in case of delay in the payment; in deciding in favour of the buyer who claimed that the stipulated amount was excessive, arbitral tribunal, in the absence of any relevant provision in the CISG, applied Art. 7. 4. 13 (2) of the Unidroit Principles and reduced the penalty to a reasonable amount; in so doing it invoked not only the Preamble stating that "[the Unidroit Principles] may be used to interpret and supplement international uniform law instruments", but pointed out that the Principles were applicable also by virtue of Art. 9 (2) CISG, since "they reflect usages of which the parties knew or ought to have known and which are widely known to in international trade"); Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 27 July 1999, No. 302/1997 (for an abstract *see* www. unilex. info) (arbitral tribunal held that the application of the Unidroit Principles was justified on the ground that they were "gradually gaining the status of internationally recognized trade usages").

② *See* in this sense, *e. g.*, ICC Award of March 1998, No. 9117 (excerpts in ICC International Court of Arbitration Bulletin, 10/2 (1999), p. 96 *et seq.*, at p. 100) (with respect to the precise effect of a so-called merger clause in an international sales contract, arbitral tribunal referred first to Art. 8 CISG, but since this provision provided no definite answer, applied Art. 2. 17 (now 2. 1. 17) of the Unidroit Principles arguing that "... although this Tribunal did not determine that the Unidroit Principles shall directly be applied, it is informative to refer to [them] because they are said to reflect a world-wide consensus in most of the basic matters of contract law ..."); Award of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 4 April 2003, No. 134/2002 (for an abstract *see* www. unilex. info) (sales contract governed by CISG; reference to Art. 7. 4. 13 of the Unidroit Principles, defined as "a code of the well-established rules of international trade reflecting the approaches of the principal legal systems", in order to reduce the amount of a penalty clause).

③ *See* in this sense Award of the International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation of 19 May 2004 No. 100/2002 (for an abstract *see* www. unilex. info) (sales contract between an Indian seller and a Russian buyer subject to the CISG; with respect to the applicable interest rate arbitral tribunal decided to apply "the international trade practice as reflected in the Unidroit Principles", i. e. Art. 7. 4. 9 (2).

the world which refines and expands the principles contained in the United Nations Convention"①.

To be sure, in some of these latter cases the Unidroit Principles were applied not to fill internal gaps in CISG but to find a solution to questions outside the scope of CISG. Yet 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.②

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① So Court of Appeal of New Zealand of 27 November 2000, *Hideo Yoshimoto v Canterbury Golf International Limited* (for an abstract *see* www. unilex. info) (contract between a New Zealand company and a Japanese businessman for the purchase of shares; when dispute arose about meaning of a particular contract provision, the court admitted that a liberal interpretation, taking into account the parties' intention, the context of the clause and its commercial objective, would be in accordance not only with Art. 8 CISG, in force in New Zealand, but also with Arts. 4. 1 to 4. 3 of the Unidroit Principles referred to as a "document which is in the nature of a restatement of the commercial contract law of the world and which refines and expands the principles contained in the United Nations Convention"; however, though pointing out that it would be desirable for the courts in New Zealand to bring the law in line with these international instruments, it ultimately opted for a literal interpretation of the contract provision in question on the ground that the Privy Council in London would not permit it to do otherwise, given that England had not yet adopted the CISG and English common law was against liberal interpretations of contracts).

② *Cf.*, *e. g.*, ICC Award of November 1996, No. 8502, *cit.* (contract not governed by CISG since seller had its place of business in a non-Contracting State; nonetheless arbitral tribunal, invoking Art. 13 (3) of the ICC Rules of Arbitration, decided to refer to CISG or to the Unidroit Principles "as evidencing admitted practices under international trade law", and did in fact apply both Art. 76 CISG and Art. 7. 4. 6 Unidroit Principles in support of the buyer's right to damages up to the difference between the contract price and the relevant market price); ICC Award of October 1998, No. 9333, *cit.* (*supra* Chapter 6, n. 102) (international service contract governed by Swiss law; arbitral tribunal acknowledged right to interest not only on the basis of Art. 104 of the Swiss Code of Obligations, but also by invoking "*les usages du commerce international dont se font l'écho, entre autres, la Convention des Nations Unies sur les contrats de vente internationale de marchandises ... ou encore les Principes Unidroit pour les contrats commerciaux internationaux*"); ICC Award of February 1999, No. 9474) (for an abstract *see* www. unilex. info) (arbitral tribunal, requested by parties to apply "the general standards and rules of international contracts", stated that "although it is generally recognized that CISG embodies universal principles applicable in international contracts ... there are other recent documents that express the general standards and rules of commercial law, in particular the Principles of European Contract Law and the Unidroit Principles of Commercial Contracts", and in fact applied Arts. 3. 5, 3. 8 and 7. 3. 2 of the Unidroit Principles).

2. *Unidroit Principles and CISG Side by Side*

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

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

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

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

Likewise, Alternative A of Art. 36. 1 of the 2003 *ICC Model Contract for the Turnkey Supply of an Industrial Plant*① provides:

"Unless otherwise agreed, any questions relating to this Contract which are not expressly or impliedly settled by the provisions container in this Contract shall be governed in the following order:

(a) by the principles of law generally recognised in international trade as applicable to international turnkey contracts,

(b) by the United Nations Convention on the International Sale of Goods (CISG),

(c) by the relevant trade usages, and

(d) by the Unidroit Principles of International Commercial Contracts with the exclusion of the clauses 6. 2. 1-6. 2. 3, with the exclusion of national laws."

The difference between the role attributed to the Unidroit Principles under such a clause and the role which, as has been shown, they may play under Art. 7 (2) CISG is, at least in theory, clear. Under Art. 7 (2), the Unidroit Principles merely serve to fill in any lacunae to be found in the CISG, i. e. to provide a solution for "questions concerning matters governed by the CISG which are not expressly settled in it ..." and with respect to which recourse to domestic law is permitted only as a last resort. By contrast, by virtue of

① ICC Publication No. 653E.

a parties' reference to the Unidroit Principles of the kind described above, the latter are intended to apply to matters actually outside the scope of the CISG and which otherwise would fall directly within the sphere of the applicable domestic law. ①

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

Domestic courts will tend to consider the parties' reference to the Unidroit Principles as a mere agreement to incorporate them into the contract and to determine the law governing that contract on the basis of their own conflict-of-law rules. ② As a result, they will apply the Unidroit Principles only to the extent that the latter do not affect the provisions of the proper law from which the parties may not derogate. This may be the case, for instance, with the rules on contracting on the basis of standard terms (cf. Arts. 2. 1. 19, 2. 1. 22) or on public permission requirements (cf. Arts. 6. 1. 14-6. 1. 17). On the other hand, the rules relating to validity (cf. Chapter 3), to the court's intervention in cases of hardship (cf. Art 6. 2. 3) or to limitation periods (cf. Chapter 10) will only be applied to the extent that they do not run counter to the corresponding provisions of the applicable domestic law.

The situation is different if the parties agree to submit their disputes arising from the contract to arbitration. Arbitrators are not necessarily bound to base their decision on a particular domestic law. ③ Hence they may well apply the Unidroit Principles not merely as terms incorporated in the contract, but as "rules of law" governing the contract together with the CISG irrespective of whether or not they are consistent with the particular domestic law otherwise applicable. The only mandatory rules arbitrators may take into

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① *See*, *e. g.*, the choice-of-law clause contained in a sales contract between a Chinese company and a Swiss company referred to in the decision of the Xiamen Intermediate People's Court of 2006 (for an abstract *see* www. unilex. info): "The application and interpretation of this contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods. On Issues not covered by this Convention, the UNIDROIT Principles (1994) shall apply. In case both instruments cannot cover the issue under dispute, international customs and the law of Seller's place of business (Swiss law) shall apply."

② For more on this point, *cf.* M. J. Bonell, *An International Restatement of Contract Law*, 3rd ed., Transnational Publishers Inc., 2005, p. 181 *et seq.*

③ *See* M. J. Bonell, *An International Restatement of Contract Law*, 3rd ed., Transnational Publishers Inc., 2005, p. 192 *et seq.*

account, also in view of their task of rendering to the largest possible extent an effective decision capable of enforcement, are those which claim to be applicable irrespective of the law otherwise governing the contract ("*loi d'application nécessaire*"). Yet the application, along with the Unidroit Principles, of the mandatory rules in question will as a rule not give rise to any true conflict, given their different subject matter. ①

IV. Conclusion

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

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

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

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

① One of the few potential examples of such conflict may be where arbitrators have to decide between the law of the place of payment imposing the payment in local currency and the different solution provided for in the Unidroit Principles that otherwise governs the contract.