The Influence of UNIDROIT principles in the Vienna Convention for the International Sale of Goods

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CONTENT

* Definitions

For purposes of the present writing, the following definitions apply:

I. CNUDMI or UNCITRAL: The United Nations Commission on International Trade Law.

II. UNIDROIT: International institute for the unification of private law.

III. CISG: The Vienna Convention for the International Sale of Goods.

IV. Principles: UNIDROIT principles, and

V. Note: The Explanatory Note of the Secretariat on the United Nations Convention on Contracts for the International Sale of goods of the UNCITRAL.

1. Introduction.

"*To a large extent, is the law contained in principles to which we may refer to sanction a person that complies with a law that breaches such principles*..."[1] This statement is mentioned by Rodolfo Vigo, while referring to the evolution of law in the stage of constitutional law; in that statement the author left us view that principles are pre-legal realities that will serve us, as legal operators, we will be able to properly apply the law, based not only on positive law but on those principles, such as expressed by Carlos Nino, while noting that "*[…] the goal is to find plausible general principles that, on one hand, justify our convictions about the right solution for a particular case and, on the other hand, satisfy the formal requirements of moral discourse."*[2]

Considering the above and regarding the matter that will be discussed herein, Mantilla Molina mentions appropriately that *"[…] commerce between nations has had and keeps having, huge economic and cultural importance ... [and it is] because of its nature that has had to deal with the problem of diversity of legal regimes of the nations among which traffic is carried on […]*"[3]; before such situation, there is a group of legal rules intended to solve such problems: the private international law. As part of such private international law, there is a tendency to execute international conventions that harmonize the rules of conflict of laws; perhaps the most important intents of that were the Montevideo Trade and the Bustamante Code, since they proposed rules for resolving conflicts of laws for all the areas of private law.[4]

Having said that, today there are three international agencies working in the unification of commercial law matters: the UNCITRAL; the Permanent Hague Conference on Private International Institute for the Unification of Private Law, and the UNIDROIT[5]. The latter, called for a meeting in 1983 to a Diplomatic Conference held in Geneva and adopted by the Convention of international law with respect to the sale of goods; this conference was attended by 58 countries and international bodies.[6] Considering the abovementioned, in this work I will refer only to the interference of UNIDROIT and its principles on the International Sale of Goods of 1980, prepared by UNCITRAL.

In connection with the homologation for unifying the criteria in regards to the international commerce, "The CISG... represents one of the progress of more relevance in the global legal concert, to the extent that, as stipulated by its preamble, combining the various economic, social and legal systems, managed to adopt uniform rules to

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[1] Vigo, Rodolfo, *Constitucionalización y judicialización del derecho*. *Del Estado de derecho legal al Estado de derecho constitucional*, México, Porrúa, 2013, p. 5.
[2] Nino, Carlos, *Ética y derechos humanos. Un ensayo de fundamentación,* Buenos Aires, Astrea, 1989, p. 200.
[3] Mantilla, Roberto, *Derecho Mercantil*. México, Porrúa, 2011, p. 40.
[4] Bustamante Code officially received that name by an agreement of the Sixth International American Conference, in honor to its author Antonio Sánchez de Bustamante y Sirven. *Ibidem*.
[5] Mantilla, Roberto, Derecho Mercantil, op. cit., p. 42.
[6] Ídem, p. 44.

contracts for the international sale of goods, with the primary aim of promoting the development of international trade."[7]

2. Some general definitions of principle

Should now turn to the basic abstraction of what a principle is, so that in that way, we can understand the importance that the principles have not only in the legal field, but in all areas of knowledge, since without them it would not be possible to understand an institution or any study that besides being able to approach a knowledge of the truth, let us lay the foundation for more accurate disciplines.

Notwithstanding the previous, this work will try to define what a principle is from a legal point of view; that is why taking the various conceptualizations of contemporary legal principles, the concept of principle has been expressed in the words of Professors Vigo[8] and Robert Alexy[9] as a "mandate of optimization"; however, there are other conceptualizations of principles that are not define as mere optimization of mandates, but that set forth that "the [principles] are pre-laws because they are vested of general and continued acceptance in the legal field and have the purpose of specifying the constitutional values"[10], as indirectly set forth by the Supreme Court of Venezuela, by noting that "the Constitution responds to social values that the constituent considered basic and fundamental to all collective life, and that the Constitutional rules must adapt to them, since they are the base of the system..."[11]; in that regard, Manuel Aragon argues that the principles "are statements which content is indeterminable, because they depend on each case [and in addition] can achieve a normative projection itself."[12]

Derived from the details of the abovementioned definitions of principle, it is necessary to standardize such contemporary approaches, and develop an own definition, which, with the described characteristics, it states that principles are mandates of optimization that result in the legal field in pre-legal realities, to which any constitution and secondary law must be subsumed by being natural boundaries that must be respected by all legal practitioner to be faced with a particular problem.

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[7] Álvarez, Luis, *Palabras de instalación, jornada académica.* En *Compraventa Internacional de Mercaderías, comentarios a la Convención de Viena de 1980*, Bogotá, Pontificia Universidad Javeriana, 2003, p. 29.

[8] In this regard, the Argentinian Professor, states that the principles are “mandates of optimization or concentrated rights that requires from law experts that the proper legal answers will be extracted according to the different cases”. Vigo, Rodolfo, op. cit, p. 19.

[9] Kiel Professor mentions that the principles are "mandates of optimization that are characterized because they can be complied in varying degrees and because the order of its enforcement does not depend only on the factual possibilities, but also on the legal possibilities, something that is referred from an ethical approach." Conference by Robert Alexy IV at the International conference on Logic and Legal Informatics, held in San Sebastian in September 1988.

[10] Vázquez Gómez, Francisco, *La ponderación en movimiento, un ejemplo de su aplicación como medio para resolver la colisión entre derechos fundamentales*. México, Ars Iuris, julio-diciembre de 2010, núm. 44, p. 140.

[11] Constitutional Interpretation action cited by Vázquez Gómez, Francisco, *La defensa del núcleo intangible de la Constitución*, México, Porrúa, 2012, pp. 118 y 119.

[12] Mentioned by Soberanes Díez, José María, *La igualdad y la desigualdad jurídicas*, México, Porrúa, 2011, pp. 31 y 33.

Once that has been defined the concept principle, then corresponds to determine which the generality of the Principles are.

3. Overview of the UNIDROIT Principles

Now it is necessary to know what the Principles are and what are their main postulates, and thus be closer to the core of this writing.

It is on that way, that the Principles for the International Commercial Contracts represent a new approach to international business law and are an attempt to remedy many of the deficiencies arising from the law applicable to such businesses.[13]

These Principles are not intended as a contractual model clause for any particular convention[14], but are an attempt to articulate rules that are common to most of the existing legal systems, and at the same time, adopt solutions that best fits to the needs of international traffic.[15]

Under this idea, the Principles are intended to be used independently of the various existing legal and economic systems in the world.[16]

In the preamble of such Principles, it is mentioned the purpose of such principles[17] and those purposes can be grouped in different ways according to common denominators and unique features that in its content manifest the following:

a) By their generality

- These Principles set forth general rules for international commercial contracts.

b) By their application:

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[13] Bonnell, Michael*, The UNIDROIT principles of International Commercial Contracts: Why? What? How?,* Tulane Law Review, Vol. 69, Abril 1995, n°5, p. 1126.

[14] Oviedo, Jorge, *UNIDROIT y la unificación del derecho privado: referencia a los principios para los contratos comerciales internacionales. En Compraventa Internacional de Mercaderías, comentarios a la Convención de Viena de 1980*, op.cit., p. 78.

[15] Bonnell, Michael, op. cit., p. 1123.

[16] Oviedo, Jorge, op. cit., p. 79.

[17] PREAMBLE
(Purpose of the Principles)
These Principles set forth general rules for international commercial contracts.
These Principles shall be applied when the parties had agreed that their contract would be governed by them.
These Principles could be applied when the parties had agreed that their contract would be governed by general principles of law, the " lex mercatoria " or similar expressions.
These Principles could be applied when the parties have not chosen the law applicable to the contract.
These Principles can be used to interpret or complement international uniform law instruments.
These Principles can be used to interpret or complement domestic law.
These Principles can serve as a reference for national or international legislators.

- These Principles shall be applied when the parties had agreed that their contract would be governed by them.

- These Principles could be applied when the parties had agreed that their contract would be governed by general principles of law, the " lex mercatoria " or similar expressions.

- These Principles could be applied when the parties have not chosen the law applicable to the contract.

c) By their interpretative and integrative capability:

- These Principles can be used to interpret or complement international uniform law instruments.

- These Principles can be used to interpret or complement domestic law.

d) By being model:

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

Furthermore, one of the goals that guided the drafters of the preamble and the principles was, in opinion of Maria del Pilar Perales[18], reducing the possible uncertainties regarding the applicable law to the contract, together with the idea of establishing an independent statutory body of the legal, economic or political contracting origin.

However, once that we are aware of the concept of principle and the material overview of the Principles, it is necessary to proceed with the analysis and application of these principles in the CISG Convention.

4. UNIDROIT principles in the Vienna Convention.

4.1 Freedom to Contract

By means of Article 1.1 of the Principles[19], and mainly based on the free will, this principle has been considered as the base of modern contract law and international trade; since it covers both, the freedom of contract and on the other hand, sets forth the content of the contract to execute.[20]

[18] Mentioned by Oviedo, Jorge, op. cit., p. 80
[19] ARTICLE 1.1
(Freedom to contract)
The parties are free to enter into an agreement and to determine its contents.
[20] Oviedo, Jorge, op. cit., p. 116.

Considering the previous, and following the free will, same that it is contained in section B, paragraph 12 of the Note[21], I would comment that consists on the power that the merchants have to freely decide to whom offer their products, accept offers for supplies and to set forth the terms and conditions under which commercial and legal relationships are governed.

4.2 Form and Formalism

Should begin by distinguishing between two concepts that in doctrine are often confused: form and formalism or formality; in that regard, I would comment as follows.

For a contract to be valid, it is not sufficient to have only an agreement of will, but it is necessary that they have an external manifestation[22]; the manifestation of consent is an extrinsic element of the contract, which is the form of it.[23] Considering the previous, the form is also a way to guarantee public and private interests, as expressed by Valverde, while noting that "the form is enemy of arbitrariness and twin sister of freedom, is valuable collateral of public and private interests and can never be removed from law."[24]

However, in the case of the formalism and formality, it should be noted that this refers to the particular legal situation in which the law provides the manner in which the contract manifests.[25]

Under such circumstances, it is convenient now to point out what the Principles refer to in this respect and their subsequent influence on the CISG.

The Principles set forth in Article 1.2[26] the freedom of form to contract; that is, they do not set forth any form or formality among the parties to express their will. This text was collected with the same objective that in the CISG in Article 11[27]; inclusive as for the part related to the proof of the agreement, there is also a conceptual homologation.

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[21] B. Autonomy of the parties
12. The basic principle of freedom to contract in the international sale of goods is recognized by the provision that allows the parties to exclude the application of the Convention or modifies the effect of any of its provisions. This exclusion will take place, for example, when the parties declare applicable to their contract the law of a Contracting State or the internal substantive laws of a Contracting State. The Convention shall cease to apply if a provision of the contract is separate from the provisions of the Convention.

[22] In this regard, Jorge Oviedo emphasized that the general rule in the Principles is the agreement in the formation of contracts; however, the possibility of adopting these formalities as prerequisites for the existence and validity of them. *Cfr.* Oviedo, Jorge *op. cit.*, p. 117.

[23] Borja, Manuel, Teoría General de las Obligaciones, México, Porrúa, 1982, p. 180.

[24] Valverde, Tratado de Derecho Civil Español, España, 1921, tomo III, p. 245.

[25] Please see Von Jhering, El Espíritu del Derecho Romano, traduction of Meulenaere, Francia, 1886-1888, volume III, p. 162 y sigs. Cited by Borja, Manuel, op. cit., p. 184.

[26] ARTICLE 1.2
(Freedom of form)
Nothing of the expressed in these Principles requires a contract, statement or act that must be concluded or evidenced by a particular form. The contract can be proved by any means, including witnesses.

[27] ARTICLE 11
The sale contract doesn't need to be executed nor evidenced by writing and will not be subject to any additional form requirement. It could be proved by any means, including witnesses.

What is more, the text of Article 2.1.18[28] of the Principles was adopted by Article 29[29] of the abovementioned CISG, which regulates the freedom to contract, to amend or terminate any provision of the sales contract, and then, establishes that in case the contract it is executed in writing, then your changes will also be in writing.

Furthermore, Article 96[30] of the referred international regulation sets forth that a Contracting State that has in its domestic law the written form to execute and amend a sale contract, will be able to issue a unilateral declaration stating his express waiving to the provisions of Articles 11 and 29 of the CISG, so that on that way any amendment to any provision of the contract, will be made on the manner prescribed by such Contracting State.

There is an exception to such rules, which is provided in Article 12[31], which states that if you have made the declaration provided for in Article 96, then that implies an express waiver to the application of articles 11 and 29.

Moreover, it is important to mention what article 2.1.13[32] sets forth about the Principles. That Article states that in case that one of the parties would like to execute an agreement with certain form, then such agreement will not perfected until the conditions and specifications of form for such agreement would be satisfied.

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[28] ARTICLE 2.1.18
(Amendment in a particular form)
A written contract requiring any modification or termination by mutual agreement to be in a particular form may not be modified or terminated otherwise. However, a party will be linked by its own acts and will not be asserted from such clause to the extent that the other party had acted reasonably in that regard.

[29] ARTICLE 29
1) The contract may be modified or terminated by agreement between the parties.
2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be modified or terminated by mutual agreement otherwise . However , either party shall be bound by their own conduct from asserting such a provision to the extent that the other party has relied on that conduct.

[30] Article 96
The Contracting State which legislation demands that the sale contracts are to be executed or approved in writing, may at any time make a declaration under Article 12 to the effect that any provision of article 11, article 29 or Part II of the this Convention, that allows the execution, modification or termination by mutual agreement of the sales contract, or the offer, acceptance or any other intent manifestation, will be made by a proceeding that will not be in writing, does not apply in the case that any of the party has his domicile in such State.

[31] ARTICLE 12
Any provision of article 11 , article 29 or Part II of this Convention shall not apply to allow the conclusion , modification or termination by agreement of the sales contract or offer, acceptance or any other indication of intention to be made by a method other than in writing, in the event that either party is established in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from this article or vary the effect

[32] ARTICLE 2.1.13
(Accomplishment of contract subject to the condition on specific matters or in a particular form)
When in the course of negotiations one of the parties insists that the contract won't be perfected until reaching an agreement on specific matters or in a particular way, the contract shall not be understood as perfectly valid until it does not reach such agreement.

Finally, section E of the Note[33], explains the regulated aspects of form in the Principles and in the CISG with the same guiding criteria that have been outlined herein.

4.3 *Pacta Sunt Servanda*

Based on Article 1.3[34] of the Principles, this principle means that any contract validly entered into is binding for the parties, so not breaching it is allowed; however, by the principle of free will, the parties may modify or terminate the effects of the contract.

This principle has an impact practically in every sale contract that is agreed by both parties, since under the free will, it is the parties that give the contract the binding character when they manifests to be pursuant to such clauses, and therefore, are obliged to comply with its content.

4.4 Uniformity at the application of the Principles

In paragraph 1 of Article 1.6[35] of the Principles is the foundation of this fundamental aspect of international contracting, and this means that the criteria under which the Principles should be interpreted, as well as the rules of the CISG, is the internationality of its norms and business standards that is regularly called to; that it is, for the same trend towards the internationalization of commercial law, the historical trend and the essence of commercial law[36].

Similarly, the text of the Article 7[37] of the CISG reveals the idea of the uniformity of internationalization of interpretation and application thereof and the supplementary use

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[33] E. Form of contract
15. The Convention does not submit the sales contract to any requirement of form. In particular, Article 11 provides that no written agreement to the contract is necessary. However, Article 29 sets forth that, if the contract is in writing and includes a provision requiring that any modification or termination by mutual agreement to be in writing , the contract may not be modified or terminated by mutual agreement otherwise . The only exception is that a party may be precluded by his conduct from asserting such provision to the extent that the other party has relied on that conduct.
16. To make it easier for those States whose legislation requires the sale contracts to be executed or evidenced by writing, Article 96 allows those States to declare that neither Article 11 nor Article 29 will apply in case that, either party of the contract has its domicile in that State.

[34] ARTICLE 1.3
(Binding character of the contracts)
A contract validly entered into is mandatory for the parties. It can only be modified or terminated pursuant to what it provides, by mutual agreement of the parties or otherwise under these Principles.

[35] ARTICLE 1.6
(Interpretation and integration of the Principles)
(1) In the interpretation of these Principles, it will take into account, its international character and their purposes including the need to promote uniformity in its application.

[36] Oviedo, Jorge, op. cit., p. 127.

[37] ARTICLE 7
1) In the interpretation of this Convention, it must take into consideration, its international character and the need to promote uniformity in its application and the observance of good faith in international trade.
2) 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 this Convention or , in the absence of such principles, in conformity with builds law applicable under the rules of private international law

of the Principles with the general rules of Private International Law. The previous, brings us to one of the cornerstones in international contracting, and specifically, to one of the foundations in which the will is based on sales: the good faith.

4.5 Good faith and fair dealing

It is hard to establish a concept of what good faith is, that it is, since the doctrine was reluctant to generate this concept[38]; however, good faith is used every day by practitioners of jurisprudence.

Notwithstanding the foregoing, there are elements in the good faith that can be used to develop its concept; such elements are the following[39]:

a) Existence of a psychological state of mind related to:

- Intention to act honestly.
- Belief that the co-contractor has the same intention.
- Belief or ignorance of attributes or qualities of situations, things or people.

b) Influence of psychological attitude in the formation of the will.

c) Acting in accordance with the mood and will.

Once the elements of good faith have been known, it is now necessary to understand the importance that this concept has in the Principles and the CISG.

Article 1.7[40] of the Principles states that the parties must act in good faith and fair dealing in international trade, thus, on that way it becomes clear what provides Article 7 of the CISG mentioned in the previous section, in the sense that, the observance of good faith in international trade is ensured. For that reason, in the opinion of Jorge Oviedo, it is being given to the principle of good faith and fair dealing a double nature: they constitute a peremptory norm in the context of the Principles, and also a specific obligation to the performance of the contracting parties[41].

In addition, in the case of the integration of the contract, Article 4.8[42] of the Principles states that to determine the most appropriate term to establish rights and obligations, good faith and fair dealing, among others, will be considered.

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[38] Barroso, José*, El principio de la buena fe en el derecho civi*l, on Revista de la facultad de derecho de México, México, tomo XXXI, núm. 119, mayo-agosto 1981, p. 408.
[39] De los Mozos, José Luis, *El principio de la buena fe*, Barcelona, Bosch, 1965, p. 45.
[40] Article 1.7 (Good faith and fair dealing)
(1) Each party must act in accordance with good faith and fair dealing in international trade.
(2) The parties may not exclude or limit this duty
[41] Oviedo, Jorge, op. cit., p. 121.
[42] ARTICLE 4.8
(Integration of the contract)
(1) Where the parties have not agreed on an important to determine your rights and obligations term , the contract will be integrated with an appropriate term to circumstances.

Moreover, Article 5.1.2[43] of the Principles sets forth that implied obligations can derived from good faith and fair dealing. Other assumptions are manifested in the case of interference with the performance of an obligation, based on Article 5.3.3[44] of the Principles, for a violation of the principle of good faith and fair dealing; and another, in the case of the provisions of Article 5.3.4[45] of same law, which provides that a party may not behave in a way that harms the rights of the other party in violation of the principles discussed herein.

Considering the foregoing, the CISG, which although does not provide fair dealing but only good faith as principles, in addition to the provisions of its Article 7, provides in section C of the Note[46] in the event of doubt on the interpretation and application of the CISG, then you have to encourage and promote the observance of good faith.

Regarding the duty of confidentiality and its close relationship with good faith, Article 2.1.16[47] of the Principles states that if one party provides confidential information in the negotiation, the other party shall not disclose that information or use it improperly for its

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(2) To determine the most appropriate term , the following shall be taken into account, among other factors :
(a) the intention of the parties;
(b) the nature and purpose of the contract;
(c) good faith and fair dealing;
(d) common sense.

[43] Article 5.1.2
(Implied obligations)
Implied obligations can derive from:
(a) the nature and purpose of the contract;
(b) practices established between the parties and the usages;
(c) good faith and fair dealing;
(d) common sense.

[44] Article 5.3.3 (Interference with conditions)
(1) If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition.
(2) If fulfilment of a condition is brought about by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the fulfilment of the condition.

[45] Article 5.3.4 (Duty to preserve rights)
Pending fulfilment of a condition, a party may not, contrary to the duty to act in accordance with good faith and fair dealing, act so as to prejudice the other party's rights in case of fulfilment of the condition.

[46] C. *Interpretation of the Convention*
13. This Convention for the unification of the law governing the international sale of goods will better fulfill its purpose if it is interpreted in a consistent manner in all legal systems. Great care was taken in its preparation to make it as clear and easy to understand as possible. Nevertheless, disputes will arise as to its meaning and application. When this occurs, all parties, including domestic courts and arbitral tribunals, are admonished to observe its international character and to promote uniformity in its application and the observance of good faith in international trade. In particular, when a question concerning a matter governed by this Convention is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention is based. Only in the absence of such principles should the matter be settled in conformity with the law applicable by virtue of the rules of private international law.

[47] ARTICLE 2.1.16 (Duty of confidentiality)
Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

own purposes, a situation in which the principle of good faith and fair dealing is perfectly showed.

To conclude this point, it is necessary to mention what it means about the opposite side of good faith: bad faith. In this regard, if the concept of bad faith is going to be discussed herein, it is necessary that the concept of fraud, will also take part in this analysis.

Fraud and bad faith, mentions Días Ferreira[48], are cause of error, a vitiated consent, but for this author, both fraud and bad faith are not a vitiated consent.

What then would be the difference between fraud and bad faith? The Portuguese author goes on to say that fraud and bad faith have the same legal effect, differing in that the former is active and passive the later. As an example, the author notes that proceeds with fraud who seeks to persuade the buyer that the item is gold when its actually copper, and in bad faith, the seller to whom the buyer offers a price as if the object were gold and keeps him in the understanding that the object were of gold.[49]

The fraud and bad faith matters always premeditation, and intent to deceive, when error was born naturally.[50]

Principles governs the negotiations in bad faith in its Article 2.1.15[51], and states that who proceeds in bad faith, is responsible for damages to the other party and will also be responsible for failing to reach an agreement.

4.6 Commercial usages

In the Middle Ages it was known as Ius Mercantorum or Lex Mercantoria, the set of practices and customs governing the transactions of traders; so that the traders were themselves who regulated such transactions through customary rules, other from corporate origin, adopted to the guilds of merchants, which were developed at the time that the decisions of the courts would do so too[52]. Today, those rules seem to be one of the fundamentals of trade negotiations, but we must not confuse the modern *lex mercantoria* only with commercial usages, but it is necessary that we use them in a broader sense that contains all the sources of law applicable to international transactions.[53]

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[48] Días Ferreira, Código Civil Portugués, second edition, 1904, volume II, p. 13-14.
[49] Ibidem
[50] Ibidem
[51] ARTICLE 2.1.15 (Negotiations in bad faith)
(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.
[52] Berman, Harold, *La formación de la tradición jurídica de occidente,* Fondo de Cultura Económica, México, 2001, p. 349-350.
[53] Oviedo, Jorge, op. cit., p. 97

It is necessary to distinguish between what is a usage and customary law, so I will make the following clarifications.

Customary law is a rule of mandatory law and public policy that supplies the absence of written law or even defers from a provision of such law; in the antique law, customary law had full force of law, as well as the provisions formally established by the authority. Today the constitutional organization does not allow referring to the customary law as a source of law, at least in an open and visible manner; the use is other thing. It can be defined as the tacit clause in an agreement by which the parties agree their relationships according to the established practice, and constitutes an element of legitimate interpretation; the usage has the force of an agreement and not of law. However, the usage that is merely an agreement, regularly derogates the law.[54]

Considering the foregoing, the commercial usages are identified with the contractual provisions separately established by the contracting parties, to such an extent that are only binding those parties of the specific business.[55]

Furthermore, and speaking on what it is disposed by Article 1.8[56] of the Principles, such article shows that taking into consideration the usages and practices recognized in commerce, it is inclusive, for the contracting parties an obligation. Obligation that appears immersed in paragraph 3 of Article 8[57] of the CISG, while referring that in the event of absence of certainty in the interpretation or meaning of the contract, reference should be made to the usages and practices of the parties. Similarly Section D paragraph 14 of the Note[58], which states that the interpretation of the contract will be performed in accordance with the usages, and the practices agreed by the parties that have had knowledge.

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[54] Thaller, *De la naturaleza jurídica de los títulos de crédito*, monografy mentioned by Borja, Manuel, op. cit., p. 63

[55] Espinosa, Carlos Antonio*, Del uso convencional a la costumbre mercantil en la Convención de Viena sobre Compraventa Internacional de Mercaderías. En Compraventa Internacional de Mercaderías, comentarios a la Convención de Viena de 1980*, op.cit., p. 229.

[56] ARTICLE 1.9 (Usages and practices)
(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

[57] ARTICLE 8 […]
(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

[58] D. Interpretation of the contract; usages
14. The Convention contains provisions on the manner in which statements and conduct of a party are to be interpreted in the context of the formation of the contract or its implementation. Usages agreed to by the parties, practices they have established between themselves and usages of which the parties knew or ought to have known and which are widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned may all be binding on the parties to the contract of sale.

5. The interpretation of the contract in the UNIDROIT Principles

The purpose of the contract interpretation, as Díez-Picazo says, is to reconstruct the thoughts and will of the parties...and attribute meaning to the statements made by the parties[59]. Based on the abovementioned, I will explain the following important points to clarify the meaning of those contractual statements.

5.1 The intention of the parties

Article 4.1[60] of the Principles sets forth that the contract must be interpreted according to the mutual intention of the parties; thus, it should be noted that the parties discharge their interests in order to get a result, either common to both and satisfy common interests, or conflicting and tending to satisfy diverse interests.

For the abovementioned reason, in the interpretation of the contracts, the prevailing principle must be the intention of the parties, according to which, the intention of the parties must be clearly known, and must be more of her than to the literal words, thus, the contract becomes law upon the parties.[61]

On the other hand, the CISG in its Article 8, paragraph 1[62], provides that the acts of the parties shall be interpreted according to his intent when the other party knows that intention.

5.2 Interpretation of the statements

Pursuant to the provisions of Article 4.2[63] of the Principles and according to its similarity with Article 8 of the CISG referred to in the previous paragraph, I would mention that in case that no intention of a declaring party is known then such statement shall be interpreted in accordance with the meaning attributed in similar circumstances.

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[59] Díez-Picazo, Luis, Fundamentos del derecho civil patrimonial, Introducción, Teoría del contrato, Civitas, Madrid, 1996, p. 394.

[60] ARTICLE 4.1 (Intention of the parties)
(1) A contract shall be interpreted according to the common intention of the parties.
(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances

[61] Sconamiglio, Renato, Teoría general del contrato, Universidad Externado de Colombia, 1991, p. 233.

[62] Article 8
(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. […]

[63] ARTICLE 4.2 (Interpretation of statements and other conduct)
(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.
(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

5.3 Logical and systematic-contextual interpretation

As provided by Articles 4.4[64] and 4.5[65] of the Principles, among the clauses of an agreement, there must be correspondence and harmony, and its clauses cannot and should not be taken separately to implement them in a way that only convenes to one party[66]. This also has its basis in the comments to Article 4.4 of the Principles[67] which states that the provisions will not be applied or interpreted separately, but will operate as parts of a whole.

5.4 Interpretation contra *proferentem*

In terms of Article 4.6[68] of the Principles, if the clauses drafted by one party are unclear, then they will be interpreted against the person to which such clauses have been written. This rule has been taken by the doctrine to regulate adhesion contracts in which one party only signs the contract, without the possibility of negotiating the contractual terms of the agreement.[69]

5.5 Integration of the Contract

It may be the case that there are gaps in the contract for certain aspects, such as the place of payment, time of payment, currency, among others. However, Article 4.8[70] of the Principles states that it is necessary to determine the most appropriate term to determine the rights and obligations omitted, and for that purpose, the intention of the parties will take into account the nature and purpose of the contract, good faith, fair dealing and common sense. The first three elements have already been discussed herein; however, common sense has not been defined or analyzed in this document, that is why I would comment that the Royal Academy of the Spanish Language (RAE)

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[64] ARTICLE 4.4 (Reference to contract or statement as a whole)
Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

[65] ARTICLE 4.5 (All terms to be given effect)
Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

[66] Oviedo, Jorge, op. cit., p. 134.

[67] "Terms and expressions used by one or both parties are clearly not intended to operate in isolation but have to be seen as an integral part of their general context. Consequently they should be interpreted in the light of the whole contract or statement in which they appear".

[68] ARTICLE 4.6 (Contra Proferentem Rule)
If contract terms supplied by one party are unclear, an interpretation against that party is preferred.

[69] Ferrari, Franco, La compraventa internacional, aplicabilidad y aplicaciones de la Convención de Viena de 1980, Biblioteca Jurídica Cuatrecasas, Tirant lo Blanch, Valencia, 1999.

[70] ARTICLE 4.8 (Supplying an omitted term)
(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.
(2) In determining what is an appropriate term regard shall be had, among other factors, to
(a) the intention of the parties;
(b) the nature and purpose of the contract;
(c) good faith and fair dealing;
(d) reasonableness.

defines common sense as "The way of thinking and proceed that the generality of the people would do"[71]; for that reason, the last option that the Principles provide us to determine the most appropriate provisions for the determination of rights and obligations is the common sense.

6. Final Thoughts

Once that we have analyzed and studied the basic components of International Commercial Contracts and in particular, the Purchase Agreement in light of the CISG as regulatory framework, we need to keep in mind the intent and purpose of such regulation and Principles, since both were created in a way that the contracting parties could have legal certainty when being in an International Commercial negotiation; since the Contracting Parties for the simple fact of expressing their will, are exposed to infringements or violations of their rights, and therefore, this may generate uncertainty in any decision among them.

For that reason, when referring to the Principles, we are in presence of a legal certainty issue, conceived as a human right, since to exercise the necessary measures, in the interest of having the certainty that other human rights will be protected, and thus not be a possible reasonable doubt against our contracting or third parties; such legal certainty, can be seen as a guarantee of being able to know what are the legal consequences of the assumptions that are updated daily life, or on everyday basis. That is, legal certainty means to know what rights and obligations can be expected when certain behaviors are updated in reality.[72]

And that is precisely the final object or purpose of these two international regulatory bodies: that the contracting parties feel supported by a transparent and appropriate regulation, translated in legal certainty, to regulate their commercial interests; and thus, be protected by the law and those mandates of optimization and pre-legal realities, achieving with that equitable trade negotiations that leave us closer to the final purpose of law: justice.

[71] http://lema.rae.es/drae/?val=sentido

[72] See Canseco, Gerardo, El principio protección de confianza legítima como una derivación del derecho humano de seguridad jurídica. Document presented at the XIV National Congress of Lawyers. Mexico, 2014.