UNIDROIT Principles and CISG : Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court

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I. – INTRODUCTION

Among the different ways in which the *UNIDROIT Principles of International Commercial Contracts 2004* (hereinafter: UNIDROIT Principles or PICC) could be applied according to their Preamble, one of the most interesting and yet still controversial cases concerns their possible use to "interpret or supplement international uniform law instruments".[1] Not surprisingly, the overwhelming majority of contributions by legal scholars and practical applications by adjudicators deals with the relationship between the UNIDROIT Principles and the 1980 *United Nations Convention on the International Sale of Goods* (hereinafter: CISG).[2]

This question has been recently addressed by the Belgian Supreme Court in a decision which may well be considered as a particularly relevant recognition of the UNIDROIT Principles, all the more so since it comes from the highest instance within a domestic jurisdiction and not – as is certainly more usual – from an arbitral tribunal.[3]

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1 *UNIDROIT Principles of International Commercial Contracts*, 2nd ed., Rome (2004), *Preamble*, § 5.

2 For references, see *infra*, § II. On the application of the UNIDROIT Principles with respect to other international conventions, see M.J. BONELL, *An International Restatement of Contract Law,* 3rd ed., Kluwer (2005), 229 *et seq*.; J. BASEDOW, "Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts", *Unif. Law Rev. / Rev. dr. unif.* (2000), 129 *et seq*.

3 Cass., 19 June 2009, *Scafom International BV v. Lorraine Tubes S.A.S.* For an English abstract of this case, see the UNILEX database, at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1457&step=Abstract>; an English translation of the full text is

In this article, after a presentation of the facts of the case and of the decision taken by the Belgian Supreme Court (II), the general issue of the gap-filling role of the UNIDROIT Principles in relation to CISG will be discussed (III) as well as its specific application to the question of a supervening change in the circumstances existing at the time of conclusion of the contract (IV and V). Finally, consideration will be given to the use of the UNIDROIT Principles as a means to interpret the applicable domestic law on change of circumstances (VI).

II. – THE DECISION OF THE BELGIAN HOF VAN CASSATIE 19 JUNE 2009, *SCAFOM INTERNATIONAL BV V. LORRAINE TUBES S.A.S.*

The controversy brought before the Belgian Supreme Court concerned a number of contracts for the sale of warm-rolled steel tubes for the production of scaffolds, concluded between Scafom International BV, a Dutch company ("the buyer" and recurrent party) and Exma, a French-based company, predecessor of the defendant Lorraine Tubes S.A.S. ("the seller").

The contracts provided for the price and the date and place of delivery (the latter of which was in Belgium, at the seat of the buyer's processor), but did not contain any price adjustment clause for the event of supervening circumstances.

After conclusion of the contracts, the seller gave notice to the buyer that it was forced to recalculate the agreed price because of an unforeseeable 70% increase in the price of steel. The buyer did not accept the new price and sued the seller in a Belgian first instance court.

In its judgment, the first instance court[4] considered that the sudden and extraordinary increase in the price of steel had been duly proven by the seller. It ruled, however, that the CISG, applicable to the contracts at hand, only covers *force majeure* cases leading to an exemption from performance and does not expressly settle the issue

available at the Pace University CISG website, at <http://cisgw3.law.pace.edu/cases/90619b1.html>.

4 *Rechtbank van Koophandel Tongeren*, 25 January 2005. An English translation of this case is available at the Pace University CISG Website, at <http://cisgw3.law.pace.edu/cases/050125b1.html>.

of a supervening change of circumstances rendering the performance more onerous ("hardship" cases). Further, it denied recourse to domestic law in order to fill this gap in the Convention, observing that the seller should have agreed a price adjustment clause with the buyer, had it wanted to adapt the contract to new circumstances.

Upon appeal by the seller, the *Hof van Beroep Antwerpen* [5] censured the first instance decision inasmuch as it had not referred to the applicable domestic law to solve the issue. Thus, not surprisingly, it applied French law (as the law of the seller) and – perhaps somewhat more surprisingly – ruled that although French law does not recognize the theory of *imprévision* as such, it does impose, in certain circumstances, a duty to renegotiate the contract based on the principle of good faith.[6]

The *Cour de Cassation*, called into play by the buyer, confirmed the Appellate Court decision, but following a different line of reasoning. It referred to Article 79(1) CISG and pointed out that while this provision expressly covers *force majeure* cases as events exempting from performance, it does not implicitly exclude the relevance of less than *force majeure* situations such as hardship.

First of all, an unforeseen change of circumstances leading to a substantial alteration of the contractual equilibrium might, under specific circumstances, constitute an event exempting from performance according to Article 79(1).

The Court, however, went much further than that. It recalled that in accordance with Article 7(1), the Convention has to be interpreted having regard to its international character and to the need to promote uniformity in its application. Moreover, Article 7(2) states that in matters governed by the Convention, gaps have to be filled on the basis of the general principles underlying the CISG, and only when no such principles are found should the judge have recourse to the domestic law applicable according to the relevant conflict of law rules.

Taking both provisions into account, the Belgian Supreme Court pointed out that gaps should be filled in a uniform manner, having

5 Preliminary decision 29 June 2006; final judgment 15 February 2007.

6 Regarding the interpretation of French law, see *infra*, § VI.

regard to the "general principles governing the law of international commerce". Without adding any further explanation, it then affirmed that such principles are to be found, among other sources, in the UNIDROIT Principles of International Commercial Contracts.

On the strength of these Principles, the Court finally concluded that a party invoking a change of circumstances fundamentally disrupting the contractual equilibrium is entitled to *request renegotiation* of the contract (emphasis added). Accordingly, it granted the seller the right to request renegotiations of the price and rejected the buyer's recourse against the Appellate Court decision.

III. – CAN THE UNIDROIT PRINCIPLES BE USED TO SUPPLEMENT CISG?

The reference to the UNIDROIT Principles in the context of the application of CISG raises, first of all, the general question of whether – and to what extent – they can be used to fill in the gaps in CISG according to its Article 7(2).

Before addressing this issue, it is worth mentioning that the parties to the disputed contract did not expressly refer to the UNIDROIT Principles as the applicable law. Had it been otherwise, it might be questioned whether such a clause amounted to a veritable choice-of-law provision or to a mere incurporation of the Principles in the contractual content, and what consequences would ensue regarding the hardship rules contained in the second section of Chapter 6 of the Principles.

We do not need, however, to enter into this discussion,[7] since the decision of the Belgian Supreme Court deals with the different issue of whether the UNIDROIT Principles may be used to interpret and/or supplement CISG *in the absence* of any reference by the parties.

As far as scholarly opinion is concerned, some interpreters have denied any role whatsoever to the UNIDROIT Principles in this respect,

7 As is well known, the role of an express choice of the UNIDROIT Principles within domestic court proceedings has been widely debated. This issue will not be addressed in the present paper. See for all M.J. BONELL, *An International Restatement*, *supra* note 2, 180 *et seq*.; most recently R. MICHAELS, in S. VOGENAUER / J. KLEINHEISTERKAMP (Eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford (2009), 36 *et seq*., at 44 for the impact of EU Regulation 593/2008 ("Rome I").

either on formal or – somewhat more convincingly – on substantial grounds. Formally, the UNIDROIT Principles, being a later product of doctrinal source, could not be used to interpret an earlier in time, hard law text such as CISG.[8] The chronological argument, however, fails to take into account the need to encourage the practical application and further development of any hard law international instrument. If taken seriously, it would probably reach a result contrary to the wishes of its proponents, undermining the use of CISG instead of fostering it.

What seems more relevant is the substantial argument against the application of the UNIDROIT Principles: notwithstanding their possible significance for international commercial contracts, they are viewed as an external instrument with no relevance to the determination of the "general principles underlying the Convention" mentioned in Article 7(2) CISG.[9]

Other authors, on the contrary, consider that the UNIDROIT Principles already represent "general international trade" rules and could therefore well fulfil the task of completing the text of uniform instruments in the same field.[10] This position has the merit of taking into account those decisions and awards that have preferred a practical

8 See F. SABOURIN, "Québec", in M.J. BONELL (Ed.), *A New Approach to International Commercial Contracts. The UNIDROIT Principles of International Commercial Contracts*, Kluwer (1999), 237 *et seq*.; see also U. DROBNIG, "The UNIDROIT Principles and the Conflict of Law", in *Unif. Law Rev. / Rev. dr. unif*. (1998), 385 *et seq*.; S.D. SLATER, "Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG", in 12 *Florida Journal of International Law* (1998), 231 *et seq*., at 248 (the gap-filling role of the UNIDROIT Principles could be seen as a subversion of the diplomatic agreement reached on Art. 7(2) CISG); F. FERRARI, "General Principles and International Uniform Law Conventions: A Study of the Vienna Sales Convention and the 1988 UNIDROIT Conventions on International Factoring and Leasing", in 10 *Pace International Law Review* (1998), 157, at 168 (supporting the chronological argument with substantive ones).

9 Decidedly against recourse to the UNIDROIT Principles: R. HERBER, " 'Lex mercatoria' und 'Principles' – gefährliche Irrlichter im internationalen Kaufrecht", *Internationales Handelsrecht (IHR)* (2003), 1 *et seq*.; a critical but more nuanced view is expressed by F. FERRARI, in I. SCHWENZER (Ed.), *Schlechtriem / Schwenzer Kommentar zum Einheitlichen UN-Kaufrecht – CISG*, 5 Ed., München-Basel (2008), 184 *et seq*.

10 *E.g.* A.M. GARRO, "The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and CISG", in 69 *Tulane Law Review* (1995), 1149; F. BURKART, *Interpretatives Zusammenwirken von CISG und UNIDROIT Principles*, Baden-Baden (2000), 222.

approach instead of discussing theoretical issues and have already found it useful to resort to the UNIDROIT Principles – in various ways – for the purpose of interpreting or supplementing CISG.[11]

There is, however, an intermediate position between the two just mentioned, which in my opinion is more convincing. According to this view, the Principles may be used to supplement CISG only as long as they help in clarifying or supporting *already existing* general principles underlying the Convention.[12]

Of course, there may be different nuances in applying such an approach, since it all boils down to the not-so-easy task of determining exactly which are the general principles of CISG. The question is whether they should necessarily be provided for by one or more specific rules within the conventional text, or may be derived also from a systematic and evolving interpretation of its provisions.[13] If we take the need of a uniform and autonomous interpretation of

11 Among the most recent examples (all cited from the UNILEX database <www.unilex.info>): *International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation*, 13 May 2008 (determination of the interest rate); *Foreign Trade Court of Arbitration attached to the Serbian Chamber of commerce*, 23 Jan. 2008 (damages and interest rate); *China International Economic and Trade Arbitration Commission*, Sept. 2004, No. 0291-1 (accepted for amount of damages, excluded for penalty clause); *ICC Court of Arbitration*, 2004, No. 12460; *Supreme Economic Court of the Republic of Belarus*, 20 May 2003 (interest rate). Other cases cite the UNIDROIT Principles as a confirmation of generally accepted rules or principles also expressed in CISG, *e.g. International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation*, 8 Feb. 2008, No. 18/2007 (principle of good faith); *International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation*, 1 Feb. 2007, No. 23/2006 (restitution following termination).

12 *E.g.* BONELL, *An International Restatement*, *supra* note 2, 317 *et seq*.; IDEM, "The UNIDROIT Principles as a Means of Interpreting and Supplementing International Uniform Law", in *ICC International Court of Arbitration Bulletin* (2002), Special Supplement, 29 *et seq*.; BASEDOW, *supra* note 2, 136-137 (what underlies CISG are not the PICC but rather the general principles that the PICC have restated); U. MAGNUS, "Die allgemeinen Grundsätze im UN-Kaufrecht", *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 59 (1995), 492.

13 This accounts for the differences in the views expressed by the authors cited *supra*, notes 10 and 11. For a more restrictive position see also SLATER, *supra* note 8, 246 *et seq*., on the assumption that Art. 7(2) CISG was meant to strike a balance between recourse to general principles and application of national law and that the latter should not be seen as a mere "last resort".

CISG seriously, stated in general terms in Article 7(1), the second view seems to be indicated and the UNIDROIT Principles may play a role in clarifying which general principles could be considered part of CISG in the light of the development of international trade law.[14]

Thus, there is no abstract solution to the gap-filling role of the UNIDROIT Principles with regard to CISG. It all depends on the specific situation involved. As a first step, it should be considered whether the subject matter is "included in the scope of application of the Convention" (what is usually referred to as an "internal gap").[15] Secondly, the existence of a "general principle underlying CISG" should be investigated for the specific case, taking the rules of the UNIDROIT Principles into account both in supporting the existence of such principle and in deriving from it a specific rule for the situation not expressly regulated by CISG.

The problem we address now is whether this reasoning works well for the subject matter decided by the Belgian Supreme Court.

IV. – THE SPECIFIC CASE OF THE CHANGE OF CIRCUMSTANCES AND THE ROLE OF ARTICLES 6.2.1 – 6.2.3 OF THE UNIDROIT PRINCIPLES

Article 79 CISG is formally entitled "exemption from non-performance" and clearly governs the classical *force majeure* situations. Less clear are the exact boundaries of this provision as concerns hardship cases.[16] According to one view, change of circumstances is a matter

14 See in these terms MICHAELS, *supra* note 7, 57: "as long as the principles restated by the PICC are the principles that underlie the uniform law or the substance of the PICC provides an attractive model for interpretation of uniform law within the adjudicator's interpretative discretion"; see also specifically on CISG at 61 *et seq*. A more critical view on the positive role of the UNIDROIT Principles in the development of international trade law is voiced by M. TORSELLO, *Common Features of Uniform Commercial Law Conventions,* Sellier (2004), denying the assumption that the use of the UNIDROIT Principles creates more consistency and coherence in international uniform commercial law.

15 *Cf.* I. SCHWENZER / P. HACHEM, in I. SCHWENZER (Ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods*, 3rd ed., Oxford (2010), at 134.

16 A review of scholarly opinion and case law may be found in the *CISG-Advisory Council Opinion No. 7*, "Exemption of Liability for Damages under Article 79 of the CISG", Rapporteur A.M. GARRO, § 26 *et seq*. Most recently on the different interpretations of Art. 79 CISG, with further references, SCHWENZER, *supra* note 15,

excluded from the scope of CISG (a veritable gap as opposed to an internal gap) and left to the otherwise applicable domestic law.[17] On the strength of this argument, it would not be possible to resort to the UNIDROIT Principles' hardship section as a means to supplementing CISG through its Article 7(2).[18]

Other interpreters have, on the other hand, pointed out that CISG may be understood expressly to cover also impracticability situations.[19] The question remains as to which are the consequences of including the unforeseen change of circumstances within the coverage of the Convention. It seems reasonable that they could not be different from the ones provided for in Article 79, *i.e.* exemption from performance.[20]

The only argument in favour of applying the hardship rules of the UNIDROIT Principles to fill in the CISG would have to be founded on Article 7(2). First of all, hardship should be considered a "matter governed but not expressly settled" in CISG; secondly, a general principle in the Convention should be construed. It can be questioned, however, whether the application of the articulated effects of hardship set forth in Article 6.2.3 of the UNIDROIT Principles could be justified on the grounds of any "general principle underlying CISG".[21] It may be worth recalling that such effects range from a right of the disadvantaged party to request negotiations to the option of either party, failing agreement, to resort to the court; in this latter

especially at 1076.

17 For a much criticised judicial decision supporting this view (though only *obiter*), see *Tribunale di Monza*, 14 Jan 1993, *Giurisprudenza italiana* (1994), I, 145 *et seq*., with critical comment by M.J. BONELL (English abstract of the decision in <www.unilex.info>, English translation in *Journal of Law and Commerce* (1995), 153).

18 E. MCKENDRICK, in VOGENAUER / KLEINHEISTERKAMP, *supra* note 7, 712 *et seq*., with further references.

19 *E.g*. FERRARI, in *Schlechtriem /Schwenzer Kommentar*, *supra* note 9, 127.

20 For this conclusion already M.J. BONELL, *supra* note 17. But see the interesting suggestion by A.M. GARRO in the *CISG-AC Opinion No. 7*, *supra* note 16, Comment to 3.1.-3.2, § 40, who refers to Art. 79(5) CISG as a means to "adapt" the contractual obligations to the changed circumstances.

21 The general principle of *favor contractus* was mentioned to this effect: see J.M. PERILLO, "*Force Majeure* and Hardship under the UNIDROIT Principles of International Commercial Contracts", 5 *Tulane Journal of International and Comparative Law* (1997), 20.

circumstance the adjudicating body has ample discretion in the choice of remedies, including termination of the contract at a date and time to be fixed and its adaptation to the new circumstances, if it is reasonable,[22] as well as ordering the parties to resume negotiations (with a view to reaching agreement), or confirming the terms of the contract as they stand.[23]

Caution is all the more indicated since the application of the UNIDROIT Principles' hardship provisions in international contracts is far from being universally accepted also in other contexts, such as when the parties have referred to "general principles of law, the '*lex mercatoria*' or the like" (Preamble, Para. 3).[24]

In conclusion, it would seem at the very least questionable that in the context of an unforeseen change of circumstances, a mere reference to the "general principles governing the law of international commerce" and to the UNIDROIT Principles as their "restatement" be a sufficient justification for the application of the latter hardship provisions.

V. – THE DUTY TO RENEGOTIATE AND ITS RELATIONSHIP WITH THE GENERAL PRINCIPLE OF GOOD FAITH

The decision of the Belgian Supreme Court is, however, more easily justified if we look upon it from another perspective. It should be recalled that in practical terms it granted the seller, as the

22 See expressly Art. 6.2.3, (1) UNIDROIT Principles: "the disadvantaged party is entitled to request renegotiations"; (3) "upon failure to reach agreement (...) either party may resort to the court"; (4) "if the court finds hardship it may, if reasonable, (a) terminate the contract at a date and time to be fixed or (b) adapt the contract with a view to restoring its equilibrium".

23 Art. 6.2.3 UNIDROIT Principles (*supra* note 1), Comment 7 on "court measures in case of hardship" and Illustration at 191-192. See also BONELL, *supra* note 2, 120 *et seq*.; MCKENDRICK, in VOGENAUER / KLEINHEISTERKAMP, *supra* note 7, 722 *et seq*.

24 A number of cases have considered the hardship rules in the UNIDROIT Principles too innovative to be accepted as part of current international trade law: see *ICC International Court of Arbitration* (2004), No. 12446 (the UNIDROIT Principles, though "well thought good rules", cannot be considered "worldwide trade customs or usages"); *ICC International Court of Arbitration*, March 1998, No. 9029; *ICC International Court of Arbitration*, July 1997, No. 8873 (provisions of the UNIDROIT Principles on hardship do not correspond, at least presently, to current practices in international trade) (all in <www.unilex.info>).

disadvantaged party, the right to *request renegotiations* of the price. The issue is, therefore, whether this limited effect could be achieved within the framework of CISG. It is maintained here that though the question may be still controversial, especially regarding some passages of the argumentation, it is possible to reach a positive answer without unduly extending the scope of application of the UNIDROIT Principles.

The starting point is Article 7(2) CISG. If we take the view that an unforeseen change of circumstances like that which gave rise to the dispute before the Belgian Supreme Court is a matter governed but not expressly settled in CISG,[25] it would be necessary to find a "general principle underlying the Convention" adapted to the case at hand that justifies the right of the aggrieved party to request renegotiations and the related duty of the other party to accept them.

This consequence could follow from the application of good faith, were the latter considered as one of the general principles underlying the Convention. It is undoubtedly true that it is far from being an uncontroversial issue, and that some commentators [26] as well as some decisions,[27] relying on a literal interpretation of Article 7(1) CISG, have denied the existence of such a general principle. On the other hand, the opposite view has also found acceptance both among scholars [28] and in judicial practice;[29] the former have convincingly

25 See *supra* note 5 and accompanying text.

26 *E.g.*, on the strength of the Convention's drafting history and literal interpretation, E.A. FARNSWORTH, "The Convention on the International Sale of Goods from the Perspective of the Common Law Countries", in *La vendita internazionale*, Milano (1981), 3 *et seq*.; this restrictive view is voiced now by SCHWENZER / HACHEM, *supra* note 15, who however qualify it since "it may influence the reading of individual communications under Art. 8" and "indirectly the contractual relationship between the parties, as it may be used to concretize rights and obligations established by the provisions of the CISG" (at 127-128).

27 *E.g. ICC International Court of Arbitration*, 23 Jan. 1997, No. 8611/HV/JK ("Aus der 'Förderung des guten Glaubens' in Artikel 7 Absatz 1 Kaufrechtsübereinkommen lassen sich keine Nebenpflichten ableiten, denn diese Bestimmung betrifft nur die Auslegung des Übereinkommens"). See also the Austrian *Oberster Gerichtshof*, 22 Oct. 2001, that refused to follow the application of the principle of good faith made by the Appellate Court.

28 M.J. BONELL, "Art. 7", in C.M. BIANCA / M.J.BONELL, *Commentary on the International Sales Law*, Milano (1987), 43 *et seq*.; J.O. HONNOLD, *Uniform Law for*

argued that good faith in the performance of the contract is already at the bottom of specific rules in CISG and may well be construed as a general principle of the entire Convention.[30]

We find here a typical case where reference to the UNIDROIT Principles may help in interpreting the Convention and supporting the existence of a general principle underlying it, while at the same time showing how the same principle can be converted into a specific rule.

The right to renegotiations granted in Article 6.2.1 could be considered a derivation from the good faith provision in Article 1.7,[31] which in its turn must be seen as one of the fundamental ideas underlying the UNIDROIT Principles,[32] as well as other international

International Sales under the 1980 United Nations Convention, 3rd ed., Kluwer (1999), 130 (also considering supervening court practice); U. MAGNUS, *Wiener UN-Kaufrecht (CISG), Staudinger Kommentar* (2005), para. 10; FERRARI, in *Schlechtriem / Schwenzer Kommentar*, *supra* note 9, 178 (both with a word of caution regarding the influence of German domestic law in this area).

29 See among the most recent cases the Belgian *Hof van Beroep Gent*, 15 May 2002 (role of the good faith principle in Art. 7(1) to determine whether there was a binding contract). In other jurisdictions: *Bundesgerichtshof*, 31 Oct. 2001 (Art. 7(1) CISG founds a duty of cooperation and information as regards standard terms in the contract); *Oberlandesgericht Celle*, 24 July 2009 (following the Supreme Court's decision); *Tribunale di Padova, Sez. Este*, 25 Feb. 2004 and *Tribunale di Padova, Sez. Este*, 31 March 2004 (both on good faith in performance of the contract as a general principle in CISG); *ICC Court of Arbitration* (2003), No. 11849 (on seller's remedies for non-performance). See also the Australian *Court of Appeal, New South Wales*, *Renard Constructions (ME) PTY LTD v. Minister for public works*, which refers to the general principle of good faith in CISG while deciding an issue relating to a domestic contract.

30 Reference is made in particular to Arts. 16(2) and 29(2) CISG.

31 For a judicial confirmation of the link between duty to renegotiate and good faith, see *ICC International Court of Arbitration,* 5 May 1997, No. 7365/FMS (in <www.unilex.info>): "[...] from the covenant of good faith and fair dealing which is implied in each contract follows that in a case in which the circumstances to a contract undergo [...] fundamental changes in an unforeseeable way, a party is precluded from invoking the binding effect of the contract. [...] In such restrictive and narrow form this concept [of hardship or *clausula rebus sic stantibus*] has been incorporated into so many legal systems that it is widely regarded as a general principle of law." A word of caution in making use of the general clause contained in Art. 1.7. UNIDROIT Principles for purposes of interpretation of domestic law is, however, voiced by R. MICHAELS, in VOGENAUER/KLEINHEISTERKAMP, *supra* note 7, 111 *et seq*.

32 UNIDROIT Principles, *supra* note 1, 18 *et seq*.; BONELL, *An International Restatement*, *supra* note 2, 127 *et seq*.

instruments such as the *European Principles of Contract Law* (PECL) [33] (for a more qualified recognition of the principle of good faith in contractual relationships, see the recently published *Draft Common Frame of Reference on European Private Law* (DCFR)).[34]

The UNIDROIT Principles may finally be of use in determining what is the exact meaning of "right to renegotiate" and what are the consequences, if any, of a failure to conduct renegotiations in good faith. In particular, there is no obligation to reach any agreement but "both parties must conduct the renegotiations in a constructive manner", "by refraining from any form of obstruction and by providing all the necessary information", taking also the duty of cooperation into account (Article 5.1.3 PICC). Though not expressly stated, a failure to comply with the above-mentioned provisions should give rise to a right to recover damages in favour of the other party.[35]

VI. – AN ALTERNATIVE SOLUTION: THE UNIDROIT PRINCIPLES AS A MEANS TO INTEPRET DOMESTIC LAW

In the preceding paragraph, we conducted our reasoning from the starting point of the existence of an "internal gap" in CISG as regards hardship, leading to the quest for a "general principle underlying the Convention" under its Article 7(1) and to the use of the UNIDROIT Principles as a means to interpret and supplement CISG. We shall now explore whether in the case at hand, the UNIDROIT Principles might have been useful to reach a similar result also following the Appellate Court solution, which took the application of domestic law to this issue for granted.

33 O. LANDO / H. BEALE (Eds.), *European Principles of Contract Law (PECL), Parts I and II*, Kluwer (1998), Art. 1:201 Good Faith and Fair Dealing).

34 Ch. v. BAR / E. CLIVE (Eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR),* Full Edition, Sellier (2009), Vol. I, 37 *et seq.*: good faith is included within the underlying principle of "justice". Art. III-1:103 recognizes the duty to act in accordance with good faith in contractual performance but warns that a breach of this duty does not in itself give rise to a liability to pay damages, though it may prevent a party from relying on an already existing right, remedy or defence. See also M.J. BONELL / R. PELEGGI, "UNIDROIT Principles of International Commercial Contracts and Draft Common Frame of Reference: a Synoptical Table", *Unif. L. Rev. / Rev. dr. unif.* (2009), 437 *et seq.*

35 See BONELL, *supra* note 2, 119-120. A right to damages is expressly provided for in the PECL, Art. 6:110(3).

The Appellate Court, as already mentioned, censured the first instance decision because it did not apply the appropriate domestic law (French law) to the matter under discussion. One would have expected, at this point, a strict refusal of the *théorie de l'imprévision* and consequently a denial of any right or remedy to the disadvantaged party. In fact, this would have been the traditional response given both by judges [36] and by scholars [37] for a supervening change of circumstances in contracts not governed by administrative law.[38] Interestingly, however, French law has recently undergone some developments in this field. Scholars have referred to the principle of good faith, cooperation or *solidarité* in order to found a duty of the parties to renegotiate their agreement when the circumstances suffer such an alteration that giving effect to the original contractual terms would be clearly unjust. A similar line of reasoning has been applied by case law.[39] Finally, a limited recognition of the *théorie de l'imprévision* is on its way within the latest proposals to reform the *Code civil* on obligations and contracts.[40]

36 Starting from the leading case *Canal de Craponne*, see for all F. TERRE / P. SIMLER / Y. LEQUETTE, *Droit civil. Les obligations*, 10th ed., Paris (2009), 481.

37 For the traditional view see, most recently, A. GOZI / Y. LEQUETTE, "La réforme du droit des contrats: brèves observations sur le projet de la chancellerie"*, Recueil Dalloz* (2008), 2610, where any duty to renegotiate is seen as an undue restriction of the parties' freedom of contract and an excess of judicial discretion. On the terms of the French debate on this issue we cannot of course offer an exhaustive bibliography here. See for all TERRE / SIMLER / LEQUETTE, *supra* note 36, 486 *et seq*.; M. FABRE-MAGNAN, *Droit des obligations, I, Contrat et engagement unilatéral*, Paris (2008), 470 *et seq*.; in a comparative perspective B. FAUVARQUE-COSSON, "Le changement de circonstances", *Revue des contrats* (2004), 67 *et seq*.; D. TALLON, in HARTKAMP *et al*., *Towards a European Civil Code*, 3rd ed., Kluwer (2004), 503; H. RÖSLER, "Hardship in German Codified Law – in Comparative Perspective to English, French and International Contract Law", in *European Review of Private Law (ERPL)* (2007), 485 *et seq*.; in the limited context of the development of a European contract law, A. VENEZIANO, "Le 'changement de circonstances' dans le cadre commun de référence sur le droit européen des contrats", *Revue des contrats* (2009), 878 *et seq*.

38 As is well known, the *théorie de l'imprévision* has been judicially accepted in the case of contracts with a governmental body subject to administrative law for prevailing policy reasons, see the leading case of the *Conseil d'Etat*, 30 March 1916, *Gaz de Bordeaux*.

39 Recent case law and scholarship on the point is reviewed in FABRE-MAGNAN, *supra* note 37.

40 Art. 136, *Projet de réforme du droit des contrats* (2008); B. FAUVARQUE-COSSON,

As far as we can judge, it is on the strength of such developments that the Belgian Appellate Court recognized a right to renegotiate the contract in favour of the disadvantaged party. The Supreme Court did not follow this route and applied uniform international law instead. The question I would like to discuss here is whether the UNIDROIT Principles could have been helpful in defining the issue at hand even if the Supreme Court had embraced the more restrictive interpretation of CISG offered by the lower instance.

I am referring to the application of the UNIDROIT Principles as "a means to interpret or supplement domestic law".[41] The UNIDROIT Principles themselves, in the Official Commentary, explain that "where the dispute relates to an international commercial contract, it may be advisable to resort to the Principles as a source of inspiration" if the courts (or the arbitral tribunals) in applying domestic law happen to be faced with alternative solutions or the lack of a specific rule on the issue to be decided.[42] Of course, any such reference to the UNIDROIT Principles can only have a persuasive effect and would depend on the readiness of the adjudicating body to recognize their intrinsic value as a model for cross-border trade relationships.[43]

It may be worth mentioning, however, that in practice quite a number of decisions have already cited the UNIDROIT Principles as a means to justify a controversial solution while applying domestic law in an international context.[44] In fact, this constitutes by far the most common role played by the UNIDROIT Principles within domestic jurisdictions.[45] This is all the more interesting, since the corresponding

"Le projet de réforme du droit des contrats", *Recueil Dalloz* (2008), *Panorama droit des contrats*, 2965 *et seq*.

41 UNIDROIT Principles, *supra* note 1, *Preamble*, para. 6.

42 UNIDROIT Principles, *supra* note 1, *Preamble*, Comment 6.

43 For an interesting discussion of the growing importance of the UNIDROIT Principles as a "restatement" useful for domestic law see R. MICHAELS, "Rethinking the UNIDROIT Principles: From a law to be chosen by the parties towards a general part of transnational contract law", *RabelsZ,* 73 (1999), 866 *et seq*.

44 This is clearly shown in the recent reasoned presentation of case law on the UNIDROIT Principles by E. FINAZZI-AGRÒ, "L'effettiva incidenza dei Principi UNIDROIT nella risoluzione delle controversie internazionali: un'indagine empirica", *Diritto del commercio internazionale* (2009), 557 *et seq.*

45 Most recently, among domestic court decisions (all cited from <www.unilex.info>): *Federal Court of Australia,* 30 Oct. 2009, *Australian Medic-Care*

paragraph in the Preamble was not contained in the first edition of the Principles and was only added in the 2004 publication on the strength of the experience gained from their practical application.[46]

Thus, it does not appear unreasonable that the UNIDROIT Principles (and in particular their Articles 1.7 on good faith and 6.2.2(1) on the right of the disadvantaged party to request renegotiations) could be used to support an emerging trend in French jurisprudence and scholarship recognizing the existence of a right to renegotiation in hardship situations.

Company Ltd v. Hamilton Pharmaceutical Pty Limited (interpretation of contracts); *Tribunale di Catania* (Italy), 6 Feb. 2009 (restitution); *Audencia Provincial de Valencia,* 6 March 2009 (fundamental breach); High Court of Delhi (India), 20 Aug. 2008, *Hansalaya Properties and Anr. v. Dalmia Cement (Bharat) Ltd.* (contract interpretation); Commercial Court of Brest Region (Belarus), 8 Nov. 2006 (rate of interest); Polish Supreme Court, 6 Nov. 2003 (penalty clause). Chinese judges have referred to the UNIDROIT Principles in their non-binding comments: see Beijing Haidian District People's Court, 20 June 2005. Reference to the UNIDROIT Principles was even made by English Court of Appeal decisions regarding evidence in precontractual negotiations, see Court of Appeal (Civil Division), 12 March 2008, *Chartbrook Limited v. Persimmon Homes Limited* (but this decision was overturned by the *House of Lords*, 1 July 2009).

46 See M.J. BONELL, "UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law", *Unif. L. Rev. / Revue dr. unif.* (2004), 15-16.