Prospects for the UNIDROIT Principles in Brazil

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In this article I intend to demonstrate the extent to which Brazilian lawyers and arbitrators are aware of the UNIDROIT Principles of International Commercial Contracts (hereinafter: "UPICC" or "UNIDROIT Principles"), not only with regard to their actual existence, but also with respect to their usefulness and applicability in the context of international transactions involving Brazilian parties.

To this end, I submitted to 71 leading business lawyers, arbitrators and corporate counsel a brief survey on the impact of the UNIDROIT Principles in their respective practices.[1] The response rate was 62.8%, and I wish publicly to thank those who replied for their time, informed input and co-operation in this endeavour.

This article is divided into five parts. In the *Introduction* I have stated my basic argument, *i.e.*, the fact that despite the general criticism that might be levelled at the UPICC, they are being increasingly used in Brazil, in some of the situations described in their Preamble. Subsequently, I have examined two preliminary issues pertinent to the application of the UNIDROIT Principles in the Brazilian context. First, the *UPICC's compatibility with contract principles prevailing under Brazilian domestic law*. Second, *the Brazilian legal system's openness to non-State law*. Moving on, I have confronted the data obtained in the field survey with the most common situations where the UNIDROIT

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1 The questions contained in the Brazilian survey are annexed to this article. I wish to thank Ms Sarah Lake, a young British scholar, for having inspired me with questions that she addressed to a much greater British and international audience in the context of her masters' dissertation at the University of Sussex, entitled: "The impact of the UNIDROIT Principles for international commercial contracts: British and International Responses", an adapted version of which is published elsewhere in this Review.

Principles may be applied in practice, namely as a *guideline for contract negotiation and drafting*, as *the law governing the contract* and as a means for *interpreting and supplementing other international instruments or the domestic law applicable*. The article concludes with some remarks about the prospects for the UNIDROIT Principles in Brazil.

I. – INTRODUCTION

> *Although these principles are referred to as the UNIDROIT Principles, they derive from this no special status in law. They are no more than a product of a UNIDROIT committee and as such have at best persuasive power in terms of a restatement or as soft law. Their authority is hardly in their academic pedigree and content, and their legitimacy if any can only derive from their reflection of international fundamental principles or from the ability of the international legal practice to recognise itself in them and to accept their guidance (...).*
>
> *J. Dalhuisen* [2]

> *Interesting though this discussion of the character of such 'general principles' may be in the theory of international law, it is even more important to know what they in fact represent ...*
>
> *Bin Cheng* [3]

Notwithstanding their great success worldwide, there is also criticism of the UNIDROIT Principles and it takes different forms. Some critics argue that the UPICC *lack legitimacy*. Others say they reflect only a *theoretical approach* to international contracts. Additionally, some disapprove of their *non-binding nature* as well as of the *general character* of their rules.

1. Lack of legitimacy

The UPICC's alleged lack of legitimacy lies in their private (or semi-private) origin, as opposed to domestic and treaty-based law, which ultimately originates in the State legislator. Because of that private origin, arguably the UNIDROIT Principles cannot be characterised as *law* nor indeed as a *legal order*. Needless to say, this view corresponds to a *positivistic* approach to the law which is no longer as prevalent as it was in the 19th and 20th centuries,

2 *Dalhuisen on International Commercial, Financial and Trade Law,* 2nd ed., Hart Publishing, Oxford and Portland, Oregon (2004), 306.

3 B. CHENG, *General Principles of International Law as Applied by International Courts and Tribunals*, first published 1953, Cambridge University Press (2006), 5; cited by M.D. NOLAN / F.G. SOURGENS, "Issues of Proof of General Principles of Law in International Arbitration", *World Arbitration & Mediation Review*, vol. 3:4-5 (2009), 505.

notwithstanding its continuing influence at the judicial level. As Friedrich Juenger has put it,

> "in those positivistic times, the very idea of a supranational *lex mercatoria* or *ius gentium* to govern private transactions was anathema because 'if it is assumed that law can only be made by nation-States, then of course it 'follows' that law cannot be made by communities that transcend nation-States.' Since private dealings, including commercial transactions, were not subject to public international law, they had to be controlled by the law of some sovereign; the only question being which sovereign." [4]

As will be seen below, when we analyse the main aspects of non-State law in international trade, *law* can no longer be understood narrowly , if only to take into account the large number of non-State legal rules governing different aspects of human life.[5]

2. Theoretical approach

Coupled with this criticism, other voices challenge the methodology adopted in the creation of the UNIDROIT Principles. It is argued that the Principles lack legitimacy because they were created, discussed and drafted by a small group of international experts, none of whom was a diplomatic delegate or represented actual international contractual practice.

This type of criticism seems unfounded. Not only were the UNIDROIT Principles created by a large number of experts – both academic *and* professional – coming from all regions of the world,[6] but they also received highly valuable input from leading international organisations devoted to the development of international trade law.[7] Moreover, the methodology

4 F. JUENGER, "The Lex Mercatoria and Private International Law", *Louisiana Law Review* (2000), 1133 at 1135-1136.

5 On this subject, see M. HERTOGH, "What is Non-State Law? Mapping the Other Hemisphere of the Legal World" (2007), available at <http://ssrn.com/abstract=1008451>, and P. ZUMBANSEN, "Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective", *Journal of Law and Society*, v. 38, n. 1 (2011), 50-75.

6 See the lists of members, observers and other participants in the project (1994, 2004 and 2010 editions) at INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *UNIDROIT Principles of International Commercial Contracts 2010*, Rome (2010), ix-xxix.

7 Such as the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), the International Bar Association (IBA), the Groupe de Travail des Contrats Internationaux (GTCI), the New York State Bar, the National Law Center for

followed by UNIDROIT involved not only the Working Group and observers, but also other UNIDROIT decision-making bodies, namely its Governing Council [8] and General Assembly, the latter made up of representatives of UNIDROIT's 63 member States.[9]

This kind of doctrinal codification becomes important in times when law is increasingly fragmented. It responds to the need for rationalising the law of international commercial contracts by identifying its underlying principles and ordering legal rules in a coherent and comprehensive manner along such principles.[10] Consequently, the UPICC promote accessibility to legal principles and rules that would otherwise remain scattered in the universe of international business transactions.

Precisely because of their *"droit savant"* nature, the UNIDROIT Principles are simultaneously *traditional* and *innovative*. Their principles and rules are not limited to those already accepted in most of the world's legal traditions, such as the principles of *freedom of contract* (Article 1.1) and the *right to damages* (Article 7.4.1).[11] They also contain rules which reflect a new perspective on a particular problem, a rule better suited to meet the special needs of international trade practice,[12] *e.g.*, the rules on *hardship* (Articles 6.2.2 and 6.2.3)[13] and the

Inter-American Free Trade, the Hague Conference on Private International Law, the Swiss Arbitration Association, the German Arbitration Association, the Milan Chamber of National and International Arbitration, the China International Economic and Trade Arbitration Commission (CIETAC).

8 In the context of its legislative activities, the UNIDROIT Governing Council at its 90th session formally adopted the third edition of the Principles of International Commercial Contracts ("UNIDROIT Principles 2010") on 10 May 2011. The UNIDROIT Principles 2010 contain new provisions on restitution, illegality, plurality of obligors and of obligees, and conditions.

9 For further information, see the UNIDROIT website at <www.unidroit.org>.

10 B. FAUVARQUE-COSSON, *Droit européen et international des contrats: l'empreinte des codifications doctrinales* (Principes du droit européen du contrat, Principes UNIDROIT), Recueil Dalloz (2007), 96.

11 For an extensive commentary on the UNIDROIT Principles, see S. Vogenauer / J. Kleinheisterkamp (Eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press (2009).

12 See M.J. BONELL, An International Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts, 3rd ed., Transnational Publishers, Inc., Ardsley, New York (2005), 48-49.

13 Very few legal systems recognise the legal doctrine known as *hardship* (*e.g.*, the Civil Codes of Denmark, Egypt, the Netherlands, and the Russian Federation), although an increasing number of countries have provisions on restoring the equilibrium of the contract (*e.g.* Brazil, Argentina, Peru, Panama, Turkey, Portugal). The innovative nature of the UPICC provisions on

presumption of joint and several obligations (Article 11.1.2).[14]

3. Non-binding instrument

Other critics say that the UNIDROIT Principles' *non-binding nature* makes their use more difficult for lawyers. Because counsel (and the parties that they represent) are deeply concerned with legal certainty and predictability in their transactions, only binding instruments such as domestic law or international conventions would be fit to govern an international contract.

However, submitting an international contract to the law of a particular State or nation, or to the rules of an international convention, does not necessarily result in more legal certainty and predictability for an international contract . Besides the specific uncertainties related to the dispute-resolution method chosen by the parties (*i.e.*, courts or arbitration), the *interpretation and application of a foreign law* is in itself a source of innumerable problems to practitioners, judges and arbitrators.

For example, in a recent *breach of loan agreement* case brought before a court in São Paulo, in which I was involved as an expert in international law, a U.S. bank sought enforcement of a guarantee obligation against the guarantors. The law applicable was New York law. The parties fiercely disputed whether issues concerning *abuse of right*, *estoppel, conflict of interests* and *unjust enrichment* were contractual or not. Because the Brazilian judge had little or no training in conflicts of law, still less in American common law institutions, a great effort of *characterisation* had to be made in order to "translate" the issues under dispute into "civil law" language, so that they could be adequately analysed and judged under the applicable New York State law.

The same can be said, albeit to a lesser degree, with respect to most international conventions [15] which, unlike the UNIDROIT Principles, rarely

hardship was recognised in ICC case No. 8873 (1997) (available at UNILEX: <http://www.unilex.info/case.cfm?id=641>). As of September 2011, UNILEX had collected 15 decisions referring to these provisions.

14 In Brazil, as in many other civil law jurisdictions, it is only by virtue of an agreement or a legal provision that several obligors can be jointly and severally bound by the same obligation towards an obligee (*cf.* Civil Code, Art. 265).

15 The *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980) (hereinafter: "CISG") is the exception, given UNCITRAL's continuing efforts to promote enforcement of its Art. 7(1) rule: "[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 (...)."

contain comprehensive comments on, and illustrations of, the practical use of their norms.

Moreover, the UNIDROIT Principles' so-called *non-binding nature* does not seem quite so loose upon closer examination. The same autonomy granted to the parties to choose the law applicable to their agreement in fact has the power to transform an international instrument which is non-binding in theory, into a binding one in practice.

Party autonomy is accepted worldwide. Choice-of-law is nevertheless usually limited to *State law*.[16] Only in the arbitral setting is the party autonomy principle open-ended, enabling parties to choose *rules of law* to govern the merits of the dispute.[17] *Rules of law* is a broader concept, which includes not only *State law* but also *non-State law* rules, such as principles of international contract law, the *lex mercatoria*, transnational law and the like.

Hence, where the UNIDROIT Principles have been chosen as the law applicable to a contract, their original non-binding nature disappears, and is transformed into a binding one by the very will of the parties.

4. Generality

The UNIDROIT Principles' attempt to harmonise the law of international business transactions worldwide would not be as successful had the original

See, *inter alia*, materials available on the UNCITRAL website at: <www.uncitral.org> and on the Albert H. Kritzer CISG Database at Pace University at: <www.cisg.law.pace.edu>.

16 In the European Union, see the Rome I Regulation (EC/593/2008), esp. Art. 3; in the United States, see the Restatement of the Law (Second) Conflict of Laws, esp. S. 187, and the UCC, esp. S. 1-301; in Japan, see the Act on General Rules for Application of Laws, 2007, esp. Arts. 7 and 9; in China, see the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relationships of 28 October 2010, which allows parties to choose the applicable law that will govern disputes related to a foreign-related contract. In Latin America, despite the very limited success of the 1994 *Inter-American Convention on the Law Applicable to International Contracts* and its modern rules on party autonomy (esp. Art. 7), the majority of countries in the region accept party autonomy in international contracts. Bolivia, Brazil, Costa Rica, El Salvador, Honduras, Nicaragua and Uruguay are those which either reject it or accept it with restrictions.

17 The choice of law can be *direct*, where the parties themselves designate the rules of law applicable to the dispute, or *indirect*, where the arbitration rules applicable to the dispute allow for the choice of the law (or rules of law) applicable to the dispute. See, for instance: Brazilian Arbitration Act (Law 9.307/96), Art. 2; 1985 UNCITRAL Model Law on International Commercial Arbitration, Art. 28(1) (adopted in 64 States); ICC Arbitration Rules (1998), Art. 17(1); *ICSID Convention*, Art. 42(1); Arbitration Rules of the Milan Chamber of Commerce, Art. 3(1); the new French Law on Arbitration (Decree 2011-48 of 13 Jan, 2011), Art. 1.511.

project aimed to address specific agreements (*e.g.*, sales, services, agency, distribution, joint ventures, and transport contracts). Given the legal diversity and local specificities involved in each of these most frequently used types of contract, not only would the task of establishing a common core of rules accepted worldwide be a never-ending one, but it would also be impracticable to agree on any prospective rules.

Rather than a shortcoming, the UPICC's *general character* is actually one of their outstanding virtues. Starting from this solid *and general* base, it has been possible progressively to improve upon the UNIDROIT Principles' substantive scope. Since the first edition was published in 1994, a number of additional chapters and rules have been added to the UPICC dealing with subjects as varied as *inconsistent behaviour* (Article 1.9), *authority of agents* (Articles 2.2.1 to 2.2.10), *illegality* (Articles 3.3.1), *set-off* (Chapter 8), *limitation periods* (Chapter 10), and *plurality of obligors and of obligees* (Chapter 11), culminating in the approval of the third edition in 2010. In sum, *generality* is a central feature of the UNIDROIT Principles: it confirms that they are not a static instrument of uniform contract law (such as an international convention) but rather a flexible one, a true *work in progress*.[18]

The UNIDROIT Principles' normative specificity indeed challenges the traditional categories, as noted by Jürgen Basedow:

> "[t]heir normative quality can only be assessed by a new theoretical reflection. It has to cross the traditional borderline between law and fact, between precepts and habits, and it must overcome the positivist concept that lawmaking is the exclusive prerogative of the State, to the effect that normative texts can only produce a binding effect if they have been approved in the proper constitutional manner." [19]

At the end of the day, criticism is good for the UNIDROIT Principles. Rather than demolishing them, criticism de-constructs them in order to allow for a better understanding of their flaws, and to create an opportunity for change that may improve the Principles in the long run.

While a case may be made for some of these criticisms, they have never amounted to an obstacle to the expanding use of the UNIDROIT Principles in international legal transactions.

18 See BONELL, *supra* note 12, 363-370.

19 J. BASEDOW, "Uniform Law Conventions and the UNIDROIT Principles", *Unif. L. Rev.* / *Rev. dr. unif.* (2000), 132-133.

5. Expanding use

Ultimately, it is the marketplace that decides when, where and how the UNIDROIT Principles should be accepted. The international trade community, including practitioners, judges and arbitrators, should assess the Principles from the point of view of internationally accepted fundamental principles and practical needs, more in particular from the perspective of the law that prevails in that sphere between professionals.

From 1994 to date, the UNIDROIT Principles have been applied in a large number of disputes. According to UNILEX, the Rome-based online database that publishes all known decisions and arbitral awards relating to the UNIDROIT Principles and the *United Nations Convention on Contracts for the International Sale of Goods* (CISG), the Principles have been invoked in at least *265 cases*, the majority of which (159) before arbitral tribunals.[20] Since arbitral awards are not usually published, the total number of decisions referring in one way or another to the UNIDROIT Principles is considerably higher than indicated by the database. For the sake of comparison, the CISG – a successful binding instrument of international uniform law – has been invoked in 891 cases since its entry into force in January 1988, the vast majority of which before State courts.[21]

As an international restatement of contracts the UNIDROIT Principles respond, at least in part, to the need for practicality, reasonableness and simplicity for international trade agents. We, the lawyers, should endeavour to free ourselves from prejudices that overlook solutions based on non-State legal instruments. As correctly put by the renowned comparativist René David:

> "[t]he lawyer's idea which aspires to submit international trade, in every case, to one or more national systems of law is nothing but bluff. The practical men have largely freed themselves from it, by means of standard contracts and arbitration, and States will be abandoning neither sovereignty nor prerogatives, if they open their eyes to reality and lend themselves to the reconstruction of international law." [22]

20 As of 28 August 2011. For further information, see UNILEX at <www.unilex.info>.

21 *Idem*. The CISG was referred to in 91 arbitral awards alone.

22 R. DAVID, "The International Unification of Private Law", in: 2 *International Encyclopedia of Comparative Law* (1969), Ch. 5, 25 at 212; cited by F. JUENGER, "The Lex Mercatoria and Private International Law", *Louisiana Law Review* (2000), at 1133.

II. – THE UNIDROIT PRINCIPLES IN THE BRAZILIAN CONTEXT

In this section, I suggest that the Brazilian legal community is increasingly familiar with the UPICC and willing to apply them in international business transactions.

Though the UNIDROIT Principles have been used most often as a *guide to contract negotiations and drafting*, the data collected show that they have also been chosen as the *law applicable to international contracts* and as *a means to interpret and supplement the domestic law applicable*. Several reasons explain this growing interest in the UNIDROIT Principles.

1. General openness to international trade and international trade law

First, the recent internationalisation of the Brazilian economy and its ensuing growth have exposed the country to a growing number of international commercial transactions,[23] including foreign direct investment,[24] with a concomitant rise in the number of legal issues and disputes. Not surprisingly, Brazil is now in the process of acceding to the CISG.[25]

This has led to an expansion of the marketplace for lawyers specialising in international law, particularly international business law. As a result, there is now more legal training in this area, which includes the study and promotion of relevant instruments such as the CISG and the UPICC.[26]

23 In 2011, the volume of international trade is expected to reach US$ 500 billion (roughly US$ 250 billion each for exports and imports) (*Jornal Valor Econômico*, Brasil, 1 Sept. 2011, A2). In 2005, international trade transactions amounted to US$ 190 billion; in 2007, US$ 281 billion; in 2010, US$ 383 billion. Source: <www.portalbrasil.net/economia_balanca comercial.htm>.

24 In 2008, foreign direct investment reached US$ 30 billion; in 2009, US$ 25.9 billion; in 2010, US$ 48.4 billion; and, until July 2011, US$ 38.4 billion. Sources: *O Estado de São Paulo,* 20 Jan. 2010 <http://www.estadao.com.br/noticias/economia,ied-somou-us-25949-bi-em-2009-informa-bc,498661,0.htm> and BBC Brazil, 25 Jan. 2011.

25 See Message No. 636 sent to Congress by the President of Brazil in November 2010. As of November 2011, the Chamber of Deputies' Commission on Economic Development, Industry and Commerce and the Commission on Constitutionality and Justice had already approved the proposed ratification bill (PDC No. 222). The Bill will now be submitted to the Plenary vote of the Chamber before being sent to the Senate for final approval.

26 Five years ago, only two Brazilian student teams participated in the traditional *Willem C. Vis Arbitration Moot* in Vienna. At the two latest moots, this figure had increased to eight and twelve, respectively. Brazilian teams have recently participated in other trade-law-related moots in Argentina, France and Serbia.

In parallel, arbitration in Brazil has boomed within the last 10 years. The enactment of a modern arbitration Act (Federal Law No. 9.307/96) and the country's accession to the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, along with the judiciary's strong support of arbitration, have laid the foundations of an arbitration-friendly legal environment in Brazil.[27]

Submitting disputes to international arbitration is a common feature of transnational business transactions. Legal certainty, procedural flexibility and timely decisions are usually referred to as the main reasons that favour arbitration in this context.

Such an environment works in favour of applying the UNIDROIT Principles, be it as a guide to negotiating and drafting contracts, as the law governing the contract, or as a means to interpret or supplement the domestic law or international instruments otherwise applicable to the dispute.

2. Soft law, international business transactions and arbitration

Second, in Brazil, as in the majority of countries worldwide, there are no legal rules that systematically address issues related to international contracts. Brazil's new Civil Code, enacted in 2002 to replace the 1916 Code, contains provisions on general contract law (good faith, formation of the contract, validity, interpretation, non-performance and termination) and on the most common types of contract (sales, donation, services, transport, loan, leasing, construction).[28] None of these rules, nor those contained in other contract-specific domestic legislation, address international contracts.

Conventional wisdom says that the particularities of international business transactions [29] create the need for *rules especially suited* to their character. These international rules may be formulated either through classic diplomatic processes (*i.e.*, rules contained in an international treaty) or by means of a non-legislative law-making process. The former often requires lengthy and difficult negotiations not only at the technical but also at the political level.

27 For further information, see the Brazilian Arbitration Committee website at <http://www.cbar.org.br/site_ing/index.html>.

28 Law No. 10.406 of 10 January 2002. For an English version of the Brazilian Civil Code, see L. ROSE, *O Código Civil Brasileiro em inglês – The Brazilian Civil Code in English*, Renovar, Rio de Janeiro (2008).

29 Such as multiple legal connections, foreign currency of payment, international trade usages and practices, etc.

Once consensus is reached among States' delegates, a further struggle commences to obtain the number of signatures and ratifications needed for the international treaty to enter into force. It will therefore come as no surprise that several international treaties containing good uniform law rules have failed to reach significant acceptance worldwide.[30]

As international business transactions develop at a much faster pace than States' ability to regulate them, this space has been progressively occupied by non-governmental bodies (or governmental bodies acting as such).[31] Law-making processes within these bodies are less formal and less politically motivated, and tend to be more technically oriented. Besides international Organisations, such as UNIDROIT, a vast network of international non-governmental bodies devotes substantial energy to the creation of legal rules in a number of trade-specific sectors. To cite but a few examples: the

30 For instance, the 1964 *Convention on a Uniform Law on the International Sale of Goods* and the 1964 *Convention on a Uniform Law on the Formation of Contracts for the International Sale of Goods* (9 ratifications each); the 1974 *United Nations Convention on the Limitation Period in the International Sale of Goods* (21 ratifications); the 1983 UNIDROIT *Convention on Agency in the International Sale of Goods* (5 ratifications). The only notable exception is the CISG, currently in force in 77 States.

31 On this subject see, *e.g.*, ZUMBANSEN, *supra* note 5, and R. MICHAELS, "The Mirage of Non-State Governance", *Utah Law Review* (2010), 31. This author asserts that: "As a consequence, the State under conditions of globalization is different from the State prior to globalization, and any category of non-State governance must be updated constantly to take account of this changing character. (...) The conceptual unattractiveness of non-State governance as a purely negative category is enhanced by the empirical insight that real non-State governance – governance in the absence of a State – may indeed exist, but it is exceedingly rare. Almost all governance combines public and private, or governmental and non-governmental aspects. This is hardly ever denied, but it is often forgotten. The starkest example is the incessant invocation of a *lex mercatoria* as an alleged self-made and autonomous law of international trade, created and administered by merchants (and their lawyers) in the absence of the State. (...) But the autonomous *lex mercatoria* is a myth, both in its ancient and in its modern form. The purported autonomous and trans-European commercial law of the middle ages consisted, at best, of procedural rules; substantive, commercial law rules were built on those of the European common law, sometimes referred to as the mother of the law merchant. The contemporary *lex mercatoria* combines rules from domestic and international law with those emerging in commerce; institutionally, the need to enforce arbitral awards and the possibility to nullify them in State courts are evidence not of the autonomy of *lex mercatoria* but instead of the entwinement between transnational commerce and the State" (at 37-38). See also J. BASEDOW, *El derecho privado estatal y la economia – El derecho comercial como un amalgama de legislación pública y privada*, in: J. Basedow / D.P.F. Arroyo / J.A. Moreno Rodriguez (Eds.), *¿Como se codifica hoy el derecho comercial internacional?*, La Ley/CEDEP/Thomson Reuters, Asunción (2010).

International Chamber of Commerce (ICC),[32] the International Federation of Consulting Engineers (FIDIC),[33] the International Cotton Association (ICA),[34] the European Coffee Federation,[35] the Grain and Feed Trade Association (GAFTA),[36] the Association of International Petroleum Negotiators (AIPN).[37]

Soft law sources of international commercial law are better suited to express their full potential in arbitration rather than before State courts. This is simply because arbitrators, who are entrusted with interpreting and applying the law of international business transactions, are not subject to the same public policy constraints as judges in the State court system.

An arbitration-friendly environment offers greater flexibility for the emergence and establishment of non-legislative rules. I have little doubt therefore as to why the UPICC are noticeable in Brazil, particularly in the context of international practice and arbitration.

3. The UPICC's suitability for international dealings

Third, the UNIDROIT Principles are not just a distinguished idea and a well-drafted legal text. Their success derives mostly from their actual use in practice by the very people to which their norms are addressed: international traders, lawyers, arbitrators and judges. Since the UPICC's first edition in 1994, their use has gradually expanded, filling various gaps in the regulation of international business transactions. The practical importance of the UNIDROIT Principles has been demonstrated not only by the increasing number of reported judgments and arbitral awards, but also in international field surveys.[38]

32 See the ICC's work in developing codes, rules and model contracts at <www.iccwbo.org>.

33 See the FIDIC's work in developing model contracts and agreements, manuals and guides at <www.fidic.org>.

34 See the ICA's work in developing by-laws, rules and model contracts for the purchase and sale of cotton at <www.ica-ltd.org>.

35 See the ECF's work in developing standard contracts for the sale of soluble and green coffee at <www.ecf-coffee.org>.

36 See the GAFTA's work in developing standard contract terms for the sale of grain, animal feed materials, pulses and rice at <www.gafta.com>.

37 See the AIPN's work in developing model contracts for the oil and gas industry at <www.aipn.org>.

38 For reported decisions, see M.J. BONELL, *The UNIDROIT Principles in Practice – Caselaw and bibliography on the Principles of Commercial Contracts*, 2nd ed., Transnational Publishers,

Where can it be more economically efficient to use the UPICC? It is generally admitted that in a multi-jurisdictional context such as the international trade arena, the availability and use of uniform legal rules helps to promote certainty and predictability in transborder transactions.

In other words,

> "the exposure of cross-border transactions to various and divergent national laws creates a situation of 'constitutional uncertainty'. In such a situation, confidence in the enforcement of contracts by a protective State is by necessity low, and trade will only occur if some compensatory private arrangements allow for trust in the performance of contractual promises." [39]

Hence, international trade has to accommodate the risks flowing from the absence of a hierarchical world State, and does so in the form of co-operative arrangements such as letter-of-credit mechanisms, international arbitration, otherwise called *lex mercatoria*. Such arrangements help to economise transaction costs in international business dealings.

The use of the UNIDROIT Principles, with their strong reliance on party autonomy, in this context helps to reduce risks, to maximise and enforce contractual rights and to strengthen results in an environment marked by legal diversity.

4. Further topics

The outlook for the UPICC in Brazil, whether good or bad, is essentially connected with two general but important issues concerning the relationship between the UPICC rules and the Brazilian legal system. Therefore, we will initially examine (i) to what extent the UPICC provisions and Brazilian contract law are compatible and (ii) whether non-State law is accepted in Brazil.

These two issues are relevant to understanding the UPICC's potential to be acknowledged and used by lawyers and corporate counsel or by arbitrators and judges in Brazil. While the former group's mission includes giving proper advice to clients and corporations on the law applicable to their international contracts, the latter group's task is concerned with the application of the law

Inc., Ardsley, New York (2006), and the UNILEX electronic database at <www.unilex.info>. Surveys conducted on the use of the UPICC are referred to elsewhere in this article.

39 J. BASEDOW, "Lex Mercatoria and the Private International Law of Contracts in Economic Perspective", in: J. Basedow / T. Kono / G. Ruhl (Eds.), *An Economic Analysis of Private International Law*, Mohr Siebeck, Tubingen (2006), 58.

to actual disputes. In addition, some light may be shed on the question as to why judges and arbitrators should refrain from applying the UPICC because of its *non-legislative nature*, as if applying it would offend Brazilian public policy.

Moving on, I will address several possible applications of the UPICC in Brazil, including their use before State courts and arbitral tribunals. To that end, I will refer extensively to the field survey mentioned above, which involved distinguished Brazilian lawyers and revealed their knowledge of and willingness to use the UPICC.

In conclusion, I will attempt to establish the extent to which using the UPICC's may actually make a difference in the Brazilian context.

III. – HOW COMPATIBLE ARE THE UPICC AND BRAZILIAN CONTRACT LAW?

The basic ideas underlying the UNIDROIT Principles reflect those which are key to international commercial contracts in any area of trade.[40] Universal in character, these ideas – or principles – can also be found in most contemporary legal systems and traditions.[41] Not surprisingly, they can be found in Brazilian law as well.

1. Freedom of contract

The first idea is *freedom of contract,* expressed in Article 1.1 of the UPICC. This principle expresses the parties' freedom to enter or not to enter into an agreement, as well as their autonomy to determine its content, by establishing the rules, terms and conditions governing their relationship. The principle reflects *laissez-faire* ideas dating back to the 19th century and the Industrial Revolution. A person free of constraints, acting rationally, should be able to determine for herself what she should purchase or sell.

Freedom of contract is still key in a market-oriented and competitive economic order such as that prevalent in the 20th and early 21st century. It contrasts with the regime characterising other systems of distribution of goods and services where, for example, State direction is predominant.

40 For an analysis of the basic ideas underlying the UNIDROIT Principles, see BONELL, *supra* note 12, esp. Chapter 4.

41 Particularly in those countries whose law is based on the common law and the civil law traditions, which make up approximately 90% of today's nations.

Where the parties are equal in bargaining power and symmetrical in knowledge, contractual autonomy contributes to the efficiency of both international and domestic commercial transactions, because it allows for the best possible allocation of interests and risks between the contracting parties. In other words, these are *win-win* situations where all the parties involved benefit from the transaction.[42]

There is no doubt that the *freedom of contract* principle is central to Brazilian contract law, as asserted by doctrinal authorities, case law and the 2002 Civil Code.[43]

2. Observance of mandatory rules

A basic underlying idea in international commerce is that there must be no room for fraudulent transactions, and fraud must be fought against. Therefore, party autonomy is not an absolute principle, even in the context of the UNIDROIT Principles. Rather, it is constrained by the *mandatory rules* existing not only in the UPICC themselves (*e.g.*, on the validity of the contract – Article 3.1.4), but also by those enacted by the State and by regional or supranational bodies.[44] Examples of the latter vary worldwide, ranging from domestic rules *prohibiting the sale of human organs* (*e.g.*, Brazilian Constitution, Article 199, §4) to supranational norms on the *exclusion of firms convicted of corruption* (2004 EU Procurement Rules, codified as European Union Directives 2004/18/EC and 2004/17/EC).

The effects of contracts that infringe mandatory rules are now set forth in Articles 3.3.1 and 3.3.2 of the 2010 UNIDROIT Principles.

In Brazil, a number of laws have a mandatory nature, reducing freedom of contract to a minimum or even eliminating it altogether. This is the case for *consumer contracts, labour agreements* and certain *government-regulated activities,* to name but a few areas where mandatory norms strongly prevail over party autonomy.

42 E. MACKAAY / S. ROUSSEAU, *Analyse Économique du Droit*, 2ème éd., Dalloz, Paris (2008), 362.

43 Brazilian Civil Code (BCC), *e.g.,* Arts. 421 and 425. Superior Tribunal de Justiça: REsp 1.202.077 (2011) and REsp 959.387 (2009) – on a leasing agreement; REsp 258.103 (2003) – on a consumer contract.

44 UPICC, Art. 1.4.

As regards contracts entered into by parties with equal bargaining power, Brazilian contract law has a number of mandatory provisions,[45] probably many more than would typically be found in common law jurisdictions, such as that of the State of New York.

3. Openness to trade usages

The UNIDROIT Principles are *open to usages*. Thus usages and practices *agreed to* by the parties are binding, as are those *widely known and regularly observed* in international trade by parties in the particular trade concerned (Article 1.9).

For example, this provision was invoked by an Australian Federal Court in a dispute between a cherry grower and an exporter, both established in Australia, who had entered into an agreement for fixed-price consignments of cherries intended for resale to importers in Singapore and Hong Kong. The exporter filled a total of 21 of such orders which the cherry grower promptly executed. A dispute arose when the exporter paid the cherry grower only two thirds of the agreed price, invoking quality defects apparent in most of the consignments of cherries on arrival in Singapore and Hong Kong. The Court found for the cherry grower, but first of all it had to address the preliminary question of the *nature of the relationship between the parties*, *i.e.*, whether it was one of *seller and buyer* (as argued by the cherry grower) or one of *principal and agent* (as argued by the exporter). The application of the CISG was dependent on this preliminary issue.[46] The Court held that the relationship between the parties was that of *an independent seller and an independent buyer* in the context of a domestic agreement and that consequently it was governed by the Australian *Sale of Goods Act* 1895. According to the Court, a *different characterisation* of the relationship between the parties could have been justified on the basis of *generally known practices and usages in the cherry sale/or exporting market* – and in this context the Court expressly referred to Article 9(2) of the CISG, Article 1.9(2) of the UNIDROIT Principles 2004 and §1-303 of the Uniform Commercial

45 *E.g.,* BCC, general provisions (CC 2035 par. one), social function of the contract (CC 421), objective good faith (CC 422).

46 Indeed, if the exporter (Respondent) was acting as a mere agent of the cherry grower (Claimant), then at least some of the consignments, *i.e.*, those shipped by Claimant to the Singapore importer, would constitute an international sales contract governed by the CISG according to its Art. 1(1)(a), so that Arts. 35, 39, 44 and 50 CISG providing for the remedy of price reduction in case of defects of the goods would be applicable.

Code, *all recognising the relevance of trade usages* – but neither party had invoked such usages.[47]

In spite of its codified nature, Brazilian law has historically considered trade usages to be of a binding nature. Before commercial contracts and obligations were subsumed into the 2002 Civil Code, the importance of trade usages was even greater, since their legal status was practically equivalent to that of legislative norms.[48] Nonetheless, trade usages remain a relevant subsidiary source of Brazilian law, as set forth in Article 4 of the 1942 Introductory Law to the Brazilian Legal Norms (LNDB), Article 8 of the 1994 Law on Trade and Corporate Register and in several provisions of the 2002 Civil Code – e.g., Articles 113, 432, 569, 596 and 1.297, §1.

4. *Favor contractus*

The UPICC also follow the *favor contractus* principle, which essentially aims at preserving the contract whenever possible by limiting the number of cases in which its existence or validity may be questioned or in which it may be terminated ahead of time.[49] In this sense, the UPICC favour: (i) binding agreements and (ii) contract validity, (iii) keeping the bargain alive despite hardship, and (iv) despite breach.

For instance, a binding agreement is deemed to exist by the mere agreement of the parties, without any further requirements of a formal nature (*e.g.*, a writing or a registration) or a substantive nature (*e.g.*, consideration or *causa*).[50] Furthermore, the existence of a binding agreement may be inferred by the parties' mere conduct, even where there has not been express acceptance of an offer (Article 2.1.1).

The contract should also survive *hardship*. This is why the UPICC grant the disadvantaged party the right to request, without undue delay, renegetiation of the contract in order to adapt its terms to the changed circumstances (Article 6.2.3).

A mere contractual breach does not entail termination of the agreement, which is in line with the notions of *favor contractus* and *fundamental breach,*

47 Australia, Federal Court, 24.10.2008 – UNILEX at <http://www.unilex.info/case.cfm?id=1366>.

48 Witness the following provisions contained in the abrogated 1850 Commercial Code: Arts. 154, 168, 179, 186, 201, 207 and 291.

49 BONELL, *supra* note 12, 102.

50 UPICC, Arts. 1.2 and 3.1.2, respectively.

adopted also by the CISG.[51] Accordingly, a party may only terminate the contract where the failure of the other party to perform an obligation amounts to a *fundamental non-performance*.[52]

Though not as well developed as in the UNIDROIT Principles, these notions are present in Brazilian contract law. The 2002 Civil Code and recent case law give several examples of the *favor contractus* principle,[53] including the notion of *fundamental breach* as a requirement for terminating the contract.

5. Good faith and fair dealing

The observance of *good faith and fair dealing* in international trade is central to the UPICC (Article 1.7), so that the parties cannot derogate from it.[54] The principle conveys the idea that besides the UPICC's legalistic and market-oriented approaches, there is also a concern with a certain "morality of business", with fair and equitable conditions in cross-border transactions.[55] Several provisions directly or indirectly reflect this idea, *inter alia*: (a) the prohibition of inconsistent behaviour (Article 1.9); (b) the interpretation of the contract in accordance with the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances (Article 4.1(2)); (c) the *contra proferentem* rule (Article 4.6); (d) the limitations imposed on the parties' right to revoke a contract where the beneficiary has relied on the contract (Article 5.2.5); (e) the prohibition of reliance on the non-performance by one party where there has been interference by the relying party (Article 7.1.2).

51 See the vast literature on CISG at Albert H. Kritzer CISG Database (<http://www.cisg.law.pace.edu/>). See also SCHLECHTRIEM & SCHWENZER, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed., Oxford University Press (2010), esp. at 398-437.

52 UPICC, Art. 7.3.1.

53 See, *e.g.*, BCC Art. 157 §2 (on gross disparity); Art. 184 (on reduction of the partially avoided contract); Art. 170 (on converting the avoided contract into a valid one of another type) and Superior Tribunal de Justiça decisions: REsp 981.750 (2010), REsp 977.007 (2009) and REsp 1.058.114 (2009). As to *fundamental breach* as a requirement for contract termination, in spite of its absence in the Civil Code, the Superior Tribunal de Justiça now requires it under certain circumstances: e.g., REsp 1.051.270 (2011), REsp 1.202.514 (2011) and REsp 912.697 (2010).

54 The mandatory nature of the good faith principle, as laid down in Art. 1.7 of the UNIDROIT Principles, has been affirmed by Canadian (Québec) and Australian Courts as well as arbitral tribunals, including ICSID. For these cases, see UNILEX at <http://unilex.info/dynasite.cfm?dssid=2377&dsmid=13621>.

55 BONELL, *supra* note 12, 127 and fn 103.

Although it provides just a few express rules, the Brazilian Civil Code has raised the *good faith* principle into a pillar of domestic contract law. It is equally relevant as (i) an interpretation tool;[56] (ii) an autonomous source of legal rights and duties;[57] and (iii) a limit on the exercise of contractual rights.[58]

With the support of doctrinal authorities and case law, the *good faith* principle has expanded to create rules on (i) the protection of the legitimate expectation of the parties to a contract; (ii) the prohibition of inconsistent behaviour; and (iii) the creation of lateral duties between the parties to a contract, such as: co-operation, information, loyalty obligations.[59]

4. Policy against unfairness

Finally, the UNIDROIT Principles adopt a strong *policy against unfairness*. Reality shows that cross-border transactions are not always entered into by experienced people, thereby giving rise to the need to police the contract or its individual terms against both procedural and substantive unfairness. Unfair bargaining behaviour, for instance, is sanctioned with provisions that allow a party to avoid a contract already concluded by another party's fraudulent misrepresentation or fraudulent non-disclosure of relevant facts (Article 3.2.5), or by unjustified threat (Article 3.2.6).

As for avoiding *substantial unfairness*, the UPICC contain specific rules which permit direct intervention in the contract by rendering ineffective a given contractual term that is deemed unfair. For example, an exemption clause which limits or excludes the party's liability for non-performance may

56 BCC, Art. 113.

57 BCC, Art. 422.

58 This function of the good faith principle is at the origin of the *fundamental breach* theory and the *venire contra factum proprium* or *estoppel* theory, which allow for the limitation of contractual rights by way of application of the following institutions: *tu quoque, venire contra factum proprium, surrectio and supressio.*

59 See, *e.g.,* T. NEGREIROS, *Teoria do Contrato: Novos Paradigmas*, Renovar, Rio de Janeiro (2003); J. MARTINS-COSTA, "A Boa-fé no Direito Privado", *Revista dos Tribunais*, São Paulo (2000); C.L.S. Ramos / G. Tepedino / H.H. Barboza / J.A.P. Gediel / L.E. Fachin / M.C. Bodin De Moraes (Eds.), *Diálogos sobre Direito Civil: construindo uma racionalidade contemporânea*, Renovar, Rio de Janeiro (2002); G. Tepedino (Ed.), *Problemas de Direito Civil-Constitucional*, Renovar, Rio de Janeiro (2000); V.M.J. FRADERA, "O Direito dos Contratos no Século XXI: A Construção de uma Noção Metanacional de Contrato decorrente da Globalização, da Integração Regional e sob a Influência da Doutrina Comparatista", in: M.H. Diniz / R.S. Lisboa (Eds.), *O Direito Civil no Século XXI*, Saraiva, São Paulo (2003), 547-570.

not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract (Article 7.1.6). Another example is the "penalty clause" establishing that an agreed payment for non-performance may be reduced to a reasonable amount whenever it is grossly excessive in relation to the actual harm caused by the non-performance and other circumstances (Article 7.4.13(2)).

Gross disparity is a situation where the UPICC have attempted to *police against the combination of procedural and substantive unfairness* (Article 3.2.7). The provision merges the civil law concept of lesion with the common law notion of unconscionability.[60] This allows for the avoidance or adaptation of the contract or an individual contract term where, at the time of its conclusion, the contract or term unjustifiably gave the other party an excessive advantage. The provision also requires that the excessive advantage must have been obtained by exploiting a bargaining handicap of the other party or otherwise must lack any justification.

The same happens under Brazilian law. As revealed by the rules concerning invalidity of the contract by reason of *error* and *mistake,*[61] *fraud,*[62] *threat,*[63] and *gross disparity,*[64] as well as the rule on *reduction of an agreed payment for non-performance* [65] and the newly introduced principle of the *social function of the contract,*[66] the 2002 BCC also adopted a strong policy against both procedural and substantive unfairness in contractual relations.

60 J.M. PERILLO, "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review", 43 *Fordham Law Review* (1994), 293; and G. ALPA, "La protezione della parte debole di origine internazionale", in: M.J. Bonell / F. Bonelli (Eds.), *Contratti commerciali internazionali e Principi UNIDROIT*, Giuffrè, Milano (1997), 233.

61 BCC, Arts. 138-144.

62 BCC, Arts. 145-150.

63 BCC, Arts. 151-155.

64 BCC, Art. 157.

65 BCC, Art. 413.

66 BCC, Art. 421, which reads as follows: "The freedom of contract shall be exercised by reason and within the limitations of the social function of the contract." Brazilian doctrinal authorities and case law usually identify the social function of the contract from the point of view of the distributive justice inherent in the Social State, with the purpose of balancing the economic and factual power between the parties. For a critical view of this principle, see L.B. TIMM, "The Social Function of Contracts in Market Economic Systems" (2010), at <http://viei.usta.edu.co/index.php?option=com_content&view=article&id=94:the-social-function-of-contracts-in-market-economic-systems&catid=60:decimo-primera&Itemid=150>.

5. The 2002 Brazilian Civil Code and the UPICC can live in close harmony

As the table below demonstrates, the UPICC's basic ideas are to a great extent compatible with the principles underlying the 2002 Brazilian Civil Code.

	UPICC	Brazilian Civil Code
Freedom of contract	Art. 1.1	Yes. Arts. 421, 425
Freedom of form	Art. 1.2	Yes. Arts. 104, III, e 107
Binding character of contract	Art. 1.3	Yes. Arts. 389, 408, 418, 427, (...)
Observance of mandatory rules	Art. 1.4	Yes. Arts. 122, 166, VI, e 2.035
Primacy of party autonomy	Art. 1.5	Yes. Arts. 132, 233, 252, 327, 354, 375, 406, 425, 427, 448, 450, 502, (...)
International and uniform character	Art. 1.6	Applicable to Brazilian contract law only to the extent that federal law must be uniformly interpreted.
Good faith and fair dealing	Art. 1.7	Yes. Arts. 113 e 422
Inconsistent behaviour	Art. 1.8	Yes. Under the general clause of good faith (Art. 422)
Binding character of usages and practices	Art. 1.9	Yes, in certain situations. Arts. 111, 113, 330, 488
Receipt principle (notice)	Art. 1.10	No. (Art. 434 – dispatch principle)
Social function of the contract	No	Yes. Art. 421
Favor contractus	Arts. 2.1.1, 3.2, 6.2.1 to 6.2.3, 7.1.4, (...)	Yes. Arts. 167, 170, 183, 184, 317, 442, 475, 479 (...)
Policing against unfairness	Arts. 2.1.15, 3.8, 3.9, 3.10, 7.1.6, (...)	Yes. Arts. 119, 147, 154, 157, 187, 422, 423, 424, 884, (...)

I believe there is no reason why Brazilian lawyers, counsel, judges and arbitrators should disregard the 2010 UNIDROIT Principles as if they were a strange animal.

Brazilian contract law has evolved from classic principles (*i.e., formal equality between the parties, freedom of contract, privity of contract and intangibility of the contractual substance)* and assimilated new principles,

relevant both in theory and in practice, such as *objective good faith, equilibrium of the contractual obligations* and the *social function of the contract*. The contractual system has thus become more permeable to metalegal values, which enables it to adapt to social change without necessarily requiring or involving a change in the positive law.[67]

Moreover, the 2002 Civil Code adopts the technique of *general clauses,* setting out intentionally vague and open-ended concepts to allow the judge or arbitrator to incorporate principles, directives and other rules originally foreign to the codification, in view of defining the legal rule for a particular case in light of its circumstances.[68]

A remarkable example of the more important role now assigned to courts and arbitral tribunals comes from a series of cases involving *leasing agreements* concluded before January 1999, and whose price varied according to the *U.S. dollar* exchange rate. When the Brazilian exchange rate regime abruptly changed in January 1999, devaluating the *real* by nearly 40% these contracts were very badly affected. While the financial institutions (which acted as lessors) attempted to transfer the full burden to the lessees, the latter sought judicial exemption from that burden. In deciding these *hardship* (and hard) cases, the *Superior Tribunal de Justiça* decided to *share* the financial burden of this event *equally* between the contracting parties, having regard to the principles of the *social function of the contract* and of *objective good faith*, in addition to the rules governing *excessive onerousness*.[69]

67 On this subject, see L. GAMA Jr., *Contratos Internacionais à luz dos Principios do UNIDROIT 2004 – Soft law, Arbitragem e Jurisdição*, Renovar, Rio de Janeiro (2006), Ch. 3. As to the social function of the contract principle, a case where its application has led to the liability of a third party who had contributed to non-performance of the contract is analysed in A. JUNQUEIRA DE AZEVEDO, "Princípios do novo direito contratual e desregulamentação do mercado. Direito de exclusividade nas relações contratuais de fornecimento. Função social do contrato e responsabilidade aquiliana do terceiro que contribui par para inadimplemento contratual", *Revista dos Tribunais*, v. 750 (April 1998), 113-120.

68 J. MARTINS-COSTA, "O Direito Privado como um "sistema em construção" – As cláusulas gerais no Projeto do Código Civil brasileiro", *Revista de Informação Legislativa* v. 139, Senado Federal, Brasília (Jul/Sept. 1998), 6-7. In the 2002 Civil Code see, *e.g.,* Arts. 421 (social function of the contract) and 422 (objective good faith). For the case law see STJ – REsp 1.217.951 (2011) – Good faith – general clause – inconsistent behaviour – protection of the legitimate expectations of the innocent party; REsp 1.051.270 (2011) – General clauses – good faith – social function of the contract.

69 BCC, Arts. 478 and 479. See, *inter alia,* STJ, REsp 802.062 (2008).

6. Summing up

Summing up, we can see that the basic ideas and provisions of the UNIDROIT Principles are to a great extent compatible with Brazilian contract law. So much so that the UPICC have been referred to by counsel and arbitrators in purely domestic cases in Brazil, as illustrated in more detail below.

Hence it is not the *substance* of the UPICC that is liable to create challenges to their application in Brazil. Rather, their vulnerability may be related to a question of *form, i.*e., to their soft law, non-legislative character. Lacking the same status as State law may indeed limit their application and expansion in Brazil. However, as seen below, State law is not – and has never been – a necessary and sufficient condition for the existence of law, still less of international business law.

IV. – IS NON-STATE LAW TABOO IN BRAZIL?

> *The center of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time.*
>
> *Eugen Ehrlich* [70]

> *The state law always has the final say; whatever it does not authorize does not … have a chance of validity.*
>
> *Christian von Bar* [71]

1. What is non-State law?

Non-State law primarily designates the law whose origin (both direct and indirect) *is not* the State. It may be found in societies and communities not organised as a State, as was the case in pre-colonial societies (16th to 20th century) in the Americas, Africa, Asia and Pacific.[72] It can also exist in parallel

70 E. EHRLICH, *Fundamental Principles of the Sociology of Law*, Transaction Publishers, New Brunswick (2002) (first published 1936), 390.

71 C. VON BAR / P. MANKOWSKY, *Internationales Privatrecht*, 2nd ed., *Bd. I: Allgemeine Lehren*, (2003), §2 para. 76; cited by F. DASSER, "Mouse or Monster? Some Facts and Figures on the lex mercatoria", in: R. Zimmermann (Ed.), *Globalisierung und Entstaatlichung des Rechts*, Mohr Siebeck, Tübingen (2008), 139.

72 As of the time of writing (Sept. 2011), very few societies are not organised *within* one of the 196 sovereign States constituting the international community, of which 193 are members of the United Nations (the Holy See, Palestine, and Kosovo are not). Other States, like Somaliland (which became independent from Somalia in 1991), have not been recognised at all by the international community. Still others, such as Abkhazia (independent from Georgia) and the

with State law, as is the case with several indigenous and religious communities worldwide.[73] Contemporaneously, non-State law can also result from the work of non-State actors at the international level, which focuses primarily on two fields: (i) the development of international merchant law and (ii) human rights law. In sum, it can be generally defined as "[a] body of law produced and enforced by non-State actors." [74]

Very often, non-State law is identified as *soft law,* because of its flexibility and lack of binding force.[75] However, *soft law* may become persuasive in some instances and acquire a binding and enforceable nature (*e.g.*, when it is chosen by the parties as the law governing their contract).

On the other hand, we may find *soft law* originating from State sources (*i.e.*, intergovernmental Organisations): *e.g.,* the 1985 UNCITRAL Model Law on International Commercial Arbitration and the 1996 Model Law on Electronic Commerce, and the UNIDROIT Principles of International Commercial Contracts and the ALI/UNIDROIT Principles of Transnational Civil Procedure.

Turkish Republic of Northern Cyprus, have been recognised by only some States. See United Nations website at <www.un.org>.

73 Brazil has an indigenous population of 800,000, divided into 230 nations. The 1988 Brazilian Constitution (Art. 231) recognises their customs, traditions, languages and faith. Historically, indigenous law has been collectively created and socially controlled. It is valid only within the indigenous community, for matters such as family, marriage, succession, property and crime. While the Brazilian Constitution has abandoned the prospect of assimilating these communities, their legal rights are still governed by Federal Law 6.001, of 1973, which denies legal pluralism and only accords them subsidiary status.

74 For an overview of this subject, see M. HERTOGH, "What is Non-State Law? Mapping the Other Hemisphere of the Legal World" (2007), available at <http://ssrn.com/abstract=1008451>, and for a critical view, R. MICHAELS, "The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism, *The Wayne Law Review*, vol. 51 (2005), 1209-1259.

75 Substantive regulation of international business transactions attempts to deal with legal diversity using three kinds of uniform rule: (a) rigid law rules (hard law), contained in international conventions and treaties or originating from domestic State sources; (b) usages and practices of international trade (*lex mercatoria*); and (c) flexible law rules (soft law). These last constitute a normative complex that serves as a reasoning criterion for judicial and arbitral decisions and as a means of legitimating practices and professional behaviour in the context of international trade, notwithstanding their lack of binding force and their application being dependent on persuasion and the convincing character of their conformity with the law (in the broader sense) or with commercial deontology (resolutions, recommendations, legal opinions, principles, directives, professional guidelines, conduct codes, model laws, etc.). A. MARQUES DOS SANTOS, "Direito Internacional Privado", in: C. Lima Marques / N. Araújo (Eds.), *O Novo Direito Internacional – Estudos em Homenagem a Erik Jayme,* Renovar, Rio de Janeiro (2005), 29-35.

2. Non-State law in international business transactions

Our focus is on non-State law, or *soft law*, created in the pluralistic legal environment existing in the international commercial arena, the decentralised nature of which is more conducive to the emergence of non-State law, given the absence of supranational legislative bodies and enforcement authorities.

Non-State actors dealing with international business transactions have historically fulfilled their own specific needs for regulation in a *quasi-autonomous* manner.[76] Indeed, much of the medieval *lex mercatoria* derived from the Roman law of sale and observed principles related to the *ius gentium*. However, other instruments such as bills of exchange were created by merchants themselves in response to the difficulties of trading at a distance. The *lex mercatoria* also included freedom of choice and speed of enforcement.

The emergence of nation-States in the 17th century caused law to be "nationalised" and thus confined to the States' territorial boundaries. Nevertheless, these circumstances never eliminated the need for self-regulation by international traders. In other words, the limitations of State law when it came to providing a stable and reliable legal framework for transnational relations created incentives for "private" legislators to continue their rule-making work for international business transactions.[77]

Private regulation of international trade is all the more necessary in a world where international law-making requires the consensus of 196 nation States.

This is why, in order to broaden the scope of the law applicable to international contract disputes, modern international instruments that deal with arbitration adopt the more neutral and broader language of "rules of law". Thus, instead of merely referring to "law" (a concept that covers only legal rules of State origin), these instruments refer rather to the broader concept of "rules of law", which comprises both non-State and State law.[78]

76 See, *e.g.*, R.A. EPSTEIN, "Reflections on the Historical Origins and Economic Structure of the Law Merchant", 5 *Chicago Journal of International Law* 2 (2004-2005), at 1. See also Ph. DE LY, *International Business Law and Lex Mercatoria*, Amsterdam, North Holland (1992), esp. 19.

77 On the process of non-State law-making, see BASEDOW, *supra* note 31, esp. 25.

78 See, *e.g.*, Art. 42(1) of the 1965 Washington *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*; Art. 1.511 of the New French Arbitration Act (Decree No. 2011-48 of 13 Jan. 2011); Art. 1.054 of the Dutch Code of Civil Procedure (as amended on 2 July 1986); Art. 187 of the 1987 Swiss Private International Law Act;

It is worth noting that the proposed Hague Principles on the Choice of Law in International Commercial Contracts have been drafted in line with this modern approach, which will hopefully persuade State courts to adopt a more liberal – and adequate – position as regards the law applicable to international contracts.[79]

3. The UPICC as soft law and non-State law

There is hardly any dispute as to the *non-State* and *soft law* nature of the UNIDROIT Principles.[80] Despite the fact that they originate from an international Organisation formed by States, they do not reflect its member States' positions, as happens with treaties and conventions. From this point of view, the UNIDROIT Principles are similar to other non-binding instruments whose authority stems from their inherent quality and adaptability to international commercial transactions.[81]

In a sense, the UNIDROIT Principles may be characterised as part of the *new lex mercatoria*. As stated in a number of arbitral awards,[82] as well as by doctrinal authority,

> "[t]oday the term is mostly used as catch-all for alleged legal rules of international commerce that are not based on a specific national or supra-national legal system – including international treaties such as the UN Sales Convention (CISG) – and are, thus, autonomous." [83]

Art. 2, §1 of the 1996 Brazilian Arbitration Act; and all domestic legislation on arbitration enacted on the basis of the 1985 UNCITRAL Model Law on International Commercial Arbitration, whose Art. 28(1) allows for the choice of rules of law, instead of limiting the choice to laws of a given State.

79 For additional information on this soft law instrument project, see the Hague Conference website at <http://www.hcch.net/index_en.php?act=text.display&tid=49>.

80 *Contra*, F. DASSER, That Rare Bird: Non-National Legal Standards as Applicable Law in International Commercial Arbitration (2011), 6 (unpublished). Since general principles of law are generally derived from State law (or international public law) rather than directly from trade usages, the author argues that their sources are not necessarily private or commercial.

81 *E.g.*, the ICC INCOTERMS, with the difference that the ICC is not an international governmental organisation but a private international body.

82 At least 7 reported arbitral awards referred to the UPICC as an expression of the *lex mercatoria*: see UNILEX at <http://unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1>.

83 DASSER, *supra* note 71, 131.

4. The basis for choosing non-State law

On a theoretical level, allowing the designation of non-State law does not involve admitting the possibility of a *"contrat sans loi ou sans droit"*, understood as a contract independent of all law, and governed solely by its own provisions.[84]

Instead, the selection of a body of non-State law such as the UNIDROIT Principles would proceed from a *choice-of-law rule*. In other words, the designated non-State law would not have binding effect *per se* but would become binding on the parties as a result of their express or implied intention to be bound by the designated non-State law.

In turn, their intention would be sanctioned by a choice-of-law rule provided either directly by State law or indirectly by arbitral rules recognised as binding by State law and the courts. The argument proceeds from the same justification that supports the traditional expression of party autonomy in those jurisdictions that already allow parties to choose the law governing their contract.

Party autonomy is an expression of the parties' intention to be bound by their contractual undertaking. A choice-of-law clause is a way of maximising party autonomy, since it recognises that in international contractual relations the parties may have a *legitimate interest* in selecting the law governing their contract, *inter alia*: (a) a neutral law that is not perceived as benefiting one of the parties to the detriment of the other (*e.g.*, Swiss law); (b) a law that will serve their particular needs (*e.g.*, well-developed commercial law, such as New York law); (c) a law better adapted to international commercial relations (this may not be a State law but an international instrument, such as the CISG, or another non-State law source).

Allowing the parties to designate non-State law broadens the scope of the party autonomy principle. From an economic perspective, it maximises the parties' individual interests with regard to economic dynamism (*e.g.*, choice of sector-specific rules), creates a more balanced relationship (*i.e.*, neutrality and minimisation of the effects of mandatory rules and public policy), and promotes transparency in their dealings. Hence it helps to stabilise the parties' expectations under their contract, even though non-State law is arguably more

84 See, *e.g.*, L. GANNAGÉ, "Le contrat sans loi en droit international privé", 11.3 *Electronic Journal of Comparative Law* (2007), 12, available at <www.ejcl.org>.

difficult to ascertain and provides less valuable information than the *lex fori* for future legal treatment.

Despite this strong endorsement of party autonomy as the basis for allowing the designation of non-State law, this policy has its limits. This means that in cases where party autonomy is limited to account for other competing policies, this should be reflected in the designation of non-State law. For example, the UNIDROIT Principles are not intended to be applied to *consumer* and *employment contracts* and any other contracts that are eventually to be excluded, primarily on the ground that the parties are typically not of equal bargaining position.

In other words, the designation of non-State law would not extend to contracts where party autonomy is already limited in most domestic and private international law systems. Moreover, the designation of non-State law would be subject to the same limits as the designation of State law with regard to mandatory rules and public policy.[85]

5. Application of non-State law in Brazil

Brazilian lawyers and arbitrators are aware of the usefulness of non-State law in the context of commercial transactions. In commercial arbitration, the designation of non-State law is widely authorised in Brazil, as per Article 2, §1 of the Brazilian Arbitration Act (Law No. 9.307/96).[86]

Not surprisingly, the field survey indicates that 63.6% of the respondents have at one time or other referred to non-State law in their international dealings. This includes the UNIDROIT Principles, the CISG (as a non-binding instrument for parties domiciled in Brazil), standard contract formulae and models (such as the INCOTERMS, model contracts provided by the AIPN, FIDIC contracts, P&I clauses).

Even Brazilian courts are familiar with non-State contract law created by international *private* organisations devoted to the development of both sector-

85 The above ideas were developed in: G. SAUMIER / L. GAMA Jr., Report on non-State law addressed to the Second Meeting of the Working Group – Hague Principles on Choice of Law in International Contracts (June 2011) (not published).

86 The provision reads as follows:

Article 2 – At the parties' discretion, arbitration may be in law or in equity.

§1 – The parties may freely choose the rules of law applicable in the arbitration, as long as their choice does not violate good morals and public policy.

§2 – The parties may also stipulate that the arbitration shall be conducted under general principles of law, customs, usages and the rules of international trade.

specific and general commercial law. Some examples come from the Superior *Tribunal de Justiça* case law regarding the recognition and enforcement of foreign arbitral awards: on standard contract rules created by the International Cotton Association – SEC 856 (2005), SEC 967 (2006), SEC 1210 (2007), SEC 978 (2008), SEC 4415 (2010); SEC 866 (2006); on GAFTA contract rules. Other examples come from domestic disputes submitted to the STJ: on INCOTERMS – REsp 886.695 (2007); REsp 194.117 (2005); REsp 343.754 (2004).

However, express designation of non-State law as the governing law of the contract is still taboo when it comes to a dispute submitted to the *Brazilian courts*. Yet it would make sense to accept such designation before the courts as widely as it is currently accepted in the arbitral setting. This would appear to be the more rational option, given that in most legal systems, arbitration now enjoys the same legitimacy and is as effective as the judicial dispute resolution system.[87]

6. Invoking the UPICC in a dispute

Be that as it may, there are several reasons that facilitate the use of the UNIDROIT Principles, when compared to other non-State law instruments.

First, the UPICC are a well-recognised body of international contract law and, despite their *soft law* nature, they benefit from the UNIDROIT seal which affords them high credibility and a reputation of excellence. Therefore, *epistemological challenges* (*i.e.*, what is law? are trade usages law? is there such a thing as non-State law?) frequently levelled against non-State law rules are not relevant as regards the UPICC.

Second, the UPICC form a systematic body of rules that are easily and freely accessible over the Internet.[88] This is sufficient to avoid the usual *evidentiary challenges* to non-State legal rules (what is non-State law and where do you find it?) and general principles of law.[89]

87 For a recent strong endorsement of this position, see F. MARRELLA, "The New (Rome I) European Regulation on the Law Applicable to Contractual Obligations: What has Changed?", 19(1) *ICC International Court of Arbitration Bulletin* (2008), 87 at 89-90. For a contrary position, see U. MAGNUS / P. MANKOWSKI, "The Green Paper on a Future Rome I Regulation – on the Road to a Renewed European Private International Law of Contracts", 103 *Zeitschrift für Vergleichende Rechtswissenschaft* (2004), 131 at 149-53.

88 See the UNIDROIT website at <www.unidroit.org>.

89 See, *e.g.*, the INTERNATIONAL LAW ASSOCIATION, *Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration and accompanying Resolution* No. 6/2008 (2008) (available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19>). For a

Third, the UPICC's official commentary and illustrations are helpful in overcoming *institutional challenges* to their application (*i.e.*, national courts and lawyers are not equipped, competent, able to identify, interpret, apply non-State law).[90]

Beyond its relevance for party autonomy, the possibility of choice in favour of non-State law both in arbitral tribunals and State courts has the added advantage of maintaining the role of State courts in the adjudication of commercial disputes and the development of international commercial law.[91]

7. Conclusion

In our opinion, resisting the application of the UPICC because of their *soft* and *non-State law* nature is unwarranted.

Concerning international contract disputes in the judicial setting, even though the Brazilian private international law rules do not expressly allow the parties to choose their own rules to govern their contract, there exists no rule forbidding them to do so, as will be developed below.

On the other hand, extensive use of arbitration to solve commercial disputes in Brazil has been fostering the application of non-State law, for both the procedural aspects and the merits of disputes.

For the sake of legal certainty and predictability, the enactment of specific legal provisions in Brazil, allowing for the application of non-State law by courts in international disputes in accordance with Article 2 of the Brazilian Arbitration Act and with the proposed Hague choice-of-law principles would be bound to foster the use of the UNIDROIT Principles.

good study on the evidentiary challenges raised by general principles of law, see NOLAN / SOURGENS, *supra* note 3, 505-533.

90 See, *e.g.*, E. DARANKOUM, *L'application des Principes d'UNIDROIT par les arbitres internationaux et par les juges étatiques*, 36 Editions Thémis (2002), 421.

91 SAUMIER / GAMA Jr., *supra* note 85. This would be entirely consistent with the purpose of the 2005 *Hague Convention on Choice of Court Agreements*, which is to provide the parties to international commercial contracts with a real option regarding dispute resolution. Party autonomy is supported by providing parties with real options vis-à-vis dispute resolution and vis-à-vis applicable law. By extending the designation of non-State law to the judicial sphere, these two elements of international commercial disputes are decoupled and party autonomy is maximised.

V. – CURRENT APPLICATION OF THE UPICC IN BRAZIL

> *It seems to me that one of the obstacles for applying the UNIDROIT Principles as the law governing the contract is the scarce knowledge of them shown by lawyers and corporate counsel. While the Principles' detailed nature offers an appropriate working tool, the time required to get acquainted with them, for those who still don't know them, hinders their adoption as the law applicable.*
>
> *Survey: statement by a practising lawyer and academic*

> *The Principles present themselves as a good reference for situations where the law has not been chosen by the parties. However, they can also serve as an acceptable middle ground where there has been no consensus between the parties with regard to the law applicable. They may also serve as a guide for the application of principles of international commerce, where such principles have been generically mentioned. Nevertheless, what the contracting parties mainly seek is predictability. In this sense, the Principles tend to be less frequently chosen than the most tested domestic laws.*
>
> *Survey: statement by a corporate counsel*

As seen earlier, the UNIDROIT Principles' basic ideas as well as the core of their provisions are fully compatible with Brazilian contract law, whose scope is becoming increasingly international.

Resistance to the application of the UPICC is usually grounded in their formal nature *(non-State and soft law)*. It has nothing to do with their content.

As is the case with the application of non-State law in several other instances, the use of the UPICC by State courts and arbitral tribunals in Brazil does not violate public policy.

1. The unlimited purposes of the UNIDROIT Principles

The Preamble of the UNIDROIT Principles sets out the most important ways in which they can be used in practice. However, in addition to their use as (i) rules of law governing the contract; (ii) a means of interpreting and supplementing other international uniform law instruments; (iii) a means of interpreting and supplementing domestic law; and (iv) a model for national and international legislators, the UNIDROIT Principles may serve other purposes.[92] One such additional purpose that is relevant to the Brazilian context is their use as (v) a guide for negotiating and drafting international contracts.

92 UPICC, Preamble and Comment. These other purposes are: (a) as a guide for drafting contracts; (b) as a substitute for the domestic law otherwise applicable, when it proves impossible or extremely difficult to establish the relevant rule of that particular domestic law with respect to a specific issue; and (c) as course material in universities and law schools, thereby promoting the teaching of contract law on a truly comparative basis.

2. Enquiries into the use of the UNIDROIT Principles

The usefulness and efficiency of any set of rules can only be assessed by those who actually use them in practice. To this end, several surveys have been conducted on the application of the UPICC since the first edition in 1994: in 1996 by UNIDROIT,[93] in 1997 by the American scholar M.W. Gordon,[94] and in 1999-2000 by the Center for Transnational Law (CENTRAL), directed at business people, lawyers, corporate counsel and arbitrators.[95]

More recently, enquiries were conducted in the United States (2008) by Professor Peter Fitzgerald [96] and in Europe by Professor Felix Dasser

93 *The Use of the UNIDROIT Principles in Practice* – Results of the first enquiry undertaken by the UNIDROIT Secretariat in September 1996 (UNIDROIT 1997). This enquiry elicited 200 replies, which confirmed the intrinsic quality of the 1994 UNIDROIT Principles. Some of its results can be found in the UNIDROIT Secretariat Memorandum addressed to the Working Group for the Preparation of a Second Enlarged Edition of the UNIDROIT Principles (UNIDROIT 1998 – Study L – Doc. 55, 1-3).

94 M.W. GORDON, "Part II – Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges", 46 *American Journal of Comparative Law* Suppl. (1998), 361. Professor Gordon conducted a survey of lawyers practising in Florida by means of a questionnaire sent to 100 randomly selected members of the Florida Bar's Section on International Law as well as to 24 members of that Section's Executive Committee. Professor Gordon's study focused on the CISG. It suggests that 20 years after it was signed and 10 years after the United States acceded to it, the CISG was still largely unknown to crucial legal audiences in Florida. Not only were many respondents unaware of the content of the CISG, but they were also hostile to the notion that there should be any such international convention to displace local law. These findings also apply to the awareness and knowledge of the UNIDROIT Principles in Florida and possibly in other U.S. states.

95 K.P. BERBER, "The Central Enquiry on the Use of Transnational Law in International Contract Law and Arbitration – Selected Results from the First Worldwide Survey on the Practice of Transnational Commercial Law", *ASA Bulletin* (2000), 654 at 659, available at <http://www.trans-lex.org/000003>. This large-scale worldwide enquiry conducted by CENTRAL between 1999 and 2000 revealed a substantial awareness of the *new lex mercatoria* within the legal community. At the same time it showed a lack of knowledge of, and information on, the content and background of the *new lex mercatoria* and a resultant hesitation to apply it in practice.

96 P.L. FITZGERALD, "The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States" (2008), electronic copy available at <http://ssrn.com/abstract=1127382>. Professor Fitzgerald's survey extended Professor Gordon's earlier survey to other U.S. jurisdictions, including two top exporting states, California and New York, and two at the bottom of the exporters' lists, Hawaii and Montana. As the survey was open

(2008)[97] and Ms Sarah Lake (2010).[98]

3. The Brazilian enquiry

In early 2011, I conducted a pioneering field survey among 71 Brazilian practitioners, leading arbitrators and corporate counsel, representing the country's most important law firms and some of the major corporations in Brazil. I received 44 responses (62.8% response rate), of which 36 (81%) from practitioners and arbitrators and 8 (19%) from corporate counsel. These responses provided me with significant data about the knowledge and practical application of the UPICC in Brazil.[99]

A set of legal rules can be seen as a product competing in the market with other rules of a similar nature, especially in the field of international contract

to other participants as well, it received responses from 23 U.S. jurisdictions and 15 foreign countries or regions. It received a total of 236 responses, of which 66% came from practitioners, 7% from jurists and 27% from legal academics. Practitioners revealed low levels of familiarity with the UNIDROIT Principles, comparable to those found in Professor Gordon's 1998 enquiry. It also revealed that only 30% of the respondents felt that the inclusion of a choice-of-law clause indicating the Principles as the law applicable would be effective to the extent that the Principles were consistent with the mandatory law of the forum. A somewhat similar result was obtained in the context of arbitral proceedings.

97 DASSER, *supra* note 71 and *idem*, note 80.

98 S. LAKE, *The impact of the UNIDROIT Principles for international commercial contracts: British and International Responses*, University of Sussex (2010) (see elsewhere in this issue for an adapted version). Ms Lake addressed questions to 500 United Kingdom practitioners and 500 practitioners internationally, and obtained a response rate of 19.4% and 13.6% for the British and international surveys, respectively. Her enquiry highlights the lack of demand for the UPICC in Britain, over half of the British respondents being unfamiliar with the UPICC. However, it does show that nearly one third of international respondents have actually used them. Interestingly, one response to the British survey was that the UPICC is viewed as "a civil lawyer's dream and a common lawyer's nightmare."

99 The survey (the text of the questionnaire is annexed to this article) was sent to 54 (76%) practising lawyers and arbitrators and 17 (24%) corporate counsel. It was conducted entirely online, by means of individual email messages containing the questions to be answered by the addressees. I sent out 71 messages to leading Brazilian practising lawyers and arbitrators as well as corporate counsel, the great majority of whom work in the states of São Paulo, Rio de Janeiro, Minas Gerais, Rio Grande do Sul and Paraná. These not only are the top exporting states but represent nearly 70% of Brazil's GDP. I obtained 44 responses (68.2% response rate): 81% from practising lawyers and arbitrators, and 19% from corporate counsel. Though modest in scope, the survey revealed interesting data about the awareness and actual application of the UNIDROIT Principles within the Brazilian legal community. Not only were many respondents aware of the content of the UPICC, but they were also willing to apply them, mostly in conjunction with domestic law.

law. Hence, empirical data collected in earlier enquiries suggest that international contract rules are more frequently used where they are more widely known by their prospective users.

All survey respondents *were aware* of the existence and availability of the UNIDROIT Principles. This reflects the fact that the UPICC have been efficiently promoted in Brazil since the first edition in 1994. There is already a significant body of academic works written in Portuguese that directly or indirectly refer to the UPICC.[100] The UPICC are frequently a leading topic at seminars and conferences dealing with international contracts and arbitration. Additionally, the widespread use of the internet in the last decade, coupled with increased exchanges between Brazilian and foreign lawyers, have enabled a larger number of individuals to access, discuss and learn about the UNIDROIT Principles in the country.

4. The UNIDROIT Principles as a guideline for contract negotiation and drafting

When negotiating and drafting international contracts, practitioners usually face a number of hurdles such as the diversity of legal systems, language barriers and cultural differences. This is where the UNIDROIT Principles are particularly useful. They are available in all major languages of the world,[101] and in addition to helping parties to overcome linguistic barriers, they serve as

100 See, *inter alia*, L. GAMA Jr., *Contratos Internacionais à luz dos Principios do UNIDROIT 2004 – Soft law, Arbitragem e Jurisdição*, Renovar, Rio de Janeiro (2006); S.A.D. MARTINS, *Análise Econômica da Assimetria de Informação nos Princípios Contratuais do UNIDROIT*, Master thesis, State University of Rio de Janeiro (2010); F.E.Z. GLITZ, *Uma leitura da contemporaneidade contratual: lesão, cláusula de hardship e a conservação do contrato*, Master thesis, Università Federal do Paraná (2005); N. DE ARAÚJO, "Contratos internacionais e a cláusula de hardship: a transposição de sua conceituação segundo a lex mercatoria, para o plano interno nos contratos de longa duração", in: M. Rosado (coord.), *Estudos e Pareceres Direito do Petróleo e Gás*, Renovar, Rio de Janeiro (2005), 409-435; V.M. FRADERA, "O Direito dos Contratos no Século XXI: A Construção de uma Noção Metanacional de Contrato decorrente da Globalização, da Integração Regional e sob influência da Doutrina Comparatista", in: M.H. Diniz / R.S. Silveira (org.), *O Direito Civil no Século XXI*, Saraiva, São Paulo (2003), 547-570; M.C.A. PRADO, "Novas Perspectivas do Reconhecimento e Aplicação do Hardship na Jurisprudência Arbitral Internacional", *Revista Brasileira de Arbitragem*, vol. 2 (April/June 2004), 32-60. A basic Google search (keywords: hardship, Princípios do UNIDROIT) revealed several articles written in Portuguese on issues addressed by the UNIDROIT Principles.

101 A Brazilian Portuguese translation of the UNIDROIT Principles is available at the UNIDROIT website at <www.unidroit.org>. A full translation of the 2004 UPICC in Brazilian Portuguese is available in hard copy.

a checklist of issues parties may wish to address in their contract, and as model clauses that parties may wish to incorporate in their contract (with or without adaptation).[102]

Answers obtained in the Brazilian survey indicate that 54.5% of respondents have used the UPICC in the context of negotiating and drafting international contracts. The majority of these respondents have used them not once, but on several occasions.

The survey suggests that the UPICC can be particularly useful to Brazil in this context. Since Portuguese is not a standard language for international business, the UPICC acts, for example, as a *linguistic bridg*e between parties and lawyers from different legal backgrounds and cultures.

In addition, the UPICC have often been used as a *checklist* of the legal issues to be resolved in the negotiation of an international contract. Indeed, issues arise in international negotiations that do not always come up in the negotiation of domestic contracts, especially in civil law jurisdictions such as Brazil. The UPICC reveal their usefulness as a *checklist* by providing, among others, rules on linguistic discrepancies, merger clauses, currency of payment, hardship and fundamental non-performance as grounds for termination of the contract.[103]

Finally, the survey shows that the neutral terminology employed by the UPICC fosters their use among Brazilian lawyers. As regards international contracts (and even some domestic contracts of a more complex nature), Brazilian legal practice has tended lately to adopt U.S. contract-drafting styles.[104] However, an international contract drafted in neutral and clear terms – as those set out in the UPICC – would naturally enjoy a higher degree of acceptance, as compared with an agreement using terminology that identifies it with a particular foreign legal system or tradition.

In sum, I may assert that, as the Brazilian economy integrates further into the world economy and as a consequence, generates more international contracts, Brazilian lawyers increasingly perceive the UNIDROIT Principles as an international standard for drafting contractual terms and conditions.

102 BONELL, *supra* note 12, 248-250, 271.

103 UPICC, Arts. 4.7, 2.1.17, 6.1.9, 6.2.2 and 7.3.1, respectively.

104 On this issue, see M. REIMANN, "Droit positif et culture juridique – L'américanisation du droit européen par reception, in: *L'américanisation du droit*, Archives de philosophie du droit, Dalloz, Paris (2001), 61-75.

6. The UPICC as the law governing the contract

The UNIDROIT Principles may be expressly chosen by the parties as the law governing their contract. In addition, a court or arbitral tribunal may consider the UNIDROIT Principles as an expression of "general principles of law", the "*lex mercatoria*" or the like referred to in the contract. Sometimes, the UNIDROIT Principles may be applied even in the absence of any choice-of-law clause in the contract.

The survey addressed the question as to whether, in the view of Brazilian respondents, the UPICC were adequate to govern a contract, *independently* of any domestic legal system.

A significant proportion of the respondents (61.5%) believe that the UPICC *are an adequate instrument* to govern an international contract *independently* of any domestic law or international convention. For them, the UNIDROIT Principles contain internationally well-established rules that are appropriate to the specific needs of international business transactions.

The remaining respondents admitted to concern about the need to determine a *domestic law* to govern an international contract, especially in view of disputes that may be submitted to State courts. Regarding this issue, respondents were unsure as to whether a Brazilian judge would allow a contract to be exclusively governed by a set of non-State rules such as the UPICC.

Additionally, respondents were concerned with the UPICC's *general character* and their potential inability to govern specific issues arising from sales contracts, service agreements and more sophisticated international contracts.

Therefore, from a Brazilian perspective, there are two major reasons for challenging the UPICC as the law applicable to an international contract.

The first reason – one that I designate as "the choice-of-law objection" – is the likely rejection by Brazilian courts of the UPICC as the exclusive law governing the contract. Such an attitude could be founded on two prevailing ideas. First, the lack of a clear choice-of-law rule allowing for party autonomy in Brazil creates uncertainty about the enforcement of the choice made by the parties.[105] Second, even if party autonomy is admitted in Brazil, courts most

105 For an accurate study in English, see D. STRINGER, "Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way", 44 *Columbia Journal of Transnational Law* (2006), 959. As to international contracts, Art. 9 of the Introductory Law to the Brazilian Civil Code (now called *Lei de Introdução às Normas do Direito Brasileiro*) has expressly adopted the *lex loci contractus*

likely would not allow it to be directed to a body of non-State law such as the UPICC.

Indeed, Brazilian conflict-of-law provisions regarding contracts designate an applicable "law" to govern them. This is quite different from the language adopted in the Brazilian Arbitration Act or in most international arbitration rules that refer instead to the applicability of "rules of law".

The second major reason – one that I call "the substantive objection" – could be related to the unsuitability of the UPICC's provisions to specific contractual issues. The UNIDROIT Principles contain only *general contract law* rules and therefore may not be adequate or sufficient to govern specific contractual arrangements, such as sale of goods, services, transportation and leasing agreements, not to mention infrastructure and more complex contracts.

While the choice-of-law objections may be easily overcome when the parties resort to international arbitration, the substantive objections constitute a more permanent ground for coupling the use of the UPICC with another body of legal rules, be they domestic or international.

For example, in a distribution agreement recently concluded between a Korean medical products manufacturer and a Brazilian distributor, the UPICC were used as a conciliatory tool. While the Korean party wished the contract to be governed by Korean law, the American lawyers assisting the Brazilian party suggested the choice of New York law. Following the intervention of Brazilian lawyers, the choice-of-law clause was drafted in broader international terms, as follows:

> "The applicable Law of this contract shall be the Law of the State of New York, including the United Nations Convention on the International Sale of Goods 1980, supplemented, when necessary, with the UNIDROIT Principles 2004."

The survey notes that this type of clause is not unusual since 44.2% of the 44 respondents referred to the UNIDROIT Principles as the law applicable to a contract, *not necessarily the only law applicable*. Of those respondents, a significant majority (68.4%) chose the UPICC by expressly referring to them in the contract. The remaining respondents chose the UPICC by agreeing that the contract would be governed by general principles of law, the *lex mercatoria* or another, similar formula.

principle. Thus, the law governing contractual obligations in respect of the interpretation and enforcement thereof is the law of the country where the contract was concluded.

Finally, the enquiry suggests that the choice made in favour of the UPICC is based on their being a neutral set of international contract rules and at the same time representing a compromise between civil law and common law.

In conclusion, although the UPICC have been chosen as the law governing a contract, the survey indicates that a majority of Brazilian lawyers still have never used them in their contractual agreements.

Even so, the UNIDROIT Principles are not only relevant where the parties choose them as the law applicable to the contract, but also when the parties decide *not* to choose a particular law to govern their dispute. This situation may arise when neither party wants the other party's law to govern the contract and they cannot find a common ground with respect to the applicability of the law of a third country. In this case, the parties make what is called a *"negative choice"*, which may be oriented, for instance, in favour of "general principles of law" or "international commercial practice".

A very interesting dispute is currently going on in Brazil between a Chilean and a Brazilian company precisely on this issue. It concerns the alleged *breach of a distribution and partnership agreement* according to which the Chilean company undertook to provide the Brazilian distributor with nitrates to be used as fertilisers. The nitrates were sold to the Brazilian distributor at competitive prices with flexible payment arrangements. In exchange, the Chilean provider was to take a part of the distributor's profits if and when the prices obtained in Brazil reached a certain level.

The dispute between the parties arose when, although nitrate prices had risen significantly in Brazil in the course of the contractual period, the Brazilian distributor failed to transmit the share of profits due to the Chilean provider.

The dispute has been submitted to an arbitral tribunal in São Paulo, and the arbitrators must determine *what is the law applicable to the merits of the* case, since the parties' choice-of-law clause actually conveys a *negative choice*. It reads:

> "The arbitrators shall decide the issues submitted to them in accordance with the international commercial practice and the general principles of law."

What are *international commercial practices* and *the general principles of law*? Where can we find such practices and principles in the international legal arena? How can the arbitral tribunal work with such vague concepts?

The claimant argues that the UNIDROIT Principles reflect the parties' reference to international commercial practice and general principles of law contained in the choice-of-law clause. To support this argument, they refer to

the UPICC's Preamble, which says that *"[t]hey may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like."* Additionally, the claimant invokes the official comment to this rule and the UPICC's usefulness in the case at hand, so as to avoid or at least reduce the vagueness of these concepts. Finally, it brings to the tribunal's attention two ICC awards where the arbitrators recognised the UPICC's relevance to the dispute *as an expression of general principles of law*, saying in one case that *"several ICC cases have considered that the UPICC are the best approach to apprehend the general principles of law"* (ICC case No. 13.012). and in another case that *"the terms international law used by the parties refer to lex mercatoria and general principles of law applicable to international contractual obligations such as the ones arising out of the Contract. Such general principles are reflected in the UPICC which will be applied for the determination of the parties' respective claims in this arbitration"* (ICC case No. 12.111).

As to the merits of the case, the claimant invokes several UPICC provisions, such as Article 1.1 (freedom of contract); Article 1.3 (binding character of contract); Article 1.7 (good faith and fair dealing); Article 3.2 (validity of mere agreement); Artice 1.2 (no form required) and Article 4.8 (supplying an ommitted term).

It is therefore fair to conclude that the UPICC represent a resourceful guide in situations of a negative choice-of-law made by the parties and the Brazilian legal community is quite aware of their relevance in this particular respect.

Except in the arbitral setting, the Brazilian legal environment has not yet reached a level of certainty and predictability as to the enforcement of choice-of-law clauses. Needless to say, this situation is even more delicate where the law chosen by the parties is a set of non-binding, soft-law rules such as the UNIDROIT Principles.

This is not peculiar to the Brazilian legal environment. The UNILEX database shows an overwhelming majority of arbitral awards where the UNIDROIT Principles have been considered as the law applicable to the contract, as opposed to a dearth of court decisions where the same issue has been discussed.[106]

106 UNILEX at <http://unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1>.

7. As a means of interpreting and supplementing the applicable domestic (State) law

My enquiry did not include a question relating to the applicability of the UPICC as a means of interpreting and supplementing the Brazilian – or otherwise domestic – law applicable to the merits of a contractual dispute. However, the UNIDROIT Principles have been invoked for this purpose in at least four arbitral awards involving Brazilian parties.

In a dispute between a Brazilian constructor and an employer from Uruguay, related to a construction and renovation turnkey contract, the arbitral tribunal sitting in Montevideo (Uruguay) referred to the 1994 UNIDROIT Principles (Articles 2.18, 4.2.2 and 4.6) to demonstrate that the solution reached under Uruguayan law corresponded to internationally accepted principles.[107]

In 2005, an arbitral tribunal sitting in Brazil referred to the UPICC in support of the solution reached under Brazilian law. The dispute involved a cabotage contract of carriage by sea concluded between two Brazilian companies. The agreement contained a hardship clause but had no criteria for adapting its terms and conditions. One of the parties alleged hardship in light of a Brazilian currency devaluation. The arbitral tribunal asserted the existence of hardship under Article 478 of the Brazilian Civil Code and referred also to Article 6.2.2 of the UPICC.[108]

In 2009, an arbitral tribunal sitting in São Paulo decided a dispute between two Brazilian energy traders and, besides invoking the application of Brazilian law, also invoked the UNIDROIT Principles (Article 6.2.1) to state that the mere fact that contract performance entailed a higher economic burden for one of the parties did not amount to hardship.[109]

Finally, in a very recent ICC arbitration between Brazilian and foreign parties, the arbitral tribunal sitting in São Paulo decided a dispute involving the control of a company. One of the parties, a foreign bank, invoked the applicability of the UNIDROIT Principles (Articles 4.1 and 4.3 on contract interpretation) as an expression of the general principles of international

107 UNILEX at <http://www.unilex.info/case.cfm?id=1187>.

108 UNILEX at <http://www.unilex.info/case.cfm?id=1532>.

109 UNILEX at <http://www.unilex.info/case.cfm?id=1530>.

commercial law. Nevertheless, the arbitral tribunal eventually applied only Brazilian law in settling the dispute.[110]

In my view, this use of the UNIDROIT Principles in the Brazilian context is in line with the breakdown of cases reported in UNILEX and should develop further as the Brazilian economy becomes more internationalised.[111] This is warranted by the fact that Brazilian law is not always adapted to complex contractual arrangements that follow international standards.

8. As a means of interpreting and supplementing the applicable international law

The UNILEX database shows that this use of the UPICC is more frequent where the CISG is the law applicable to the contractual agreement.

Brazil, however, is not yet a Party to the CISG, where most of these situations occur. Thus, the survey showed no significant results regarding this particular use of the UNIDROIT Principles. This is also confirmed by the absence of case law on this issue.

9. Application in court and arbitral proceedings (general assessment)

So far, there has been no reported application of the UNIDROIT Principles by Brazilian courts. This is explained by two reasons: first, the lack of information about the UNIDROIT Principles in the judicial setting; second, the judges' tendency to be more positivistic in the application of law, which renders the use of the UNIDROIT Principles – a non-State set of rules – by the courts more difficult than in the arbitral setting.

This reflects the general view shared by Brazilian lawyers and corporate counsel which regards the arbitral setting as the most adequate for using the UPICC.

VI. – CONCLUDING REMARKS

1. My survey results suggest that Brazilian lawyers are not only aware of the UNIDROIT Principles but are also willing to apply them, if the legal environment affords sufficient certainty and predictability with respect to their choice.

110 ICC case No. 16.398 (2011). Award unpublished.

111 UNILEX shows that 146 of the 257 reported cases referred to the UNIDROIT Principles as a means for interpreting and supplementing the domestic law applicable.

2. In this respect, Brazilian lawyers may face resistance from their common law counterparts who are traditionally more reluctant to accept the concept of a non-State body of rules applicable to international contracts.

3. While arbitration is booming in Brazil as a means of solving contractual disputes, international arbitration involving Brazilian parties, lawyers and arbitrators represents only a small number of cases. This explains why the UNIDROIT Principles have been invoked mostly in domestic disputes taking place in Brazil.

4. In parallel with UNIDROIT's work in promoting the UNIDROIT Principles, there is still much to be done in order to make the contents of transnational law visible, accessible and workable for the international legal practitioner.

5. In Brazil, the gap between the assumptions of academics dealing with the theory of transnational commercial law and the viewpoints of lawyers, arbitrators and corporate counsel who practise internationally is diminishing. This is due to productive interaction between academia and practising professionals.

6. If the problem is knowledge of transnational law, which is now part of the arsenal of every internationally-oriented lawyer, then the solution must be for transnational law to be more present in Brazilian law school courses, continuing legal education, law review articles and arbitration moots.

7. The future of the UPICC in Brazil is promising and dissemination efforts surrounding the new 2010 edition of the UPICC should further support their evolving use in practice. With the growing strength and internationalisation of Brazil's economy, the consequent increase in the bargaining power of Brazilian parties and the growing acknowledgment and use of the UPICC by Brazilian lawyers should definitely have an impact beyond Brazilian borders.

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ANNEXE

QUESTIONNAIRE ON THE USE OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

The following questionnaire is intended to assess the impact of the UNIDROIT Principles in Brazil. The UNIDROIT Principles (<www.unidroit.org>) consist of a set of non-State rules on international contracts. They are aimed at harmonising commercial contract law for international transactions, providing business people, lawyers, arbitrators and judges with a type of *lingua franca* at international level.

As the UNIDROIT Principles are adopted on a voluntary basis, their adoption relies on parties choosing them to govern their contract, either as the only law governing the contract or as the law applicable to supplement provisions of the domestic law or the international instrument chosen (e.g., the 1980 United Nations Convention on the International Sale of Goods).

1. Are you aware of the UNIDROIT Principles?

Yes	
No	

THE UNIDROIT PRINCIPLES AS A GUIDE IN CONTRACT NEGOTIATIONS AND DRAFTING

2. Have you already used the UNIDROIT Principles in negotiating and/or drafting international contracts (e.g., legal terminology, contract provisions)?

Yes		How often?
No		

3. What do you think is the appeal of the UNIDROIT Principles when negotiating and/or drafting international contracts? (Please select as many as you think are appropriate)

	To overcome language barriers as they are available in various languages.
	As a *checklist* of issues to address during negotiations.
	As a model for contract provisions.
	To provide neutral legal terminology that all parties can understand.
	Other, please state:

THE UNIDROIT PRINCIPLES AS THE LAW GOVERNING AN INTERNATIONAL CONTRACT

4. Do you think the UNIDROIT Principles are an appropriate instrument to govern an international contract regardless of any other domestic law (the law of a State)?

Yes	
No	
Why?	

5. Have you used other international uniform law instruments, either in drafting contracts or as the law governing the contract? (Contract formulas, CISG)?

Yes		Which?
No		

THE UNIDROIT PRINCIPLES AS THE LAW CHOSEN TO GOVERN AN INTERNATIONAL CONTRACT

6. Have you used the UNIDROIT Principles to govern a contract in any of the circumstances indicated below?

	By expressly referring to the UNIDROIT Principles in the contract.
	By agreeing that the contract will be governed by general principles of law, the *lex mercatoria* or the like.
	Due to an absence of a choice of law for the contract.
	None of the above, I have never used the UNIDROIT Principles. (in this case, you do not need to respond to the following questions)

7. If you have used the UNIDROIT Principles, what type of contracts have these been used for?

	Sales / Supply
	Distribution
	Agency
	Transport
	Construction
	Insurance
	Infrastructure
	Other(s):

8. Why do you think the UNIDROIT Principles are useful to govern an international contract? (Please select as many as you think are appropriate)

	Neutral in relation to domestic (State) law.
	Avoid having to choose a domestic law which will give an unfair advantage to one of the parties.
	Better than a neutral law (e.g., Swiss law).
	Halfway house/compromise for civil and common law jurisdictions.
	Other, please state:

9. Have you used the UNIDROIT Principles for domestic contracts?

Yes	
No	

If so, why?

	To confer international legitimacy to the provisions of the particular contract.
	To supplement the domestic law applicable.
	Other, please state:

10. When you have used the UNIDROIT Principles to govern the contract, have the contractual disputes been subject to:

	Arbitration
	Courts (including as a result of a choice-of-courty agreement)

Please state any additional comment you wish to make.

[...]