UNIDROIT: TACKLING COVID-19 THROUGH PRIVATE LAW

by Soterios Loizou[*†]

> § 45: "If a man rent his field to a tenant for crop-rent and receive the crop-rent of his field and later Adad *(i. e.,* the Storm God) inundate the field and carry away the produce, the loss (falls on) the tenant."
>
> § 48: "If a man owe a debt and Adad inundate his field and carry away the produce, or, through lack of water, grain have not grown in the field, in that year he shall not make any return of grain to the creditor, he shall alter his contract-tablet and he shall not pay the interest for that year."[1]

INTRODUCTION

The outbreak of the COVID-19 pandemic has exposed humankind to a global health crisis unprecedented in its scope and impact. Millions of people have been infected, hundreds of thousands of people have passed away, and almost the entire species has been affected by the pandemic.[2] As expected, at the forefront of the race to tackle this crisis, one finds doctors, nursing staff, medical research teams, institutions, and pharmaceutical companies trying to find a cure against the virus. The pandemic struggle, however, is not limited to our biological survival. On the contrary, it extends to preserving our cultural and growth achievements by avoiding an economic catastrophe on both global and regional levels. For that reason, on a macro level, governments and regional organizations have deployed plans to alleviate the severe problems created by the reduced or complete shut-down of economic activity and the sealing of borders. Resembling watertight bulkheads, countries and regional organizations have swiftly taken measures to reinforce their economic structures in an attempt to prevent the effects of the virus from 'flooding' their compartments and 'sinking' their economies. In stark contrast to this bigger picture, on a micro level, only a few narrow measures have been taken to restore the equilibrium in affected business relationships.[3] This lack of rigorous regulatory

---

[*] Lecturer (Ass. Professor) in Commercial Law, King's College London, School of Law; TTLF Fellow, Stanford Law School

[1] Robert Francis Harper, *Code of Hammurabi King of Babylon about 2250 B.C.* (2nd edn, The University of Chicago; Callaghan & Co; Luzac & Co 1904) 27.

[2] For live metrics on Covid-19, see https://coronavirus.jhu.edu/map.html (last accessed 21 August 2020).

[3] For COVID-19-related legislation and its impact on European states, see Ewoud Hondius and others (eds), *Coronavirus and the Law in Europe* (Intersentia Online 2020).

intervention raises the question of whether private law regimes are sufficiently detailed and, at the same time, abstract enough to fairly address the effects of the pandemic on international trade.

This enquiry constitutes the focus of this research study. In particular, the following paragraphs will explore the role of UNIDROIT, one of the most prominent international organizations promoting the unification of private law on a global level,[4] in tackling the effects of the COVID-19 pandemic. To this end, this paper comprises three parts, which correspond to the most important aspects of UNIDROIT's legal response to the problems created by this public health and economic crisis: *i.* the successful resolution of disputes and the salvage of existing business relationships (Part I), *ii.* the reinstatement of trust and the creation of new opportunities in international trade (Part II), and *iii.* the promulgation of private law mechanisms that foresee such crises and fairly allocate the burden of coping with the impact and effects of such major events between the parties (Part III).

I. RESOLVING DISPUTES AND SALVAGING BUSINESS RELATIONSHIPS

The quick contagion rate of COVID-19 mandated extreme measures in order to gain valuable time to successfully prepare and re-organize national health systems. As a result of a seemingly never-ending domino of lockdowns, confinement measures, and travel bans, international trade suffered from a sudden scarcity of resources. Bearing in mind the inter-connectedness of markets, this scarcity crippled trade routes and greatly tilted supply and demand. This destruction of market equilibrium resulted in major problems for individual transactions, which faced an imminent default by contracting parties. Over the past few months, merchants have experienced a series of contractual breaches, which were attributed to two main reasons, either significant delays in contractual performance or complete inability to perform the assumed obligations due to the supervening circumstances and lack of liquidity to finance existing and future deals. Another relatively common scenario has been the change of circumstances, which made performance under the contract substantially more difficult and/or

[4] UNIDROIT Statute, Art. 1, 'The purposes of the International Institute for the Unification of Private Law are to examine ways of harmonising and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law.'

excessively onerous, thus warranting an amendment or termination of the contractual arrangement.

As great as these difficulties might seem, they do not constitute novel problems in private law theory and practice. On the contrary, supervening circumstances have already been regulated since the Code of Hammurabi almost four millennia ago, where provision was made to Adad, the Storm God, who unexpectedly inundated fields and ruined the produce.[5] Rules of this kind can be found in various modern national and international instruments, although they follow different theories and adopt different approaches to the problem.[6] This lack of consistency and coordination of national laws might hamper economic recovery in the aftermath of the crisis. Provisions on supervening circumstances can also be found in instruments promulgated by or devised under the auspices of UNIDROIT, such as the Principles of International Commercial Contracts (2016),[7] the Convention on Travel Contracts (CCV, 1970),[8] the Convention relating to a Uniform Law on the International Sale of Goods of 1964,[9] and the Convention on the Contract for the International Carriage of Goods by Road (CMR, 1956).[10] Given the breadth of their subject-matter and for the sake of brevity, it is apposite to examine further the relevant rules enshrined in the UPICC.

The UNIDROIT Principles of International Commercial Contracts (UPICC), currently in their fourth edition (2016), comprise a set of non-binding rules on general law of obligations for international business transactions.[11] Since the drafting committee was independent of governmental mandates, the UPICC do not reflect compromises of the represented legal

[5] Harper (n 1) 27, paras 45 and 48.
[6] For an overview of various national rules and concepts, such as 'frustration,' 'act of God,' 'change of circumstances,' '*imprévision*,' '*impossibilité*,' '*clausula rebus sic standibus*,' etc., see e.g. Thomas Kadner Graziano, *Comparative Contract Law: Cases, Materials, and Exercises* (2nd edn, Edward Elgar 2019) 384–439.
[7] UNIDROIT Principles of International Commercial Contracts (2006) (hereinafter 'UPICC'), Arts 6.2.1-6.2.3 (hardship) and 7.1.7 (*force majeure*).
[8] International Convention on Travel Contracts (Brussels, 23 Apr. 1970) 1275 U.N.T.S. 531, 9 I.L.M. 699 (1970), *entered into force* 24 Feb. 1976, Arts 10, 15, and 26. *Cf*. European Parliament and Council Directive (EU) 2015/2302 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L 326/1, Arts 3(12), 12, 13(7)-(8), 14(3), and 21.
[9] Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1 Jul. 1964) 834 U.N.T.S. 107, 3 I.L.M. 854 (1964), *entered into force* 18 Aug. 1972 (hereinafter 'ULIS'), Art. 74. *Cf*. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 Apr. 1980) 1489 U.N.T.S. 3, *entered into force* 1 Jan. 1988 (hereinafter 'CISG'), Art. 79.
[10] Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956) 399 U.N.T.S. 189, *entered into force* 2 Jul. 1961, Art. 17(2).
[11] *See* Jan Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law*, vol 2 (6th edn, Hart Publishing 2016) 152, 'Neither internationality nor commerciality are defined, but the use of these notions may imply some reference to the international commercial legal order.'

systems. Instead, adopting the "better-rule" approach, they enshrine "optimal" rules, *i.e.* a mixture of universally accepted rules, provisions found in the minority of legal systems, and, of course, novel rules.[12] Classic examples of such advanced and flexible rules are those enshrined in articles 6.2.1-6.2.3 and 7.1.7.[13] Setting forth a rule on hardship, articles 6.2.1-6.2.3 provide that parties can renegotiate their contractual arrangement. Should they fail to reach an agreement, either party—typically, the disadvantaged party—can resort to the adjudicatory authority seeking adaptation or termination of the original contract. In addition, article 7.1.7 regulates *force majeure* situations. Rather than interfering with the contractual relationship, article 7.1.7 provides for the exemption of liability for non-performance that resulted from supervening circumstances.

Setting aside jurisdictions that have used the UPICC and other UNIDROIT instruments as blueprints for their domestic legislation,[14] the UPICC are not hard law; they have no binding power *per se*. Rather, they require a legal gateway to apply, either by virtue of a choice by the parties or through the lens of default rules and general principles of the applicable law.

To begin, the admissibility,[15] classification, and legal effects of the selection of the UPICC depend greatly on the conflict-of-laws rules of the forum, and, specifically, on the low

[12] Michael Joachim Bonell, 'Towards a Legislative Codification of the UNIDROIT Principles?' in Camilla B Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday* (Wildy, Simmonds & Hill Publishing 2008) 63; Fabio Bortolotti, 'The UNIDROIT Principles and Their Application in the Context of International Arbitration' in Laurent Lévy and Yves Derains (eds), *Liber Amicorum en l'Honneur de Serge Lazareff* (Editions A Pedone 2011) 83; Herbert Kronke, 'The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond' (2005) 25 Journal of Law and Commerce 451, 458–459, 'The UNIDROIT Contract Principles have felicitously been called a restatement. However, to the extent that they do not follow the common-core but the best-solution approach the even more felicitous characterisation is pre-statement: the drafters take on the role of an enlightened legislature to enact the most functional, modern and internationally acceptable rule.'

[13] For a succinct analysis of the *force majeure* and hardship rules of the UPICC, see 'Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis' (UNIDROIT 2020) 8–24.

[14] UPICC 2016, Preamble, '[These Principles] may serve as a model for national and international legislators.' For examples of international and national law rules that were inspired by the UPICC, see 'Preliminary Document, Development of the Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a Focus on Sales)' (Hague Conference on Private International Law, Permanent Bureau 2020) 60, note 68; Michael Joachim Bonell, 'UNIDROIT Principles 2004 - The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law' (2004) 9 Uniform Law Review 5, 7–8; Michael Joachim Bonell, 'The UNIDROIT Principles: First Practical Experiences' (1999) 1 European Journal of Law Reform 193, 195–197; Ralf Michaels, 'Preamble I' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, Oxford University Press 2015) 91–106.

[15] Also referred to as "permissibility," "enforceability," or "effectiveness."

or high threshold of party autonomy enshrined therein.[16] Should the latter allow for the selection of a-national law, the wide regulatory scope of the Principles would, normally, imply the exclusion of any otherwise applicable regime. Conversely, should the relevant conflicts rules allow for the selection of statist law only, the selection of the UPICC would have no impact on the determination of the applicable law. The Principles would merely be incorporated by reference into the commercial transaction as contractual terms, superseding only the dispositive rules of the applicable law.[17] Nevertheless, because the greater part of national contract law comprises dispositive rules,[18] parties are largely free to deviate from the latter.[19] Thus, the pertinent rules enshrined in the UPICC, such as articles 6.2.1-6.2.3 and 7.1.7, would almost invariably apply, irrespective of the rules-selection agreement used—be it a choice-of-law/rules agreement or an incorporation-by-reference clause.[20]

The most crucial function of the UPICC, however, comes indirectly through the influence exerted on the interpretation and application of international uniform law instruments and national law rules. A controversial, yet very important, point pertains to the interplay between the UPICC and international uniform law instruments. While some commentators

[16] UPICC 2016, Preamble, Comment No. 4(a). *See* Peter Nygh, *Autonomy in International Contracts* (Clarendon Press 1999) 86–87; Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 314. For the historical origins of party autonomy in choice-of-law, see e.g. ibid 44–64. For model clauses selecting the UPICC, see 'Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts' (UNIDROIT Rome). *See also* Michael Joachim Bonell, 'Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts' (2013) 18 Uniform Law Review 473. For model contracts that include a selection of the UPICC, see e.g. ICC Model International Consulting Services Contract (2017), Art. 13.1 (Option A); ICC Short Form Model Contract (International Distributorship) (2017), Art. 11.1; ICC Short Form Model Contract (International Commercial Agency) (2017), Art. 10.1; ICC Model Distributorship Contract (Sole Importer-Distributor) (2016), Art. 24.1 (Option A); ICC Model Confidentiality Agreement (2016), Arts 17 (Option A), 20; ICC Model International Commercial Agency Contract (2015), Art. 24.1 (Option A); ICC Model Contract (Occasional Intermediary; Non-circumvention, Non-disclosure) (2015), Art. 13.1; ICC Model International Franchising Contract (2011), Art. 31.A; ICC Model International Technology Transfer Contract (2009), Art. 18 (Option A); ICC Model International Trademark Licence (2008), Art. 19 (Option A); ICC Model Selective Distributorship Contract (2004), Art. 23.1 (Option A); ICC Model Mergers and Acquisitions Contract (Share Purchase Agreement) (2004), Art. 18.1 (Option B); ICC Model Contract for the Turnkey Supply of an Industrial Plant (2003) (with express exclusion of the UPICC hardship rules), Art. 36.1 (Option A); ITC Model Contract for the International Commercial Sale of Goods (2010), Art. 15.1 (Short Version), Art. 23.1 (Standard Version); ITC Model Contract for the International Distribution of Goods (2010), Art. 25 (Alternative 1); ITC Model Contract for the International Long-Term Supply of Goods (2010), Art. 20 (Alternative 1).

[17] Trib. di Padova, Jan. 11, 2005, *translation available at* http://cisgw3.law.pace.edu/cases/050111i3.html (It.). *See* UPICC 2016, Art. 1.4.

[18] *But see* consumer protection legislation, which, more often than not, comprises mandatory rules.

[19] *See* Nicole Kornet, 'The Interpretation and Fairness of Standardized Terms: Certainty and Predictability under the CESL and the CISG Compared' (2013) 24 European Business Law Review 319, 321.

[20] *But see* 'Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts' (n 16) 15, 'It is true that in the field of general contract law mandatory rules are rather rare; however, domestic mandatory rules that prevail over conflicting rules of the UNIDROIT Principles may exist, if at all, inter alia with respect to special requirements as to . . . contract adaptation in case of hardship, exemption clauses, penalty clauses and limitation periods.'

argue that the UPICC can either inform the interpretation and assist in filling the gaps of international uniform law instruments,[21] or operate as trade usages,[22] others have argued that the Principles can be used only to inspire or corroborate the interpretation and application of

[21] UPICC 2016, Preamble, '[These Principles] may be used to interpret or supplement international uniform law instruments.'; Unidroit Convention on International Factoring (Ottawa, 28 May 1988) 2323 U.N.T.S. 373, 27 I.L.M. 922 (1988), *entered into force* 1 May 1995, Art. 4; Convention on International Interests in Mobile Equipment (Cape Town, 16 Nov. 2001) 2307 U.N.T.S. 285, *entered into force* 1 Mar. 2006, Art. 5; Unidroit Convention on International Financial Leasing (Ottawa, 28 May 1988) 2321 U.N.T.S. 195, 27 I.L.M. 922 (1988), *entered into force* 1 May 1995, Art. 6.; CISG Art. 7; ULIS Art. 17. *See e.g.* Cour de Cassation [Cass.] [Supreme Court for judicial matters], Feb. 17, 2015, *available at* http://www.unilex.info/case.cfm?id=1999 (Fr.); Hof van Cassatie [Cass.] [Court of Cassation], Jun. 19, 2009, AR C070289N, *translation available at* http://cisgw3.law.pace.edu/cases/090619b1.html (Belg.); *Seller (Netherlands)* v *Buyer (Italy)*, Interim Award, Feb. 10, 2005, Netherlands Arbitration Institute, 32 Y. B. Comm. Arb. 93, 103; *Agent* v *Principal*, Final Award, ICC Case No. 8817 (1997), 25 Y. B. Comm. Arb. 355, 358; ICC Case No. 8128 (1995), *translation available at* http://cisgw3.law.pace.edu/cases/958128i1.html; Jürgen Basedow, 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts' (2000) 5 Uniform Law Review 129, 137; Alejandro M Garro, 'The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG' (1994) 69 Tulane Law Review 1149, 1159; Ulrich Magnus, 'Interpretation and Gap-Filling in the CISG and in the CESL' (2012) 11 Journal of International Trade Law and Policy 266, 276; Ulrich Magnus, 'Tracing Methodology in the CISG: Dogmatic Foundations' in André Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publishers 2009) 45–46; Michaels (n 14) 83; Joseph F Morrissey and Jack M Graves, *International Sales Law and Arbitration: Problems, Cases and Commentary* (Kluwer Law International 2008) 58. *See also* Michael G Bridge, *The International Sale of Goods* (4th edn, Oxford University Press 2018) 607, 'Except where they would contradict the CISG, the Unidroit Principles may stimulate the search for unstated general principles in the CISG. It is quite likely, however, that in the great number of cases a general principle can be inferred from the CISG without any direct reference to the Unidroit principles.'; Pilar Perales Viscasillas, 'Article 7' in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (2nd edn, Verlag CH Beck; Hart; Nomos 2018) 142–143, '[M]odern trends in the interpretation of the CISG allow considering the *lex mercatoria*, the PICC and to a lesser extent the PECL, as a means of interpreting and supplementing the CISG when no general principles within the Convention are found.'; Pilar Perales Viscasillas, 'The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-Filling of CISG' in André Janssen and Olaf Meyer (eds), *CISG Methodology* (Sellier European Law Publishers 2009) 303. *Contra* John Y Gotanda, 'Using the UNIDROIT Principles to Fill Gaps in the CISG' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 116, '[I]t goes too far to apply the UNIDROIT Principles as the primary source of authority for filling a gap in the CISG.' For a proposal that UNCITRAL should adopt a formal Recommendation to use the UPICC as means of interpretation and supplementation of the CISG, see Bonell, 'Towards a Legislative Codification of the UNIDROIT Principles?' (n 12) 71. *Cf.* Principles of European Insurance Contract Law (PEICL, 2015), Art. 1:105(2), referring to the Principles of European Contract Law (PECL, 1998, 2002) for the filling of regulatory gaps.

[22] *See* Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Sellier European Law Publishers 2007) 19–20, 36. *Contra* Bortolotti (n 12) 99, note 46; Michael Bridge, 'Choice of Law and the CISG: Opting In and Opting Out' in Harry M Flechtner, Ronald A Brand and Mark S Walter (eds), *Drafting Contracts under the CISG* (Oxford University Press 2008) 82, 'Given the recent coining of the UPICC and the means by which they were developed, the UPICC could not be dealt with as a package but would have to be treated severally, with a case being made for each and every usage contained in its provisions.'; Franco Ferrari, 'Interpretation of the Convention and Gap-Filling: Article 7' in Franco Ferrari, Harry Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Sellier European Law Publishers 2004) 204; Michaels (n 14) 77; Martin Schmidt-Kessel, 'Article 9' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 195–196, 'While [the INCOTERMS, UCP, UPICC] do not . . . represent a trade usage in their entirety, individual provisions of these rules can readily be deemed trade usages insofar as the prerequisites under Article 9[2] are met.'; Ingeborg Schwenzer, Christiana Fountoulakis and Mariel Dimsey, *International Sales Law* (2nd edn, Hart Publishing 2012) 81; Viscasillas, 'The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-Filling of CISG' (n 21) 313.

principles that already flow from the international uniform law instrument.[23] This clash of approaches is eloquently illustrated in the interplay between CISG art. 79 and the UPICC rules on hardship and *force majeure*.[24] Notwithstanding the doctrinal disagreement in legal scholarship, the practical significance of the UPICC in the resolution of international disputes, either as a corroborating legal source or as a restatement of established commercial usages and customs, can hardly be disputed and, certainly, cannot be overstated.

In contrast to international uniform law instruments, *national* law is, by definition, not suitable for the regulation of *international* relationships.[25] Rather than shoehorning hardship and *force majeure* cases into arcane rules and inflexible national law provisions which befit purely domestic situations and barely serve the needs of modern trade, it appears more appropriate to interpret open-ended rules and fill the gaps of domestic law provisions in light of the UPICC.[26] Under such scenarios, the UPICC would not directly apply; they would merely be consulted as a source of inspiration for the concretization of domestic rules.[27] Hence, general principles, such as good faith and the concept of equity, or special domestic law provisions could acquire meaning and be given effect to in line with the relevant hardship and *force majeure* rules of the UPICC.[28] Besides, drawing inspiration from the UPICC in the interpretation and application of domestic law would contribute to the progressive

[23] 'Preliminary Document, Development of the Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a Focus on Sales)' (n 14) 28, noting that this position is 'the common understanding'. *See* Ferrari (n 22) 170; Gotanda (n 21) 119; Huber and Mullis (n 22) 36; Ingeborg Schwenzer and Pascal Hachem, 'Article 7' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016) 138; Schwenzer, Fountoulakis and Dimsey (n 22) 81.

[24] *See generally* CISG Advisory Council, 'CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG. Rapporteur: Alejandro M. Garro' (2007); CISG Advisory Council, 'CISG-AC Opinion No. 20, Hardship under the CISG. Rapporteur: Edgardo Muñoz' (2020).

[25] *See* Dalhuisen (n 11) 188; Maren Heidemann, 'European Private Law at the Crossroads: The Proposed European Sales Law' (2012) 20 European Review of Private Law 1119, 1124, 'International trade needs to cover specific risks and difficulties in their contracts that will not arise in the same way in domestic contracts.'

[26] UPICC 2016, Preamble, '[These Principles] may be used to interpret or supplement domestic law.' *See* Bonell, 'UNIDROIT Principles 2004 - The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law' (n 14) 15–16; Bortolotti (n 12) 99, fn. 46, 'It is certain that the Unidroit Principles are closer to the expectations of businessmen engaged in international trade than the rules of many domestic laws, but this does not necessarily mean that they are a custom or usage.'

[27] *See* 'Preliminary Document, Development of the Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a Focus on Sales)' (n 14) 64, 'Whether an adjudicator may take the UPICC into account for the purposes of interpretation of another contract law regime depends on the rules and principles of interpretation of that particular regime.'

[28] *See* www.unilex.info, where 44 court judgments and arbitral awards, which are listed on the database, refer to the UPICC as corroborating legal source for the decision reached by the adjudicatory authority (Argentina: 1; Brazil: 2; Canada: 1; China: 1; Colombia: 2; Costa Rica: 1; Italy: 4; Lithuania: 3; Russian Federation: 16; Spain: 3; Ukraine: 10).

harmonization of private law, which would foster further legal certainty and predictability—values that are much coveted in international trade.

Another function of the UPICC in disputes arising from distressed contracts could be their use as a fallback answer to the content-of-laws enquiry. Typically, under a private international law analysis the legal framework of the case would comprise national law rules. Nevertheless, bearing in mind the international character of the dispute, it has been argued that, instead of national law provisions, deference should be given to instruments that acknowledge the *sui generis* cosmos of cross-border business, such as international uniform law or soft-law regimes, such as the UPICC.[29] Such an approach would be particularly helpful in relation to business disputes arising from the pandemic where interim relief is sought but the associated time-constraints negate elaborate private international law exercises by the adjudicatory authority.[30] Succinctly, the UPICC rules could offer a solution to the dispute by substituting the domestic rules of the otherwise applicable law, when the latter was neither invoked nor sufficiently proved to the conviction of the adjudicatory authority.[31]

In summary, the foregoing analysis has illustrated that the UNIDROIT rules dealing with supervening circumstances and, specifically, UPICC articles 6.2.1-6.2.3 and 7.1.7 could be triggered in a variety of situations, even if not selected by the parties. This could foster cooperation between distressed businesses, promote the preservation of contractual relationships, serve as the basis for addressing the effects of the pandemic, and, overall, contribute to the revival of international commerce.

[29] UPICC 2016, Preamble, Comment No. 8, 'The Principles may also be used as a substitute for the domestic law otherwise applicable. This is the case whenever it proves impossible or extremely difficult to establish the relevant rule of that particular domestic law with respect to a specific issue, i.e. it would entail disproportionate efforts and/or costs. The reasons for this generally lie in the special character of the legal sources of the domestic law in question and/or the cost of accessing them.'; E Jayme, 'Article 1' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) 33, 'Uniform law may not be applicable only by means of private international law. It has been suggested that uniform law supplies a subsidiary solution for cases in which the applicable foreign law cannot be ascertained . . . .'; Michaels (n 14) 75.

[30] *See ALI/UNIDROIT Principles of Transnational Civil Procedure, as Adopted and Promulgated by the American Law Institute, and by UNIDROIT* (Cambridge University Press 2006) 25–27, Principle 8.

[31] *See* ibid 43, Principle 22.2.3.

II. REBUILDING TRUST AND CREATING OPPORTUNITIES IN INTERNATIONAL TRADE

The resolution of disputes that have arisen due to the pandemic forms only part of the problem—it looks at the past. Of equal importance, however, is to look at the present and, in particular, how the flame of commerce can be reignited worldwide. As countries slowly reopen their borders and societies rush to adapt to a new reality mandated by COVID-19, it is crucial to assess the contribution of private law to restarting and supporting the economy globally. While governmental and intergovernmental measures, exuding a protectionist aura, offer top-down solutions, one should not overlook the bottom-up potential of trade regulation. Like a phoenix rising from its ashes, the devastating effects of the pandemic to international trade can also be addressed by international trade itself thanks to the regulatory tools offered by private law. UNIDROIT instruments pioneer in this respect as well.

With the transport, farming, and natural resources industries heavily hit by the pandemic,[32] sustained financing has become key for the survival of entire economic sectors. In that respect, the Cape Town Convention[33] and its amending Protocols[34] could maintain a steady stream of cash-flow for companies and extend liquidity until the equilibrium in the market is restored.[35] Specifically, the electronic international registry of prioritized financial interests created by the Convention and the Protocols ensure that major businesses, which are crucial for the seamless production of raw materials and food, as well as their transport worldwide, will not collapse. Rather, the supporting mechanisms devised under the auspices of UNIDROIT bridge the trust divide between merchants, thus reducing the cost of credit and allowing certain key-sectors to benefit from the transparency and legal stability that they create for the acquisition of necessary equipment and secured financing of their business endeavours. This financing of commercial activities would also procure further macroeconomic benefits,

[32] For statistics and press releases on the impact of the COVID-19 pandemic on various industries and sectors of international trade, see https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm (last accessed 21 August 2020).

[33] Convention on International Interests in Mobile Equipment (Cape Town, 16 Nov. 2001) 2307 U.N.T.S. 285, *entered into force* 1 Mar. 2006.

[34] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agricultural and Construction Equipment (Pretoria, 22 Nov. 2019), *not yet in force*; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 9 Mar. 2012), *not yet in force*; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 23 Feb. 2007), *not yet in force*; Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (Cape Town, 16 Nov. 2001) 2367 U.N.T.S. 517, *entered into force* 1 Mar. 2006.

[35] For the forthcoming joint-project of UNIDROIT and UNCITRAL on warehouse receipts financing, see Possible Future Work on Warehouse Receipts, Note by the Secretariat of the United Nations Commission on International Trade Law, Fifty-Third Session (6-17 July 2020), U.N. Doc. A/CN.9/1014 (2020).

including the development of additional investments projects, the creation of employment positions, and the accrual of higher revenues for the public sector. In a nutshell, the private law regime of the Cape Town Convention could contribute to the solidification of the gains achieved over the past decades, secure vital sectors for the global economy, and ensure that the world progresses to a prosperous post-COVID-19 era.

III. FORESEEING CRISES AND SAFEGUARDING FUTURE DEALS

Finally, having explored the contribution of the UNIDROIT instruments in terms of the past and present of the COVID-19 pandemic, the analysis turns to future perspectives. While private law cannot prevent pandemics or other crises, it can provide businesses with tools that acknowledge the possibility of supervening circumstances and devise a 'roadmap' on how to address their effects on contractual relationships and business deals. In that context, a very important, yet relatively underplayed, function of the UNIDROIT instruments is their contribution to legislation and contract drafting.

In particular, the UNIDROIT instruments could be used as a template when drafting legislative acts and elaborate business transactions. The terminology and the detailed rules of the instruments—particularly, the UPICC—could serve as a *lingua franca* and checklist for the matters contemplated in agreements.[36] Hence, national legislators can amend their national legislation by adopting wholesome or building on the rules delineated in the various projects of UNIDROIT.[37] Also, parties can look at the UPICC to ensure that their contract is complete—if a contract can ever be complete at all—and, if necessary, go beyond or deviate from the default rules enshrined therein.[38] In relation to supervening circumstances, the frequently open-ended or rigid rules of the otherwise applicable national law might be inappropriate for the

[36] UPICC 2016, Preamble, Comment No. 8; Michael Joachim Bonell, 'Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts' (1992) 40 American Journal of Comparative Law 617, 628–629. *See* Michaels (n 14) 107-108 and, particularly, 41–42, where the concept of 'hardship' in UPICC arts 6.2.2 and 6.2.3 is offered as illustrative example of the neutral terminology used. *See also* 'Preliminary Document, Development of the Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a Focus on Sales)' (n 14) 58, '[T]he UPICC are multilingual. They are available in a variety of world languages, so that there is a high probability that both parties to an international contract can access them in a language that they are familiar with.'

[37] 'Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis' (n 13) 23–24. *See* n 6.

[38] UPICC 2016, Art. 1.5.

business project at hand.[39] Therefore, the flexible and well-balanced rules of UNIDROIT could serve as a reminder that such issues might arise and, for that reason, need to be addressed in the agreement in the first place.[40] They could also be used as a blueprint for particular clauses of the transaction,[41] or even spark comparative law research to identify and select the most appropriate contract law regime by virtue of an accompanying choice-of-law agreement.[42]

By the same token, commentaries and information on contract drafting could dispel ambiguities and elucidate difficult legal concepts for the primary addressees of the instruments. For instance, the Legal Guide on Contract Farming prepared jointly by UNIDROIT, FAO, and IFAD,[43] offers insight into the conclusion of contracts and their content in the field.[44] Absent such guidelines, the legal framework would be inaccessible to laypeople and any commercial arrangement would remain unperfected without retaining legal counsel. Hence, this immensely helpful project aims to advise all directly involved parties of the issues that might arise, delineates key legal concepts, and offers concrete, detailed guidance on how to enter into an agreement and how to approach matters of *force majeure* and supervening circumstances.[45] In a nutshell, they demystify confusing legalese, restore control in the hands of the interested contracting parties, and enhance stability in commerce through the efficient and precise drafting of contracts.

CONCLUSION

The foregoing analysis strived to delineate the role of UNIDROIT in tackling the effects of the COVID-19 pandemic through private law. Adopting a holistic approach, the analysis has

[39] *See* Michaels (n 14) 89, 'Recently the provisions on hardship have become popular, perhaps for a similar reason: to ease the harshness of domestic contract law with its stricter rules on bindingness.'
[40] Bonell, 'Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts' (n 36) 629.
[41] *See e.g.* 'ICC Force Majeure and Hardship Clauses' (International Chamber of Commerce 2003) 11, 14, 16, and 17, noting that the model clauses have been inspired, among others, by the UPICC. *See also* 'ICC Force Majeure and Hardship Clauses' (International Chamber of Commerce 2020), following closely the wording of the 2003 version of the clauses; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB(AF)/98/1), 15 ICSID Review (2000), 457, 538-539, where the parties, essentially, copied in their agreement UPICC articles 6.2.1-6.2.3.
[42] 'Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis' (n 13) 23; Bonell, 'Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts' (n 36) 629.
[43] *See generally* 'Legal Guide on Contract Farming' (UNIDROIT, FAO, IFAD 2015).
[44] For the future Legal Guide on Agricultural Land Investment Contracts jointly prepared by UNIDROIT, FAO, and IFAD, see https://www.unidroit.org/work-in-progress/agricultural-land-investment (last accessed 21 August 2020).
[45] 'Legal Guide on Contract Farming' (n 43) 126–142.

shown that UNIDROIT's projects—hard law regimes, soft law instruments, and legal guidelines—could be pivotal in the revival of global commerce. Specifically, the flexible and well-balanced hardship and *force majeure* rules enshrined in major international conventions and the UPICC could either directly apply to disputes arising from the pandemic or indirectly influence the interpretation and application of the otherwise applicable law, thus contributing to the fair resolution of disputes and salvaging business relationships. Furthermore, the Cape Town Convention and its amending Protocols could rebuild trust by securing the financing of key-commercial activity and ensure the survival of vital sectors for global economy by enabling the creation of new opportunities in international trade. Lastly, the various regimes and guidelines prepared by UNIDROIT could be used as a blueprint for future national and international legislation and as a checklist when drafting commercial agreements, thus insulating commerce from risks associated with supervening circumstances. In light of these considerations, it is the crux of this study that the work of prominent international organizations, such as UNIDROIT, should lie at the core of any effort to provide the mercantile community with the most efficient and transparent legal framework for conducting business across borders. Only by pairing our past regulatory experience and its performance during the crisis with the outlook of international commerce, can we lift economies out of recession and pave the way for post-pandemic affluence on a global level.