

### UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven

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#### INTRODUCTION

Chapter 7 of the UNIDROIT Principles of International Commercial Contracts is significant on at least two levels. In practical terms, it is the substantive heart of the whole Principles. It is where the Principles' solutions to a large proportion of real world disputes in commercial transactions are to be found. It is here that the remedial consequences of serious failures of performance are defined: orders of performance, damages, contract termination by rescission, and restitution. These are difficult and central substantive issues. Indeed, Chapter 7 is probably the most imaginative synthesis to emerge in this generation of some of the most difficult practical questions of contract law. It will be a powerful support for the harmonization of actual outcomes and improve the reliability of the often unpredictable results of disputes. The substantive content of Chapter 7 is important as an illustration of the creative power of the UNIDROIT Principles.

Chapter 7 is also important as an example of how the Principles work and of their usefulness in the emerging pattern of harmonized international commercial law. Chapter 7 brings closer together the substantive outcomes in courts, arbitral tribunals, and institutions of alternative dispute resolution in different legal systems, thus providing a prime example of how harmonization of international commercial law can improve the law. I have pointed out elsewhere that harmonization is not always the equivalent of substantive reform that improves the operation of the law.<sup>1</sup> A unified law is not always a better law, nor need it produce better results in application. The challenge is to use the opportunity of legal change for harmonization to produce better law.

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<sup>1</sup> A. ROSETT, "Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law", 40 *American Journal of Comparative Law* 683 (1992).

This brief presentation seeks to combine these two levels of significance, although the description of the major substantive provisions of Chapter 7 will have to be limited to a bare outline. In so doing, it attempts to demonstrate that the UNIDROIT Principles represent an important step forward that should be promoted to the fullest extent and used in commercial law practice.

I will also try to demonstrate the importance of the UNIDROIT Principles in relation to the other major projects that are now successfully harmonizing international commercial law in most nations of the world. The process of harmonization has turned out to be somewhat different than many of us had expected a decade ago. Those who have an ongoing interest in commercial law must deal with the rapidity of change in commercial law on both a domestic and an international level. The motivating cause of this change is not hard to find. It lies in the changing structures of commercial markets and business practice as increased trade and rapid communication have created large regional and global markets. Change in commercial law is inevitable because it is driven by powerful economic forces visible throughout the world. New legal regimes are a response to the changes in transactions and relationships that mark the new economic and social situation.

This change is proceeding on several levels and is providing a unique opportunity to reconcile and harmonize the content and concepts of global commercial law. The only choice that does not appear open is to let the past rule the future. If the law is permitted to stand still and fail to respond to the needs of the business people who engage in trade transactions, these business "consumers" of the law will certainly find other, non-legal, ways to structure their commercial lives and the law as administered in the national courts will become increasingly irrelevant to their concerns.

The process of legal harmonization in global economic markets has taken divergent forms, yet to our great benefit, a remarkable degree of coherence and agreement can be found in the underlying ideas, and most importantly, the outcomes of similar disputes through the use of these divergent forms. In order fully to understand the usefulness of the UNIDROIT Principles, we must appreciate how they fit into this emerging multi-layered structure that is becoming dominant. In the following paragraphs I will describe seven salient examples of these different forms or vehicles. One might expect, as I did until recently, that these vehicles would be competitive and exclusive of each other. Were that the case, our task would be to pick and choose among them, settling on the one solution we thought overall provided the best advantages and the most acceptable costs. But that is not how the development of the law has worked out. Instead, as each vehicle has been constructed and presented to the legal consumers, each has been applauded and adopted by most legal cultures. Most of the world has adopted a number of these vehicles and nobody seems overly concerned by the apparent divergences in their approaches to common problems. This is possible because, while they may incorporate different approaches, they nevertheless largely share a common sense of the best outcome to practical problems that arise frequently. That is why lawyers, judges, arbitrators and other consumers of law would do well to view these different vehicles and techniques not as competitive, but as mutually supportive and supplementary to each other. The question is not which technique to choose, but rather how to use all of them productively. Used wisely, they work together and support each other.

### THE EMERGING MULTI-LAYERED STRUCTURE OF HARMONIZATION

Which, then, are the major choices available in designing the new legal structures?

*a. National Code Revision* – First and probably most important, the national legal systems of the world are currently embarked on the reconciliation and revision of national commercial law codes. Mexico started several years ago to modernize and harmonize the *Código Comercial* and related statutes. A number of European nations are in the midst of comparable code revisions or have recently completed their projects. In the United States, the National Commissioners on Uniform State Laws and the American Law Institute are bringing to fruition a revision of all twelve parts of the Uniform Commercial Code (UCC), particularly Article Two dealing with Sales. It is difficult to revise a code that has been a monumental success and has been incorporated in the laws of each of the fifty states. As the new drafts are approved by the editorial committees, the real battle begins to gain adoption in fifty independent state legislatures. Certainly this is not a process that will be completed overnight, but we can predict with a high level of confidence that it will happen.

This confidence is grounded on admiration for the quality of the revision that is emerging, and also on the simple recognition of the irresistible power of the economic and social changes that are impelling change in the codes. New formulations of the law are required to serve the purposes of that new order. A consequence of the new reality is that each of these national revisions must take account of the global realities of trade and thus incorporate a harmonized approach to transactions. The great families of the law live on and their children retain their pride in their Roman, Common Law, or Napoleonic forebears. Ancient family traits can still be observed, but the new codes increasingly resemble each other than their ancestors.

A new draft of Article Two of the UCC was circulated recently which refers with striking frequency to provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles, INCOTERMS and other international sources. There are more than 50 references to the international provisions.<sup>2</sup> The UNIDROIT Principles, in particular, are frequently used as a source for clear and workable definitions of concepts. This reflects the obvious truth that, in economic terms, the lines between domestic and international transactions are being eroded within global markets. In legal terms, the code revisions indicate how quickly these boundaries between domestic and international rules of commercial practice are fading. The inevitable result will be a harmonized legal approach to all similar commercial transactions.

*b. Creation of International Codes* – We now have almost a decade of experience with the CISG. Over forty nations have acceded to the Convention and collections of jurisprudence drawn from courts around the world are providing guidance on its interpretation and application. The CISG pursues the strategy of harmonization by

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<sup>2</sup> The Draft referred to is: American Law Institute, *Uniform Commercial Code Revised Article 2. Sales*, Council Draft No. 2. November 1, 1996. It should be noted that the comments and notes do not take final form under the practice of the American Law Institute until there is agreement on the text and the Reporter has had an opportunity to exercise his or her discretion to revise the notes.

seeking a single worldwide formal statement of contract rules, which become the law applicable in transactions between parties from Contracting States. The Convention starts this process by seeking agreement on a formal statement of the rules. It provides a rather neutral framework for decision, although as Alejandro Garro has pointed out,<sup>3</sup> it contains *lacunae* that require completion and explanation. Moreover, the UNCITRAL process, out of which the CISG developed, is largely episodic, with only limited ongoing opportunities for revision of the Convention in the light of experience with some of its less successful provisions. In this respect, the CISG shares some of the problems described earlier with reference to the Uniform Commercial Code revision in the United States. An arduous process of national legislation or an equally complex process of ratification of treaty amendments will be needed to repair less-than-satisfactory provisions in the original Convention. In fact, these difficulties are more troubling with respect to the CISG, since it lacks the ongoing editorial process built into the UCC. The process of revision of the CISG will require ratification by every nation in the world, a prospect even more formidable than that of securing adoption of UCC revisions by the fifty state legislatures.

c. *Adoption of Regional Choice-of-Law Conventions* – The revision of national commercial codes and the creation of a global code for commercial sales both emphasize the degree to which the rules that govern transactions are made by the nation-state. A third general approach to harmonization is typified by the CIDIP Convention on the Law Applicable to International Contracts and by the European Convention upon which it is based.<sup>4</sup> This approach seeks harmony, not in the promulgation of uniform substantive rules, but in the creation of a process for choosing among competing national and international rules, leaving the substance of each domestic system largely untouched. This approach would seem particularly useful in the many international transactions between sophisticated commercial parties, who can be expected to look after their own interests and do not require the protection of governmental regulation. Such parties will take care of themselves and produce a more rational allocation of interests than can be expected from the state. It is more doubtful, however, whether this approach will harmonize and approximate the rules applicable in more common situations. National systems of law no longer present an insuperable barrier to trade under this approach, but harmonization is no longer a prime value.

d. *Adoption of Uniform Private Rules* – The UCC, the CISG and the Choice of Law Conventions recognize that party autonomy is central to commercial transactions and permit the parties in most instances to derogate by contract from the provisions of the law. Emphasis on private rather than state rules is likewise the core of a fourth approach to harmonization of international commercial rules. In a great many industries,

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<sup>3</sup> A. GARRO, "The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG", 69 *Tulane Law Review* 1149 (1995).

<sup>4</sup> Organization of American States, Inter-American Convention on the Law Applicable to International Contracts, approved March 17, 1994 at the Fifty Inter-American Specialized Conference on Private International Law (The "Mexico City Convention"). The Mexico City Convention follows closely the European Convention on the Law Applicable to Contractual Obligations (1980) (The "Rome Convention").

trade practices, uniform contract forms, trade association rules and the like provide a secure foundation for common transactions and harmonize outcomes for these transactions throughout the world. The work of the International Chamber of Commerce in this connection is particularly noteworthy. The Uniform Customs and Practices on Documentary Credits (UCP) has provided a frequently updated, workable set of rules for letters of credit and similar documents.<sup>5</sup> Billions of dollars' worth of transactions are made under these rules every day, with few problems. World law on the subject has effectively been unified because almost every bank in the world incorporates these rules in its letter of credit documents. Intervention by government-made rules has been peripheral at best. The recent revision of Article Five of the Uniform Commercial Code on this subject indicates how few and how minor are the problems left for legislation to address.<sup>6</sup>

One reason for the success of the UCP has been the enthusiastic involvement of a small, well-defined group of participants in these transactions, namely, the banks. A more general project to define trade contract terms (INCOTERMS) lacks this simplifying virtue, yet the ability of the International Chamber of Commerce group that produces and regularly revises these definitions is impressive to say the least. They have anticipated and moved promptly to solve trade transaction problems very effectively. These transactions have ancient foundations in maritime practice, but they have been completely transformed by the growth of modern intermodal and containerized forms of maritime transport, computerized systems for the generation of trade documents, and the growth of air cargo services. While the use of INCOTERMS is not as universal as the adoption of UCP, it has proved an important source of harmonizing impetus.

*e. The Universal Adoption of Arbitral Regimes in Commercial Disputes* – A fifth vehicle in the movement to harmonize international commercial law has been the well-nigh universal adoption of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>7</sup> Harmonization is supported by dispute resolution processes that avoid the idiosyncrasies in outcome that mark all national court systems. These arbitration regimes typically are embodied in rules such as the UNCITRAL Arbitration Rules or the International Chamber of Commerce rules that afford the parties a great deal of control over the selection of arbitrators. The parties are in a position to be sure that the arbitrators selected understand and will apply international commercial practice in a sensible manner.

*f. Re-emerging emphasis on Customary Commercial Practice* – A sixth factor supporting harmonization has been increasingly sympathetic attention to commercial usage and trade practice in defining the controlling rules. I hesitate even to mention those mysterious Latin words, *lex mercatoria*, lest I unwittingly summon the Genie out

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<sup>5</sup> International Chamber of Commerce, *ICC Uniform Customs and Practice for Documentary Credits* (ICC Publication No. 500 (1993)).

<sup>6</sup> The Revised Article Five was promulgated by the Commissioners on Uniform State Laws in 1995 and has been promptly adopted by the legislatures of a number of states. It became the law in California, for example, on January 1, 1996.

<sup>7</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958; 330 *United Nations Treaty Series* 38 (The "New York Convention").

of its bottle and then be unable to coax it back again so that I may finish what is intended to be a short list. Suffice it to say that I am not always sure what is being described by this term, *lex mercatoria*, nor what degree of historical imagination is involved when it is invoked. Nonetheless, it is usually clear that it implies a reference to some kind of commercial practice and an assertion of its normative legitimacy in the face of some entrenched legal norm, usually found in an obsolescent national code. The claim that there is a custom usually indicates that the custom enjoys broad, if not global acceptance. Its use, therefore, tends to harmonize the rules of commercial contracts.

*g. An International Restatement: The UNIDROIT Principles* – Joachim Bonell refers to the UNIDROIT Principles as an International Restatement of Contract Law,<sup>8</sup> by which he implies that they seek to capture the essence of the governing rule on a subject without attempting a formal codification. The UNIDROIT Principles provide a somewhat looser-textured statement of guiding principles than can always be captured by a positive statement of controlling law. The UNIDROIT Principles place less emphasis on the conceptual rules or on the choice of law, and more on the spirit and supporting purposes that should determine the outcomes of particular kinds of commercial disputes. This approach focuses on the undeniable reality that the parties to these disputes are less interested in theory than they are in outcome, that they have less of an investment in systematic rules than they have in the vindication of expectations that arise in all commercial transactions. When a principle is implicated, it suggests the appropriate outcome. The job of the judicial or arbitral decision-maker then is to vindicate that interest in the outcome, and the path to that result may differ in different situations. The rightness of the decision is measured by its outcome. Practical answers are good answers. Theory and doctrine are useful primarily insofar as they point us toward good solutions in particular cases. Grand theory is avoided where it leads us to insist on dogmatics and conceptual structures at the expense of outcome.

This is not to say that the UNIDROIT Principles, standing alone, provide all the answers to the puzzle of harmonization of commercial law. On the contrary, in my view the UNIDROIT Principles may be regarded as drawing upon, explaining, and being explained by the CISG, by national law and by private rules, and indeed as providing a choice-of-law alternative for the parties who may select them under the Mexico City Convention, and for courts and arbitrators who may select them as the appropriate law under that Convention. The UNIDROIT Principles provide an orientation that promotes consciousness of outcome and consistency with party expectation. In doing so, they promote harmonization of result in fact and a higher level of consistency between legal outcomes and the expectations of business persons.

The UNIDROIT Principles offer an approach to solving common problems in commercial law that indeed does suggest a coherent set of principles. These underlying principles provide an excellent foundation for a coherent system of commercial law to develop, grow and operate. The central virtue of the UNIDROIT Principles is that they give practical guidance to judges and arbitrators who must decide disputes and to all those who must interpret all legal texts.

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<sup>8</sup> M.J. BONELL, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, Irvington, N.Y., 1994 (referred to hereinafter as "M.J. BONELL").

## A BRIEF INTRODUCTION TO CHAPTER 7

Chapter 7 is divided into four sections made up of 31 articles. Section 1 defines non-performance and then outlines the obligations of cooperation, cure, *nachfrist*<sup>9</sup>, and assurances, all of which are devices designed to bring about performance rather than contract failure after difficulties have been encountered by the parties during performance. The section ends with articles on *force majeure* and exemption clauses, situations in which the normal expectations of performance have been disturbed by supervening events. In short, the focus is on bringing about performance of the contract and avoiding termination. At the same time, non-performance is defined in terms that include all failures and defects in performance, including those that are excused, and avoids terminology emphasizing breach or fault.<sup>10</sup> The provisions on cure<sup>11</sup> and *nachfrist*<sup>12</sup> are similarly broad. The idea behind these articles seems clear; the contract should be supported and preserved whenever possible. In only a limited number of cases is the existence or validity of the contract to be questioned or is the contract to be terminated before performance is complete.<sup>13</sup> When difficulties arise during performance, the rules are structured to encourage parties to cure their defects, to extend the time for performance, to allow it to be completed. Exemption and penalty clauses are to be read as serving the legitimate purposes of the contract and to avoid being “grossly unfair”.<sup>14</sup> When supervening events produce impediments to performance that cannot be overcome or avoided, the Principles favor temporary suspension of obligations rather than immediate termination of the contract.<sup>15</sup> A burden of communication with the other side is imposed on the party unable to perform and liability for damages is imposed for failure to communicate, even in circumstances when the ultimate liability to perform will be excused because of *force majeure*.

These examples can be multiplied,<sup>16</sup> but the same basic point remains, *i.e.* that the provisions of Chapter 7 are systematically structured to favor the existence and performance of the contract and to minimize the instances in which the contract is terminated before performance is complete. The UNIDROIT Principles indeed are girded by underlying “basic ideas” that are reflected in the text of the specific articles.<sup>17</sup>

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<sup>9</sup> The title for Article 7.1.5 in English is “Additional period for performance”, in Spanish *Plazo adicional para el cumplimiento*, neither of which is very descriptive of its content. The concept is largely drawn from German law and for this reason I follow the common practice of referring to the idea by its German name.

<sup>10</sup> Article 7.1.1.

<sup>11</sup> Article 7.1.4

<sup>12</sup> Article 7.1.5

<sup>13</sup> M.J. BONELL, *cit.*, 65-79.

<sup>14</sup> Article 7.1.6

<sup>15</sup> Article 7.1.7.

<sup>16</sup> See M.J. BONELL, *cit.*, 65-79.

<sup>17</sup> Professor Bonell is of course in the best position to articulate these basic ideas, since he served as chairman of the Unidroit Working Group responsible for the preparation of the UNIDROIT Principles. Without infringing on his turf, here I simply note that he lists five basic ideas: a) Freedom of Contract: Party Autonomy; b) Openness to Usages; c) *Favor Contractus*; d) Observance of good faith and fair dealing in international trade; and e) Policing against unfairness. M.J. BONELL, *cit.*, Chapter 4.3 (The Basic Ideas

Section 2 of Chapter 7 presents, at least to this North American lawyer, an example of yet another virtue of the UNIDROIT Principles. The articles are drafted with an elegance and craft that enable them to reconcile long-standing conflicts in the practice of different legal systems and they do so in a way that produces a sensible and attractive reading of the law. The subject under discussion in Section 2 is the order of performance, what we Common-Lawyers call specific performance. An order of performance is, of course, the basic preferred remedy in many legal systems of the world. It is designed to give the disappointed party precisely what was promised but not performed. Yet there have always been limits on the circumstances in which a court will give an order of performance. The Common Law has historically taken a different approach. Damages are seen as the basic universal remedy for breach of contract. Specific performance is an extraordinary remedy available only when the preferred remedy is inadequate. When the CISG was adopted, it was apparently not possible to reach a consensus on such matters. Instead an Article 28 was inserted to provide in general terms that a court is not bound to enter a judgment for specific performance "unless the court would do so under its own law in respect of similar contracts of sale..."

Section 2 of Chapter 7 of the UNIDROIT Principles takes a superior and more harmonious path. It states the general preference for orders to perform, but in the same article notes exceptions to this general rule.<sup>18</sup> The remedy is not discretionary, but is simply unavailable if a) performance is impossible in law or fact; b) performance or enforcement are unreasonably burdensome or expensive; c) performance is available to the injured party through a covering transaction with another person in the market; d) performance is of an exclusively personal character; or e) the party seeking performance is dilatory and does not act promptly. European sources indicate that this approach does not substantially distort the existing law in Civil Law countries. The beauty of it is that the outcomes of cases are very close to the preexisting law in Common Law jurisdictions as well. The result is true harmonization made possible simply by placing less emphasis on familiar historic doctrine and stressing the practical outcome of cases instead.

## CONCLUSION

The task of harmonizing world commercial law turns out to be different from what might have appeared to be the case a decade ago. It is now clear that there will not be one single monumental document that will harmonize all legal rules. Instead, the situation I have described, in which at least seven kinds of harmonization proceed in parallel, is likely to continue. Moreover, the changes in world economic structures are hardly complete. As trade continues to evolve, the legal structure for these transactions must have the flexibility to grow and remain relevant.

It is in this context that the UNIDROIT Principles, and particularly Chapter 7, demonstrate their worth. A principle-based restatement presents several advantages deriving from its form. Such a restatement does not compete or claim to displace the other harmonizing projects, but instead fits well with them as part of the multi-layered

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Underlying the UNIDROIT Principles) and "The UNIDROIT Principles of International Commercial Contracts: Why? What? How?" 69 *Tulane Law Review* 1121 (1995).

<sup>18</sup> Article 7.2.2.



approach, avoiding confrontation between the various components and enabling them to supplement each other.

The UNIDROIT Principles provide well drafted, thoughtful specific provisions on vexing problems. Their avoidance of the formality of a code increases the clarity of their provisions. They also manage to sidestep many of the favorite conceptual formulations of various legal systems, formulations that tend to become battlefields and occasions for the assertion of national pride.

Practical answers are good answers. The test of successful law harmonization is the quality of the results to which it leads in specific cases. Successful harmonization enhances economic efficiency and vindicates the reasonable expectations of the parties to transactions. Theory and doctrine are useful primarily insofar as they point toward good solutions in real situations. Theory is tested by outcome. This position is in contrast to that which insists on the primacy of grand theory at the expense of outcome. By offering practical solutions, the UNIDROIT Principles free us from the conceptual straitjackets that interfere with the harmonization of outcomes. It is likely to prove a substantial advantage over time that the UNIDROIT Principles are not a convention. They benefit from the primary role played by practical lawyers and scholars rather than diplomats in shaping it.

The way in which the UNIDROIT Principles are stated and their non-legislative status should make it easier to keep them attuned to a changing commercial setting. It will not be necessary to convene a great diplomatic Conference to consider changes when the need for revision becomes clear. The Principles need not imitate the potentially stifling verbal forms of a code. They are open-textured and can incorporate comments, illustrations and clarifying hypothetical examples. Often they fill gaps and cure incompleteness in the CISG and national law.

Chapter 7 of the UNIDROIT Principles illustrates how the process of international commercial law harmonization is likely to be more complex than we might have anticipated only a few years ago. Instead of one format or document in which the new, harmonious order is articulated, we may anticipate a range of documents taking diverse approaches to the problems at hand. Nevertheless, in a way the path to harmony and reform may be simplified by the availability of such a rich palette of legal forms from which the most appropriate form for a particular problem can be chosen. Over time, the legal community around the world may come to see this variety as providing an ample supply of flexible tools to support imaginative solutions to the challenges of a more tightly integrated global economic system.



***LES PRINCIPES D'UNIDROIT ET L'HARMONISATION DU DROIT COMMERCIAL INTERNATIONAL  
– L'EXEMPLE DU CHAPITRE 7***

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*L'harmonisation du droit commercial s'inscrit dans un contexte radicalement différent de ce qu'il était il y a seulement dix ans. La globalisation de l'économie a donné l'impulsion à de nombreuses initiatives d'harmonisation juridique inspirées de conceptions divergentes et*

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*offrant des règles apparemment incompatibles. A l'examen cependant, on constate que les instruments en question reposent sur des principes fondamentaux semblables qui conduisent à la meilleure façon de résoudre les problèmes pratiques qui se posent le plus souvent. Loin d'entrer en concurrence, ces instruments sont en vérité complémentaires.*

*Le processus d'harmonisation est réalisé par des strates successives: révision des codes nationaux qui incorporent de plus en plus d'éléments harmonisés, législations internationales telles que la Convention des Nations Unies sur la vente, conventions de conflits de lois à vocation régionale (ainsi la Convention interaméricaine de Mexico et la Convention de Rome), règles uniformes très largement appliquées émanant d'instances professionnelles, systèmes unifiés de règlement des conflits, regain d'actualité de la pratique et des usages commerciaux.*

*Les Principes d'UNIDROIT ajoutent à cette stratification. Ils constituent un exercice de grande valeur qui repose sur certaines idées fondamentales, écartant l'approche dogmatique au profit d'une optique éminemment pratique. Le Chapitre 7 des Principes (Inexécution) fournit une illustration particulièrement intéressante de la démarche de l'ouvrage, et est d'importance majeure puisqu'il traite de questions essentielles et délicates dans le contentieux des contrats internationaux. L'auteur retient deux principes qui sous-tendent ce chapitre: privilégier la vie du contrat en aménageant les réponses à donner à l'inexécution plutôt que viser à sa résolution; consacrer l'exécution en nature au nombre des moyens ordinaires pour le débiteur, ce qui constitue une solution novatrice au regard des règles de Common Law.*

*Le succès de l'harmonisation juridique se mesure à l'aune de ses résultats concrets. Les Principes qui sont affranchis de carcans conceptuels offrent l'avantage d'une forme claire et non contraignante soumise à une procédure simple de révision qui leur permettra de conserver toute leur actualité.*

