

THIRTY YEARS OF UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: AN ASSESSMENT AND WAY FORWARD

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INTRODUCTION

The International Institute for the Unification of Private International Law (UNIDROIT) is one of the most prominent international organizations promoting the unification of private law.¹ Despite extensive unification efforts, uniformity remains an arduous task. International business transactions are subject to multiple laws in different jurisdictions. The need to access foreign laws in different languages leads to increased transaction costs and delays.

The UNIDROIT Principles of International Commercial Contracts (hereinafter UPICC) are nonbinding contract law principles designed for international trade.² Currently in their fourth edition (2016), they provide a neutral law for international transactions.³ The UPICC provide a compromise across legal traditions or in many cases a choice that better suits to the needs of cross border trade (better rule approach).⁴ As a soft law instrument, they do not impose any obligation on states to unify their national laws.⁵

The UPICC were developed by international working groups that consisted of eminent contract lawyers and first published in 1994. The Preamble lists a number of practical uses: (a) they shall be applied when the parties have agreed that their contract be governed by them; (b) they may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like or when the parties have not chosen any law to

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¹ 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.’

² UNCITRAL, HCCH and UNIDROIT, ‘Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales’ 72 <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tripartiteguide.pdf>> accessed 10 April 2024 (hereinafter the Tripartite Guide).

³ Ibid.

⁴ Ibid 73; Michael Joachim Bonell, ‘Towards a Legislative Codification of the UNIDROIT Principles?’ (2007) *Unif L Rev* 234; 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.’

⁵ Tripartite Guide (n 2) 74.

govern their contract; (c) they may be used to interpret or supplement international uniform law instruments; (d) they may be used to interpret or supplement domestic law; (e) they may serve as a model for national and international legislators.

Although the UPICC have received considerable scholarly attention,⁶ their 30th anniversary marks an important milestone and presents an opportunity to assess their use in practice and their role in the development of the law. This enquiry constitutes the focus of this study. To this end, this paper comprises three parts, which correspond to the most important aspects of the UPICC role in practice: i. the application of UPICC in contract drafting and dispute settlement (Part I), ii. the influence of UPICC on domestic laws and international law instruments (Part II), and iii. their possible role in new frontiers of contract law (Part III).

I. APPLICATION IN CONTRACT DRAFTING AND DISPUTE SETTLEMENT

The UPICC can only bind the parties if two requirements have been met: first, the parties, or someone adjudicating a dispute between them, must have chosen to make the UPICC applicable in the contract; and, second, such a choice must be allowed by the law governing the proceedings between the parties, be it the *lex fori* or the *lex arbitri*.⁷ To the extent that the parties are free to choose the UPICC as the law governing their contract, these provisions will prevail over any other regime, be it of national or international origin.⁸

The effect of the parties' choice of the UPICC as the governing law differs considerably depending upon whether their application is invoked before a domestic court or an arbitral tribunal for at least three reasons: (a) arbitrators have a broader discretion to apply non-state law if it is chosen by the parties; (b) arbitrators are often familiar with the UPICC due to their specialization and personal involvement in international business transactions; and (c) the applicable arbitration law may require arbitrators to take into account trade usage.⁹

Against this background, the first and most obvious use of the UPICC in practice is when the parties choose UPICC to apply by simply incorporating them into their contract,

⁶ UNILEX includes a total number of 950 bibliographic references <<https://www.unilex.info/principles/bibliography/article/all>> accessed 10 April 2024.

⁷ Tripartite Guide (n 2) 75.

⁸ For example, Section 46 of the English Arbitration Act allows the freedom to choose non-national rules, such as the UPICC:

(1) The arbitral tribunal shall decide the dispute—

(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or

(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

⁹ For a more detailed analysis, see Michael Joachim Bonell, 'The UNIDROIT Principles and Transnational Law' (2000-2) *Rev Dr Unif* 199, 201-209.

adopting a model clause¹⁰ or standard form contract that includes a selection of the UPICC. Standard form contracts are a common feature in commercial relationships because they reduce transaction costs,¹¹ promote certainty, support predictability and encourage uniformity regarding the parties' rights and obligations and the meaning of contractual terms in numerous transactions.¹² Standard form contracts typically contain a choice of law and choice of forum where disputes will be adjudicated.¹³

Standardization notwithstanding, contracts are subject to applicable contract law, including contract interpretation rules and mandatory rules on the enforceability of such terms. These rules differ from one jurisdiction to another, so the same contract may have different legal effects depending on the governing law. Even when the wording of a clause remains intact, and the same national law applies, courts and arbitral tribunals in different jurisdictions may adopt varied approaches and interpretations.

Even in cases where disputes are resolved by international arbitration tribunals, domestic courts will need to recognize the award and domestic bailiffs and other officers must seize assets and take other required steps to execute the award should parties fail to comply

¹⁰ For example, see Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts available at <<https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/>> accessed 10 April 2024.

¹¹ Mark Patterson, 'Standardization of Standard-Form Contracts: Competition and Contract Implications' (2010-2011) 52 William and Mary Law Review 327, 331.

¹² 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, 319. See also Marcel Kahan & Michael Klausner, 'Standardization and Innovation in Corporate Contracting (Or "The Economics of Boilerplate")' (1997) 83 Virginia Law Review 713, 719-729 who distinguish between the "learning benefits" and "network benefits" of standard terms. Specifically, they consider the following as "learning benefits" of commonly used terms: (a) drafting efficiency; (b) reduced uncertainty over the meaning and validity of a term due to prior judicial rulings; and (c) familiarity with a term among lawyers, other professionals, etc. On the other side, "network" benefits mirror some of the learning benefits, but they stem from contemporaneous use, i.e., after the firm has adopted a particular term, rather than from past use. Because network benefits depend on contemporaneous use, they are primarily relevant to contracts of long duration. Learning externalities run in only one direction, from early to later users. Network externalities run in two directions in the sense that all users benefit from one another's contemporaneous use of the product, regardless of when they started using it. The principal effect of learning and network benefits is to increase the degree of contract standardization.

¹³ For model contracts that include a selection of UPICC, see e.g. 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 Contract for the Turnkey Supply of an Industrial Plant (2003), 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).

voluntarily.¹⁴ Therefore, the choice of UPICC by the parties may reduce the uncertainty about the contents of the applicable law but is not a guarantee for uniform interpretation and enforcement.

Another option for the parties is to incorporate the UPICC in their contract instead of choosing the UPICC as the rules of law governing their contract.¹⁵ In such cases, the UPICC merely apply as contractual terms and bind the parties only to the extent that they do not clash with the corresponding provisions of the applicable law from which parties cannot derogate.¹⁶ Indeed, a large part of national contract law includes dispositive rules, thus parties are free to deviate from the latter.¹⁷

There are no global statistics on the actual use of the UPICC in international contracts and dispute resolution practice and obviously it is hard to provide precise data.¹⁸ The information we do have are court decisions and arbitral awards rendered worldwide referring to the UPICC and the collection of decisions in the UNILEX database. It is in this way that we grasp better the application of UPICC in contract drafting and dispute settlement.

According to this data, the UPICC have been recognized over time both by courts and arbitral tribunals in many jurisdictions.¹⁹ It should be noted that this data is not reliable, as it is impossible to estimate the actual number of arbitral awards, given that most of them are confidential and remain unpublished.

In fact, it is determined that parties rarely choose the UPICC as applicable law in their contracts.²⁰ This is explained by a variety of reasons. From a practical standpoint confirmed

¹⁴ Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 Am J Comp L 97, 99.

¹⁵ Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts, Model Clause No 2 <<https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/>> accessed 10 April 2024. See Comment 1: One of the reasons for opting for this approach may be that – as is generally the case in court proceedings – according to the relevant rules of private international law parties cannot choose a soft law instrument such as the UPICC as the rules of law governing their contract,

¹⁶ See UPICC 2016, Art. 1.4, Comments No. 1, 2.

¹⁷ However, domestic mandatory rules that prevail over the UPICC may exist regarding e.g. consumer protection, illegality, penalty clauses and limitation periods, see Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts, Model Clause No 2, Comment 5 <<https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/>> accessed 10 April 2024.

¹⁸ See some data from a nonrepresentative survey conducted in 2020 in 'Introduction to the UNIDROIT Principles of International Commercial Contracts ("PICC")' in Eckart Brödermann, *UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary* (2nd edn, Kluwer Law International 2023) 1-24. In Queen Mary University of London and White & Case, '2010 International Arbitration Survey: Choices in International Arbitration' 15 <www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed 10 April 2024 62% of respondents indicated that they have used UPICC and/or INCOTERMS at least 'sometimes'.

¹⁹ The total number of cases available at Unilex is 580 as of 10 April 2024.

²⁰ Ralf Michaels, 'The UNIDROIT Principles as Global Background Law' (2014) 19 Unif L Rev 643, 646. In Queen Mary/White & Case Survey (n 18) 15, respondents said that transnational rules are often used as

with those negotiating contracts, the choice of law and dispute resolution clause is one of the last and quickest points to be considered.²¹ Given the indifference of the contracting parties toward choice of law and dispute resolution clauses, a reluctance to contemplate a possible dispute, and the interest of the parties to get the deal done, the choice of law and dispute resolution method is almost ‘automatic.’

A further explanation for avoiding UPICC is the lack of predictability and certainty. First of all, issues outside the scope of the UPICC and, therefore, not covered by them will be governed by other legal sources.²² Unless the contract provides a reference to the specific sources to be used, they will be determined in accordance with relevant rules of private international law, which differ from state to state and are not always predictable in their application.²³ To avoid uncertainty, parties are advised to choose the UPICC supplemented by a particular domestic law.²⁴

However, international parties need to know precisely where they stand in their commercial bargain. For example, English law is chosen most frequently because it is valued for its certainty and sophistication, its reputation for respecting the bargain reached between the contracting parties and for the large number of historical precedents reflected in case law.²⁵ It is also perceived that English law is well-developed and predictable, and the English bar and courts possess more expertise than those of other countries.²⁶ For this reason, maritime and commodities standard contracts typically provide for arbitration in London under English law.²⁷

supplementary or definitional concepts alongside a governing national law, rather than as a law that is intended to regulate all substantive legal issues.

²¹ John Thomas, ‘Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration’ 17 (March 9, 2016), <www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-baillilecture-20160309.pdf> accessed 10 April 2024 referring to the clauses inserted in standard form contracts as a matter of routine: these “embedded” clauses remain for many years making any task of change difficult. Queen Mary/White & Case Survey (n 18) 7 confirms that the majority of respondents will concede the law governing the substance of the dispute, the seat and the institution/rules if there are compelling reasons or they receive something in return.

²² Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts, Model Clause No 1.1. (a), Comment 3 <<https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/>> accessed 10 April 2024.

²³ Ibid.

²⁴ Ibid, Clause 1.2. (a), Comment 1.

²⁵ Queen Mary/White & Case Survey (n 18) 13-14.

²⁶ Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* 70 (OUP 2013).

²⁷ See e.g. GENCON 2022, clause 37 (a standard voyage charter party which is a general purpose agreement for the services of a ship in exchange for freight and can be used in a variety of trades); GAFTA (Grain and Feed Trade Association), Contract No 1, clause 27, 28. Clause 29 specifically excludes the application of the CISG, the United Nations Convention on Prescription (Limitation) in the International Sale of Goods of 1974 and the amending Protocol of 1980 and INCOTERMS.

Finally, in cases that the parties have not incorporated UPICC in their contracts, the UPICC may indirectly apply to the contractual relationship between the parties if the adjudicator uses them to interpret or supplement the applicable contract law.²⁸ In both the national and the international contexts, the permissibility of gap-filling with reference to the UPICC depends on the relevant rules and the limits of gap-filling.²⁹ Given the interdependence of rules,³⁰ gap-filling is a promising function of the UPICC. Parties may wish to refer to the UPICC as a means of interpreting and supplementing the applicable domestic law even when the domestic law in question is that of a country with a highly developed legal system.³¹ The UPICC may also be used as a substitute for the domestic law whenever it proves impossible or extremely difficult to establish its relevant rule.³²

In summary, the foregoing analysis has illustrated that the UPICC will continue to play an important role in assisting parties in negotiating and drafting cross-border contracts. The frequent incorporation of UPICC in standard form contracts could promote clarity, consistency and certainty in their application. Referring to the UPICC to interpret and supplement the applicable domestic law is also one of the most promising functions of the UPICC, since parties can achieve greater predictability and reduce costs. Even if not selected by the parties, the UPICC could be triggered by the adjudicators for interpretation and gap-filling.

II. INFLUENCE ON DOMESTIC LAWS AND INTERNATIONAL INSTRUMENTS

The adoption of harmonized legal rules by different legal systems around the world raises essential theoretical questions. One of the most important is whether harmonization or regulatory competition produces better rules from an economic efficiency point of view.³³

²⁸ Tripartite Guide (n 2) 78.

²⁹ Ibid.

³⁰ See Pistor (n 14) 98: ‘The interdependence of legal rules means that there are only a few rules that can be understood and applied without reference to other legal rules or concepts.’ and further explains 107: ‘The reason is that only very few rules are freestanding and do not require further explanation in the form of explicit or implicit references to other rules, legal terms or concepts. In principle, the more explanations or cross-references a rule requires, the more difficult it is to achieve conformity.’

³¹ Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts, Model Clause No 4 (a), Comment 2 <<https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/>> accessed 10 April 2024. For example, in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 [37,41], the contract was governed by English law and ‘the arbitrator(s) shall also apply principles of law generally recognised in international transactions. The parties are agreed - and we are content to accept - that the reference to “principles of law generally recognised in international transactions” is to be understood as a reference to the UNIDROIT Principles of International Commercial Contracts.’

³² UPICC 2016, Preamble, Comment No. 8.

³³ Pistor (n 14) 103.

Another controversial point pertains to the participation of international organizations, nongovernmental organizations, and experts from the industry in the international law-making process. Such participants lack democratic legitimacy.³⁴ However, the dialectic procedures of these organizations are expected to promote the collective interest and legitimize their efforts.³⁵

State delegations support different positions on the projects of said international organizations. The interaction among legal systems is continuous and cultural clashes arise. Conventions must satisfy multiple interests to be accepted internationally. On the contrary, the Working Group for the preparation of the UPICC was—at the price of renouncing governmental endorsement—able to carry out legal analysis free from political constraints.³⁶

Unless the UPICC have been incorporated in national law or international instruments they are not binding. However, they are influential for judicial and arbitral practice as evidenced by case law derived from the UNILEX database. The picture is more obscure when assessing the influence on legislation, both domestic and international, as there is no relevant data. National legislators may choose to enact the UPICC either in their entirety or in part, depending on the needs of each state, as they may do with other uniform law instruments, such as the UNCITRAL Model Law on International Commercial Arbitration.³⁷ In this way, the UPICC have the potential to contribute to the harmonization of national laws. This purpose differs substantially from that of a convention, such as the Convention on Contracts for the International Sale of Goods.³⁸ The implementation of a model law in different countries may lead to uniformity or variation.

Although national legislators and organizations have used the UPICC as inspiration or as a model code when reforming or drafting domestic law,³⁹ this paper will not focus on this issue. Perhaps the most crucial function of the UPICC comes indirectly through their influence in the interpretation and application of national law and international law instruments.

³⁴ See Yannick Radi, 'Standardization: A Dynamic and Procedural Conceptualization of International Law-Making' (2012) 25 *Leiden J Intl L* 283, 303-304.

³⁵ *Ibid*, further contends that the autonomous private/hybrid bodies play a normative role inside the international legal order and are participants in international law-making when they take part, together with public bodies.

³⁶ Kronke (n 4) 457.

³⁷ UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, annex 1 (21 June 1985) (with amendments as adopted in 2006).

³⁸ United Nations Convention on Contracts for the International Sale of Goods (Vienna, April 11, 1980) 1489 U.N.T.S. 3, *entered into force* 1 Jan. 1988 (hereinafter CISG).

³⁹ Tripartite Guide (n 2) 74; 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; Christine Whited, 'The UNIDROIT Principles of International Commercial Contracts: An Overview of Their Utility and the Role They Have Played in Reforming Domestic Contract Law Around the World' (2011) 18 *ILSA Journal of International and Comparative Law* 167, 169. For an assessment of the success of these projects, see Michaels (n 20) 646.

Adjudicators may use the UPICC to determine the meaning of rules and concepts of national contract laws and international uniform law instruments, such as the CISG.⁴⁰ A controversial issue pertains to the interplay between the UPICC and international uniform law instruments.⁴¹ While the prevailing view favors using the UPICC to interpret or supplement international instruments like the CISG, other commentators deny such potential on the basis of the formalistic argument that the former were adopted after the latter.⁴² In practice, both arbitral tribunals⁴³ and domestic courts⁴⁴ refer to the UPICC to interpret and supplement CISG.

Another important function of the UPICC is as a means of interpreting domestic laws. 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 regime.⁴⁵ English law is used most frequently and sector-specific standard contracts such as maritime and commodities often choose English law as the applicable law and English courts or London arbitration for dispute resolution, regardless of where the parties have their places of business. The extensive use of English law and dispute resolution in London lead to a de facto harmonization of the legal regime in specific areas and the concentration of the related dispute resolution business in London.

⁴⁰ Tripartite Guide (n 2) 78.

⁴¹ 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; 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, Art. 17.

⁴² Michael Joachim Bonell, 'Towards a Legislative Codification of the UNIDROIT Principles?' (2007) Rev Dr Unif 233, 240.

⁴³ For example, see ICC Case No. 11849 (2003) UNILEX; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation Case No. 134/2002 UNILEX characterizes UPICC as a code of the well-established rules of international trade reflecting the approaches of principal legal systems to the legal settlement of relations arising out from the mentioned agreements; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation Case No. 97/2002 UNILEX; ICC Case No. ICC-FA-2020-226, 2020', ICCA Yearbook Commercial Arbitration 2020, Volume 45, Kluwer Law International

⁴⁴ e.g. Cour de Cassation, 17 Feb. 2015, UNILEX (France); Court of Cassation, 19 June 2009, UNILEX (Belgium).

⁴⁵ Tripartite Guide (n 2) 78. For example, 4A 240/2009 Federal Supreme Court of Switzerland, UNILEX accepts that 'due to the fact that the term "material breach" does not exist in traditional Swiss contract law, the arbitral tribunal took into account the definition of a "fundamental breach" according to Article 25 CISG and Article 7.3.1 of the Unidroit Principles of International Commercial Contracts. By doing so, it examined how companies that are active in the international trade would understand the term "material breach". The Court found that the arbitral tribunal had thus interpreted the respective clause according to Swiss law principles of contract interpretation rather than applying foreign law in violation of the Parties' choice of law.'

For this reason, the interface between English law and the UPICC merits some further consideration.⁴⁶ Although the UK Supreme Court has noted that the UPICC reflect the French philosophy of contractual interpretation, which is different from that of English law,⁴⁷ it has recently characterized the UPICC as ‘widely used codes’⁴⁸ and as one of the ‘influential attempts to codify the law of contracts internationally’.⁴⁹ The stance of English courts proves that the UPICC enjoy recognition by highly developed legal systems and can be successfully used to supplement domestic laws.

III. NEW FRONTIERS

Finally, having explored the contribution of the UPICC to contract drafting and dispute settlement, as well as to national and international legislation, the analysis turns to future perspectives. Contracts arising from the Chinese ‘Belt and Road Initiative’, as well as the emerging contracts relating to blockchains, cryptocurrencies, and metaverse are possible prominent fields of application for the UPICC in the future.⁵⁰

Undoubtedly, the UPICC will continue to be useful as a model in cross-border contracts and legislation drafting. The language of the UPICC is concise and straightforward, thereby creating a *lingua franca* and checklist to be used globally.⁵¹ Their function as gap-filler avoids the complexities of selecting them as the applicable law.

Another advantage of the UPICC is that unlike an international treaty, they are flexible.⁵² In this context, a further crucial question is whether it would be necessary and/or desirable to elevate the status of the UPICC to a binding instrument.⁵³ However, the recent experience of drafting, negotiation, and ratification of international conventions, such as the

⁴⁶ For a succinct analysis see IBA, ‘Perspectives in Practice of the UNIDROIT Principles 2016, Views of the IBA Working Group on the Practice of the UNIDROIT Principles 2016’, England 127-132 <www.ibanet.org/MediaHandler?id=D266F2AF-3E0B-4DC0-AFCE-662E5D49BB7E> accessed 10 April 2024.

⁴⁷ *Chartbrook Ltd (Respondents) v Persimmon Homes Ltd and others (Appellants) and another (Respondent)* (2009) UKHL 38 [39].

⁴⁸ *Rock Advertising Limited (Respondent) v MWB Business Exchange Centres Limited (Appellant)* (2018) UKSC 24 [13].

⁴⁹ *Cavendish Square Holding BV (Appellant) v Talal El Makdessi (Respondent)* (2015) UKSC 67 [37]; *ParkingEye Ltd (Respondent) v Beavis (Appellant)* (2013) EWCA Civ 1539 [37, 164, 265].

⁵⁰ Brödermann (n 18); Olaf Meyer and Pietro Ortolani, ‘The Unidroit Principles and the Inflexibility of Code as Law: Reconciling Smart Contracts with General Clauses’ (2024) *Uniform Law Review* unae014.

⁵¹ UPICC 2016, Preamble, Comment No. 8; Michael Joachim Bonell, ‘The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles’ (2018) 23 *Unif L Rev* 15, 22.

⁵² Michaels (n 20) 668: ‘The big advantage of the PICC over a treaty is not that they can be changed more easily (in the twenty years of existence, very little has been changed) but, rather, that, due to their nonbinding character, adjudicators can draw on those provisions they deem attractive and leave out the others.’

⁵³ See Michael Joachim Bonell, ‘Towards a Legislative Codification of the UNIDROIT Principles?’ (2007) *Unif L Rev* 238 on the idea of preparing a “Global Commercial Code”.

Rotterdam Rules⁵⁴ confirms the difficulties in such ambitious unification efforts. Lacunae in existing texts, such as the CISG, were a result of the impossibility of finding a compromise solution.⁵⁵ It is unlikely that governments will, at least in the near future, pursue a far-reaching project such as the adoption of the UPICC by an international convention.⁵⁶

On the other hand, businesses engaged in international trade appear to favor the current flexible regime of party autonomy. Self-regulation via standard form contracts is successful and efficient and the UPICC can serve as a useful guide during negotiation of standard form contracts, as well as in interpretation and gap-filling of applicable national laws. Against this background, an international convention regulating contracts is unnecessary.⁵⁷ A further complex issue in the adoption of an international legal regime is that it would introduce untested rules and concepts. Since new issues will need to be clarified in case law and judges in different jurisdictions lack a common point of reference, increased uncertainty would lead parties to opt out of the international uniform regime.⁵⁸

Another idea is adopting the UPICC as a model law. The direct involvement of governments would enhance the authority of the UPICC, while the risk of losing their innovative character is reduced given the non-binding nature of a model law.⁵⁹ At any rate, organizations engaged in unification efforts have emphasized that any activity in the area of international contract law should build on existing instruments.⁶⁰ Any future work should avoid overlap, since such a vast project would require substantial human and financial resources.⁶¹

By their nature, the UPICC are particularly suited to serve as background law in applying domestic laws in an international context.⁶² Such gradual development of the UPICC to a ‘global background law’ could receive a significant push by the parties themselves, if they expressly agree that the domestic law they have chosen shall be interpreted by the UPICC.⁶³

⁵⁴ G.A. Res. 63/122, annex, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (12 Nov. 2008). The Rotterdam Rules are not yet in force.

⁵⁵ UNCITRAL, Report of the Commission on the work of its 45th session (A/67/17), 2012, para 130 <<https://documents.un.org/doc/undoc/gen/v12/551/54/pdf/v1255154.pdf?token=VHXREq3Kmxcebwo4lt&fe=true>> accessed 10 April 2024.

⁵⁶ Michael Joachim Bonell, ‘Towards a Legislative Codification of the UNIDROIT Principles?’ (2007) *Unif L Rev* 239.

⁵⁷ *Ibid* 244; Michaels (n 20) 668.

⁵⁸ Pistor (n 14) 110-11 brings the CISG as an example.

⁵⁹ Michael Joachim Bonell, ‘Towards a Legislative Codification of the UNIDROIT Principles?’ (2007) *Unif L Rev* 244.

⁶⁰ UNCITRAL Report (n 55) para 128.

⁶¹ *Ibid*.

⁶² Michael Joachim Bonell, ‘The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles’ (2018) 23 *Unif L Rev* 15, 38; Michaels (n 20) 643.

⁶³ Bonell *ibid*.

While the freedom to choose the UPICC broadens the range of options available to parties and promotes party autonomy, an understanding of the options and their parameters is required to exercise them effectively. Such process of legal innovation depends on the availability of information not only about the contents of legal rules but also about their benefits and functioning in international business transactions.⁶⁴ Easily accessible and available in many languages, the UPICC contribute greatly to the availability of such information. At the same time, the constant update of UNILEX also contributes to the dissemination of information on the application and influence of the UPICC. UNIDROIT should continue to play a leading role in the efforts to increase the available information and knowledge on the UPICC.

CONCLUSION

The foregoing analysis strived to delineate the use of the UPICC in practice and their role in the development of the law. The analysis has highlighted the most crucial functions of the UPICC. Specifically, the UPICC will continue to play an increasingly important role in negotiating and drafting cross-border contracts. The frequent incorporation of UPICC in standard form contracts could promote clarity, consistency and certainty in their application, while parties can achieve greater predictability and reduce costs by referring to the UPICC to interpret and supplement the applicable domestic law.

Apart from cases of direct application, the UPICC also indirectly influence the interpretation and application of the applicable law, thus contributing to the fair resolution of disputes. Lastly, the UPICC could be used as a checklist when drafting commercial contracts and as a model for future national and international legislation.

Easily accessible and flexible, the UPICC contribute greatly to the availability of information on the contents of rules, while the freedom to choose the UPICC promotes party autonomy and legal innovation. In light of these considerations, UNIDROIT should continue its efforts to increase the international visibility of the UPICC.

⁶⁴ Pistor (n 14) 98.