Ius Comparatum – Global Studies in Comparative Law

Alejandro Garro
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Use of the UNIDROIT Principles to Interpret and Supplement Domestic Contract Law

Springer

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Académie Internationale de Droit Comparé
International Academy of Comparative Law

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ISSN 2214-6881 ISSN 2214-689X (electronic)
Ius Comparatum – Global Studies in Comparative Law
ISBN 978-3-030-54321-1 ISBN 978-3-030-54322-8 (eBook)
https://doi.org/10.1007/978-3-030-54322-8

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The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Acknowledgment

The authors would like to thank Maria Belen Moreno, without whose editorial assistance this volume would not have been possible.

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The UNIDROIT Principles as a Common Frame of Reference for the Uniform Interpretation of National Laws

Alejandro Garro and José A. Moreno Rodríguez

Abstract The preamble to the UNIDROIT Principles on International Commercial Contracts (otherwise referred to as "UPICC", "PICC", "UNIDROIT Principles" or simply the "Principles") suggests many potential uses. However, almost half of the known judicial decisions and arbitral awards referring to the Principles invoke them for the purpose of supporting or providing further legitimacy to a solution which is either dictated or at least suggested by some national (domestic) law of contract. This general report provides a comparative perspective on how the Principles have been used to "*interpret or supplement domestic law*". While exploring the use of the Principles in domestic contract law for the sole purpose of corroborating that a similar solution may be reached under the PICC, this research study suggests how courts and arbitrators may fruitfully resort to some of the rules of the PICC either for the purpose of clarifying some ambiguities or filling same internal gaps in domestic contract law.

1 Introduction

The UNIDROIT Principles or PICC are meant to serve as many purposes as lawyers, arbitrators, judges, and different stakeholders who are aware of their existence find them useful to govern or settle cross-border transactions.[1] However, the PICC are

[1]The truth of the matter, however, is that still very few are aware of their content. Confronted with the question why should lawyers spend time and money researching conflicts of law rules and different solutions provided by domestic contract rules to contracts that are international, an

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A. Garro, J. A. Moreno Rodríguez (eds.), *Use of the UNIDROIT Principles to Interpret and Supplement Domestic Contract Law*, Ius Comparatum – Global Studies in Comparative Law 51, https://doi.org/10.1007/978-3-030-54322-8_1

rarely applied on their own and the first edition of the Principles, unlike its sister project, the Principles of European Contract Law ("PECL"),[2] did not contemplate its potential use as a means interpret or supplement domestic (national) law. It was not until the 2004, realizing that in numerous cases the Principles were mentioned for the purpose of corroborating a decision in a dispute governed by domestic law,[3] that the Working Group decided to include, as one of its potential uses, the "*interpretation and supplementation of national law*".[4]

But which are the typical patterns, if any, whereby judges and arbitrators from different jurisdictions allow the Principles to be applied in order to discover the meaning of domestic contract rules? Which normative link may be resorted to in order to fill gaps and decide the unprovided-for issue arising out of an international contract exclusively governed by domestic law? Is it appropriate resorting to such use of the Principles by referring to "general principles" of law found in some codes or statutes? Can the use of the Principles rest on the perception that the PICC

experienced international lawyer is said to have answered in 2016: "*Of course, that is true. We believe that the UNIDROIT Principles are a wonderful tool. The problem is that most people do not know them and do not take the time to read them.*" Brodermann (2018) quoting a senior director of the European Legal Department of a US manufacturing company selling pulp to 30 countries around the globe.

[2]See Preamble to the PECL ("*These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so*"). See Lando and Bale (2003), Parts I and II, Art. 1:101(4). The PICC consists of a Preamble and 211 articles divided into 11 chapters covering various aspects of general contract law and accompanied by detailed commentaries and illustrations, including general provisions (Ch. 1), formation of contracts and the authority of agents (Ch. 2), validity (Ch. 3), interpretation (Ch. 4), content (Ch. 5, including third party rights and its conditions), performance (Ch. 6), non-performance (Ch. 7), set-off (Ch. 8), assignment of rights, transfer of obligations, and assignment of contracts (Ch. 9), limitation periods (Ch. 10), and plurality of obligors and obliges (Ch. 11). See Vogenauer and Kleinheisterkamp (2015).

[3]A fairly accurate tough incomplete report of court decisions and arbitral awards resorting to the UPICC may be found in the data base of UNILEX (http://unilex.info), developed by the Centre for Comparative and Foreign Law of the University of Rome I, with the support of the Italian National Research Council. For a more comprehensive account of the different uses of the UPICC, see Michaels (2015), paras. 134–140. For use of the UPICC by arbitral tribunals, see Scherer M, Preamble II, paras. 46–57. See also Meyer (referring to the cases and awards reported by UNILEX in 2016) ("*Of the more than 400 decisions that to date have referred to the PICC, the cases that concern the interpretation of a domestic law constitute the largest group in purely numerical terms*").

[4]See para. 6 of the Preamble to the 2004 edition of the UPICC ("*They may be used to interpret or supplement domestic law*"). See Bonell (2005). After prescribing that the Principles "shall" be applied *when the parties have agreed that their contract be governed by them*, the Preamble suggests that the "may" be applied when "*the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like*, "*when the parties have not chosen any law to govern their contract*", and to "*interpret or supplement international uniform law instruments*". They can also be used, and they have in fact been used many times, to "*serve as a model for national and international legislators*". For a discussion of how the Principles have been used to inspire legislative reform, especially in countries with scarce jurisprudential developments on contracts involving foreign companies or those that have undergone radical socio-political changes, see Whited (2011).

somewhat embody or evidence "trade usages" or commercial "customs"? Thus, the first question addressed to the national reporters in this comparative study asks whether there is any statute, judicial decision or scholarly writings supporting reliance on the UPICC for this purpose.[5]

Several national reports assuredly inform that there are no judicial decisions in which the Principles have been ever cited or referred to as evidence of a "*consensus on the law applicable to contracts*". In those jurisdictions lacking any explicit reference to a set of general principles or rules aimed at interpreting or supplementing the law applicable to international commercial contracts, the cases in which the Principles have been used to interpret domestic contract law are scarce or nonexistent.

Other legal systems, in contrast, provide for different normative routes or doctrinal openings allowing the Principles to be used for the purpose of interpreting or supplementing (i.e., complementing or filling gaps) the domestic law of contract governing transnational disputes. Thus, some national reports mention cases in which the Principles have been referred to as evidence of a general consensus in the interpretation of treaties governing international contracts (e.g., international sales contracts governed by the CISG or international arbitration agreements governed by the New York Convention).

Aside from the fact that in some jurisdictions the UNIDROIT Principles are cited by some courts while they are simply ignored in others, there is a significant weight of scholarly opinion regarding the Principles as a sort of "general consensus" of contract law shared by most Western legal systems, a sort of "common frame of reference on the law of contracts" or "global background law"[6] that may substantiate or support the interpretation of the domestic law of contracts, especially with regard to issues on which most legal systems tend to agree but remain subject to different perspectives (e.g., the scope of application of open-ended principles such as "good faith", or how serious or "fundamental" a breach of contract must be to warrant its termination, or which are the contours of the obligation to pay interest for failure to render a timely performance, etc.). This is why the second question posed to the national reporters sought trace those instances in which arbitral tribunals invoked the

[5]The first question posed to the national reporters reads: *Is there any legal source in your legal system allowing the use of the UPICC to interpret or supplement national contract law (either by way of explicit and specific legislation, by way of reference to "trade usages", "general principles of law", or based in any other source)? If so, please refer to such legal source, explaining how the court has reached such a decision (indicating, for example, whether and how the courts reached the conclusion that the UPICC represent "trade usages" or "customs" in the field of contract law).* See The UNIDROIT Principles as A Common Frame of Reference for the Uniform Interpretation of National Laws, *Reports to the XIXth International Congress of Comparative Law, International Academy of Comparative Law* (2018). ("Questionnaire on the UNIDROIT Principles as a Common Frame of Reference") (http://gc.iuscomparatum.info/gc/project/the-unidroit-principles-as-a-common-frame-of-reference-for-the-uniform-interpretation-of-national-laws-english/).

[6]Michaels (2014) (Michaels refers to "*nine surprising findings concerning the actual use of the PICC*", most of which pointing their perception of "*a Restatement of global contract law, and their function as that of a global background law*").

authority of the Principles and applied them, in the absence of the parties' choice, as the general background contract law.[7]

The absence of a reference to the UNIDROIT Principles in the settlement of judicial disputes subject to domestic contract law presents a remarkable contrast with the generous hospitability given to the Principles by legal scholars from those same jurisdictions, who often rely on many provisions of the Principles as a comparative yardstick to clarify, interpret, and even "develop" their own domestic contract rules. This is probably the most extensive use of the UPICC other than in the context of judicial decisions and arbitral awards.[8]

In order to assess the extent to which the UPICC offer a modern and suitable response to issues of international commercial contracts which are not clearly or adequately addressed, or simply ignored, by the domestic contract law, the second and final part of the questionnaire individualizes a dozen provisions of the UPICC, scattered through its different chapters (formation, interpretation, performance and nonperformance), asking the national reporters to identify a counterpart (statutory or judge-made law) in their domestic law of contracts.[9] The national reporters were also asked whether there are other rules,[10] not included in the given list, which may be resorted to interpret or fill gaps of their domestic law of contracts.[11]

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[7]The second question posed to the national reporters reads: *Have the UPICC been used as evidence of a general consensus on the law applicable to contracts (for example, on the existence of a duty of good faith, the obligation to pay interest, the requirement that a breach of contract must be "fundamental" in order to allow for the termination of the contract, etc.)? If so, please indicate which specific provision of the UPICC has been used in this way, referring also to the factual context of the dispute in which the UPICC have been used in this manner.*

[8]This is probably the answer to the third question posed to the national reporters: *Assuming that the UPICC* ***have been not*** *been used by courts in your country for the purpose of interpreting or supplementing national or local rules on contract law, indicate whether they have been used in any other way and how. Discuss, for example, whether references to the UPICC were made as a general body of contract law or to some of its provisions in particular; whether references to the UPICC were made in combination with other instruments of uniform law such as the UN Convention on Contracts for the International Sale of Goods ("CISG") or a more diffuse body of state laws (e.g., the so called lex mercatoria).*

[9]Question 5 lists selected provisions of the PICC, posing the following question: *If there is a statutory or case-law rule (such as a code provision or jurisprudential line of decisions) dealing with the same or similar issue addressed by those selected provision of the UPICC, please reproduce the full text of such a provision or case-law rule, indicating any relevant difference you find between the domestic rule of contract law and the selected rule of the UPICC, also indicating whether the UPICC may be relied upon by the courts of your country as a general principle of contract law interpreting and supplementing national contract law.*

[10]Question 7 reads: *Please include those rules of the UPICC (other than those included in the given list) which have been relied upon by courts or arbitral tribunals for the purpose interpreting a similar provision of your national contract law or in order to supplement (thus serving as a gap-filler) the national contract law in force in your jurisdiction.*

[11]Question 6 reads: *If there is no such a rule of contract law in your jurisdiction, please indicate, with reasons, whether any of those selected provision of the UPICC may, in your view, be relied upon as a source of interpretation of the law of contracts in force in your country, or for the purpose of supplementing gaps in your national contract law.*

Some national reports identified rules of domestic contract law functioning as clear counterparts to PICC rules and principles, though not always formulated in the same fashion. Other PICC provisions, in contrast, did not recognize any counterpart in the domestic law of contracts. The information provided in the national reports were thus able to identify the UPICC's most innovative provisions, generally dealing with issues of particular relevance to international business transactions (e.g., conflicting languages, default rules for determining the currency of performance of monetary obligations), turning those rules quite attractive for the purpose of interpreting, filling gaps, or "developing" and ultimately stimulating and inspiring efforts towards law reform.

While starting with the study of actual or potential openings for the use of the UPICC in domestic contract law, this general report closes with a comparative analysis of contrasting approaches towards the Principles, speculating on possible explanations for their limited use in some jurisdictions in contrast with the generous hospitability received in others. This is perhaps the most important contribution furnished by the magnificent national reports that we had the privilege of examining. The national responses that we seek to sort out, in fact, foreshadow the continuous potential of the UNIDROIT Principles to increasingly inspire and affect the development not only of the law of international commercial contracts, but also of the domestic law of contracts in general.

2 Foundations for Using the PICC to Interpret and Supplement Domestic Contract Law

Because most national legal systems have been conceived as self-sufficient, that is, as providing for themselves the method to follow while filling any gaps or lacunae, it is necessary to find a normative or doctrinal foundation within the national legal order by which the PICC may be resorted to as a means to interpret or supplement domestic contract law. In in the absence of a viable legal "route" by which the Principles can enter the legal system it would be difficult to legitimize the application of a non-binding instrument such as the UNIDROIT Principles.

The answer to the question whether the legal system provides for "*any legal source*" opening the door for the application of the PICC in their jurisdictions received very different answers from the national reports, suggesting that some legal systems are more amenable than others for allowing the UPICC to influence the interpretation and supplementation of domestic law. Whereas some national reports pointed to the absence of any legal link between between the UNIDROIT Principles and their domestic law of contract, others pointed to the reference to the "general principles of law" and "trade usages" as a potential legal foundation on which the application of the Principles may rest.

2.1 Jurisdictions Lacking Normative Foundations for Applying the PICC to Interpret or Supplement the Domestic Law Governing the Contract

Some national reports such as those from Chile, Germany, Greece, Japan, Italy, and the United States point to the absence of legislative provisions expressly admitting the use of the UNIDROIT Principles for the purpose of interpreting domestic law contract law or for filling its gaps. Not surprisingly, there have been instances in which a court's reluctance to apply the UNIDROIT Principles to a dispute governed by domestic contract law rested on the ground that, not having been incorporated by the parties into their contract, the PICC are not to be considered "*universally recognized principles*" of contract law, nor can they be legitimately applied an integral part of the national law of contracts.[12] In other instances, it has been held that the PICC's non-binding nature represents a compromise among conflicting legal solutions which are not always acceptable at the domestic level, thus rejecting their identification with trade usages common to international business transactions.[13]

2.2 The Concept of "General Principles of Law" as a Source of Application of the PICC

Other national reports, although failing to report the existence of an express and direct source providing legal foundations to apply the PICC to cases governed by domestic law, they nevertheless point to their potential application through alternative doctrinal foundations. This is the case of Mexico, whose due process clause prescribes the courts' duty to follow the text of the law and, in the absence thereof, to resort to "*general principles of law*" or similar formulations. Failure to apply the law "correctly" may become a reversible error in *amparo* trials.[14] The Brazilian,[15]

[12]Russian Federal Commercial Court, Central Circuit, 19 July 2011, referred to by Meyer (2016), p. 601, n. 13.

[13]*Tribunale Verona* (Italy), 30 June 2010, also referred to by Meyer, n. 14.

[14]Mexico Nat. Rep., referring to Article 14 of the Mexican Constitution, *in fine* ("*. . .In civil actions, the final judgment must be rendered in accordance with the letter of the law or its legal interpretation and, in the absence thereof, in accordance with general principles of law*").

[15]See Article 4 of the Law of Introduction to Norms of the Brazilian Law, Law No. 12376 of September 30, 2010 ("Braz. LNDB"). *When the legislation is silent, the judge shall decide the case according to analogy, customs and the general principles of law ("Quando a lei for omissa, o juiz decidirá o caso de acordo com a analogia, os costumes e os princípios gerais de direito").*

Paraguayan[16] and Uruguayan[17] reports, among others, also refer to the application of the "*general principles of law*", found in the Constitution as well as the Civil code, both of which supporting the potential application of the UPICC.

2.3 *The PICC as a Codification of the Law Merchant ('lex mercatoria')*

Less plausible, though not theoretically inconceivable, is the opening offered to the application of the UNIDROIT Principles by way of reference to the *lex mercatoria* as a supplementary source of law. Although this meaning is unlikely to be attributed to the concept of "law merchant", as used in specific contexts such as it is found in Section 1-103 of the Uniform Commercial Code of the United States ("UCC"),[18] the diffuse and amorphous concept of *lex mercatoria* is precisely mentioned in the preamble to the PICC as the meaning sought to be acquired by the PICC.[19] Yet,

[16]Parag. Nat. Rep., referring to Article 6 of the Paraguayan Civil and Commercial Code of 1985 ("Parag CC"), directing judges to take into account, in addition to the letter and spirit of the statutes, analogous cases as well as the general principles of law.

[17]Urug. Nat. Rep., referring to Art. 332 of the Uruguayan Constitution ("*The provisions of this Constitution acknowledging individual rights as well as those conferring rights and prescribing duties of public authorities shall be applied despite the absence of applicable rules, in default of which shall be governed by the rationale of analogous statutes, the general principles of law and generally accepted scholarly doctrine.*"). Reference to general principles are also found in Art. 1302 of the Urug. CC ("*In civil cases that cannot be resolved by the letter or the spirit of the law on the subject matter, resort shall be made to analogous statutes and, if doubt still persists, to general principles of law and the most accepted scholarly doctrine, taking into account the circumstances of the case.*").

[18]See USA Nat. Rep., referring Section 1-103 UCC and Karl Llewellyn's idea of opening up the UCC to the "immanent law" emerging from industry's practices. See 1-103 UCC ("*Supplementary General Principles of Law Applicable. Unless displaced by the particular provisions of this Act, the principles of law and equity, including the* ***law merchant*** *and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions*"). Emphasis added. As noted the national reporter, the Official Comment accompanying this provision suggests that such references to the law merchant point to the common law of contracts developed courts in the United States, rather than some body of laws of a transnational nature.

[19]In the words of Lord Mustill, the Principles "*represent a distillation of a large number of laws which it would often be impracticable to examine individually...*", quoted in Bonell, An International Restatement at 239. For a pointed criticism of the concept of "lex mercatoria", see Czech Nat. Rep. at 3 ("*Czech legal theory does not differentiate substantially from traditional theories of private international law in Europe. Lex mercatoria is a fuzzy term, and it is in our opinion impossible to accept that the rules arising from lex mercatoria could be regarded as having the nature of generally binding legal norms. As sometimes mentioned in literature, lex mercatoria is not a "lex". Only states adopt generally binding legal norms*").

some national reports refer to isolated cases in which a court relied on the PICC as an expression of the *lex mercatoria*.[20]

In two decisions reported by Unilex, rendered relatively recently by the Court of Appeals of Rio Grande do Sul, the PICC were referred to as a "*new lex mercatoria*", which the Brazilian court conceptualized as a "*group of norms gathered in principles, usages and customs, model clauses, model contracts, judicial decisions and arbitral awards, conceived or derived from trade transactions amongst actors of international commerce*."[21]

2.4 International "Trade Usages" or Customs as an Alternative Source of the PICC

Most national legal systems give binding effect to **trade usages**, customs and commercial practices having played, and currently playing, a most significant role as a source of domestic[22] as well as international[23] business transactions. Trade usages draw on unofficial practices, by and large closely related to a specific branch of trade or particular markets. Trade usages have played a significant role in international trade, providing a greater level of flexibility absent in the more formal legislative process, thus allowing market participants to react more quickly to changing circumstances and new developments. Accordingly, some decisions,

[20]See, e.g., Urug. Rep. at 1, referring to an appellate court decision relying on Article 7.1.6 PICC to uphold the validity of an exemption of liability clause (Civil Court of Appeals of Montevideo, Term 1, Decision No. 152/204, 13 August 2014).

[21]Court of Appeals of Rio Grande do Sul, 14 February 2017, Noridane Foods S.A. v. Anexo Comercial Importação e Distribuição Ltda, reported in http://www.unilex.info/principles/case/2035. See also Court of Appeals of Rio Grande do Sul, citing the Brazilian national reporter, Professor Lauro Gama Jr., for the proposition that "*the use of the UNIDROIT Principles – as well the application of the CISG even if not part of the Brazilian domestic law – reaffirms a flexible, non-positivist approach to disputes as is required in the field of international commercial law*". See also, Court of Appeals of Rio Grande do Sul, 30 March 2017, Voges Metalurgia Ltda. v. Inversiones Metalmecanicas I.C.A. – IMETAL I.C.A., reported in http://www.unilex.info/principles/case/2042.

[22]See, e.g., Turkish CC, Art. 1. For the ample room conferred on usages in Spanish law, see Spain Nat. Rep. (referring to the "normative" as well as "interpretative" function played by usages in the Spanish CC and ComC). See also UCC Section 1-303(c), referring to "*usage of trade*". In many jurisdictions, however, trade usages or customary practices are allowed only in those cases in which the law refers to them (*secuendum legem*). See Parag. Nat. Rep., referring to Article 7 Parag. CC, according to which "*commercial usages and customs can only apply when the law refers to them to determine the sense of words or technical phrases of commerce and to interpret acts and conventions of the same nature*".).

[23]See the formulation of the binding force of trade usages under Art. 9(3) CISG and Art. 1.9 UPICC.

including one from the High Commercial Court of Ukraine,[24] and more than one arbitral award of China's International Economic and Trade Arbitration Commission ("CIETAC"),[25] have declared that the UNIDROIT Principles express international usages applicable to cross-border transactions in the absence of, and unless in conflict with, the domestic law governing the contract.[26] Most national reports point to the absence of judicial decisions in which the UNIDROIT Principles have been applied as part of international trade usages.[27] Although many of the national reports indicate that the UNIDROIT Principles have never been used as trade usages by the national courts,[28] other reports state that as long as the PICC "*represent 'trade usages' and 'general principles of commercial law', an arbitral tribunal is allowed to take them into consideration and, consequently, use them to interpret or supplement national contract law*."[29]

In fact, in more than one occasion Paraguayan courts have resorted to the UNI DROIT Principles in disputes governed by domestic contract law, finding that the usages and practices referred to in Article 7 of the Paraguayan Civil Code[30] give rise to the kind of "implied obligations" referred to in Article 5.1.2(b) PICC.[31] In a case in which a party complained to the Supreme Court because the lower court relied on

[24]Letter of the Supreme Economic Court of Ukraine, 7 April 2008, On Some Issues in the Application of the Civil and Commercial Code of Ukraine, referred to by Michaels (2014) note 27.

[25]See Huang (2008), pp. 105, 135–136.

[26]Although acknowledging that the PICC was not and cannot be conceived as a restatement of commercial usages, Michaels notes that this may be one of the roles the Principles assume in order to gain legitimacy in its application ("*If courts, especially in formerly socialist countries, draw on them regardless, it appears they sue them as a hook to escape their overly restrictive domestic laws*."). See Michaels (2014) note 27.

[27]See, e.g., Greek Nat. Rep. at 1, reporting "*no court cases . . .where the UPICC have been invoked as representing "trade usages" or "customs" in the field of contract law and, accordingly, no relevant court decisions*.".

[28]See Japanese Nat. Rep. at 1 ("*The UPICC has never been explicitly used by Japanese courts in interpreting or supplementing Japanese law. There is no institutional barrier for using the UPICC for that purpose as far as the principles in the UPICC can be viewed as representing "customs" or "trade usages". Nonetheless, that has not happened.*").

[29]Guatemalan National Rep., point to Article 36(2) and (3) of the Guatemalan Arbitration Law, referring to the application of the "*usages and principles of international commercial law*", "*trade usages and commercial practices of general acceptance*", and "*usages of the trade applicable to the particular case.*".

[30]Article 7 of the Paraguayan Civil Code provides customs and practices cannot create rights unless the parties refer to them.

[31]Article 5.1.2(d) PICC provides that implied obligations in a contract may arise, inter alia, from "*the practices established between the parties and usages*". In a dispute involving a sales commission agreement, a Paraguayan court of appeals found that that the seller's delivery of the goods directly to the customers, instead of at the place of the seller's premises as originally agreed, resulted from the usages and practices binding on the parties by virtue of Article 1.9 PICC, which closely follows Article 9 CISG, giving rise to the seller's implied obligation to deliver the goods directly to the customers. See Paraguayan Nat. Rep., referring to Ofelia Valenzuela Fernandez c. Paraguay Granos y Alimentos SA, Civil and Commercial Court of Appeals of Asuncion, 6th Chamber, Acuerdo y Sentencia 66 (2016).

Article 5.1.3 PICC for the purpose of imposing a duty to cooperate with the other contracting party, the Supreme Court of Paraguay, although revoking the lower court decision on other grounds, upheld the use of such provision of the UNIDROIT Principles stating that the duty to cooperate "*complements the principle of good faith in contractual relations recognized in Paraguayan law.*"[32]

Whether the PICC codifies international trade usages appears as a controversial route of entry for the UNIDROIT Principles to be used in the interpretation or supplementation of domestic contract law.[33] Actually, it does not seem appropriate to assimilate the UNIDROIT Principles to international trade usages, as if the PICC were to codify usages and practices developed throughout the years. Whereas trade usages and customs are rooted in habitual practices, the rules embodied in the UNI DROIT Principles do not necessarily reflect nor intend to formulate predominant practices, but they rather aim at articulating the most suitable solutions for cross-border transactions.

Not surprisingly, some arbitral awards have refused to put the PICC on an equal footing with trade usages.[34] In some jurisdictions such as the Chzech Republic, even though proven trade usages clearly preempt default rules of the otherwise applicable law,[35] its national report does not find it likely that Chzech courts would resort to the

[32]Paraguayan Nat. Rep., referring to Jorge Moises Etcheverry Ali c. Rosa Maria Ramona Etcheverry de Brizuela, decided by the Civil and Commercial Court of Appeals of Asuncion, Sixth Chamber, Acuerdo y Sentencia 62 (2015). The Paraguayan National Report refers to other cases in which Paraguayan courts of appeals consistently resorted to Article 5.1.3 PICC, providing thus: "*Each party shall cooperate with the other party when such cooperation may reasonably be expected for the performance of that party's obligation*". See Paraguayan Nat. Rep. ("*The duty of cooperation is not expressly contemplated in Paraguayan domestic laws. However, the Court of Appeals sustained that it is derived from the duty of good faith in contractual relations, which, in turn, is contemplated by Paraguayan domestic laws. The Court supported its conclusion in the UPICC, relying on its Article 5.1.3 and also referring to its explanatory notes*.").

[33]Trade usages are generally regarded as born out of habitual practices, thus calling for an ascertainment of facts rather than law. See Oser (2008), pp. 80–81. On the evidentiary difficulties inherent in the finding of trade usages prevailing in relevant markets, geographic locations and branches of trade, see Bernstein (2015).

[34]See, e.g., ICC Case No. 10021 (2000) *("the reference to the UNIDROIT Principles as codified trade usages is rather of persuasive rather than binding nature*"); ICC Case No. 124446 (2004) ("*though this arbitration tribunal does not deny that UNIDROIT Principles indicate well thought good rues, that fact does not make the UNIDROIT Principles worldwide trade customs or usages*"). See also ICC No. 9029 (March 2004) ("[A]*lthough the UNIDROIT Principles constitute a set of rules theoretically appropriate to prefigure the figure lex mercatoria should they be brought into line with international commercial practice, at present there is no necessary connection between the individual Principles and the rules of the* lex mercatoria*, so that recourse to the Principles is not purely and simply as recourse to an actually existing international commercial usage*"), cited in Meyer, notes 58–61.

[35]Czech National Rep., at 3, quoting Article 558(2) of the Czech Civil Code: "*In legal transactions among entrepreneurs, account is taken of business usages maintained in general or in a given industry, unless excluded by an agreement between the parties or by a statute. Unless otherwise agreed, a business usage is conclusively presumed to take precedence over a non-mandatory*

UNIDROIT Principles as embodying business practices.[36] The national report on Russia does not disclose any court judgment resorting to the UNIDROIT Principles as trade usages, yet the Principles have been applied several times as reflecting international trade usages in awards rendered by arbitration tribunals operating under International Arbitration Court and the Russian Federation Chamber of Commerce ("ICAC").[37]

2.5 *Jurisdictions Where the PICC Have Been Used as a Model for Reform of the Domestic Contract Law*

Surveys undertaken about a decade ago showed that the UPICC remained relatively unknown several years after they were originally adopted in 1994.[38] Awareness of the Principles is likely to improve with the passage of time, as reflected by the reference to the PICC in academic debates about new trends in contract law and the impact it had on the drafting of regional restatements such as the PECL, OHADA,[39] and more recent projects in Asia ("PACL")[40] and Latin America ("PLACL").[41] More importantly for the purpose of resorting to the UNIDROIT Principles in the interpretation of domestic contract law is the case of those jurisdictions were the Principles have been relied upon as a model for the reform of the domestic law of contract law.[42]

Many rules of the Principles have been relied upon as a model for modernizing the law of contracts, not only in socialist or former socialist States (People's Republic of China, Latvia, Estonia, Lithuania, the Czech Republic, Hungary, the

provisions of a statute; otherwise, an entrepreneur may invoke a usage if he proves that the other party must have known a given usage and was aware that it would be followed".

[36]Czech National Rep., at 3 (*"We are of the opinion that in light of the indicated approach to usages, it cannot be assumed that in the future Czech courts would use this provision to apply the UPICC. Such scenario is not likely to take place..."*).

[37]See Russian Nat. Report at 6, referring to a series of published arbitral awards of the ICAC, including ICAC award of 5 June 1997, Case No. 229/1996, referring to the UNIDROIT Principles as "*progressively acquiring the status of international customs*".

[38]Surveys conducted among English and US judges, international practitioners, and legal scholars yielded disappointing results. For the UK, see Goode (2001) and Fitzgerald (2008). For the USA, see Gordon (1998).

[39]For a discussion of the draft contract law adopted by the Organization for the Harmonization of Commercial Law in Africa ("OHADA").

[40]For a discussion on the PACL see Kanaya (2010) and Han (2013).

[41]For a discussion of the PLACL, see Pizarro Wilson (2012).

[42]See Bonell, note 78, noting the success of the UPICC as a progressive "model contract law" or source of inspiration for law reform, especially, though not exclusively, in former socialist states.

Russian Federation),[43] but they also have been influential in law reform projects in jurisdictions with a long and influential practice and legal scholarship (France,[44] Germany,[45] and Japan).[46] In these jurisdictions the UNIDROIT Principles are expected to be increasingly taken into account when their courts are asked to interpret the newly enacted codes, especially when it is clear that the UPICC influenced the drafting of the particular provision to be interpreted.[47] There are

[43]For a general discussion of the use of the Principles as a model for law reform in Lithuania, Estonia, Latvia, Russia, and other jurisdictions, see Estrella Farias (2016), pp. 238, 243–247.

[44]See amendments for the modernization and simplification of the law and procedure on the field of justice and domestic affairs (*Loi No. 2015-177 du 16 février 2015 relatif à la modernization et à la siplificqtion du droit et des procedures dqns les domaines de lq justice et des qffaires interieures*). See Fauvarque-Cosson (2014). See also Estrella Farias (2016), pp. 262–269. The statute authorizes the Executive branch to promulgate a regulation (*ordonnance*) revising twelve specific areas in the field of conventional obligations governed by the Code civil. In many instances, the reform reproduces pre-existing provisions or case-law developments (*jurisprudence constante*), but many other provisions mirror the UPICC. This is the case, for example, on the overriding duty of r1.7 UPICC); liability for breaking off negotiations in bad faith and the duty of maintain confidentiality in the course of negotiations (Art. 1112 Fr.CC and Art. 2.1.15 UPICC). Also in correspondence with the approach of the Principles, the amendments to the French Civil Code eliminate the concept of cause among the essential elements of the contract (see comments to Art. 3.1.2 UPICC); introduces the notion of "anticipatory breach", also covered by Art. 71 CISG, allowing one party to suspend performance in case of a serious risk of non-performance by the other party (Art. 1220 Fr. CC and Art. 7.3.3 UPICC); excludes specific performance in cases where performance would be unreasonably burdensome and expensive (Art. 1221 Fr.CC and Art. 7.2.2 (b)). Following the approach of Arts. 6.2.2 and 6.2.3 UPICC, Art. 1195 Fr.CC allows either party to the contract to request renegotiations when unforeseen and drastic changes after the conclusion of the contract disrupts the equilibrium of the performances, turning excessively harsh the performance of a party that had not assumed such a risk ("*Si un changement de circonstances imprévisible lors de la conclusion d'un contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque*. . ."). If the renegotiations end in failure, both parties may request the court to adapt the contract. But if both parties fail to agree on how to adjust the performances, either party may apply for a judicial revision or termination of the contract.

[45]For a survey on the influence of the UPICC in the modernization of the German law of obligations, passed on 27 November 2001 and entered into force in January, 2002, see Zimmermann (2005).

[46]A working group set up by the Legislative Council of the Japanese Ministry of Justice have been meeting since 2009 for the purpose of revising Book III of the Japanese Civil Code of 1896, dealing with obligations and contracts. The working group submitted a draft bill to the National Diet on March 31, 2015. According to Professor Takashi Uchida, a member of the Legislative Council, the UPICC has been a "a rich source of inspiration" for some of the revised rules on contract law. See Ushida (2011) pp. 697, 710. See also Estrella Farias (2016), pp. 259–260.

[47]This is case in a jurisdiction such as Lithuania, whose Civil Code replicated many provisions of the UPICC. See Supreme Court of Lithuania, 19 Jan. 2005 (referring to Art. 2.1.15 UPICC and its comments for the interpretation of Art. 6.163 of the Lithuanian CC dealing with liability for the braking-off contractual negotiations in bad faith); Svenska Petroleum Exploration AB, Government of the Republic of Lithuania, 4 Nov. 2005, a decision rendered by the English High Court, applying the relevant rules of contract interpretation in Arts. 6.193 to 6.195 of the Lithuanian CC, which according to a Lithuanian legal scholar "*repeat Article 4.1 to 4.6 of the UNIDROIT Principles*." See Meyer, notes 43–44. See also Zukas (2007) pp. 238–239.

also a number of jurisdictions, such as Spain[48] and Scotland,[49] in which the Principles are being considered as a possible source of inspiration for future reforms in the law of contracts.

Another case on point on the consultation of the PICC as a source of legislative intention is the Contract Law of the People's Republic of China (1999), whose rules applicable to contracts in general has been significantly influenced by the UNIDR OIT Principles.[50] The Civil Code of the Russian Federation ("CCRF"), adopted at different stages between 1994 and 2008, has largely drawn inspiration from the U NIDROIT Principles, even though its drafters not always made express reference to those instances in which a particular provision has been modeled after a rule of the UNIDROIT Principles.[51] The PICC are also mentioned as a model for some of the

[48]For the influence of the UPICC in the drafting of Spanish legislative projects, see Martìnez Cañellas (2007) (discussing the wisdom of using the UPICC as a source of inspiration of for the revision of commercial (or mercantile) contracts regulated in the Commercial Code, preventing the Spanish Autonomous Communities from passing special laws to regulate those issues of contract law). See also Estrella Farias (2016) reporting on the influence of many provisions dealing with the formation of contracts, taken from the CISG or from the UPICC (e.g., Arts. 2.1.1 and 2.1.6), noting that those provisions with no equivalent in the CISG are clearly derived from the UPICC, such as those on negotiations in bad faith (Art. 2.1.15 UPICC), duty not to disclose information received during the negotiations of the contract (Art. 2.1.16 UPICC), modification in a particular form (Art. 2.1.18 UPICC), writings in confirmation (Art. 2.1.12 UPICC).).

[49]For a discussion of the impact of the UNIDROIT Principles on the reform of the Scottish reform of domestic contract law, see Orucu (2011), pp. 1002–1023.

[50]Contract Law of the People's Republic of China, President's Order No. 15, 15 March 1999 ("Chinese Contract Law" or "ChCL"). A statistical study undertaken by the Civil Law Bureau of the Legislative Committee of the National People's Congress, cited by Professor Zhang Shaohui, refers to the influence of foreign domestic sources, including the civil codes from Italy (31.8%), Germany (25.7%), Japan (14.3%), France (10.7%), and even the Uniform Commercial Code (3.5%). Instruments of international uniform law such as the UPICC are also credited with influencing the general part of contract law (47.3%) and the CISG on specific rules on the contract of sale (50%). See Shaohui (2008). The most evident influence of the Principles on the ChCL is in the field of formation of contracts, though such influence is questionable given the similarities with those of the CISG, upon which many of the UPICC rules on formation of contract were modeled after. But the rules of the ChCL on the validity of contracts (Art. 55 ChL and Art. 3.2.9 UPICC) and the consequences of breach of contract corresponds to many of the rules found in Chapters 6 ("Performance") and 7 ("Non-Performance") of the UPICC. See Yuqing and Danhan (2000). See also Estrella Farias (2016), pp. 250–252, notes 67–69.

[51]See Russian Nat. Rep., at 1 (*The travaux préparatoires to the reform stress that the UPICC were one of the main models and explicitly invoke their provisions many times. The (final version of the) Concept for the Development of Civil Legislation in the Russian Federation makes three references to the UPICC (the only reference to non-state law above that being the one to the ICC Uniform Customs and Practice for Documentary Credits (UCP 600)). The much more detailed draft Concept of the working group on obligations has built mainly upon soft law and international instruments: the 'international principles of contract law', generally meaning the UPICC and the like, were referred to 10 or 11 times, the UPICC specifically – 14 times (whereas the PECL – only 5 times and the DCFR – not a single time). The real number of inspirations from the UPICC might have been higher if one suggests that there were cases where the drafters have made use of the UPICC with no specific reference to the Principles. It is worth mentioning that Alexander S. Komarov, a member of the working groups for the preparation of the first three editions of the UPICC (1994, 2004, 2010), has participated in the drafting of the original text of the Code as well as of the amendments to it during the reform."*).

contract provisions incorporated into the Argentine Civil and Commercial Code of 2015 ("ArgCCC").[52]

Even though no one questions that the Principles have been used up certain extent as a source of inspiration, the degree to which different States have modelled their contract rules on the PICC varies from country to country, and the level of influence of the Principles may also depend on each contract rule in particular. On the one hand we have the case of the Lithuanian Civil Code, some of whose provisions follow word for word the UNIDROIT Principles.[53] On the other hand, we have other jurisdictions, such as the Civil Code of the Czech Republic (2012) and the Hungarian Civil Code (2013) in which It is not altogether clear the extent to which the UNIDROIT Principles were taken into account in the drafting of their contract rules. Both national reports indicate that their recently enacted codes have been influenced in one way or another by different provisions of the Principles, although it remains to be seen the extent to which the Czech[54]

[52]See Argentina Nat. Rep., referring to Law No. 26.994 passed on October 1, 2014, adopting a new Civil and Commercial Code ("Arg. CCC"), replacing the Civil Code of 1869. Justice Ricardo Lorenzetti, who presided the legislative committee that drafted the new CCC, expressly referred to the influence of the UPICC in the drafting of the new provisions on contracts. See Código Civil y Comercial de la Nación, Buenos Aires, Led. La Ley, preface by R. L. Lorenzetti, at XCII ("*The design of these provisions [referring to the title on contracts in general] draws heavily on the U NIDROIT Principles, which are widely accepted in today's legal tradition (Arts. 971 et seq.)*. . ."). Although the Committee's final report fails to mention specific provisions of the Principles, the national report expressly refers to the text of a draft Civil Code prepared by a committee established by Executive Decree No. 685/95, whose "1998 CC Draft" (*Anteproyecto de Codigo Civil de 1998*) refers to the influence of the UPICC (together with the PECL and a Draft of a European Contract Code by the Academy of Pavia) on areas such as the contract of representation or agency (mandate), the formation of contracts, as well as the impact of Art. 7.4.4 UPICC on foreseeability of the harm. See Argentina Nat. Rep. ("*The influence of the UNIDROIT Principles as a source of the [1998 CC Draft] --and therefore a source of the CCC-- is not limited to the occasions in which it is expressly mentioned in the recitals. As in the [1998 CC Draft], the Principles have inspired many other solutions*. . . .").

[53]Reportedly, Article 6.163 of the Lithuanian Civil Code follows verbatim Article 2.1.13 PICC on precontractual liability. See Meyer, 607.

[54]Czech Nat. Rep., text accompanying note 26, referring to the Civil Code of the Czech Republic that came into effect on January 1, 2014 (Law No 89/2012) ("CzCC") and at p. 18 ("*Undoubtedly, the UPICC may be regarded as an interpretation tool with regard to the provisions of the new 2012 Civil Code, as the UPICC served, together with other sources, as a model for some new provisions*"). Thus, the Czech Nat. Rep. refers to the influence of some provisions of the Principles in the drafting of the new Civil Code, such as Art. 1753 on surprising terms (Art. 2.1.20 UPICC); Art. 2002(1) CzCC on the right to terminate a contract in case of fundamental breach (Art. 7.3.1 (1) UPICC). However, it is not the text of the PICC the one that always prevailed as a source of inspiration. See Czech Nat. Rep. at 9, referring to the rules on precontractual liability adopted in Sections 1728–1729 CzCC "(*In 2012 the Czech Republic saw extensive recodification of private law resulting in the adoption of a new civil code which came into effect on 1 January 2014. In the new CC precontractual liability is expressly regulated under Sections 1728 – 1729. According to the Explanatory Report on the CC the drafters were inspired by the regulation of pre-contractual liability in Art. 6 – 8 Code Européen des Contrats rather than by the regulation contained in the UPICC").*

and Hungarian courts[55] rely on the PICC in order to interpret ambiguities or fill gaps in the law of domestic contracts.

This is also the case of the most recent reform to the Japanese Civil Code, which will come into force on April 1, 2020, to which the UNIDROIT Principles served as a significant legislative model for the drafting of domestic rules on contract law. It remains to be seen, however, whether the Principles, which up to this day remains relatively unknown to most Japanese practitioners, will become an important source of consultation in the interpretation of the new contract rules or in order to fill its gaps.[56]

2.6 *Choice of the PICC as a Means of Interpreting and Supplementing the Applicable Domestic Law*

Because the PICC provides for contract "rules", rather than "law", much of the use of the UNIDROIT Principles, even in those cases in which the parties have expressly chosen the application of the PICC, depends on the recognition and scope of the principle of party autonomy of forum.[57] This is why it is always highly commendable for the parties to opt into the Principles through a dispute resolution clause, as recommended in the official footnote to the second paragraph of the Preamble. Even if the parties include a choice-of-law clause into the contract, it is the applicable

[55]Hungary Nat. Rep., referring to provisions of the Hungarian Civil Code (of 2013 ("HCC") that were inspired by the Principles, such as Art. 6:63 HCC on trade usages (Art. 9 CISG and Art. 1.9 UPICC); Art. 1:3 on liability for breaking off negotiations in bad faith (Art. 2.1.15 UPICC); Art. 6:78 HCC on standard terms (Art. 2.1.20 UPICC); and Art. 6:86 HCC on interpretation of a contract as a whole (Art. 4.4 UPICC). See Hungary Nat.Rep. at 2 ("*During the preparation of the [Hungarian Civil Code or "HCC"] several instruments of unification of contract law were taken into account, as a source of inspiration, especially the United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL). This influence and inspiration was expressly admitted by the Editorial Committee preparing the original draft of the HCC. So, it is not surprising, that the sections on contracts of the HCC fairly often contain similar or compatible norms to that of the UPICC").*

[56]See Japan Nat. Rep. at 4 ("*The receptivity toward the UPICC, however, may have gradually changed during the course of the past few years, as it has been frequently referred to as an important legislative model in the recent amendment of the Japanese Civil Code. This may have some positive impact on the courts and arbitral tribunals, but it is still yet to be seen if the courts and arbitral tribunals in Japan are prepared to find that UPICC is a restatement of "customs" or "trade usages" in international contacts").*

[57]See Guatemalan Report, referring to Article 31 of the Law of the Judicial Branch, providing that "*Legal acts and contracts are governed by the law chosen by the parties, unless such choice is contrary to prohibitive rules or public order*". The Guatemalan Report adds: "*According to the rules of interpretation governing in Guatemala, the term "law" should be interpreted narrowly and refers only to a State law, i.e., one issued by the corresponding legislative authority of a State, and not an instrument of soft law*."

conflict of law rules of the forum (be it an arbitration or a judicial forum) which will decide if and how the UNIDROIT Principles will be accepted.[58]

The model clauses suggested by UNIDROIT distinguish between choices that the parties may conclude in the contract itself and after the dispute has arisen, and one of the models provides for the language that may be included in a clause in which the PICC are selected as a means of interpreting and supplementing the applicable domestic law: "*This contract shall be governed by the law of [the State X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2010)*". The comments point to the convenience of relying on the Principles when the applicable domestic law pertains to a legal system without much exposure and experience on cross-border transactions, but it also remarks how important is to count on the support of the Principles when the applicable domestic law is that of a highly developed legal system. The role of the PICC in these cases may be relevant in those instances where the applicable domestic law fails to provide for a clear-cut solution to specific issues, either because scholarly opinions are sharply divided, the case-law on the matter is not altogether clear, or the issue at stake has not been addressed at all.[59]

2.7 *Use of the PICC by Arbitral Tribunals as Opposed to National Courts*

Relatively recent empirical studies indicate that the parties make little use of UPICC, both in contracts whose disputes were settled by arbitrators as well as those ending up before the regular courts.[60] Those same studies show that in most cases the PICC were actually resorted to and used by adjudicators even in cases in which they have not been chosen by the parties to the contract.[61] In those cases in which the parties

[58] Although party autonomy in the determination of the applicable law to commercial contracts may be considered a principle generally accepted in most Western jurisdictions, in some Latin American jurisdictions party autonomy is only accepted in disputes submitted to arbitration (e.g., Bolivia, Brazil, Colombia, and Uruguay). See Albornoz (2010), pp. 47–48.

[59] See Model Clauses for Use by Parties at 20–21.

[60] See Michaels (2014), pp. 646–647, reporting in 2014 figures reported by UNILEX and the ICC ("*. . .UNILEX lists only 19 arbitral decisions addressing the applicability of the PICC as rules of law governing the contract in disputes before an arbitral tribunal, out of 186 arbitral decisions that mention the PICC. Out of those 19, no more than four concern matters in which the parties had chosen the PICC in their contract. . .[T]he PICC were mentioned in only 54 proceedings or 0.8 % of all proceedings. From another report, we learn that, between 2007 and 2011, the PICC were mentioned in contracts in only seven matters referred to arbitration under the ICC, as opposed to 3, 551 in which national law was chosen. . .*").

[61] See Michaels (2014), p. 648, Figure 1, showing different applications of the UPICC by judges and arbitrators. By far the biggest portion of decisions were those in which the Principles were applied to interpret and supplement domestic law (221), followed by their use in the interpretation of international commercial instruments (62). In 60 cases the Principles were used in the absence of

have not chosen the application of the UNIDROIT Principles, the third paragraph onwards of the Preamble suggests that the Principles may still be applied in several instances, without distinguishing those cases in which the adjudicator is a state (national) court or an arbitration tribunal. As previously noted, however, the distinction between these two types of adjudication remains relevant, as noted in most national reports. It is worth returning to this distinction, because the possibility of resorting to the PICC as a means of interpreting and supplementing the applicable domestic law also depends on whether the dispute is to be decided by an arbitral tribunal as opposed to a national court.

Because the choice of law rules of most traditional legal systems still require the parties to choose a national "state" law, the choice of the PICC in combination with the choice of a judicial forum (state court) calls for an interpretation of such clause in the sense that the parties intended the Principles to be incorporated into the contract, which remains governed by the applicable state law.[62] The application of the UN DROIT Principles is, at least in principle, excluded under traditional choice-of-law regimes.[63] The possibility of choosing non-State law may be achieved through their incorporation into the contract.[64]

By way of exception, a few international treaties such as the 1994 Inter-American Convention on the Law Applicable to International Contracts (the "Mexican Convention")[65] and the 2015 Hague Principles on the Choice of Law in International

express choice of law by the parties, in 25 cases as a reflection of the "*lex mercatoria*" and the like, and only in 30 cases they were chosen by the parties.

[62]The distinction between the application of the UNIDROIT Principles as a mere incorporation of its rules into the contract, as opposed to their application as a contract legal regime, may be relevant to determine the impact of the mandatory laws (Art. 1.4 PICC). As to the theoretical underpinnings of relying on the UPICC as "applicable law", as opposed to incorporating them into contract clauses. On the negligible practical differences between these different manners of choosing the UPICC, see Estrella Farias (2016), n. 12.

[63]See, e.g., Art. 3(1) of the Rome I Regulations.

[64]See, e.g., Council Regulation (EC) 593/2008 on the Law Applicable To Contractual Obligations (2008) OJ L 177 recital 13 ("Rome I Regulation"), enabling the choice of non-state law through incorporation. See also Italian National Report, referring to Italian case law according to which the parties' reference to the *lex mercatoria* and the UNIDROIT Principles do not constitute a veritable "choice of law" by the parties, but rather the incorporation of such rules into the contract, so that they bind the parties to the extent they are not in conflict with mandatory domestic law.

[65]Inter-American Convention on the Law Applicable to International Contracts (1994), 33 ILM 732 (1994). In the absence of the parties' choice of the applicable law, the first paragraph of Article 9 of the Mexican Convention (ratified to this date only by Mexico and Venezuela) provides for the application of the law with which the contract has "its closest ties". However, in an undisputable reference to the UNIDROIT Principles, the second paragraph also allows the court to resort to "*the general principles of international commercial law recognized by international organizations*". Article 10 of the Mexican Convention provides in turn that in the determination of the applicable law to the contract, the court may also take into account "*the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted*".

Contracts (the "Hague Principles on Choice of Law")[66] allow a national court to choose the UNIDROIT Principles even in the absence of the parties' choice. As noted in the Paraguayan national report, Article 5 of Law No. 5393 (2015) is the first jurisdiction to grant formal status to a set of rules such as the UNIDROIT Principles, replicating the Hague's Principles on Choice of Law: "*In this law, a reference to law includes rules of law of a non-State origin that are generally accepted as a neutral and balanced set of rules*".[67] This solution has been recently advocated for future legal reforms in the continent by the "Guide on the Law Applicable to International Commercial Contracts in the Americas", approved by Resolution 249 of 2019 of the Inter-American Juridical Committee of the Organization of American States.[68]

In contract, most modern arbitration statutes and rules increasingly allow arbitral tribunals to choose the applicable law or "rules of law", thus allowing the application of the UPICC[69] as an alternative to domestic/state law.[70] Not surprisingly, it is at the result of the arbitral tribunal's own initiative that the UNIDROIT Principles have been applied, at times for the purpose of clarifying a rule of domestic law, and at other times for the purpose of supplementing, tempering or merely corroborating a solution resulting from the application of the domestic law applicable to the contract.[71]

The widest possible impact of the UNIDROIT Principles is likely to arise when the choice of the Principles is incorporated into an arbitration clause. Thus, the parties are invited to adopt the wording suggested in the official footnote to the second paragraph of the Preamble to the UNIDROIT Principles, being offered

[66]See Hague Principles on Choice of Law, Art. 3 (allowing a court to apply the "*rules of law that are generally accepted on an international, supranational, or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise"*.). On the influence of the 1994 Mexican Convention on the 2015 Hague Principles on Choice of Law, see Moreno and Albornoz (2011), pp. 491–526.

[67]See Parag. Nat. Rep. and Moreno Rodriguez (2016). (hereinafter "2 Eppur si muove").

[68]CJI/RES. 249 (XCIV-O/19). The text is available at the site http://www.oas.org/en/sla/iajc/docs/Guide_Law_Applicable_to_International_Commercial_Contracts_in_the_Americas.pdf.

[69]Unlike state choice-of-law rules, those governing international commercial arbitration, or the arbitration rules chosen by the parties, by and large do not compel arbitrators to determine the applicable law on the basis of predetermined choice of law rules. This is not always the case, but many arbitration laws speak in terms of "rules of law", thus opening the door for the application of non-state law such as the UNIDROIT Principles.

[70]See, e.g., Art. 28(2) UNCITRAL Model Law on International Commercial Arbitration, providing for the arbitral tribunal to choose the applicable law throughout the application of the pertinent choice of law rules (*voie indirecte*) (Art. 33(1) Swiss Rules of International Arbitration), as opposed to arbitration regimes in which the arbitral tribunal may directly choose the applicable rules of law (*voie directe*), such as Art. 1115 French Code of Civil Procedure. See also the many institutional arbitration rules authorizing the arbitral tribunal, in default of the parties' choice, to determine the "rules of law" most suitable to decide the dispute. See, e.g., ICC Rules on International Commercial Arbitration, Art. 21(1); UNCITRAL Arbitration Rules, Art. 35; London Court of International Arbitration, Art. 22(3); CEAC Hamburg Arbitration Rules, Art. 35(c).

[71]See Muñoz and Geny (2016), pp. 109, 114.

eleven model clauses for the parties to on the language most suitable to their transaction.[72]

2.8 *Use of the PICC for the Purpose of "Clarifying" and "Adapting" Domestic Law to the Cross-Border Nature of the Transaction*

Most rules of contract law found in domestic legal systems were not conceived with a cross-border dimension in mind, so that the contribution of UNIDROIT Principles in order to clarify an area of national law offering diverse solutions, or to fill a gap on an issue on which the national law remains silent, may prove positive and influential in the outcome of the dispute.

A decision rendered by the Federal Court of Australia has been mentioned as one instance in which the UNIDROIT Principles were creatively resorted to for the purpose of adapting the restrictive approach toward the notion of good faith under traditional English common law, to the more flexible international standard of "*good faith and fair dealing*" which Article 1.7 PICC recognizes as a veritable duty of the parties to the contract.[73]

Alexander S. Komarov, a member of UNIDROIT's working groups for the first three editions of the PICC (1994, 2004, and 2010), who also had an active participation in the drafting of the Civil Code for the Russian Federation ("CCRF") and its amendments, reported on the influential role of the UNIDROIT Principles in the interpretation of concepts introduced in the CCRF for the for the first time, such as "good faith and fair dealing" and "hardship".[74] Professor Christina Ramberg also refers to the influence of the PICC in the development by the Swedish courts of the ramifications implicated in the duty of "good faith".[75] The value of the construing domestic law in light of the UNIDROIT Principles has been also referred to for the

[72]See UNIDROIT, Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts (2013), accessible online by googling "Unidroit Model Clauses". See Veneziano A, The Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts as a Tool for Party Autonomy and in Adjudication, in 2 Eppur si muove 1687–1697.

[73]See Hughes Aircraft Systems International v. Airservices Australia, 30 June 1997, cited by Meyer, 606, attributing to Justice Finn, an Australian member of the UPICC Working Group, favoring an expansive application of the principle of good faith more in tune with the case law and legal scholarship developed in civil law jurisdictions. Quoting from the language of the Hughes Aircraft case, Justice Finn stated that good faith, pursuant to Art. 1.7 UPICC, "*has been propounded as a fundamental principle to be honored in international commercial contracts*".

[74]Referring to a decision of 8 February, 2008, rendered by the International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation, referred to in Meyer, 604 n. 27.

[75]Referred to in Meyer, 604 n. 28.

purpose of interpreting a cross-border transaction in the context of a consumer dispute.[76]

A different, though admittedly very close, situation is presented when the international nature of the transaction actually calls for an interpretation of the domestic applicable law which, though consistently with the intention and expectations of the parties, "pushes the envelope" and requires the "development" of the applicable national law, so as to make it compatible with the international standards espoused by the Principles. Even more significant is the role the Principles may play to settle a set of practical issues which are generally not covered in domestic rules of contract law, whose choice may also be far from evident. I am referring to issues such as time-zone management (Art. 1.12(3)).

2.9 Reference to the PICC for the Sole Purpose of Corroborating a Result Reached Under Domestic Law

Mere reference to the UPICC does not tell us much whether their use is limited to an ornamental remark or whether the rule applied by the court or tribunal is actually relevant to the outcome of the dispute or the development and modernization of the law governing an issue at stake in the dispute. It is only upon a close look at what was actually decided that one may ascertain whether the solution furnished by the Principles was the same as the one provided under domestic law. Indeed, in some cases, the UPICC play an important role in actually assisting the interpreter to favor one out of several possible outcomes under domestic law, filling a veritable gap left by traditional contract law, or at times providing an elegant escape from overly restrictive rules. Yet, in many other instances reference to the PICC is meant to serve as a check on the reasonableness of the outcome reached under the otherwise applicable domestic law of contract.

The use of the Principles as *obiter dicta* or as a sort of a check on an outcome otherwise and already provided under domestic law, rather than a source for interpreting and supplementing domestic law whenever it appears unclear or in order to fill gaps for the unprovided-for case, has not gone unnoticed in the national reports. Spanish courts, for example, have resorted to the UPICC in more than 850 cases, more than 60 of which rendered by Spain's highest court.[77] Yet, a closer look at those decisions reveal that, rather than "interpretation" or "supplementation" of Spanish contract law, the main role played by the UPICC has been one of

[76]Tribunale di Nola, 6 December 2010, in which an Italian court relied on the PICC for the purpose of deciding a dispute in which a patient sought restitution of a fee paid to a dentist, referred to in Meyer, 604, n. 32.

[77]Spain Nat. Rep., identifying the first decision by the Spanish Supreme Court of July 4, 2006. See Bouza Vidal (2016) and Perales Viscasillas (2016), p. 1619.

"support",[78] a recurring [national law applicable to the contract, courts and arbitral tribunals often decide to strengthen the conclusion that the court or arbitral tribunal made the right decision by resorting to the UPICC, adding that the same result would have been arrived at by applying the Principles.[79]

Similarly, it is reported that in the majority of cases where Russian courts resorted to the UNIDROIT Principles, the reference was made for the purpose of corroborating the rationale underlying a decision reached under domestic law.[80] As noted in the Argentine national report, in several instances the courts resorted to the Principles "*as a confirmation that the proposed solution enjoys consensus in international commercial law*",[81] providing an indication of those rules in the PICC supplying the level of persuasiveness that the otherwise applicable domestic law fails to provide. This is the case, for example, to the need for the breach to be "fundamental" in order to allow for the remedy of termination (Art. 7. 3 PICC); that negotiated clauses prevail over conflicting standard clauses (Art. 2.2.1 PICC); that silence or inactivity does not amount in itself as an acceptance (Art. 2.1.6(1) PICC).

2.10 Application of the PICC to Cross-Border and Domestic Contract Disputes

It appears that the UNIDROIT Principles have been used in domestic and international settings situations in roughly similar numbers.[82] Because national (domestic) contract law may govern not only national (domestic) disputes but also those connected with more than one jurisdiction, the use and potential misuse of the UN IDROIT Principles should be examined when the Principles are applied to cross-

[78]See Spain Nat. Rep., pointing that the assumption that Spanish courts would resort to the Principles in order to interpret or supplement domestic law appears "too optimistic" ("[*I*]*n the case were the UNIDROIT Principles have been used the function of the Principles is restricted to that of supporting or ratifying the decision based on national law in international litigation or to support the interpretation of contractual clauses, i.e., as support of the ratio decidendi, or as a comparative or doctrinal reference which supports the decision of the judge or arbitrator.*").

[79]See Michaels, 652 ("*The desire of judges seems to be to ascertain that a solution they find in domestic law is compatible with what is considered a global consensus. The PICC are not cited as applicable law nor are they usually the only source used, but their use is for the purpose of information and confirmation.*").

[80]See Russian Nat. Rep. at 5 ("*In an overwhelming majority of cases the courts have invoked the UPICC to just additionally endorse the conclusion following from the relevant provisions of the Russian law. The courts introduce references to the UPICC with help of expressions like 'besides, it should be noted that...', "based on a similar premise", "the normative basis...is not only Art...of the Civil Code...but...the UPICC as well...Cases where the court explicitly states that the UPICC were used as a gap-filler are extremely rare."*").

[81]Argentine Nat. Rep., responding to Question (2).

[82]Michaels, 657 ("*Contrary to their explicit international character, the PICC are used in similar intensity in domestic and international situations").*