

# THE UN SALES CONVENTION, THE UNIDROIT CONTRACT PRINCIPLES AND THE WAY BEYOND

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## I. INTRODUCTION

The working title of the assignment to this important anniversary—arguably the most important one in the history of modern transnational commercial law, given that the Vienna Sales Convention of 1980 is probably the single most successful among the few success stories in our field—would appear to give me maximum leeway in developing this paper’s content. I shall, however, try to exercise the necessary measure of self-restraint and to take only moderate advantage of the academic freedom given. A note of terminological clarification seems appropriate: while many use the official title *UNIDROIT Principles of International Commercial Contracts* and the short form UNIDROIT Principles interchangeably, the adoption of the ALI/UNIDROIT Principles of Transnational Civil Procedure,<sup>1</sup> as well as the likelihood that “principles” on other areas of private and commercial law (e.g. capital market law) may see the light of the day before long, more precise language such as *UNIDROIT Contract Principles* and the widely used abbreviation UPICC would avoid unnecessary confusion.

## II. THE CISG AND UNIDROIT PRINCIPLES: THEIR INTENDED AND ACTUAL RELATIONSHIP

### A. General

It was, fortunately, in the very distant past that people wondered whether the two instruments were not too unequal a pair and whether they could—or should—be seen as two items of equal dignity and potential usefulness in the

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1. Text reproduced in 9 UNIF. L. REV. 758-809, 811-97 (2004), with comments by Ronald T. Nhlapo, Moritz Brinkmann, Clifford R. Einstein and Alexander Phipps, Konstantinos D. Kerameus, Cassio Scarpinella Bueno and Pierre Karrer. See also LA PROCÉDURE CIVILE MONDIALE MODÉLISÉE: LE PROJET DE L’AMERICAN LAW INSTITUTE ET D’UNIDROIT DE PRINCIPES ET RÈGLES DE PROCÉDURE CIVILE TRANSNATIONALE (Frédérique Ferrand ed., 2004).

tool box of international contract drafters, litigators, courts or arbitral tribunals. Much water has passed under the bridges of the Danube and the Tiber since that question was raised. International commercial practice and legislatures in all four corners of the world have passed judgment: the two utterly diverse individuals are a perfect match—as happens not infrequently in real life. But let us go back ten years. What was the situation at the time when the *red book* (as it then was) was published?

Here was the Vienna Sales Convention, a most remarkable achievement, a universally acclaimed binding instrument, a codification of some 100 articles for the basic and most frequent type of commercial transaction, drafted under the chairmanship of Professor Roland Loewe by a vast number of the most distinguished commercial law experts and (after only five years!) in force in 34 countries. At the time it was an unparalleled success. And there came along an exotic creature which did not pretend to be binding, bearing the name of “Principles,” equally consisting of roughly 100 articles but, although created in the framework of an intergovernmental organisation, never negotiated or endorsed by governments and purporting to be a general part of the law of contractual obligations.

What raised eyebrows were at least three suggested ways for their use as stated in the Preamble:<sup>2</sup>

Preamble

*(Purpose of the Principles)*

These Principles set forth general rules for international commercial contracts.

*They shall be applied when the parties have agreed that their contract be governed by them.*

*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.*

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

*They may be used to interpret or supplement international uniform law instruments.*

They may serve as a model for national and international legislators.

In his essay in honour of Professor Rolf Herber, Professor Loewe—until recently the dean and First Vice-President of the UNIDROIT Governing Council—describes the *lex mercatoria* as “a kind of Yeti or Loch Ness monster; no one has ever seen them but they might turn out to be useful.”<sup>3</sup> In

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2. The italics are mine. They highlight the suggestions that stirred particularly intense discussions.

3. Roland Loewe, *Kaufrechtsübereinkommen—Lückenfüllung durch nichtamtliche Kodifikationen*, in *TRANSPORT UND VERTRIEBSRECHT 2000, FESTGABE FÜR ROLF HERBER 7* (Karl-Heinz Thume ed., 1999).

which circumstances are the UNIDROIT Principles useful, both in connection with the CISG and beyond?

Obviously, the carve-outs regarding certain categories of goods in Article 2 CISG, the exclusions from the Convention's scope of important issues, such as validity, the unmentioned problem areas, such as conclusion of contracts through an authorised agent, standard terms, and certain effects flowing from State intervention at various stages of the life cycle of a contract come to mind. Furthermore, there is the famous provision of Article 7(2). In short, most of us would agree by and large that there are "open," deliberate gaps and—defying, much to the wonderment on the part of some professional commentators, logic—"hidden" gaps, in Professor Loewe's metaphoric language *absent* Yetis and *virtual* Loch Ness monsters, lack of clarity or disclosed or undisclosed compromises, as they are regularly generated in complex intergovernmental negotiations.

### *B. Specific Contracts*

Before comparing the content and a few specific solutions adopted in the CISG on the one hand and the UNIDROIT Principles on the other hand, and before trying to define these two instruments' interrelationship, it may be beneficial to have a brief glance at one feature which obviously distinguishes them and where the UNIDROIT Contract Principles go *beyond*, i.e. other types of specific contracts.

#### *1. Institutional Recommendations*

In a number of instances international organisations, both intergovernmental and representing the private sector, have recommended the use of the UNIDROIT Contract Principles or have referred to them in their own negotiated contracts with providers of goods or services. Not surprisingly, some recommend the combined use of the CISG and the UPICC. Thus, Article 14 of the *Model Contract for the International Commercial Sale of Perishable Goods* issued by the International Trade Centre UNCTAD/WTO (ITC) of 1999<sup>4</sup> contains a combined choice-of-instruments clause.

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4. See 5 UNIF. L. REV. 306 (2000).

Similarly, Article 13(1) of the *Model Occasional Intermediary Contract*<sup>5</sup> and Article 12 of the *Model International Franchising Contract*<sup>6</sup> of the International Chamber of Commerce make reference to the general framework offered by the UNIDROIT Contract Principles.

More recently, Article 24.1.A of the *ICC Model Commercial Agency Contract*,<sup>7</sup> Article 24.1.A of the *ICC Model Distributorship Contract—Sole Importer—Distributorship*,<sup>8</sup> include an identical provision worded as follows:

- Any questions relating to this contract which are not expressly or implicitly settled by the provisions contained in this contract shall be governed, in the following order:
- a) by the principles of law generally recognised in international trade as applicable to international [agency] [distributor] contracts,
  - b) by the relevant trade usages, and
  - c) by the UNIDROIT Principles of International Commercial Contracts, with the exclusion . . . [of mandatory provisions]

The text of the UPICC is reproduced in full as an Annex to these two model contracts.<sup>9</sup>

Finally, Articles 31 and 23 of the *ITC Contractual Joint Venture Model Agreements* of 2004<sup>10</sup> provide:

- 31.1 This Agreement is governed by the laws of [*specify country*].
- 31.2 The Agreement shall be performed in a spirit of good faith and fair dealing.
- 31.3 In the interpretation and application of the Parties' rights and obligations under this Agreement, due weight shall be given to applicable practices in international trade. When defining these practices, reference shall be made, *inter alia*, to the UNIDROIT Principles of International Commercial Contracts.

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5. ICC MODEL OCCASIONAL INTERMEDIARY CONTRACT (ICC Publication No. 619, 2000).

6. ICC MODEL INTERNATIONAL FRANCHISING CONTRACT (ICC Publication No. 557, 2000).

7. ICC MODEL COMMERCIAL AGENCY CONTRACT (ICC Publication No. 644, 2d ed. 2002).

8. ICC MODEL DISTRIBUTORSHIP CONTRACT (ICC Publication No. 646E, 2d ed. 2002).

9. An exhaustive overview and detailed analysis of the reception of the UPICC in ICC model contracts is provided in Alexis Moure & Emmanuel Jolivet, *La réception des Principes d'UNIDROIT dans les contrats modèles de la Chambre de Commerce Internationale*, 9 UNIF. L. REV. 203 (2004).

10. ITC CONTRACTUAL JOINT VENTURE MODEL AGREEMENTS (International Trade Centre—UNCTAD/WTO, 2004). For in-depth comment, see Jean-Paul Vulliet, *Le contrat type pour les Joint Ventures contractuelles du Centre du Commerce International au regard des Principes d'UNIDROIT et d'autres normes d'unification du droit des contrats*, 9 UNIF. L. REV. 295 (2004).

## 2. *Arbitration Practice*

Going by the 150 or so published<sup>11</sup> or otherwise known arbitral awards referring to them, the UPICC are being used, apart from the sale of goods, in contracts on works and services, in particular construction and complex transportation contracts, distribution, licenses, BOT, aircraft maintenance, shareholder agreements, partnership agreements, merger and takeover agreements.

## 3. *Contract Practice*

The UNIDROIT Principles of International Commercial Contracts are further known to have been used in natural gas supply contracts, including both counter-trade (barter) and service contract elements. This is of significant interest because commodities-trade practitioners sometimes contend that only certain national laws meet their needs. The Membership Agreement of COVISINT, an electronic market place for the supply of parts set up among car manufacturers Daimler-Chrysler, Ford, General Motors, Nissan, Peugeot and Renault, deserves mention for a different reason, namely its multi-party structure made up of parties of presumably similar bargaining power rooted in four different legal systems. The relevant clause provides:

The Product Agreement shall be construed in accordance with the UNIDROIT Principles of International Commercial Contracts, with the exception of Section 4.6. [*“Contra proferentum rule”*] which is excluded due to the difficulty of providing explicit language to cover each possible interpretation that may arise in a multinational legal structure.

A similarly multinational fact pattern provided apparently a strong incentive for choosing the UPICC in a complex satellite-transponder lease, sublease and joint venture agreement.<sup>12</sup>

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11. The most complete database is accessible at [www.unilex.info](http://www.unilex.info).

12. Eckart Brödermann, *UNIDROIT Principles 2004 as a Tool for Satellite-Related Contracts and Other International Transactions*, IBA Legal Practice Division, Outer Space Committee Newsletter, Aug. 2005, at 5-6.

### III. CONTENTS COMPARED<sup>13</sup>

#### A. *The Rule: Coinciding Solutions*

As is well known, the solutions chosen by the drafters of the UPICC, as a rule and subject to only few exceptions, follow the CISG's lead. Where the CISG addresses an issue and the solution offered by the Convention is not considered to be a tainted compromise or an outdated or otherwise substandard rule, the UPICC do not seek originality for its own sake.

#### B. *Exceptions*

The most spectacular deviation from the CISG template is undoubtedly the enunciation of a general and overarching duty for the parties to a contract to act in good faith from the pre-contractual phase<sup>14</sup> and throughout the contract's life-cycle (Article 1.7 UPICC). Article 7(1) CISG faintly reflects some of its drafters' greater ambitions in this respect. Yet in 1980 the ground had not been prepared as it became subsequently through case law in England, Australia and other common-law jurisdictions, as well as the revision of the UCC in the United States.

Another example is the UPICC's unambiguous option for the remedy of specific performance (Article 7.2.2). By contrast, Article 28 CISG is the expression of an attempt to elegantly "paper over" fundamental disagreements in this respect.

#### C. *The UNIDROIT Contract Principles as a "General Part" of Contractual Obligations*

In 2004, a distinguished learned practitioner could simply state: "To a unified sales law such as the CISG one can try and add a "general part" of contract law. This is what happened in Art. 1 of the UCC, and now also with

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13. For detailed analysis, cf. MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 305-13 (3d ed. 2005).

14. Noteworthy the EC's Advocate General's conclusions as regards Article 2.15(2), now Article 2.1.15(2), in Case C-334/00, *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, 2002 O.J. C 274, 11. See also comment by Olaf Meyer, 4 UNIF. L. REV. 1222 (1999).

the UNIDROIT Principles which may be seen as a general part of the CISG.”<sup>15</sup> Indeed, the idea to draft a “general part” not only for the conventions on international sale of goods<sup>16</sup> but for the entirety of international conventions on specific types of contract, had been at the origins of the UPICC. Consequently, they show a clear ambition to be both more comprehensive and bolder than the CISG or its predecessors as regards formation, interpretation, content, performance and non-performance even as regards technicalities such as the rate of interest (Article 7.4.9). The Working Group for the preparation of the UPICC was—at the price of renouncing governmental endorsement—able to carry out legal analysis unbridled by political and diplomatic constraints. Also, the mere passing of time and the deepening discourse among comparativists secured a higher degree of maturity for the later instrument.

#### IV. MEANS OF INTERPRETING AND SUPPLEMENTING UNIFORM LAW INSTRUMENTS

Much has been written about whether or not the UPICC may be referred to when interpreting other instruments and, in particular, pre-existing uniform law conventions.<sup>17</sup> The controversy turns on Article 7(2) CISG—and similar provisions in a number of other conventions—and the question whether “the general principles on which it is based” must be construed in a narrow sense so as to refer only to general principles encapsulated in the CISG itself or, in any event, crystallized at the time when Article 7 was crafted at the 1980 Diplomatic Conference. While there continues to be authoritative support for this view<sup>18</sup> the more widely held and, it is submitted, preferable opinion sees “the general principles” referred to in, for example, Article 7(2) CISG as the essence of transnational contract law as it is evolving over time and across

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15. Pierre Karrer, *Internationalization of Civil Procedure—Beyond the IBA Rules of Evidence*, 9 UNIF. L. REV. 893, 895 (2004).

16. At the time, these were the Hague Uniform Sales Laws of 1964.

17. BONELL, *supra* note 13, at 228-33.

18. JAMES J. FAWCETT, JONATHAN M. HARRIS & MICHAEL BRIDGE, *INTERNATIONAL SALE OF GOODS IN THE CONFLICT OF LAWS* 923-35 (2005), whose position is, in addition, based on the fact that the two instruments were developed within the framework of different organisations. If that were relevant, it would be equally doubtful whether the ULIS history and case law are sources for interpreting the CISG. The drafters of the CISG themselves, in many instances, expressed the view that they were. Rolf Herber, “*Lex mercatoria*” und “*Principles*”—*Gefährliche Irrlichter im internationalen Kaufrecht*, 3 INTERNATIONALES HANDELSRECHT 1, 7 (2003).

subject matters.<sup>19</sup> The relevant rules on interpretation—Article 31(3) of the Vienna Convention on the Law of Treaties—certainly permit this wider perspective. What must be shown in the case at hand is, obviously, that the issue at stake (e.g. compensation of the other party in case of non-performance) falls within the scope of the CISG and that the relevant provisions of the UPICC do express the “general” principles on which the CISG is based.

### V. COMPLEMENTARITY

What we see looking at the two instruments—the CISG as the mother of all modern conventions on the law of specific contracts and the UPICC as the (inevitably) soft-law source of modern general contract law—are neither competitors nor apples and pears. What we see is actually, and even more, potentially, a fruitful coexistence and, if legislatures, parties to a contract or dispute, and tribunals and courts so wish or agree, a source for critical scrutiny, “improvement” or refinement of the solutions provided for in the earlier—and more statist—by the later—and more commercial—instrument. In most of these instances the “improvement” is not so much a personal or professional merit of the later instrument’s drafters as a natural evolution of transnational commercial law thinking and, it is fair to say, that ounce more of courage independent experts should by definition have as opposed to negotiators who are reporting to their political masters. The UNIDROIT Contract Principles have felicitously been called a restatement. However, to the extent that they do not follow the common-core<sup>20</sup> but the best-solution approach<sup>21</sup> the even more felicitous characterisation is pre-statement.<sup>22</sup> the

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19. Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG*, 69 TUL. L. REV. 1149 (1995); Ulrich Magnus, *Die allgemeinen Grundsätze im UN-Kaufrecht*, 59 RABELSZ 469, 492 (1995); Jürgen Basedow, *Die UNIDROIT Prinzipien der Internationalen Handelsverträge und die Übereinkommen des einheitlichen Privatrechts—Eine theoretische Studie zur praktischen Anwendung des internationalen Transportrechts, besonders der CMR*, in Festschrift für Ulrich Drobnig zum Siebzigsten Geburtstag 19, 31 (1998); Jürgen Basedow, *Depositivierungstendenzen in der Rechtsprechung zum Internationalen Einheitsrecht*, in 50 Jahre Bundesgerichtshof 777 (A. Heldrich & K.J. Hopt eds., 2000); Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* 181 (1999); Roy M. Goode, Herbert Kronke, Ewan McKendrick & Jeffrey Wool, *Transnational Commercial Law* 209 (2004).

20. Examples are Article 1.1 (freedom of contract), Article 1.9 (usages), Article 3.8 (fraud), Article 3.9 (threat), Article 7.1.7 (*force majeure*), and Article 7.4.1 (damages for breach).

21. Examples are Articles 2.1.15, 2.1.16 (pre-contractual liability), Articles 5.2.1 to 5.2.6 (third-party rights), Article 6.2.1 (hardship), Articles 8.1 to 8.5 (set-off), and Articles 10.1 to 10.11 (limitation



drafters take on the role of an enlightened legislature to enact the most functional, modern and internationally acceptable rule. Apart from that, the UNIDROIT Contract Principles are, obviously, complementary in that they address a wide range of topics of general contract law which neither the CISG nor any other existing or future convention devoted to a specific type of transaction would ever venture to touch upon.

## VI. CISG, UPICC: RULES V. STANDARDS—PRAGMATISM V. THEORY

### A. Rules and Standards

Much has recently been written about the “new” transnational commercial law, consisting of fact-specific *rules*, having taken over from the “old” law, consisting all too often of highly abstract *standards* which are constantly in need of interpretation and, therefore, threatened by erosion. Assuming that is correct, would it then not be a disservice to the constituencies of transnational commercial law to continue producing international instruments such as the UNIDROIT Contract Principles and should we not then concentrate all resources on narrow problem areas resolving those specific problems by practice-driven drafting of instruments such as the Cape Town Convention<sup>23</sup> or the UN Receivables Financing Convention?<sup>24</sup>

The answer is no if the question were to suggest a radical either-or choice. While it is true that governments would be well-advised not to again discuss, for example, the concept of good faith in the context of developing rules for a *specific* transaction, as they did in Vienna where they finally settled on papering over disagreements in Article 7 CISG, we can say so only now that we have discovered an alternative vehicle for the promotion of that concept: Article 1.7 UNIDROIT Contract Principles. And while it is equally true that a maxim of interpretation in good faith would sit awkwardly in the Cape Town Convention, it would not today be used as an overarching and abstract principle on interpretation in any sophisticated domestic law on the taking of collateral either. Rather, it would be broken down into specific, mostly judge-

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periods).

22. Pierre Komer, *Commentary on Article 187*, in KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT n.71 (Heinrich Honsell et al. eds., 1996).

23. UNIDROIT, Convention on International Interests in Mobile Equipment, 16 Nov. 2001 (Cape Town, South Africa); UNIDROIT, Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 16 Nov. 2001 (Cape Town, South Africa).

24. United Nations Convention on the Assignment of Receivables in International Trade, U.N. Doc. A/RES/56/81, U.N. Sales No. E.04.V.14 (12 Dec. 2001).

made rules on the protection of the security provider or the lessee in specific circumstances.

In other words, standards have not become irrelevant. They have found their proper—different—place within the widened spectrum of types of international instrument. And we, the intergovernmental organisations, in an ongoing intellectual exchange with academic debate and business, were able to identify their proper role and designate their proper place thanks to the freedom granted by governments.

*B. No Role for Theory?*

The movement that created transnational commercial law as it now blossoms has been guided by pragmatism and by opportunistic behaviour—the latter with a positive connotation. The law and economics movement, on the other hand, has raised the question of whether it is not time to build a number of lighthouses in this ocean of pragmatism and to task cartographers with redrawing the maps so as to regain certainty as to what is sea and what is land.

Put differently, is no true legal theory anymore necessary to give us guidance? And is it not a travesty of intellectual freedom if we fail to even attempt to design a coherent system of transnational commercial law, its underlying motives and inner logic?

Scepticism surrounds the usefulness of such a system in commercial law. I have always shared this sentiment, even in my previous life as a law teacher in a country where legal theory had, earlier than elsewhere, reached the highest summit of conceptualizing rules and institutions for regulating human behaviour. This scepticism has been further strengthened during a high-level conference, “Commercial Law Theory and the CISG,” organised by the New York University School of Law where the most distinguished protagonists of the law and economics movement had kindly invited humble commercial lawyers and internationalists such as Jürgen Basedow, Michael Bridge, Franco Ferrari, Filip de Ly, Catherine Kessedjian, Joseph Lookofsky, a few others, and myself to discuss basic traits of the CISG and transnational commercial law in general with them.<sup>25</sup> Commercial law is based on experience, and it is low-key; that is, it listens at least as much as it talks. Professors Clayton Gillette and Robert Scott, apart from raising the issue of standards versus rules already referred to, in essence contended that: (i) typical sophisticated parties

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25. Conference on Commercial Law Theory and the CISG, N.Y.U. Villa La Pietra Campus, Florence, Italy, October 14-16, 2004 (publication of papers forthcoming).

had strong incentives to contract out of the CISG because it had insufficiently clear fall-back rules; (ii) the only “normative” justification for international sales law and transnational law in general *would be* that average parties were able to draft their contracts themselves only at higher transactions costs which was, however, in the authors’ view, not the case; and (iii) uniform law was probably undesirable in principle because it undermined the competition of domestic legal systems (a competition which would, I assume, on average be won by New York Law).<sup>26</sup>

While the commercial lawyers on the panel tried to convince the theorists that the factual assumptions on the first two points were wrong, it was also pointed out that the CISG was not a very good foundation for building a general theory of transnational commercial law. The CISG is distinctive in two respects. First, its provisions, with few exceptions, are entirely dispositive, a feature only justified by the centrality of the law of sales and not to be found in any subsequent convention. Second, it tries to be comprehensive and addresses general contractual aspects which, today, we would treat elsewhere. Regarding the competition of domestic legal systems, outside the law of international sales, pragmatism-based instruments such as the Cape Town Convention would actually appear to assist many legal systems in becoming competitive in the first place.

In summation, responsible use of methodical freedom given to the intergovernmental organisations is necessarily responsive, reactive in nature. Legal theory’s critical scrutiny of the approaches of UNIDROIT and its toolbox is welcome and will be taken into consideration—in particular if it can be shown that theory has listened more carefully to practice than, e.g., governments have and that the solutions proposed provide equal or greater legitimacy.

### *C. Which Role for the Comunitas Mercatorum?*

A recently published book on legal pluralism in the world society bears the title “Global Law Without a State.”<sup>27</sup> A presentation of views on the *lex mercatoria* will not be pursued in this paper. Briefly, however, Professor Clive Schmitthoff, who was one of the leading exponents of the modern *lex mercatoria*, is often invoked as a progenitor of the idea that there is an

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26. Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law* 2-4 (N.Y.U. Law & Economics Research Working Paper No. 05-02, 2005).

27. GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

autonomous law of international trade created by spontaneous interaction of merchants and owing nothing to national laws or sovereign powers. What is often overlooked is that Schmitthoff clearly stated that parties to international contracts were largely free to make their own law *under the authority given by States*.<sup>28</sup> No contract can speak to its own validity. Likewise, usages require the sovereign's sanction for them to become a source of law.

So, whatever is done to discover, document, compile, codify—as in the case of INCOTERMS and UNIDROIT Contract Principles—the various expressions of the *lex mercatoria*, ours is just the freedom to be meticulous, not creative. And while there is the merchants' autonomy as far as *observance of practice* is concerned, there is no autonomous generation of *lex*. Since all developed legal systems do sanction this as a source of binding power, nothing more is however needed.

## VII. THE NEVER-SUBSIDING CHARM OF CODES

The UNIDROIT Secretariat in 1970,<sup>29</sup> Clive Schmitthoff in 1980, most prominently, of course, the then Secretary of UNCITRAL Gerold Herrmann in 2000,<sup>30</sup> echoed by Joachim Bonell<sup>31</sup> and most recently and forcefully, Ole Lando in 2004,<sup>32</sup> made the case for the elaboration of a Global Uniform Commercial Code. The basic idea and the reasoning are as simple as they are fascinating.

- (1) There is a huge body of conventions, model laws and other types of instrument on sales, carriage of goods, banking, finance and secured transactions, insolvency, etc.
- (2) What this material needs is coordination, the analytical identification of the red threads, common underlying and guiding principles, planned and step-by-step constructed order—in Continental European parlance: a “General Part.”

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28. See generally LEO D'ARCY ET AL., SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE (10th ed. 2000).

29. Progressive codification of the law of international trade, Note by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT), 1968-1970 UNCITRAL Y.B. 285, U.N. Doc. A/CN.9/SER.A/1970.

30. Gerold Herrmann, *The Role of UNCITRAL*, in FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW 28 (Ian Fletcher, Loukas Mistelis & Marise Cremona eds., 2001).

31. Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 5 UNIF. L. REV. 469 (2000).

32. Ole Lando, *A Global Commercial Code*, 50 RECHT DER INTERNATIONALEN WIRTSCHAFT 161 (2004).

While Professor Bonell is envisaging the UPICC assuming that function in maintaining their present status of soft law, Professor Lando insists on their being elevated to binding rules, to be mandatorily applied to non-domestic and non-inter-European transactions.

#### VIII. A PROCESS-ORIENTED VIEW

With the greatest sympathy and respect for both the vision and some of the detailed proposals put forward by my learned friends and colleagues, my rather more modest pragmatism (as my general scepticism vis-à-vis grand designs and codifications in our time which I have explained elsewhere<sup>33</sup>) would prompt me to pause and to urge to focus on the process, the methods, and the organisation of work on law reform in the international arena.

First, we must continue on the road to ever more fine-tuned coordination amongst the private-law formulating agencies. As far as I can see, it works now better than ever. The initial stages of the negotiation of the Cape Town Convention in Rome and the Receivables Financing Convention in Vienna should remain the last example of wasting scarce resources on issues of precedence induced by governments who, torn between diverging industry concepts and business models, were unable to provide leadership. The path forward would be careful analysis of reciprocal endorsement and recommendation of each other's instruments—e.g. the UNIDROIT Contract Principles by UNCITRAL, and the UNCITRAL work on e-commerce by UNIDROIT—to governments and industry.

Second, we must convince our Member States that private and commercial law ought to be discussed and drafted in these organisations where the expertise is, rather than through economic policy think tanks which in turn employ Norwegian, German or Wall Street practitioners who, at Wall Street rates, design Norwegian insolvency law, German company law and U.S. secured transactions law for the same client government.

Third, we must seriously analyse the impact—both actual and potential—which varying economic policy objectives in various Regional Economic Integration Organisations have on commercial law.<sup>34</sup> The changing

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33. Herbert Kronke, *Brauchen wir ein Europäisches Zivilgesetzbuch? Rechtspolitisches Forum—Legal Policy Forum*, 11 INSTITUT FÜR RECHTSPOLITIK AN DER UNIVERSITÄT TRIER (2002).

34. See the contributions in *Worldwide Harmonisation of Private Law and Regional Economic Integration. Acts of the Congress to celebrate the 75th Anniversary of the Founding of the International Institute for the Unification of Private Law (UNIDROIT), Rome, 27-28 September 2002*, 8 UNIF. L. REV. 1-593 (2003).

constitutional patterns reflected in Article 53 of the Montreal Convention<sup>35</sup> and Articles 48 and XXVII of the Cape Town Convention and the Aircraft Protocol are just early harbingers of what we have to be prepared for.

Fourth, we must monitor and actively participate in work in regional law reform bodies or economic cooperation organisations which are showing interest in commercial law making: the OAS-CIDIP, OHADA, MERCOSUR, ASEAN, SADC, ECOWAS and others.

Fifth, we must speak with one voice to the regional organisations (e.g. on the reform of the Rome Convention on the Law Applicable to Contractual Obligations, the future Rome I-Regulation) and the Bretton Woods Organisations and other powerful organisations at the worldwide level that are or begin to be involved in legal matters. To the extent governments consider our instruments appropriate and mature, those organisations should adopt or endorse them and use them as building blocks and standards.

Sixth, we must closely monitor how our work relates to the WTO treaty system; in particular how do our instruments, embedded in principles of non-discrimination, most-favoured nation status, national treatment and market access provide incentives or disincentives for law reform and channel wealth and opportunities in which direction?

If we—for the duration of the term of office of the current UNCITRAL Secretary and my own and that of our respective successors—systematically do all that and if we do it successfully (and apart from carefully drafting selected additional sections of the UPICC and binding and non-binding instruments on other types of commercial transactions) then we will have done our duty.

With that, I do not say that one should not work—or, that *no one* should work—on thoroughly analysing the potential for ordering the tons of material before us.

## IX. CONCLUSION

As always, charting the way forward is, more than anything else, a matter of identifying and agreeing on priorities. Beyond the CISG, and the UNIDROIT Principles of International Commercial Contracts and other instruments on specific transactions, lies work, method and critical evaluation

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35. Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999. Text in 4 UNIF. L. REV. 948 (1999). See also Michael Milde, *Liability in international carriage by air—the new Montreal Convention*, 4 UNIF. L. REV. 835 (1999).

of strategy. And what lies beyond that remains to be discussed by the next generation of practitioners, scholars and civil servants.