

The Autonomous Contract  
-  
Reflecting the borderless electronic-commercial  
environment in contracting

Ralph Amissah

1997-10-07

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# **The Autonomous Contract - Reflecting the borderless electronic-commercial environment in contracting Ralph Amisah**

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# Reflecting the borderless electronic-commercial environment in contracting

## 1. Introduction

"Globalization is unstoppable. Even though it may be only in its early stages, it is already intrinsic to the world economy. We have to live with it, recognize its advantages and learn to manage it.

That imperative applies to governments, who would be unwise to attempt to stem the tide for reasons of political expediency. It also goes for companies of all sizes, who must now compete on global markets and learn to adjust their strategies accordingly, seizing the opportunities that globalization offers."<sup>1</sup>

At a national level, jurists as lawmakers over time magically create their own reality, that is, the world in which they work, and are certified as oracles.<sup>2</sup> They are proud of their traditions in which they are specialists and about which they tend to be protective. Commercial men as contracting parties, with greater ease, instantaneously, through an expression of their will, (by the wave of their pens, if not by mere incantations), can choose to make any one of several alternative parallel worlds their reality. The various dogmas and beliefs held as sacrosanct by individual sovereign legal parishes, are not necessarily so hallowed by the business community.<sup>3</sup> The fact that the desired "law" may generally be selected by an expression of the will of the parties, means that they can elect out of any of these fettered systems. This paper is unsentimental about legal systems, its loyalty is placed elsewhere, in the contract, and its ability to find solutions to the needs of the parties it serves. An eminent economist has suggested that the study not of contract law, but rather of contract practice is the key to understanding the economic properties of contracting that are necessary to work out sensible uniform laws for commercial purposes.<sup>4</sup> That view is shared in this paper. However, even within

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<sup>1</sup>Maria Livanos Cattai, *The global economy - an opportunity to be seized* in *Business World* the Electronic magazine of the International Chamber of Commerce (Paris, July 1997) at

「<http://www.iccwbo.org/html/globalec.htm>」

<sup>2</sup>Tangential support for the simile from Hans Petter Graver, "*Den juristskapt virkelighet og juristrollen*" in Jussens Venner (1986) p. 314-324.

<sup>3</sup>René David suggests the primary constraints on development are "conservatism, routine, prejudice and inertia" cited by the *UNCITRAL Secretariat, The Future Role of UNCITRAL - Promoting Wider Awareness and Acceptance of Uniform Texts*, in *Uniform Commercial Law in the Twenty First Century - Proceedings of the Congress of the United Nations Commission on International Trade Law* (New York, 1992) pp. 249-259 on p. 252, referred to later as *25<sup>th</sup> UNCITRAL Congress*. See also René David comments in *International Encyclopedia of Comparative Law*, Vol. II, Chap. 5 (Tübingen, 1971) pp. 24 and 25.

<sup>4</sup>Ronald Coase, *Industrial Organization: A Proposal for Research* (1972) in *The Firm, The Market and the Law* (Chicago, London, 1988) pp. 57-74, comp. Coase's Nobel Lecture *The Institutional Structure of*

the frame of law and economics<sup>5</sup> (to which only passing reference is made in this paper) it is necessary to be mindful of the limitations of the desirability of absolute freedom of contract.<sup>6</sup> And to recognise the fact that the international business community as a whole may benefit from a degree of control over such freedom.<sup>7</sup> This possibility is recognised by more modern schools of law and economics such as the Institutional Approach.<sup>8</sup>

The autonomous contract is a concept based on three ideas, that provide lenses or perspectives with which to view the needs of the international business community as they affect and are affected by a polymorphous set of interrelated issues and areas of law: **(i)** *The "autonomous contract" as an expression of the will that "governs" international commerce*. The extensive freedom of contract granted the parties in international commerce, ensures that the contract determines the nature of the business relationship and most matters that govern it, including the "law" selected (subject to the mandatory provisions of applicable governing law), and the means of dispute resolution. In a real sense the contract is at the top of the hierarchy of legal instruments that govern the parties' relationship. This ensures that the selection of "law" and means of dispute resolution is a market driven affair that will be based on their ability to provide the parties with the greatest utility. *Contractual autonomy as a function of freedom of choice in the global economy*. **(ii)** *The "autonomous contract" as seeking the means to transcend national boundaries*. Economic activities have become increasingly global and the "law" that provides for them should do so in the same dimension. The quest is to find or achieve a uniform legal order that is preferably delocalised, transcends state boundaries, provides cross-border transparency and world-wide effect.<sup>9</sup> This idea is discussed in relative terms, the more transnational and transcending of state law, the greater the uniformity achieved, or the more a-national the "law", the more autonomous the resulting contract.<sup>10</sup> Areas of particular interest are: uniform substantive rules of law; uniform interpretation of such rules and the contract; and the global enforcement of decisions. *Seeking a foundation for contract that is more autonomous of individual states, with the aim of attaining greater efficiency, consistency and predictability in international business transactions, and thereby, insofar as it is possible, to transcend the relevance of borders*. **(iii)** *"The autonomous contract"*

*Production*, AER 82 (1992) pp. 713-719. For a web site inspired by the work of Coase see *The Center for Research on Contracts and the Structure of Enterprise* at the Katz School, University of Pittsburgh

「<http://crcse.business.pitt.edu/>」 also the *New Institutional Economics Network*

「<http://sykuta.business.pitt.edu/nie/>」

<sup>5</sup>For an introduction to the different approaches to law and economics see Nicholas Mercuro and Steven Medema, *Schools of Thought in Law and Economics: A Kuhnian Competition* in Robin Malloy and Christopher Brown (ed.) *Law and Economics New and Critical Perspectives* (New York, 1995) pp. 65-123.

<sup>6</sup>See Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard, 1993).

<sup>7</sup>Discussed very briefly in section 2.3.4 of this paper in relation to protective principles.

<sup>8</sup>Which is pursued by Wisconsin University and Michigan State University. Mercuro and Medema (1995) pp. 65-123 at pp. 95-108.

<sup>9</sup>The concept of the autonomous contract becomes attractive when looked upon as the collective embodiment of elusive characteristics that the business community seeks upon which to base their transactions, and includes: harmonisation, transnationalism and a-nationalism for our purposes insofar as it furthers the other two objectives.

<sup>10</sup>An a-national uniform transnational legal framework for contracts that is independent of, but supported by governments.

*designed to be virtually self-contained and "self-governing"*. The contract could become a transnational medium of regulation onto itself, being designed as a one-stop reference, containing all the material required for its functioning, governance and the resolution of any disputes arising under it. Technology of the electronic age together with developments in international law would allow a contract to be incorporated and presented together with all material that was to have a binding authoritative effect in relation to it, (excepting the mandatory law).<sup>11</sup> *The self-contained autonomous contract as one possible solution to the efficient achievement of global predictability*

The practicability and utility of an "autonomous contract" (e.g. one founded in a national law) is dependent on its ability to serve the international business community as a suitable risk management tool and to result in improved transaction costs. Much discussion is focused on the underlying supportive structure for contracting and how a predictable and efficient means of contracting world-wide might be achieved. There is a relationship (sometimes co-operative at others competitive) between the efforts of interested international organisations and governments to provide services to the international business community on which they can choose to base the substance of their contracts and the resolution of disputes arising thereunder. Given the scope of the subject matter of the paper, only a broad outline and general framework can be developed. The discussion though occasioned by and made more current by the nature and growth of electronic-commerce, is a broader one that holds true for all contracts that have a transnational aspiration and as such is of general relevance to international commerce. The wider frame is adopted under the assumption that solutions should, as far as possible, be technology neutral. Section 2 of this paper looks at the various means available to the international business community to cope with the multitude of states in which they conduct business. It suggests a correlation between the search to establish reliable internationally uniform business methods and having greater autonomy from state law. The autonomous contract in the second sense, seeking the means through greater autonomy of individual state to reflect a desired borderless transnational environment in contracting. Section 3 looks at the difficulty in achieving predictability in international disputes, which is a requisite for commercial contract planning, and which all legal orders, especially those that are autonomous of state, must satisfactorily cope with if they are to succeed. Section 4 looks at possible alternative ways of improving uniform predictability and/or efficiency of dispute resolution, that would result in greater autonomy or lead to the further transcending of state law.

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<sup>11</sup>Though parties can "legislate" an extensively autonomous contract, they cannot "legislate" a contract that is entirely. Areas such as "validity" are defined differently within different jurisdictions, and international contracts can be subject to laws on currency control; export and import control; hazardous substances; antitrust | competition rules; anti-boycott; anti-bribery, etc. Similarly, mandatory rules on such matters as good faith, fair dealing, unconscionability, fraud, duress, extortion, interest, penalty clauses, etc. In specialised fields, such as consumer contracts, contracts with local sales representatives and specialised industries, such as banking and insurance, one also encounters national laws that parties cannot modify by their contract "legislation". See also article by Jan Ramberg *Autonomy of Contract and Non-Mandatory Law* in *Scandinavian Studies in Law* (1993) pp. 141-149.

## 2. In search of autonomy

The business community engaged in international commerce has had to find ways to cope with the high degree of legal uncertainty brought about by the crossing of numerous legal systems whose rules are expressed in a multitude of languages. This section discusses the business community's search to reduce the relevance of borders and attain greater uniformity for their contracts by various means, including basing their contracts on a-national law and reliance upon international commercial arbitration for the resolution of disputes that may arise. Methods employed to reduce the legal relevance of borders include *inter alia* :

**(1.a)** Use of standard contracts. **(1.b)** Reference to uniform principles and rules. **(2.a)** Choice of law of an acceptable state.<sup>12</sup> **(2.b)** Choice of law of a state applying relevant uniform laws. **(3)** Choice of jurisdiction of an acceptable state.<sup>13</sup> **(4.a)** Recourse to international commercial arbitration (ICA) which gives the greatest effect to the will of the parties, and provides the most extensive regime for enforcement. **(4.b)** In ICA excluding the application of the law of any sovereign state - through application instead of *lex mercatoria* or the like - the rules and principles of the international business community. **(5)** Use of self-regulating constitutional contracts that attempt to internalise all aspects of the parties' relationship, e.g. a long-term joint venture which may or may not be designed so as to result in the establishment of a separate company (Shell is such a company). **(6)** Large multinationals which are vertically and horizontally integrated in their production and provision of services across national boundaries are able to arrange their transactions internally within the corporate structure to a large extent avoiding the need for contract law and practice. Examples 5 and 6 are related to corporate structuring and are outside the scope of this paper.

The contract is a formal tool used by the business community to structure their relations, for which business practice and economics suggest the importance of a predictable and efficient underlying legal framework. However, any kind of legal regulation is a potential source of unpredictability. The transnational nature of international business provides an additional dimension to the difficulty of securing these requirements. The predictability of business relations is dependent on such aspects of "law" as the predictable interpretation and construction of legal texts, and the global recognition and enforcement of the dispute resolution judgement or award. Predictability and efficiency, which may be roughly equated to risk management and transaction costs, can be enhanced through the establishment and use of uniform "laws", rules and principles, insofar as they result in reduced complexity. The "autonomous contract" in the three senses of the concept, if directed towards these ends by the business community suggests various means to secure these collective ends for the international business community. A more autonomous basis for contract is already given support by relevant international institutions (and states competing for international business) that take into account the needs of the business community, signalled by their choices (of

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<sup>12</sup>Criteria for selection might include: familiarity; application of uniform law; neutrality; reputation; language; and convenience.

<sup>13</sup>Similar criteria to choice of law in addition to which include: appropriate enforcement treaties; location.

law and legal framework).

## 2.1. The diminishing role of States

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The paradigmatic concept of law and model of legal order is still that of the sovereign state.<sup>14</sup> National systems, for all their shortcomings, tend to consistently apply themselves in a way that becomes publicly known to the relevant legal community, and allows for the predictable structuring of relations. However, members of the international business community are not well served by having to employ lawyers in each country in which they operate to provide specialist advice on similar areas of law<sup>15</sup> and are in a constant search for ways around these obstacles. There are a number of ways in which this paradigm is being broken down in the sphere of international commerce. **(a)** At one level the concept of law of the nation state is eroded through action of the states themselves, by their implementation of uniform laws (both at an international and regional<sup>16</sup> level). This may be the result of a state wishing to modernise its law, or recognising the limitations of a fractal international legal order and wishing to facilitate trade by simplifying their relationship to it. This is typically done by working through international institutions to achieve substantive uniformity in a particular area of commercial law. The result of this being that individual state law becomes less important. **(b)** With modern substantive uniform law, states are increasingly called upon to bind themselves and their judiciaries,<sup>17</sup> to take account of the "international character" of the uniform law and "the need to promote uniformity in international trade." In spite of the formidable problems associated with achieving uniformity of application of such uniform laws in the judiciaries of different states acting independently of each other, this obligation further internationalises state law. **(c)** Perhaps more importantly, the contract regulatory order represented by the laws and judiciary of the sovereign state, has a significant competitor that is arguably much better suited to the needs of transnational commerce, in the package represented by the many forms of international commercial arbitration. **(d)** States, in accepting the preference of the international business community, play a further essential role in giving support to the framework required by arbitration for it to function effectively. This in fact is carried further as competition exists on a state level as regards providing national arbitration laws that attract arbitration.<sup>18</sup> **(e)** Most important and underlying this advance has been the granting of full effect to the "will" of contracting businessmen. Through freedom of contract in commercial affairs, states have provided parties with comprehensive autonomy in the organisation of their commercial affairs, with the exception of course of

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<sup>14</sup>E.g. Thomas Wilhelmsson, *Legal Integration as Disintegration of National Law in Legal Polycentricity - Consequences of Pluralism in Law* (1995) pp. 127-147 on p. 128.

<sup>15</sup>E.g. arbitration law (different arbitration statutes), electronic commerce (the validity of electronic documents and signatures), or sale of goods law (England and Japan do not apply the *CISG*) for example. Also see comment by Charles Brower, in the arbitration panel, *Are International Institutions Doing Their Job? - The American Society of International Law, Proceedings of the 90th Annual Meeting, 1996* (Washington D.C. 1996) p. 249.

<sup>16</sup>E.g. *EC, NAFTA, ASEAN*.

<sup>17</sup>*De jure* if not *de facto*.

<sup>18</sup>See William W. Park, *International forum selection* (Hague, 1995).

mandatory law. If state law does not suit the demands of the business community, they are free to go elsewhere. Businessmen can and do limit the role of the state in their contractual relations, seeking more globally applicable and uniform solutions. Responding to this demand there are various international institutions and service providers that are sensitive to the needs of the business community that increasingly target the contracting parties as representing an alternative means of unifying "law" and providing global solutions.

## **2.2. Solutions available within national law**

### **2.2.1. Uniform law and its limitations**

Selection of the law of a municipal system that applies uniform law is one important step that can be taken within the framework of municipal law, to make the contract more autonomous. The comments in this paper will be restricted to uniform substantive law, in the form of conventions that are to be adopted and applied in a uniform manner at an international level.<sup>19</sup> Several other approaches to reaching various levels of uniformity exist.<sup>20</sup> The model law approach for example, is based on ensuring that the law of different countries has a similar recognisable structure and essential elements. This is used where structural similarity is desirable but uniformity is not essential,<sup>21</sup> or where the achievement of greater uniformity would prove difficult or impossible due to differences in national law. Also discussed in this paper are "restatements" of law, in the form of general principles of contract, with the *UNIDROIT*<sup>22</sup> *Principles of International Commercial Contracts*,<sup>23</sup> providing a prominent current example.

#### ***The CISG as a uniform law example***

"Can clear, predictable international law be made from the divergent rules of dozens of domestic legal systems, rules built with local idioms for which there are no equivalent terms in other languages? The answer, unhappily, is no, but that is not the end of the story."<sup>24</sup>

The greatest success for the unification of substantive commercial contract law to

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<sup>19</sup>Regional efforts with their frequently associated political objectives are outside the scope of this paper.

<sup>20</sup>See Roy Goode, *Reflections on the Harmonisation of Commercial Law* in *Uniform Law Review* (1991) pp. 54-74 for a more detailed account of the alternatives and related considerations.

<sup>21</sup>E.g. *UN Model Law on Arbitration 1985* ; *UN Model Law on Electronic Commerce 1996* .

<sup>22</sup>The International Institute for the Unification of Private Law, Rome, <http://www.agora.stm.it/unidroit/> also [http://itl.irv.uit.no/trade\\_law/papers/unidroit.html](http://itl.irv.uit.no/trade_law/papers/unidroit.html) »

<sup>23</sup> *UNIDROIT Principles of International Commercial Contracts* (Rome, 1994) text of the principles and accompanying commentary; Joachim Bonell, *An international restatement of contract law: the UNIDROIT principles of international commercial contracts* (New York, 1994); and *UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?* (Paris, 1995) referred to later as *UNIDROIT Principles: A New Lex Mercatoria?* The black letter text of the *Principles* are on the Internet at <http://www.agora.stm.it/unidroit/english/principles/pr-main.htm> » and [http://itl.irv.uit.no/trade\\_law/doc/Unidroit.Contract.Principles.1994.html](http://itl.irv.uit.no/trade_law/doc/Unidroit.Contract.Principles.1994.html) »

<sup>24</sup>John Honnold, *Goals of unification - Process and value of the unification of commercial law: lessons for the future drawn from the past 25 years* (1992) in *25<sup>th</sup> UNCITRAL Congress* , pp. 11-13, p. 11.

date, has been by *UNCITRAL*<sup>25</sup> with respect to the sale of goods in the *Vienna Sales Convention (CISG)*.<sup>26</sup> The *CISG* is currently applied by 49 states, commonly estimated as representing two-thirds of world trade. It may be regarded as the culmination of an effort in the field dating back to Ernst Rabel,<sup>27</sup> followed by the Cornell Project,<sup>28</sup> and connected most directly to the *UNIDROIT* inspired *Hague Uniform Law for International Sales (ULIS and ULF)*,<sup>29</sup> the main preparatory works behind the *CISG*.

The development and formulation of uniform law takes time, as does the formulation of uniform principles and rules. Unlike principles and rules, however, for uniform law to come into force and to be applicable, must go through a long process of ratification and accession by states. Even where states implement uniform law they frequently do so with various reservations. Success that is by no means guaranteed, takes time. For every uniform law that is a success, there are more failures. Even where there is widespread use of a uniform law, there are usually as many or more states that are exceptions. The implementation of uniform law is however, not the end of the story, as immediately the question of its uniform application arises. This is a fascinating subject that is of central importance to the development of autonomy, both within and outside the framework of municipal law. 21

"If *UNCITRAL* manages to become accepted by the whole world in any domain of the law or a set of rules, one believes that the problem of conflict of laws will be eliminated in this field, but this is not the case. A counter-effect enters into the picture. The uniform law from the very moment of its coming into operation starts to differ from itself. Every judge in every country is a sovereign interpreter of the text, and the judge became a judge by learning the system of law of his own country. And as the speediest bird is unable to fly out of itself, so the judge is unable to forget the law that he has learned. Divergent or contradictory interpretations, like the application of rules of different countries, lead to different judgements"<sup>30</sup> 22

We shall return to the problem of uniform application, under that heading and in the 23

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<sup>25</sup>United Nations Commission on International Trade Law, Vienna, <http://www.un.or.at/uncitral> also [http://itl.irv.uit.no/trade\\_law/papers/UNCITRAL.html](http://itl.irv.uit.no/trade_law/papers/UNCITRAL.html)

<sup>26</sup> *United Nations Convention On Contracts For The International Sale Of Goods (1980)*. See Honnold, *Uniform Law for International Sales, Under the 1980 United Nations Convention* (Philadelphia, 1991); Fritz Enderlein and Dietrich Maskow, *International Sales Law, United Nations Convention on Contracts for the International Sale of Good...* (1992); Kritzer, *International Contract Manual: Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1994) and the *CISG W3 Database*, Institute of International Commercial Law, Pace University School of Law <http://www.cisg.law.pace.edu/> For some general links [http://itl.irv.uit.no/trade\\_law/nav/sales.html](http://itl.irv.uit.no/trade_law/nav/sales.html)

<sup>27</sup>Ernst Rabel, *Das Recht des Warenkaufs* Bd. I&II (Berlin, 1936-1958). Two volume study on sales law.

<sup>28</sup>Cornell Project on Formation of Contracts 1968 - Rudolf Schlesinger, *Formation of Contracts. A study of the Common Core of Legal Systems*, 2 vols. (New York, London 1968). Arthur von Mehren (ed.), *International Encyclopedia of Comparative Law* - Konrad Zweigert, including an agenda for national reports and general reports on various issues of contract law from formation to termination. For more information see Erich Schanze, *New Directions in Business Research in Børge Dahl & Ruth Nielsen* (ed.), *New Directions in Contract Research* (Copenhagen, 1996) pp. 61-90, on p. 61.

<sup>29</sup> *Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)* and the *Convention relating to a Uniform Law on the International Sale of Goods (ULIS)* The Hague, 1964.

<sup>30</sup>László Réczei, *Process and value of the unification of commercial law: lessons for the future drawn from the past 25 years* (1992) in *25<sup>th</sup> UNCITRAL Congress*, pp. 5-7, on p. 6.

context of seeking means of achieving solutions to the problem of predictability. It should be noted here however, that uniform law does not cover all aspects of the relationship between the contracting parties, its scope is defined.<sup>31</sup> Relevant applicable and mandatory law continues to apply.

### **2.2.2. Uniform rules and principles**

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We include in this category, rules and principles governing specific aspects of the contractual relationship,<sup>32</sup> negotiated standard contracts, and more comprehensive negotiated standard contracts drafted by international institutions<sup>33</sup> and trade associations.<sup>34</sup> In addition to these are the newcomers in the form of comprehensive general contract principles or contract law restatements that create an entire "legal" environment for contracting. Standard rules and principles provide greater flexibility, and have one clear advantage over uniform law in their being contractually agreed, and thereby, as Honnold put it "becoming effective by a stroke of the pen of the parties concerned."<sup>35</sup> Amongst the reasons for their use is the reduction of transaction cost, "parties often want to close contracts quickly, rather than hold up the transaction to negotiate solutions for every problem that might arise",<sup>36</sup> and they satisfy risk management criteria, being known, tried and tested, their effects being predictable. Furthermore uniform principles allow unification on matters that at the present stage of national and regional pluralism could not be achieved at a treaty level. Take for example the question of "interest", which is a politically sensitive issue in some countries, though largely accepted by the business community, and compare the provision in the *CISG* with that of the *UNIDROIT International Contract Principles*.<sup>37</sup> Such provisions are extremely useful to have for clarity, and may be varied if unacceptable to the contracting parties. With the *UNIDROIT*<sup>38</sup> and *EU*<sup>39</sup> *Contract Principles*, we have contract law restatements, that is, standard rules and principles of contract that create what is close to an autonomous (complete and independent) environment for

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<sup>31</sup>The *CISG* for example covers international sale of goods of specific types not those listed under Article 2; and specifically excludes its application to factors that vitiate a contract and the passing of property under Article 4.

<sup>32</sup>E.g. *ICC's Incoterms* (1990) and contract clauses on *Hardship and Force Majeure*, and recently completed model for various *CISG* transactions.

<sup>33</sup>Such as the European Council for Europe, *General Conditions for the Supply of Plant and Machinery for Export* (Form No. 574) (UN - ECE, 1955); The International Federation of (independent) Consulting Engineers, *FIDIC Red Book on Construction* (1996); Works of the European trade association *Orgalime*.

<sup>34</sup>Such as the Grain and Feed Trade Association - *GAFTA*

<sup>35</sup>Honnold (1992) on p. 12.

<sup>36</sup>Honnold id. p. 13.

<sup>37</sup>*CISG* Article 78 - Interest; *UNIDROIT Principles*, Article 7.4.9 - "interest for failure to pay money," and Article 7.4.10 - "interest on damages."

<sup>38</sup>See footnote 23.

<sup>39</sup>*The Principles of European Contract Law 1998* (publication expected in 1998). Previews of the final text of the *Principles of European Contract Law* are available on the Net at

「<http://www.ufsia.ac.be/estorme/PECL.html>」 and

「[http://itl.irv.uit.no/trade\\_law/doc/EU.Contract.Principles.1997.preview.html](http://itl.irv.uit.no/trade_law/doc/EU.Contract.Principles.1997.preview.html)」 Also the earlier edition of the principles and accompanying commentary is published: Ole Lando and Hugh Beale (ed.) *Principles of European Contract Law, Part I: Performance, Non-performance and Remedies* (1995).

contracting. This is so even where selected in conjunction with the law of a sovereign state whether in the context of litigation or arbitration. We shall return to consider the *UNIDROIT International Contract Principles* in the context of international commercial arbitration where it is possible to achieve even greater autonomy.

### **2.2.3. Situation specific standard contracts**

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Standard contracts may attempt to be autonomous in themselves, but seldom are, having a limited scope of regulation and depending for their ultimate interpretation and gap filling on the applicable "law". This type of standard contract is more often than not drafted unilaterally by a single firm that represents a particular contractual interest. These are too diverse for much of a general nature to be extracted for our current purposes, being specific to the business that prepares them and to the type of goods or services for which they provide.

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### **2.3. A transnational regulatory order for contracts**

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Within the traditional municipal order a limited degree of autonomy is available in contract. Autonomy is here used in the sense of reducing the relevance of specific national laws. This is achieved as discussed through: the selection of the law of a state that applies uniform law; the use of uniform rules and principles; and/or the use of negotiated standard contracts. There are problems however, with state's judiciaries' limited ability to disengage themselves from their traditional legal process, methods of legal reasoning, use of sources, and interpretation of uniform law, principles, rules and contracts. In addition to these there are problems associated with the enforcement of claims in other states world-wide as required for international commerce. These constraints have long represented a hindrance to the business community that has sought and found a preferable solution in international commercial arbitration. This may be further enhanced through the selection of a-national law as the governing law of the contract under arbitration, such as *lex mercatoria*. This a-national regulatory order is made possible by: **(a)** States' acceptance of *freedom of contract* (*ordre public* or public policy excepted). **(b)** Sanctity of contract embodied in the principle *pacta sunt servanda*. **(c)** Written contractual selection of dispute resolution by *international commercial arbitration* - *ad hoc* or institutional, usually under internationally accepted arbitration rules. **(d)** Enforcement: arbitration where necessary borrowing the state apparatus for *law enforcement* through the *New York Convention on Recognition and Enforcement of Arbitral Awards 1958*. **(e)** Greater transnational effect is achieved through the exclusion of state law as governing the contract. Usually substituting the choice of general principles of law or *lex mercatoria* as governing the contract, or calling upon the arbitrators to act as *amiable compositeur* or *ex aequo et bono*. For increased predictability preferably through application of the *UNIDROIT Principles*.

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### **2.3.1. International commercial arbitration (ICA)**

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It appears accepted that ICA has become the most prevalent means of dispute resolution in international commerce.<sup>40</sup> This is hardly surprising as ICA is a cornerstone of the autonomous contract, and unlike litigation survives on its merits as a commercial service to provide for the needs of the trading community. As such ICA adheres more closely to the rules of the market economy, responding to those needs and catering for them more adequately. It has consequently been more dynamic than the national courts, in adjusting to the changing requirements of modern world trade.<sup>41</sup> ICA, in taking its mandate from and giving effect to the will of the parties, provides them with greater flexibility and frees them from many of the limitations of municipal law. As examples of this, it seeks to give effect to the parties' agreement upon: the *lex mercatoria* as the law of the contract; the number of, and persons to be "adjudicators"; the language of proceedings; the procedural rules to be used, and; as to the finality of the decision. ICA through state support provided by the *New York Convention* (and where implemented by the *UN Model Law* on ICA) grants international commercial contracts an unparalleled enforcement apparatus world-wide.<sup>42</sup> Much that has been essential to the success of ICA has been contributed by the activities of international organisations, both governmental<sup>43</sup> and non-governmental,<sup>44</sup> in providing the necessary legal infrastructure for arbitration in the form of international legal instruments and the dissemination of information about their application on a world-wide basis. There are multitudes of papers and publications dedicated to ICA.<sup>45</sup>

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Note: Arbitration under the World Bank supported *ICSID Rules*<sup>46</sup> is of special im-

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<sup>40</sup>Alexander Komarov *Remarks on the Applications of the UNIDROIT Principles of International Commercial Contracts in International Commercial Arbitration* (1995) in *UNIDROIT Principles: A New Lex Mercatoria?* pp. 157-166 on p. 157; Stewart Hancock *A Uniform Commercial Code for International Sales? We Have it Now* in *New York State Bar Journal* (January, 1995) quoting oral statement by Werner Melis to the effect that practically all international commercial disputes are settled by arbitration and not before state courts. Also see comments by Yasuhei Taniguchi, *The Changing Attitude to International Commercial Dispute Settlement in Asia* in *Arbitration and Dispute Resolution Law Journal* (London, 1997) pp. 67-77 at pp. 72-73.

<sup>41</sup>Dispute resolution is a service industry - with many competing arbitration entities, both institutional and freelance, it is sensitive to its market. An arbitration tribunal's mandate is determined by the "will" of the contracting parties, this extends to the methods and "law" employed by it in dispute resolution. Competition exists also on a national level as regards national arbitration laws to attract ICA, see Park (Hague, 1995).

<sup>42</sup>Attained through state support of the *New York Convention 1958* (108 states contracting states) said to be honoured/ effective in 98 per cent of cases, see Albert Jan Van Den Berg, *Some practical questions concerning the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1992) in *25<sup>th</sup> UNCITRAL Congress* pp. 212-220 at p. 213. Also through the subsequent *UN Model Law on Arbitration 1985*. In the important but less generic area of investment disputes where a contracting state is a party to the contract, the *ICSID Arbitration Rules* have even wider and further reaching effect.

<sup>43</sup>Such as *UNCITRAL*.

<sup>44</sup>Such as the *ICC's International Court of Arbitration*; *LCIA - London Court of International Arbitration*; *AAA - American Arbitration Association*.

<sup>45</sup>For a brief overview see Sir Michael Kerr, *Concord and Conflict in International Arbitration*, in *Arbitration International* (London, LCIA, 1997) Vol. 13 pp. 121-143.

<sup>46</sup>See Allan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London, 1991) pp. 47-49; and Esa Paasivirta, *Participation of States in International Contracts*

portance for investment disputes involving a state which is a contracting party to the convention. *ICSID* arbitration (which is beyond the scope of this paper) is binding and enforceable without appeal even on the grounds of public policy, and has an even wider global range of enforceability than is available to ICA under the *New York Convention*

### **2.3.2. Lex Mercatoria - and its essential link to arbitration**

"The *lex mercatoria* has sufficient intellectual credentials to merit serious study, and yet is not so generally accepted as to escape the sceptical eye."<sup>47</sup>

"Let me just note that in Europe the *lex mercatoria* is a fact. Arbitrators apply it and those courts which have faced awards applying it have accepted its application."<sup>48</sup>

"Arbitrators entrusted with the task of settling a dispute in accordance with the intention of the parties and without recourse to any national legal system usually find themselves in a rather challenging situation. However, it is widely recognised as a matter of fact that arbitrators are not so reluctant to apply a-national and less definite systems of rules agreed upon by the parties as their colleagues from a state judiciary, who are more concerned with legal technicalities than with the desire to find a solution in a way contemplated by the parties at the time of conclusion of the contract.<sup>49</sup> Obviously that can also explain the reason why arbitrators of differing nationalities who have applied the *lex mercatoria* in collegiate arbitral tribunals have not experienced great difficulties in reaching consensus."<sup>50</sup>

The concept of *lex mercatoria* : of an autonomous set of rules and practices accepted by the international business community as regulating their transactions, has been actively promoted by a number of eminent authorities, mainly in continental Europe, and has continued to gain in stature over the years.<sup>51</sup> The concept has developed particu-

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(Helsinki, 1990).

<sup>47</sup>The Rt. Hon. Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-five Years* in Maarten Bos and Ian Brownlie, *Liber Amicorum for the Rt. Hon. Lord Wilberforce*, Clarendon Press (Oxford, 1987) pp.149-183.

<sup>48</sup>See Ole Lando, *The Law Applicable to the Merits of the Dispute*, in Julian Lew (ed.) *Contemporary Problems in International Arbitration* (1987) pp. 101-112 on p. 104.

<sup>49</sup>W. Laurence Craig, William W. Park, Jan Paulsson, *International Chamber of Commerce Arbitration* (New York, looseleaf updated, 2nd ed.) p. 640.

<sup>50</sup>Lando, *The lex mercatoria in International Commercial Arbitration*, 34 ICLQ (1985) p. 753. as cited by Komarov (1995) pp. 157-166 on p. 161.

<sup>51</sup>Discussions and examples of *lex mercatoria* are to be found in: Berthold Goldman, *Frontières du droit et lex mercatoria*, Archives de philosophie du droit (Paris 1964); *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, 106 *Culnet Journal du droit international* (1979) p. 475; *Etudes offertes à Berthold Goldman* (Paris 1982) contributions by Battifol, Kahn, von Mehren, Rigaux, Weil; Cremades and Pehn, *The New Lex Mercatoria and the Harmonisation of the Laws of International Commercial Transactions* 3 *Boston Univ Intl LJ* 317 (1984); *The applicable Law: General Principles of Law - the Lex Mercatoria* in J. Lew (ed.), *Contemporary Problems in International Arbitration* (1986) p. 113; *Lex Mercatoria* in *Forum Internationale*, No.3 (Nov. 1983); Pierre Lalive of Switzerland, *Transnational (or Truly International) Public Policy and International Arbitration*; Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, (Oxford, 1987) pp.149-183; E. Gaillard (ed.), *Transnational Rules in International Commercial Arbitration* (Paris, 1993); Lando, *Lex mercatoria*

larly in conjunction with ICA, identified by Clive Schmitthoff of England and advanced by such authorities as Berthold Goldman of France and Pierre Lalive of Switzerland. Under current legal thinking, most national courts still require a contract to be governed by a national legal system,<sup>52</sup> although on this front also *lex mercatoria* advances.<sup>53</sup> ICA is not so constrained. It has been suggested that *lex mercatoria* was being used in as many as 5-10% of ICA cases.<sup>54</sup> Ole Lando identified 1985 as the landmark year when the *UNCITRAL Model Law on International Commercial Arbitration* in Article 28(1) allowed for arbitral disputes to be determined "in accordance with the rules of law as chosen by the parties".<sup>55</sup> This clarification is welcome, though hardly revolutionary.<sup>56</sup> It has long been accepted that arbitrators in executing their mandate derived from the will of the parties, if so requested, will settle the dispute on non legal grounds, in equity or on the merits, acting as *amiable compositeur* or *ex aequo bono*.<sup>57</sup> Given that ICA is decided according to "the will" of the contracting parties, it was open earlier for an a-national (autonomous) decision based on *lex mercatoria* by specification of its application together with the rules of equity.<sup>58</sup> This would have fallen under the accepted provisions of the earlier recognition and enforcement of arbitration rules. It appears to be accepted that \_when agreed by the parties in ICA\_, *lex mercatoria* may be applied as a separate legal frame independently of national law (mandatory law apart),

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1985-1996 in *Festschrift till Stig Strömholm*, Vol. II p. 567-584 (Göteborg, 1997). Also Clive Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions in the Transnational law of International Commercial Transactions* in *Studies in Transnational Economic Law*, Vol. 2 (1982) pp. 23-24. See also the *UNIDROIT Principles of International Commercial Contracts 1994* and the *Principles Of European Contract Law 1998*.

<sup>52</sup>See Himlar Raeschke-Kessler, *Should an Arbitrator in an International Arbitration Procedure apply the UNIDROIT Principles?* (1995) in *UNIDROIT Principles: A New Lex Mercatoria?*, pp. 167-177 on p. 169 "It is no secret that the prevailing opinion among jurists in some countries, like mine, is plainly adverse towards an uncodified *lex mercatoria* as an independent body of transnational law" and discussion by Ulrich Drobnig, *The Use of the UNIDROIT Principles by National and Supranational Courts* (1995) in *UNIDROIT Principles: A New Lex Mercatoria?*, pp. 223-229 on p. 226-227.

<sup>53</sup>The *Inter American Convention on the Law Applicable to International Contracts 1994* invites state courts to apply *lex mercatoria*, Article 10. This is done in addition to the application of state law. In the absence of its selection by the parties the state with the closest ties, Article 9(1). Significantly, Article 9(2) provides that the court also take into account the general principles of international commercial law recognised by international organisations. See Lando (1997) pp. 567-584.

<sup>54</sup>Kazuaki Sono, *The Changing Role of UNCITRAL* within *The Future Role of UNCITRAL* (1992) in *25<sup>th</sup> UNCITRAL Congress*, pp. 249-252, on p. 250. Statement made prior to the *UNIDROIT Principles*, a significant figure as pinning down the exact content and effect of use of *lex mercatoria* is far from certain.

<sup>55</sup>Lando (1997) p. 575. See also *UNIDROIT Principles*, Preamble 4 a. Also Arthur Hartkamp, *The Use of UNIDROIT Principles of International Commercial Contracts by National and Supranational Courts* (1995) in *UNIDROIT Principles: A New Lex Mercatoria?*, pp. 253-260 on p. 255, notes that "there is a growing tendency to permit them to choose 'rules of law' other than national laws on which the arbitrators may base their decisions".

<sup>56</sup>Innovative and new are the ("Lando" and "Bonell") codifications of contract principles "*lex mercatoria*" discussed in the following section. Though these may be regarded as being inspired by the *US Restatement of Contract Law*.

<sup>57</sup>As indicated e.g. by the *European Arbitration Convention 1961*, *UNCITRAL Arbitration Rules 1975*, *UNCITRAL Model Law 1985*.

<sup>58</sup>Komarov (1995) on p. 163; Hans Van Houtte, *The UNIDROIT Principles of International Commercial Contracts and International Commercial Arbitration: Their Reciprocal Relevance* (A:1995) in *UNIDROIT Principles: A New Lex Mercatoria?*, pp. 181-195 on p. 183.

and that such decisions will be enforced as valid by national courts.<sup>59</sup> Equally, if so instructed, both in arbitration and in national courts, *lex mercatoria* may be called upon to play a gap filling function for the selected applicable national law. *Lex mercatoria* is a polycentric and integrative concept that has eluded precise definition, its precise nature, scope, content and application being vague, with wide latitude granted arbitrators.<sup>60</sup> It has been suggested that "there can at most be no universal *lex mercatoria* , but merely a variety of *lex mercatoria* systems depending on sector or region."<sup>61</sup> It has been pointed out that *lex mercatoria* is a distinct concept from harmonisation and transnationalism.<sup>62</sup> There is a convergence however, if one takes the perspective of the business community's needs and goals. The business community usually refers to *lex mercatoria* by what are regarded as loose synonyms, in such phrases as "internationally accepted principles of law governing contractual relations", that more clearly indicate the intent behind their subscription to it.<sup>63</sup>

Some reservation must be expressed to their unconsidered use based on the uncertainty they represent. Amongst the items of which the *lex mercatoria* has grown to be comprised of,<sup>64</sup> in a not necessarily hierarchical manner, are: **(a)** Customs and usages<sup>65</sup> of international trade. **(b)** Relevant rules promulgated by international institutions on the area of law concerned - *ICC - Incoterms* , or the *Uniform Customs and Practices for Documentary Credits* . **(c)** The rules and principles common to all or most states engaged in international trade, or to those states which are connected to the contract. Apart from individual principles and rules for given circumstances, this includes uniform law such as *UNCITRAL's CISG* . The following quotation is of interest as regards general principles constituting *Lex Mercatoria* :

"Distilled from a vast literature, these general principles have been enumerated by Lord Justice Mustill as (in abridged form):<sup>66</sup> (1) *Pacta sunt servanda* (contracts should be enforced according to their terms); (2) *Rebus sic stantibus* (substantially changed circumstances can entail a revision of contract terms); (3) *Abus*

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<sup>59</sup>There is no dissent on this from the correspondents of various nationalities in *UNIDROIT Principles: A New Lex Mercatoria?* E.g. Michael Furmston in *The UNIDROIT Principles in International Commercial Arbitration* (1995) in *UNIDROIT Principles: A New Lex Mercatoria?* , pp. 199-208 on p. 202; Raeschke-Kessler (1995) p. 170. See also *UNIDROIT Principles* , Preamble 4 a. See also Van Houtte (A:1995) p. 183. Apart from the *UNCITRAL Model Law on International Commercial Arbitration* (Article 28) specific provision permitting the selection of "rules of law" (as opposed merely to "the law") is provided in the new *Arbitration Rules* of both the *ICC* (Article 17) and *LCIA* (Article 22(2)), both effective from 1 January 1998.

<sup>60</sup>See comment by Van Houtte, *International Trade Law* (London, 1995) p. 28-29 and p. 399 suggests that *lex mercatoria* is too vague and imprecise to be "self-sufficient". See the next section of this paper on "general contract principles as *lex mercatoria* ."

<sup>61</sup>Van Houtte (London, 1995) p. 28. Given the uncertainty as to its precise scope and application he also suggests that it is safer to apply a given system of state law, Van Houtte (London, 1995) p. 412 and p. 399.

<sup>62</sup>Mustill (1987) pp.149-183 at pp.152-153.

<sup>63</sup>As applied in *Deutsche Schachtbau-und Tiefbohrgesellschaft v. Ras Al Khaimah National Oil Co.* [1987] 2 All ER 769. See comment by Komarov (1995) on p. 162.

<sup>64</sup>See for example Lando (1997) pp. 567-584.

<sup>65</sup>Trade usages are actual practices of the relevant business community, the existence of which must be established and if necessary proven, e.g. by expert witnesses. The trade usage is not a source of law.

<sup>66</sup>Mustill (1987) pp.149-183 at pp.174-177.

*de droit* (unfair and unconscionable contracts should not be enforced); (4) *Culpa in contrahendo* ; (5) Good faith [and fair dealing] ; (6) Bribes render a contract void or unenforceable; (7) A state may not evade its obligations by denying its own capacity to make an agreement to arbitrate; (8) The controlling interest of a group of companies is regarded as contracting on behalf of all members; (9) Parties should negotiate in good faith if unforeseen circumstances arise; (10) "Gold clause" agreements are valid and enforceable; (11) One party may be released from its obligations if there is a fundamental breach by the other; (12) No party can be allowed by its own act to bring about a non-performance of a condition precedent to its own obligation; (13) A tribunal is bound by the characterisation of the contract ascribed to it by the parties; (14) Damages for breach of contract are limited to the foreseeable consequences of the breach; (15) A party which has suffered a breach of contract must mitigate its losses; (16) Damages for non-delivery are calculated by reference to the market price of the goods and the price at which the buyer has purchased equivalent goods in replacement; (17) A party must act promptly to enforce its rights, lest lose them by waiver; (18) A debtor may set off his own cross-claim to diminish his liability to a creditor; (19) Contracts should be construed according to *ut res magis valeat quam pereat* ; (20) Failure to respond to a letter is regarded as evidence of assent to its terms."<sup>67</sup>

(d) In the absence of the above the arbitrators will apply or establish the rule which appears to them to be best suited to the situation. (e) In ICA also relevant is the public policy of the country in which the award is likely to be requested.<sup>68</sup> (f) Recently the definition of *lex mercatoria* has been greatly if controversially assisted, by comprehensive international rules made for this purpose by *UNIDROIT* and the Commission on European Contract Law.

### **2.3.3. Codified general contract principles as *lex mercatoria***

"The unification of law has ceased to be the prerogative of State legislators.... The hope of all of us who believe in the necessity of a flexible and pluralistic approach to the international unification of law, is that this equilibrium will be maintained in future."<sup>69</sup>

"In offering the *UNIDROIT Principles* to the international legal and business communities, the Governing Council is fully conscious of the fact that the *Principles*

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<sup>67</sup>As presented by Jarrod Wiener, *The 'Transnational' Political Economy: A Framework for Analysis* (1995) at

⌈ [http://itl.irv.uit.no/trade\\_law/papers/The.Transnational.Political.Economy.a.Framework.for.Analysis.Jarrod.Wiener.UKC.html](http://itl.irv.uit.no/trade_law/papers/The.Transnational.Political.Economy.a.Framework.for.Analysis.Jarrod.Wiener.UKC.html) ⌋

For a listing of general principles to be found within the *CISG*, see Ulrich Magnus, *Die Allgemeinen Grundsätze im UN-Kaufrecht [The General Principles of the CISG- in German]*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1995) 469-494. For an english translation of this text, see ⌈ <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html> ⌋ at the *CISG W3 Database*, Institute of International Commercial Law, Pace University School of Law.

<sup>68</sup>Mustill (1987) pp.149-183 at p. 173.

<sup>69</sup>Bonell, *Various Techniques of Unification - Non-legislative means of harmonisation* (1992) in *25<sup>th</sup> UNCITRAL Congress*, pp. 33-40 on p. 40.

, which do not involve the endorsement of governments, are not a binding instrument and that in consequence their acceptance will depend on their persuasive authority.”<sup>70</sup>

”The objective of the UNIDROIT Principles is to establish a balanced set of rules designated for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied. This goal is reflected both in their formal presentation and in the general policy underlying them.”<sup>71</sup>

The precise contents of ”the general principles of law” and of *lex mercatoria* have always been vague and obscure, and presented the arbitrator who was to apply them with something of a challenge.<sup>72</sup> This is changed by reference to the *UNIDROIT International Contract Principles* or *European Contract Principles* as the proper law of the contract.<sup>73</sup> They provide a comprehensive set of rules to govern contractual relations and may be regarded as contract law restatements, although it has been pointed out that it is not for these principles to advance themselves as *lex mercatoria*.<sup>74</sup> Given our global perspective, we shall confine ourselves to the *UNIDROIT Principles*, which were more international in their formulation and purpose.<sup>75</sup>

The arrival of the *UNIDROIT International Contract Principles* was particularly timely. It coincided with the successful attempt at reducing trade barriers represented by the *World Trade Agreement*, and the start of the general use of the Internet,<sup>76</sup> which has allowed for the exponential growth of electronic commerce, and has further emphasised its transnational nature. This is all the more opportune bearing in mind that it takes years to prepare such a legal instrument. The *UNIDROIT Principles* were contemplated in 1971, a steering committee was formed composed of René David, Clive Schmitthoff and Tudor Popescu to make a study into the feasibility of such a project. Their first report in 1974 stressed the importance of the project laying down the broad outlines for its structure. In 1980 a special working group was constituted, ”members of the Group, which included representatives of all the major legal and socio-economic

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<sup>70</sup>Introduction of the *UNIDROIT Principles of International Commercial Contracts* (Rome, 1994) p. ix.

<sup>71</sup>Id. p. viii.

<sup>72</sup>As pointed out, their general nature, and the wide latitude granted arbitrators to determine the case, has led to some reservation as to the general suitability of their use, see Van Houtte, id. p. 412 and p. 399.

<sup>73</sup>Whether so instructed specifically by the parties, or referred to as suggested by the Preamble of the *UNIDROIT Principles 1994*. Comp. Article 1.101 - Application of the Principles of the *European Principles, European Principles 1998*.

<sup>74</sup>The most constraining suggestion being that it is only when the *UNIDROIT Principles 1994* and the *EU Principles 1998* converge, together with the *CISG* that there is a clear indication that they represent the *Lex Mercatoria*, see Raeschke-Kessler (1995) on p. 174.

<sup>75</sup>Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purpose?* in *UNIDROIT Uniform Law Review* (Rome, 1996) pp. 229-246 at pp. 242-243; Lando (1997) pp. 567-584 where he states ”The *UNIDROIT Principles* are for the World ... The *PECL [Principles of European Contract Law]* are for the European Union” on p. 572.

<sup>76</sup>See Amisshah, *On the Net and the Liberation of Information that wants to be Free* in *Fra institutt til fakultet, Jubileumsskrift i anledning av at IRV ved Universitetet i Tromsø feirer 10 år og er blitt til Det juridiske fakultet* (Tromsø, 1996) pp. 59-76 or the same at

⌈[http://itl.irv.uit.no/trade\\_law/papers/On.the.Net.and.Information.17.02.1997.Amisshah.d.html](http://itl.irv.uit.no/trade_law/papers/On.the.Net.and.Information.17.02.1997.Amisshah.d.html)⌋

systems of the world, were leading experts in the field of contract law and international trade law... all sitting ... in a personal capacity, and not expressing the views of their governments."<sup>77</sup> The first edition of the *UNIDROIT Principles* were finalised in 1994, 23 years after their first conception, and 14 years after work started on them in earnest. The *UNIDROIT Principles* constitute a system of principles and rules that govern most aspects of contractual relations. They were drawn up after consideration of different legal systems, but such influence has been deliberately obscured, with the intention and instruction that the *UNIDROIT Principles* should be interpreted according to an autonomous international standard. The only earlier set of rules to which reference is made within their commentary being the *CISG* .<sup>78</sup> Nevertheless they have been met with certain reservation, especially as regards their relationship to *lex mercatoria* . It has been expressed on the one hand that:

"It is not up to the *Principles* to advance themselves as general principles of law or as *lex mercatoria* . As general principles of law the *UNIDROIT* text will only be accepted when the legal community and not merely the some twenty drafters of the *UNIDROIT* text, no matter how skilled and reputed these lawyers may be, has recognised that the *UNIDROIT* document states principles which underlie most legal systems and are generally accepted. In fact some *UNIDROIT* rules are certainly too specific to be perceived as such. The *UNIDROIT* standards will only be part of the *lex mercatoria* if they are recognised as such by the business community and its arbitrators. Since the *UNIDROIT Principles* have just been launched, it is too early to assess this possibility."<sup>79</sup> 47

Or again that: 48

"No one doubts of course that the principles are the brainchild of learned lawyers who laboured independently. All the same is it not somewhat pretentious to claim that the principles represent the generally accepted principles of law?" ... "For the time being, the *UNIDROIT Principles* remain no more than a learned codification."<sup>80</sup> 49

And it has been suggested that an indication of the traditional *lex mercatoria* is only firmly established by these codified principles where the three new systems represented by the *CISG* the *UNIDROIT Principles* and *EU Principles* converge.<sup>81</sup> Be these objections as they may, the *UNIDROIT* (and *EU* ) *Principles* as contract law 50

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<sup>77</sup>See Bonell (1996) on pp. 230-231.

<sup>78</sup>Bonell, *The UNIDROIT principles of International commercial contracts: Why? What? How?* in Børge Dahl & Ruth Nielsen (ed.), (1996) pp. 91-98 on p. 93 and in id. (1997) on p. 231, comments on sources of inspiration mentioning diverse sources including (articles combined) the United States *Uniform Commercial Code* and the *Restatement (Second) of the law of Contracts* , the drafts of the *Dutch Civil Code 1992* , the *Civil Code of Quebec 1994* , also the *Foreign Economic Contract Law of the Peoples Republic of China 1985* , and the *Algerian Civil Code of 1975* . The international instrument referred to is the *CISG* . Also to non-legislative instruments such as Incoterms, the UCP, FIDIC Red book, and various works by *UNCITRAL* .

<sup>79</sup>Van Houtte, *The UNIDROIT Principles as a Guide to Drafting Contracts* (B:1995) in *UNIDROIT Principles: A New Lex Mercatoria?* pp. 115-125 on p. 118.

<sup>80</sup>Jérôme Huet, *Synthesis* (1995) in *UNIDROIT Principles: A New Lex Mercatoria?* pp. 273-281 on p. 278 and p. 281.

<sup>81</sup>Supra footnote 74.

restatements cater to the needs of the business community that seeks an a-national or transnational law as the basis of its contracts. Where in the past they would have been forced to rely on the ethereal and nebulous *lex mercatoria*, the business community is finally provided with the opportunity to make use of such a "law" that is readily accessible, and has a clear and reasonably well defined content. As such the *UNIDROIT Principles* allow for more universal and uniform solutions. Their future success will depend on such factors as: **(a)** Suitability of their contract terms to the needs of the business community. **(b)** Their becoming widely known and understood. **(c)** Their predictability evidenced by a reasonable degree of consistency in the results of their application. **(d)** Recognition of their potential to reduce transaction costs. **(e)** Recognition of their being neutral as between different nations' interests (East, West; North, South). At the present time the *UNIDROIT Principles* have to overcome the deterrent fact that they are relatively new and untested. Their content, which needs to be known for their practical application, is as yet unfamiliar. Their suitability for various tasks has not yet been fully ascertained. And the workings of many discretionary powers granted the arbitrators have not yet been observed much in practice.

There are those within the business community who point out that "any pretension to interfere from the outside, through the imposition of uniform legislation, would be inopportune and in any case doomed to failure."<sup>82</sup> In this regard, the *UNIDROIT Principles* advancing themselves as a matter of choice for the parties do not constitute such an imposition. 51

*The UNIDROIT Principles* require study and understanding for their effective use in contracting. **(a)** The *UNIDROIT Principles* are broad in scope covering most aspects of contract and as such create a largely autonomous uniform legal environment for contracting. Exceptions are mandatory law, and some validity issues including capacity. These occur in a minority of disputes.<sup>83</sup> **(b)** The *UNIDROIT Principles* adhere to the principle of freedom of contract, but contain mandatory provisions, that parties voluntarily choosing to use them cannot contract out of. **(c)** They are to be understood not on their own but in conjunction with their commentary. **(d)** The *UNIDROIT Principles* cover most aspects of contract including chapters on: formation, validity, interpretation, content, performance, and non-performance. The section on formation also covers pre-contractual negotiations. **(e)** The standards applied are meant to be international and may be different from similar domestic standards - e.g. good faith and fair dealings "in international trade."<sup>84</sup> **(f)** The *UNIDROIT Principles* contain separate provisions for the interpretation of the text of the *UNIDROIT Principles* themselves (Article 1.6), and those of the contract to which they apply (Chapter 4). **(g)** Most of the *UNIDROIT Principles* can be regarded as "default rules" that save the parties the time and cost "of negotiating and drafting by providing rules that they would probably have agreed upon had they taken the time to do so."<sup>85</sup> **(h)** An important consideration is 52

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<sup>82</sup>J. Carver, *Uniform law and its impact on business circles: the experience of the legal profession*, in *UNIDROIT* (ed.), *International Uniform Law in Practice* (N.Y., 1988) p. 411. see also Bonell (1992) p. 39.

<sup>83</sup>Honnold, *Documentary History of the Uniform Law for International Sales* (1989) para. 19 on p. 256.

<sup>84</sup>Article 1.7, Comment 2. Also see Van Houtte (A:1995), p. 186.

<sup>85</sup>See Allan Farnsworth, *An American View to the Principles as a Guide to Drafting Contracts* in *UNIDROIT Principles: A New Lex Mercatoria?* pp. 85-92 on p. 87.

that these rules are drafted specifically to take into account the needs of international trade, and as such contain provisions specifically directed at such matters as: determination of price; currency of payment; government permissions to perform; liquidated damages; interest rate on money due; reference back to original language text of a contract in case of doubt. **(i)** Unlikely to be familiar to those used to contract law models based on *caveat subscriptor*, are a number of protective principles, including those of good faith and fair dealing, and loyalty, which are discussed briefly later in this paper. **(j)** There are also rules which (in contrast with the regular acceptable default rules) serve rather the role of inducing the parties to negotiate more suitable terms for their transaction.<sup>86</sup> **(k)** In yet other areas the rules are extremely general such as the hardship provision and other works on standard rules may provide more suitable solutions.<sup>87</sup> **(l)** The *UNIDROIT Principles* contain many discretions, that arise from their nature as principles, and use of standards within them (such as reasonable) that are without specific meaning, the content of which depends on the context in which they are applied.<sup>88</sup> **(m)** One might additionally observe that the *UNIDROIT Principles* can be used in conjunction with more specific rules and regulations. Of particular interest in the sale of goods, the *UNIDROIT Principles* are suitable for use (on the contracting parties' election<sup>89</sup>) together with the *CISG* to fill gaps in the provisions of the *CISG*. Provisions of the *CISG* would be given precedence over the *UNIDROIT Principles* under the accepted principle of *specialia generalibus derogant*.<sup>90</sup> The *CISG* has many situations that are not provided for at all, or which are provided for in less detail than the *UNIDROIT Principles*. Examples include: the deliberately excluded validity (Article 4); the provision on interest (Article 78); impediment (Article 79), and; what many believe to be the inadequate coverage of battle of forms (Article 19).<sup>91</sup>

As to the suitability of The *UNIDROIT Principles* for complex international contracts, there are differing views. As pointed out forcefully by Vivian Gaymer: 53

"In relation to the complex type of contracts, I have to say that if the parties are content that the contract would be governed by a well-developed existing law which has been found to be satisfactory in relation to similar contracts in the past they would be unlikely even to consider using the *Principles*. The reasons are obvious. Parties like to know where they stand. They like to have access to an existing body of expert advice. *The Principles*, for the time being at least, suffer from the disadvantage of novelty. The lawyers seem to be resistant to change."<sup>92</sup> 54

Paradoxically, where governments are involved (in complex agreements), they not 55

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<sup>86</sup>Farnsworth id. as an example points out Article 6.1.4(2) does not reflect commercial practice.

<sup>87</sup>E.g. the *ICC's Force Majeure and Hardship clauses*.

<sup>88</sup>Van Houtte (A:1995), p. 185.

<sup>89</sup>Also consider present and future possibilities for such use of *The Principles* under *CISG* articles 8 and 9.

<sup>90</sup>Special principles have precedence over general ones. See Huet, *Synthesis* (1995) p. 277.

<sup>91</sup>Drobnig, id. p. 228, comment that the *CISG* precludes recourse to general principles of contract law in Article 7. This does not refer to the situation where parties determine that the *UNIDROIT Principles* should do so, see *CISG* Article 6.

<sup>92</sup>Vivien Gaymer, *The UNIDROIT Principles as a Guide for Drafting Contracts: A View from an International Commercial Lawyer*, in *UNIDROIT Principles: A New Lex Mercatoria?* pp. 97-102 on p. 100.

infrequently find it necessary to resort to an a-national order to govern the contract. Kazuaki Sono before the promulgation of the *UNIDROIT Principles* writes:

“For complex transactions which were seldom heard of in the past, there is a tendency to have resort to “the general principle of law”, *lex mercatoria* , or “the principle of good faith and fair dealing” particularly through arbitration clauses. During the Congress, I have been told personally from a reliable source that 5 to 10 per cent of the disputes which are submitted to arbitration now contain such clauses. The person who provided me with this information said “only 5 to 10 per cent”, but to me it is an extremely significant percentage. Yet, the contents of these principles are still far from certain.”<sup>93</sup>

In such situations selection of the *UNIDROIT Principles* should provide a welcome increase in clarity.<sup>94</sup> Their use where states participate in international contracts is likely to generally boost confidence in their use for more complicated agreements also within the business community.

#### **2.3.4. Protective principles as a necessary part of *lex mercatoria***

The virtues of freedom of contract are stressed in this paper in that they allow the international business community to structure their business relationships to suit their needs. The protective principles of good faith and fair dealing are of particular interest as in the *UNIDROIT Principles* they are mandatory and place an encumbrance on this freedom. Other protective principles such as loyalty also absent from some traditional contract systems are of similar interest. It has been pointed out however, that it is necessary to be mindful of the limitations of the benefits of absolute freedom of contract. The mandatory protective principles may be justified in that they (on the balance) reflect the collective needs of the international business community. It may be further and more positively argued that they are in fact beneficial and facilitate trade. **(a)** The protective principles help bring about confidence and foster relations between parties. They provide an assurance in the international arena where parties are less likely to know each other and may have more difficulty in finding out about each other. **(b)** They better reflect the focus of the international business community on a business relationship from which both sides seek to gain. **(c)** They result in wider acceptability of the principles within both governments and the business community in the pluralistic international community. These protective principles may be regarded as enabling the *Principles* to better represent the needs of “*the Commonwealth*” (here used to mean the world as a whole). **(d)** Good faith and fair dealing are fundamental underlying principles of international commercial relations. More generally, freedom of contract benefits from these protective principles that need mandatory protection from

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<sup>93</sup>Sono (1992) p. 250.

<sup>94</sup>Furmston (1995) p. 202, provides the compelling examples of two such agreements involving **(i)** the construction and **(ii)** the operation of the Channel Tunnel by Anglo-French consortiums. Both agreed upon disputes being “governed by those Principles of English and French contract law which are common and, if were no relevant common principles, by general principles of international commercial law.” Dispute resolution to be by *ICC* arbitration in Brussels.

contractual freedom to effectively serve their function. One might suggest that for most types of international contract based on a-national law, this is the minimum price of freedom of contract that should be insisted upon by mandatory international law, as the limitation which hinders the misuse by one party of unlimited contractual freedom. They appear to be an essential basis for acceptability of the autonomous contract (a-national contract, based on agreed rules and principles). As mandatory principles they become the default standard for the conduct of international business and as such may be looked upon as "common property." Unless mandatory they suffer a fate somewhat analogous to that of "the tragedy of the commons."<sup>95</sup>

Modern contract "law" models lay greater emphasis on the contract as an expression of co-operation between the parties.<sup>96</sup> Both the *UNIDROIT Contract Principles* and the *EU Contract Principles* display these modern features. They include protective principles such as good faith and fair dealing, loyalty, and hardship<sup>97</sup> that will not be as familiar to those used to the traditional contract model<sup>98</sup> though they will be more familiar to others. These may be justified as co-operative rules and principles to which members of the international business community are prepared to subscribe in order to be able to assume the same of others. Being able to make these assumptions may facilitate trade, by allowing for greater trust between parties that are in less of a position to know of or find out about each other, than would be the case in a domestic transaction. Good faith and fair dealing, also identified by the English Lord Justice Mustill as part of "The" *Lex Mercatoria*,<sup>99</sup> is a pervasive and fundamental underlying principle common to both the *UNIDROIT* and *EU Principles*.<sup>100</sup> The loyalty principle means that a party cannot take a completely singular view of its own interests to the exclusion of the other, having in some circumstances to take account of those of the other party.

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<sup>95</sup>Special problem regarding common/shared resources discussed by Garrett Hardin in *Science* (1968) 162 pp. 1243-1248. For short discussion and summary see Trebilcock, (1993) p. 13-15.

<sup>96</sup>Hugh Collins, *The Law of Contract* (London, 1986) p. 160; Lars Erik Taxell, *Avtalsrättens normer* (Turku, 1987) p. 11; cited by Wilhelmsson, *Questions for a Critical Contract Law - and a Contradictory Answer: Contract as Social Cooperation* in Wilhelmsson (ed.), *Perspectives of Critical Contract Law* (1993) pp. 9-52 on p. 20.

<sup>97</sup>There are other protective provisions in the form of: hardship (Chapter 6, Section 2); surprising terms (2.20); duty of confidentiality (2.16); and negotiation in bad faith (2.15). The principles also have specific provisions on: fraud (3.8); threat (3.9) gross disparity (3.10); and mistake (3.4, 3.5).

<sup>98</sup>Gaymer (1995) p. 97 states "I particularly noted Article 1.7, which requires each party to act in accordance with good faith and fair dealing. This is not a general principle of English contract law, nor can it be readily achieved under that law and I am interested to learn more about its perceived application and benefits." The US has come further than England with the development of the doctrine of unconscionability, and in basing the Uniform Commercial Code on the principle of good faith, which is hailed as its "single most important concept" and as "the foundation on which the [UCC] was drafted", citations to Dore and DeFranco from Albert Kritzer, *International Contract Manual: Guides to Practical Applications of the CISG* (looseleaf 1994) p. 74. See also the *Official UCC Commentary*, Section 1-203.

<sup>99</sup>Supra 2.3.2. in eĝ39.

<sup>100</sup>*UNIDROIT Contract Principles*, General provisions - Article 1.7 Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this liability. *EU Contract Principles*, General Obligations - Article 1.201 (ex art. 1.106) - Good faith and fair dealing: "(1) Each party must act in accordance with good faith and fair dealing. (2) The parties may not exclude or limit this duty." Good faith and fair dealing is also to be found in several national contract law systems, if not the English and "American". Generally see Lando, *Each Contracting Party Must Act In Accordance with Good Faith and Fair Dealing* in *Festschrift til Jan Ramberg* (Stockholm, 1997) pp. 345-361.

Conversely, it is instructive to question the role in international commerce of the traditional contract represented by English contract reasoning and inherited by the British Commonwealth. Based on freedom of contract, *pacta sunt servanda* and *caveat subscriptor*. Although claimed to be neutral in making no judgement as to the contents of a contract, this claim is misleading. It is based on free market arguments that parties best understand their interests, and the contract arrived at will be an optimum compromise between their competing interests. It not being for an outsider to regulate or evaluate what a party of its own free will and volition has gained from electing to contract on those terms. This approach to contract is adversarial, based on the conflicting wills of the parties, achieving a meeting of minds. It imposes no duty of good faith and fair dealing or of loyalty (including the disclosure of material facts) upon the contracting parties to one another, who are to protect their own interests. The traditional model's failings are known in the domestic and international arena, frequently producing contractual relations that take advantage of the weaker, and less informed party.<sup>101</sup> Information presents particular problems in international commerce.<sup>102</sup> Adherents to the *caveat subscriptor* model, point to the fact that parties have conflicting interests, and should look out for their own interests. However, as compared with domestic transactions the contracting parties in international commerce are less likely to possess information about each other or of what material facts there may be within the other party's knowledge, and will find it more difficult (and costly) to acquire. And as Michael Trebilcock put it: "Even the most committed proponents of free markets and freedom of contract recognise that certain information preconditions must be met for a given exchange to possess Pareto superior qualities."<sup>103</sup> Furthermore the more information one already has, the less it costs to identify and to obtain any additional information that is required.<sup>104</sup> This suggests that some parties will be in a much better position to determine and access what they need to know, a factor that should be reflected in the application of the principle.<sup>105</sup> It is also increasingly accepted that it is not possible to fix long-term contracts once and for all, without future adjustments, as the traditional model would suggest. Also of interest are the claims of those who point out that this method of contracting is out of step with the reality of what businessmen do when entering an agreement. Ian Macneil<sup>106</sup> suggests that contract has become an unrealistic abstraction, there being no solidarity except in legal remedies, with reciprocity absent except in the case of the discrete transaction. And it has been

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<sup>101</sup>Roger Brownsword, *Towards a Rational Law of Contract* in Wilhelmsson (ed.), *Perspectives of Critical Contract Law* (1993) pp. 241-272 on p. 241. Furmston (1995) on p. 201 notes: "It is recognised that even between commercial parties there may be stronger and weaker parties" in discussing Article 3.10 of the *UNIDROIT Principles*.

<sup>102</sup>Apart from the more straightforward cases of different types of misrepresentation.

<sup>103</sup>Trebilcock, (1993) p. 102, followed by a quotation of Milton Friedman, from *Capitalism and Freedom* (1962) p. 13.

<sup>104</sup>Trebilcock, (1993) p. 102, note quoted passage of Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (1988) p. 25.

<sup>105</sup>On the loyalty principle generally see L.E. Taxell, *Avtalsträtt* (Stockholm, 1997). For a critical opinion on the principle of loyalty see Ernst Nordtveit, *Partnerskap ved utveksling av ytingar. Realitet eller illusjon* in *Lov og Rett* (1996) p. 337.

<sup>106</sup>Ian Macneil, *Barriers to the Idea of Relational Contracts*, in F. Nicklisch (ed.), *Der komplexe Langzeitvertrag* (Heidelberg, 1987) 31-49, at 35.

pointed out that business-persons at the time of contracting look not to their rights and remedies, but to the success of the business relationship.<sup>107</sup> Modern contract models in placing greater emphasis on co-operation between the parties, and recognising a distinction between procedural and substantive fairness, go some way towards redressing these objections and arguably better reflect the ideology and needs of the international business community, notwithstanding such other issues as risk allocation.

The area represented by protective provisions generally, placing a limitation on freedom of contract, is a large and complicated one, which beyond these comments is outside the scope of this paper.<sup>108</sup> 62

Caveat: Contract law is not built on one model, but on several competing ones.<sup>109</sup> Protective principles, though they may be widely suited for most types of contract, may be persuasively argued against for others. Protective principles may for example be generally suited for trade in goods and services or use in joint venture agreements, (which may benefit from their tendency to foster trust between international business contracting parties). However, they are less certain suit the needs of financial agreements and some specialist contract areas. 63

#### **2.4. The autonomous contract - an a-national solution, a summary** 64

The autonomous contract, in the sense of one based on an a-national, autonomous order, is possible both in form and substance where based on ICA and *lex mercatoria*, with the mandatory law of states excepted. The mandatory law exception referring principally to the laws of states in which performance is to be made or awards are to be enforced. This arrangement can be provided with greater predictability through application of the *UNIDROIT Principles*. This model provides the potential to reduce transaction cost through the possibility of adherence to a uniform acceptable standard that can be applied across borders with minimal concern as to the underlying municipal legal structure.<sup>110</sup> This presupposes the functional and substantive predictability of the a-national "law" based contract. Functional predictability appears to have been provided, ICA being better catered for on a world-wide basis than the national legal order, having secured for itself an unparalleled regime for the recognition and enforcement of awards.<sup>111</sup> Discussion might focus on how much could usefully be adopted in ICA from the *ICSID* approach to arbitration. The issue is much more complicated where substantive predictability is concerned. The simple answer would appear to be, to accept a degree of uncertainty, as being in the nature of legal reasoning. Parties 65

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<sup>107</sup>Stewart Macaulay, *Non-Contractual Relations in Business a Preliminary Study*, in *American Sociological Review* (1963) pp. 55-67 on p. 61.

<sup>108</sup>Writing on EC law Hans-W. Micklitz, *Principles of Justice in Private Law within the European Union* pp. 259-258 at pp. 284.290, discusses the concept of "legitimate expectations" as having the potential to cover similar ground in a more constructive manner as being as yet without national connotations it may be easier to achieve/develop an internationally uniform definition and interpretation.

<sup>109</sup>Wilhelmsson, *Legal Polycentricity: Consequences of Pluralism in Law* (1995) pp.127-147 on p. 131.

<sup>110</sup>Secured as required by relevant conditions precedent and contractual guarantee.

<sup>111</sup>Under the *New York Convention 1958*, *UNCITRAL Model Law on Arbitration 1985* and arbitration laws that have been influenced by it.

should perhaps look more to a reasonable solution based on the application of the relevant rules and principles, as many parties do. With this in mind there is nothing to prevent the updating of the *UNIDROIT Principles* periodically in the light of experience of their use. The principals are analogous to the *US Restatement of Contract Law*, which is periodically updated, as are *ICC's Incoterms* and *Uniform Customs and Practices* and even the *FIDIC Red Book* on construction. Occasional updating would allow the *UNIDROIT Principles* to keep pace with developments and should not fall foul of the point raised by Jérôme Huet:

"However, if the *UNIDROIT Principles* were to be modified, corrected or improved they might also finally be rejected. This is because, even if one believes in the merits of "soft law" which is often more effective than written law, it remains that any law must be known and accepted. There must be sufficient time to get used to it. In other words it must be reasonably stable, and not be a 'changing law'".<sup>112</sup>

The commentaries could be updated with greater frequency (than the black letter text of the *UNIDROIT Principles*) in the light of experience. So doing should allow for adjustments in the text that assist in ensuring the more uniform application of the principles. The question however remains as to how such predictability might be improved for an a-national legal order.

### **3. The problem of predictability**

However parties contractually structure their relations there is always the question of the interpretation of their contract and any "law" on which it is based whether municipal, uniform law, or rules and principles. The question is how to achieve the uniform application of uniform "law" and legal texts. It is necessary to understand the nature of the problem in order to discuss the viability of and to seek ways of achieving: uniform international contract law; an autonomous contract order; and the autonomous contract (in the third sense used in this paper) as a possible solution. Note that much in this section is an overview related to problems regarding the unification of international law.<sup>113</sup> it examines the nature of the problem of achieving a uniform global "legal" platform on which to base the autonomous contract and the problems associated with attaining a high degree of predictability for international commerce. Consider the following passage by Ole Lando:

"I believe that in many arbitrators, as in many lawyers, there are two conflicting attitudes. One wishes the law to be a perfect and stringent system of rules under which the good lawyer can always find the true and only solution. To apply the law is the same as to apply the theorems of mathematics. This will produce certainty and predictability for the citizen.

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<sup>112</sup>Huet (1995) p. 278 and p. 281.

<sup>113</sup>For more detailed reading see Goode (1991) pp. 54-74. For an English law perspective on uniform statutes see F.A. Mann, *Uniform Statutes in English Law* in P.V. Baker (ed.) *The Law Quarterly Review* (London, 1983) Vol. 99 pp. 376-406.

The other attitude tells the arbitrator that absolute predictability is not attainable. Each legal system has many gaps and the most provident legislator cannot close them all. Nor can he prevent new gaps from arising when social conditions change. No legal system provides certain solutions to all problems. Even the best lawyer in the most highly-developed country is often in doubt. Besides, predictability is only one of several legal values. Rules which create certainty also tend to bring about rigidity. They do not consider special circumstances and changing conditions. The legal process is not and can never be a mere syllogism. It is above all an effort to reach the most fair and appropriate decision. In this process which is often inventive the arbitrator will weigh the possible solutions against each other and make his choice." <sup>114</sup> 71

Uniform "law" has the potential to reduce transaction costs and increase world-wide predictability in international commerce. However, the success of an autonomous uniform international regulatory order is tied to its ability to provide for the risk management needs of the business community and has proved to be one of the most challenging, fascinating, and enduring problems. The selection of uniform laws and uniform rules is not enough, as this does not ensure their uniform application, without which the purpose of establishing uniform law is largely defeated. Pragmatically the issue of predictability may be regarded as one of degree. "Uniformity of application" is closely related to the "predictability" of a legal text and although not identical, their use has at times been interchanged in this writing. What degree of uniformity is necessary or acceptable in the ordering of relations, and what trade-offs are there in achieving or attaining this predictability? There is clearly a tension between certainty and flexibility - "rules which create certainty also tend to bring about rigidity." 72

Some comments may be made on the decision-making process and discretion in relation to rules and principles. An attempt to base a legal system on rules alone would create gaps. Discretion is required, which is applied through principles of law, which are more holistic constraining legal standards. Ronald Dworkin<sup>115</sup> appears to distinguish them in two ways. **(i)** Whereas a rule is either applicable or not, principles do not operate in this all or nothing way, having a dimension and weight, they can apply to varying extents. **(ii)** Rules cannot conflict, either they apply or they do not, whereas principles may conflict with each other.<sup>116</sup> Some principles will be more pervasive than others.<sup>117</sup> Their relative importance may vary according to the circumstances in which they are to be applied. The work of the legal craftsman being to know when and how they are to be applied in a given factual situation, according to the different considerations and relationships between particular conflicting circumstances, and in so doing arrive at the "correct" legal solution. 73

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<sup>114</sup>Lando (1987) p. 111.

<sup>115</sup>Ronald Dworkin, *Laws Empire* (Harvard, 1986); *Hard Cases in Harvard Law Review* (1988). For a short summary see Wayne Morrison, *Jurisprudence: from the Greeks to post-modernism* (London, 1997) pp. 415-448.

<sup>116</sup>E.g. *pacta sunt servanda* and the narrow *clausula rebus sic stantibus*.

<sup>117</sup>E.g. *pacta sunt servanda* and good faith under the *UNIDROIT* and *EU Principles* and their interpretation clauses.

### 3.1. Predictability at a municipal level

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Complete predictability in a legal or regulatory regime is not attainable - this is a charge that can be levelled against all legal systems including those of sovereign states. At a national level the nature of legal reasoning and application of particular rules of law and principles is understood by its practitioners, and certified by supreme authority. Consider the comment of John Honnold:

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“Perfect clarity and predictability in law, as most of you know all too well, is not for this world ... Nevertheless, within a single domestic system it usually has been possible to keep uncertainty within tolerable limits so that nearly everyone prefers law to anarchy.”<sup>118</sup>

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This issue is important enough to merit special consideration. **(i)** Ignoring evidentiary problems, total predictability is unattainable even at a domestic level where we are confined to the workings of legal reasoning, without admitting the possibility of extraneous influences. The nature of the decision-making process, in this case, in the application of rules and principles with various sources of law for appropriate guidance<sup>119</sup> has all the hallmarks of a highly complex system, indeed in the nature of the chaoplexic.<sup>120</sup> The fact that decisions stem from deterministic processes does not mean jurists can predict all their meanderings. The application of simple deterministic axioms<sup>121</sup> to subtly differing sets of circumstance can lead to complex results that often cannot be predicted with certainty. Simple sets of principles and rules applied give rise to extremely complicated patterns that never quite repeat themselves. **(ii)** Even within a single national jurisdiction, whether or not they should, extraneous influences will play a role in the decision-making process. There will be differences in the basic ideologies and beliefs of the adjudicators, and these will sometimes have an effect on the decision-making process. The diversity of basic ideology, views and politics accepted within a democracy, together with the different social, economic and cultural backgrounds of adjudicators guarantee a difference in their basic assumptions that cannot be excluded from playing a role in their application of discretion and in the weighing of principles. Even Dworkin’s super-judge Hercules is not unaffected. In a democracy accepting the pluralism of views, there is no single set of background characteristics that may be used to define such a being.

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### **3.2. Uniformity at an international level**

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Absolute predictability does not exist at a purely domestic level. These problems are compounded in the context of the application of a uniform law by different judiciaries.

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”Even within a common set of rules and concepts, the habits of mind of lawyers in different legal systems, no doubt reinforced by rules of civil procedure, are too deeply ingrained to achieve practical uniformity in approach ... the instinct of civil lawyers is to turn to rules contained in the code, whereas English lawyers turn principally to the terms of the contract. The difference between legal systems about what constitutes a good argument, what has intellectual strength and integrity, will prove hard to abolish...”<sup>122</sup>

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Adjudicators (especially within national courts) are faced with formidable compounded complexity where attempting to apply a uniform law in a uniform manner, that will frequently prove difficult to satisfactorily overcome, even where assuming that there is no problem of access to information. These are a consequence of their different legal traditions, which have different technical rules of procedure, rely on different sources for authority and respect different reasoning as legally sound. (There are also additional extraneous influences resulting from their different cultures and ideologies).

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#### **3.2.1. The *UN Convention on the Law of Treaties***

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Where dealing with uniform law, the way of discovering the rights and duties of contracting parties is by its interpretation, and that of the parties’ contract. Herbert Briggs in *The Law of Nations; Cases, Documents and Notes*<sup>123</sup> on the interpretation of treaties states:

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”Practically all treatises on international law have sections on the so-called ‘canons of interpretation’ of treaties. Analysis reveals that the canons consist largely of the application of the principles of logic, equity, and common sense to the text of a treaty in an endeavour to discover its ‘clear’ or ‘natural’ meaning.”

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<sup>118</sup>Honnold (1992) p. 11.

<sup>119</sup>In the common law system based on the earlier authoritative legal reasoning of binding precedent and persuasive authority.

<sup>120</sup>Word coined by John Horgan in *The End of Science* (London, 1996) to cover the related fields of chaos and complexity. Chaos theory is a branch of mathematics and physics. Sometimes described as the edge of chaos, what is studied here is not randomness or disorder. Chaoplexity examines non-linear systems in which simple sets of deterministic rules can lead to highly complicated (detailed) results, which cannot be predicted accurately. A good introduction to the subject chaos is provided by James Gleick, *Chaos: Making a New Science* (New York, 1987).

<sup>121</sup>Such as those provided by Dworkin in explaining the application of rules and principles (to determine judicial outcomes).

<sup>122</sup>Hugh Collins, *European Private Law and Cultural Identity of States* in *European Review of Private Law* 3 (1995) pp. 353 at 356, 357-58, citation used by Christian Joerges, *The Process of European Integration and the ‘Denationalization’ of Private Law* in Børge Dahl & Ruth Nielsen (ed.), (1996) pp. 73-90, p. 82.

<sup>123</sup>Herbert Briggs, *The Law of Nations; Cases, Documents and Notes* (New York, 1952) on p. 897.

The *UN Convention on the Law of Treaties 1969* (in force 1980) is considered to be a codification of existing public international law with regard to the interpretation of treaties.<sup>124</sup> 85

The relevant articles on interpretation are Article 31 and 32. Article 31 instructs that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 instructing that reference be made to its *travaux préparatoires* and circumstances of its conclusion to confirm the meaning resulting through application of Article 31, and resolve any ambiguity, or that which is manifestly absurd or unreasonable. Article 31(2) takes into account agreements made by the parties as to its interpretation on the conclusion of the treaty. Article 31(3)(a) and (b) instruct the taking into account of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, including that which is evidenced by a practice in its application by the parties; Article 31(3)(c) makes any relevant rules of international law applicable in the relations between the parties; Article 31(4) states that the application of a special meaning shall be given to a term if it is established that the parties so intended. 86

### **3.2.2. Interpretation clauses within uniform laws**

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"The more successful the activities of *UNCITRAL*,<sup>125</sup> "the more it extends its activities in the field of international trade relations, the more necessary the uniform interpretation of the uniform rules will be." <sup>126</sup> 88

Modern uniform laws and principles increasingly contain their own interpretation clauses, which increasingly provide for the taking into account of their international character, and the need to promote uniformity in their application. <sup>127</sup> The *CISG* provision on interpretation - Article 7: 89

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. 90

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on 91

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<sup>124</sup>Lord Diplock in *Fothergill v Monarch Airlines* [1981], A.C. 251, 282 or see

「[http://itl.irv.uit.no/trade\\_law/papers/England.Fothergill.v.Monarch.Airlines.HL.1980.html#ecs85](http://itl.irv.uit.no/trade_law/papers/England.Fothergill.v.Monarch.Airlines.HL.1980.html#ecs85)」. Also Mann (London, 1983) at p. 379.

<sup>125</sup>And other international organisations such as *UNIDROIT* - footnote added.

<sup>126</sup>Réczei (1992), p. 6.

<sup>127</sup>Examples: *The United Nations Convention on Contracts for the International Sale of Goods* 1980, Article 7; *The UNIDROIT Principles of International Commercial Contracts* 1994, Article 1.6; *The Principles of European Contract Law* 1998 Article 1.106; *The United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules)* 1978, Article 3; *The United Nations Convention on the Limitation Period in the International Sale of Goods* 1974 and 1978, Article 7; *UN Model Law on Electronic Commerce* 1996, Article 3; *UNIDROIT Convention on International Factoring* 1988, Article 4; *UNIDROIT Convention on International Financial Leasing* 1988 Article 6; also *EC Convention on the Law Applicable to Contractual Obligations* 1980, Article 18.

which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The *UNIDROIT Principles* provision on the "interpretation and supplementation of the Principles" - Article 1.6: 92

(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application. 93

(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles. 94

Most scholarly writing to date has centred on the *CISG*, though much of the discussion there holds true generally for all uniform law. It is instructive to read Honnold's text *Uniform Words and Uniform Application*,<sup>128</sup> prepared with input from 16 professors to get an idea of the dimension of the problem faced, as seen through the eyes of scholars representing each of the major legal systems. The professors agreed that to achieve the uniform application of texts it was necessary to look at writings in other jurisdictions, and to look beyond the traditional national sources and methods of interpretation. They also agreed that this was a Convention duty imposed upon Contracting States.<sup>129</sup> Relevant sources were identified as: **(a)** The legislative history. **(b)** Rulings world-wide. **(c)** The official and other commentaries. **(d)** Scholarly writings. However, perhaps not surprisingly, despite such forward thinking as to how uniformity might be achieved, success so far has been limited and a number of questions have been raised. Where a particularly novel solution is employed by a court, is it to be followed elsewhere? Where a solution thought to be inappropriate is adopted, is this to be followed, must it be distinguished, or can it simply be ignored? If there is much text generated on a particular uniform law, how much is it necessary to cover, and what should be approached first and what relative weight should be given the different sources? Courts will still have a tendency to look first to domestic decisions and writings. In one sense ICA with an international arbitral panel provides a better balance in having a more international perspective as to how the uniform law should be applied. This will allow arbitrators to reach a reasonable conclusion in the circumstances, taking into account their multi-national perspective of the uniform law. Such a method of reaching a reasonable decision, though more flexible, has its measure of predictability where the approach is understood. It may be what a significant proportion of the international business community that chooses ICA are after. A distinction is to be made between world-wide predictability in application, and predictability on a national scale. Where national law is applied by its national court "A" that looks first to its domestic writings, it may have a clear - predictable manner of application, even if not in the spirit of the Convention. Another nation "B", may apply the uniform law in a different way 95

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<sup>128</sup>Honnold, *Uniform words and uniform applications. Uniform Words and Uniform Application: The 1980 Sales Convention and International Juridical Practice in Einheitliches Kaufrecht und nationales Obligationenrecht*. Referate Diskussionen der Fachtagung. am 16/17-2-1987, hrsg. von Peter Schlechtriem (Baden-Baden, 1987) pp. 115-147.

<sup>129</sup>Under Article 7. See also footnote 126.

that is equally predictable, being perfectly consistent internally. This however defeats much of the purpose of the uniform law. The court of nation "B", applying the national law of state "A", is much more likely to take seriously the treaty obligation undertaken by that state,<sup>130</sup> and much the same is the case where a nation fails in its Convention obligations as to its implementation of a uniform law.<sup>131</sup> The question both as regards the adoption of uniform substantive law, and attempting to achieve its uniform application is not so much whether or not a country has a perfectly good and modern contract law tradition, and should definitely not be whether it is felt that the effort could be improved upon. The question should be how far is it possible to end up with a common understanding and application of a uniform text, so as to achieve a uniform and predictable law, at as international a level as possible, and thereby facilitate international commerce by simplifying it.

Among the solutions levelled at the problem is the greater dissemination of information, including making use of information technology to ensure that writings are commonly known world-wide. Efforts have been started by *UNCITRAL*, *UNIDROIT* and some academic institutions.<sup>132</sup> But assuming successful updating and dissemination of relevant international texts, if much writing is generated, whether in the form of decisions or literature, there is an information management challenge. What does one look at, if one has to be selective, and in any event, what weight should be given to any given legal writing?<sup>133</sup> And according to whose legal methodology and practice should they be applied? And the question, is this really the best way to promote the development of uniform law?

## 4. Alternative solutions

Whoever is able to provide the business community with the solutions it is seeking, in an acceptable way, has a reasonable chance of being subscribed to. Keep in mind: **(i)** the business community's interest in greater efficiency and predictability in the uniform and if possible transnational application of "law" and uniform texts; **(ii)** the business community's lack of focus on national law as a goal *per se*, increased autonomy from state law being acceptable and in fact desirable if successfully able to further the mentioned goals, and; **(iii)** the business community's ability through freedom of contract to take advantage of what is made available to them.

However a question does arise as to whether the ability to create alternative solutions

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<sup>130</sup>To take account of its international nature and the need to promote uniformity in international trade.

<sup>131</sup>For an example based on the probable international treatment of Norway's singular and controversial transformation of the *CISG* see Viggo Hagstrøm, *Kjøpsrettskonvensjon, Norsk Kjøpslov og Internasjonal Rettsenhet* in Tidsskrift for Rettsvitenskap (1995) pp. 561-588 on p. 569 and Joseph Lookofsky, *Understanding the CISG in Scandinavia* (Copenhagen, 1996) on p. 5, 13, and 105. Compare Kai Krüger's argument in *Komparativ rettsmetode - observasjoner vedrørende prinsipper for rettsanvendelse i Europa nord og sør - illustrert ved tilfellet Norge og Italia* in Jussens Venner (1996) pp. 281-312 on p. 312.

<sup>132</sup>For further information on such projects and information sources, see ITL the *International Trade Law Monitor* by Amisshah at [http://itl.irv.uit.no/trade\\_law/](http://itl.irv.uit.no/trade_law/)

<sup>133</sup>Coming as they do from different: states; genre of writing; sources and levels of authority.

and even an independent *lex* is or should be without limits. The present author is of the opinion that the duties of good faith and fair dealing and loyalty (or an acceptable equivalent) should be a necessary part of any attempt at the self-legislation or institutional legislation of any contract regime that is based on "rules and principles" (rather than a national legal order). If absent a requirement for them should be imposed by mandatory international law. As discussed in section 2.3.4 such protective provisions are to be found within the *UNIDROIT* and *EU Contract Principles* on good faith and fair dealing, and loyalty.

#### **4.1. Independent supra-national interpretation tribunals**

A radical approach has been proposed,<sup>134</sup> to have states accept an independent supra-national interpretation tribunal, to whom questions of an international commercial character concerning a uniform law would be referred for clarification, and whose rulings would be followed under a *droit commune*.

"[O]nly a fundamental methodological change would have a chance to reduce the gap between the slow pace of international legislation and the requirements of the modern world, especially in the field of international trade. He suggested that States should agree, by way of a general Convention, to accept rules established by the Commission, or under its auspices as a body of common law (*droit commune*)." <sup>135</sup>

This suggestion was advanced on more than one occasion at early sessions of *UNCITRAL* where it drew respectful attention but little enthusiastic support.<sup>136</sup> A mitigation might be to give such a tribunal only persuasive authority.<sup>137</sup>

"As Professor Don King also indicated, a need may soon be felt for the establishment of a global court of commerce initially for those cases where resort has been made in arbitration to a national *lex mercatoria* or to general principles of contract law. At this Congress, we already heard a suggestion of Professor Sohn for the establishment of an international tribunal to interpret uniform texts."<sup>138</sup>

To date the political will backed by the financing for either such organ has not been

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<sup>134</sup> *UNCITRAL* Secretariat (1992) p. 253. Proposed by David (France) at the second *UNCITRAL* Congress and on later occasions put forward by Farnsworth (USA). For references on interpretation of the *CISG* by a supranational committee of experts or council of "wise men" see Bonell, *Proposal for the Establishment of a Permanent Editorial Board for the Vienna Sales Convention*, in *International Uniform Law in Practice/Le droit uniforme international dans la pratique [Acts and Proceedings of the 3<sup>rd</sup> Congress on Private Law held by the International Institute for the Unification of Private law (Rome 7-10 September 1987)]*, (New York, 1988) pp. 241-244; and Drobniq, *Observations in Uniform Law in Practice*, *supra.* at p. 306.

<sup>135</sup> *UNCITRAL* Secretariat, id.

<sup>136</sup> *UNCITRAL* Secretariat, id.

<sup>137</sup> *UNCITRAL* Secretariat, id. p. 258.

<sup>138</sup> Sono (1992) p. 251. The suggestion by Louis Sohn found in, *Uniform laws require uniform interpretation: proposals for an international tribunal to interpret uniform legal texts* (1992) in *25<sup>th</sup> UNCITRAL Congress*, pp. 50-54.

forthcoming. In 1992 the *UNCITRAL* Secretariat's conclusion was that "probably the time still has not yet come".<sup>139</sup>

## **4.2. Authoritative reviews as co-ordinating guides**

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A less radical possibility is that there might be some body charged with (or that charges itself with) the task of reviewing important developments in relation to uniform texts over the course of time, and giving their authoritative, or persuasive opinion on the issue as to the right course to be taken in future. This might be an international body of scholars formed by the institution concerned, or in some other manner acceptable to legal counsel of the international business community, that reviews the decisions and writings made over the year and makes recommendations as to the future course that should be taken by others in the interpretation of the text. This could alternatively be pursued as an international interdisciplinary research effort (involving legal academics and practitioners, economists, business schools, and representatives of the business community) that is co-ordinated by a central institution.

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If pursued through the original formulating agency, this could be done as a periodic update to a relevant commentary such as that of the *UNIDROIT Principles*, which could be updated in light of the experience that has been gained from the application of the text. Again this would be able to take advantage of the opportunities offered by information technology. Alternatively an independent authoritative guide on uniform application could be published annually (as a complete text). However organised, and whether by integral commentary update, or independent guide, provided the publication is reputable and acceptable to the business community it has a number of attractive features. The parties in their contract could specifically refer to the commentary or guide, together with the black letter text, as the primary source of regulation and means of interpretation of the uniform "law" in dispute resolution.

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## **4.3. Limiting of sources for interpretation**

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This suggests the possibility of another approach to the problem of unpredictability of uniform application. Given the mentioned problems, serious consideration should be given to the fact that improved predictability and efficiency may be better achieved by limiting of sources to be applied for the purpose of interpretation. What might such an alternative solution be? In attempting to achieve the uniform transnational application of a uniform text it is most efficient to look for answers as far as possible within the text itself, and if there is one, in the commentary or guide. An argument may be made for leaving the rest largely to the discretion of arbitrators. Part of the appeal of the *UNIDROIT Principles* is that they may be regarded (at the parties' election) as largely self-contained and that they allow for the arrival at efficient reasonable resolutions of disputes. The parties may wish to rely on the substantive text and accompanying commentary or guide to the greatest possible extent, and to restrict external sources

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<sup>139</sup> *UNCITRAL* Secretariat, id.

for their interpretation in the interests of efficiency - achieving this "at the stroke of a pen". This to the common law lawyer is unfamiliar territory.<sup>140</sup> Predictability in most circumstances may be increased by reduced complexity in knowing where to look, the parties having a uniform, clear and concise idea of what there is to be aware of on the issue. Transaction cost should be reduced as a result, in knowing that there is a single set of transnational uniform rules and principles, and a limited amount of text to be ploughed through. This would represent the further rise of pragmatism over legal technicalities.

Robert Hillman writing on Article 7 of the CISG (contemporaneously with the writing and presentation of this paper) makes the following observations, that are of general relevance to harmonisation efforts, and with which the present author is in full agreement as suggesting the sensible approach and way forward: 111

"Professor Honnold suggests that decisions construing the Convention and secondary analysis will also clarify the significance of focusing on the "international character" of the Convention. In fact, most authorities have called for the publication of cases construing the Convention to increase the potential for its uniform application. The problem with this approach is that a high reliance on cases may create the impression that they are the primary source of international sales law and that the Convention's principles are inadequate. Such an environment may encourage tribunals not only to take their eyes off the principles but to engage in distinguishing, overruling, and even manipulating precedent. Lawyers from common-law states may feel comfortable with these activities, but they do not offer much promise if the goal is to achieve uniformity and certainty in the international sales law. Perhaps most worrisome, de-emphasizing principles may encourage tribunals facilely to turn to domestic cases, expressly or implicitly, when interpreting and gap-filling under Article 7. Analysts should therefore urge tribunals to try to find answers within the four corners of the Convention and to look to cases only in the unusual case where the Convention does not supply adequate guidance."<sup>141</sup> 112

In addition to original texts, international supra-national bodies or acceptable third parties might produce works on interpretation which, if not overly voluminous, and if they become generally known and recognised, could provide a particularly efficient way of reducing transaction costs and achieving sufficient predictability. Relying upon the reasonable resolution of the dispute by an arbitrator directed to use these specific sources as authority for reaching the decision. 113

#### 4.4. Information technology solutions - transnational harmonising information and knowledge-bases

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There can be no doubt that the information potential of information technology will play a vital role in this process. As a tool what is most valuable is its potential to make instantly available large volumes of information if required (from anywhere on the globe). At the most basic level tremendous potential is provided for comparative study of developments around the world with regard to uniform law texts - academic writings, court decisions. However, its most exciting potential is realised when designed for transnational harmonisation. There is every possibility to adopt the approaches discussed in section 4.1-4.3 combined with an educational aspect (section 4.6). One possibility is the development of specialist sites dedicated to particular uniform law texts, that attempt to catalogue and manage information regarding international developments, and in so doing implicitly or explicitly recommend and provide a guiding hand as to how it should be interpreted and applied. Such "databases" dedicated to the task of international harmonisation would serve more than "data". Such use of information technology appears over time to offer the best chance of altering the orientation and focus of the world's legal communities in the way necessary to achieve the internationally uniform application of uniform texts and more generally to achieve greater harmonisation of international trade law.

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#### 4.5. E-contract solutions?

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The electronic environment provides possibilities for designing standard contracts that are virtually self contained and self-governing. The contract together with an entire *Lex* can easily be stored on electronic media - illustrated by the possibility of storing relevant portions of such databases as *Lexis*, *Westlaw*, or *Lovdata* on "disk". The parties may confine themselves to their electronic contract, which contains or incorporates all sources of regulation and their interpretation in a convenient one-stop location, including *inter alia*: all relevant conventions, principles, rules and standard terms on which it is based, together with relevant commentaries and contractually authorised sources of authority (copyright problems apart). Having relevant material easily available from a single source is of some interest, however, the idea in itself is only of marginally greater interest than what is made possible by the use of one of the large commercial law databases.<sup>142</sup> The real value of such a concept arises where the electronic contract (as a one-stop solution) is designed to meet the "objective" of the business community for a relatively straightforward transnational and uniform *Lex*, (see Section 2.4) that is of a limited textual dimension, (see Section 4 and 4.1 - 4.4).

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<sup>140</sup>Which is not the same as to suggest that the idea would be new. As Goode points out "Truly there is nothing new under the sun. Nearly two thousand years have elapsed since Cicero proclaimed the virtues of legal harmonisation", see Goode (1991) p. 54.

<sup>141</sup>Robert Hillman, *CISG Cross Reference and Editorial Analysis: Article 7* in *CISG W3 Database*, Institute of International Commercial Law, Pace University School of Law (New York, September 1997)

┌ <http://www.cisg.law.pace.edu/cisg/text/hillman.html> ┘

<sup>142</sup>It should be noted that whilst electronic media makes such a solution more practicable and attractive, the same thing is achieved through the age-old tradition of incorporation by reference.

It was suggested that limiting the sources for the interpretation of uniform texts might be a better way to achieve uniformity than seeking to know and distinguish all that has been decided on point internationally.

In the electronic contract further steps could be taken in the design of the contract so as to limit the necessity to look elsewhere. Several issues that might not usually be agreed in advance could be covered, including procedural ones, such as the manner and amount of discovery in the event of a dispute. In creating an environment for the parties, it could also be used as a means of broaching some differences between civil law and common law approaches. There are numerous other possibilities, the contract could for example become part of a standard software utility program (being incorporated into a standard model regulatory order, based for example on the structure outlined within this text). Such a contract, even if agreed at a specific point in time, is likely to be more dynamic. It could guide the parties during contractual negotiations as to some of the more important factors to consider. On having entered a contract it could assist the parties in determining the nature and timing of their relative obligations. For longer term and more complex agreements, part of the contract directed towards the parties goals could be designed to have interactive logistical functions. It could make use of live data from specified sources - that is continually updated. "appendices" to the electronic contract could record submitted logs of performances of the parties. The parties may be guided to use electronic communication for third party conciliation and mediation, before the more serious step of adversarial dispute resolution through ICA. 118

Beyond this the imagination is the only limitation as to what might technically be done. Drawing back to the more mundane, but essential in today's world, the standard electronic contract could have country specific profiles that might include such details as the status of electronic documents and signatures, and relevant country specific details and peculiarities. 119

A standard electronic "autonomous contract" could provide greater control, and further simplify the parties' contractual environment. Given that this would be the result of the parties' contractual freedom there is no need to suggest that this would be the only or best solution, only that it should be workable, and should have potential if pursued. 120

**Note on the validity of electronic documents and signatures** 121

"Contract law is one of Rome's most important contributions to legal history. Yet, Watson (The Evolution of Law) writes, it is *prima facie* astonishing that the Romans never developed a written contract that would take its place by the side of *stipulatio* as a second contract form. Stipulation required the presence of both parties and was oral. A written contract could have been negotiated at a distance and would have been easier to prove. The Romans knew that written contracts had been standard and useful in classical Athens. But the idea of *stipulatio* as the contract form had become so ingrained in the Roman legal mind that the option of using an alternative form simply was not adopted."<sup>143</sup> 122

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<sup>143</sup>John Robert Cassidy Mahwah, *An Undergraduate Course in Comparative Legal Studies* in

For most purposes but not all and in most jurisdictions though not all, contracts may be entered into without regard as to form: orally, in writing, or by conduct. It being possible, where necessary, to adduce evidence as to the existence and contents of an agreement. In some cases however, an agreement must be in writing, as for example in the case of an arbitration agreement for its recognition and enforcement under the *New York Convention*.<sup>144</sup> Needless to say, for such purposes, acceptance of the validity of electronic documents is essential for truly electronic contracting and commerce. For electronic contracting to be borderless and effective globally such acceptance of validity should be world-wide. Some states including some "modern" European ones do not recognise the validity of electronic documents or electronic signatures, however well authenticated and free from the possibility of tampering they may be.<sup>145</sup> *The UNCITRAL Model Law on Electronic Commerce 1996* addresses these and other issues related to electronic commerce. In the interest of a global rather than regional solutions, it makes sense that states give electronic commerce the support it needs by adopting the *Model Law* or by enacting laws that are in conformity with it. The guiding principle, here to be applied to writing on paper or electronically, that is found in the *UN Model Law on Electronic Commerce*, is suggested by the *US Framework for Global Electronic Commerce* (1997):

"rules should be technology-neutral (i.e., the rules should neither require nor assume a particular technology) and forward looking (i.e., the rules should not hinder the use or development of technologies in the future)"<sup>146</sup>

This in a sense is a rejoinder to the Roman favouring of oral over written contracts, which today sounds backward, but in fact is no less so than the blanket non-acceptance of electronic writing and signatures regardless of suitable authentication and verification possibilities. Beyond these observations on the need for electronic documents to be held valid for electronic commerce, the discussion in this paper is generic to international commerce. Under the current diverse national orders, however, it is necessary to know the requirements of individual state laws to ensure the validity of electronic contracts where a contract is required to be in writing, and if in doubt to resort to paper.

It may be observed that the business counterparts are least cognisant of location in transactions that can be carried out entirely within the electronic world, such as trade in intangibles, money transfers, services, many areas on intellectual property; whereas trade in tangibles, including goods and most types of investment include a physical

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*Rechtstheorie Zeitschrift für Logik, Methodenlehre Kybernetik und Soziologie des Rechts, Beiheft 12 Monistic or Pluralistic Legal Culture?* Ed. Peter Sack, Carl Wellman, Mitsukunk Yasaki (Berlin, 1987) pp. 200-207 on p. 205. See also footnote 3 of this text.

<sup>144</sup> *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 1958*, Article II. The convention is available off ITL.

<sup>145</sup> Noted in the *European Initiative on Electronic Commerce* (1997) §45. "A number of Member States' rules governing the formation and the performance of contracts are not appropriate for an electronic commerce environment and are generating uncertainties relating to the validity and enforceability of electronic contracts (for example the requirements for written documents, for hand written signatures, or the rules of evidence that do not take into account electronic documents)..."

┌ <http://www.cordis.lu/esprit/src/ecomcomx.htm> ┘

<sup>146</sup> *US Framework for Global Electronic Commerce* (1997) ┌ <http://www.whitehouse.gov/WH/New/Commerce/> ┘

(off-line) component.

#### **4.6. Education**

"... one should create awareness about the fact that an international contract or transaction is not naturally rooted in one particular domestic law, and that its international specifics are best catered for in a uniform law."<sup>147</sup>

Within the framework described in this section, education and sensitivity to the needs of the business community by the legal profession and academia would appear to be a necessary part of any solution. However, while the business community seeks and requires greater uniformity in their business relations, there has paradoxically, at a national level, been a trend towards a nationalisation of contract law, and a regionalisation of business practice.<sup>148</sup> As Pierre Lalive points out quoting Roy Goode: "The undeniable fact is that, in most countries today, the part played in a student's *curriculum* by what I would call 'non-national' subjects (ie public and private international law, comparative law, international trade law and the like) has steadily diminished over the years, paradoxically, at the very time when everyone can observe and should know that the world is becoming more and more international."<sup>149</sup> The disparity grows worse today. Legal education has become more local as a result of the considerable domestic and regional legislation passed. Textbooks and studies, to cope with the increased material, have had to concentrate on taking a domestic and regional approach with little space to spare for an international perspective, or for comparative study.<sup>150</sup> This is regarded by many as unfortunate, especially given the long experience with fruitful international communication in the area of international trade law.<sup>151</sup> Finding means to transcend national boundaries is also to continue in the tradition of seeking the means to break down barriers to legal communication and understanding. In 1966, a time when there were greater differences in the legal systems of states comprising the world economy Clive Schmitthoff was able to comment that:

"22. The similarity of the law of international trade transcends the division of the world between countries of free enterprise and countries of centrally planned economy, and between the legal families of the civil law of Roman inspiration and the common law of English tradition. As a Polish scholar observed, "the law of external trade of the countries of planned economy does not differ in its fundamental principles from the law of external trade of other countries, such as e.g., Austria or Switzerland. Consequently, international trade law specialists of all countries have found without difficulty that they speak a 'common language'

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<sup>147</sup> UNCITRAL Secretariat (1992) p. 255.

<sup>148</sup> Schanze (1996) p. 62.

<sup>149</sup> Lalive, *International Arbitration - Teaching and Research* in Julian Lew (ed.), *Contemporary Problems in International Arbitration* (1987) at p. 18, quoting statement by Goode.

<sup>150</sup> Regionalisation may be a step towards internationalisation, but is not the same thing, and the subsequent step does not necessarily follow.

<sup>151</sup> See Lalive, id. reference to Goode and the Institute of International Law, Teaching of International Law, 1987 Committee chaired by Zourek.

23. The reason for this universal similarity of the law of international trade is that this branch of law is based on three fundamental propositions: first, that the parties are free, subject to limitations imposed by the national laws, to contract on whatever terms they are able to agree (principle of the autonomy of the parties' will); secondly, that once the parties have entered into a contract, that contract must be faithfully fulfilled ( *pacta sunt servanda* ) and only in very exceptional circumstances does the law excuse a party from performing his obligations, viz., if *force majeure* or frustration can be established; and, thirdly that arbitration is widely used in international trade for the settlement of disputes, and the awards of arbitration tribunals command far-reaching international recognition and are often capable of enforcement abroad."<sup>152</sup> 131

As suggested in the passage quoted earlier by Lalive and Goode and underlined by the discussion throughout this paper, an increased attention to international commercial law and arbitration is merited in the law student's curriculum. Efforts by a number of institutions aimed at enriching student awareness, education and experience in this respect, through the arrangement of such international inter-collegiate activities as arbitration moots and essay competitions are commendable. Equally so are various international commercial law oriented Internet efforts that are of value to researchers and practitioners alike.<sup>153</sup> 132

## **5. Summary**

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This paper has discussed a number of interrelationships, themes, problems and possible solutions that arise from its premises, perspective, and framework, as set out in summary form in the introduction. It highlights the need for lawyers world-wide to foster a genuine international approach to their thinking, method, practice and solutions with regard to international commercial contracting and law. The conduct of business world-wide is increasingly transnational. It demands that the legal community keep abreast of and cater for these needs. Efforts to find solutions to should similarly focus on a transnational and harmonising direction. The discussion in this paper concentrates on various aspects that are raised in consequence of this with regard to: the legal framework available for the international business community; problems related to further transnationalisation; and some possible solutions. It is not, however, a mere matter of choice for the legal community to decide whether or not to take an interest in this increasingly evident phenomena. The international business community has the power to find ways to meet their needs through the expression of their choice in the exercise of their contractual freedom. In using this power they exert influence on the conduct of the legal community in a manner which ensures that these needs are eventually satisfied. The business community subscribes to the legal framework and services provided by those sensitive to their needs. Those less sensitive are marginalised and 134

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<sup>152</sup>Report of the Secretary-General of the United Nations, *Progressive Development of the Law of International Trade* (1966). Report prepared for the UN by C. Schmitthoff.

<sup>153</sup>The Institute of International Commercial Law, Pace University School of Law, is engaged in the various activities mentioned in this paragraph with regard to the *CISG* .

eventually persuaded of the need to adapt. The results that would be achieved by absolute freedom of contract, however, are not necessarily the most ideal for the business community as a whole. As such it is necessary to be mindful of the limitations of contractual freedom and legislators should give recognition to this need as well.

## 6. Endnote

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\* Lectures on private law aspects of international trade at the Faculty of Law, University of Tromsø, Norway, and created *ITL - International Trade Law Monitor* [http://itl.irv.uit.no/trade\\_law/](http://itl.irv.uit.no/trade_law/) or <http://tradelaw.net/> off which a large number of the (black letter) legal texts referred to in this paper are available. 136

Thanks are due to Albert Kritzer, the Executive Secretary, Institute of International Commercial Law, Pace University School of Law and Petri Keskitalo, Research Fellow, Faculty of Law, University of Tromsø, for reading and commenting on this text in its preparatory stages. The views expressed here and any remaining errors are my sole responsibility. 137

URLs are occasionally provided as references. These are subject to change without notice. 138

Endnotes