THE UNIDROIT PRINCIPLES ON INTERNATIONAL COMMERCIAL CONTRACTS: AN APPROPRIATE TOOL TO FILL THE GAPS IN THE CISG?

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Abstract

*The Convention on the International Sale of Goods ("**CISG**") is widely used as the substantive law in international commercial contracts. Its relevance today is only increasing, due to the growing incidence of commercial transactions in the modern world. It found its genesis in the need to promote uniformity in sale of goods transactions across the world, a sentiment which has been expressed in its Article 7. However, like all treaties, it was the result of multilateral negotiations and saw heavy disagreements among those negotiating it. The consequent consensus was by way of a compromise, and there remained gaps and ambiguities in the treaty's text. This essay examines the viability of using the UNIDROIT Principles of International Commercial Contracts to fill these gaps. In the first section, the author introduces the Convention and the Principles,*

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and their immense but distinct utilities. In the second section, the author has compared the two, highlighting their similarities and differences, with a view to examine whether it makes sense to approach gap-filling in the Convention using the Principles. In the third section, a legal justification for using the Principles in this manner is looked for. The fourth section comprises two examples of problem areas within the CISG which could be effectively supplemented using the Principles. In the fifth section, the author has examined the various approaches of courts and tribunals while using the Principles for gap-filling, and critically determined which of these approaches is optimum. The last section concludes.

I. INTRODUCTION

The United Nations Convention on International Sale of Goods ("**CISG**" or "**Convention**") found its genesis in 1980, with a goal to promote the efficiency of international commercial transactions and the development of international trade.[1] It has been widely applied as the substantive law in a plethora of arbitral proceedings and has been extremely successful in the international unification of private law.[2] However, on account of the CISG being a multilateral treaty entered into by sovereign states - all of which had different socio-economic

[1]United Nations Convention on Contracts for the International Sale of Goods, Apr. 1, 1980, 1489 U.N.T.S. 3, pmbl [Hereinafter "*CISG*"].

[2]PETER HUBER & ALASTAIR MULLIS, THE CISG 1 (1 ed. Sellier, European Law Publishers 2007).

structures and legal traditions - some issues were left out at the very outset from the scope of the Convention.[3] A number of other issues evoked conflicting views at the time of negotiations, and the logjam could only be overcome through compromise solutions, which in effect left those issues undecided.[4] This inevitably created gaps in the interpretation of the CISG. Increasingly, and controversially, courts and tribunals have sought to employ the UNIDROIT Principles of International Commercial Contracts ("**UNIDROIT Principles**" or "**Principles**") for the purpose of gap-filling vis-à-vis the CISG.

The Principles, brought into existence in 1994 by the International Institute for the Unification of Private Law, were drafted with lofty goals. Their goal "is to establish a balanced set of rules designed 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."[5] Self-described as 'general', these Principles may be applied to a broad range of contract law-related issues.[6] They seek to present the best solutions to problems in the field of international commercial contracts, even if these may not be the generally adopted solutions to such problems.[7] Therefore, they do not merely retell the law found in other Conventions or legal systems; they do more than that by being an aspirational[8] set of rules.

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[3]M.J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law*, 36 REV. JUR. THEMIS 340 (2002).
[4]*Id.*, at 341.
[5]*International Institute for the Unification of Private Law, Principles of International Commercial Contracts (1994)* [Hereinafter "UNIDROIT PRINCIPLES"], UNIDROITHttps://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.
[6]UNIDROIT PRINCIPLES, pmbl.
[7]*Id.*
[8]Klaus Berger, *The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Contract Law*, 28 LAW AND POLICY IN INTERNATIONAL BUSINESS 946 (1997).

According to the UNCITRAL website, as of February, 89 countries have adopted this Convention, the noteworthy ones being major economies like the US, China, Canada, France, Germany, Russia, Brazil, Italy, Spain, Australia and the Netherlands.[9] The relevance and utility of these principles in the present time can be denied only by a few. They are a neutral, preferred substantive law in cases involving parties of different nationalities entering into sale of goods transactions with each other.

In a 2018 decision, an American circuit court observed that the interpretation of an international sale of goods contract should be governed by the CISG, not by New York law.[10] There cannot be found a more emphatic exaltation of this Convention in recent times than this example, where a domestic court was willing to forego the application of even its own law in favour of the CISG. A Convention as prolifically brought into relevance (due to how increasingly globalised the world has become) as the CISG is necessarily required to be interpreted most accurately and efficiently, and finding this manner is the author's endeavour.

II. A COMPARISON BETWEEN THE CISG AND THE UNIDROIT PRINCIPLES

It is imperative to note the differences between the CISG and the UNIDROIT Principles because this sheds light on the utility and flexibility of the Principles. *First,* the drafters of the Principles were legal scholars from around the world, whose opinions did not represent any state in particular. For this reason, the opinions of the

[9]UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, https://uncitral.un.org/.

[10]Transmar Commodity Group Ltd. v. Cooperativa Agraria Industrial Naranjillo Ltda., No. 16-3532-cv (2d Cir.: 2018).

drafters of the Principles were not blinkered by national considerations or the need to reach a compromise, thus obviating the need for diplomatic solutions. This led to inclusion of fairer provisions, such as those related to gross disparity[11] and hardship,[12] which could not find a place in the CISG due to deep-rooted conflicts of opinion. Another consequence flowing from the Principles not having the official imprimatur of an international treaty was that they could be amended more easily, to deal with new problems arising after the first edition of the Principles. They were last amended in 2016 and are best adapted to suit the needs of parties in international commercial contracts. In contrast, the CISG was drafted by official representatives of states, who could not concur on a number of issues. For the very same reason, amending the CISG is difficult.

Second, the Principles are soft law, and cannot be enforced through public force.[13] They shall only be applied if they are expressly incorporated as the substantive law governing the contract, or if the Principles are seen amenable to fill gaps found in the regulation of the contract by the arbitrator or the judge. In contrast, the CISG is an international Convention which binds contracting states.

Last, the UNIDROIT Principles have a broader scope and deal with all kinds of transactions arising out of international commercial contracts, while the CISG specifically deals with contracts for the international sale of goods.

There are notable similarities between the CISG and the UNIDROIT Principles as well. By and large, the two are complements of each other. Both instruments put stock in the principles of good

[11]UNIDROIT PRINCIPLES, Art 3.10.
[12]UNIDROIT PRINCIPLES, arts 6.2.1-.3.
[13]Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 284 (2010).

faith,[14]party autonomy,[15] and freedom of form.[16] The concept of communication becoming effective when it reaches the intended recipient is also found in both instruments.[17] Other points of convergence include survival of a contract against unilateral and premature termination[18] and the bar on the contradiction of a representation that has been relied on by another party.[19]

III. THE SEARCH FOR A LEGAL JUSTIFICATION TO FILL THE GAPS IN THE CISG WITH THE UNIDROIT PRINCIPLES: EXPERT OPINIONS AND THE AUTHOR'S SUGGESTIONS

The legality of using the UNIDROIT Principles to fill the gaps in the CISG shall be subsequently discussed. However, at this juncture, it is vital to highlight the numerous logical justifications of doing so. First, it is amply clear that the CISG is, in places, fragmentary. Its supplementation using the Principles will only bolster fairness, equity and consistency in the application of the Convention to international commercial dispute resolution. Second, in preventing the tribunal or court from taking recourse to domestic law for gap-filling, the use of the UNIDROIT Principles will level the playing field for parties, who will be equally familiar with these Principles. This would prevent an unfair advantage accruing to the party whose domestic laws would otherwise be applied. Third, gap-filling using the Principles will help further the mandate of Article 7(1) of the CISG, which provides that

[14]CISG, Art 7(1); UNIDROIT PRINCIPLES, art 1.7(1).
[15]CISG, art 6; UNIDROIT PRINCIPLES, arts 1.1, 1.5.
[16]CISG, arts 11, 29(1);UNIDROIT PRINCIPLES, art 1.2.
[17]CISG, art 24; UNIDROIT PRINCIPLES, art 1.9.
[18]CISG, arts 19(2), 25-26, 34, 37, 49(2), 51(1), 64(2), 71-72; UNIDROIT PRINCIPLES, arts 2.11(2), 2.12, 2.14, 2.22, 3.3, 5.7, 6.2.1-.3.
[19]CISG, arts 16(2), 29(2); UNIDROIT PRINCIPLES, arts 2.4(2).

in the Convention's interpretation, regard must be had to its 'international character' and 'the need to promote uniformity in its application'. As mentioned initially, the UNIDROIT Principles are balanced and may be used throughout the world since they are not heavily influenced by any particular legal tradition. Their application has an obvious advantage over that of the domestic laws of states since the latter would be detrimental to applying the CISG in a uniform and consistent manner. Besides, Article 7(2) permits recourse to domestic law only in cases where no other suitable alternative is available. In no way does the author purport to suggest that the UNIDROIT Principles should be used to interpret questions which are outside of the scope of the CISG; the only suggested use is for supplementing the interpretation of the existing provisions.

From the above discussion, it seems clear that the legal justification for applying the UNIDROIT Principles in such a manner should be looked for in the aforementioned Article 7 of the CISG. Article 7(2) provides that "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 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". Some scholars have suggested that the UNIDROIT Principles set forth the general principles forming the backbone of the CISG, and thus Article 7(2) permits reliance on the Principles to fill gaps in the CISG.[20] However, this interpretation has been criticised[21] on the account that the UNIDROIT Principles are not merely principles governing the international sale of goods; they pertain to many kinds of commercial

[20]M.J. BONELL, *General Report*, *in* A NEW APPROACH TO INTERNATIONAL COMMERCIAL CONTRACTS: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, 12-13 (1999).

[21]PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 103 (2d ed. Oxford University Press 2005) [Hereinafter "Schlechtriem & Schwenzer"].

transactions. Article 7(2) does not state that the CISG must be interpreted in light of principles governing international commercial contracts in general; it specifically points to the general principles on which the CISG, a Convention dealing with the international sale of goods, is based.[22]

Another approach to gap-filling using the UNIDROIT Principles is to use the Principles as an indicator of emerging trends and practices in international contract law,[23] with which the CISG has not kept pace due to its rather inflexible nature. Those who favour this approach state that the phrase "*general principles*" in Article 7(2) of the Convention should be interpreted as 'evolving with and following changes and transitions in international commerce', and to use the UNIDROIT Principles as a supplement in places where the CISG is incapable of giving an answer would help in the unification of international contract law.[24] In essence, these scholars seem to believe that to construe the phrase "*general principles*" in a manner which restricts these principles to those flowing from the Convention would be too narrow an approach. Article 7(2), in their opinion, has been drafted loosely enough to even include those principles which have not expressly been included in its ambit. However, the idea of approaching gap-filling in this manner falls flat due to the very nature of the UNIDROIT Principles. They have not been drafted merely to reflect prevailing practices across the world; they also purport to provide what is perceived as the 'best' solution to a particular problem, even if such a solution has not been generally adopted so far.[25] Therefore, to use the UNIDROIT Principles as an indicator of

[22]JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 667-91(3d ed. Wolters Kluwer 1999).
[23]Ulrich Magnus, *Die allgemeinen Grundsätzeim UN-Kaufrecht,* 59 RABELSZ 492-93 (1995).
[24]Shani Salama, *Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application,* 28 U. MIAMI INTER-AM. L. REV. 241 (2006).
[25]UNIDROIT PRINCIPLES, pmbl.

what the law is, as opposed to what it should be, would be a fundamental error in their application.

A much more sensible method of using the UNIDROIT Principles for the gap-filling purpose would be to restrict their use to matters where the context allows such reliance. It has been suggested, and in the author's opinion, quite rightly so, that the Principles must only be used for interpreting the CISG when a particular provision of the CISG is fundamentally similar to a particular principle in the UNIDROIT Principles in both text and context.[26] Thus, the limited function of the Principles in such a scenario, according to Professor Kritzer, would be to provide "*meat on the bare bones*" of the CISG.[27] Kritzer, a strong proponent of this interpretative approach, opines that the CISG is by nature a minimalistic document, with no official commentary to elucidate its often fragmentary provisions; to use instruments such as the UNIDROIT Principles, which have an official commentary, to understand the CISG in situations where the texts are 'similar or identical', would put flesh on the CISG's bones and plug the gaps in it to some extent.[28] The utility of this approach is self-evident: it effectively minimises over-reliance on a soft-law instrument, while at the same time succeeding in tapping on the benefits of a well-explained model law, which certainly has much in common with the law which needs to be interpreted.

The author wishes to propose a solution to the problem of when it is amenable to fall back on the UNIDROIT Principles in the process of interpreting the CISG. The ideal method to fill in the gaps in the CISG would be to, first and foremost, look to the bare provision which has to be interpreted. This is in consonance with Article 31 of

[26]CHENGWEI LIU, REMEDIES IN INTERNATIONAL SALES: PERSPECTIVES FROM CISG, UNIDROIT PRINCIPLES AND PECL 240 (1 ed. Juris Publishing 2007).
[27]*Id.* ,at 241.
[28]*Id.*, at 240.

the Vienna Convention on the Law of Treaties,[29] a treaty that governs the interpretation of all other international treaties. The Vienna Convention mandates that preponderance should be given to the ordinary meaning of a treaty's provisions while one is interpreting it.[30] After this, if the plain reading of the CISG is unsuccessful in giving a clear result to the arbitrator or judge, it must be determined by the arbitrator or judge as to whether a particular issue was left to be dealt with by a country's domestic law on purpose.[31] However, it is the view of the author that such reliance on national laws must be minimised, to respect the international nature of the Convention, as well as to ensure that it is applied uniformly. Subsequently, if the application of the second step yields a negative answer, Article 7(2) of the Convention would mandate the judge or arbitrator to look at the general principles on which the CISG is based, and as has been discussed previously, these need not be the UNIDROIT Principles in all cases. At this point, the adjudicator must necessarily look at provisions within the CISG that bear contextual similarity to the principles that are being relied on, for an answer.[32] The author suggests that at this juncture, Kritzer's approach should be taken into consideration, and the arbitrator or judge should, if the context permits, look at analogous principles contained in the UNIDROIT Principles. The UNIDROIT Principles may be used with a moderate degree of liberty in an interpretative capacity; however, they are not,

[29]Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, art 31.

[30]Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art 31.

[31]CESARE BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION 75 (Fred B Rothman & Co 1987); Honnold, at 108.

[32]John Gotanda, *Awarding Damages under the United Nations Convention on the International Sale of Goods: A Matter of Interpretation*, 37 GEO. J. INT'L L.121 (2005).

and should not be used as primary legal authority.[33] If all the above steps fail in giving a result, only then should the principles of private international law be applied, as is mandated by Article 7(2) of the Convention.

To sum up the UNIDROIT Principles should play a supporting role to the general principles on which the CISG is based, and should facilitate a cogent and comprehensive understanding of these general principles, in the process of interpreting the CISG, as well as in the process of filling gaps in the CISG.

IV. GAP-FILLING BY THE UNIDROIT PRINCIPLES IN ACTION

In this section, the author has examined two areas within the CISG which could benefit from gap-filling, on account of the incompleteness and ambiguity of the bare text of the Convention. The author has also clarified as to how the UNIDROIT Principles would help in creating a comprehensive legal framework by overcoming the inherent deficiencies of the CISG in these areas.

The first example of a situation where the UNIDROIT Principles could play a vital role in filling the inherent gaps in the CISG is the regime governing damages under the CISG. Article 74 of the CISG provides the framework governing damages in international sale of goods contracts. It reads as under:

"*Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss*

[33]Michael Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 784-85 (1998).

which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."[34]

Here, the method of calculation of damages is not provided.[35] According to this article, the tribunal looks at the particular circumstances of the case, and is to put the aggrieved party in the same economic position as it was before the breach; such an aggrieved party receives the benefit of the bargain.[36] This provision remains incomplete on at least three counts – first, it does not specify explicitly as to whether the gains made by the aggrieved party are to be accounted for in the process of calculation of damages; second, it does not provide as to what extent such a party must show that it has suffered a loss, so as to be awarded damages; third, it does not provide for the currency in which damages are to be calculated.

The UNIDROIT Principles can help fill the gap here. They specifically provide that the gains made as a result of the breach by the aggrieved party in the case are to be accounted for;[37] additionally, they state that only that harm which is proved with a reasonable degree of certainty is to be compensated.[38] They state that the currency to calculate damages in is the one "in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate."[39]

The second example relates to a notably litigious area in the sale of goods jurisprudence – the law governing interest. Article 78 of the

[34]CISG, art. 74.
[35]JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 449 (1 ed. Kluwer Law and Taxation Publishers 1989).
[36]Schlechtriem & Schwenzer, 746; GUENTER TREITEL, REMEDIES FOR BREACH OF CONTRACT – A COMPARATIVE ACCOUNT 82 (Oxford University Press 1988).
[37]UNIDROIT PRINCIPLES, art 7.4.2.
[38]UNIDROIT PRINCIPLES, art 7.4.3.
[39]UNIDROIT PRINCIPLES, art 7.4.12.

CISG provides for the payment of interest when a sum due is in arrears; however, it fails to provide a method to calculate the amount of interest that is to be paid in such a situation.[40] The UNIDROIT Principles efficiently supplement the CISG on this account, and state that the applicable rate of interest is "the average short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment."[41] In the absence of such an interest rate, the interest accrues at the average prime rate in the state of the currency of payment, and, if such rate does not exist, the rate of interest is to be fixed by the law of the State of the currency of payment.[42] Another gap is filled by the UNIDROIT Principles in the Convention, in that they provide that interest is payable from the time when payment is due,[43] while such a stipulation is notably absent from the CISG.

V. RELIANCE ON THE PRINCIPLES BY COURTS AND TRIBUNALS

Despite the many criticisms (as earlier highlighted by the author) of relying on the UNIDROIT Principles as a predominant gap-filler for the CISG, there is an ample body of cases and arbitral awards in which the courts and tribunals have recognised and applied the UNIDROIT Principles as the general principles governing the CISG. Some forums have taken unique and novel routes to justify the use of the UNIDROIT Principles as contextual gap-fillers for the Convention. The author has briefly discussed the efficacy and aptness of each of these approaches, and at the end, a streamlined approach

[40]CISG, art 78.
[41]UNIDROIT Principles, art 7.4.9.
[42]*Id.*
[43]*Id.*

has been sought, which combines the best of judicial practice in the area.

The International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation has been proactive in using the UNIDROIT Principles to interpret the CISG. In a 1997 case,[44] there was a dispute related to a penalty clause in a contract governed by the CISG. The court applied the Principles as "a means to interpret and supplement the CISG". Additionally, it also held that these Principles could be applied because they reflected international usages under Article 9(2) of this CISG. Since the CISG did not provide a solution on the matter of penalty related to default in the payment of a price, Article 7.4.13 of the UNIDROIT Principles (which concisely dealt with this matter) was applied to the case. In a 2007 decision[45] related to the interpretation of Articles 78 and 79 of the Convention, the same court took into account Article 7.4.9 of the UNIDROIT Principles, which deals with similar situations of default. The court held that the UNIDROIT Principles reflect an "understanding generally accepted in international commercial practice." A case from 2008[46] before this court related to the transfer of the obligation to pay the price from the original buyer to a third party to the transaction. To supplement and fill the gap found in the CISG, the court relied on Article 9.2.1of the Principles, which was, according to the court, reflective of international commercial practice. This court's approach is a need-based and practicable one; it has justified using the UNIDROIT Principles very consistently on the ground of them reflecting international commercial practice and usage. This is a functional approach because it abandons straitjacket requirements of legality and

[44]Case No. 229 (Int'l Arb. Ct. Chamb. Comm. Ind. Russ. Fed., 1996), http://www.unilex.info/case.cfm?id=731.
[45]Case No. 13 (Int'l Arb. Ct. Chamb. Comm. Ind. Russ. Fed., 2007), http://www.unilex.info/case.cfm?id=1492.
[46]Case No. 14 (Int'l Arb. Ct. Chamb. Comm. Ind. Russ. Fed., 2008), http://www.unilex.info/case.cfm?id=1493.

instead focuses on the unique utility of the UNIDROIT Principles, a point that the author has discussed previously.

French courts have, in contrast, used specific provisions of the UNIDROIT Principles to supplement the interpretation of the CISG, while not making sweeping assertions about the universal applicability of the former. In a 1996 case decided by the Court of Appeal at Grenoble,[47] a UNIDROIT principle in Article 6.1.6, to the effect that the obligation to pay must be performed at the buyer's place, was found to be a general principle underlying the CISG. More recently, in 2015, the Court of Cassation allowed the invocation of hardship and the right to request a renegotiation of price by the seller, based on Articles 6.2.2 and 6.2.3, which cover matters not expressly dealt with in the CISG.[48] In contrast to the previously discussed approach, this one is cautious and based on a case by case analysis of the Principles and the Convention.

Arbitral tribunals have, in a number of awards, employed the UNIDROIT Principles to both fill gaps in the CISG, as well as to bolster the idea that certain articles of the CISG reflect universal practices, in case they are echoed in the Principles. In a 2007 arbitral award[49] made between an Estonian seller and a Kazakhstani buyer, the law governing the transaction as per the contract was Russian; however, since both parties were from states that had contracted to the CISG, the Convention was applied by the tribunal. Article 81 was the law of pertinence in the matter. To establish that this Article reflected a 'universally applied approach', Articles 7.2.1, 7.2.2, and 1.3 of the

[47]SCEA GAEC Des Beauches Bernard Bruno v. Societé Teso Ten Elsen GmbH & Co. KG (Cour D'Appel de Grenoble, 1996), http://www.unilex.info/case.cfm?id=222.
[48]Dupiré Invicta Industrie v. Gabo, Case No. 12-29.550 13-18.956 13-20.230 (Cour de Cassation, 2015), http://www.unilex.info/case.cfm?id=1999.
[49]Unknown (Int'l Arb. Ct. of the Chamb. of Comm. and Ind. of the Russ. Fed., 2007), http://www.unilex.info/case.cfm?id=1332.

UNIDROIT Principles were pointed to, since they reiterate the law in the Convention. Another arbitral tribunal, in the text of an award dating back to 2004,[50] stated that in order to fulfil the mandate of gap-filling in accordance with Article 7(2) of the Convention, recourse should be taken to the UNIDROIT Principles, seeing as they contain and have further developed the general principles underlying the CISG. In a notable case of application of UNIDROIT Principles over domestic law to supplement the CISG, the arbitral tribunal chose to corroborate CISG provisions with the Principles, seemingly to not let the matter be decided by domestic law.[51] The tribunal observed that *"although the UNIDROIT Principles of International Commercial Contracts shall [not] directly be applied, it is nevertheless informative to refer to them because they are said to reflect a world-wide consensus in most of the basic matters of contract law*".[52]

The author believes that it is wise to earmark certain specific provisions of the UNIDROIT Principles as reflecting international consensus and general trade practices. However, for courts and tribunals to hold that the Principles in their entirety reflect international commercial practice would be erroneous, due to their aspirational nature. The UNIDROIT Principles do not always reflect prevailing practices, and often envisage 'best' practices which may not have become the norm.[53]

Therefore, while the approach of the International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation is utilitarian and offers a simple solution to the problem, a nuanced approach is probably for the best. The French courts, in this

[50]Award No. 12460 (ICC Int'l Ct. Arb., 2004), http://www.unilex.info/case.cfm?id=1433.
[51]Award No. 9117 (ICC Ct. Arb. Zur., 1998), http://www.unilex.info/case.cfm?id=399.
[52]*Id.*
[53]*Supra* note 6.

regard, exhibit a restraint that should more preferably be emulated to yield the most legally and logically sound solution in every case.

VI. CONCLUSION

It has been established that the UNIDROIT Principles, as a whole, do not represent the general principles on which the CISG is based. At the same time, however, it is unwise to completely disregard them, due to their utility – they are demonstrably effective in that they have overarching similarities to the CISG, and also they reflect a constantly updated, current understanding of international commercial law. The author strongly suggests that courts and tribunals must use specific provisions of the UNIDROIT Principles to understand analogous provisions of the CISG, but this should be done only when the context permits such use. Moreover, the Principles should only be applied in an interpretative capacity, and not as a substantive law in themselves. As far as the attitude of courts and tribunals is concerned, the author believes that a more nuanced and controlled use of the Principles will uphold the intentions of the CISG's drafters to apply it uniformly, as well as help in understanding the Convention itself more completely. Restraint must be exercised while relying on the Principles; however, when it is salutary to use them, they must not be ignored, because that would be an unnecessary application of restraint.

The incidence of international commercial transactions is only increasing, leading to a greater utility of the CISG in the second decade of the 21st century. This, in turn, requires that the somewhat rigid CISG become more pliable and have the ability to adapt itself in a manner it previously has not been able to, due to it being a treaty negotiated by (often dogged) sovereign states. The use of the UNIDROIT Principles can help ensure this to an extent, due to them being a more contemporary and up-to-date set of rules. The author

hopes that the Principles are used judiciously – and yet, adequately – in future adjudications.