THE CONTRIBUTION OF THE UNIDROIT PRINCIPLES TO THE ADVANCEMENT OF INTERNATIONAL COMMERCIAL ARBITRATION

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I. INTRODUCTION

The contribution of the UNIDROIT Principles for International Commercial Contracts (Principles)[1] is apparent in light of the recent increase in the use of arbitration to settle international commercial disputes. The reasons underlying this widespread practice include the contracting parties' preferences for a neutral forum, a neutral procedural scheme within which arbitrators will conduct the arbitral process, and a neutral substantive law (i.e., a set of rules or principles not particularly connected with either party) to govern the merits of the dispute.[2] However, despite the favor shown for unconnected procedural and substantive rules, people who conduct business worldwide retain the need for a body of commercial law which is accessible, understandable, and, most importantly, suited to their legitimate expectations.[3] The Principles contribute to the fulfillment of this by providing parties to international contracts with a set of rules that are specifically designed for application to international commercial contracts[4]—unlike the controversially vague

1. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [hereinafter UNIDROIT PRINCIPLES]. For a discussion on the content and purposes of the Principles, see generally Symposium, *Contract Law in a Changing World*, 40 AM. J. COMP. L. 541 (1992). For a shorter but perceptive review, see generally Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and Review*, 63 FORDHAM L. REV. 281 (1994).

2. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 18 [hereinafter New York Convention]. Article V(l)(e) of the New York Convention provides that a Convention state may refuse to enforce an award if it "has been set aside or suspended by a competent authority of the country in which, *or under the law of which*, the award was made." *Id.* (emphasis added). This explicit recognition of the possibility that an arbitral award may be issued under the law other than that of the situs illustrates the drafter's realization that in the context of international commercial arbitration, the arbitral situs is often selected for reasons other than the parties' intention to have the law of the situs govern the arbitration. *See* Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629, 641 (1989).

3. Pieter Sanders, *Trends in the Field of International Commercial Arbitration*, 145 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL 205, 262 (1975) ("The wishes of the international business communities undoubtedly go towards denationalization. . . . The parties . . . want their dispute, as far as possible, to be dealt with regardless of any specific national law.").

4. UNIDROIT PRINCIPLES, *supra* note 1, pmbl.

concept of *lex mercatoria*.[5] The Principles are therefore likely to increase the efficiency of international arbitration as a means of investment and trade dispute resolution. In this sense, there is a mutual or "natural alliance between the Principles and international arbitration."[6]

The main purpose of this Article is to frame the various contexts in which the Principles may contribute to international commercial arbitration. This analysis first examines the scope of the Principles' application, then discusses the role of the Principles in the specific context of international commercial arbitration. Part IV discusses the role that the Principles may play in situations that are not expressly contemplated in the Preamble but which often arise in connection with matters within the Principles' scope. Part V concludes with a summarization of the heightened fairness and certainty which accrues to the arbitral process through use of the Principles.

II. THE SCOPE OF THE PRINCIPLES' APPLICATION

The Principles are not intended to be promulgated as national law by legislatures or as a treaty or convention by an international conference.[7] Instead, they offer a set of contract rules to be adopted by those who wish to use them.[8] Unlike an international convention, the Principles do not include a hard and fast rule on their scope of application. Instead, a crisp preamble is addressed to lawyers who draft international contracts, decision-makers in charge of settling international disputes

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5. For an explanation of the varying definitions of *lex mercatoria*, see Berthold Goldman, *The Applicable Law: General Principles of Law—the Lex Mercatoria*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113 (1986). As defined in the widest sense, *lex mercatoria* is "the law proper to international economic relations. One would encompass not only transnational customary law, . . . but also law of an interstate, or indeed state, which relates to international trade." *Id*.

6. Patrick Brazil, UNIDROIT Principles of International Commercial Contracts in the Context of International Commercial Arbitration (Oct. 9-14, 1994) (unpublished paper submitted to the 25th Biennial Conference of the International Bar Association, on file with the author).

7. On the prospective function of the Principles in practice, the coordinator and leader of the Working Group for the Preparation of Principles for International Commercial Contracts, Professor Bonell, has stated: "Without excluding the possibility that in the future the Principles might take the form of a convention or model law, the current assumption is that they will not bind but will be applied in practice only because of their persuasive character." *See* M.J. Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 AM. J. COMP. L. 617, 625 (1992).

8. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. *See also id*. pmbl. cmt. 4.

involving such contracts, and national and international legislators who draft statutes and international treaties dealing with matters within the Principles' ambit.[9] The Preamble envisions application of the Principles in the following situations:

> PREAMBLE
>
> (*Purpose of the Principles*)
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> These Principles set forth general rules for international commercial contracts.
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> They shall be applied when the parties have agreed that their contract be governed by them.
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> They may be applied when the parties have agreed that their contract be governed by "general principles of law," the "lex mercatoria" or the like.
>
> They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.
>
> They may be used to interpret or supplement international uniform law instruments.
>
> They may serve as a model for national and international legislators.[10]

The Principles' aspiration to impose themselves by virtue of their usefulness and sophistication is a great strength and peculiarity of this instrument—as well as a source of possible confusion and misunderstanding. This calls for an explanation of the various purposes for which the Principles may be put to work.

A. The Principles as a Set of General Rules

Although the title of the Principles and the opening descriptive statements contained in the Preamble emphasize the Principles' function

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9. *See id*. pmbl. cmts. 1-7.

10. *Id*. pmbl. The preamble's content is due in part to the fact that a majority of the Members of the Governing Council of UNIDROIT found the references to rules of private international law in a body of rules of substantive law to be somewhat disturbing. Thus, the rules of the scope of application of the Principles were relegated to paragraphs of the present preamble. *See Report on the Session*, UNIDROIT Governing Council, 72d Sess., Rome, 15-18 June, 1993, at 20-21.

as a set of "general rules,"[11] such a description is a modest understatement. A cursory look at the content of each article and the accompanying comments reveals by and large that these general rules are in fact not very abstract. Many of the provisions are specific, concrete, and detailed operative guidelines to parties and decision-makers (i.e., judges and arbitrators).[12]

For example, the Principles generally recognize the autonomy of the parties,[13] the binding character of the contract,[14] the validity of a contract *solo consensu*,[15] the duty of mutual cooperation,[16] and the injured party's right to damages for breach of contract.[17] In addition, they contain rules which detail the entitlements, duties, and remedies of the parties in numerous articles concerning the sufficient relevance of mistake,[18] gross disparity,[19] or hardship for the avoidance of a contract.[20] Other rules identify the party who is bound to apply for a public permission,[21] and delineate the parties' rights to cure by the nonperforming party,[22] required performance of a nonmonetary obligation,[23] and termination of the contract.[24]

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11. UNIDROIT PRINCIPLES, *supra* note 1, pmbl.

12. Each rule of the principles is stated as an article. Each article is accompanied by one or more numbered comments giving the reasons for the rule, its purpose, operation and relationship to the other rules. In some cases, the operation of the rules is also explained by the use of short and concrete illustrations. *See id*. *passim*.

For a discussion on how arbitral awards and their resulting "jurisprudence" may shape the content of the broader Principles (*notions à contenu variable*), see H. van Houtte, UNIDROIT Principles of International Commercial Arbitration: Their Reciprocal Relevance (Oct. 9-14, 1994) (unpublished paper delivered at the 25th Biennial Conference of the International Bar Association, on file with the author).

13. *Id*. art. 1.1.

14. *Id*. art. 1.3.

15. *Id*. art. 3.2.

16. UNIDROIT PRINCIPLES, *supra* note 1, art. 5.3.

17. *Id*. art. 7.4.1.

18. *Id*. art. 3.5.

19. *Id*. art. 3.10.

20. *Id*. art. 6.2.3.

21. UNIDROIT PRINCIPLES, *supra* note 1, art. 6.1.14.

22. *Id*. art. 7.1.4.

23. *Id*. art. 7.2.2.

24. *Id*. art. 7.3.1.

B. The International and Commercial Nature of the Contract

Although the Working Group for the Preparation of Principles for International Contracts (Working Group) deemed it necessary to indicate in the Principles' final draft that the rules are primarily suited for *international* contracts of a *commercial* nature,[25] the implication of the Preamble's permissive tone is that the Principles may be applied in situations which the Preamble does not expressly describe. Nothing in the Principles prevents parties from agreeing to apply them to purely domestic or noncommercial contracts.[26] In addition, the Working Group provided no explicit definitions of the terms international and commercial. At one point during the preparation of the Principles, the Working Group had planned to include these definitions,[27] but they were later dropped because they narrowed the scope of the Principles to categories, the contours of which were not yet well defined or widely accepted.[28] This deliberate omission further implies that both concepts should be understood in the broadest possible sense.[29]

A result of the wide latitude of the terms international and commercial, as used in the Principles' Preamble and accompanying comments, is the erosion of the distinctions commonly made in national and international legislation between domestic and international, as well as commercial and noncommercial, contracts.[30] For example, an international transaction is traditionally defined as one between parties domiciled in different states, as a contract significantly connected to more than one state or involving a choice of law, or as an agreement which

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25. *Id.* pmbl. For a discussion of the reasons for limiting the scope of the Principles to international and commercial contracts, see Bonell, *supra* note 7, at 620-21.

26. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 3. *See also id*. pmbl. cmts. 1-2.

27. *Draft Principles for International Commercial Contracts*, UNIDROIT Study L-Doc. 50 (1991) [hereinafter *Draft Principles*]. Article 1.1(2) of Professor Bonell's draft chapter relating to general provisions provided: "(2) For the purpose of these Principles (a) a contract is international whenever it involves a choice between the laws of different countries; (b) a contract is of a commercial nature whenever it is made by both parties in the course of their trade or profession." *Id*.

28. *See* UNIDROIT, SUMMARY RECORDS OF THE MEETING HELD IN MIAMI FROM 6 TO 10 JAN. 1992, P.C.-Misc. 18, at 9 (1992) [hereinafter *Miami Meeting*]; UNIDROIT, SUMMARY RECORDS OF THE MEETING HELD IN ROME FROM 29 JUNE TO 3 JULY 1992, P.C.-Misc. 19, at 6-7 [hereinafter *Rome Meeting*].

29. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmts. 1-2. *See also* Bonell, *supra* note 7, at 621.

30. Bonell, *supra* note 7, at 621-22.

affects international trade.[31] In contrast, the term "international" acquires a life of its own in the Principles.[32]

The Principles' departure from traditional legal distinctions is especially meaningful with respect to the distinction between commercial and noncommercial contracts. In civil law systems, the categorization of a contract as civil or noncommercial depends on the status of the parties or the nature of the transaction.[33] The comments to the Preamble make clear that *commercial*, as used in the Principles, has no connection with

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31. Other international conventions and national laws do not agree on the distinctive features that make a given transaction international in nature. The international character of a transaction may be narrowly circumscribed. *See, e.g.*, Convention on the Law Applicable to Contractual Obligations 80/934/EEC, *opened for signature* June 19, 1980, art. 1, ¶ 1, 1980 O.J. (L266) 1 [hereinafter Rome Convention] (applying the Convention to all "contractual obligations . . . involving a choice between the laws of different countries") ("It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party."); Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, OEA/SER.K/XXI.5, CIDIP-V/DOC. 34/94 rev. 3 corr. 2 [hereinafter Mexico Convention]; Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, Dec. 22, 1986, art. 1(a)-(b), 24 I.L.M. 1574 (1985) (whenever parties' businesses are located in different states or when a choice between the laws of different countries is involved). However, legislation might also use a broader approach. *See, e.g.*, NOUVEAU CODE DE PROCÉDURE CIVILE [NOUV. C. PR. CIV.] art. 1492 (Fr.) (Givort de Kerstrat & Crawford trans., 1978) (defining international arbitration as that which "touches upon (affects or involves) the interests of international trade"). For a more elaborate concept of internationality, see, e.g., Convention Relating to a Uniform Law on the International Sale of Goods, Annex, July 1, 1964, art. 1 cmt. 1, *reprinted in* 13 AM. J. COMP. L. 451, 456 (1964) (providing that an international contract of sale is one which involves carriage across a border, the occurrence of offer and acceptance in different states, or delivery in a state other than the one in which the contract was concluded). For a discussion of the international element of arbitration, see generally Mario Riccomagno, The UNIDROIT Principles in the Context of International Commercial Arbitration 4-7 (Oct. 11, 1994) (unpublished paper presented at the 25th Biennial Conference of the International Bar Association, on file with the author).

32. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 1.

33. On the historical and functional distinctions between civil and commercial law, see JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 90-100 (2d ed. 1985); RENÉ DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY 95-97 (Michael Kindred trans., 1972). For a discussion of the civil-commercial dichotomy in Latin America, see Alejandro M. Garro, *Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L. 587, 606-08 (1992). Most countries in Latin America adopt the dichotomy between civil and commercial transactions by applying special rules to some commercial contracts, which are different from the general rules contained in the civil code. *Id.* Paraguay has adopted a monistic approach, merging the civil and commercial rules to be applied to obligations and contracts. *Id.* at 607-08. However, contracts involving professional services—that is, the services of architects, lawyers, medical doctors, and engineers—which in many civil law systems tend to fall outside the traditional field of commercial law, are also intended to be covered by the Principles.

the technical meaning attached to that term by individual legal systems.[34] Therefore, the Principles may apply to contracts which most civil law systems have traditionally categorized as *civil*, or noncommercial. The concern for consumer protection is addressed by Article 1.4 of the Principles, which protects national public policy interests even when the parties adopt the Principles for purely domestic consumer contracts.[35]

Another approach to protecting consumer interests that the Working Group could have taken would have been to expressly indicate an intent to exclude any contracts not entered into in the regular course of the trade or profession of the parties. This language, which was adopted by the 1980 Vienna Convention on Contracts for the International Sale of Goods (Vienna Sales Convention),[36] would have effectively prevented application of the Principles to consumer contracts for goods or services and would have provided a clearer assurance that the public policy interests of civil law jurisdictions are not affected by the Principles.

The drafters might also have delineated commercial contracts by following the example of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law).[37] Pursuant to the UNCITRAL Model Law approach, the Working Group could have

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34. *See* UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 2, which acknowledges that

> [t]he Principles do not provide any express definition, but the assumption is that the concept of commercial contracts should . . . include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as investment and/or concession agreements, contracts for professional services, etc.

35. UNIDROIT PRINCIPLES, *supra* note 1, art. 1.4. Article 1.4 clarifies that the Principles do not "restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law." *Id.*

36. United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 19 I.L.M. 671 (1980) [hereinafter Vienna Sales Convention]. The Vienna Sales Convention approach does not expressly confine the Vienna Sales Convention's applicability to international *commercial* contracts for the sale of goods. In contrast, whereas article 1(3) states that the civil or commercial character of the parties or of the contract is not to be taken into account when determining the relevance of Vienna Sales Convention, article 2(a) specifically excludes consumer purchases from its scope of application. *Id*. arts. 1(3), 2(a). For a similar approach, compare UNIFORM COMMERCIAL CODE [U.C.C.] § 1-102(2)(a) (1990) (pointing to commercial transactions as the focus of the code) with U.C.C. § 2-102 (limiting the U.C.C.'s scope with respect to consumer transactions).

37. *Model Law on International Commercial Arbitration*, *in* 16 Y.B. U.N. COMM'N ON INT'L TRADE L. 132, U.N. Doc. A/CN.9/263 (1985) [hereinafter UNCITRAL Model Law].

signified the broad meaning attached to the term commercial by providing illustrations of the kind of transactions intended to fall within the Principles' scope in the Preamble.[38] However, the UNCITRAL Model Law failed in its attempt to clearly define the contours of the term. This frustrating precedent prompted the Working Group, after long discussions, to leave the term undefined and unrestricted.[39]

Ultimately, the Working Group preferred to keep the international and commercial labels in the Preamble, despite the fact that the Principles distinctly represent much more than general principles and despite the clear applicability of the Principles to contracts that do not fit under the traditional concepts of international or commercial contracts. Consequently, parties are free to apply the Principles to any kind of contract. However, because the title and comments of the Principles retain the indication that they are best-suited for contracts labeled as international and commercial, the application of the Principles to these types of transactions is likely to be more frequent, thus creating narrower practical definitions of the concepts.

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38. *Id.* art. 1(1). The drafters of the UNCITRAL Model Law also had to struggle with the traditional meaning attached to the term commercial in different legal systems. Because they were unable to find a satisfactory definition, they attached a footnote to article 1(1) calling for "a wide interpretation so as to cover matters arising from all relationships of a commercial nature." *Id.* art. 1(1) n.**. The footnote then provides an illustrative list of commercial relationships which underscores the width of the interpretation:

> Relations of a commercial nature include, but are not limited to . . . any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail, or road.

Id. The UNCITRAL Model Law has been incorporated into the legal systems of a number of countries with varying legal cultures, such as Australia, Bulgaria, Canada, Hong Kong, Mexico, Nigeria, and several states of the United States of America. *See* American Arbitration Association Survey of International Arbitration Sites 13, 27, 57, 79 (J. Stewart McClendon ed., 3d ed. 1993); ISAAK I. DORE, THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE 136, 140, 142 (1993). For a discussion of the role of the UNCITRAL Model Law in denationalizing commercial arbitration, see Vratislav Pechota, *The Future of the Law Governing the International Arbitration Process: Unification and Beyond*, *in* 3 THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 17 (1992).

39. *See Rome Meeting*, *supra* note 28, at 6-7; *Miami Meeting*, *supra* note 28, at 2-8.

C. Situations in Which the Principles Are Meant to Be Applied

The Preamble indicates five practical contexts in which the Principles may be applied.[40] Unlike many international conventions, the Principles do not expressly distinguish between situations in which they shall apply and those in which they shall not.[41] Instead, the application provisions are framed in terms of when the Principles shall and *may* apply.[42] This introductory statement of purpose appears to be an invitation to the different actors in international legal practice (lawyers, arbitrators, and judges) to use the Principles in the drafting of contracts and the settlement of disputes. Another implication of the Preamble is that the Principles are meant to serve as a useful tool for those engaged in international commercial practice, rather than a mere academic exercise in comparative law which is designed to set forth abstract and universal axioms on the law of contracts. Although the Principles are much more than a set of general guidelines, they do not purport to represent a self-sufficient codification of interlocking norms which constitute a complete body of contract rules, to the exclusion of national law. As such, various sources of laws may be applied to fill the Principles' gaps.

The first and probably the most common situation which triggers the application of the Principles is based on the will of the parties and arises when "the parties have agreed that their contract be governed by them."[43] Although the Preamble states that the Principles shall apply in this situation, whether and to what extent an express or implied agreement to incorporate the Principles is valid and enforceable depends on the governing body of law.[44] It is unlikely, however, that a legal system would fail to honor such agreements[45] insofar as they do not

40. UNIDROIT PRINCIPLES, *supra* note 1, pmbl.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* pmbl. cmt. 4(a).
45. This result is not surprising given the wide acceptance of party autonomy in arbitral matters that is demonstrated in several international treaties and arbitral rules. *See*, *e.g.*, 1961 European Convention on International Commercial Arbitration, April 21, 1961, art. VII, 484 U.N.T.S. 364, 374 [hereinafter Geneva Convention]; *United Nations Commission on International Trade Law Arbitration Rules*, 31 U.N. GAOR, Supp. No. 17, art. 33, U.N. Doc. A/31/17 (1976) [hereinafter *UNCITRAL Arbitration Rules*].

violate relevant mandatory rules of law.[46] The Principles become *lex causae* (part of the proper law of the contract) and displace the otherwise applicable national law of the contract,[47] albeit only with regard to those matters falling within their scope.[48]

Article 1.6(2) of the Principles supplies a gap-filling technique which calls for application of the Principles' underlying general principles to issues which fall under the scope of the Principles but are not expressly settled by them.[49] However, many legal issues which must be determined by the choice-of-law process remain in any contract that names the Principles as its exclusive source of applicable law.[50] Consequently, certainty and predictability in the dispute resolution are not fully attained. In order to cover questions falling outside the scope of the Principles (e.g., assignment of claims under the contract and rights and obligations of agents representing the contracting parties), the parties should consider choosing the law of one or more specific domestic legal systems to apply to such issues.[51] In the absence of such a choice, the law governing those issues would be selected in conformity with the rules

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46. UNIDROIT PRINCIPLES, *supra* note 1, art. 1.4. Due to the widespread acceptance of multilateral arbitration treaties such as the New York, Inter-American, and Geneva Conventions, a court's refusal to enforce an award rendered pursuant to the UNIDROIT Principles would be equally unlikely. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 33 (1981). *But see* Sir Michael J. Mustill, *Contemporary Problems in International Commercial Arbitration: A Response*, 17 INT'L BUS. LAW. 161 (1989) (asking whether parties can "effectively contract to have their disputes decided by arbitrators who are empowered to apply no defined principles").

47. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 4(a).

48. *See id*. art. 1.6(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.").

49. *Id.*

50. *Id*. art. 1.6(2) cmt. 4.

51. *Id*. The drafters of the Principles advise that

> [p]arties are of course always free to agree on a particular national law to which reference should be made for the supplementing of the Principles. A provision of this kind could read: "This contract is governed by the UNIDROIT Principles supplemented by the law of country X," or "This contract shall be interpreted and executed in accordance with the UNIDROIT Principles. Questions not expressly settled therein shall be settled in accordance with the law of country X."

Id. For an example of the increasing acceptance of *depeçage* in the choice of law, see, e.g., *Rome Convention*, *supra* note 31, art. 7; Craig M. Gertz, Comment, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage*, 12 NW. J. INT'L L. & BUS. 163, 178-80 (1991).

of private international law, despite the parties' choice of the Principles as the primary governing law of their contract.[52]

The second scenario of possible application of the Principles is "when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria, or the like."[53] In these cases, the Principles *may* apply; the Preamble extends an invitation to judges and arbitrators to apply the Principles in spite of the fact that the parties have not expressly chosen them. There are at least three reasons to apply the Principles in such an instance. First, because the parties have expressed a willingness to subject the contract to some kind of international commercial law that is not connected with the national law of a particular jurisdiction, the Principles will effectuate the will of parties. Second, the Principles provide a well-defined set of rules, thereby reducing the inherent indefiniteness and uncertainty of the general principles of law and the usages and customs of international trade that make up *lex mercatoria*. Whereas most national courts may want to avoid use of *lex mercatoria* because of its vagueness, even if the parties have agreed upon its application,[54] the parties can be confident that if a dispute arises under a contract to which the Principles are applied as governing law, their contractual rights and duties will be enforced pursuant to the Principles to the extent permitted by the domestic law. Finally, unlike the contract rules codified in a civil or commercial codes or statutes, the rules embodied in the Principles are specifically tailored to international commercial disputes.

The third situation in which the Principles may be applied is "when it proves impossible to establish the relevant rule of the applicable law."[55] According to the comments, even when it proves extremely difficult or costly to find the relevant rule applicable to a particular issue,

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52. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 4(a).

53. *Id.* pmbl. The concept of general principles of law was incorporated at the international level by article 38 of the Statute of the International Court of Justice which recognizes as sources of public international law the "international conventions, international custom, and the general principles of law recognized by civilized nations, or judicial decisions." Statute of the International Court of Justice, art. 38, *reprinted in* CURRENT INTERNATIONAL TREATIES 137 (T. Millar ed., 1984). *See also* Note, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816, 1819 (1988). For a definition of *lex mercatoria*, see Goldman, *supra* note 5, at 125.

54. *See* Ole Lando, *Assessing the Role of the UNIDROIT Principles in the Harmonization of Arbitration Law*, 3 TUL. J. INT'L & COMP. L. 129, 137 (1994).

55. UNIDROIT PRINCIPLES, *supra* note 1, pmbl.

resorting to the Principles may avoid the application of *lex fori*, which in most cases would be likely to favor one party to the detriment of the other.[56]

The fourth situation contemplated in the Preamble allows for the application of the Principles to "interpret or supplement international uniform law instruments."[57] For example, if the parties refer specifically to only the International Chamber of Commerce Terms (INCOTERMS),[58] judges or arbitrators will apply those rules to the issues to be decided (e.g., place of delivery of the goods) to the extent that they cover those issues. With regard to aspects of the contract that are not covered by the INCOTERMS, the decision-maker may rely on the Principles. If the parties have instead made use of the Vienna Sales Convention, an arbitrator who must determine the substantive validity of a contract may resort to Chapter 3 of the Principles in order to fill the notorious "black hole" left by Article 4(a) of the Vienna Sales Convention[59] as well as other aspects of international sales that are not covered by this Convention.[60]

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56. *Id.* pmbl. cmt. 5.

57. *Id.* pmbl. The term *instruments* is broad enough to encompass more than international treaties, covering also texts elaborated by professional bodies or trade associations and widely used in international trade, such as INCOTERMS, the Uniform Rules and Practices for Documentary Credits, the FIDIC Conditions of Contract for Works of Civil Engineering or for Electrical and Mechanical Work, and the UNIDO Model Form of Turnkey Lump Sum Contract for the Construction of a Fertilizer Plant. Bonell, *supra* note 7, at 623.

58. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 460, INCOTERMS (1990).

59. Vienna Sales Convention, *supra* note 36, art. 4(a). Article 4(a) of the Vienna Sales Convention is expressly "not concerned with . . . issues concerned with the validity of the contract or any of its provisions or of any usage," and limits the instrument's scope to issues of the formation of sales contracts and the consequent obligations that arise. *Id.* Issues such as mistake, fraud, duress, and unconscionability might therefore be determined by municipal law. *See* Helen Elizabeth Hartnell, *Rousing the Sleeping Dogs: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 11, 14-15 (1993).

60. The Vienna Sales Convention is also expressly inapplicable to a variety of situations involving or related to sales transactions. Vienna Sales Convention, *supra* note 36, art. 2(a)-(f). The Vienna Sales Convention does not apply to sales

> (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
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> (b) by auction;
>
> (c) on execution or otherwise by authority of law;

This method of supplementing a body of international rules such as the Vienna Sales Convention with the Principles carries with it the advantage of consistent application of international commercial law. Rather than filling gaps with the rules and criteria provided by the domestic law, be it the law of the forum or the one determined by its rules of private international law, a judge or an arbitrator will be able to resolve the issue according to rules which are consonant with the spirit of that instrument.[61] Resorting to the Principles in these instances also provides for fairness in international adjudication because it avoids application of the law of a forum which is likely to be more accessible or familiar to one party than to the other.[62]

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels or aircraft;

(f) of electricity.

Id. Nor does coverage under the Vienna Sales Convention extend to sales that predominantly involve labor or other services or to issues of the effect of the contract on property in the goods sold. *Id*. arts. 3(1), 4(b).

The exclusions from the Vienna Sales Convention are likely to become vexing obstacles to the unification of international sales law. Eventually, the provisions included in Chapter 3 of the Principles which deal with questions not regulated by the Vienna Sales Convention may contribute to the development of an international jurisprudence on the validity of contracts for the international sale of goods. *See* Alejandro M. Garro, *The Gap-filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. (forthcoming June 1995). Even the Principles, however, leave some issues of validity to municipal mandatory rules of law. *See* UNIDROIT PRINCIPLES, *supra* note 1, arts. 3.1, 1.4.

61. When the interpretation and application of the Vienna Sales Convention's provisions are in question, article 6 calls for attention "to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." Vienna Sales Convention, *supra* note 36, art. 6. Other international conventions stress the same point. *See*, *e.g.*, *Rome Convention*, *supra* note 31, art. 18; Mexico Convention, *supra* note 31, art. 4; Convention on Agency in the International Sale of Goods, February 17, 1983, art. 6, 22 I.L.M. 249; UNIDROIT Convention on International Financial Leasing, art. 6, 27 I.L.M. 931 (1988); *United Nations Conference on the Liability of Operators of Transport Terminals in International Trade*, U.N. GAOR, U.N. Doc. A/Conf.152/6, at 24 (1991).

62. *Cf.* UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 5 (discouraging application of *lex fori* domestic law in cases where establishing the applicable law is "extremely difficult" because of the unfair advantage that is likely to accrue to one party). A uniform body of law such as the Principles retains its independence from national law, regardless of whether it has been incorporated into a national legal system. Bonell, *supra* note 7, at 627. Professor Bonell explains that "uniform law, even after its incorporation into the various national legal systems, only formally becomes an integrated part of the latter, whereas from a substantive point of view it does not lose its character as a special body of law autonomously elaborated and intended to be applied in uniformly [*sic*]." *Id*.

The fifth possible use of the Principles is to serve as a model "for national and international legislators."[63] Thus, the Principles may provide a pattern for use in the drafting of conventions and model laws related to international contracts and transactions or act as a useful reference for regulating matters of domestic contract law that are not generally covered in civil and commercial codes drafted more than half a century ago.[64] Moreover, because the Principles were originally drafted in English and the adoption of versions in many different languages is pending, the Principles offer an international glossary of contractual terms, and they may be used to unify legal concepts which are not utilized consistently or in a uniform manner by various jurisdictions throughout the world.[65] In this sense, the Principles may be regarded as a significant contribution to the globalization of legal thinking.[66]

III. APPLICATION OF THE PRINCIPLES TO INTERNATIONAL COMMERCIAL ARBITRATION

A. Use of the Principles by International Arbitrators

Like the Principles themselves, arbitration may be used to settle contractual disputes if both parties affirmatively indicate their accord on this issue in the contract.[67] Because of this contractual nature of arbitration, the arbitrator's choice of applicable law is also likely to be guided by the intention of the parties. Given the drafters' reference to

63. UNIDROIT PRINCIPLES, *supra* note 1, pmbl.

64. *Id.* pmbl. cmt. 7. Among the many provisions that are innovative from the standpoint of civil and commercial codes adopted a century or more ago are those on modified acceptance and writings in confirmation, *id*. arts. 2.11-2.12, the battle of the forms, *id*. art. 2.22, the determination of the kind of duty involved, *id*. art. 5.5, payment by funds transfer, *id*. art. 6.1.8, cure by nonperforming party, *id*. art. 7.4.1, and interest on damages, *id*. art. 7.4.10.

65. *Id.* pmbl. cmt. 7. For examples of inconsistencies that could be avoided in several international instruments if the terminology of the Principles were to be adopted as an international uniform glossary, see Bonell, *supra* note 7, at 626.

66. *See* Perillo, *supra* note 1, at 282.

67. This principle of party autonomy is recognized by almost every major treaty on international arbitration and arbitral rules. *See, e.g.*, New York Convention, *supra* note 2, art. V(l)(a); UNCITRAL Model Law, *supra* note 39, art. 34(2)(a)(i); *UNCITRAL Arbitration Rules*, *supra* note 47, art. 1.

arbitration in Comment 4(a) to the Preamble,[68] the Principles appear to have been especially designed for application by international arbitrators.

With respect to the application of the Principles, relevant differences between the judicial and arbitral forums are said to exist. Without delving into the mysteries of the juridical nature of arbitration,[69] these differences are likely to promote the application of the Principles in the context of international commercial arbitration. First, because the choice of the seat of arbitration is in most cases prompted by the parties' wish for a neutral forum, rather than by that forum's substantive law or choice of law rules, an international arbitral panel does not establish the same kind of legal nexus with the forum that a court possesses. Second, an international arbitral panel derives its power to adjudicate from a combination of the parties' agreement and some body of law that makes such an agreement enforceable. A court's jurisdiction, on the other hand, is based on *lex fori*, which stems from the state's sovereign authority. As a result, an arbitral award is not rendered in the name of a given jurisdiction to the same extent as a judicial judgment.[70] Third, because the purpose of conflicts rules is to regulate the scope of the state's legislative control over its officers, requiring an international arbitrator, who is not an organ of the state, to apply the conflicts rules of the forum would not further the same purpose.[71] Finally, because members of the arbitral panel are likely to be from different countries and likely to be more familiar with international contract practices than judges, they are

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68. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 4(a). The drafters advise the parties to an international commercial contract to combine the use of the Principles with an arbitration agreement to settle any eventual disputes arising under the contract. *Id.*

69. Examples of various theories on the nature of arbitration include the contractual, jurisdictional, and mixed theories of arbitration. *See, e.g.*, JULIAN D. M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 54-56 (1978); PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL [INTERNATIONAL COMMERCIAL ARBITRATION] 320-21 (1965); Georges Sauser-Hall, *L'Arbitrage en droit international privé* [*International Private Law Arbitration*], *in* ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL [YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW] 394, 399 (1957); JACQUELINE RUBELLIN-DEVICHI, L'ARBITRAGE: NATURE JURIDIQUE: DROIT INTERNE ET DROIT INTERNATIONAL PRIVÉ [ARBITRATION: JURIDICAL NATURE: DOMESTIC LAW AND INTERNATIONAL PRIVATE LAW]114-15 (1965).

70. Pierre Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international sigéant en Suisse* [*Conflict of Law Rules Applied to Substantive Matters of Litigation by the International Arbitrator Sitting is Switzerland*], 3 REVUE DE L'ARBITRAGE 155, 159 (1976).

71. *See id*. at 160 ("[National judges] apply the conflicts rules of the state whose authority they represent, rules expressing a legislative policy concerning the delimitation of the state's legislative competence.") (author's translation).

also more likely to be receptive to applying a set of rules designed especially for international commercial contracts such as the Principles.

Admitting that international arbitrators are less responsible to a particular national judicial body or legal system,[72] they must still adhere to certain principles of law. Therefore, when the arbitrators are directed to settle a dispute which has connections to several legal systems, the issue becomes one of which law to apply. The answer to this question depends greatly on both the terms of the arbitration agreement and the law governing the arbitration. Thus, the arbitrators may apply the law designated by the parties, by virtue of the choice-of-law rules of the situs deemed most relevant by the arbitrators, or by virtue of any rules of law (including the Principles) that the arbitrators find most appropriate to the circumstances of the transaction and the case.

B. When the Parties Have Made an Express Choice to Apply the Principles to Their Contract

Parties commonly designate in their contract the substantive law which is to be applied to the arbitration in the event of a dispute. Individualized needs for dispute-reduction and outcome-determination affect the parties' choice of applicable law;[73] thus, most domestic arbitration laws, arbitral rules, and international conventions expressly permit the parties to choose the substantive law that will govern their dispute.[74] Use of the Principles as the substantive law of international

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72. *See* Lando, *supra* note 54, at 139 ("We cannot offer you any absolute proof but it is our opinion that arbitrators take up an even more relaxed attitude towards the rule of law than do the judges whose decisions may be appealed, are often published, and frequently criticized by the writers, for some of which they have respect.").

73. *See generally* Francis J. Higgins, et al., *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1041 (1980).

74. *See* UNCITRAL Model Law, *supra* note 37, art. 34(2)(a)(i); International Chamber of Commerce Rules of Arbitration and Court, art. 12, *reprinted in* W. LAURENCE CRAIG, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION app. II-7 (2d ed. 1990) [hereinafter ICC RULES]; *UNCITRAL Arbitration Rules*, *supra* note 45, art. 33; American Arbitration Association International Arbitration Rules, art. 29, *reprinted in* The American Arbitration Association, THE INTERNATIONAL ARBITRATION KIT: A COMPILATION OF BASIC AND FREQUENTLY REQUESTED DOCUMENTS 139, 146 (Laura Ferris Brown ed., 1993) [hereinafter AAA International Arbitration Rules]. For examples of international conventions allowing party autonomy in the selection of the substantive governing law, see, e.g., New York Convention, *supra* note 2, art. V(1)(a); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160 [hereinafter ICSID Convention];

arbitration not only addresses the needs and expectations of parties to international commercial contracts, but it also allows the arbitrators to stand on equal footing, while applying law to the merits.[75] Because the Principles fulfill both of these needs and because they are an expedient and fair method of dispute resolution, international commercial arbitration has much to gain from arbitrators' direct application of this readily available, cohesive body of international law, rather than national laws.

If the parties have expressly adopted the Principles as the rules of law governing their contract, the arbitrators are bound to apply them,[76] as long as the issue to be decided falls expressly or impliedly within their scope and the Principles do not conflict with mandatory rules from which the parties may not deviate.[77] Even in situations where the issues to be decided fall under the scope of the Principles but are not expressly settled by them, the arbitrator is encouraged to apply the Principles and their "underlying general principles" as the proper law of the contract.[78]

In contrast, use of the Principles by courts, as called for by the contracting parties, may face obstacles that are not present in an arbitral setting. Most national courts adhere to the traditional view that contractual freedom of choice is restricted to provisions within domestic or national law, to the exclusion of a body of law that is not rooted in a

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European Convention on International Commercial Arbitration, April 21, 1961, art. VII, 484 U.N.T.S. 349 [hereinafter European Convention]; Inter-American Convention on International Commercial Arbitration, art. 5(1)(d), *reprinted in* AMERICAN ARBITRATION ASSOCIATION, *supra*, at 63-64 [hereinafter Panama Convention].

75. *See* Lando, *supra* note 54, at 140. Professor Lando, an experienced arbitrator, remarks that the application of a nationally-based substantive law may give rise to the following situation:

> Those who have participated in an international arbitration governed by foreign law have experienced the frustration of being told the law by a participant who is a "native" of that legal system. If the native is not the sole arbitrator or the president of the tribunal, but one who is or may be suspected of being interested in the outcome of the dispute you may have reason to fear that you are not always told the whole truth about the law. Nevertheless, you remain the foreigner who speaks without authority, you are the dilettante where the other is the expert. If he is your co-arbitrator you have often very little to say.

Id.

76. UNIDROIT PRINCIPLES, *supra* note 1, pmbl.

77. *Id.* pmbl. cmt. 4(a). Otherwise, the resulting arbitral award may be challenged and set aside on the ground that the arbitrator went beyond the terms of the authority conferred on them under the arbitration agreement. *See* New York Convention, *supra* note 2, art. V(l)(c).

78. *Id.* art. 1.6(2).

municipal legal system.[79] National courts may also hesitate to allow any exclusion of the applicable domestic law designated by the rules of private international law of the forum.[80] This is why in the eyes of a national court, the Principles are complementary to the applicable national law. In this sense, one may draw a distinction between the degrees of the Principles' binding force in situations where they are invoked before a national court and where they serve as *lex causae* in international commercial arbitration.

C. When the Parties Have Agreed to the Application of the General Principles of Law, Lex Mercatoria, or the Like

The contractual choice of sources such as *lex mercatoria* or general principles of law as the law applicable to arbitration presents different problems. When parties select these sources, arbitrators may resort to usages, customs, and rules on which international commercial law has been and continues to be built.[81] Arguably, arbitrators should not apply nonnational substantive rules that are more a "myth"[82] or an "enigma"[83] than a separate, clearly defined, and autonomous body of law.

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79. *Id.* pmbl. cmt. 4(a). Judges may doubt, as do commentators, "whether a *lex mercatoria* even exists, in the sense of an international commercial law divorced from any state law." SIR MICHAEL J. MUSTILL & STEWART C. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 80-82 (2d ed. 1991).

80. *Id.*

81. *See* Berthold Goldman, *Lex Mercatoria*, 3 FORUM INTERNATIONALE 6 (1983). Professor Goldman defines *lex mercatoria* as customary transnational law, and states that "[t]he criterion for determining the ambit of lex mercatoria . . . does not solely reside in the *object* of its constituent elements, but also in its *origin* and its *customary*, and thus *spontaneous*, nature." *Id*. In another article, Professor Goldman elaborates on his definition and describes *lex mercatoria* as "rules the object of which is mainly, if not exclusively, transnational, and the *origin* is customary and thus spontaneous, notwithstanding the possible intervention of interstate or state authorities in their elaboration and/or implementation." Goldman, *supra* note 5, at 114. *See generally* Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, *in* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 1 (Thomas E. Carbonneau ed., 1990).

82. Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575, 611 (1989). Referring to *lex mercatoria* in the context of state contracts, Delaume states that *lex mercatoria* "remains, both in scope and practical significance, an elusive system and mythical view of a transnational law of state contracts whose sources are elsewhere."

83. Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613 (1989). Highet argues that *lex mercatoria* is more aptly described as "*principia mercatoria*." *Id*. at 628. "The *lex mercatoria* is a sort of shadowy, optional, aleatory, international commercial *congeries* of rules and principles." *Id.* at 618.

The absence of a delineated and predictable set of principles and rules on which the parties may base their expectations appears as a major shortcoming to both the choice and the application of *lex mercatoria* to a contract. From the standpoint of the parties, the choice of *lex mercatoria* does not allow them to confidently determine their rights and obligations under the contract. From the standpoint of the arbitrators, the application of *lex mercatoria* requires a search for diffuse rules found in, among other areas, trade usages, customs, and legal scholarship. Here is where the major contribution of the Principles to the advancement of international commercial arbitration is felt most strongly.

Notably, those who favor the application of *lex mercatoria* have examined the complexities and inadequacies of the choice-of-law process and suggest applying *lex mercatoria* in the absence of a better alternative.[84] The choice of the Principles may avoid deadlock when each side refuses to accept each other's law and may be used by arbitrators instead of resorting to the vagaries of *lex mercatoria* or general principles of law.[85] The Principles offer legal guidelines according to which the parties may ascertain their rights and duties before any dispute has arisen,[86] and if there are good reasons for resorting to *lex mercatoria*, their persuasive force is enhanced by the availability of the Principles to supplement such a diffuse body of law.

If the rules of *lex mercatoria* were sufficiently defined and understood throughout the world, reliance on the UNIDROIT Principles would be unnecessary. In the present state of affairs, however, the application of the Principles has the potential of minimizing uncertainty with respect to the many contract rules on which there is insufficient consensus. Although the Working Group did not specify of the degree of clarity, objectivity, universality, and official sanction that must be present before a given rule can be said to constitute *lex mercatoria* and, therefore, to be applicable to arbitration.[87] However, the thoroughness of the

84. *But see* Lando, *supra* note 54, at 137 (arguing persuasively that, in the context of international commercial disputes and particularly when the parties have failed to select the law of a given jurisdiction, *lex mercatoria* offers at least as much predictability and certainty as that of any given country).

85. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 4(b).

86. *Id.*

87. *See supra* pp. 96-97 and note 12. Furthermore, the opinions of the members of the Working Group are unlikely to be unanimous on this matter.

Principles and the specificity of most of its rules make delving into those jurisprudential questions unnecessary.

D. When It Proves Impossible to Identify the Relevant Rule of the Applicable Law

The Principles may also have a role to play in cases where the parties have selected the law of a particular legal system to be the applicable law of the contract.[88] More specifically, the Principles may apply when it proves "impossible to establish the relevant rule of the applicable law."[89] This is the only instance in which the Preamble refers to a situation in which the Principles may be applied as a substitute for the otherwise applicable domestic law. The comments make clear that recourse to the Principles in this instance should be seen as a last resort.[90]

The comments indicate, however, that the concept of impossibility should not be carried too far.[91] The Principles do not require proof that establishing the applicable rule is an absolute impossibility but imply a more flexible notion of whether it is practicable and economical to accede to a particular legal system and to bring an issue to the attention of the tribunal.[92] For example, the Principles may apply in cases where the research required to identify the applicable rule would entail costs that are disproportionate to the value at stake.[93]

However, the mere impracticability in finding the relevant rule of the applicable law does not suffice to dissolve the choice of law made by the parties or by the rules of private international law.[94] Impossibility also does not cover the situation where reaching a fair solution to the case at hand is what appears to be impossible. The question then becomes one of the extent to which the Principles may be applied when the

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88. *See, e.g.*, UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmts. 3, 4(a) , 5.
89. *Id.* pmbl.
90. *Id.* pmbl. cmt. 5.
91. *Id.*
92. *Id.*
93. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 5.
94. *See id.* Compare the approach taken by the Committee on European Contract Law in its proposed Principles of European Contract Law, art. 1.101(4) [hereinafter PECL], which would permit their use to settle issues which the applicable law does not resolve. *See* Ole Lando, *European Contract Law*, 31 AM. J. COMP. L. 635, 654 (1983). ("These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.").

rudimentary character or the inadequacies of the applicable domestic law does not allow the arbitrators to equitably settle the issue. Because this situation is not one expressly contemplated in the Preamble of the Principles, it will be examined in the next chapter.[95]

IV. APPLICATION OF THE PRINCIPLES IN SITUATIONS NOT EXPRESSLY CONTEMPLATED IN THE PREAMBLE

In addition to the situations described in the Preamble, the Principles may also be useful in situations which are not expressly contemplated. For example, at the time of negotiation and drafting of an international contract, the conceptual framework offered by the Principles may serve as a useful guide to lawyers from different legal cultures. The Principles may also have a pedagogical function, assisting parties to identify issues common to different types of contracts and to allocate their rights and obligations accordingly.[96] Other scenarios which are not enunciated in the Preamble to which the Principles may be applied deserve further discussion: (1) when the arbitrators decide *ex aequo et bono*, (2) when the parties have not chosen any law to govern their contract, (3) when there are gaps in the domestic law chosen by the parties or the law determined by the rules of private international law, and (4) when the applicable domestic law determined by the rules of private international law is manifestly inadequate to bring a fair solution to a particular issue.

A. When the Arbitrators Decide Ex aequo et bono

To the extent that the distinction between arbitration *de jure* and *ex aequo et bono* is retained by many arbitration statutes, rules, and conventions, the application of the Principles may depend on whether or not the arbitrators are authorized to decide as *amiables compositeurs*[97] or only according to rules of law. If the arbitrators are directed to apply the

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95. *See infra* pp. 120-22.

96. *See* Bonell, *supra* note 7, at 628-29.

97. Arbitrators may be designated *amiables compositeurs* in two ways; the parties may expressly grant the arbitral tribunal the power to decide *ex aequo et bono* or, pursuant to some arbitration statutes, the arbitrators are conferred with this power unless the parties agree otherwise. *See, e.g.*, UNCITRAL Model Law, *supra* note 37, art. 28(3); Geneva Convention, *supra* note 45, art. VII(2). For a discussion on the application of *lex mercatoria* in the *amiable composition*, see Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, 6 ARB. INT'L 133, 141-42.

Principles, they are bound to decide according to the Principles, regardless of whether their sense of equity would lead to a different result. If the arbitrators are empowered to decide as *amiables compositeurs*, they need not refer to the Principles as a basis for their decision. However, an *amiable compositeur* is not prevented from resorting to the Principles. In fact, he or she may be encouraged to apply the Principles in order to provide an award *ex aequo et bono* with more than his or her own sense of justice or good conscience. Although an authorization of *amiable composition* does not signify a choice of the Principles as governing law, such a choice permits the application of the Principles to the extent that the arbitrators deem them suitable to a decision *ex aequo et bono*.[98] In this way, the Principles may be squeezed in as part of an equitable *ratio scripta* that the *amiables compositeurs* are free to follow.

B. When the Parties Have Not Chosen any Law to Govern Their Contract

Incredible as it may seem, parties often fail to agree on the application of a particular substantive law. It is not always easy to ascertain the reasons behind such an omission in a contract. Parties may fail to provide for the applicable law because, after having discussed the topic, they were unable to agree. Other times they simply may not want to raise an issue of possible contention and are willing to put off any conflict until the need to settle it arises at the time of performance.[99] The omission may also be due to the fact that the parties did not think about the choice of law to govern their contract.

Regardless of how the omission occurred, absent an express or implied choice by the parties, the arbitrators must determine the appropriate substantive law which is to be applied to resolve disputes between the parties. Unfortunately, international conventions, arbitration statutes, and arbitral rules provide no uniform method for determining the

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98. *See* David Rivkin, *Enforceability of Arbitral Awards Based on Lex Mercatoria*, 9 ARB. INT'L 67, 71-72 (1993) (arguing for the possibility of applying *lex mercatoria* if the arbitrators are authorized to decide *ex aequo et bono*).

99. For example, in a foreign investment contract, it is common for private investors to show reluctance to commit themselves to an agreement governed by the national law of the state in which they are contracting, whereas host governments are reluctant to commit to an agreement containing a foreign national law. *See* Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 74-75 (1982).

applicable law. The arbitrators may rely upon choice-of-law methods which range from those compelling reliance on the rules of private international law of the situs to those which defer the selection to the arbitrators themselves. In the latter situation, the arbitrators may rely on the conflicts rules they deem most appropriate or choose the substantive law directly.

The traditional method used by arbitrators to determine the applicable law is to adopt the choice-of-law rules of the place where the arbitral tribunal has its seat.[100] This territorially oriented criterion is based on the theory that an arbitral tribunal exercises the same functions as a court and, therefore, that the choice-of-law rules of the forum apply to arbitral, as well as judicial, proceedings.[101] With respect to contractual obligations in general, national conflicts laws usually provide the specific criteria to determine the applicable law when an express choice by the parties is absent.[102] The primary purpose of these criteria is to assist arbitrators in determining the state with the most significant relationship to the contract or the issue in controversy. Yet, despite this assistance, the most significant relationship may remain unclear in many cases.

Another, more modern method used by arbitrators to determine the applicable law of a particular contract is the direct selection of the choice-of-law rules that should be applied,[103] which need not necessarily be those of the situs of arbitration.[104] Accordingly, in exercising their freedom to determine the applicable conflicts system, the arbitrators may resort to different methods and theories for choosing substantive law. This direct approach distinguishes the task of the arbitrator from that of a

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100. *See, e.g.*, 1 A.V. DICEY & J.H.C. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 584-85 (Lawrence Collins ed., 1993).

101. Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 INT'L LAW. 613, 626-27 (1982).

102. Other relevant treaties, such as the Rome Convention and the Mexico Convention operate in the same way at the regional level. *See* Rome Convention, *supra* note 31, art. 18; Inter-American Convention, *supra* note 31, art. 9.

103. Croff, *supra* note 101, at 632.

104. *See* Geneva Convention, *supra* note 45, art. VII(1) ("The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rules of conflict that the arbitrators deem applicable."); UNCITRAL Model Law, *supra* note 37, art. 28.2 (The arbitral tribunal may apply "the law determined by the conflict of laws rules which it considers applicable."); ICC Rules, *supra* note 73, art. 13(3) (Arbitrators may apply the choice of law rule they deem appropriate.).

judge, because the latter will often apply the forum's conflicts.[105] Instead, the arbitrators may, for example, (1) cumulatively or proportionately apply the rules of each conflicts system connected with the dispute,[106] (2) choose the conflict of law system regarded as most responsive to international commerce,[107] (3) apply the conflicts rules of the jurisdiction most closely connected to the dispute,[108] or (4) create a choice-of-law rule derived from a comparison of competing systems.[109] Yet even under this "modern" direct approach, the arbitrators must engage in a thorough comparative analysis of the substantive rules of each of the legal systems with which the contract may be connected. This approach then leads to a cumbersome procedure; first, the arbitrator must select a system of choice-of-law rules, and then he must search for the contract's *center of gravity*, *most significant contact*, or *most characteristic prestation* in order to determine the relevant substantive law under the conflict rules.

This cumbersome method for determining the law applicable to a contract has been improved upon by what might be considered as an emerging (or at least progressive) trend which, without any reference to any conflicts system, allows the arbitrators to select either the substantive laws most closely connected to the dispute or a set of international, nonnational, or transnational rules of law.[110] This approach is exemplified in the arbitration framework provided by the ICSID

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105. Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 236, 258 (1986).

106. Yves Derains, *L'application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige* [*The Cumulative Application by the Arbitrator of Conflict of Law Systems Relative to Litigation*], 2 REVUE DE L'ARBITRAGE 105 (1972).

107. Danilowicz, *supra* note 105, at 258.

108. Croff, *supra* note 101, 632-33.

109. Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

110. Croff, *supra* note 101, at 632-33. *See also* Danilowicz, *supra* note 108, at 284, who forcefully advocates that

> the arbitrator's determination of the applicable law should be based on an analysis of the substantive rules rather than on application of conflict of laws rules. . . . In choosing the substantive rules, the arbitrator should consider the national legal systems involved in the dispute, as well as nonnational rules. The arbitrator's choice should be made on the basis of the completeness and sophistication of a set of rules, rather than their source.

Convention,[111] the 1981 amendment of the French Code of Civil Procedure,[112] the 1986 amendment of the Portuguese arbitration law,[113] the 1993 amendment to the provisions of the Mexican Commercial Code relating to international commercial arbitration,[114] and the International Arbitration Rules of the American Arbitration Association.[115] An arbitrator who decides to apply the substantive law of a particular legal system will find that the choice of applicable law is simplified if all the possible legal systems involved offer the same solution to the dispute at hand. However, before he or she may conclude that such a false conflict situation exists, the arbitrator must verify that the outcome of the dispute would have been the same regardless of the choice of law.[116] If a true conflict is found under any potentially applicable system, the arbitrator will have to consider all aspects of the case pursuant to each relevant systems' rules.[117]

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111. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, art. 42(1), 17 U.S.T. 1270, 575 U.N.T.S. 160 [hereinafter ICSID Convention] (authorizing the arbitrators, in the absence of the parties' choice, to apply the law of a contracting state party to the dispute "and such rules of international law as may be applicable").

112. NOUV. C. PR. CIV. art. 1496(2). The Code allows an arbitrator to apply the rules of law which she deems appropriate when the parties have not made a choice of the applicable law. *Id*. On the significance of the amendment, see Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence* [*International Arbitration in France After the Decree of May 12, 1981*], 46 LA. L. REV. 1045, 1059 (1986):

> On the practical level, a legal regime was created that satisfied the requirements for effective arbitration of international commercial disputes. On the theoretical level, such seminal ideas as special substantive rules for international matters and an effective dispute-resolution process that does not emanate from—nor depend upon—an Austinian sovereign were conceived and given expression.

Id. *See also* Philippe Fouchard, *L'arbitrage international en France après le décret du 12 mai 1981* [*International Arbitration in France After the Decree of May 12, 1981*], at 109 JOURNAL DU DROIT INTERNATIONAL 374, 397 (1982) (arguing that the conviction that parties' needs are better served by neutral rather than domestic rules of law prompted the expansion of discretion given to arbitrators).

113. Loi No. 31/86 of 29 Aug. 1986, art. 33.2, *reprinted in* 3 REVUE DE L'ARBITRAGE 487, 496 (1991).

114. CODIGO DE COMERCIA [COD. COM.] art. 1445. *See also* Julio Trerino, *The New Mexican Legislation on Commercial Arbitration*, 5 J. INT'L ARB. 5, 22 (1994).

115. AAA International Arbitration Rules, *supra* note 73, art. 29(i).

116. Croff, *supra* note 101, at 632-33.

117. *Id*.

In light of current methods used by arbitrators to supply the law governing a contract, several reasons support the application of the Principles when the contract is silent as to the applicable law. First, the Principles provide an appealing option to arbitrators who must otherwise determine the applicable law by conducting a conflicts search for a national law. Such law is often artificial and inappropriate to the extent that it is likely to have been adopted with domestic transactions in mind. As such, it may be inconsistent with the needs and usages of international commerce.[118] Second, the Principles dispense with the need to search for a determination of the law most significantly related to a contract, and are more likely than any other domestic law to supply a clear answer to the pertinent issue. Third, an arbitrator's direct application of the Principles without an initial reference to choice-of-law rules is already permitted under several arbitration laws and rules which have followed the noted emerging trend.[119]

In addition, the existence of an arbitration clause in an international contract provides a plausible ground for the application of the Principles. Presumably, the parties' choice of arbitration in a neutral forum indicates their choice of a substantive law which is not tied to any particular jurisdiction. Accordingly, a case may be made that the arbitrator's choice of the Principles may be considered as an extension of the principle of party autonomy, to the extent that the arbitrator acts as an agent of the parties in determining the law governing the dispute.[120] This argument is persuasive, but it is not contemplated in the Preamble to the Principles.

However desirable the application of the Principles may be in the absence of an express choice of law by the parties, this application does not find express support in even the *travaux préparatoires* of the Principles. At one point during the drafting process, the Working Group,

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118. *Cf.* Richard Hyland, *On Setting Forth the Law of Contract: A Forward*, 40 AM. J. COMP. L. 541, 542 (1992) ("[T]he Principles probably represent the most accurate description to date of the emerging international consensus about the rules that are most suitable to international trade.").

119. *See supra* pp. 117-18.

120. Since the principle of party autonomy in contractual matters is almost universally recognized, the danger of the unenforceability of an award attained through use of the Principles is remote. Peter D. Ehrenhaft, *Effective International Commercial Arbitration*, 9 LAW & POL'Y INT'L BUS. 1191, 1212-13.

after much discussion, was ready to accept that the Principles may be applied "when the parties have not chosen any law to govern their contract."[121] However, this language met with strong criticism by the Governing Council of UNIDROIT.[122] The Council found it inappropriate for an instrument which gathers binding force from the will of the parties to take the place of the domestic law that ought to be determined by the rules of private international law of the forum.[123] This omission notwithstanding, the reasons mentioned infra weigh strongly in favor of the application of the Principles when the parties have failed to choose some other law to govern their contract, insofar as they do not apply to the exclusion of applicable mandatory laws.[124]

C. When There Are Gaps in the Domestic Law Chosen by the Parties or in the Law Determined by the Rules of Private International Law

Assuming that the parties or the rules of private international law bring about the application of law which does not address the peculiarities of international contracting, the absence of rules dealing specifically with issues such as the formation, validity, interpretation, content, performance, and breach of international commercial contracts could arguably authorize the arbitrators to apply the Principles to fill that gap. However, the text of the Principles limits their gap-filling role to cases involving "international uniform law instruments."[125] The importance of

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121. *See Draft Principles*, *supra* note 28, art. 1.2(2) ("The Principles may be applied. . . (b) when the parties have not chosen any law to govern their contract."). *See also Miami Meeting*, *supra* note 28, at 21-30.

122. *See Rome Meeting*, *supra* note 28, at 22. Because the text of the UNIDROIT Principles was not submitted to the approval of a committee of governmental experts, nor were they adopted at a diplomatic conference, the Governing Council of UNIDROIT became actively involved in the review of the text of the Principles, at times not hesitating to exercise its authority as the supreme body of UNIDROIT. *Id.* at 89. The Governing Council decided by ten votes against eight, with one abstention, to delete the quoted sentence from the Draft Principles. *Id*.

123. *Id*.

124. Lando, *supra* note 54, at 142. Professor Lando argues not only that "the arbitrator should take into account the public policy provisions of the country in which the award would have to be enforced. But he should also consider mandatory rules of a country closely connected with the contract, even though the award would not be enforced in that country." *Id.*

125. *Compare* UNIDROIT PRINCIPLES, *supra* note 1, pmbl., *with* PECL, *supra* note 95, art. 1.101(4). The PECL specifically authorize filling gaps in the domestic law applicable to the contract. "These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so." *Id.*

the Principles' supplementing function is apparent in view of the fragmentary nature of most international conventions dealing with commercial transactions. Use of the Principles in supplementing international conventions is also consistent with the directives which are attached to some of the most recently adopted international conventions.[126] These directives call for construction of the conventions in accordance with both their international character and the need for uniform application.[127]

Whereas this role as a gap-filler for international uniform instruments is expressly contemplated in the Preamble to the Principles, the same cannot be said with respect to domestic law. Arguably, the supplementary role to be played by the Principles may be analogous to the gap-filling role played in civil law jurisdictions by the civil code rules on obligations and contracts, or to the supplementary role played in the Uniform Commercial Code by the common law and equity principles.[128] However, the relationship between the Principles and domestic law, as stated in the Preamble, comes into play only when it is "impossible to establish the relevant rule of the applicable law."[129] As discussed earlier, a distinction may be drawn between a situation in which it is not possible

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126. *See supra* note 61 and authorities cited therein. An exceptional provision worth noting is found in article 9 of the Mexico Convention, which appears to incorporate the UNIDROIT Principles as a complementary source to the applicable domestic law. *See* Mexico Convention, *supra* note 31, art. 9. Article 9 points to the application of the law of the state with which the contract has the "closest ties," but it also requires "tak[ing] into account the general principles of international commercial law recognized by international organizations."

127. Vienna Sales Convention, *supra* note 36, art. 7(1). Furthermore, Article 7(2) of the Vienna Sales Convention provides that questions not expressly settled by Vienna Sales Convention are to be settled "in conformity with the general principles on which [the Vienna Sales Convention] is based" (without giving any indication as to what those general principles might be). *Id.* Arguably, the UNIDROIT Principles may be properly considered as a component part of the underlying "general principles" of the Vienna Sales Convention as well as of other international treaties governing specific commercial contracts. Therefore, the Principles may play a future role with regard to international instruments governing specific contracts, such as a contract of carriage by sea or air, marine or air insurance, and banking transactions. Accordingly, assuming that an issue arises concerning the proper rate of interest to be applied to a monetary obligation under article 78 of the Vienna Sales Convention, article 7.4.9(2) of the Principles may be resorted to for the purpose of determining the law establishing such a rate, rather than applying the law determined by the rules of private international law of the forum. *See* Garro, *supra* note 60.

128. *See, e.g.*, U.C.C. § 1-102(2)(a)(1994) ("Supplementary General Principles of Law Applicable. Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant . . . shall supplement its provisions.").

129. UNIDROIT PRINCIPLES, *supra* note 1, pmbl.

(i.e., extremely burdensome or costly) to identify the applicable law and a situation in which the applicable law has been identified, but that law does not contemplate the particular issue at hand.[130] In the former case, which is the one expressly envisioned in the Preamble, the Principles may apply in lieu of *lex fori*.[131]

In the latter situation, one must consider the problem of assuming that a gap in a particular legal system exists. Most legal systems aspire to self-sufficiency through their own gap-filling techniques, including analogy, custom, and general principles of law. These techniques could conceivably provide solutions for almost every legal issue and preclude the immediate resort to the Principles, rather than the domestic law. For example, one could argue that since the institution of *hardship* is not addressed by the domestic rules of the law chosen by the parties or determined by the rules on private international law, the decision-maker should apply the rules on hardship contained in the Principles[132] in order to fill that gap. However, the absence of rules on hardship may indicate either the rejection of the concept or an inadvertent omission in that legal system. Therefore, it seems appropriate to determine the availability of hardship under that domestic law in light of what the courts of that jurisdiction would hold than to declare the existence of a gap upon the simple finding that such legal system does not include provisions on hardship.

An arbitrator's substitution of municipal law with an international instrument such as the Principles also risks betraying the will of the parties. If the parties have decided to submit to the rules of a particular domestic legal system, irrespective of how inadequate that system may be to deal with commercial contracts in an international context, the intention of the parties may be frustrated if the arbitrators were to resort too readily to the Principles. Although in many cases the parties are not actually aware of the many ramifications of the substantive law that they have chosen to govern their contract, the most sensible approach for arbitrators and judges is to operate under the assumption that the parties

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130. *See supra* pp. 112-13.

131. UNIDROIT PRINCIPLES, *supra* note 1, arts. 6.2.1-6.2.3.

132. For a discussion on the ever-emerging body of domestic rules and practices governing trade, investment, and technology, see generally Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. DISP. RESOL. 235 (1988).

wished to be governed by the chosen law. As such, the judges and arbitrators should not construe omissions as an excuse to resort to the Principles. Although this particular rejection of the sophisticated and readily-available Principles is disappointing, to extend their use to situations beyond the parties' own wishes would endanger the values that the Principles seek to protect.

D. When the Applicable Domestic Law Determined by the Rules of Private International Law are Manifestly Inadequate

One of the main reasons for UNIDROIT's focus on international commercial contracts is the inadequacy of national laws with respect to international cases. Apart from the problems with the outdated or fragmentary nature of some domestic systems, even the most comprehensive and sophisticated contract rules in municipal law are likely to have been drafted primarily, if not exclusively, for domestic contract disputes.[133] This is a reasonable approach for a national legislature to take because, even today, most of the cases handled by national courts are strictly of a domestic nature. The problem with this domestic orientation is that the imposition of traditional concepts and practical solutions on an ever-increasing number of international contracts can often be unfair. By way of exception, some national laws provide for special situations present only in an international setting, such as import-export restrictions or flow-of-currency control.[134] However, such regulation does not necessarily reflect an awareness of the needs of modern international trade. In many cases, the only purpose behind domestic regulation of international transactions is protection of the interests of the state, and the domestic law often contains restrictions or

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133. *See* Perillo, *supra* note 1, at 283-84.

> [I]f the rules of conflict of laws points to a state whose law is obscure, undeveloped, or merely difficult to ascertain, the judges or arbitrators have a neutral resource to apply. This last function of Principles should not be underestimated, as this is one of the primary functions of the Restatement in the United States. *Id.*

See also Riccomagno, *supra* note 31, at 12 ("What the arbitrators are not allowed to do is disregard the national laws (either chosen by the parties or clearly applicable according to the rules of private international law) on the ground that they are inadequate for the resolution of the international dispute under their consideration.").

134. UNIDROIT PRINCIPLES, *supra* note 1, pmbl. cmt. 5.

forfeitures of rights which are based on an unbalanced consideration of the interests of parties to an international contract.

When a choice-of-law clause or the applicable rules of private international law leads to the exclusive application of a particular national system of rules, and the solution provided by those rules is obscure, undeveloped, or out of line with the reasonable expectations of the parties and the business community as a whole, the question arises as to whether the arbitrators may eschew application of the domestic law and instead apply the Principles on grounds of inadequacy. Opinions differ as to the kind of exigent circumstances that would authorize the arbitrators to seek a more fair solution under the Principles.[135] The issue appears to be settled in the negative by the Principles; the text does not authorize arbitrators to cast aside the application of national law when the answer provided by that law is unsatisfactory.[136] Only if the parties have agreed that their contract be governed by the Principles or by *lex mercatoria*, or if it becomes impossible (or at least extremely cumbersome or costly) to establish the relevant law, will the dispute become a good candidate for application of the Principles.[137] If the contract directs the arbitrators to apply a given national law, they must do so.[138] However, in practice it is likely that a good arbitrator will manage to find the means by which to circumvent the application of a domestic law which is manifestly unfair, either through an intelligent use of the sources provided by the applicable national law or by interpreting the national law consistently with accepted international trade practices.[139]

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135. *See id.*

136. *Id.*

137. *Id.*

138. *See id*. Notably, the UNIDROIT Governing Council turned down a proposal to include language in the preamble stating that the Principles "may provide a solution to an issue raised if it proves *inappropriate or impracticable* to identify a particular domestic law applicable, or to establish the relevant rule of law." *See Rome Meeting*, *supra* note 28, at 21.

139. *See* Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, 6 ARB. INT'L 133, 147 (1990) (referring, by way of analogy, to Section 114 of the Restatement (Third) of the Foreign Relations Law of the United States: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

V. CONCLUSION

The preparation and adoption of the Principles is a significant step in the gradual emergence of a clear and objective body of transnational contract law.[140] The most immediate contribution of the Principles is the provision of a method for avoiding conflicts which in turn facilitates contractual negotiations, the performance of the obligations and the resolution of disputes by arbitration. Parties to an international commercial contract may select the Principles when they are unable to agree upon any municipal law and be assured that any issues arising in connection with their international commercial contract will be covered. At times, haggling over an international business deal results in putting off the choice of a substantive law applicable to their contract; at other times, the unequal bargaining power of the parties may result in the selection of law with which only one of the parties is familiar. In other instances, the deadlock may be overcome by agreeing to the application of the law of some neutral jurisdiction, whether or not either party has any understanding of that country's law. From the standpoint of international commercial practice, these options are not as desirable as resorting to the Principles, which enhance both party autonomy and legal certainty.

A second, but not less important, contribution is the transnational dimension that Principles will bring to the arbitral process. If the parties decide to adopt the Principles as the rules applicable to their contract coupled with an arbitration agreement, they will gain the advantage of a set of rules which are better-suited than national laws to handle international issues. Through the use of these rules, the arbitral process is (if so agreed by the parties and supported by the law governing that agreement) enhanced with the following features: (1) the Principles permit the arbitrators to bypass elaborate comparative choice-of-law exercises, which are often erratic, inconclusive, and artificial; or (2) the Principles may supplement the contractual rules of a designated national law with a set of contract rules that are not tied to any particular jurisdiction.

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140. On the evolution of a body of lex mercatoria applicable to international contracts, see generally Berthold Goldman, *La lex mercatoria dans les contrats et l'arbitragé internationale: Réalité et perspectives* [*Lex Mercatoria in International Arbitration Contracts: Reality and Perspectives*], 106 JOURNAL DU DROIT INTERNATIONAL 475, 490-91 (1979).

The Principles' contribution to the arbitral process also extends to situations where the parties agree that the contract be governed by general principles of law or *lex mercatoria*. Although many of the rules embodied in the Principles are general and broad, most of them are bound to heighten the contracting parties' certainty with respect to their contractual obligations. The Principles capture the advantages of neutrality, fairness, and suitability that have been attributed to *lex mercatoria*, while reducing the vagueness and uncertainty inherent in any body of law that aspires to be uniformly applied.

Eventually, the Principles may serve as a means for circumventing national laws which are inconsistent with the needs of international trade. In the same way that the New York Convention helped denationalize commercial arbitration by dispensing with the need to subordinate the proceedings to the procedural law of the country where arbitration takes place,[141] the Principles similarly advance the goals of commercial arbitration by offering the parties to an international commercial contract a well-defined body of law that allows them to argue their case on equal ground, rather than on the uneven plane that exists when the transaction is subject to the domestic legal system of one of the parties. Regardless of the position one may take on the role of the Principles as a substitute or supplement for the otherwise applicable municipal law, the Principles may be regarded as an expository code of international contract law rules, the gradual international acceptance of which will transform them into customary rules of universal application.

It is not to be expected that national courts will be predisposed at this initial stage to apply the Principles to cases and controversies arising within their jurisdictions.[142] The Principles do not draw their binding

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141. New York Convention, *supra* note 2, art. V(l)(d).

142. Since the Vienna Sales Convention came into force on January 1, 1988, there have been only four reported court cases in the United States that have mentioned the Vienna Sales Convention. *See* Filanto S.p.A v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992); Beijing Metals & Minerals Import/Export Corp. v. American Business Center Inc., 993 F.2d 1178 (5th Cir. 1993); Interag Co. v. Stafford Phase Corp., No. 89 Civ. 4950, 1990 U.S. Dist. LEXIS 6134 (S.D.N.Y. May 22, 1990); and Orbisphere Corp. v. United States, 726 F. Supp. 1344 (Ct. Int'l Trade 1989).

In contrast, at least ten cases have been decided by German courts since the Vienna Sales Convention came into force in Germany in 1991. *See* Volker Behr, *Commentary to Journal of Law and Commerce*, J. L. & COM. 26, Jan. 1994, at 26. Since only four cases have been reported for an international commercial transaction (which is the core of the U.S. export-import business)

force from the will of a sovereign state or from an agreement concluded between states in their capacity as subjects of international law. Because the Principles are born out of private autonomy, the contract is the progenitor of both the Principles and arbitration. Whereas, the Principles bind the parties to adopt them, they may also be applied if decision-makers resort to them in order to complement, supplement, interpret, and eventually resolve a contractual dispute. It follows that the actual contribution of the Principles is likely to rest more on the frequency with which the parties decide to adopt them as the law governing their contracts than on the frequency with which they will be applied *sua sponte* by the courts or by arbitrators.

The use of arbitration clauses in international commercial contracts is almost universal,[143] but the overwhelming majority of contractual choice-of-law clauses refer to some municipal law as the proper law of the contract.[144] Thus, the ultimate factor determining the Principles' utility will be awareness of their existence in business circles and the diffusion of its knowledge among the lawyers who represent those circles. Unlike other codified sources of international commercial law, in the case of the Principles, it is ultimately the user who will have the final word on the actual contribution of these *principia mercatoria* to international commercial arbitration.

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governed by an international treaty which has become the "law of the land" in all fifty states, it is unlikely that the Principles will receive increased attention from U.S. courts during the first years of its existence.

143. *See* Michael Kerr, *International Arbitration vs. Litigation*, 1980 J. BUS. L. 164 (1980).

144. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 76 (1986).