

THE UNIDROIT PRINCIPLES OF INTERNATIONAL  
COMMERCIAL CONTRACTS. AN INTRODUCTION  
TO CHAPTER SEVEN: NON-PERFORMANCE

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SUMMARY: I. *The Emerging, Multi-layered Structure of Harmonization.* II. *A Brief Introduction to Chapter Seven.*  
III. *Conclusion.*

I have been asked to discuss Chapter Seven of the UNIDROIT Principles, which is entitled Non-performance in English and *Incumplimiento* in Spanish. Chapter Seven is significant on at least two levels that I want to comment on today. In practical terms, this Chapter is the substantive heart of the whole Principles. This is where the Principles solutions to a large proportion of real world disputes in commercial transactions are to be found. It is here that the remedial consequences of serious failures of performance are defined: orders of performance (*derecho a exigir el cumplimiento*), damages (*resarcimiento*), contract termination by rescission (*terminación*) and restitution (*restituciones*).

Chapter Seven thus concerns difficult and central substantive issues. Indeed, Chapter Seven is probably the most imaginative synthesis to emerge in this generation of some of the most difficult practical questions of contract law. It will be a powerful support for the harmonization of actual outcomes and improve the reliability of the often unpredictable results of disputes. The substantive content of Chapter Seven is important as an illustration of the creative power the UNIDROIT Principles.

Chapter Seven also is important as an example of how the Principles work and their usefulness in the emerging pattern of harmonized international commercial law. Chapter Seven brings closer together the substantive outcomes in courts, arbitral tribunals, and institutions of alternative dispute resolution in different legal systems. Chapter seven Thus

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provides a prime example of how harmonization of international commercial law can improve the law. I have pointed out elsewhere that harmonization is not always the equivalent of substantive reform that improves the operation of the law.<sup>2</sup> A unified law is not always a better law, nor need it produce better results in application. The challenge is to use the opportunity of legal change for harmonization to produce better law.

In this brief presentation I will try to combine these two levels of significance, although I will have to limit to a bare outline my description of the major substantive provisions of Chapter Seven. I know that several able speakers will present these substantive provisions and I hope the Chair will permit me to participate in that panel discussion. By this exposition I hope to persuade my audience that UNIDROIT Principles represent an important step forward that should be promoted to the fullest extent and used in commercial law practice.

These remarks also will try to demonstrate the importance of the UNIDROIT Principles in relation to the other major projects that are now successfully harmonizing international commercial law in most nations of the world. The process of harmonization has turned out to be somewhat different than many of us had expected a decade ago. Those who have an ongoing interest in commercial law must deal with the rapidity of change in commercial law on both a domestic and an international level. The motivating cause of this change is not hard to find. It lies in the changing structures of commercial markets and business practice as increased trade and rapid communication have created large regional and global markets. Change in commercial law is inevitable because it is driven by powerful economic forces visible throughout the world. New legal regimes are a response to the changes in transactions and relationships that mark the new economic and social situation.

This change is proceeding on several levels and is providing a unique opportunity to reconcile and harmonize the content and concepts of global commercial law. The only choice that does not appear open is to let the past rule the future. If we stand still and do not respond to the needs of the businesspeople who engage in trade transactions, they will certainly find other, non-legal, ways to structure their commercial lives

<sup>2</sup> Rosett, "Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law", 40 *Am. J. Comp. L.*, 683 (1992).

and the law as administrated in the national courts will become increasingly irrelevant to their concerns.

Permit me to briefly review this process. Many forms of law are being harnessed to provide a legal framework for the increasingly global economic markets. One might expect, as I did until recently, that these vehicles would be competitive and exclusive of each other. Were that the case, our task would be to pick and choose among them, settling on the one solution we thought overall provides the best advantages and the most acceptable costs. Instead, I suggest, lawyers, judges, arbitrators and other consumers of law should view these different vehicles and techniques not as competitive, but as mutually supportive and supplementary of each other. The choice is not between them, but how to use all of them productively. If we use them wisely, they work together and support each other.

The process of harmonization has taken divergent forms, yet to our great benefit, a remarkable degree of coherence and agreement can be found in the underlying ideas, and most importantly, the outcomes of similar disputes through the use of these divergent forms. To fully understand the usefulness of the UNIDROIT Principles, we must appreciate how they fit into this emerging multi-layered structure that is becoming dominant.

## I. THE EMERGING, MULTI-LAYERED STRUCTURE OF HARMONIZATION

Consider the major choices that are available in designing the new legal structures.

*a. National Code Revision.* First and probably most important, the national legal systems of the world are currently embarked on the reconciliation and revision of national commercial law codes. Here in México you started several years ago to modernize and harmonize the *Código de Comercio* and related statutes. Many European nations are in the midst of comparable code revisions. In the United States the National Commissioners on Uniform State Laws and the American Law Institute are bringing to fruition a revision of the dozen parts of the Uniform Commercial Code (UCC), particularly Article Two dealing with Sales. It is difficult to revise a code that has been a monumental success and has been incorporated over the years in the last of each of the fifty states. As the new drafts are approved by the editorial committees, the real

battle begins to gain adoption in fifty independent state legislatures. Certainly this is not a process that will be completed overnight, but we can predict with a high level of confidence that it will happen.

This confidence is grounded on admiration for the quality of the revision that is emerging, and also on simple recognition of the irresistible power of the economic and social changes that are driving change in the codes. New formulations of the law are required to serve the purposes of that new order. A consequence of the reality is that each of these national revisions must take account of the global realities of trade and thus incorporates a harmonized approach to transactions. The great families of the law live on and their children retain their pride in their Roman, Common Law, or Napoleonic forebears. Ancient family traits can still be observed, but the new codes are much more like each other than they resemble their ancestors.

Just last week a new draft of Article Two of the UCC arrived on my desk.<sup>3</sup> I was struck at the frequency with which this draft cites provisions of the UNCISG and the UNIDROIT Principles. On virtually every page there is some reference to the international provisions. The UNIDROIT Principles in particular are frequently used as a source for clear and workable definitions of concepts. In economic terms, the lines between domestic and international transactions are being eroded by growing global markets. In legal terms, the code revisions indicate how quickly these lines between domestic and international rules of commercial practice are fading. The inevitable result will be a harmonized legal approach to all similar transactions.

*b. Creation of International Codes.* We now have almost a decade of experience with the United Nations Convention on Contracts for the International Sale of Goods (UNCISG). Over forty nations have acceded to the Convention and collections of jurisprudence drawn from courts around the world are providing guidance on its interpretation and application. The Convention starts the process of harmonization by seeking agreement on a formal statement of the rules. UNCISG pursues the strategy of harmonization by seeking a single worldwide formal statement of contract rules, which become the law applicable in transactions between parties from signatory states. It provides a rather neutral frame-

<sup>3</sup> American Law Institute, *Uniform Commercial Code Revised*, Article 2, Sales, Council Draft, num. 2, November 1, 1996.

work for decision, although as Alejandro Garro has articulately pointed out,<sup>4</sup> the UNCISG contains *lacunae* that requiring filling and explanation. Moreover, the UNCITRAL process, out of which UNCISG developed, is largely episodic and provides only limited ongoing opportunities for revision of the UNCISG in light of experience with some of its less successful provisions. In this respect the UNCISG shares some of the same problems I described earlier with reference to the Uniform Commercial Code revision in the United States. In fact, these difficulties are more troubling with respect to UNCISG, since it does not have available the ongoing editorial process that is built into the Uniform Commercial Code. It also can be anticipated that the process of revisions of the UNCISG, which will require ratification by every nation in the world, will be even more formidable than the difficulties of gaining adoption of revisions of the UCC by the fifty state legislatures.

*c. Adoption of Regional Choice-of-Law Conventions.* The revision of national commercial codes and the creation of a global code of commercial sales laws both emphasize the degree to which the rules that govern transactions are made by the state. Both the UCC and the UNCISG, recognize the centrality of party autonomy to commercial transactions and permit the parties to derogate in most instances from the law's provisions by contract. A third general approach to harmonization is typified by the CIDIP convention on the law applicable to international contracts and by the European conventions upon which it is based. This approach seeks harmony, not in the promulgation of uniform substantive rules, but in the creation of process for choosing among competing national and international rules, leaving the substance of each domestic system largely untouched. This approach would seem particularly useful in the many international transactions between sophisticated commercial parties, who can be expected to take care of their own interests and do not require the protection of governmental regulation. Such parties will take care of themselves and produce a more rational allocation of interests than can be expected from the state. It is more doubtful, however, whether this approach will harmonize and approximate the rules applicable in common situations. National systems of law no longer present an insuperable

4 Garro, Alejandro, "The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG", 69 *Tulane Law Review*, 1149, 1995.

barrier to trade under this approach, but harmonization is no longer a prime value.

*d. Adoption of Uniform Private Rules.* Emphasis on private, rather than state rules also is the core of a fourth approach to harmonization of international commercial rules. In numerous industries, trade practices, uniform contract forms, trade association rules and the like, provide a secure foundation for common transactions and harmonize outcomes for these transactions throughout the world. The work of the International Chamber of Commerce is particularly noteworthy. The Uniform Customs and Practices on Documentary Credits (UCP) has provided a frequently updated workable set of rules for letters of credit and similar documents. Billions of dollars of transactions are transacted under these rules every day with few problems. World law on the subject has effectively been unified because almost every bank in the world incorporates these rules in its letter of credit documents. Intervention by government-made rules has been peripheral at best. The recent revision of Article Five of the Uniform Commercial Code on this subject indicates how few and how minor the problems left for legislation are.

One reason for the success of the UCP has been the enthusiastic involvement of a small, well-defined group of participants in these transactions, the banks. A more general project to define trade contract terms (INCOTERMS) does not have this simplifying virtue. Nonetheless, one cannot help but be positively impressed at the ability of the International Chamber of Commerce group that produces and regularly revises these definitions. They have anticipated and promptly moved to solve trade transaction problems very effectively. These transactions have ancient foundations in maritime practice, but they have been completely transformed by the growth of modern intermodal and containerized forms of maritime transport, computerized systems for the generation of trade documents, and the growth of air cargo services. While the use of INCOTERMS is not as universal as the adoption of UCP, it has proven an important source of harmonizing impetus.

*e. The Universal Adoption of Arbitral Regimes in Commercial Disputes.* A fifth element in the movement for harmonization of international commercial law has been the virtually universal adoption of the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Decrees. Harmonization is supported by dispute resolution proc-

esses that avoid the idiosyncracies in outcome that mark all national court systems. These arbitration regimes typically are embodied in rules such as the UNCITRAL Arbitration Rules or the International Chamber of Commerce rules that afford the parties a great deal of control over the selection of the arbitrator. The parties are in a position to be sure that the arbitrator selected understands and will apply sensibly international commercial practice.

*f. Reemerging emphasis on Customary Commercial Practice.* A sixth factor supporting harmonization has been increased sympathetic attention to commercial usage and trade practice in defining the controlling rules. I hesitate to even mention those mysterious latin words, *lex mercatoria*, lest I unwittingly summon the Genie out of the bottle and then not be able to finish what I intend to be a short list. I am not always sure what is being described by this term, *lex mercatoria*. Nor am I sure what degree of historical imagination is involved when it is invoked.

Nonetheless, it is usually clear that this term implies a reference to some kind of commercial practice and an assertion of its normative legitimacy in the face of some entrenched legal norm, usually found in an obsolescent national code. The claim that there is a custom usually is that the custom has broad, if not global acceptance. Its use, therefore, tends to harmonize the rules of commercial contracts.

*g. An International Restatement—The UNIDROIT Principles.* Finally, we come to the subject of this meeting, the UNIDROIT Principles. Joachim Bonell refers to the Principles as an International Restatement of Contract Law,<sup>5</sup> by which he implies that they seek to capture the essence of the governing rule on a subject without attempting a formal codification. They provide a somewhat looser textured statement of guiding principles that can always be captured by a positive statement of controlling law. The UNIDROIT Principles place less emphasis on the conceptual rules or on the choice of law, and more on the spirit and supporting purposes that should determine the outcomes of particular kinds of commercial disputes. This approach focusses on the undeniable reality that the parties to these disputes are less interested in theory than they are in outcome, that they have less of an investment in systematic rules than they have in the vindication of expectations that arise in all

<sup>5</sup> Bonell, M. J., *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 1994.

commercial transactions. When a principle is implicated, it suggests the appropriate outcome. The job of the judicial or arbitral decisionmaker then is to vindicate that interest in the outcome and the path to that result may differ in different situations. The rightness of the decision is measured by its outcome. Practical answers are good answers. Theory and doctrine are useful primarily insofar as they point us toward good solutions in particular cases. Grand theory is avoided when it leads us to insist on dogmatics and conceptual structures at the expense of outcome.

Please do not understand me as suggesting that the UNIDROIT Principles standing alone provide all the answers to the puzzle of harmonization of commercial law. On the contrary, my point is that the Principles draw upon, explain, and are explained by the UNCISG. I would also suggest that the Principles provide a choice of law alternative for the parties who may select them under the CIDIP Convention and to courts and arbitrators who may select them as the appropriate law under that Convention. The UNIDROIT Principles provide an orientation to the other approaches that promotes consciousness of outcome and consistency with party expectation. In doing so, they promote harmonization of result in fact and a higher level of consistency between legal outcomes and the expectations of business persons.

The great strength of the UNIDROIT Principles is precisely that they provide an approach to solving common problems in commercial law that indeed do embody a coherent set of Principles. These principles, which have been most eloquently articulated by Professor Bonell, provide an excellent foundation for a coherent system of commercial law to develop, grow and operate. The central virtue of the UNIDROIT Principles is that this document succeeds in incorporating the principles in the provisions of the text, and thereby gives practical guidance to judges and arbitrators who must decide disputes and all those who must interpret all legal texts.

## II. A BRIEF INTRODUCTION TO CHAPTER SEVEN

Chapter Seven is divided into four sections made up of 31 articles. The first section defines non-performance and then outlines the obliga-



tions of cooperation, cure, *nachfrist*,<sup>6</sup> and assurances, all of which are devices designed to bring about performance rather than contract failure, after difficulties have been encountered by the parties during performance. The section ends with articles on *Force Majeure* and exemption clauses, situations in which the normal expectations of performance have been disturbed by supervening events or by express agreement of the parties. In short, the focus is on bringing about performance of the contract and avoiding termination. At the same time, non-performance is defined in terms that include all failures and defects in performance, including those that are excused, and avoids terminology emphasizing breach or fault.<sup>7</sup>

The provisions on cure<sup>8</sup> and *nachfrist*<sup>9</sup> are similarly broad. The idea behind these articles seems clear; the contract should be supported and preserved whenever possible. In only a limited number of cases is the contract's existence or validity to be questioned or is it to be terminated before performance is complete.<sup>10</sup> When difficulties arise during performance, the rules are structured to encourage parties to cure their defects, to extend the time for performance, to allow it to be completed. Exemption and penalty clauses are to be read to serve the legitimate purposes of the contract and to avoid being "grossly unfair".<sup>11</sup> When supervening events produce impediments to performance that cannot be overcome or avoided, the Principles favor temporary suspension of obligations rather than immediate termination of the contract.<sup>12</sup> A burden of communication with the other side is imposed on the party unable to perform and liability for damages is imposed for failure to communicate, even in circumstances when the ultimate liability to perform will be excused because of the *Force Majeure*. These examples can be multiplied,<sup>13</sup> but

6 The title for this Article 7.1.5. in English is "Additional period for performance", in the Spanish version the title is *Plazo adicional para el cumplimiento*, neither of which is very descriptive of its content. The concept is largely drawn from German law and for this reason I follow the common practice of referring to the idea by its German name.

7 7.1.1.

8 7.1.4.

9 7.1.5.

10 Bonell, pp. 65-79.

11 7.1.6.

12 7.1.7.

13 See Bonell, pp. 65-79.

the same basic point remains, the provisions of Chapter Seven are systematically structured to favor the existence and performance of the contract and to minimize the instances in which the contract is terminated before performance is complete. The UNIDROIT principles indeed are girded by underlying “basic ideas” that are reflected in the text of the specific articles.<sup>14</sup>

The second section of Chapter Seven presents, at least to this North American lawyer, an example of another virtue to the UNIDROIT Principles. They are drafted with an elegance and craft that enables them to reconcile longstanding practices in the practice of different legal systems and does so in a way that produces a sensible and attractive reading of the law. The subject under discussion in section 2 is the order of performance, what we common-lawyers call specific performance. As you know, an order of performance is the basic preferred remedy in many legal systems of the world. It is designed to give the disappointed party precisely what was promised but not performed. Yet there have always been limits on the circumstance in which a court will give an order of performance. The common law historically took a different approach. Damages are seen as the basic universal remedy for breach of contract. Specific performance is an extraordinary remedy available only when the preferred remedy is inadequate. When UNCISG was adopted it apparently was not possible to reach consensus on such matters. Instead an Article 28 was inserted to provide in general terms that a court is not bound to enter a judgement for specific performance “unless the court would do so under its its own law in respect of similar contracts of sale [...]”.

Section 2 of Chapter Seven of the UNIDROIT Principles takes a superior and more harmonious path. It states the general preference for orders to perform, but in the same article notes exceptions to this general rule.<sup>15</sup> The remedy is not discretionary, but is simply unavailable if a)

<sup>14</sup> Professor Bonell is of course in the best position to articulate these basic ideas, since he served as the principle drafter and scientific director of the UNIDROIT project. He lists five basic ideas: a) Freedom of Contract: Party Autonomy; b) Openness to Usages; c) *Favor Contractus*; d) Observance of good faith and fair dealing in international trade; and e) Policing against unfairness. Bonell, Chapter 4.3 and “The UNIDROIT Principles of International Commercial Contracts: Why?, What?, How?”, 69 *Tulane Law Review*, 11-21 (1995).

<sup>15</sup> 7.2.2.

performance is impossible in law or fact; b) performance or enforcement is unreasonably burdensome or expensive; c) performance is available to the injured party through a covering transaction with another person in the market; d) performance is of an exclusively personal character; or e) the party seeking performance is dilatory and does not act promptly. I am told by my European friends that this approach does not substantially distort the existing law in Civil law countries. The beauty of this provision is that the outcomes of cases are very close to the preexisting law in common law jurisdictions as well. The result is a true harmonization that becomes possible by simply putting less emphasis on familiar historic doctrine and emphasizing the practical outcome of cases.

### III. CONCLUSION

The task of harmonization of world commercial law turns out to be different than might have appeared to be the case a decade ago. It is now clear that there will not be one single monumental document that will harmonize all legal rules.

Instead, the situation I have described, in which at least seven kinds of harmonization go on in parallel, is likely to continue. Moreover, the changes in the world economic structures are hardly complete. As trade continues to evolve, the legal structure for these transactions must have the flexible capacity to grow and remain relevant.

It is in this context that the UNIDROIT Principles, and particularly Chapter Seven, demonstrate their worth. A principle based restatement presents several advantages based on its form.

It does not compete or claim to displace the other harmonizing projects, but instead fits well with them as part of the multilayered approach. Use of the restatement form avoids confrontation between Principles and other parts of multi-layers approach, enables them to supplement each other.

The UNIDROIT Principles provide well drafted, thoughtful specific provisions on vexing problems. The Principles' avoidance of the formality of a code increases clarity of its provisions.

It also manages to sidestep many of the favorite conceptual formulations of various legal systems, formulations that tend to become battlefields and occasions for the assertion of national pride.

Practical answers are good answers. The test of successful law harmonization is the quality of the results it leads to in specific cases. Successful harmonization enhances economic efficiency and vindicates the reasonable expectations of the parties to transactions. Theory and doctrine are useful primarily insofar as they point toward good solutions in actual cases.

Theory is tested by outcome. This position is in contrast to that which insists on the primacy of grand theory at the expense of outcome. The Principles free us from the conceptual straight jackets that interfere with the harmonization of outcomes on practical grounds.

It is likely to prove a substantial advantage over time that the UNIDROIT Principles are not a convention. The Principles benefit from the primary role played by practical lawyers and scholars rather than diplomats played in shaping it. The way the Principles are stated and their non-legislative status should make it easier to maintain them current in a changing commercial setting. It will not be necessary to convene a great diplomatic congress to consider changes when the need for revision becomes clear. The principles need not imitate the potentially stifling verbal forms of a code. They are open-textured and can incorporate comments, illustrations and clarifying hypothetical examples. Often they fill gaps and incompleteness in the CISG and national law that have not been provided by legislation.