The UNIDROIT Principles of International Commercial Contracts : an American Perspective on the Principles and Their Use

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I. – THE PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: WHAT THEY ARE AND WHERE THEY COME FROM

The UNIDROIT Principles of International Commercial Contracts [1] are the product of the International Institute for the Unification of Private Law (UNIDROIT). UNIDROIT was set up in 1926 as an auxiliary organ of the League of Nations. Following the demise of the League, the organization was re-established in 1940 on the basis of a multilateral agreement. UNIDROIT is an independent intergovernmental organization. Its purpose is to examine ways of coordinating the private law of States and to prepare gradually for the adoption by States of uniform rules of private law. UNIDROIT's member States are drawn from the five continents and represent a variety of different legal, economic, and political systems.[2]

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1 International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* (1st ed. 1994) (hereinafter: the Principles), available in 34 Intern*ational Legal Materials* (1995), 1067.

2 UNIDROIT has 63 member States: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Holy See, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico,

The UNIDROIT Governing Council approved the project to draft the contract Principles in 1971, but a working group was not set up until 1980. The first set of Principles was approved in 1994. These are composed of a Preamble and 119 articles divided into seven chapters: "General Provisions" (Chapter 1); "Formation" (Chapter 2); "Validity" (Chapter 3); "Interpretation" (Chapter 4); "Content" (Chapter 5); "Performance" (Chapter 6); and "Non-Performance" (Chapter 7). Chapter 6 has two sections dealing with "Performance in General" and "Hardship", respectively, while Chapter 7 has four sections: one concerning "Non-Performance in General", one on the "Right to Performance", one on "Termination", and one on "Damages".

The second set of Principles was promulgated in 2004.[3] The 2004 Principles do not replace the 1994 Principles but supplement them with new additional chapters on "Set-off" (Chapter 8); "Assignment of Rights, Transfer of Obligations, Assignment of Contracts" (Chapter 9); and "Limitation Periods" (Chapter 10); as well as a new Section 2 to Chapter 2 on the "Authority of Agents".[4]

Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, Republic of Korea, Romania, Russian Federation, San Marino, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia (Federal Republic of).

3 In addition to the English and French versions of the 2004 Principles, promulgated by UNIDROIT, the Principles have also been translated into Arabic, Chinese, Farsi, German, Italian, Korean, Portuguese, Romanian, Russian, Spanish and Vietnamese. The 2010 Principles are available in English and French (integral version) and in German, Italian, Japanese, Portuguese, Russian and Spanish (black-letter rules).

For further general discussion on the Principles, see M.J. BONELL, *Caselaw and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (2d. ed., 2005); *Idem,* "Soft Law and Party Autonomy, the Case of the UNIDROIT Principles", 51 *Loyola Law Review* (2005), 229; *Idem*, "From UNIDROIT Principles 1994 to UNIDROIT Principles 2004: A Further Step Towards a Global Contract Law", 37 *Uniform Commercial Code Law Journal* (2004), 1; "Symposium, The UNIDROIT Principles of International Commercial Law: Why? What? How?", 69 *Tulane Law Review* (1995), 1121.

For a comparison of the Principles with the European Principles of Contract Law, see M.J. BONELL, "The UNIDROIT Principles of International Commercial Law and the Principles of European Contract Law: Similar Rules for the Same Purpose?", 2 *Unif. L. Rev. / Rev. dr. unif.* (1996), 229; O. LANDO, "A Vision of the Future World Contract Law: Impact of European and UNIDROIT Contract Principles", 37 *Uniform Commercial Code Law Journal* (2004), 2.

4 The only substantive change made in the 2004 version from the original 1994 text is an amendment to Art. 2.8(2) on the effect of holidays occurring during or at the expiration of the period of time fixed by an offeror for acceptance. This section is now in Art. 1.12.

A third set of Principles was completed in 2010. The 2010 edition adds new sections on illegality, conditions, restitution in failed contracts, and plurality of obligors and obligees, and amends some of the sections in the general provisions, the grounds for avoidance, and termination. In addition, some reordering of the Principles has been done.

The Principles are intended to enunciate rules that are common to most legal systems.[5] To the extent that the rules do not reflect these principles, they are designed to accommodate the special requirements of international trade.[6] The "black-letter rules" are accompanied by extensive and detailed comments, including illustrations, which form an integral part of the Principles.

Important from an American legal perspective, unlike an international treaty or convention, or a domestic statute, which are sources of international and domestic positive law, the UNIDROIT Principles do not apply by legislative mandate. Instead, they were drafted as a non-legislative standard of uniformity for international commercial contracts. In this limited respect, they are similar to the Restatements of Law promulgated by the American Law Institute in the United States.[7] As such, the Principles do not have the force of law [8] and, therefore, must be incorporated into a contract

5 M.J. BONELL, *An International Restatement of Contract Law* (3d. ed., 2005), at 46. The primary influences were codifications that had recently been drafted or amended. These include domestic legislation, such as the American Uniform Commercial Code and Restatement 2d of Contracts, the Algerian Civil Code, the Dutch Civil Code, the Civil Code of Quebec, and the law of obligations of the German Civil Code. The CISG also was a major influence. *Ibidem*, 48-49.

6 *Ibidem*, 46–47 and 50–52.

7 In fact, the American Restatement of Law was the model for the UNIDROIT Principles. See M.J. BONELL, *An International Restatement of Contract Law* (2d ed., 1997), 19; BONELL, *supra* note 5, at 9–25.

It would be misleading to overstate the similarities between the American Restatements of Law and the UNIDROIT Principles. Certainly they are both attempts to systematize a specific body of law. Moreover, they are constructed in the same way in that they both provide black-letter rules followed by extensive explanations and examples. However, the American Restatements have been drafted within the framework of existing American law. For the most part, the Restatements provide a ready source of what the existing law is. The UNIDROIT Principles, on the other hand, were drafted independently of any domestic law and therefore, unlike the Restatements, do not provide a source of what the law is, but what the law should be. This aspiration aspect of the UNIDROIT Principles negates any real argument that they are a Restatement in the American sense.

8 Because the Principles do not have the force of law, it may be asked what purpose the Principles are meant to serve. There is not a single goal, but in fact a multitude of considerations that support the Principles. For a discussion of the goals of the Principles, see BONELL, *supra* note 5, at 9–25. For the view that since the Principles have no legislative impact,

or used by a judge or arbitrator.[9]

The Principles have also to be placed within the broad family of non-binding legal rules that are often referred to as "soft law".[10] Various soft law instruments are well known and widely used by American parties in international commercial transactions. These include model laws,[11] codifications of customs and usages,[12] and the promulgation of international trade terms.[13] What these have in common is that they fill in a specific transactional need. As will be discussed below, the question is whether the

they should be treated as primarily a grand academic enterprise: see C. KESSEDJIAN, "Un exercice de renovation des sources du droit des contrats du commerce international: les Principes proposés par l'UNIDROIT", *Revue critique de droit international privé* (1995), 641.

9 "This means, in essence, that the UNIDROIT Principles will be applied only if incorporated into a contract, or if the Principles find enough favor with an arbitrator or a judge looking for a rule to fill a gap encountered in the regulation of a given international commercial contract." "Symposium, The UNIDROIT Principles of International Commercial Contracts – 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* (1995), 1149. See also K.P. BERGER, "International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts", 46 *American Journal of Comparative Law* (1998), 129 (reviewing the circumstances under which international arbitral tribunals have applied the UNIDROIT Principles); *Idem*, "The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts", 28 *Law & Policy in International Business* (1997), 943 (discussing the doctrinal and practical issues related to the *lex mercatoria* doctrine as it applies to the UNIDROIT Principles); O. LANDO, "Assessing the Role of the UNIDROIT Principles in the Harmonization of Arbitration Law", 3 *Tulane Journal of International & Comparative Law* (1995), 129 (discussing the concept of *lex mercatoria* as it applies to the UNIDROIT Principles); A.M. GARRO, "The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration", 3 *Tulane Journal of International & Comparative Law* (1995), 93 (providing an overview of the circumstances under which the UNIDROIT principles are and should be applied in an arbitration setting).

10 Defined by one commentator, "'soft law' is understood as referring in general to instruments of normative nature with no legally binding force and which are applied only through voluntary acceptance": M.J. BONELL, "Soft Law and Party Autonomy: The Case of the UNIDROIT Principles", 51 *Loyola Law Review* (2005), 229. Soft law is generally established legal rules that are not positive and therefore not judicially binding.

11 See, *e.g.*, UNCITRAL Model Law on International Commercial Arbitration (1985).

12 For example, the International Chamber of Commerce (ICC) has promulgated the Uniform Customs and Practice for Documentary Credits which set out the rules and principles that govern letters of credit. The ICC, which was founded in 1919 in Paris, is a federation of business organizations and business people. It is a non-governmental body, and it is neither supervised nor subsidized by governments.

13 See, *e.g.*, International Chamber of Commerce, Incoterms 2010.

Principles likewise fill a specific need for American parties to international commercial transactions.

II. – THE AMERICAN EXPERIENCE

Eighteen years after their original promulgation, there are only two [14] reported American cases that address the Principles.[15] The court in neither case addressed any substantive aspect of the Principles.

In *The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*,[16] the court was asked to affirm and enforce an arbitral award under the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention). The court in this case addressed the narrow issue of whether the use of the Principles as a source of international commercial law by an ICC arbitral tribunal exceeded the scope of the tribunal's terms of reference. Noting that one of the questions presented to the tribunal was whether international law applied to the dispute, the court found the tribunal's reference to the Principles was clearly within the tribunal's terms of reference. As the provisions of the Principles themselves were not at issue in the case, the court neither used nor analyzed any specific provision of the Principles nor in any way noted how the Principles operate within the framework of American domestic law.

14 A third case is mistakenly listed in the UNILEX database: *Koda v. Carnival Corp.*, 2007 U.S. Dist. LEXIS 97109 (order to compel arbitration); 2007 U.S. Dist. LEXIS 100084 (order denying motion for rehearing). In this case, the court does not reference the Principles. The plaintiff cites the Principles in its pleadings, and this citation is picked up by the UNILEX database as being part of the court opinion.

15 A third case is mistakenly listed in the UNILEX database: *Koda v. Carnival Corp.*, 2007 U.S. Dist. LEXIS 97109 (order to compel arbitration); 2007 U.S. Dist. LEXIS 100084 (order denying motion for rehearing). In this case, the court does not reference the Principles. The plaintiff cites the Principles in its pleadings, and this citation is picked up by the UNILEX database as being part of the court opinion.I do not want to suggest that this is an abnormally low number of cases for any country. There are only 94 reported cases worldwide, <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13619&x=1>, and only two countries, Spain and Australia, have more than ten reported cases. There are no reported German cases in the UNILEX database that apply the Principles.

16 United States District Court for the Southern District of California, 29 Federal Supplement 1168 (1998).

In a second American case, the court was asked to compel arbitration under the New York Convention.[17] In this case, the arbitration was challenged on the grounds that the arbitration agreement was both unconscionable under domestic American law as well as a violation of the doctrine of fairness under the Principles because the party had no real bargaining power for the terms of the contract. Noting that the court was bound by the precedent that lack of bargaining power was not a defense to an arbitration agreement,[18] the court determined that neither domestic law nor the Principles were a basis for overriding the existing law. The court in this case neither discussed the difference between the standard of fairness under the Principles and the concomitant rule under American domestic law nor did the court state what would suffice under the requirement of fairness under the Principles to invalidate an arbitration clause or any other contract provision.

There is one American administrative determination by the Overseas Private Investment Corporation, which dealt with a dispute between an American and Argentinean parties that recognized the Principles for the purpose of determining contract formation.[19] The administrative tribunal made the unremarkable finding that the Principles provide for contract formation both by an offer as well as by conduct. It is not clear whether the parties provided for the application of the Principles in their agreement or whether the tribunal raised it on its own.

As for arbitrations, the extent to which American parties have chosen or consented to the Principles as controlling law, or the extent to which tribunals have applied the Principles in transactions with American parties cannot be ascertained because the majority of the awards are unreported. There are, however, no reported American arbitrations that use the Principles.

III. –HOW AND WHY AMERICAN COURTS MIGHT USE THE PRINCIPLES

There is much to commend the Principles to American courts. To the extent that a court is not otherwise constrained by conflict of laws rules, other mandatory rules, or public policy restraints, the Principles have specific characteristics that suggest their use in appropriate cases. First, the Principles are designed for

17 *Krstic v. Princess Cruise Lines*, 706 Federal Supplement 1271 (United States District Court for the Southern District of Florida, 2010).

18 The court cited *Bautista v. Star Cruises*, 396 Federal Reporter 3d 12 89 (United States Court of Appeals for the 11th Circuit, 2005).

19 <http://www.unilex.info/case.cfm?id=1125>.

international contracts, and they reflect the expectations of international commerce more than most domestic laws.[20] In addition, to the extent that a transaction may be governed by other international law, such as the CISG, the broad scope of the Principles may be a useful supplement to interpret the otherwise applicable law.

It is difficult to determine how often the Principles are used, either in American or other agreements because in the majority of cases where the parties have chosen to use the Principles, no dispute arises. Actual usage is, therefore, unknown. Moreover, in the majority of agreements in which they are used the Principles sit in the background without being interpreted. In addition, even when there is a dispute between parties that may implicate the Principles, the majority of cases in which they have been used, either by party choice or by the decision of a court or arbitral tribunal, will not be reported. Given these constraints of information, it is still possible to examine the reported cases in which the parties have used the Principles. There are actually quite few – only 255 reported court cases and arbitral awards since the Principles were first promulgated.[21] This would suggest that parties are not widely adopting the Principles and courts and arbitral tribunals are not widely using them as controlling.

Yet, in appropriate circumstances,[22] the Principles might be a source of guidance to courts. The American Restatements of Law, which as mentioned above are soft law instruments similar to the Principles,[23] have been widely used by American courts as a basis for forging new legal rules as well as inter-

20 The American Uniform Commercial Code, for example, is primarily based on American domestic case law, and it reflects a particular American, if not common law legal perspective.

21 This figure was taken from the Rome-based UNILEX database, and tracks all reported cases (<http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13618&x=1> (last viewed on July 22, 2011)).

22 Presumably the use of the Principles would be limited to commercial, and probably international, disputes.

23 For a discussion of the similarities between the Principles and the American Restatements, see M.J. BONELL, "The UNIDROIT Principles of International Contracts and CISG: Alternative or Complementary Instrument?", *Unif. L. Rev. / Rev. dr. unif.* (1996), 26-39.

preting existing ones.[24] For international commercial contracts, the Principles could possibly, in a limited role [25] as discussed below, fill this need.

For example, the Principles could be used as gap fillers when the otherwise applicable international or domestic law does not address a specific question. Thus, as the Principles have a broader scope than the 1980 *United Nations Convention on Contracts for the International Sale of Goods* (CISG),[26] they have been used to resolve questions not addressed by the CISG.[27]

As for questions that might otherwise be resolved by American domestic law, although the scope of the Principles does not cover any area where there is no otherwise applicable domestic law, given that the Principles only govern international contracts, a court may well decide that the proper rule, if the domestic law otherwise deviated from the Principles, should be the Principles because the expectations of parties in an international transaction differ from the expectations of parties in a domestic transaction, these latter expectations being reflected in the otherwise applicable domestic law.

If we look at the possible uses of the Principles as suggested by the Preamble to the Principles, it is fair to conclude that the impact on an American court [28] would be quite limited. The Preamble to the Principles suggests six specific uses:

1. They shall be applied when the parties have agreed that their contract be governed by them.
2. 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.

24 See K.D. ADAMS, "The American Law Institute: Justice Cardozo's Ministry of Justice?", 32 *Southern Illinois University Law Journal* (2007), 173.

25 It would be misleading to overstate the similarities between the American Restatements of Law and the UNIDROIT Principles. The American Restatements have been drafted based on existing American law. When an American court cites the Restatements, it is generally either to fill in a gap of that state's law or to permissibly extend the existing law of that state. For an American court to apply the Principles, except in the limited circumstance where the Principles were being used to interpret the existing law, the Principles would be used to supplant the existing law. This is a fundamentally more radical use of the Principles than would be the use by a court of the Restatements.

26 The major areas of scope in the Principles that are not covered by the CISG are limitation periods, assignment of rights and delegation of duties, third party rights, and set-off.

27 See, *e.g.*, *Hideo Yoshimoto v Canterbury Golf International Limited*, Court of Appeal of New Zealand, (2000) NZCA 350; *SCEA GAEC Des Beauches Bernard Bruno v. Société Teso Ten Elsen GmbH & COKG*, Cour d'appel de Grenoble (1996).

28 These limitations may not apply to an arbitral tribunal.

3. They may be applied when the parties have not chosen any law to govern their contract.
4. They may be used to interpret or supplement international uniform law instruments.
5. They may be used to interpret or supplement domestic law.
6. They may serve as a model for national and international legislators.

It is the first five of these that might have some application in a court deciding an international commercial law case.[29]

Before looking at any of these particular uses, it is important to remember that the Principles were drafted with the goal of providing guidance for international commercial contracts. Embedded in this is the notion, that presumably would be recognized by American courts, that parties to both domestic and non-commercial contracts have different expectations from those that arise in international commercial contracts. Thus, to the extent that an agreement is either a domestic or consumer contract, the Principles would probably not be the best model, as both domestic and consumer contracts would normally entail expectations and assumed risks different from international commercial contracts.[30] Moreover, it is unlikely that any American court would have any basis for looking outside domestic American law in a non-international or a non-commercial contractual agreement.

As for the utility of the Principles as a basis for the governance of international commercial contracts, it is important to distinguish between those contracts in which the parties have chosen the Principles to govern the agreement and those contracts in which a court or arbitral tribunal independently decides to apply the Principles. In those cases in which the court or tribunal is independently choosing to use the Principles, it is also important to

29 The question of whether the Principles may be the source of future American legislation is discussed below. Legislative law revision, though, is not a concern of the courts.

30 Explaining why the Principles might be used as guidance for the interpretation of domestic law, the comments that accompany the Preamble to the Principles state "[e]specially where the dispute relates to an international commercial contract, it may be advisable to resort to the Principles as a source of inspiration." (UNIDROIT Principles of International Commercial Contracts, Preamble, Comment 6) This comment suggests the limited scope but important possible application of the Principles: those cases in which a domestic law is the governing law, but the contract itself is an international contract. The cited cases and arbitral decisions on this point have been limited to the circumstances where the Principles have been cited either to interpret how the domestic law should apply in an international case or to supplement the findings in the case by the customs and usages of international practice derived from the Principles.

distinguish between the use of the substantive rules of the Principles as controlling and the use of the Principles to interpret other law.

(a) The parties expressly choose the Principles

If the parties expressly choose the application of the Principles, the role of the courts should be straightforward. Subject to any restriction the jurisdiction's law may have on choice of law,[31] the court should simply apply the Principles.[32] At least in the reported cases, the American courts have not had the opportunity to apply the Principles by party choice.

It should be noted that the question of choice of law under American law may be more restrictive than under other systems. For example, under the Uniform Commercial Code, the parties' choice of law is limited to those agreements where the chosen law bears a reasonable relation to the chosen jurisdiction.[33]

Moreover, there is the question of whether the parties' choice of the Principles would be recognized under choice of law principles at all as the Principles are not recognized "law" in the normal sense of the term. In the case of specific party choice to use the Principles, though, in a properly drafted agreement the choice of law restrictions should not prevent the application of the Principles if the agreement specifies that the Principles are not binding as a choice of law, but instead, are binding as the explicit terms of the agreement itself.[34] This is simply the application of the Principles as freedom of contract and not as choice of law.

31 PICC, Preamble, Comment 4.

32 This is, of course, subject to any mandatory rules that the governing jurisdiction may have that would overrule or supplement the Principles. This point is recognized in the Principles: "Nothing in these Principles shall 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." (PICC Art. 1.4)

33 Uniform Commercial Code § 1-301(b). A proposed revision to the Uniform Commercial Code would have limited this choice of law restriction to domestic cases, thereby allowing international commercial parties a more unrestricted limitation on choice of law. This revision, however, has only been adopted by the United States Virgin Islands, and the Official Version of the Uniform Commercial Code withdrew this proposal in 2008.

34 This is recognized in the Official Comments to the Uniform Commercial Code:

An agreement that varies the effect of provisions of the Uniform Commercial Code may do so by stating the rules that will govern in lieu of the provisions varied. Alternatively, the parties may vary the effect of such provisions by stating that their relationships will be governed by recognized bodies of rules or principles applicable to commercial transactions. Such bodies

(b) The parties choose the contract to be governed by general principles of law or lex mercatoria

In the rare case where the parties expressly provide for the application of "general principles of international law" or some equivalent, it is possible, but unlikely, that an American court would determine that the Principles should apply. At this time, no reported court case, American or otherwise, has done so, although several arbitration cases have.[35] The problem with the application of the Principles in this circumstance is the unlikelihood that a court would recognize the Principles as positive law.[36] As there is already positive international commercial law, such as the CISG, a court would likely gravitate toward such existing positive law.

(c) The Principles used to interpret other applicable law

As a basis for interpreting other governing law, the Principles might be used either to interpret how the governing international law might be interpreted [37] or to supplement the findings in the case by a custom and usage of international practice as derived from the Principles.[38] As noted, no American case has used the Principles for this purpose, but as the Principles become more widely known, this is one use of the Principles that could develop in American law.

of rules or principles may include, for example, those that are promulgated by inter-governmental authorities such as UNCITRAL or UNIDROIT (see, *e.g.,* UNIDROIT Principles of International Commercial Contracts), or non-legal codes such as trade codes. (Uniform Commercial Code § 1-302 Official Comment 2)

35 This is noted in the Rome-based UNILEX database: <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1>.

36 As discussed above, this is fundamentally different from the circumstance where the parties' agreement is governed by other application law, and the parties choose the Principles as the terms of the agreement, and under the principle of freedom of contract, the otherwise applicable law is supplanted by the Principles.

37 This use appears to be more theoretical than practical: there are only two reported cases of the Principles being used for this purpose. This would be expected, particularly when the CISG is the governing law, as there are already hundreds of cases interpreting every provision of the CISG as well as hundreds of articles and books exploring every nook and cranny of the CISG. The need for yet another interpretive view is not present.

38 There is no reported court decision having done this; however, there are fifteen arbitration decisions that have used the Principles as a basis to determine international customs and trade usage.

(d) The Principles used where there is no express choice of law clause or incorporation of the principles into the terms of the agreement

The Preamble to the Principles suggests that the Principles may be applied in cases where there is not an express choice of law by the parties. This appears to be more aspirational than realistic. No court, much less an American court, has done so.[39] Given the hurdles a court would normally follow to find the Principles as the governing law, this is understandable. Under conflict of law rules (rules of private international law), a court would normally look to the governing law of one of the jurisdictions of one of the parties or to an applicable international convention or treaty. The Principles, not having been adopted as the positive law of any jurisdiction, would not be applicable under these rules. The comments to the Preamble mention the inherent flexibility of arbitral rules to provide an arbitral tribunal with the power to choose the applicable law.[40] This flexibility is not generally recognized by courts.

IV. —HOW AND WHY AMERICAN PARTIES MIGHT USE THE PRINCIPLES

There is no evidence of any extensive use of the Principles by American contracting parties. There appear to be two possible reasons for this, but no empirical evidence to support either or both reasons. First, parties may just be unaware of the Principles. Second, parties may have some familiarity with the Principles but have not determined that the Principles create any substantial benefits over what would otherwise be the applicable law. It is this second reason that goes to the core issue of whether the Principles are likely to have any substantial future among American parties.

Within the limits provided by choice of law rules and party autonomy, it is assumed that parties may choose to adopt specific rules embodied in non-binding instruments such as the Principles.[41] Parties may choose the Principles because they believe the rules reflect their business relationship better than domestic or other international law or they seek a neutral principle that

39 There are three reported arbitration cases in which the tribunal, acting as *amiable compositeur*, chose the Principles as the governing law.

40 PICC Preamble, Comment 4(c).

41 Some instruments, such as the Uniform Customs and Practice for Documentary Credits or the INCOTERMS, are so commonly used and accepted that they often govern by default absent a contrary party agreement. Most soft law instruments, however, become a part of the parties' agreement by express or implicit adoption.

does not give one party an advantage.[42] This is unusual, though, and not common among American parties.

In fact, to a large extent, the question is not what the *best* law is, but what the *governing* law is. For if the parties know what the operative law is, they know what rules they need to draft around. Given the general allowance of freedom of contract, this is generally allowed except to the extent that the provisions violate otherwise mandatory law. As mandatory provisions are the major limitation on the use of the Principles,[43] parties have virtually equal freedom to draft their agreements as they wish, whether or not they use the Principles as the underlying law.

Despite these limitations, there may be some advantages to using the Principles that American parties should consider. First, the Principles were drafted specifically to provide rules that broadly accommodate both the Civil and Common law traditions. To the extent that the parties are uncomfortable with an agreement that is governed by either of these legal traditions, the Principles provide some neutrality.

Moreover, although there has not been any American case interpreting the Principles, there are cases from other jurisdictions that have, and these cases, in addition to the extensive comments that accompany the Principles, provide clear interpretive guidance. This should, to some extent, alleviate the concern parties will have as to how the Principles will be understood.

42 Between parties of unequal bargaining power, it is not uncommon for the stronger party to insist on the choice of its own domestic law. However, there are times when a party, although having sufficient bargaining power to impose its own domestic law, in practice prefers not to because of its own law's lack of predictability or for another reason, and instead opts for other governing law such as the UNIDROIT Principles of International Commercial Contracts.

For instance, as pointed out by the President of the International Court of Arbitration of the Russian Federation, "[a] reason which may militate in favour of the wide use of the UNIDROIT Principles [in Russia] is the fact that Russian lawyers and business people do not seem to be as reluctant as their foreign counterparts to contemplate references to the Principles in place of the application of their domestic law on the ground that the former would not confer on them the advantages which parties to foreign trade contracts usually expect from the application of their own domestic law, namely the well-known and detailed regulation of business transactions to which they are accustomed": A.S. KOMAROV, "The UNIDROIT Principles of International Commercial Contracts: A Russian View", *Unif. L. Rev.* / *Rev. dr. unif.* (1996), 247, 250).

Because parties are free to negotiate the performance terms of their agreement, it is not clear that the Principles are likely to provide any party advantage in most circumstances. The standards under the otherwise applicable law that the parties do not want to govern can simply be contracted away.

43 PICC Art. 1.4.

V. – THE UNIDROIT PRINCIPLES AS AN INSPIRATION FOR FUTURE AMERICAN LAW

In the recent attempts to revise the American Uniform Commercial Code, the drafting committee was mandated to look at international legal rules, particularly the CISG, for possible guidance. The revisions, completed in 2003, and recently withdrawn without enactment, did not in fact draw upon any section of the CISG for guidance.[44] Likewise, the Principles, which could have been a source of inspiration, did not have any influence whatsoever on the revisions. As it is unlikely that commercial law in the United States, at least at a national level,[45] will be revised in the near future, there is little possibility that the Principles will have any influence on the statutory commercial law in the United States any time soon.

Given the experience with the revisions of the Uniform Commercial Code, though, it is unlikely that the Principles would have any influence on domestic American law even if it were being revised today. Ideally, a revision of commercial law would look at other legal systems and sets of rules, such as the Principles, for solutions to existing problems as well as for improvements over existing law. In the revision process in the United States, we found structural challenges that impeded this.

First, there was the question of the mandate. The primary goal was to resolve existing problems, and to the extent practical, harmonize the domestic commercial law with international law. But because the Principles are not binding positive law, in their efforts to harmonize, and all the complications that this entailed, the drafters did not focus on soft law such as the Principles because the soft law did not create a conflict between two sets of binding

44 Thus, after twelve years of work revising the American Uniform Commercial Code, the fruits of attempting to harmonize the Uniform Commercial Code with the CISG were reduced to the following prefatory comment: "When the parties enter into an agreement for the international sale of goods, because the United States is a party to the Convention, the applicable law may be the United Nations Convention on Contracts for the International Sale of Goods (CISG). Since many of the provisions of the CISG appear quite similar to provisions in Article 2, early in the process of drafting the amendments the drafting committee considered making references in the Official Comments to similar provisions in the CISG. However, upon reflection, the drafting committee concluded that these references should not be included because their inclusion might suggest a greater similarity between the Article 2 and the CISG than in fact exists."

45 Commercial law in the United States is for the most part state and not federal law. But because of the Uniform Commercial Code, many of the commercial laws are drafted for adoption by the several states with the idea that there will be national uniformity.

positive law, and therefore there was nothing seen in the Principles to harmonize with the domestic law.

Moreover, when the drafters confronted the actual and perceived problems of the existing law, the focus tended to be inward-looking; the focus was on correcting perceived existing deficiencies as opposed to looking outward toward other sources of law such as the Principles. It is also the case that many who were tasked with the revisions brought to the process expertise in the laws being revised, but most had no particular expertise with other laws such as the Principles.

A second problem the drafters confronted in the revision of American commercial law with consideration of international norms, such as the Principles, was the accommodation of different legal traditions.[46] The updating of commercial law should, ideally, take into account the globalization of trade and economies, and this should entail looking at a variety of other commercial legal regimes. However, to the extent that this crosses different legal traditions, revision efforts that attempt to bridge these legal traditions have been quite difficult. To the extent that the Principles embody Civil law concepts, this would create difficulty in their use as a source for American law in the future.[47]

It is yet to be seen what influence the Principles may have on other domestic legislation in the future. It may well be that they are used as a model because they are well drafted and balanced,[48] or this may occur simply because they are a convenient and ready source of law and therefore

46 Primarily, this arises in the context of trying to adjust rules that accommodate both the Common law and the Civil law traditions.

47 For a general discussion of the incompatibility issues in an attempt to reconcile the American domestic law and the CISG, see H.D. GABRIEL, "The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the revision of Article Two of the Uniform Commercial Code", 72 *Tulane Law Review* (1998), 1995.

Although there have been many successful efforts to harmonize international commercial law, this success has largely been due to the fact that its principles have only to be compatible with international commercial practice, not with domestic laws based on Civil law or Common law traditions. An obvious exception is the United Nations Convention on Contracts for the International Sale of Goods (CISG). The CISG successfully straddles both the Common law and the Civil Law, and avoids grappling with the major distinctions between the two. See H.D. GABRIEL, *Contracts for the Sale of Goods: A Comparison of U.S. and International law*, Oxford University Press (2009), at 14.

48 This would appear to be the case with the recent promulgation by the Organization for the Harmonization of Business Law in Africa of a new Uniform Law on Contracts, which is based on the UNIDROIT Principles of International Commercial Contracts.

eliminate the difficulty of drafting new language.[49] Regardless, they have not nor are likely to have much influence on the development of American law.

VI. – COMPARISON OF THE MAJOR RULES OF THE PRINCIPLES WITH AMERICAN COMMERCIAL CONTRACT LAW

If American contracting parties choose to adopt the Principles as governing in their agreements in the future, they will discover, for the most part, that the Principles are consistent with American law and will cause little conflict. Moreover, except to the extent that the Principles derogate from mandatory domestic law,[50] the Principles will govern over otherwise applicable domestic law that would apply if the parties had not chosen the Principles. There are, however, some areas where the Principles vary from American commercial contract law, and in this section, I highlight the main issues.

American commercial contract law is a blend of statutory and case law. Moreover, because commercial law is for the most part state, and not federal law, there are fifty separate state (and several district and territory) laws that govern commercial transactions.[51] Thus, to speak of an American law of commercial contracts is somewhat misleading. However, as most of American commercial law [52] is based on general common law principles, and the various jurisdictions have long looked to the law of their sister American jurisdiction in the development of contract law, it can be accurately said that there are general principles of American commercial contracts. These general contract rules can be compared to the Principles.

49 Describing the influence of the American Uniform Commercial Code and the Restatement Second of Contracts on the drafting of the UNIDROIT Principles of International Contracts, the late Professor Allan Farnsworth noted: unlike any other common lawyer, "I came with texts in statutory form: the Uniform Commercial Code and the Restatement (Second) of Contracts. No decision of a common law tribunal – not even the House of Lords – was as persuasive as a bit of blackletter text": E.A. FARNSWORTH, "The American Provenance of the UNIDROIT Principles", 72 *Tulane Law Review* (1998), 1985, 1990.

50 Subject, of course, to otherwise applicable mandatory law. See PICC Art. 1.4.

51 With the Uniform Commercial Code articles on contracts for the sale of goods enacted in all states except Louisiana, at least for these limited types of contracts (contracts for the sale of goods) it is possible to discuss American commercial contracts.

52 With the exception of Louisiana, which is a Civil law jurisdiction.

(a) Structural differences and major concepts

American commercial contract law operates within a context of established principles of the Common law of contracts. Conversely, the Principles are not based on any particular set of underlying established domestic legal principles. Instead, they were drafted to be independent of, rather than to work in conjunction with, any particular domestic law or legal tradition.[53] Thus, any comparative discussion must recognize the lack of a common legal tradition. This is not just an academic concern of comparative legal scholars, but also a concern of practicing lawyers who would have to navigate in unfamiliar territory if the Principles were used.

The Principles also lack two traditional staples of the common law: the statute of frauds and the parol evidence rule.[54] The absence of a statute of frauds (certain contracts need to be in writing to be enforceable) is only a theoretical difference – most international contracts will have a writing or electronic equivalent, and moreover the writing requirement might be enforceable anyway under the Principles as a mandatory rule.[55]

The lack of a parol evidence rule may also be more of a theoretical distinction. This goes to the general question of contract interpretation. The Principles set out a general standard of interpretation of statements and other conduct that is derived from Article 8 of the Convention:

> 1. The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

53 See F. FERRARI, "Universal and Regional Sales Law: Can They Coexist?", 8 *Unif. L. Rev. / Rev. dr. unif.* (2003), 177; G. PARRA-ARANGUREN, "Conflict of Law Aspects of the UNIDROIT Principles of International Commercial Contracts", 69 *Tulane Law Review* (1995), 1239; A.M. GARRO, "Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods", 23 *International Lawyer* (1989), 443, 480-83.

54 It should, of course, be noted that the United Nations Convention on Contracts for the International Sale of Goods also excludes these, and the Convention also excludes the statute of frauds and the parol evidence rule. The Convention is the law of the United States, as the United States has ratified it, but in these areas, as with some other areas of the Convention, provides rules that are not otherwise in conformity with American law.

55 PICC Art. 1.4. Presupposing the possibility of a mandatory writing requirement in the appropriate enforcing jurisdiction, the Principles define "writing" in PICC Art. 1.10. It has been noted that "[a]rticle 1.10, which, in defining 'writing' ... takes into account the fact that messages and other forms of information are increasingly exchanged in a paper-free fashion by electronic means."

2. If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.[56]

The Principles also have a general rule of interpretation of party intent that is a modified rule of objective interpretation:

1. A contract shall be interpreted according to the common intention of the parties.
2. If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.[57]

This rule is similar to the Common law American approach—the meaning that reasonable persons would have given the language controls unless both parties intended a different meaning.[58]

Moreover, similar to the Common law, but without the hierarchical ordering, the Principles set out a categorization of the types of evidence that might be used to show intent:

> In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including
>
> (a) preliminary negotiations between the parties;
> (b) practices which the parties have established between themselves;
> (c) the conduct of the parties subsequent to the conclusion of the contract;
> (d) the nature and purpose of the contract;
> (e) the meaning commonly given to terms and expressions in the trade concerned;
> (f) usages.[59]

56 PICC Art. 4.2.

57 PICC Art. 4.1.

58 See Restatement (Second) of Contracts § 201(1): "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."

59 PICC Art. 4.3.

Without delving into the complexities of the Common law parol evidence rule, the Principles do, unlike the Convention, provide guidance on the effect of a merger clause:

> A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.[60]

This is similar to the Common law parol evidence rule, which provides that an integrated agreement can be explained by evidence outside the record, because it cannot be contradicted or supplemented by terms outside the agreement, as it is more limited in scope since this rule only applies where there is a merger clause. It should also be noted that unlike this rule, there is no clear position in American law on whether a merger clause is conclusive, as it is in the Principles, or merely presumptive.

The law of warranty for contracts for the sale of goods is another example where there is a major divergence between American law and the Principles. The Principles and the American Uniform Commercial Code both assume that the seller must tender goods that conform to the contract. Under the Uniform Commercial Code, this is resolved under a theory of warranty.[61] The American law of warranty is an outgrowth of a long history of Common law responsibility that has its roots in both contract and tort.[62] Thus, the Code rules are very much grounded in this history. In contrast, the Principles do not have a general theory of warranty. Instead, under the Principles, the obligation to deliver goods that conform to the contract description is derived from the general obligation to perform at a reasonable quality [63] and the duty to achieve a specific result.[64] Unlike the American law of warranty, the Principles do not specify any specific terms, such as "warranty", to define these obligations. Although the difference is

60 PICC Art. 2.1.17.

61 The seller may make an express warranty, an implied warranty of merchantability, or an implied warranty of fitness for a particular purpose or all three in a particular transaction. These warranties are terms of the contract to which the goods must conform. See U.C.C. Rev. §2-313 and 2-315.

62 For the classic and standard article tracing the rise of American warranty law through the morass of tort and contract, see W.L. PROSSER, "The Implied Warranty of Merchantable Quality", 27 *Minnesota Law Review* (1943), 117.

63 PICC Art. 5.6.

64 PICC Art. 5.4(1).

primarily one of terminology, the difference can be significant. Under the Uniform Commercial Code, one is often looking to the language of warranty as well as the well-established rules based on the warranty language.[65] In contrast, because the Principles do not work in terms of warranty, there are no familiar terms to help grasp the similarities.

This point is emphasized in the modification and disclaimer provision for warranties. Because the term "warranty" is not used, the Principles have no provision for the "exclusion or modification" of warranties. The Principles deal with disputes over quality by providing a flexible standard that requires that, where the quality is neither fixed by nor determinable from the contract, a party is bound to render performance of a quality that is reasonable and not less than average in the circumstances.[66] The Uniform Commercial Code, on the other hand, offers quite a bit of protection to the buyer against attempts by the seller to exclude or limit express and implied warranties by agreement. Thus, for example, if an attempt to negate or limit cannot be construed as reasonably consistent with an express warranty, the disclaimer is "inoperative".[67] Similarly, a disclaimer of an implied warranty of merchantability must meet certain requirements of form and disclosure.[68] Thus, the effort to limit or exclude "must mention merchantability" and if the disclaimer is in writing, "must be conspicuous".[69]

Although it has been proclaimed as "the *Magna Carta* of international commercial law",[70] the concept of good faith and fair dealing has no fixed meaning in the law. This is another legal concept that could not be said to be the same in American commercial law and the Principles. The Principles expressly state a standard of good faith for the conduct of the parties: "Each party must act in accordance with good faith and fair dealing in international trade."[71] This obligation[72] exists throughout the whole of the contract, including nego-

65 The American courts have had this problem with the CISG, and there has been a tendency for the courts to analyze CISG cases in terms of warranty law. See, e.g., *Schmitz-Werke Gmbh & Co. v. Rockland Industries, Inc.*, 37 Fed. Appx. 687 (4th Cir. 2002).

66 PICC Art. 5.6.

67 Uniform Commercial Code §2-316(1).

68 Uniform Commercial Code §2-316(2).

69 *Ibidem*.

70 K.P. BERGER, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International (1999), at 165.

71 PICC Art. 1.7(1).

72 This obligation is non-waivable, PICC Art. 1.7(2).

tiations.[73] This application of the concept is similar to that taken by many Civilian systems, but not necessarily that taken by some Common law jurisdictions.[74] Thus, in no sense can it be assumed to be a universal application of the concept of good faith.

It has been suggested that "good faith" under the Principles is an objective, not a subjective standard.[75] This is consistent with many Civil law jurisdictions,[76] but not necessarily the standard in some Common law jurisdictions. The concept of "good faith" in the Principles includes both "abuse of rights" as well as "inconsistent behavior". [77]

The meaning of "good faith" in the Uniform Commercial Code, in contrast to the Principles, is bifurcated. Most articles of the Code have adopted a definition of good faith that applies both an objective and subjective standard to all parties.[78] Article 5: Letters of Credit does not adopt the objective component of the definition. This is a deliberate decision based on customary practices with regard to letters of credit.[79]

(b) Formation

The rules of contract formation under the Principles are, for the most part, consistent with the American law. The Principles do not define the necessary terms of exchange between the parties, and therefore the issue of Common law "consideration" or Civil law "*cause*" is avoided. As for the rules of offer and acceptance, the Principles differ from the American Common law on the

73 Comment 1 to PICC Art. 1.7.

74 See, *e.g.*, R. GOODE, *The Concept of "Good Faith" in English Law*, Centro di Studi e Ricerche di Diretto Comparato e Straniero (1992).

75 One rationale for this is that because "good faith" is coupled with the term "fair dealing", which is understood to be an objective standard, "good faith" should likewise be interpreted as an objective standard: BONELL, *International Restatement*, *supra* note 5, at 131. However, it is just as reasonable to assume that because both terms are present, "good faith" should be interpreted subjectively to complement the objective standard of "fair dealing".

76 See, *e.g.*, A.S. HARTKAMP, "Judicial Discretion under the New Civil Code of the Netherlands", 40 *American Journal of Comparative Law* (1992), 551, 554-555.

77 BONELL, *International Restatement*, *supra* note 5, at 133–134. These are both Civil law concepts. Inconsistent behavior most clearly resembles the doctrine of equitable estoppel in the Common law.

78 See, *e.g.*, Uniform Commercial Code §1-201(20) of revised Art. 1; §3-103(6) of revised Art. 3, imported into Art. 4 by §4-104(c); §4A-105(a)(6); §7-102(a)(6) of revised Art. 7; §8-102(a)(10) of amended Art. 8; and §9-102(a)(43) of revised Art. 9.

79 *See* Uniform Commercial Code §5-102(a)(7).

question of when an acceptance becomes effective. Under the Principles, an acceptance is effective upon receipt of the acceptance by the offeror;[80] under the Common law, it is effective upon dispatch.[81]

(c) Fundamental non-performance

The Principles provide that a party may suspend its own performance and terminate the contract upon the other party's "fundamental non-performance".[82] As with any broad concept, the term "fundamental non-performance" is not subject to a precise definition, and there is no attempt in the Principles to provide one.[83]

The Common law does not have a concept directly equivalent to fundamental non-performance. However, developing from the doctrine of conditions in contracts, the Common law [84] has developed a similar concept of "material breach". The Restatement defines a material breach as "a condition of each party's remaining duties to render performances to be exchanged under an exchange of promise that there be no uncured material failure by the other party to render such performance due at an earlier time." [85] Therefore, to the extent that there is a material breach, as with a fundamental non-performance under the Principles, the non-breaching party has not only a right to damages, but also the right to quit performance of that party's own obligations. Moreover, the factors for determining a material breach are similar to the factors one would consider for a fundamental non-performance.[86]

Yet, the cautious lawyer would be circumspect in equating the two concepts, for one can never be sure a court or arbitral tribunal will also equate "fundamental non-performance" and "material breach". This fear can be easily alleviated by providing clear, express guidance for the grounds for termination. Doing so would override the standards for termination and insure there was no basis for different standards.

80 PICC Art. 2.3(1).

81 Restatement (Second) of Contracts § 63.

82 PICC Art. 7.3.(1).

83 General guidance on the types of factors to consider is provided in PICC Art. 7.3.(1).

84 At least the American branch. At least one Canadian court has concurred that the Common law standard for fundamental breach is the same as that of the Convention. See *Diversitel Communications Inc. v. Glacier Bay Inc.*, 42 C.P.C. (5th) 196 (2003).

85 Restatement (Second) of Contracts §237.

86 Restatement (Second) of Contracts §241.

(d) Contract modification

The traditional Common law rule for contract modification requires new consideration to modify the agreement. The Principles, conversely, actively eschew the necessity of new "consideration" or "cause" and provide simply that "[a] contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirements." [87] Thus, the Principles simply do not address the question of whether consideration or cause (in other words, whether additional value) is necessary for a modification of the agreement. Deviating from the traditional Common law rule, this is the approach taken by the American Uniform Commercial Code for contracts for the sale of goods.[88]

(e) Damages

Consistent with American Common law, the Principles provide for a general right of damages for the aggrieved party.[89] Also consistent, in appropriate cases, under the Principles this would include personal injury losses.[90] In addition, consistent with the American Common law, under the Principles the damages must be foreseeable, and the Principles adopt both an objective and a subjective standard of foreseeability.[91] Across the board, the right to and the measurement of damages is consistent between the Principles and American commercial contract law.

(f) Assignment of rights

The Principles, consistent with the American commercial law, assume contractual rights are freely assignable.[92] This rule, in American law, of course is a general rule subject to many statutory exceptions. An agreement otherwise governed by the Principles would also be subject to these statutory exceptions, as the exceptions would be mandatory rules that would govern over the default provisions of the Principles,[93] thus effectively creating the same standard for both American commercial law and the Principles. Also

87 PICC Art. 3.2.
88 Uniform Commercial Code §2-209.
89 PICC Art. 7.4.2.
90 PICC Art. 7.4.2(2).
91 PICC Art. 7.4.4.
92 PICC Chap. 9.
93 PICC Art. 1.4.

consistent with American commercial law, the Principles recognize non-assignability clauses, thereby allowing the parties the freedom to restrict the assignment of contractual rights.[94]

Unlike the traditional common law approach to assignment of rights, the Principles specifically allow the transfer of future rights. Many older American cases did not allow for this on the theoretical basis that one cannot assign a right that does not exist. Most courts would allow the assignment of future rights today as an "equitable assignment",[95] and therefore would come to a result consistent with the Principles.

(g) Illegality

A restriction on the enforcement of illegal contracts could serve as a powerful tool to encourage positive behavior between contracting parties. After several years of discussion on this issue, however, the drafting committee for the Principles was unable to come up with a standard that was effectively consistent among the various legal systems. Thus, although adding a section on illegal contracts, the Principles in fact do not create any substantive rule for illegal contracts. Instead, the Principles simply provide that a provision that otherwise infringes a mandatory rule under Article 1.4, is unenforceable.[96] Because the contractual provision would be subject to the otherwise applicable mandatory rule under Article 1.4, the articles on illegality add nothing. By deferring to mandatory rules in the domestic law, the article on illegality in the Principles is by definition fully in accord with American commercial law.

(h) Conditions

Under the American law of contracts, a condition requires the existence of a contract. The duties of the respective parties may be conditional such that the duties do not come into effect [97] or are suspended [98] unless something occurs or does not occur. In either case, there is an existing contract that creates the condition and the parties' contingent duties under it. The Principles provide a

94 PICC Art. 9.1.9.

95 Restatement (Second) of Contracts § 312.

96 PICC Art. 3.3.1.

97 Condition precedent. The Principles adopt the Civil Law terminology, and refer to this as a suspensive condition. PICC Art. 5.3.1.

98 Condition subsequent. The Principles adopt the Civil Law terminology, and refer to this as a resolutive condition. PICC Art. 5.3.1.

similar framework, but also provide for the possibility that the existence of the contract itself is subject to a condition:

> Conditions governed by the Principles include both those that determine whether a contract exists and those that determine obligations within a contract. Accordingly, application of the Principles may in some circumstances impose duties even in the absence of a contract.[99]

This concept is foreign to American law, and how it would be enforced in an American court is not clear. Certainly, a court could not enforce the condition under contract law given the non-existence of the contract. To the extent that it would be fair to enforce the condition, one can assume courts either finding a contract subject to a condition as indicating the parties' true intent, or finding some extra contractual basis for enforcement such as promissory estoppel.

(i) Limitation periods

The Principles provide a limitation period of three years from the time the obligee knows or should have known of the basis for the action, subject to a maximum period of ten years.[100] How the limitation period in the Principles operates within the framework of American law requires an appreciation of the effect of a limitation period in American law. The Principles note that:

> All legal systems recognize the influence of passage of time on rights. There are two basic systems. Under one system, the passage of time extinguishes rights and actions. Under the other system, the passage of time operates only as a defense against an action in court. Under the Principles a lapse of time does not extinguish rights, but operates only as a defense.[101]

Under American law, a limitation period is created by statute, and whether the limitation period is considered jurisdictional, and therefore extinguishes the rights, or is in the nature of a defense and therefore has to be affirmatively raised or is therefore waived, varies from state to state and statute to statute. Given this complexity, it is not possible to determine with any sense of accuracy how the limitation period in the Principles would work with American law. However, some general observations can be made.

99 PICC Art. 5.3.1, Comment 1.
100 PICC Art. 10.2.
101 PICC Art. 101, Comment 1.

First, to the extent that the domestic limitation period is jurisdictional, it is likely to be treated as a mandatory rule under Article 1.4, and therefore if the domestic limitation period is less than the one provided by the Principles, the shorter domestic period will govern as the court would not have jurisdiction to hear the case after this time. If the limitation period under the Principles is shorter, that shorter period should also govern as a matter of party choice. In other words, while a court would have jurisdiction to hear the claim, the parties would have contractually limited it, and this limitation should be binding.

If the domestic limitation period is not jurisdictional, but simply a defense to enforcement, and if the limitation period in the Principles is the shorter period, then the parties should be held to have agreed by party choice to the shorter period. If the domestic limitation period is the shorter period, then it would apply if the party in whose favor the period would run raises it as a defense.

VII. – CONCLUSION

Although originally promulgated in 1994, the UNIDROIT Principles have had virtually no influence on American law. This might be due to a lack of familiarity with the Principles among American contracting parties and American lawyers.

It may also be due to a lack of recognition as to the usefulness of Principles as a choice of law. As explained above, the primary question most transactional lawyers ask is which law applies so that they know what to contract around. Given that, there is a natural resistance to adopt a new and unfamiliar set of legal rules irrespective of how balanced and well written they may be.

American lawyers have slowly become familiar with the United Nations Convention on Contracts for the International Sale of Goods, but this is due primarily because the Convention is binding law, and therefore it governs many agreements. Even here, for many years, parties routinely opted out of the Convention primarily for fear of having to master a new and unknown body of law. Whether parties will embrace the Principles, another new and unknown body of law, without the impetus of it being binding, is yet to be seen.