UNIDROIT Principles of International Commercial Contracts as a Legal Framework for International Business Transactions*

A. Discussion of the Presentations made by Professors Widmer, Bonell, and Vischer

Mayer: I have a question for Professor Vischer concerning the negative choice of law. In your presentation, I sensed a certain reserve towards this theory and I would be very interested in hearing your motivation for this. The concept of the negative choice of law and its meaning for arbitration in practice has been described in 1982 by Professor Lars Hjerner in the *Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce* and has been used in the context of the 'common trunc doctrine', as applied in the *Channel Tunnel* case, and in many other decisions. This would suggest that arbitration methodology follows this theory. From the practitioner's point of view it would also correspond to the intention of the parties in many cases. Just last week I attended a seminar for the legal department of a large Swiss multinational on choice of law and jurisdiction clauses where several speakers emphasized how the question of the applicable law was often deliberately left unresolved. Either the parties do not want to apply any particular countries' law or they cannot agree on one national legal system. In some cases, leaving the choice of law deliberately unresolved could thus be the best policy or strategy. In light of this, I would like to ask why you hesitate in accepting the concept of the negative choice of law, in particular since it would allow the application of the UNIDROIT Principles under Article 187(I) of the IPRG if the exclusion of any national legal system was interpreted as a choice of law in this direction.

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* The discussions are based on presentations made at the Conference in Basle on 7 and 8 November 1997, "UNIDROIT Principles of International Commercial Contracts as a Legal Framework for International Business Transactions". The Conference was organized by the Europainstitut Basel and was chaired by Professor Ernst Kramer. The contributions have been subsequently annotated and updated, several are translations of the originals.

European Journal of Law Reform, Vol. 1, No. 3

Vischer: Indeed, I am sceptic about the so-called negative choice of law. I am sceptic because at the bottom line the concept of the negative choice of law rests purely on an assumption. If the parties to an agreement have not chosen a national legal system and have expressed their intention not to have any national legal order applied, one may well presume that they had the intention of authorizing the arbitrators to apply international law such as the UNIDROIT Principles. However, can we infer the same from a mere silence about the choice of law? Silence, as you have pointed out yourself, may be due to lack of consent for any specific national law. It does not necessarily demonstrate a positive will of the parties to have international law applied.

Mayer: Let me ask a further question concerning the relationship between Article 187(I) of the IPRG and the new arbitral rules of the ICC in Paris. Up to now a court of arbitration was entitled to apply *the law* it saw fit under Article 13(III) of the ICC Rules if it had been established in Switzerland and the parties to the dispute were found neither to have expressly chosen the UNIDROIT Principles nor any specific national legal system. According to standard practice of the court of arbitration it was and still is not necessary in these cases to apply national conflicts of law rules or private international law rules. This is changed as of 1 January 1998 by Article 17(I) of the new ICC Rules. Now a court of arbitration, if the parties have not executed a choice of law, is entitled to apply *the legal rules* it considers 'to be appropriate'. Would you, Professor Vischer, argue that Article 187(I) of the IPRG prevents a court of arbitration from applying the UNIDROIT Principles in such a case?

Vischer: A court of arbitration with its seat in Switzerland has to apply the provisions of the IPRG. Article 187 of the IPRG, in the chapter on international arbitration, provides that the court of arbitration has to apply that law which is most closely related to the dispute if the parties have not expressly chosen a law. Therefore, in my opinion, in the absence of a choice of law a court of arbitration can only then directly chose the Principles and disregard any one national law, if the dispute does not have a close relationship to any one national law.

Article 17(I) of the new ICC Rules indeed contains a rule for the applicable law that deviates from the IPRG: in the absence of a choice of law, the court of arbitration should 'apply the rules of law which it determines to be appropriate'. The question therefore is whether parties who select arbitration according to the new ICC Rules automatically give their authorization to the court to directly apply *inter alia* the UNIDROIT Principles without even examining whether the dispute does have a close relationship with one particular national law. I am presuming now that by saying 'rules of law' the ICC Rules deliberately want to include non-governmental rules such as the Principles. Thus, we find a certain normative contradiction between the IPRG Rule and the ICC Rules. Giving priority to the ICC Rules would only seem possible for courts of arbitration seated in Switzerland, if really one must conclude that by submitting an arbitration to the ICC Rules, the parties also authorize the court to apply non-governmental law. I should advise a court of arbitration in such a case to inquire at the beginning of the proceedings whether the

parties agree to this interpretation of the law. However, any court of arbitration can always interpret the national law it has to apply in light of the Principles, regardless of any express choice of law.

Bonell: Let me confirm this. Are you saying, Professor Vischer, that a court of arbitration, established in Switzerland on the basis of the ICC Rules, cannot disregard the provision of Article 187 of the IPRG? Would not an agreement providing for this type of arbitration by necessity also include and if only implicit an agreement in favour of the ICC Rules, including the new Article 17(I)?

Vischer: I agree but still believe that disregarding the Swiss rule on the applicable law is only possible if it has been positively established in the case at hand that the parties have accepted that instead of national law, international principles can be applied.

Bonell: This is very encouraging!

Wehrli: I would like to insist on this point once more. Did I understand you correctly that whenever the parties chose the ICC Rules the more flexible ICC Rule on the applicable law takes precedent over the provisions of the IPRG? I am talking about the new ICC Rules that have come into force on 1 January 1998 and in particular their Article 17(I) which provides for application not of the law most closely linked to the case but for the appropriate rules. To be yet more precise, my question does not relate to arbitration clauses concluded under the old ICC Rules where only the dispute takes place under the new regime. I am only talking about cases where it can be reasonably presumed that the parties selected the ICC Rules with positive knowledge of the new text. For arbitration practice it will be of eminent importance to know whether the ICC Rules will take precedence over the IPRG in this case.

Vischer: The old ICC Rules did not provide a clear answer to the question of choice of law. They were more geared to the application of national law. International law was only to be applied in a supplementary way. That was one of the reasons for the revision of the Rules. If the parties went for the ICC Rules with positive knowledge of the choice of law rule contained in the new Article 17 and if taking all circumstances into account one can presume that the parties were aware of the consequences, one can indeed conclude that the court of arbitration was implicitly authorized to apply international rules. The court should however provide for an explicit mention of this in its 'terms of reference' (Article 18(I)(g) of the ICC Rules).

Dasser: In his introduction, Professor Kramer addressed the UNIDROIT Principles as 'the Magna Charta of the *lex mercatoria*'. However, as Professor Vischer has pointed out, there are certain differences in nature between the UNIDROIT Principles and the *lex mercatoria*. I will try to be more specific. Twelve years ago, when I started working with the *lex mercatoria*, the latter was often addressed in a rather derogatory form. Gerold Herrmann, then Secretary-General of

UNCITRAL and influential specialist of international trade law, called it the '*lex mex*' and meant it that way. The majority of experts was rather critical back then. Nowadays, however, the *lex mercatoria* has become quite fashionable and has won a certain authority. I share Professor Vischer's point of view that today there are no legal impediments against applying the *lex mercatoria* in the context of an arbitration. Yet the remaining problem is how to determine the precise content of the *lex mercatoria*. We hardly have concrete rules, in any case not enough of them. All we have are certain trade habits and customs and a number of general principles such as good faith and *pacta sunt servanda*. In this way the *lex mercatoria* says everything and nothing because rules of such a general and abstract manner, while covering potentially every kind of dispute, hardly give any concrete guidelines for the settlement of individual cases. Thus, what we have with the *lex mercatoria* would seem a recognized legal order in the making but with hardly any rules. By contrast, the UNIDROIT Principles would offer very concrete rules, however only on the level of a *ratio scripta* without formal authority. Would it not be the natural consequence to fuse the two? If we were to consider the UNIDROIT Principles as a sort of codification of the *lex mercatoria*, both sides could win. Personally, I am supportive for both systems but so far have been considering them as separate sources of law. Therefore, a court of arbitration should certainly not declare the *lex mercatoria* as the applicable law and then, without further ado, rely on the UNIDROIT Principles. On the other hand, a court of arbitration could and should give reasons when applying the UNIDROIT Principles why it considers a certain principle to be part of the *lex mercatoria*. My argument would not be in favour of unreflected equation of the Principles and the *lex mercatoria*.

Vischer: I would like to support this proposal wholeheartedly. There clearly is a difference in nature between the rules we have traditionally understood to form the *lex mercatoria* and the UNIDROIT Principles. Supporters of this 'old' *lex mercatoria* have always emphasized its undogmatic and unsystematic character as a great advantage and have insisted that the *lex* has been and will have to be a law in constant flux. On the one hand it is a historical fact that modern trade law has been developed out of the practice applying the *lex mercatoria*. On the other hand, many have pointed to the danger of petrification, the exclusion of further development, if the *lex mercatoria* were codified. This difference must be kept in mind when talking about the UNIDROIT Principles as 'the new *lex mercatoria*'.

Kramer: If I may add something here. Under the presumption that the UNIDROIT Principles are not an expression of the classical *lex mercatoria*, what is the impact of a choice of law clause referring to the *lex mercatoria* in an arbitration? Would the court of arbitration be entitled to apply the UNIDROIT Principles or not? I presume not, unless it could be demonstrated via interpretation of the treaty that the parties were not referring to the classical *lex mercatoria*, which would be the ordinary presumption, but rather that they meant to apply the 'new *lex mercatoria*', i.e. the UNIDROIT Principles. How would you approach this type of situation?

Vischer: You are right, Professor Kramer. If the UNIDROIT Principles are not to be considered an expression of the classical *lex mercatoria*, the question arises whether the Principles are included if a choice of law clause refers to the *lex mercatoria*. The answer will depend decisively on the understanding of the parties as to the *lex mercatoria*. However, even if the parties were using the term in its traditional understanding, I would consider it legitimate to consult the UNIDROIT Principles whenever recourse has to be taken to general principles of law. Even amongst traditionalists, there is agreement that 'general principles of law recognized by civilized nations' (Article 38(1)(c) of the Statute of the International Court of Justice) can always be applied. The precise content of these general principles is rather uncertain, however. Thus, the UNIDROIT Principles can be seen as an expression and codification of a number of these generally recognized principles. This could be the bridge between the classical *lex mercatoria* and the Principles.

Bonell: It should be noted that the UNIDROIT Principles are expressly stipulating in their preamble that they '*may* be applied' if the parties to a contract have chosen the *lex mercatoria* or general principles of law. In other words, the Principles themselves do not claim to be the expression of the *lex mercatoria* or even to be automatically applicable when the *lex* is the chosen law. And how could they possibly raise such a claim when the *lex mercatoria* is in general held to be the international custom in a particular trade, as expressed in typical contract clauses and forms, whereas the 'general principles of law' by their very nature are composed only of a few general principles and blanket clauses. The role of the UNIDROIT Principles in this context is merely one of an additional source of wisdom for those cases where neither the *lex mercatoria* nor the 'general principles of law' provide sufficiently clear rules. The following question may serve as an example which indeed has been presented to international arbitration recently and in the end was decided on the basis of the UNIDROIT Principles, namely whether a 'pre-bid agreement' in which the parties agreed to negotiate the main agreement at a later point in time 'in good faith' was binding and could be enforced. This sort of question, which by the way is also very controversial in many national legal systems, cannot be resolved merely on the basis of the classical *lex mercatoria* or 'general principles of law', whereas the UNIDROIT Principles indeed provide useful clues.

Ferrari: I would like to comment on a number of remarks made by my colleagues Professors Kramer, Vischer, and Bonell. In my opinion it is not possible to distinguish between different types of *lex mercatoria*, a classical and a new one. The question whether the UNIDROIT Principles can be seen as an expression of the *lex mercatoria* must not lead to a distinction of a new *lex*, codified by the Principles, and an old or classical *lex mercatoria*. I think the question needs to be phrased differently: can and/or should the UNIDROIT Principles be applied if the parties have submitted their contract to the *lex mercatoria*? If this question is answered on the basis of the Principles themselves, it seems the only correct answer would be affirmative since the preamble of the Principles expressly provide for their applicability in cases where the parties have chosen (*inter alia*) the *lex mercatoria*.

This does not mean, however, that the Principles *have to be applied*, as Professor Bonell also remarked. Since the Principles themselves are non-binding, they cannot possibly provide for mandatory application. So how can they be applied in a case of the sort we have been discussing? I believe they can only be applied, if and inasmuch as the arbiters conclude that the UNIDROIT Principles are expressing the *lex mercatoria* on a certain question, i.e. are identical to the *lex*. I think it is perfectly possible that an arbiter will not apply the UNIDROIT Principles in spite of a contractual clause providing for application of the *lex mercatoria*. It is for each individual judge and arbiter to decide whether in a given case the UNIDROIT Principles can really be seen as a codification of the *lex mercatoria*. Thus, it is also possible that one and the same arbiter will see some of the Principles as part of the *lex mercatoria* but reject the equation of other Principles with the *lex mercatoria* as entirely mistaken. More than that, since the Principles are non-binding, an arbiter does not even have to justify why he or she does not want to apply the Principles in a dispute where the parties have opted for the *lex mercatoria*. From this I conclude that there is but one *lex mercatoria*. Whether the UNIDROIT Principles are reflecting this *lex* needs to be decided on a case-by-case basis.

Bonell: I think an arbiter should always justify why he or she does or does not apply the UNIDROIT Principles. Otherwise he or she would become a supporter or opponent of the Principles as such.

Ferrari: Okay, an arbiter should justify it but he or she could say there is simply no need to apply the Principles.

Dasser: The distinction betwen a 'new' and a 'classic' *lex mercatoria* is unnecessary and misleading. In my view there is only one *lex mercatoria* which consists on the one hand of various trade customs, on the other of relatively vague and general principles of law. The UNIDROIT Principles do not change this. They cannot be applied as part of the *lex mercatoria* but only, which is however not insignificant, as a pragmatic source of inspiration, as laid down in their Preamble. In the context of today's pragmatic application of legal rules, this distinction in turn does not make much of a difference for the importance of the UNIDROIT Principles.

There have sometimes been arbitration courts which relied on the principle of good faith, without seeking to specify it at all and then went on in the next sentence to decree the specific effects of the principle in a given case. In the end nobody could really tell on which basis the final decision had been found. It would have been just as possible to rely on the principle of good faith to come to the opposite result. Thus, a comprehensible justification was not given. Thanks to the UNIDROIT Principles an arbitration court could nowadays say that it is using the principle of good faith as part of the *lex mercatoria* and considers rule x, y or z of the UNIDROIT Principles as concretization of this general principle, while this concretization was, according to the conviction of the arbiters, in line with the needs and practice of trade and commerce (at least in the area of business and the geographic region concerned) and thus applicable. This way of linking the two areas would not be dogmatic, however, but purely pragmatic.

B. Discussion of the presentations made by Professors Ferrari, Schnyder and Kramer

Schwenzer: I have a question concerning Professor Ferrari's presentation, specifically the relationship between uniform law, in particular the CISG, and the UNIDROIT Principles. Let us presume that I found a legal rule in uniform law, which can only be fully understood on the basis of a national rule. Did I understand you correctly, Professor Ferrari, that according to your opinion I would still be obliged to apply this rule as such and would be estopped from taking recourse to national law?

Ferrari: I am sorry, if I have given the impression that a rule of uniform law must be interpreted solely on the basis of the Convention, even if it can really only be understood in the context of national law. If the authors of a convention have alluded to a 'national' rule of law, the latter must obviously be taken into account. When I said that comparative law analysis should not be applied, I was only talking about the fleshing out of general principles which would be at the basis of uniform law conventions. If these fundamental principles needed to be found on the basis of comparative law analysis, this would first of all be asking too much from an average arbiter, secondly, even if an arbiter would find that a certain fundamental principle was common to several legal orders concerned, that would still not prove that it was also at the basis of the relevant rule of uniform law. Thus, the carving out of fundamental principles via comparative law analysis can easily lead to a situation where lacunae are filled with 'external' principles which in turn is contradictory to the spirit of the uniform law rules on the filling of lacunae.

Mayer: I would like to put two questions concerning the interpretation of the Principles to Professor Ferrari. Amongst the rulings based on the UNIDROIT Principles so far adopted, we find two rulings by an Italian arbiter which were adopted in the context of arbitration administered by the Austrian *Bundeswirtschaftskammer*. According to these rulings, Article 78 of the CISG needs to be supplemented by Article 7.4.9(2) of the UNIDROIT Principles. My question goes in the opposite direction: Professor Bonell informed us in his presentation that nearly half of those who responded to questionnaires on the UNIDROIT Principles stated that the case or cases they were aware of had concerned a sales agreement. Let us now presume that a sales agreement contains a clear and effective clause choosing the UNIDROIT Principles and that the relevant Principles prove to be incomplete. Can the CISG be relied upon in order to supplement the Principles in such a situation? In other words, how far can the interpretation of the Principles go in such a case, in particular with regard to the application of national law? The problem of notice of defects could be an example. Could Articles 38 and 39 of the CISG be relied on in order to determine the time limit for the notice? Would it not be likely that arbitration courts would arrive at a very different result if compared to domestic courts? At the bottom line the question is directed at the problem of the split in the

development of the law which can be observed between courts of arbitration on the one hand and national courts on the other and to what extent there is a methodology for the determination of legal rules which has not as yet been sufficiently examined. In other words, will the UNIDROIT Principles be unsuitable for the method of interpretation applied for uniform law because of their nature as 'general' rules?

My second question concerns the interpretation of Article 7(I) of the CISG. The wording of this rule suggests that the principle of good faith should only be applied in the interpretation of the Convention. Some authors have concluded from this that the parties of an agreement are themselves under no obligation to observe the principle of good faith in their conduct and performance. In contrast to Article 7(I) of the CISG the UNIDROIT Principles, in their Article 1.6, provide for an explicit obligation of the parties to act in accordance with the principle of good faith. If you compare these two rules, do you see a real danger of diverging results or do you believe that Article 7(I) of the CISG, implicitly, contains an equivalent rule to Article 1.6 of the Principles?

Ferrari: The question, whether the UNIDROIT Principles can be interpreted in light of the UN Convention can, in my opinion, only arise if the parties have specifically chosen the Principles as the applicable law. Without explicit agreement of the parties, the Principles should not be applied, I believe. However, if the parties have chosen the Principles as sole source of law for the settlement of their contractual relations and disputes, then lacunae of the Principles have to be filled by reliance on the fundamental principles at the basis of the UNIDROIT Principles. This is expressly stipulated in Article 1.6 of the latter. If it comes to interpretation, on the other hand, one could certainly imagine that expression which are found in the Principles are interpreted in light of the UN Convention on International Sale of Goods or other conventions. This could only improve harmonization.

Bonell: I have a somewhat different opinion here. While the scope of the Principles is large in many respects, they have never claimed to be final and complete. This is clearly seen from their Article 1.6. If we take up the example of notice of defects once more, which is a good example since the question is obviously not dealt with in the Principles, there can, in my opinion, be no doubt that the lacunae can and in fact should be filled by reliance on the CISG. This would even be so irrespective whether or not the criteria for application of the CISG are fulfilled in the concrete case or not. The significance of the CISG as supplementary to the UNIDROIT Principles follows simply from the fact that both are elaborate legal orders of an international nature and very widely recognized.

By the way, Article 1.6 of the UNIDROIT Principles deviates in two ways from Article 7 of the CISG, its model. Firstly, paragraph one of this Article not only emphasizes the need to consider the international character of the Principles when interpreting them but explicitly refers to their purpose. Thus, a teleological, purpose-oriented interpretation is demanded. Now the UNIDROIT Principles have a number of purposes but one of them could be their harmonious application or supplication of other international legal orders such as the CISG.

Secondly, paragraph two of Article 1.6 about the filling of lacunae mainly refers to general principles of law, just as Article 7, paragraph 2 of the CISG. In contrast to Article 7, paragraph 2 of the CISG, however, the Principles make no specific reference to the national law to be applied according to the relevant rules on conflicts of law. I see this omission as a clear invitation to fill any lacunae in the UNIDROIT Principles by judicial development of the law and by legal comparison. This possibility would seem to be severely limited, if existent at all, under Article 7, paragraph 2 of the CISG.

Allow me to add a personal remark here. I should like to ask Professor Ferrari to call the UNIDROIT Principles in German either *Prinzipien*, which I prefer myself, or at least *Grundregeln* but not *Grundsätze*. The latter expression would seem to fit only for some of its provisions.

Kramer: Professor Ferrari, in your presentation you expressed the view that *de lege lata* a choice in favour of the UNIDROIT Principles could only be seen as a material choice and not as a choice of law in the conflicts of law sense. However, *de lege ferenda*, you supported the notion that the choice should be a full choice of law. If this is correct and the latter would really be the better solution, what prevents us from already now interpreting the law this way? If we look at the Swiss IPRG for example, it distinguishes clearly between a choice 'of law' and the choice of the 'law of a state'. Article 116 of the IPRG stipulates that a contract is subject to 'the law' chosen by the parties. Article 117 of the IPRG stipulates that absent a choice of law, the contract shall be subject to 'the national law ...'. Even on the basis of the wording but certainly on the basis of the result intended, the Swiss IPRG would not seem to prevent us from allowing a full-scale choice of law in favour of the UNIDROIT Principles. A similar interpretation would seem possible for Article 3 of the 1980 EEC Convention on the Law Applicable to Contractual Obligations. The first paragraph of that Article again refers simply to 'the law' and not to the law of a state.

Ferrari: I agree with you and Professor Vischer as far as the Swiss IPRG is concerned. However, as far as the 1980 Rome Convention is concerned, I think the interpretation must clearly be different. According to Article 18 of the Agreement, its legislative history must be taken into account when interpreting it. If we look at this legislative history, we find that the term 'law' was intended to mean 'the law of a state'. A closer look at the wording would seem to lead to the same result. While Article 3, paragraph 1 of the Rome Convention suggests that the parties can freely chose the applicable 'law' and not only the 'law of a state', Article 3, paragraph 3 of the Convention clarifies that 'the law' must be 'the law of a state'. The same is true for the 1994 Inter-American Convention which I mentioned in my presentation. In that Convention the question whether the term 'law' is to be understood as 'the law of a state' was explicitly dealt with. Article 17 of said Convention stipulates unambiguously that 'law' as used in the Convention can only be 'the law in force in a state'. For policy reasons, I still prefer the Swiss solution. *De lege lata*, however, I think it cannot be applied in the framework of these Conventions.

Straub: I have a question for Professors Bonell and Ferrari concerning the extensive provisions in the UNIDROIT Principles concerning the determination of the content of a contract. Specifically, my question refers to Article 5.7 which stipulates that in case the parties have not agreed on the price to be paid and where a market price or other reasonable criteria cannot be identified, the judge or arbiter should fix a 'reasonable' price. What is the ratio of this rule? I have some difficulties with it which I will briefly explain. Where the parties of a business transaction have agreed neither explicitly nor implicitly on the price to be paid, after all the price is the essential *quid pro quo* in any transaction, it seems strange to offer supplementary interpretation of a contract in order to uphold that contract. Upholding a contract even though essentials are missing cannot but invite negligent behaviour by the parties. Worse, it would seem to invite tactical manoeuvres in order to achieve results which cannot be obtained in fair and open negotiations. Should the Principles lend a hand to this type of bad faith behaviour? In fact, I believe the promise made by the Principles, namely the determination of a 'reasonable price' where the parties have failed to determine one, cannot be fulfilled where a market price or other criteria cannot be found. Is not the fundamental respect of private law for the autonomy of the parties based exactly on the very fact that in many cases there is no objectively just price or just value for a good or service? Therefore, I would argue that the relevant passage in the Principles by definition cannot lead to a result that is mutually accepted. The result would then be the following: rather than putting the blame on the parties who failed to agree on an essential element of their contract, the blame is put on the lawyers who are failing to come up with a 'just' result. By contrast, if the Principles did not provide for the fixing of a reasonable price, the contract would have to be declared null and void and all transfers already executed would have to be returned according to the rules of unjust enrichment. This perspective should clearly motivate the parties to seek and find a compromise for the reasonable price rather than demanding such a determination from a judge or arbiter. 'Upholding a contract at any cost', or at any price, would, therefore, seem plainly wrong to me.

Bonell: Firstly, we have to make a clear distinction between two provisions relevant to your questions. Article 2.14 of the UNIDROIT Principles refers to a situation, where at the time of conclusion of a contract the parties, for whichever reason, consciously leave certain elements of their contract undecided, such as the price to be paid, and agree to determine these elements at a later time either themselves or with the help of a third person. Article 5.7, by contrast, deals with the much more frequent case that the parties have neither explicitly nor implicitly agreed on a price nor provided for a mechanism for its subsequent determination. For such contractual lacunae, Article 5.7 is intended as a supplementary rule and provides for certain supplementary criteria, such as the 'market price' or a 'reasonable' price, for the determination of the missing element of the specific contract at hand. If you were to argue that in such a situation the contract should really be null and void because any outside intervention and determination of the price as an essential element of the

contract would be incompatible with the principle of the parties' autonomy and would only lead to abuse and speculation, I should fundamentally disagree with you. Your position was historically shared only in two legal orders, namely in French law where the jurisprudence of the courts had strictly applied the dogma of *pretium certum*, and in the socialist countries, where very elaborate contracts fixing every detail in writing were considered necessary in order to exercise full control over any entrepreneural activity and the fulfilment of the central plans. Both of these legal orders, by insisting on the perpetuation of their solution, are also responsible for the very unfortunate and internally contradictory regulation in Articles 14 and 55 of the CISG. In the meantime, however, the French Cour de Cassation has been converted to the other solution and we all know what has happened to the socialist systems...

Ferrari: I fully agree with Professor Bonell. Just like him, I believe that the above-mentioned Principle on the determination of the price (Art. 5.7) will not induce carelessness in the parties. Quite to the contrary, the parties and their lawyers who are aware of this rule (which exists in many national legal orders in similar form) will seek agreement on a price if they do not want to accept the market price or the reasonable price.

Kramer: We should mention Article 4.8 of the UNIDROIT Principles in this context. Mr Straub's criticism may be more adequately directed at this Principle since it would seem all too tolerant towards negligence and carelessness by the parties in defining their rights and duties. Article 4.8 provides for a method for dealing with contractual lacunae. If the parties have not agreed upon an element which is important, and I stress important, for the determination of their mutual rights and duties, the contract will be supplemented by provisions which are reasonable under the given circumstances. If I see this correctly, the Principles draw no line whatsoever for judicial supplementation. In the extreme case, even a mere torso of a contract could thus be upheld.

Bonell: We should not forget that certain essential elements must be identifiable in order to prove an offer and its acceptance and thus the existence of a contract in the first place. However, I have to admit that there is a certain grey area.

Schmidt-Kessel: Professor Kramer, concerning the limits of supplementary interpretation in Article 4.8: are you missing an abstract limit for judicial supplementation? Are you not demanding something from the UNIDROIT Principles that none of the European national legal orders, maybe with the exception of English law, can deliver? And connected to this: Professor Schnyder said that the rules on interpretation in the Principles demonstrated that many different concepts and national practices of interpretation had been integrated. I fully agree with this. In our discussion of Article 4.8 we should not forget to mention Article 5.2. Professor Schnyder, how do you see the relationship between these two Principles? If I see this relationship correctly, there is only one difference, at least between Article 4.8, paragraph 2 and Article 5.2 which may be summarized as follows. Article 4.8 has a subjective emphasis whereas Article 5.2 refers to objective

'practices established between the parties'. How do you see this relationship and do you not believe that it is perfectly possible to work with both approaches in practice and set up a coherent concept for arbitration? I should just like to point out that we can find the dualism between objective and subjective rules on interpretation also in national laws, such as sections 133 and 157 of the German BGB. I assume that one could find similar provisions in other codifications.

Schnyder: Whilst you are asking me, I think you have given the answers yourself. Indeed I do not see much of a difference between Article 4.8 and Article 5.2. The choice of words is similar, even if the sequence is somewhat different in Article 5.2 if compared to Article 4.8. Personally, I share the problems Professor Kramer has with Article 4.8, paragraph 2. Like him, I ask myself, where are the limits to supplementary interpretation. Actually I consider the provision as superfluous, since it mainly mentions elements which an arbiter or judge doing her job properly should take into consideration anyway. And the list is open. If I were acting as an arbiter, I would feel neither encouraged nor discouraged by Article 4.8, paragraph 2 from looking at all surrounding circumstances of a contract.

Bonell: If I may add something off the record, I should agree that from a systematic point of view Articles 4.8 and 5.2 are not without flaws. Article 4.8 is a reflection of the German concept of *ergänzender Vertragsauslegung* while Article 5.2, which has to be seen in the context of the entire chapter 5 and its supplementary rules, is clearly influenced by Roman law (in particular Art. 1135 of the French Civil Code and Art. 1374 of the Italian Codice Civile).

With respect to Professor Kramer's comments: maybe your concerns can be taken care of by taking into consideration that Article 4.8 intentionally does not speak of *essentialia negotii* but rather of general conditions that are *important* for the determination of the rights and duties of the parties.

Dillier: I came here to ask one specific question. Two critics of the UNIDROIT Principles advised me to always exclude the Principles when drafting a contract. You will not be surprised to hear that these critics are Ms Kessdijan and Mr Richard Hill, who have made similar statements in a number of publications. May I ask you, therefore, to deal with central elements of the criticism by these authors? Richard Hill's central argument is that the Principles do not lead to more transparency and foreseeability but rather to more uncertainty. His examples mainly concern the rules on mistakes and I should like to hear your learned opinion about the merits of this criticism in order to advise me whether I should really continue to exclude the Principles from the contracts I am drafting. If somebody is able to summarize the criticism of Kessdijan and Hill more adequately, I would like to invite him or her to join the discussion.

Bonell: I am very grateful for this question since it gives me a more than welcome opportunity to clarify certain things and to answer some of the most pronounced critics of the UNIDROIT Principles. Let us begin with Richard Hill and his article in the *Journal of International Arbitration* which, unfortunately, received rather wide

attention. Mr Hill obviously does not like the Principles at all. While that is perfectly legitimate, what is his real criticism? Well, what it boils down to is the accusation that their impossible provisions are a serious threat to the peaceful conduct of international trade relations. As an example, and this is surprising, he quotes Article 3.4 of the Principles, a completely innocent and unproblematic provision which merely defines the term 'error' as used in subsequent provisions. According to Mr Hill, this Article 3.4 could allow avoidance based on an error in the price calculation. This reading of Article 3.4 is so manifestly erroneous that the footnotes to Hill's article which tell us that he is not a lawyer himself but only wants to express the 'common sense' of the *business people*, can only provide some consolation. Let's face it, how many *business people* would misunderstand the reach of Article 3.4 so fundamentally? The same is true for Article 3.10 of the Principles. That provision may leave much to desire but to go as far as Mr Hill does and to claim that it threatens world peace by creating problems that do not exist in reality due to the ever correct behaviour of all traders in the world, is clearly beyond reason.

As far as Ms Kessedijan is concerned, I have to admit that her criticism has surprised, or should I say disappointed?, me even more. She is a trained lawyer and well-known expert of uniform international law and still ... Let us just look at her critique of Article 2.16 about the duty of confidentiality. According to Ms Kessedijan, this provision, as so many others in the UNIDROIT Principles, deviates completely from international contractual practice. Respectively, she claims the provision does not adequately address the real needs of international commerce since, as a sanction, it merely offers damages and thus excludes other remedies, such as injunctions, which may be more useful in a given case. Excuse me! All we have to do is to look at the wording of the provision itself ('Where appropriate, the remedy for breach of [the duty of confidentiality] *may include* compensation based on the benefit received by the other party' (emphasis added)) and in particular the explanations which explicitly mention the possibility of injunctions. This shows how poorly founded this criticism really is.

Kramer: An error in the price calculation, as mentioned by Richard Hill, is exactly what is dealt with by Article 3.5, paragraph 2, lit. b. This is the classical example of an error to be borne by the party committing it. Many national legal orders have significantly more problems in dealing adequately with errors about value or price calculation. The 'problem' picked by Richard Hill is therefore a strength rather than a weakness of the UNIDROIT Principles.

Emmert: It seems to me that we could summarize this discussion, admittedly with some irony, by saying that the best and maybe the only good reason for generally excluding the application of the Principles to a contract is the fact that the lawyers do not know them and do not want to read them.

Werro: I should like to ask a question about Article 1.7, paragraph 2. This provision stipulates that the parties to a contract cannot exclude the principle of good faith. Thus, they are not allowed to provide for application of the Principles while at the same time

excluding the principle of good faith. I do not understand the practical impact of this provision. How can we say that the application of the Principles is optional and at the same time make one of them compulsory? Maybe Professor Bonell could provide an authentic interpretation of this provision?

Bonell: You have limited your question to the interpretation of Article 1.7, paragraph 2. However, we could use this question for a general discussion of binding provisions in the UNIDROIT Principles. Of course, you are right in seeing a certain contradiction in the fact that the Principles have to be agreed upon in order to become applicable while at the same time the same parties should be unable to exclude certain provisions by the same agreement. To explain this apparent contradiction, I would like to point out that the Principles are used not only as a uniform law chosen by some parties but also as a model for law reform at the national and international level. Furthermore, and despite opposition from my friend Franco Ferrari, the Principles can be used to concretize the *lex mercatoria* or general principles of law if that is the law chosen by the parties. In this I fully agree with Philippe Kahn who is grateful that the binding provisions in the UNIDROIT Principles have (finally) lifted certain parts of the *lex mercatoria* to the level of *ordre public*.

C. Discussion of the Presentations made by Professors Schwenzer and Schlechtriem (the Latter presented by Mr Schmidt-Kessel)

Staehelin: I have a very general question concerning the suitability of the Principles for contracts that are neither sales agreements nor contracts for works and services. Even though the Principles are leaning on the CISG in many respects, they go beyond the latter in their applicability to other types of contracts, such as investment agreements, concession agreements, contracts for professional services, and even contracts for the performance of continuing or recurring obligations. On the other hand the Principles contain only general provisions and do not explicitly regulate specific types of contractual obligations. The general provisions are best suited to sales agreements and contracts for works and services. This is confirmed by the fact that most of the examples cited in the presentations have been dealing with these types of agreements. My question is therefore, whether the Principles are sufficiently clear and concrete for other types of contracts, whether disputes can be adequately dealt with via interpretation according to Article 1.6, or whether the lack of specific provisions would not lead to new uncertainties about the rules to be applied in a given case?

Schwenzer: The question you have raised is a most important one. I believe that sales agreements are frequently paradigmatic for the drafters of a general part of a

law on obligations. This can be seen in most national legal systems and I think the Principles are another example where the drafters more often than not had sales agreements in mind when thinking about contractual issues. Nevertheless, in my opinion, the Principles are better suited to deal with contracts for the performance of continuing or recurring obligations than most national laws on obligations, with maybe the exception of the new Dutch NBW. Similarly, for problems associated with the conclusion of contracts, the Principles offer reasonable solutions for many types of contracts, not least because of their rules on *culpa in contrahendo* etc. When it comes to non-performance, I see more difficulties, even though we should appreciate the promising start in the Principles to solve these complex issues. Precisely in respect of non-performance and its consequences, the presentation by Professor Schlechtriem has demonstrated that practitioners must not rely entirely on the Principles. Rather they should carefully draft their contractual terms when leaving the realm of sales agreements and contracts for works and services.

Schnyder: Professor Schwenzer, earlier on you expressed your opposition against penalties and punitive damages very pointedly. I do sympathize with this view. However, as an international procedural lawyer, I now have the question whether we can instrumentalize the concept of *ordre public* within the Principles against orders to pay penalties or punitive damages, now that we have Article 43 of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the ARG EvÜ and that all European states have ratified these Conventions? Concretely my question is thus, whether the *ordre public* objection could and should be used even against states who are not parties to these Conventions? Personally, I have my doubts about this but would like to hear your opinion.

Schwenzer: Up to now I have been thinking mainly of an application of the *ordre public* against the enforcement of arbitration awards. However, I believe that the *ordre public* could be used to resist enforcement of a judgment of a state court, for example if a French court would fix a penalty payment based on the UNIDROIT Principles which would be beyond what could be fixed as *astreint* in France.

Kramer: Professor Schwenzer, you have been quite outspoken in your criticism of the rules on the right to performance and the consequences of non-performance. Thus, I was surprised not to hear criticism of a related rule. I am thinking of Article 7.2.3 on the replacement of defective performance. This right is commonly and rightly seen as a right to performance. Thus, it may exist even in cases where the failure to perform does not concern a fundamental performance. If I am correct, there is a significant difference to the CISG here. Under Article 46, paragraph 2 of the CISG, a right to replacement of defective performance is granted only in cases where fundamental performances are concerned. The reasons for a restrictive approach to replacement are evident. The problems in the *Rückabwicklung* (restitution after termination) of an international contract are to be avoided where possible. The same ratio is behind the restrictive rules on termination. Thus, I do not understand why the UNIDROIT

Principles do not take the same parallel and restrictive approach to termination and replacement and always require that the failure concern a fundamental performance.

Schwenzer: I have no problem with this line of argument. In fact, Professor Kramer, I would agree with you that replacement should only be due where a failure concerns a fundamental performance. Whenever it can be reasonably expected from the creditor to accept repair and provided she will then obtain fundamentally what was owed in the first place, the rights of the creditor should clearly be limited to repair. Dogmatically, this result can easily be achieved via Article 7.2.2, lit. b. In such a case replacement is simply 'unreasonably burdensome or expensive' for the creditor. In my view, the rules of the UNIDROIT Principles are sufficiently flexible to achieve the same result as under the CISG in this type of case.

Bonell: I fully agree with Professor Schwenzer's conclusions. Just by way of an *amicus curiae*, and to further reassure Professor Kramer, I would like to point out that Article 7.2.3 not only makes an express reference to the previous rules in Articles 7.2.1 and 7.2.2 but that it is limited in itself by the phrase 'in appropriate cases'. Furthermore, it should not be forgotten that the UNIDROIT Principles, in contrast to the CISG, have certain 'general provisions' in their chapter 1. All subsequent rules must be read in the light of these general provisions. The good faith principle in Article 1.7 is of particular importance in this context and Article 7.2.3 should always be understood and applied against this background.

Since I have already taken the floor, allow me to say a word about the criticism of Articles 7.2.1 and 7.2.4 made by Professors Schwenzer and Schnyder. As far as Article 7.2.1 is concerned, I can follow your arguments but would nevertheless like to point out that in my view it would go too far to actually include such very fine distinctions into a regulatory framework such as the UNIDROIT Principles. Even in more elaborate national statutes one will look in vain for such a rule. Of course, one could delete the entire Article 7.2.1 and leave the question to be resolved by reasonable interpretation and practice. However, in particular the developing countries and the former socialist countries had insisted on an express rule concerning restitution in kind in cases of obligations to pay money. These countries were obviously interested in making sure that monetary obligations owed to them in foreign, i.e. hard currencies, should be enforceable via court orders if necessary.

Finally, a few words about penalties. Personally, if I may say so off the record, I have never been a friend of these rules. Yet I believe that Professor Schnyder's concern that Article 7.2.4 of the Principles could mislead state courts into awarding disguised punitive damages which would then have to be checked in other states by taking recourse to the *ordre public* is somewhat exaggerated. I think we must not overestimate the impact of the UNIDROIT Principles in this specific issue.

Mayer: I would like to make several remarks. Firstly, Professor Schlechtriem's presentation referred to the *vertragliche Rückgewährschuldverhältnis* without explaining how and why this principle, which can be found only in Germanic legal systems, can be applied in the framework of the UNIDROIT Principles. And

Professor Schwenzer presented the UNIDROIT Principles as an attempt at an international commercial code, an interpretation which is not in conformity with the genesis and principal goals of the Principles. It would thus seem that both speakers give much importance to a comparative approach in the interpretation of the Principles.

Preparations for the Principles had in principle already begun in the 1960s, at a time when UNIDROIT in Rome had laid the foundations for the European Convention on International Commercial Arbitration, signed at Geneva in 1961, and at a time when René David, one of the foremost arbiters of this century, had decisive impact on the work of the Institute. Subsequently, in 1971, the Steering Committee, consisting of David, Schmitthoff and Popescu, did not receive the charge of drafting a uniform commercial code or a commercial law convention but to summarize customary rules in trade and commerce. Mainly this was aiming at the reasons given by international arbitration courts in their daily practice. The charge was thus to codify the rules which had been accepted and applied by those involved in international trade and commerce. So much for the origin of the Principles.

If the interpretation is nowadays done by taking recourse to national legal orders and by presenting the Principles as an international commercial code, their fundamental purpose is no longer taken into account. Professor Kropholler has long been teaching that a comparative approach and method should be decisive in the interpretation of uniform law but Professor Ferrari has just contradicted him. I share his conviction that the Principles should not be interpreted on the basis of comparative law methods and would like to briefly give my reasons for this. We may safely presume that the UNIDROIT Principles are still exclusively applied by arbitration courts. State courts will only exceptionally take recourse to the Principles in a trial. Thus, all cases where the Principles are applied, are cases where the parties of a contract have either expressly or implicitly provided for the application of the Principles or of general principles of law. Ever since *Götaverken General National Maritime Transport Company v. Société Götaverken Aredal A.B.* (Cour dAppel de Paris, 1re Ch.civ., Rev. Arb. 1980, 524), it has been furthermore recognized that decisions by international arbitration courts cannot have more than a very limited connection to any specific national legal order and even that only if the *lex loci arbitri* so permits.

If we recall once more that the UNIDROIT Principles are a codification of international commercial practice, it should become clear that their interpretation with recourse to comparative method can lead to wrong results. National statute books just do not contain those rules which are used in international commercial practice, and they never will, since the branch specificity of this practice will not lend itself to uniform codification. For all these reasons, international arbitration courts will not take recourse to national legal systems when interpreting the UNIDROIT Principles. Rather, they will examine whether there is an accepted custom between the parties and what it provides for. This is the only method of interpretation which would seem adequate given the very intention of the UNIDROIT Principles. Beyond it, comparative method can of course be a supplementary source of inspiration.

Finally, I would like to come back to the example quoted at the beginning, namely the *vertragliche Rückgewährschuldverhältnis*. The application of this principle in the context of the UNIDROIT Principles is a particularly good example where a non-autonomous interpretation of the Principles may lead. According to the protocols, the drafters of the UNIDROIT Principles never discussed the *vertragliche Rückabwicklung* and the same is true in the context of Articles 81 et seq. of the CISG. Only writers in the Germanic legal systems mention the possibility of a *vertragliche Rückabwicklung*. The French and English language do not even have words for it. A similar problem exists in Swiss law. *Vertragliche Rückabwicklung*, by now extended to rescission by the Swiss Federal Tribunal, is categorically rejected by French speaking lawyers in Western Switzerland who are under the influence of French law. This is further evidence for the difficulties created by taking recourse to national legal concepts when interpreting uniform law.

Schwenzer: Mr Mayer, you know my attitude towards purely theoretical discussions. Thus, I should not care to discuss the usefulness and permissibility of comparative method in the interpretation of the Principles at a purely abstract level. All we have to do is to look at reality and practice. There is no such thing as an 'international lawyer'. Every one of us is coming from a distinct national legal order and brings with him or her the respective understanding of legal concepts. In particular in the areas which I have presented, namely the right to performance, and the preference for performance in European and the preference for damages in American law, national concepts are deeply entrenched. Thus, even if we all pursue the ideal of interpreting the UNIDROIT Principles autonomously, the national concepts we have learned will always influence our thinking. This is simply a fact of life. However, if we were to negate this fact of life, namely that the arbiters and lawyers will always interpret the Principles against the background of their own legal horizon, we will be unable to deal adequately with the Principles. More concretely, when drafting a contract as a lawyer or a party to that contract, I always have to be aware that it will be interpreted differently, for example regarding penalties, depending on whether it eventually comes before French courts or German courts. The question whether the interpretation should then be done with or without comparative method may be of theoretical interest. In practice it has no relevance whatsoever.

Schmidt-Kessel: I would also like to comment on Mr Mayer's contribution. First, concerning the general question of interpretation applying comparative method. I think we cannot force an arbiter in her practice to constantly re-invent the wheel. All legal terms used in international documents, irrelevant of the language they are in, have some background in national law and this background will have an impact on the way the lawyers are thinking and arguing. It is a major merit of comparative method to lay this open.

Secondly, about the term of *vertragliche Rückgewährschuldverhältnis*, which I have used: I am not sure whether it is my job to defend Professor Schlechtriem, therefore, I am just speaking for myself. Maybe the term as used was not sufficiently

precise. However, it has not been used to describe a specific remedy but rather to show in a few words the material question concerned. What precisely can be demanded in these cases should be for another discussion.

Burkhardt: The contribution by my colleague, Mr Mayer, from Geneva, has demonstrated how difficult it would be to have state courts apply the UNIDROIT Principles. For practical reasons I believe it would not enhance the quality of our administration of justice if the courts had all too much room for interpretation via comparative law or any other method. But now let me address Article 6.2.2 of the Principles concerning 'hardship'. This Article should not be underestimated. As I understand it, this provision applies even to cases which would be called 'manifest error about future events' in Switzerland. While Article 3.4 of the Principles about 'mistakes' is obviously limited to erroneous assumptions about facts existing at the time of conclusion of the contract, Article 6.2.2 deals with events which occur or become known only after conclusion of the contract and fundamentally alter the equilibrium of the contract. Under the presumption that nobody would conclude a contract which is fundamentally unbalanced, any grave error of the party which turns out to be the disadvantaged one would seem capable of coming under Article 6.2.2. Since Articles 6.2.2 and 6.2.3 provide for renegotiations by the parties or, failing those, for adaptation by the courts, this may have a very profound impact on the contracts. How can these problems be dealt with in practice?

Emmert: I think the problem addressed by Mr Burkhardt may soon become practical, namely in the context of the transition to European Monetary Union. Whenever contracts of long duration or of a speculative nature were concluded in the last few years, the parties, if they considered the point at all, will have reasonably presumed that the convergence criteria for monetary union would be adhered to or, failing that, that monetary union would be postponed. As we all know by now, decisions were taken on a political basis rather than strictly along the legal criteria in the treaties. Should the euro prove to be less strong as a result, we can be sure that some parties will attempt to reach an adaptation of their contracts via Article 6.2.2 where the UNIDROIT Principles are applicable. If one were to accept the possibility of adaptation via Article 6.2.2 in this case, the problem will be how and where a reasonable equilibrium can be found by the arbiters and courts. At the bottom line this raises the question of risk distribution in the contracts in question and this question can probably only be decided *ex aequo et bono*.

Schmidt-Kessel: I think in these cases we should first look at the provisions of the applicable currency law. The relevant Council Regulation 1103/97, OJ 1997 L 162/1 provides in Article 3 that the transition to the new currency shall not affect the continuity of pre-existing contracts. Even though some states of the US American Federation have differing solutions for this problem of conflicts of laws, I believe it is reasonable to follow the currency laws in Europe. This would also seem to be supported by various rules in the Principles. The most important of these rules is probably the one about interest payment in Article 7.4.9 which ultimately refers to

the law of the state of the currency of payment. Therefore, I suggest that we will consider EU law as the currency law for the purposes of said problem wherever the Principles are applicable. This suggestion, by the way, would apply also to cases where the UN Convention is applicable. In the framework of most other international conventions the problem does not become pertinent, for example where they refer to special drawing rights. However, it is true that Regulation 1103/97 only deals with the transition to the new currency itself. Should this new currency turn out to be weak at a later point in time and thus fundamentally disturb the equilibrium of a contract, this would indeed have to be taken into consideration under Articles 6.2.1 to 6.2.3 where the UNIDROIT Principles are applicable.

Kramer: Our discussion has been rather critical about the Principles. Namely, it was remarked, that they are not always sufficiently differentiated. However, we should always remember that the Principles are only general principles or an *Allgemeiner Teil*. They are not dealing with specific types of contracts and therefore, it is clear that many differentiations which would be necessary for these contracts cannot be provided by the Principles. This is part of their very nature and inevitable. In Swiss law, the Principles would thus have to be compared with Article 68 et seq. of the OR and if we were to look only at those articles, I am sure we would also find many a point of criticism. Therefore, I would like to summarize our discussion by encouraging the continuation of the work done in the Principles, namely the development of further Principles for specific contracts and thus a *Besonderer Teil* of contract law. Finally, I would like to express my personal hope that Professor Bonell is not too upset about our criticism. Allow me to recall an anecdote which has been recorded in France. When Napoleon heard the first and often critical comments about his Civil Code he apparently exclaimed 'Mon Code est perdu!' As we all know, the Code, after almost 200 years, is still in force. If the UNIDROIT Principles should suffer a similar fate, I believe we can all be satisfied.