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The Growing Significance of Sets of Principles to Govern Trans-boundary Private Relationships

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INTRODUCTION

In the last decades, a considerable number of public (“governmental”) and private (“non-governmental”) institutions have participated in an ever-growing global movement of normative production aimed at having an impact on the regulation of trans-boundary private legal relationships. Among the assorted kinds of instrument that have been elaborated, the present contribution focuses on those that lack any binding character, and that do not have as sole goal to serve as a model for domestic legislation (“model laws” and “legislative guides”). These types of instrument have in general – rightly or wrongly – been labelled as “principles” although sometimes they appear under other names such as “guidelines” and even “rules”. They contain a set of provisions¹ (or, precisely, principles) adopted on the basis of either common practice or common sense as a result of broad comparative studies. The purposes of those instruments vary as they are addressed to different legal actors, namely parties in legal relationships (individuals, companies, States), dispute deciders (judges, arbitrators), and public powers (executive branches and legislatures, besides judges).

The sets of principles (or, shortly, “principles”) considered in this paper cover the transnational dimension of a wide array of legal fields such as contract law, civil procedure, arbitration law, financial law or corporate law. In other words, they may affect relationships falling within the scope of what is known as private international law or conflict of laws. However, the belonging of the “principles” to this discipline is far from accepted by traditional conflicts scholarship.² Ultimately, whether or not the principles should be accepted as a part of private international law is not too significant. What seems really relevant is that all the actors mentioned are taking them into account as regards trans-boundary relationships. As a matter of course, principles of different kinds can currently be

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¹ We exclude here the lists of boilerplate contract clauses, such as the Incoterms elaborated by the International Chamber of Commerce (ICC).

² Perhaps the sole exceptions would be the Hague Principles on Choice of Law in International Commercial Contracts (Hague Principles, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>, see M. PERTEGÁS and B. A. MARSHALL, Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts, *Brooklyn Journal of International Law* 39 (2014) p. 975-1002), and a part of the ALI (American Law Institute) / UNIDROIT (International Institute for the Unifications of Private Law) Principles on Transnational Civil Procedure (PTCP, <http://www.unidroit.org/instruments/transnational-civil-procedure>, see H. GAUDEMET-TALLON, Les aspects de droit international privé du Projet ALI- UNIDROIT, in F. Ferrand (ed.), *La procédure civile mondiale modélisée* (Éd. Jur. et Techniques (2004) p. 76-83). The rest of the instruments, which would lack of a strict “conflict” nature, cannot pertain to the rigid, small scope private international law has according a formal point of view.

found in domestic acts, international instruments, private contracts, judgments and arbitral awards. In some contexts, this normative production has been particularly fruitful. That is the case of international arbitration, where soft law instruments as the Guidelines on Conflicts of Interest in International Arbitration elaborated by the International Bar Association (IBA)³ undeniably have an important impact on daily practice.

This contribution firstly proposes to discuss various typologies of principles, which, albeit in a different way, illustrate the wide panorama of principles that have been elaborated in the last decades. It then identifies the main issues involved in the making of those principles, *inter alia* questioning the underlying rationale of institutions engaged in principles-making. After having analysed the application of those principles, the contribution aims to identify their main uses and their influence on everyday private international law actors. An important part of the references are related to the UNIDROIT Principles on International Commercial Contracts (PICC),⁴ the most famous and accepted of all the principles. And writing about PICC amounts to evoking Michael Joachim Bonell, one of the most talented, charming, and successful legal scholars of our era, whose name will be for ever linked to the elaboration of principles in the transnational arena and, by this means, with the (post)modernisation of legal thinking.

I TYPOLOGY OF PRINCIPLES

Broadly speaking, the instruments envisaged in this contribution do not share a great number of common features. They are very heterogeneous indeed. However, two typologies may be adopted to classify these instruments into different categories of principles: a static (a) and a dynamic typology (b).

A) STATIC TYPOLOGY

A static typology of principles may be when taking every single instrument into consideration and isolating a particular characteristic of each one. In this regard, one may focus on the institutional setting where the principles were elaborated (1), their envisaged scope of application (2) and finally classical distinctions based on their content and object (3).

1. The institutional setting where the principles were elaborated

A simple distinction may be made by identifying the public or private nature of the institutional setting in which the principles were elaborated. It is accordingly easy to distinguish between principles made in the framework of intergovernmental organisations and those elaborated in purely private institutional settings. Among the former we can mention those the main activity of which is normative production (such as UNIDROIT⁵ or the

³ http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

⁴ <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>. See M. J. BONELL, An International Restatement of Contract Law. The UNIDROIT Principles of International Commercial Contracts, 3rd ed. (Transnational 2005).

⁵ In addition to the PICC, UNIDROIT prepared, jointly with the ALI, the above mentioned PTCP (*supra* note 2). See R. STÜRNER, The Principles of transnational civil procedure, an introduction to their basic conceptions, *RabelsZ* 69 (2005) 201-254. More recently, UNIDROIT issued the Principles on the operation of close-out netting provisions. See O. BÖGER, Close-out netting provisions in private

Hague Conference on Private International Law⁶) as well as institutions that include some normative production among their proper goals.⁷ Of course, we can find principles of public nature adopted out of institutional (permanent) settings, in ad hoc intergovernmental meetings.⁸ Principles are also elaborated in purely private institutional settings of different nature, namely professional⁹ or academic.¹⁰ Both types of setting may be either “universal” (or have a universal vocation) or “regional”.

The previous examples are perhaps classical textbook examples. Indeed the traditional public/private divide does not always easily allow capturing all already existing principles. This is for instance the case with various European sets of principles (on contracts, non-contractual responsibility, and family law). All these principles are indeed formulated in a private institutional setting whose extensive interaction with the European Commission is not a secret. Furthermore, possible funding received by private institutional settings equally complicates the task of identifying the true public or private nature of a work. In other cases the specific body in charge of the normative production may be considered as an informal group deprived of any supranational authority although it operates under the aegis of an

international law and international insolvency law, *Unif. L. Rev.* 18 (2013) p. 232-261 (Part I) and 532-563 (Part II). Notwithstanding the name given to this instrument, its goal is to serve as a legislative guide (see <http://www.unidroit.org/instruments/capital-markets/netting>, Introduction, § 11).

⁶ *Supra* note 2. We do not add the other main public institution, the United Nations Commission on International Trade Law (UNCITRAL), because it has not elaborated principles yet. Its normative production is mainly made up of conventions, model laws and legislative guides (all instruments excluded from this paper), as well as contractual instruments such as the Rules on Arbitration, on Transparency in Investment Arbitration, and on Conciliation. However, as we will see later, all these instruments often play the role of standard rules or principles.

⁷ For instance, the Organisation of Economic Co-operation and Development (OECD). See the OECD Guidelines for Multinational Enterprises (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁸ This is the case of the Washington Conference Principles on Nazi-Confiscated Art, adopted in 1998. See E. JAYME, Narrative Norms in Private International Law. The Example of Art Law, *Recueil des Cours* 375 (2014) p. 46-47.

⁹ Thus, the guidelines and rules on transnational arbitration elaborated by the IBA are broadly regarded. See G. KAUFMANN-KOHLER, La codificación y la normatividad del *soft law* en el arbitraje internacional, in J. Basedow, D. P. Fernández Arroyo and J. A. Moreno Rodríguez (eds.), *¿Cómo se codifica hoy el derecho comercial internacional?* (La Ley / Thomson Reuters, 2010) p. 107-127. In general, on private law-making see G. CUNIBERTI, The Merchant Who Would Not Be King. Unreasonable Fears about Private Lawmaking, in H. Muir Watt and D. P. Fernández Arroyo (eds.), *Private International Law and Global Governance* (Oxford University Press, 2014) p. 141-155.

¹⁰ For instance, among many others, the Trans-lex Principles developed by CENTRAL, University of Cologne (<http://www.trans-lex.org/principles/>), the several set of principles (on Divorce and Maintenance Between Former Spouses, on Parental Responsibilities, and on Property Relations Between Spouses) elaborated by the Commission of European Family Law (<http://ceflonline.net/principles/>), or the Principles on Transnational Access to Justice, which are being elaborated by the American Association of Private International Law (ASADIP, www.asadip.org).

international organisation.¹¹ Finally, no less important is the example of principles born from private initiatives, which have subsequently been endorsed by public institutions.¹²

2. The spatial scope of application covered by the principles

Identifying the envisaged scope of application of the principles certainly allows conceiving a different typology. Certain principles aim at being universally applied while others may explicitly restrict their application to a particular geographical area.¹³ Thus, as such, the PICC, the PTCP or the Hague Principles share this aim of universality. They do not contain any restriction as to when or where they should apply. The very fact that they were elaborated in universal settings leads more or less automatically to a broad definition of their scope of application.

Under a similar rationale, the principles elaborated in regional settings might be primarily associated with a scope of application limited to the region in which the institution acts. In this regard, one might speak of principles with a restricted regional reach. This would be the case with the various European sets of principles,¹⁴ the Draft Latin-American Principles of Contract Law (PLADC),¹⁵ or the Principles of Asian Contract Law.¹⁶ One may however question whether these principles can – according to their geographical label – be considered as “regional” principles. Indeed, their scope of application is not limited to intra-regional cases,¹⁷ which in turn means that they also share a certain universal reach. Furthermore, this distinction may be valid as long as the principles are directly addressed to persons involved in a trans-boundary relationship. However, when principles play the role of

¹¹ This is the case of the Basel Committee of Banking Supervision (BCBS), which operates within the framework of the Bank for International Settlements. The BCBS Charter expressly establishes: “The BCBS does not possess any formal supranational authority. Its decisions do not have legal force” (Article 3). The BCBS has produced a long list of principles grouped under the names of standards, guidelines, and sound practices. See https://www.bis.org/bcbs/about/work_publication_types.htm

¹² See, for instance, the Ruggie Principles endorsed by the UN Human Rights Council as the Guiding Principles on Business and Human Rights, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See J. G. RUGGIE and J. F. SHERMAN, III, Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice, *Journal of International Dispute Settlement* 6 (2015) p. 455-461.

¹³ Another restriction of scope might be to a specific category of persons.

¹⁴ The most well-known instrument is the Principles of European Contract Law (PECL). See D. MAZEAUD, *Principes du droit européen du droit du contrat* (1), *Projet de cadre commun de référence* (2), *Principes contractuels communs* (3) *Trois codifications savantes, trois visions de l'avenir contractuel européen...*, *RTD Eur.* (2008) p. 723.

¹⁵ This is a private initiative carried out by a group of South-American scholars. See R. MOMBERG, *Harmonization of Contract Law in Latin America: Past and Present Initiatives*, *Unif. L. Rev.* (2014) p. 1–18.

¹⁶ See N. KANAYAMA, *PACL (Principles of Asian Civil Law)*, in *Mélanges Jean-Louis Baudouin* (Yvon Blais 2012) 393-419. See also http://www.law.uchicago.edu/files/file/naoki_kanayama-principles_of_asian_contract_law.pdf

¹⁷ Thus, even though the Draft PLADC includes a curious provision according to which “These Principles shall be applied preferentially over any other principles of contracts to contracts related to countries located in South America, the Caribbean, and jurisdictions of the Americas governed by the civil law system” (Article 1), other provisions of the same article allow a much broader application.

recommendations addressed to governments, a restriction as to their possible applicability which depends on the location of the parties, or the application of a specific national law, is not relevant anymore.

3. The content and the goal of the principles

Lastly, the content and the goal of the principles may be criteria to use to distinguish different categories of principles. For many of these instruments one may accordingly adopt the traditional distinction between procedure and substance. In this regard, the first category certainly includes the PTCP or the Principles on Transnational Access to Justice. Differently, substantial or material principles would certainly include the PICC or the PECL. The classification of the Hague Principles may in this regard again appear difficult. Indeed, we are facing a purely conflict-law instrument.¹⁸

Rather than distinguishing between the matters covered by the principles, one may distinguish between instruments that only aim to apply to international situations on the one hand, and principles that also apply to domestic situations on the other. By definition, this contribution deals only with transnational principles or, better said, with principles regarding transnational situations. In fact, several among the instruments here considered carry a name indicating such a character: transnational (PTCP), international (PICC), multinational (OECD Guidelines for Multinational Enterprises). However, while some texts are also concerned with domestic situations, those which apparently are only applicable to transnational situations are, notwithstanding their names, often nationalized in practice by the parties, by the courts and the tribunals, or – ultimately – by the lawmakers.

B) DYNAMIC TYPOLOGY

Apart from the static typology, it is perhaps more interesting to elaborate another, dynamic one. This typology reflects the intervention of more than one institution at the same time (shared effort) or successively (chain of instruments). In other words, while certain principles are elaborated by a single institution, others are the result of “joint ventures”, and both may evolve when taken into consideration in a different institutional setting. One should in this regard distinguish among purely public dynamics (1), mixed private-public dynamics (2) and purely private dynamics (3).

1. Purely public dynamics

Under this category, are to be found a certain dynamic and interaction between different public institutional settings which remain shielded from any influence on the part of private institutions. Sometimes there is a real institutional collaboration, such as that which took place between UNIDROIT and the OHADA in order to develop an OHADA Uniform Act on Contract Law.¹⁹ At other times, an institution endorses a set of principles elaborated by

¹⁸ See *supra* note 2.

¹⁹ On some difficulties to achieve this work of “regionalisation”, see M. FONTAINE, Law harmonization and local specificities – a case study: OHADA and the law of contracts, *Unif. L. Rev.* 18 (2013) p. 50-64.

another, as happened with the G20/OECD Principles of Corporate Governance.²⁰ In other cases there is a spontaneous reception, a direct influence based on the prestige of the instrument. This occurs whenever a national legislature uses principles as inspiration for domestic rules.²¹ In both cases what was born as a typical non-binding instrument may become a hard-law instrument in its new institutional context.

2. Mixed private-public dynamics

There are also cases of collaboration and evolving processes involving both public and private institutions. The best example of such dynamic is given by the PCTP, which are the result of the work of a joint American Law Institute and UNIDROIT Study Group.²² Later on, UNIDROIT's choice to focus on the regional adaptation and implementation of these principles led to a currently on-going joint project with the European Law Institute (ELI), aimed at developing European Rules of Civil Procedure. According to what is said on the website of the ELI, this "regionalisation" of the PTCP shall be made "in the light of: i) the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union; ii) the wider *acquis* of binding EU law; iii) the common traditions in the European countries; iv) the Storme Commission's work; and v) other pertinent European sources".²³

Also related to procedural matters, the on-going work to achieve the ASADIP Principles of Transnational Access to Justice – a purely private (academic) initiative – is likely to enter into a stage of cooperation with public institutions once the final text is released to the public. In this sense, informal talks have taken place with both the Organization of American States (OAS) and UNIDROIT.

3. Purely private dynamics

Although we do not have significant examples at hand, nothing should prevent private institutions to launch joint projects for the elaboration of principles. From this point of view, for instance, academic institutions may cooperate in the elaboration of principles. They may also take private principles as a source to elaborate a different private instrument.

²⁰ They had been adopted by the OECD in 1999 and were subsequently endorsed by the G20. See <http://www.oecd-ilibrary.org/docserver/download/2615021e.pdf?expires=1453682409&id=id&accname=guest&checksum=7DA18FFDDABDE25DEFF3100979B58F12> (current (2015) version). Other institutions participating in the elaboration of the new version were the BCBS, the Financial Stability Board, and the World Bank Group.

²¹ See *infra* V.B.

²² See *supra* note 5.

²³ See [http://www.europeanlawinstitute.eu/projects/current-projects-contd/article/from-transnational-principles-to-european-rules-of-civil-procedure/?tx_ttnews\[backPid\]=179508&cHash=f55b9b03751e4ae4f928b654d7329d96](http://www.europeanlawinstitute.eu/projects/current-projects-contd/article/from-transnational-principles-to-european-rules-of-civil-procedure/?tx_ttnews[backPid]=179508&cHash=f55b9b03751e4ae4f928b654d7329d96) and <http://www.unidroit.org/work-in-progress-studies/current-studies/transnational-civil-procedure>. See also X. KRAMER, The structure of civil proceedings and why it matters: exploratory observations on future ELI- UNIDROIT European rules of civil procedure, *Unif. Law Rev.* 19 (2014) p. 218-238.

II ISSUES ON THE PRINCIPLES-MAKING PROCESS

A) PRINCIPLES-MAKING AS A LAST-RESORT SOLUTION

In this part we elaborate on the rationale behind principles-making. One may indeed wonder why an institution such as the Hague Conference, which has so far been generally successful in the elaboration of nearly 40 conventional instruments, suddenly decided to propose a set of principles on the choice of law in international contracts. We argue that the choice to elaborate principles rather than other instruments may often be qualified as a “default” or last-resort option. When participating in the normative-production exercise, an institutional framework must always consider the receptiveness of everyday practice to the envisaged instrument. In that regard alternatives to principles-making must be considered, principally treaty-making (1) or model-law-making (2).

Undeniably, international conventions or model laws may as such provide a comprehensive set of rules apt to gain binding force, which may seem more interesting than the formulation of – merely – a set of principles. The application and effectiveness of such instruments however fully depends on their ratification or enactment by domestic powers, in accordance with constitutional proceedings often hard to accomplish.

1. Treaty-making inherent complexity

Treaty-making is a complex option which may not be recommended or viable in a particular case. The first difficulty is typically captured by the situation in which the proposal of elaborating a treaty is not well received in a particular institutional setting. The life of international organisations dealing with legal codification has plenty of cases of proposals for international conventions made or supported by a State or a group of States that are strongly resisted by other States because of policy considerations.²⁴ Generally speaking, institutions must systematically consider whether the time is ripe for a conventional instrument. If a prospected treaty seems unlikely to be acceptable to a significant number of States, the project may be either discarded or postponed.²⁵ Furthermore, international instruments are often presented as if they had a progressive degree of feasibility. Consequently, if the conditions for the adoption of a convention do not seem favourable, a model law may be presented as a more accessible option. The same relation may be

²⁴ An example within the framework of the OAS, was the failed proposal for a Convention on law applicable to international consumer contracts. Indeed, initially introduced in 2001 and actively pushed by Brazil, the proposal was later supported by Argentina and Paraguay. However, the rejection by some States (mainly the United States and Canada), which considered that the proposal’s strong *pro* consumer stress might jeopardize its economic viability on the one hand and the indifference of the majority of OAS member States on the other, blocked the adoption of the instrument after several years of negotiations. See http://www.oas.org/dil/CIDIP-VII_consumer_protection_brazil_joint_proposal.htm

²⁵ To be sure, the prospective evaluation of the success of a treaty is a hard task, which is confirmed by the relatively long list of failed conventions. Among some notorious examples, one can mention the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods or the 2001 UN Convention on the Assignment of Receivables in International Trade.

established between a model law and a legislative guide,²⁶ or between any of these instruments and a set of principles.

A second difficulty lies within the treaty-making process itself. Principles-making in an institutional setting will often allow the constraints of classical treaty-law-making to be avoided by allowing discussions of more innovative and ambitious rules. On the contrary, treaty-negotiators are rather conditioned to systematically bear in mind that their final text will have to be accepted by States and may react accordingly during the negotiations. The final text of a treaty must be acceptable to all State negotiators as a whole.²⁷ In modern treaty-making, reservations and declarations represent a very limited way to cushion unacceptable provisions. Principles-making in private institutional settings may in this regard largely be shielded from such additional pressure. This flexibility, however, is not exempt from risks since principles – in particular those coming from prestigious settings – are usually treated as standards. This means that every single principle is likely to be taken as the best possible solution in the matter. Therefore, soft-made principles may become hard-like standards. In this perspective, when the principles are made in a public setting, members may be tempted to reduce this flexibility.²⁸ Legitimacy arguments are sometimes invoked.²⁹

2. Model-law-making as a soft law option

Differently, it might also be possible to envisage the elaboration of a model law, which aims to be adopted as such by domestic legal systems. In this regard the example of the 1985/2006 UNCITRAL Model Law on International Commercial Arbitration highlights the main goal of that approach. The Model Law certainly counts as one of UNCITRAL's numerous successes, which have been particularly decisive in matter of arbitration.³⁰ Indeed, even if the Model Law is not adopted *telle quelle* in every State around the globe, and the examples are not rare where it has in fact been adopted with substantial changes,³¹ its impact on the worldwide harmonization of arbitration law is undeniable. Conversely, legal harmonization is not a primary objective for principles, and to be transformed – as a whole – into domestic

²⁶ In some cases, the adoption of a legislative guide is taken as a first step for a future model law, as happened in UNCITRAL concerning secured transactions.

²⁷ See P. SARCEVIC, Unification and 'soft law', in *Mélanges Alfred E. von Overbeck* (Université de Fribourg, 1990) p. 87-101.

²⁸ In this vein, Ralf Michaels comments that the Hague Conference adopted a "semi-official" procedure for the Hague Principles by organizing special commissions as in diplomatic Conferences. State representatives were present and more particularly the representative of the European Union actively opposed the inclusion of "rules of law" and influenced the final wording of the Article 3 of the Principles (which includes the caveat "unless the law of the forum provides otherwise"). See R. MICHAELS, Non-State Law in the Hague Principles on Choice of Law in International Contracts, <http://ssrn.com/abstract=2386186>, spec. 11. See also S. C. SYMEONIDES, The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments, <http://ssrn.com/abstract=2256661>, 23; D. MARTINY, Die Haager Principles on Choice of Law in International Commercial Contracts. Eine weitere Verankerung der Parteiautonomie, *RabelsZ* 79 (2015) 636-639.

²⁹ See *infra* III.C.

³⁰ Legislation based on the Model Law has been adopted in 101 jurisdictions of 71 States. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

³¹ In fact UNCITRAL only considers a domestic act as an UNCITRAL act (which amounts to deliver a sort of "UNCITRAL label") when no substantial changes have been introduced.

legislation even less so. Their advantage consists in the plurality of functions they may achieve. From the opposite perspective one must recognise that provisions contained in both conventions and (especially) model laws are often taken as standards, that is to say as principles. Accordingly, it must come as no surprise that a court applies a model-law provision that is not in force in its country.³²

In any event, the fact that a set of principles may in many cases seem easier to accomplish than a treaty or a model law should not be taken as evidence that the latter two represent codification of an intrinsic higher quality than the former.³³ Actually, treaties frequently contain some bad provisions as a result of the weight given to their hard-law nature, especially in last-minute drafting negotiations. Model laws are obviously less hard than treaties. However, their requirement of completeness (model laws must be able to be enacted as they are, even though they are modified in most cases) makes them not that soft. Yet, principles may be seen as the most appropriate instrument as regards the moment, the matter, and the envisaged goals. Even assuming that harder rules are achievable, a good argument in favour of principles-making is that principles are extremely easy to manage by adjudicators.³⁴

B) PRINCIPLES THAT WOULD LIKE TO BE (OR BECOME) RULES

It should of course be highlighted that the rationale that leads an institutional setting to opt for a principles-making approach need not be definitive. Principles-making may also be an adequate and efficient way to test the receptiveness of a certain set of principles for a future instrument which may for instance take the form of a convention or of a model law.³⁵ An

³² Examples are numerous. Thus, in Argentina, the Supreme Court of the Province of Mendoza referred to the UNCITRAL Model Law on Cross-Border Insolvency, which provides that foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding as national creditors. The Court concluded that this has become an inexorable trend (“*tendencia inexorable*”) and thereby a reversal of the burden of proof in conformity with Articles 13 and 14 of the Model Law was justified (Supreme Court Mendoza, Chamber I, 28 April 2005, *Sabaté Sas, El Derecho* p. 214-372). Almost at the same time, the Argentinian Supreme Court of Justice highlighted that Article 16 of the UNCITRAL Model Law on International Commercial Arbitration, which embodies the *Kompetenz-Kompetenz* principle, “is an internationally recognised norm” (CSJN 5 April 2005, *Bear Service, DeCITA* 5/6 (2006) p. 431). It should be underscored that in both cases Argentina had not adopted the model laws and in the latter case Argentinian arbitration law did not contain this principle.

³³ Nevertheless this seems to be Symeonides’ opinion. According to him, instead of choosing a choice-of-law convention as envisaged thirty years ago, in 2006 the Hague Conference preferred “a much less ambitious goal: a non-binding instrument” (S.C. SYMEONIDES (note 28) 2).

³⁴ R. MICHAELS, The UNIDROIT Principles as global background law, *Unif. L. Rev.* 19 (2014) p. 668.

³⁵ These concerns are not exclusively found in the field of private international law. One may in this regard draw a parallel with the work of the UN International Law Commission (ILC) on a codification of rules on State responsibility, expressed in the 2001 Draft Articles on Responsibility of States for International Wrongful Acts (http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). Since their adoption by the ILC, the question of the elaboration of a convention based on said rules has systematically been postponed (even if not explicitly excluded). By the way, Article 1 of the Statute of the ILC highlights that “the Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law”, which shows the ever growing porosity between private international and public international law.

interesting example in this regard is provided by the PTCP. Initially the principles were accompanied by a set of rules, which adopted a similar content albeit with a typical rules-type formulation. However, this formulation was not endorsed by UNIDROIT, thus highlighting a simple consideration: these rules were not ripe enough to be adopted.³⁶ At their current stage, the PTCP are being submitted by UNIDROIT and ELI to a new process of *rulification*, now in a regional framework.³⁷

The issue here is essentially whether or not an instrument may be deemed to be of a binding nature. Looking at its use within certain contexts, “rules” would apparently carry a certain binding vocation. In this sense the texture of “rules” would be harder than that of “principles”, i.e. more apt to be directly applicable. The idea according to which the transformation of a set of principles into a binding instrument, whether international or domestic, would signify an upgrading of the instrument is questionable. On the contrary, keeping principles flexible may help to keep their attractiveness alive. Actually, nothing can ensure that the shift would be made without a loss of quality.³⁸ In certain sense, it is arguable that it is preferable for principles to act as rules without their names having to be changed. In practice, ultimately, similar instruments are called differently, just as different instruments play similar roles.

C) *LEGITIMACY AND JUSTIFICATION FOR PRINCIPLES-MAKING*

The question of the legitimacy of principles is largely intertwined with the general traditional reluctance in the field of private international law rules to embrace non-State rules as equivalent to State rules. Often perceived as a “paradigmatic expression of transnational law”,³⁹ one may still wonder why such transnational rules are generally treated in a different way from national law. Needless to say, traditional, positivistic views are still strong notwithstanding all data coming from a simple observation of the reality.⁴⁰ Consequently, relevant scholars now attack “non-State law” with a virulence similar to, and arguments equally harsh than, those used several decades ago to criticise the first version of the PICC⁴¹

³⁶ On the very issue of the relation between “principles” and “rules”, see F. FERRAND, *Les ‘Principes’ relatifs à la procédure civile transnationale sont-ils autosuffisants ? – De la nécessité ou non de les assortir de ‘Règles’ dans le projet ALI/UNIDROIT*, *Unif. L. Rev.* 6 (2001) p. 1015-1033, and T. PFEIFFER, *The ALI/UNIDROIT Project: Are Principles Sufficient, without the Rules?*, *Unif. L. Rev.* 6 (2001) p. 1015-1033.

³⁷ See *supra* notes 22-23 and accompanying text.

³⁸ See, in this vein, M. J. BONELL, *Towards a Legislative Codification of the UNIDROIT Principles?*, *Unif. L. Rev.* 12 (2007) p. 233-245.

³⁹ See L.G. RADICATI DI BROZOLO, *Non-National Rules and Conflict of Laws / Reflections in Light of the UNIDROIT and Hague Principles*, *RIDPP* 48 (2012) p. 841.

⁴⁰ See E. LOQUIN, *Les règles matérielles internationales*, *Recueil des Cours* 322 (2006) p. 9-242; see also D. P. FERNÁNDEZ ARROYO, *El derecho internacional privado en el diván – Tribulaciones de un ser complejo*, in *Libro homenaje a Roberto Ruiz Díaz Labrano* (CEDEP 2013) p. 29-32.

⁴¹ See C. KESSEDIAN, *Un exercice de rénovation des sources du droit des contrats du commerce international: Les principes proposés par l’UNIDROIT*, *Revue critique DIP* 84 (2005) p. 641-670.

and, before then, the new *lex mercatoria*.⁴² The key point is still the supposed supremacy of State law, which is the only normative expression that deserves the name of law.⁴³

This approach is however not acceptable as such. None of the arguments that are generally advanced in this regard are convincing enough to justify a differential treatment between non-State rules and State rules. Indeed, the designation of non-State law as the applicable law to the contract, for instance, would not prevent overriding mandatory rules to apply. According to Article 1.4 of the UNIDROIT Principles, “(N)othing 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”.⁴⁴ The Hague Principles are even more careful on this point: they not only include – in addition to caveats related to mandatory rules – provisions on public policy, but also expressly mention arbitral tribunals besides courts as adjudicators.⁴⁵ Something similar may be said of all principles.⁴⁶ Concerning unbalanced legal relationships, if unbalanced non-State law may be enforced without any correction in a given jurisdiction, it will probably be because the State law there in force is also unbalanced.⁴⁷

⁴² See, for example, P. LAGARDE, *Approche critique de la lex mercatoria, Études offertes à Berthold Goldman* (Litec, 1982) p. 125.

⁴³ When commenting on the Hague Principles, S.C. SYMEONIDES (Hague Principles, 18-19) clearly adopts and defends a traditional approach: “[...] [T]he Principles call them, “rules of law.” Obviously, the use of this very term is neither accurate nor neutral. It cannot be accurate because if these norms are really “rules of law,” then they should possess the same attributes as real rules of law, such as the rules of a statute. They do not. They lack the attributes of statutory, judge-made, or customary rules. They do not emanate from the collective will of the people formally expressed through the ordinary, and nowadays democratic, legislative process; they do not result from the pronouncements of the judiciary; and they do not qualify as custom (i.e., a usually spontaneous practice repeated for a long time (*longa consuetudo*) and generally accepted as having acquired the force of tacit and common consent (*opinio juris*)).” He warns of the “unbounded euphoria that seems to pervade much of the literature on non-State norms” questioning the neutrality of certain institutional settings in which such non-State rules were elaborated. As a result there would be good, reliable non-State law produced by intergovernmental bodies like UNIDROIT and UNCITRAL or by well-intentioned academics, and another bad, suspicious non-State law made by interested bodies. It is interesting and fair to underline that the same author participated actively in the drafting of the (2001) Oregon Choice-of-Law Statute for Contracts (Or. Rev. Stat. §§ 81.100–81.135 (2005)), which, according to him, allows the selection of non-State law by the parties. See S.C. SYMEONIDES, *Oregon’s Choice-of-Law Codification for Contract Conflicts: An Exegesis*, *Willamette Law Review* 44 (2007) p. 229.

⁴⁴ In this regard, the commentary to Article 1.4 of the PICC adds that: “Given the particular nature of the Principles as a non-legislative instrument, neither the Principles nor individual contracts concluded in accordance with the Principles, can be expected to prevail over mandatory rules of domestic law, whether of national, international or supranational origin, that are applicable in accordance with the relevant rules of private international law”.

⁴⁵ Article 11. The first sentence of its commentary cannot be more eloquent: “Party autonomy, as recognised by the Principles, is not absolute”.

⁴⁶ For example, the 2011 OECD Guidelines for Multinational Enterprises are absolutely clear: “Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation” (I. Concepts and Principles, n° 2).

⁴⁷ In a similar vein, CUNIBERTI (note 9) 152: “If a problem exists, it has nothing to do with private lawmaking, but with the private international law doctrines allowing private actors to shop around and to select the national jurisdiction that they prefer”.

In that regard it also appears necessary to highlight that supranational, international, and domestic provisions allow parties to select one or several laws to apply to their contract, including laws without any connection with the contract, and to change the law applicable during the operation of their contract. In such a context, rejecting the selection of non-State law contained in a set of principles, even well-known codified principles (such as PICC or PECL), as this is the solution chosen by the EU Regulation on the Law Applicable to Contractual Obligations (Rome I), is hardly justifiable.⁴⁸ Even less, when an argument can be made that the legitimacy of principles is increased by their quality: e.g. they constitute a mature and neutral body of law which may on various occasions better respond to the concerns and needs of practice.⁴⁹ In doing so, they further highlight that national laws do not always provide the best and ready-to-be-applied solution, although this does not mean that national law is always unfit to govern international transactions: much has been done in this regard.⁵⁰ These are the reasons that permit looking at the 1994 Inter-American Convention on Law Applicable to International Contracts (Mexico Convention) as a better instrument than the Rome I Regulation, notwithstanding its flaws.⁵¹ One shall admit that all national, international and supranational instruments that allow the application of usages and private practices recognise that adjudicators do not operate only with public rules.⁵²

The reluctance towards non-State rules is particularly questionable since in most cases national legislators seem to have no difficulties in allowing domestic courts to apply foreign

⁴⁸ L.G. RADICATI DI BROZOLO (note 39) p. 855-856. This solution is unlikely to change in the foreseeable future. See S. VOGENAUER, *The UNIDROIT Principles of International Commercial Contracts at twenty: experiences to date, the 2010 edition, and future prospects*, *Unif. Law Rev.* 19 (2014) p. 515-516.

⁴⁹ See, concerning the PICC, L.G. RADICATI DI BROZOLO (note 39) p. 848, or F. K. JÜENGER, *The Lex Mercatoria and Private International Law*, *Louisiana Law Review* 60 (2000) p. 1140-1142. A similar opinion about the PTCP may be found in H. P. GLENN, *The ALI/UNIDROIT Principles of Transnational Civil Procedure as Global Standards for Adjudication?*, *DeCITA* 4 (2005) p. 44. On the Hague Principles, see MARTINY, pp. 626, 651.

⁵⁰ There is no decision saying that the PICC are too vague. See L.G. RADICATI DI BROZOLO (note 39) pp. 843, 861.

⁵¹ See particularly Articles 9(2) and 10 of the Mexico Convention: Article 9(2): "The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations". Article 10: "In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case". See J. SAMTLEBEN, *Los principios generales del derecho del comercio internacional y la lex mercatoria en la Convención interamericana sobre derecho aplicable a los contratos internacionales*, in J. Basedow, D.P. Fernández Arroyo and J.A. Moreno Rodríguez (note 9), p. 413-426. See also J.A. MORENO RODRÍGUEZ and M.M. ALBORNOZ, *Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts*, *Journal of Private International Law* 7 (2011) p. 491-526.

⁵² On this "homologation" of private rules, see D.P. FERNÁNDEZ ARROYO, *La multifacética privatización de la codificación internacional del derecho comercial*, in J. Basedow, D.P. Fernández Arroyo and J.A. Moreno Rodríguez (note 9) p. 55-58.

law,⁵³ but only experience such difficulties with regard to non-State rules. As far as the domestic courts are concerned, there is hardly an argument to be made that these would be unequipped to deal with non-State principles when they may however be expected to apply the laws of foreign, even remote countries. The usual argument that the application of foreign laws is facilitated by the existence of extensive case law (as opposed to the one on non-State rules) is unpersuasive.⁵⁴ Non-State rules such as the UNIDROIT Principles are well drafted, documented by an online database⁵⁵ with each article commented on directly in the text.

It appears even more difficult to understand such reluctance in consideration of the fact that non-State rules may well constitute the *lex contractus* in a dispute submitted to arbitration.⁵⁶ Indeed, both in arbitration acts and in arbitration rules there has been a general progressive trend towards the admission that non-State law may be selected by the parties, as well as directly applied by the arbitral tribunal, when the parties fail to choose the law applicable to their contract. The technical key opening this avenue has simply consisted in using the expression “rules of law” instead of “law” (the actual meaning of which is “State law”). Neither philosophical nor pragmatic reasons exist to justify the use of this expression exclusively in arbitration norms and its correlative exclusion from court adjudication.⁵⁷ In fact, it is far from clear why States penalise parties who prefer to submit their disputes to national courts. It is equally unclear why States discriminate national courts vis-à-vis arbitral tribunals. In light of the foregoing, the Hague Principles, with their recognition of non-State law in Article 3, were a necessary step in the evolution of private international law. Their reception in practice may help to overcome the unjustified reluctance to apply non-State law in a quite paradoxical way (the squared non-binding law paradox): it would be an attempt to enforce non-binding law by means of equally non-binding law.

⁵³ Actually, in many jurisdictions foreign law shall be applied *ex officio*. See M. JÄNTERÄ-JAREBORG, Foreign law in national courts: a comparative perspective, *Recueil des Cours* 304 (2003) p. 240-246.

⁵⁴ L.G. RADICATI DI BROZOLO (note 39) p. 853.

⁵⁵ www.unilex.info. Of course, besides this official page there are many other ways to get accurate information about the application of the PICC.

⁵⁶ See L.G. RADICATI DI BROZOLO (note 39) p. 851. According to him, “the fact that the application of such (non-State) rules to the exclusion of domestic law is permitted in arbitration is of itself an indication that they are sufficiently complete and precise to be capable of providing suitable solutions to transnational disputes”.

⁵⁷ For clear, convincing arguments in this sense, see L. GAMA JR and G. SAUMIER, Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts, in D.P. Fernández Arroyo and J.J. Obando Peralta (ed.), *El derecho internacional privado en los procesos de integración regional* (EJC, 2011) p. 41-65. S.C. SYMEONIDES seems nevertheless to be particularly satisfied with this dichotomy. According to him, there are “good reasons to object to the elevation of non-State norms to the status of law in litigation, while acquiescing to the status quo in arbitration (...) It is not far-fetched to assume that [parties opting for arbitration] have also opted for, or do not object to, private law-making. In contrast, parties who have not opted for arbitration have chosen to remain in the field of public adjudication, and there is no reason to subject them to private law-making” (S.C. SYMEONIDES (note 28) 20). We confess our perplexity before the association, apparently logical, of public adjudicators with public rules when many national and international legal instruments allow adjudicators to apply rules other than public ones. The CISG – a paradigmatic and broadly applied international “public” instrument – even includes a strong presumption on this applicability in its Article 9(2). See among many others Supreme Court of Spain, 1 July 2013 (cereal case), <http://cisgw3.law.pace.edu/cases/130701s4.html>.

III APPLICATION OF PRINCIPLES

An important number of studies is entirely dedicated to the application of principles (namely the PICC, which are by far the most famous) in practice. These studies tend to analyse and describe the application of these principles through the traditional dichotomy opposing judicial litigation and arbitration with regard to parties' right to select non-State rules as the law applicable to their contract. Indeed, pursuant to the prevailing, albeit contested approach in private international law,⁵⁸ the designation of non-State law as the *lex contractus* is allowed in arbitration but is generally not permitted before domestic courts. The notable exception is a novel Paraguayan Act, which nationalises the Hague Principles.⁵⁹ Besides this act, only within the framework of arbitration may parties adopt "rules of law" to govern their contract. For the purposes of this contribution, we intend to depart from this traditional dichotomy. The following section will first adopt the perspective of the institutional setting which elaborated the "principles" (the author). This will allow identifying the situations in which the principles aim to be applied. Secondly, one needs to compare the aim of the principles with the concrete reality: i.e. what is really done in practice.

A) THE PERSPECTIVE OF THE INSTITUTIONAL SETTING WHICH ELABORATES THE PRINCIPLES (THE AUTHOR)

Most principles aim themselves to determine their scope of application. With some variations, one may find a classical trilogy according to which the principles may apply directly to the legal relationship by decision either of the parties or of the adjudicators, supplement existing national/international rules, or serve as a model for future national/international rules.

The Preamble of the PICC accordingly provides that the Principles may apply if they are explicitly or implicitly selected by the parties or in the absence of a choice of law by the parties.⁶⁰ In addition to their direct application as the law applicable to the contract, the Preamble adds that the PICC may be used to interpret or supplement international uniform law instruments or domestic law. Lastly, they may also serve as a model for national and international legislators.⁶¹

The Hague Principles adopt the same trilogy albeit in a different order: "2. They may be used as a model for national, regional, supranational or international instruments. 3. They

⁵⁸ See L. GAMA JR., *Contratos internacionales à luz dos princípios do UNIDROIT 2004 (Renovar 2006)*, p. 174-177. See also L.G. RADICATI DI BROZOLO (note 39) p. 862. The author concludes by saying that "the time has probably come to put non-national rules and national law on the same footing in terms of their applicability to transnational transactions also before national courts".

⁵⁹ Act N° 5393 on the Law Applicable to International Contracts (*Gaceta Oficial*, N° 13, 20 January 2015). See J.A. MORENO RODRÍGUEZ, *Nueva Ley paraguaya de contratos internacionales: ¿regreso al pasado?*, in *Temas actuales de derecho bancario y societario* (IPDBS / Intercontinental, 2015) p. 121-202. A previous exception would be the Oregon Statute mentioned by S.C. SYMEONIDES, *supra* note 42.

⁶⁰ To be more precise, the Preamble uses always "may" except for the first case (explicit selection by the parties) where it says "shall".

⁶¹ As R. Michaels puts it: "With little exaggeration, it can be said that the PICC offer themselves for whatever use people want to make of them" (R. MICHAELS (note 34) p. 646).

may be used to interpret, supplement and develop rules of private international law. 4. They may be applied by courts and by arbitral tribunals”. Strikingly, the commentary to the Hague Principles highlights the Conference’s modesty, since courts and arbitral tribunals are only “invited to apply” the Principles (P6). An additional comment may here be appropriate as far as the Hague Principles are considered: as has been pointed out,⁶² the Principles remarkably depart from the classical and still prevailing approach in private international law concerning the selection of non-State law. Article 3 indeed allows the parties to choose “rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise”. The Commentary confirms that the Principles broaden the scope of what has typically been afforded to parties litigating before national courts. Article 3 accordingly allows parties to designate not only State law but also rules that do not emanate from public sources, regardless of the mode of dispute resolution chosen.⁶³ The Principles nevertheless defer to the law of the forum if that law limits the parties’ choice to State law.⁶⁴

As to the Preamble of the PTCP, it provides that “[t]hese Principles are standards for adjudication of transnational commercial disputes. These Principles may be equally appropriate for the resolution of most other kinds of civil disputes and may be the basis for future initiatives in reforming civil procedure”.⁶⁵ The Principles’ Comments confirm that a national system seeking to implement these Principles could do so by a suitable legal measure, such as a statute or set of rules, or an international treaty.⁶⁶ Given the mandatory character recognized to procedural law in most jurisdictions, one may wonder if there is a role for the PTCP other than that of a model, which requires positive actions of States in order to be applied. The purpose of the PTCP goes explicitly beyond this function: “Courts may adapt their practice to these Principles, especially with the consent of the parties to litigation”.⁶⁷ The accomplishment of this proposal will be possible insofar as the *lex fori* neither excludes that parties have such a power, nor excludes that courts have such a flexibility. The usefulness of the PCTP should be greater in the absence of specific rules in the *lex fori* dealing with the specific situation at hand. This may happen, for example, in situations of *lis alibi pendens*, *forum necessitatis* or *forum non conveniens*.⁶⁸

⁶² *Supra* note 28.

⁶³ What is not clear, nonetheless, is the correct meaning of the required neutrality, general acceptance, and balance. See L.G. RADICATI DI BROZOLO (note 39) p. 859-860. See also R. MICHAELS, *Non-State Law*, p. 16-17.

⁶⁴ As previously mentioned, this is the case with the Rome I Regulation. One may at this point highlight that the Principles and the Commentary avoid the difficult question of the silence of national private international law rules in that regard.

⁶⁵ On the ambitions of the PTCP see H. KRONKE, *Efficiency, Fairness, Macro-Economic Functions: Challenges for the Harmonisation of Transnational Civil Procedure*, *Unif. L. Rev.* 6 (2001) p. 741.

⁶⁶ Comment P-A. Certain matters are excluded from PTCP’s scope, such as “group litigation” (Comment P-D). Conversely, they apply to international arbitration, “except to the extent of being incompatible with arbitration proceedings, for example, the Principles related to jurisdiction, publicity of proceedings, and appeal” (Comment P-E). We have doubts about the existence of such incompatibility, at least as an assumption without nuances.

⁶⁷ Comment P-A.

⁶⁸ All regulated in the Article 2.

Without looking beyond procedural law, the application criteria set up in principles elaborated in the framework of private settings may perhaps be interesting to mention, specifically the ASADIP Principles on Transnational Access to Justice.⁶⁹ Also in this case it is possible to verify that the above-mentioned trilogy is present. However, the Preamble of the ASADIP Principles adds that they “establish the minimum requirements to grant access to justice”, in accordance with what is settled by international human right law and by modern constitutions. In other words, the ASADIP Principles do not avoid going further in granting this fundamental right.

B) *THE PERSPECTIVE OF THE PRACTICE (THE REALITY)*

Given their broad drafting often used, authors’ expectations may be generally viewed as too optimistic. However, sometimes the practice shows how the application of principles may go even beyond than expected.

1. *De jure* reality

Let us consider how national laws and private international law conventions approach the question of the application of principles, particularly the PICC. It appears possible schematically to indicate three approaches in that regard. The first approach has already been mentioned and is best represented by the Rome I Regulation according to which principles may only be incorporated in the contract but not directly chosen by the parties as the law applicable to the contract.⁷⁰ Also the second approach does not allow the parties directly to choose the law applicable to the contract. However, it provides a window of opportunity for non-State rules to be taken into account by domestic courts as trade usages. This is *inter alia* the approach taken by the Mexico Convention in its Articles 9(II) and 10.⁷¹ This approach can also be found in similar wording in the laws of Venezuela⁷² or in the project for a private international law code in Uruguay⁷³. The still isolated Paraguayan Act represents the third

⁶⁹ *Supra* note 10.

⁷⁰ See §§13, 14 of the Preamble of Rome I Regulation: “(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention. (14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules”. The tragic fate of this §14 in 2003 is well known. The Green Book of the Commission initially considered the possibility to allow parties select general principles of law. The 2005 draft maintained this solution, which however was eventually deleted from the final text. See, fairly critical with this solution, M.J. BONELL, *El Reglamento CE 593/2008 sobre la ley aplicable a las obligaciones contractuales* (‘Roma I’) – Es decir, una ocasión perdida, in J. Basedow, D.P. Fernández Arroyo and J.A. Moreno Rodríguez (note 9), p. 211-225.

⁷¹ *Supra* note 51.

⁷² Art. 31 of the Venezuelan Act of Private International Law (1998) provides that: “In addition to the provisions of the former articles, whenever it should so result, application shall be made of norms, customs and principles of International Business Law, as well of generally accepted trade uses and practices, with the purpose of reifying the requirements imposed by justice and fairness in the solution of a concrete case”. See J. OCHOA MUÑOZ, Artículo 31. Aplicación de la *lex mercatoria*, in *Ley de derecho internacional privado comentada*, II (UCV, 2005) p. 805.

⁷³ The project of a Private International Law Code in Uruguay provides a similar provision in Articles 13(4) and 51. See D. OPERTTI BADÁN and C. FRESNEDO DE AGUIRRE, *El derecho comercial internacional*

approach, the one that puts non-State law on the same level as State law, by following the model of the Hague Principles.⁷⁴ Nonetheless, it does more than that. Indeed the Paraguayan Act solves also the question of the law applicable to the contract failing a selection by the parties, which the Hague Principles do not do. The Paraguayan solution allows adjudicators to apply the (State or non-State) law with the closest links to the contract.⁷⁵

2. *De facto* reality

Assessing the *de facto* reality of the application of the principles requires taking a look at the practice of courts and arbitral tribunals. As regards the PICC, a distinction should be made between the direct application of principles as the law applicable to a contract and its indirect application as a means for the interpretation of the applicable law.

Several situations may lead to the application of principles as the law applicable to the contract. The first situation is the one where the parties have directly and explicitly selected principles as the applicable law. Such a situation should in practice typically be encountered in the framework of arbitration, where arbitrators tend to consider that they are bound by the parties' choice to select such principles as the applicable law.⁷⁶ Nevertheless, findings of a search conducted in the UNILEX database (unilex.info) show that parties choose the PICC as the law applicable to the contract in only just over 1% of the almost 200 reported arbitral decisions that mention the PICC.⁷⁷ In other situations, the application of the principles may be the result of a particular, or rather open, choice of law by the parties. In particular, it is remarkable to see the extent to which the PICC aim to be applicable as soon as the parties designate the *lex mercatoria* as the law applicable to the dispute⁷⁸ or use any other such general formula.⁷⁹ The reality is that in the vast majority of the cases the parties select a national law. Obviously, this is anything but surprising. Contract negotiators know that almost no country accepts the selection of principles as the law of the contract and they fear that the award may encounter problems in post-arbitral litigation, even if the evidence in various jurisdictions seems to show the opposite.⁸⁰

en el Proyecto de Ley general de derecho internacional privado del Uruguay – Una primera aproximación, in J. Basedow, D.P. Fernández Arroyo and J.A. Moreno Rodríguez (note 9), p. 390-394.

⁷⁴ Article 5 of Paraguay Act follows Article 3 of the Hague Principles. The *caveat* concerning an eventual contradiction with the law of the country is obviously deleted.

⁷⁵ Article 11.

⁷⁶ See E. JOLIVET, A Influência dos Princípios UNIDROIT em Matéria de Prática Contratual e Arbitral, *Revista Brasileira de Arbitragem* VI-23 (2009) p. 90-109; D. OSER, The UNIDROIT Principles of International Commercial Contracts: A Governing Law? (Martinus Nijhoff, 2008) p. 19 ff.

⁷⁷ Curiously, the number of reported judicial decisions mentioning the PICC is not so different.

⁷⁸ A similar approach is adopted in Article 1.101 of the PECL. Some contradict this association between contractual principles and the *lex mercatoria*, which is traditionally deemed to be a merchants' spontaneous product. See P. MAYER, Le choix de loi dans la jurisprudence arbitrale, in Sabine Corneloup and Natalie Joubert (eds.), *Le règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux* (Litec, 2011) 439. However, it is not difficult to accept that the Principles are a professional codification of the *lex mercatoria*.

⁷⁹ ICC Case N° 7110 (partial award, issued by majority), in which the application of the PICC was founded on the reference to "natural justice" present in several arbitral agreements, is well known.

⁸⁰ See L.G. RADICATI DI BROZOLO (note 39) p. 843, n. 10 (courts uphold arbitral awards applying the PICC).

What is crystal clear from case law is that principles are used by courts and arbitral tribunals to supplement or interpret the law otherwise applicable to the contract. Several studies confirm that these are the predominant ways in which for instance the UNIDROIT Principles are used⁸¹. Compared with the previous paragraph, it seems that the PICC are not really applied as a “set of principles” but to deal with concrete situations addressed by specific provisions of the PICC. Among others, cases related to hardship and interest rates are often invoked. In the absence of a selection by the parties, arbitral tribunals take advantage of the general authorisation contained in the formula “appropriate rules of laws”. Usually, arbitrators do not invoke the PICC on their own motion. Reality indicates that they follow counsel, who tend to invoke the Principles in order to reinforce their interpretation of the applicable law.⁸² Quite remarkably, the UNIDROIT Principles have been used not only in commercial contractual cases. They have also been applied in the context of investment arbitration based on treaties.⁸³ In such cases, the PICC have been used as a reflection of general principles of law and may accordingly serve in the interpretation of public international law provisions.⁸⁴ As regards the ICSID Convention, a persuasive argument advocates the inclusion of the PICC in the “rules of international law” mentioned in its Article 42 as applicable to solve disputes.⁸⁵

⁸¹ *Ibid.*, 842-843; R. MICHAELS (note 34) p. 648: “By far the biggest portion of decisions are those, however, in which the PICC are used for the interpretation and supplementation of international law and, even more frequently, domestic law”.

⁸² Concerning the application of the CISG, the invocation of the PICC is founded on Article 7(2) of the Convention, which provides: “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based”.

⁸³ M.J. BONELL, International Investment Contracts and General Contract Law: A Place for the UNIDROIT Principles of International Commercial Contracts?, *Unif. L. Rev.* 17 (2012) p. 141-159; P. BERNARDINI, UNIDROIT Principles and international investment arbitration, *Unif. L. Rev.* (2014) p. 561-569; G. CORDERO-MOSS and D. BEHN, The relevance of the UNIDROIT Principles in investment arbitration, *Unif. L. Rev.* 14 (2014) p. 570-608; W. BEN HAMIDA, Les Principes d'UNIDROIT et l'arbitrage transnational: L'expansion des Principes d'UNIDROIT aux arbitrages opposant des États ou des organisations internationales à des personnes privées, *Journal de droit international* 139 (2012) p. 1213-1242.

⁸⁴ Thus, for instance, in the ICSID case *El Paso Energy International Company v. Argentina* (Award of 31 October 2011). The Tribunal when facing the question of how to interpret Article 11 of the Argentina-US BIT seeks to know if this rule exists as a “general principle of law” in the meaning of Article 38 of the Statute of the ICJ and only considers the PICC. In §623 of the award, the Tribunal describes the UNIDROIT Principles as a sort of restatement of contract law reflecting principles applied by a majority of national legal systems. Here the Principles are used to interpret an investment agreement. See A. M. STEINGRUBER, *El Paso v Argentine Republic: UNIDROIT Principles of International Commercial Contracts as a reflection of ‘general principles of law recognized by civilized nations’* in the context of an investment treaty claim, *Unif. L. Rev.* 18 (2013) 509-531.

⁸⁵ See BEN HAMIDA (note 82) and his reference to B. Goldman: “dans la pratique, la référence au droit international ne signifie jamais que les parties choisissent le droit international public, mais qu'elles entendent soumettre leurs relations à des principes généraux qui forment un droit transnational, ce qui est tout à fait différent” (*Annuaire de l'Institut de droit international* 58 (1979) p. 54).

The courts of some countries are particularly active in resorting to the PICC.⁸⁶ According to the information contained in *unilex.info*, more than one half of courts decisions applying the PICC deal with the interpretation of national law, frequently in purely internal cases. In most cases, they invoke the PICC as an authoritative argument, as they say: our decision is the right one because it coincides with the solution given to the same issue by the prestigious PICC.⁸⁷ When the decider faces an international case and a national law is applicable, interpretation in accordance with the Principles may be particularly appropriate in order to adapt the domestic solution (which was conceived for internal, homogeneous cases) to the requirements of transnational affairs. When they are used to supplement or interpret national laws, it should however be highlighted that the UNIDROIT Principles are not necessarily the exclusive source judges or arbitrators take into consideration.⁸⁸

IV INFLUENCE OF “PRINCIPLES”

Taken as a whole, the previous findings show that the Principles may not only be seen as an alternative to national laws which the parties may select as the law applicable to the dispute. They may have a different function and influence in practice, which we shall address in this part. Existing principles in practice display a variety of diffuse or more direct influences on the practice and actors of private international law.

A) DIFFUSE INFLUENCE

Under diffuse influence, we refer to the idea according to which the principles may contribute to a progressive movement towards a standardisation/harmonisation of good normative solutions or practices.⁸⁹ It is a *lieu commun* that nevertheless deserves to be mentioned. First of all, one should in this regard mention the possibility for principles to operate as a restatement of the law. Strikingly, the Introduction to the Hague Principles highlights that: “the instrument may be considered to be an international code of current best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts, with certain innovative provisions as appropriate”.⁹⁰ It accordingly recognizes that

⁸⁶ R. MICHAELS (note 34) p. 649, mentions the case of Ukraine, the Supreme Economic Court of which established in a letter issued in 2008 that “the PICC, among other texts, can be viewed as an expression of business custom” (which is quite controversial). Cases decided by Latin-American countries by invoking the PICC are also quite numerous. In Argentina, the National Commercial Court of Appeal has been particularly active in this regard.

⁸⁷ According to L.G. RADICATI DI BROZOLO (note 39) p. 845: “The reference to the Principles in support of a solution dictated by the applicable local law could be an indication that, in dealing with international and even domestic cases, judges find comfort in reaching solutions that are not parochial, as evidenced by the fact that they are in keeping with those dictated by authoritative transnational instruments, and in particular the Principles. This in turn could be an indication of a belief in the need to move towards solutions which are more commonly shared than those dictated by purely self-centred domestic legal systems.”

⁸⁸ R. MICHAELS (note 34) p. 648: “The PICC are here not a source, but an element, in a broad comparative survey”.

⁸⁹ See M.J. BONELL, *Soft law and party autonomy: The case of the UNIDROIT Principles*, *Loyola Law Review* 31 (2005) p. 229-252; GAMA JR. (note 58) p. 219-221.

⁹⁰ Introduction, N° 15.

while the Hague Principles may reflect best practices, they may also contain innovative provisions that are not necessarily found in common practice. The function of “restatement” has from the start also been contemplated for the PICC,⁹¹ which are indeed inspired by State court decisions around the world.⁹² The fact of reassembling (best) existing practices with (good) new solutions reflects the goal to accomplish a “healthy” harmonisation. We are talking about a rather psychological operation aiming at permeating legal thinking with the sensibleness of the Principles.

Differently, most solutions provided by the PTCP embody the best possible synthesis between the two major western legal traditions in matter of civil procedure. This means that the PTCP – rather than (or in addition to) best solutions – contain solutions that do not exist as such in any legal system, which have been elaborated by searching for their acceptability.⁹³ They would be, at least to a certain degree, soft (acceptable) versions of the proper solutions of each legal tradition. Therefore, while contractual principles are looking to consolidate a common legal framework which already exists in a considerable measure, their procedural peers try to build a bridge between two different conceptions. Here the object of the desired influence is to persuade legal actors that hybrid models are technically feasible and may also be useful to facilitate the international movement of legal relationships. Needless to recall that even without leaving the pure theoretical field, the PTCP provoked some reactions of a defensive nature.⁹⁴

In other types of principles, such as the Ruggie Principles⁹⁵ or the OECD Guidelines for Multinational Enterprises,⁹⁶ the diffuse influence may be highly significant because of the strong “moral” charge embodied therein. Even though they aspire to somehow becoming binding, these set of principles operate as a warning, trying to draw the attention of politicians, corporations’ managers and shareholders, as well as of the public in general, to the inescapable conciliation between economic activity and protection of human rights.

B) DIRECT INFLUENCE

Before finishing this modest contribution, we would like to add some brief comments about the direct influence of principles on lawmakers, adjudicators, and users. The influence on lawmakers is real, concrete and general, although it manifests itself in different ways. Generally, the principles play the role of source inspiring the solutions of national and international instruments. In fact, it is not exaggerated to say that the elaboration of a

⁹¹ M.J. BONELL (note 4).

⁹² As R. Michaels simply puts it: “When the PICC were drafted, they were drafted as a restatement of global contract law, with no direct view to actual application” (R. MICHAELS (note 34) 668). The author develops an interesting argument in that regard, presenting the PICC as a “reservoir of solutions” rather than as an additional competitor to State laws. The PICC differ *inter alia* from national laws because as a whole they do not contain policy choices like national laws do. R. Michaels accordingly finds that the PICC can be understood as a restatement of an existing or developing new *ius commune* (*ibid.*, p. 661-662).

⁹³ Perhaps one might argue that, given the traditional disparities between both legal traditions, the best synthesis amounts to the best solution. See H.P. GLENN (note 49) p. 38-44.

⁹⁴ H. GAUDEMET-TALLON (note 2).

⁹⁵ *Supra* note 12.

⁹⁶ *Supra* note 7.

contractual instrument without looking carefully at the PICC (which have even inspired national rules on domestic contracts) or of a procedural instrument without taking into account the PTCP (which have influenced national legislation even before their official adoption by UNIDROIT⁹⁷) would result as barely understandable. The inspiration may be partial – when the principles concur with other instruments –, but this does not at all diminish the significance the principles have acquired. In contrast, there are singular cases of incorporation by reference⁹⁸ as well as cases of use of principles as model laws.⁹⁹ There are also many examples of arbitration acts and rules opening the way to the application of non-State law in general by the use of the expression “rules of law”. Ultimately, the reference to lawmakers encompasses also private settings, which take sets of principles elaborated by other institutions as a starting point for their own private codifications.¹⁰⁰

The impact of principles on adjudicators may also be remarkable as derived from the PICC experience. In this case, interestingly, the influence is even broader, as the Principles are applied not only to international cases (the field for which they were specifically elaborated) but also to domestic ones.¹⁰¹ It is also worth mentioning that judges from many jurisdictions seem less cautious than lawmakers when they approach the Principles. Even when the Principles are only invoked to justify a particular choice, the fact is that – in doing so – the judges recognise a sort of “legitimizing power” to the Principles. As regards arbitrators, we have already pointed out the great familiarity they have with non-State law. The generalised use of the 2010 IBA Rules on Taking of Evidence in International Arbitration¹⁰² constitutes a significant example in this sense.

To be sure, the fact that judges and arbitrators become more and more accustomed to take non-State law into consideration is to a large extent due to its presence in the submissions of counsel. Actually, young generations of lawyers – including those from countries still

⁹⁷ Thus as early as 2001 they were taken into consideration by the Lithuanian legislature. See V. MIKELENAS, *The Proposed ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure and the New Code of Civil Procedure in Lithuania*, *Unif. L. Rev.* 6 (2001) p. 981-993. See also S. MCAULEY, *Achieving the Harmonization of Transnational Civil Procedure: Will the ALI/UNIDROIT Project Succeed?*, *ARIA* 15 (2004) p. 248.

⁹⁸ See Article 56 of the Panamanian Arbitration Act (Act N° 13 of 31 December 2013): “In any case the arbitral tribunal shall decide in accordance with the stipulations of the contract and shall take into account the commercial usages applicable to the case. In international arbitrations it will be furthermore take into account the Principles of the International Institute for the Unification of Private Law (UNIDROIT) on International Commercial Contracts” (free translation by the author). The wording used in the Article 9(2) of the Mexico Convention (“general principles of international commercial law recognized by international organizations”) was introduced thinking of the PICC but is now also linkable to the Hague Principles. Something similar may be said regarding Article 10 of the MERCOSUR Agreement on International Commercial Arbitration, which provides that the law applicable to resolve the dispute shall be “based on private international law rules and principles, as well as on international trade law”.

⁹⁹ See *supra* notes 59 and 74 and accompanying texts, concerning the incorporation of the Hague Principles in the Paraguayan legal order. Also the PICC were taken as a model within the framework of the OHADA, albeit unsuccessfully (*supra* note 19).

¹⁰⁰ This happens with the dynamics of regionalisation of universal principles. See *supra*, notes 15-17 and accompanying text.

¹⁰¹ R. MICHAELS (note 34) p. 655-656.

¹⁰² See http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

ruled by a strong positivistic legal thinking – are more inclined to use soft law instruments than their predecessors when dealing with international cases. They show this inclination from the very beginning of negotiations.¹⁰³ Remarkably, it should be stressed that this attitude is visible already in law school students. For them, the application and use of principles such as the PICC is often perceived as an easier solution which can/should be welcomed. The experience of international moot competitions certainly confirms this finding. Indeed, the issue of the (non)-binding character of the rules is generally not perceived as a defect or weakness, indeed is often not perceived at all. Or, to put it differently, the ease students might experience while using such principles largely outweighs any concerns they may have regarding their character.

A FEW WORDS IN CONCLUSION

For the time being, the experience of principles-making has been positive from several points of view. On the one hand, the principles have confirmed the denationalization of law. More precisely, they stress the end of the State's monopoly on normative production (assuming such a monopoly ever existed). Overcoming the unjustified distinction between State law and non-State law, the principles permit law to evolve in different ways, particularly in relation to the emergence of a post-post-modern private international law. On the other hand, the principles may bring court and arbitral practice closer together, once the former are persuaded that there is no reason to leave the monopoly of application of non-State law to arbitrators. All in all, we are confident that by considering the practical value of the principles and abandoning old dogmas younger generations will be able to go beyond doctrinal criticism.

¹⁰³ This is clearly the case in relation with the PICC. See H. VAN HOUTTE, Contract negotiations and the UNIDROIT Principles, *Unif. L. Rev.* 19 (2014) p. 550-560.