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## CML606W Masters in Commercial Law

The UNIDROIT Principles of International Commercial Contracts
and South African Contract Law

Master of Laws Research Dissertation



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## INTRODUCTION

The present state of international trade law governing commercial contracts seems to be far from satisfactory. A commercial transaction between parties from different countries gives rise to a variety of legal issues that normally find no counterpart in a purely domestic transaction.[1] Since the traditional way of dealing with an international commercial contract is to make reference to the rules of private international law of the lex fori, in most cases rules of *municipal law* will govern the legal relationship between the parties. Yet, domestic law is not tailored to meet the specific requirements of modern international sales, and thus may often provide legal solutions that are not appropriate to cross-border transactions at all.

Against this background, the idea of a uniform world trade law has emerged and has given rise to various attempts made by national legislators, as well as private and public organisations, to set forth special rules to govern international transactions. The most famous example for such uniform contract law rules is, without any doubt, the United Nations Convention on Contracts for the International Sale of Goods (CISG) which was set up in 1980 and came into force on the 1st of January 1988.[2]

There is, however, a more recent set of rules which, in view of the apparent failures of the CISG, seems to proliferate in this field: the UNIDROIT Principles of International Commercial Contracts (in the following referred to as the "Principles"). These were published in 1994

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[1] For instance: carriage of goods and the inherent risks of damage and loss, fluctuating exchange rates, regulations of foreign trade in form of export and import licences or other trade barriers etc.. See M. **Ndulo**, The United Nations Convention on Contracts for the International Sale of Goods (1980) and the Eastern and Southern African Preferential Trade Area, 3 (1987) Lesotho Law Journal 127, at 132

[2] South Africa is not a party to the Convention yet. The fact that South Africa, in contrast to the 46 memberstates of the CISG, has failed to sign the Convention up to now, may be the result of the long-lasting isolation of the country within the international trading and business community for reasons of apartheid. Several writers who have recently evaluated the Convention's impact on international business, have recommended that the South African Government ratify the CISG. See, for instance, **S. Viejobueno**, Progress through compromise: the 1980 United Nations Convention on Contracts for the International Sale of Goods, 28 (1995) CILSA 200, at 227; **Clement Ng'ong'ola**, The Vienna Sales Convention of 1980 in the Southern African legal environment: formation of a contract of sale, 4 (1992) RADIC 835, at 853; the same, The Vienna Sales Convention of 1980 and sales law of Southern Africa, 7 (1995) RADIC 227, at 256.

by UNIDROIT[3] which eventually set them up after a long period of deliberation that had lasted for more than 14 years.
It has to be stressed, however, that the Principles are no uniform *law* in the proper sense, since they are not binding in character.[4] There seems to be a tendency to depart from the traditional approach within the international business world, where a large number of *non-legislative* rules are already being applied.[5] Therefore, it is not so surprising that the Principles, in the two years since their publication, have met with great success among the international business and legal community.[6] More than 3000 copies of the Principles have been sold world-wide. It appears that they are not a deadletter, but they are relied upon among the world trading community.

In Part one, light will be shed on the idea of a universal unified set of rules for commercial transactions in general. The historical aspect will be taken into consideration by elucidating the concepts of *ius commune* and the English *law merchant*. The question will be raised as to why there is a need for unified law in the field of international sales at all, by which means it can be created, and what would be the impact of such unified rules on the national legal system with particular regard to the conflict of law rules.

Part two will deal with the UNIDROIT Principles for Commercial Contracts. It will be demonstrated how they came into existence and what the intention of their drafters was, in particular in the light of the successful CISG already published at the time the UNIDROIT working group started the elaboration of its Principles. Furthermore, the different ways of applying the Principles will be considered. Finally, account will be given of the Principles' reception among the international business and legal community.

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[3] The International Institute for the Unification of Private Law, which is an independent intergovernmental organisation. See Part two I. South Africa is a member to UNIDROIT.
[4] See Introduction to the Principles, Internet *http://www.unidroit.org/english/principles/intro-1.htm on 05/14/98*, at p.2.
[5] The INCOTERMS of the International Chamber of Commerce, for example
[6] M.J. **Bonell**, The UNIDROIT Principles in Practice - The Experience of the First Two Years, Internet: *http://www.unidroit.org/english/principles/pr-exper.htm on 05/14/98*, at p.1. The author draws this conclusion from a formal inquiry launched by the UNIDROIT Secretariat among the users of the Principles in 1996. There will be given further account of this report in Part two IV.

In Part three, an attempt will be made to evaluate the impact the UNIDROIT Principles might have on South African law of contract in general. What changes the application of the UNIDROIT Principles would actually introduce into an international transaction for a local buyer or seller will be considered by comparing the rules of South African contract law with the provisions of the UNIDROIT Principles. Attention will be given to the formation of contract, interpretation, performance, breach of performance and the respective remedies.

## PART ONE: THE CONCEPT OF UNIFORM COMMERCIAL LAW IN GENERAL

### I. Historical development of the idea

The idea of unifying rules of private law in general was not born in recent times.[7] It has had two famous predecessors in the field of international trade, one of them even goes back to the times of Roman law. The Roman *ius gentium* was intended to govern contracts made among Roman citizens only. Commercial relations between a Roman citizen and a *non*-citizen could not be covered by those rules, for their application was based on the active personality principle. When cross-boundaries trade proliferated, Roman lawyers, instead of sacrifying the strict application of the active personality principle, and thus extending the sphere of application of Roman law to those peregrines,[8] decided to create uniform law rules applicable to everybody to govern those cross-border transactions. This body of law was the so-called *ius gentium*. This first example of uniform law, however, was not the result of a comprehensive comparative study of the different legal regimes that existed at the time, because its drafters decided for themselves what should be considered "reasonable opinions of law that are common to all people".[9]

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[7] A. **Spickhoff**, Internationales Handelsrecht vor Schiedsgerichten und staatlichen Gerichten, 56 (1992) Rabels Zeitschrift 116, at 118; **C. v.Bar**, Internationales Privatrecht, 1st Volume, Muenich 1987, at 23

[8] **v.Bar**, note 7, at 26

[9] **v.Bar**, note 7, at 27

Several centuries later, a comparable development took place in England when the *law merchant* came into existence. It was created by English judges due to the fact that English ordinary courts were reluctant to apply any law other than English law.[10] The conflict of laws which, on the Continent, was resolved by referring to the rules of private international law, was governed by the concept of *jurisdiction* in England where there were no such rules. An English court that considered itself competent to decide in a matter automatically applied its domestic law to the dispute. But it was not likely that foreign traders would agree to be exclusively governed by English law if a dispute arose before an English Court.[11] Thus the new *law merchant*, i.e. a set of rules of modern business law appropriate to cross-border transactions was created.

In addition, specific commercial tribunals were created at significant ports in different countries. It can thus be assumed that, at the time, an internationally applicable system of uniform sales law applied by merchants regardless of their nationalities and legal backgrounds[12] existed to govern commercial matters.

The increasing trend towards nationalisation and the inherent wish of every state to create its own commercial law code in the 18th and 19th century, led to the gradual decline of the *law merchant.*[13] The universal commercial law did not reflect the international reality any more. It had become obsolete.

The idea of a uniform private or commercial law was reborn more than 200 years later. In 1893, the first Conference on Private International Law took place at the Hague, but more serious efforts were only made in the second half of this century, due to the dramatic increase in transnational commerce and the need for a correspondent legislative policy designed to regulate it.[14] There has been a continuing effort by legislators to create uniform rules for this purpose since then.[15]

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[10] **Spickhoff**, note 7, at 118

[11] **v.Bar**, note 7, at 30

[12] loc.cit. at 119

[13] It can be inferred from the decision of the English court in the case of *Pillans v. Van Mierop* in 1765, English Reports 97, 1035, that the law merchant had lost its international ambit and had simply been transformed into the *national* commercial law of England. See **v.Bar**, note 7, at 31

[14] F. **Ferrari**, Defining the Sphere of Application of the 1994 "UNIDROIT Principles of International Commercial Contracts", 69 (1975) *Tulane Law Review* 1225

[15] For instance, the Hague Sales Convention of 1964, the CISG of 1980 etc.

Even though some points are common to those two famous old models of uniform law and today's uniform sets of rules,[16] one striking difference has to be borne in mind: modern uniform law does not, by its very nature, form universally applicable law. It is only valid in those states which are party to the corresponding convention. In a world of sovereign states of equal value, no single state is in a position to dictate rules of law to the rest of the world. No state may hold that, in its opinion, these rules form the *natural reason* of all human beings and are thus binding on everyone, as it was the case at Roman times.

Today uniform law is national law, and the only feature to distinguish it from common national law is the fact that it has been created in collaboration with several states and is applicable in foreign legal systems as well.[17]

It is noteworthy that the international business world itself, through its organisations, has created a large variety of rules, such as standard-form contracts and standard terms, usages and the incoterms.[18]

## II. The various methods needed to achieve unification of law

There are two basic techniques that are usually followed to achieve this aim. The first relates to unifying the rules of private international law, whereas the second consists of harmonising and unifying substantive rules of law.[19] The 1980 Rome Convention on the Law Applicable to Contractual Obligations[20] is an excellent example of the first alternative, whereas the most famous example for unified substantial law can be seen in the CISG created in 1980.

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[16] It is again, predominantly, international commercial law.

[17] **v.Bar**, note 7, at 50

[18] See **Spickhoff**, note 7, at 119; It is, however, not clear what the legal nature of such non-legislative systems of rules is, and whether they can be considered sources of law that the courts can refer to. See **v. Bar**, note 7, at 78 and **Spickhoff**, note 7, at 117.

[19] R. **David**, The Methods of Unification, 16 (1968-9) American Journal of Comparative Law 13; F. **Ferrari**, note 14, at 1226-7

[20] The Convention is the product of the efforts of member states of the former European Economic Community (EEC) to harmonise their rules of law. Even though only member states of the Community may sign the convention, its rules have an international scope, in the sense that the convention replaces the choice-of-law rules of the contracting states.

The first approach assures the parties to a contract that, no matter which forum judges their dispute, their reference to the rules of private international law will point to the same municipal system of law. Unification of the substantive rules, however, does not only provide legal certainty as to the municipal law which will apply to the contract, but it defines the precise rules of law applicable to the dispute. The advantage is that a national judge does not have to embark on the laborious task of determining the rules of an unknown municipal law system and this law's ability to apply usages and practices of international trade to the contract,[21] which creates an enormous legal uncertainty.

However, there is no clear answer as to which technique is preferable. Whereas the second method can definitely provide more comprehensive legal certainty for the parties, and therefore happens to be considered "superior"[22] or "of a higher level"[23], the first is more likely to be agreed upon within the international community, since it affects the national legal environments only to a relatively small extent. Furthermore, a far simpler process of creation is necessary to unify the conflict of law rules instead of substantive rules.[24]

Unification of rules of law has almost exclusively taken the form of obligatory instruments, such as supranational legislation,[25] international conventions[26] or only model laws[27] in cases where such a broad censensus can not be obtained. However, as evidenced by the UNIDROIT Principles, it is also conceivable to create a non-binding set of rules.[28] This apparently striking difference between binding and non-binding instruments considerably loses its force when their use in practice is taken into account. Model laws leave wide room for a state's discretion to include changes when it transforms the model act into national law.[29] Conventions, on the other hand, offer numerous

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[21] **David**, note 19, at 17
[22] P. **Winship**, Private International Law and the U.N. Sales Convention, cited in: **Ferrari**, note 14, at 1227 note 19
[23] G. **Eoersi**, The Hague Conventions of 1964 and the Internationale Sale of Goods, cited in: **Ferrari**, note 14, at 1227 note 19
[24] O. **Lando**, European Contract Law, in: **Ferrari**, note 14, at 1227 note 20
[25] Legislation within the EU, for instance.
[26] Such as the CISG, for example.
[27] For instance, the UNCITRAL model act on International Commercial Arbitration of 1985.
[28] see part II on UNIDROIT
[29] F. **Diedrich**, Chancen und Ziele von Einheitsrecht fuer den internationalen Handelsverkehr, (1992) Zeitschrift fuer die Internationale Praxis, 408 at 409

occasions to exclude their application in certain cases by making reservations.[30] The only truly binding form of uniform law, therefore, seems to be supranational legislation; but this requires surrender of legislative powers to a supranational authority, as is the case within the European Union. It is thus not very likely to be the common model for creating uniform law.

**III. The need for unifying commercial law today**

Applying national rules of private international law subjects law at an international level to a considerable legal uncertainty and unpredictability.[31] The parties to an international transaction are thus in fear of being exposed to unfamiliar and possibly disadvantageous rules of a foreign legal system.

In order to illustrate this, let us consider the usual way in which an international case is treated before a national court.

If, in an international contract, it becomes necessary to determine the proper law governing the contractual relationship, the traditional approach by state courts is to refer to the rules of conflict of law of the forum state.

Since there is no uniform system of conflict of law rules, except for some occasional models of unification of the rules of private international law,[32] the outcome of such an international dispute will *entirely depend on the forum* where the parties instituted their proceedings and the rules of private international law of the forum.[33]

However, even if there were a uniform system of conflict of law rules, this would not necessarily entail uniformity in the outcome of the particular case. Although the rules point to the same national legal system, the substantive rules applicable to the case would not necessarily have to be the same, since the *mandatory rules* of the forum assert

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[30] **David**, note 19, at 19-20

[31] H. **Booysen**, The International Sale of Goods, (1991-2) SAYIL 71, at 72

[32] For example, the Rome Convention on the Law Applicable to Contractual Obligations of 1980

[33] H. **Booysen**, note 31, at 72

In addition, even if the rules of conflict of law are unified, it cannot be denied that national courts have a tendency to obtain applicability of their own law by interpreting the connecting factors in a particular way in preference to another.[34]

Furthermore, making reference to the choice of law rules of the forum still only results in the application of a certain domestic law system. As mentioned above, municipal law is ill-suited to international purposes and usually unable to provide appropriate solutions to the particular demands of an international sale.[35] In addition, foreign domestic law is difficult for a judge to assess.

Finally, the application of the national rules of conflict of law does not necessarily point to the best legal regime. The purpose of the conflict of law is to provide justice in terms of private international law, but not necessarily substantial justice.[36]

There are, however, several arguments against uniform commercial law.

First, it is argued that just creating uniform law does not take us any further in our search to eliminate the apparent inconveniences of the traditional approach. It is a mistaken belief to consider that identical legal rules will operate in the very same way in different legal systems with their particular social and political settings.[37] This is not necessarily due to failures of the statutes themselves, but will mainly result from jurisprudence which is reluctant to apply an autonomous interpretation. As long as there is no exclusive international commercial tribunal to apply uniform law in a consistent manner, national courts will continue to use their national law when it comes to interpreting or filling gaps left open by the unified rules[38]. There is thus no reason to believe that the

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[34] K.P. **Berger**, Die UNIDROIT Prinzipien fuer International Handelsvertraege, 94 (1995) Zeitschrift fuer Vergleichende Rechtswissenschaft, 217, at 222

[35] see note 1 above

[36] **Berger**, note 34, at 222

[37] A. **Rosett**, Unification, Harmonization, Restatement, Codification and Reform in International Commercial Law, 40 (1992) American Journal of Comparative Law 683, at 687

[38] Even though this is expressly rejected in most of the uniform laws where it is stated that the rules should be interpreted in an autonomous way, international practice shows that courts tend to apply their national laws to those issues.

outcome of the cases will be truly uniform as a result of the mere existence of a unified international sales law.[39]

Secondly, unifying rules of private law is in general deemed an unfeasible and neverending task.[40] It is true that uniform law, in principle, can only provide fragmentary sets of rules dealing with selective issues. As reference has to be made to the rules of private international law to determine the law applicable to the remaining issues, uniform law is not of great help when it comes avoiding use of domestic law systems. However, this point could be easily counterargued by saying that every legal innovation takes a certain time before it is eventually accepted.[41]
The reason for the incompleteness of uniform law mainly resides in the fact that it is usually the result of complex international diplomatic negotiations between representatives of states who are anxious to defend their respective national interests to the utmost. This then leads to uneasy compromises,[42] a State's willingness to compromise seeming to depend largely on their respective bargaining position.[43] The stronger this is, the less they will be inclined to sacrifice applicability of their own law and the inherent legal certainty for their citizens. This inconvenience could be bypassed by using an approach like UNIDROIT did in form of the Principles.

Businessmen, in reaction to the obvious imperfection of the rules provided for by national legislative law, strive to avoid the use of national law. That is why they define the nature of their obligations in standard-form contracts and provide that the settlement of their disputes be entrusted to arbitration tribunals.[44] This presents a considerable danger to the "weaker" and inexperienced parties, particularly from developing countries, who might be forced to accept the self-created

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[39] R. **Hyland**, On Setting Forth the Law of Contract: A Foreword, (1992) American Journal of Comparative Law, 541, at 542
[40] H. **Koetz**, cited in U. **Magnus**, Die allgemeinen Grundsaetze im UN-Kaufrecht, 59 (1995) Rabels Zeitschrift 469, at 471
[41] In the field of uniform law, the first set of rules of importance, the Hague Sales Convention of 1964, was very much criticised for its gaps and one-sided provisions. Then UNCITRAL created, based on this old model, the CISG, as an improved and supplemented version of unified sales law which gained enormous success within the international business community.
[42] See, for example, the obvious contradiction within the CISG between Articles 14 and 55 as regards open-price contracts, and Article 28 that allows courts not to enter a judgment for specific performance if this is not in compliance with their own law. See **Viejobueno**, note 2, at 202-212
[43] ibid at 202
[44] **David**, note 19, at 22 seq.

rules imposed upon them by their stronger business partners. Such standard terms not only tend to be one-sided, but they inevitably are also influenced by the legal concepts of their drafters' countries of origin.[45]

This risk will definitely result in a disinclination on the part of traders, in particular those from poorer and developing countries, to enter into cross-border transactions. Not only would providing a readily applicable and balanced set of rules encourage them to concluding an international transaction, thus leading to an effective protection of such disadvantaged parties by cutting their risk exposure to unknown and biased rules, but it would also reduce the cost of such international business transactions as a whole.[46] There would be no need to launch expensive enquiries into unknown applicable national law.
In addition, uniform law could create one legal language to replace the different languages of the domestic systems and thus prevent misunderstandings in contract negotiations and performance.

As a result, it seems that uniform sales law might well be in a position to give massive new impetus to international trade. This might lead to an increased and more stable global economic co-operation that could serve as a means against political instability, especially in the case of poorer countries.[47]

In summary, despite all the difficulties encountered in the process of creating uniform law, in the long run the advantages it provides with respect to the general increase of international trade activities seem to outweigh the obvious problems.
The ideal would certainly be to constitute a world commercial court to judge all international commercial transactions by applying uniform universal trade law in an equitable manner.[48] Yet, as long as this remains a dream, for it would require the national surrender of jurisdiction in international commercial cases[49], to create and apply a unified code of consistent rules would at least be a good start.

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[45] M.J. **Bonell**, The UNIDROIT Principles of International Commercial Contracts: Why? What? How?, 69 (1995) Tulane Law Review 1121 at 1124
[46] **Ndulo**, note 1, at 130
[47] **Diedrich**, note 29, at 409
[48] G.A. **Barton**, The United Nations Convention on Contracts for the International Sale of Goods, 18 (1995) CILSA 21, at 26: **Diedrich**, note 29, at 411
[49] Barton, loc.cit.

**IV. The impact of uniform law on the domestic legal systems**

Uniform law affects domestic law rules in two ways. First, within its sphere of application, it replaces the substantive rules of the domestic law system which would otherwise have been found to be applicable to the dispute by the forum's rules of private international law. Secondly, it might render futile the conflict of law rules of the forum.

It is true that, a priori, rules of unified law and private international law are in opposition to each other.[50] Whereas uniform law, by virtue of its direct applicability to the contract, is aimed at *avoiding* conflicts between different legal systems, the purpose of the rules of private international law is to interfere when there actually *are* conflicts arising from the existence of several legal systems which might be applicable to a certain legal relationship. It thus follows that directly applicable rules of uniform law considerably diminish the importance of the conflict of law rules.[51]

However, this does not infer that private international law loses its right to exist. Quite the reverse is true. Even if uniform law can, indeed, affect the scope of application of the conflict of law rules, the latter will still play an important role by reason of their intrinsic predominance. As long as national rules of private international law do not give the order to apply uniform rules of law, the unified law will play no role in the legal dispute.[52] Uniform law cannot claim preferential application on the mere grounds of its noble purpose.[53] It is entirely dependent on the rules of private international law to select it from among the different legal systems that could govern the legal relationship in question. The uniform rules thus are on a level with the substantial rules of domestic law.[54]

Consequently, as long as there remain areas of law that are not entirely governed by unified rules, the rules of private international law will not lose any of their importance. The achievement of this goal is not yet in sight. On the one hand, no uniform law is universally applicable so far. On the other hand, even in areas where uniform rules already exist, reference to the rules of private international law is still made when it comes to determining the law applicable to those issues not covered by

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[50] **Booysen**, note 31, at 87
[51] loc.cit.
[52] loc.cit.
[53] **v.Bar**, note 7, at 66
[54] loc.cit.

the uniform rules[55], or when the exact sphere of application of the uniform set of rules is to be defined.[56]

As a consequence, it seems to be clear that in the presence of true uniform law, private international law rules still stand their ground.

## PART TWO: THE UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

The UNIDROIT Principles as a non-binding instrument appear to constitute a completely new approach to international trade law.[57] They are the result of harsh criticisms expressed towards intergovernmental legislative instruments, such as conventions and model laws. They are mostly rather fragmentary in character with the consequence that they need to be supplemented by domestic laws. An increasing number of voices were therefore raised in favour of recourse to non-legislative means of unification of law.[58] Some of these advocated creating model clauses and contracts formulated by the interested business circles on the basis of current trade practices and relating to specific types of transactions only.[59] Since this presupposes a more general regulatory system within which to apply those model clauses, others went even further and advocated the elaboration of a sort of "modern ius commune" at a supra-national level which was to provide rules for contract law in general. The UNIDROIT Principles for International Commercial Contracts are the result of such endeavours. Reflecting all the major legal systems of the world, they are intended to cover the whole area of contract law without being conceived in terms of specific

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[55] see Article 7 para.(2) CISG for instance

[56] see, for example, Article 1 para.(1)(b) of the CISG

[57] **Bonell**, note 45, at 1122

[58] In the international context, there is a need to adapt the applicable rules in conformity with the developing practice in the international business world. Statutes, however, do not leave enough room for such flexibility. The creation of uniform law on a legislative basis being a difficult and very time-consuming process, the rules have often become "obsolete" at the time when they enter into force. In the case of the CISG, for example, it took 18 years until the convention came into force in 1988! See with respect to this issue: Diedrich, note 47, at 410; introduction to the UNIDROIT Principles by the Governing Council of UNIDROIT, Internet *http://www.unidroit.org/english/principles/intro-1.htm* at p.1

[59] M.J. **Bonell**, Unification of Law by Non-legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts, (1992) American Journal of Comparative Law 617, at 617-18

types of transactions. The Principles, therefore, provide a set of rules applicable to all commercial contracts whatever their specific nature.

## I. Creation of the UNIDROIT Principles

UNIDROIT is an independent intergovernmental organisation with its seat in Rome. Its purpose is 'to examine ways of harmonising and co-ordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law.'[60] UNIDROIT was initially set up as an auxiliary organ of the League of Nations in 1926, and, following the latter's demise, was re-established in 1940 on the basis of the multilateral agreement of the UNIDROIT Statute. Today the organisation is composed of 57 member States[61] representing the whole world.

In 1971 the Governing Council whose task it is to draw up the Institute's Work Programme, decided to extend its activities to the domain of contract law and launched preliminary inquiries into the feasibility of such a project. It took several years before a special Working Group including representatives[62] of all the major legal and socio-economic systems of the world was eventually constituted in 1980. It then took these experts almost 14 years to bring their task to an end so that the Principles were presented to the public as late as 1994. They are composed of 119 articles divided into seven chapters: "General Provisions", "Formation", "Validity", "Interpretation", "Content", "Performance", and "Non-performance". The single articles are drafted in the style of the European codifications, but the structure of the rules itself calls to mind the American Restatement of the Law: a general rule of law is followed by short explanations in form of comments and illustrating examples.[63]

The drafters of the Principles did not intend to create completely new rules, but they understood their task to be one of restating the existing

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[60] See General Information on UNIDROIT on the Internet *http://www.unidroit.org/english/presentation/pres.htm* at p.1

[61] They are listed on the Internet, see previous footnote. South Africa is also party to UNIDROIT.

[62] They were all leading experts in the field of comparative law and international trade law, academics, high ranking judges or civil servants. See **Bonell**, note 59, at 619

[63] **Berger**, note 34, at 218

international contract law. They were inspired by two thoughts. First, the drafters intended to enunciate rules that are common to most of the existing legal systems. Secondly, they strove to create rules to provide solutions which seems best suited to the specific needs of the international business world.[64] As a consequence, in the case of disparities between the different legal systems, the drafters did not select the rule by arithmetic means by preferring the one which was supported the majority of the legal systems at domestic level. They based their decision on the persuasive value of the different possible solutions and considered which solution might be the most appropriate on an international level.[65]

When drafting the Principles, the Working group made reference to the different national codifications and, in particular, considered the more recent ones, such as the United States Commercial Code, the new Dutch Code of 1992 and the new Civil Code of Quebec of 1994.[66] On an international level, an outstanding point of reference was, of course, the CISG. Some of its provisions were introduced into the new set of Principles[67], some literally and some in part. Furthermore, the drafters sought inspiration from non-legislative instruments that had been created by private organisations of the international business world and are widely refereed to in international trade practice, such as the International Chamber of Commerce's INCOTERMS and Uniform Customs and Practice for Documentary Credits.[68]

It is worth noting, however, that the drafters of the Principles abstained from naming the specific sources of inspiration used in their comparative research. This was done on purpose so as to stress the international character of the rules which are intended to be independent from any specific legal domestic system.[69]

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[64] **Bonell**, note 45, at 1129
[65] ibid
[66] ibid
[67] Where the CISG pronounced general rules of contract law which were not specific to sales, the UNIDROIT drafters did not hesitate to refer to them literally, for instance, in the domain of formation and interpretation of contracts.
[68] See enumeration of the different points of reference given by **Bonell**, note 45, at 1130
[69] **Berger**, note 34, at 218

## II. How the UNIDROIT Principles differ from the CISG

When UNIDROIT embarked on the elaboration of its Principles in 1980, the United Nations Commission on International Trade Law, UNCITRAL, had just published the Vienna Convention on Contracts for the International Sale of Goods (CISG), which was to provide uniform rules applying to international sales. The most striking difference between the two set of rules is the non-binding character of the UNIDROIT rules. A contract will only be governed by them if the parties have agreed to either include the Principles in the contract; or to submit their dispute to an arbitrator who, unlike a conventional judge, is not bound to apply only national legal systems to a dispute.[70] The CISG, however, if it has been ratified by a state, is binding for the international contracts of its nationals.[71]

Given the obvious success of the CISG, the question arises as to why there was a need to create some more unified rules. The short answer is: to create a better set of rules.[72]

One significant improvement lies in the way in which the two set of rules were drafted. The CISG has often been criticised for being one-sided and disadvantageous to politically and economically weaker parties. It is a given fact that developing countries were, and still are, suspicious with regard to international uniform law for they believe that the export-orientated industrialised countries use their political weight to provide themselves with numerous advantages under the guise of apparently neutral rules.[73]

Thus the way in which the Principles were drafted incorporates an element of fairness into international uniform law. The members of the Working Group did not participate in the process as representatives of their respective governments, but only in their role as legal experts. It follows that there was no need to adopt diplomatic solutions and to

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[70] However, the parties' freedom to have their contractual relationship governed by the Principles depends on whether the domestic legal system allows the otherwise applicable law to be displaced.

[71] Unless its application has been excluded by the parties according to Article 6 CISG.

[72] The members of the Working Group took some of the provisions of the CISG into their Principles without any modification. Where it was held that there might be a better solution to an issue, they included improved provisions.

[73] **Diedrich**, note 29, at 411

disguise deep and lasting political opposition with a compromise formula[74], as it had been the case during the creation of the CISG.[75]

Another weak point of the CISG is its inflexibility that is not suited to the dynamic world of business. Conventions are created by diplomatic negotiations and stay in force in the form in which they have been drafted. Changing their content requires difficult negotiations among the member states. The Principles, however, can be adapted to new developments or new techniques in the area of international trade law at any time and without any formal requirements.

The UNIDROIT Principles cover all kinds of transactions arising out of international commercial relations, whereas the scope of application of the CISG is restricted to contracts of purchase and sale only.[76] Considering the wide ambit of the Principles, as evidenced in the preamble, it seems that in international contract law the Principles might adopt the role that on a domestic level in civil law jurisdictions is played by the rules on obligations and contracts in general vis-à-vis those rules applicable to specific types of contracts[77]. It is even possible that, in the future, the Principles might constitute the centrepiece of international conventions on commercial contracts.[78]

### III. The purpose followed by the drafters of the Principles

Even if the Principles are not intended to be a binding instrument, they could still be of great value to the international business world in different respects as evidenced by the words of their preamble. They set out the general rules for *international commercial* contracts.

The *international* character of a contract is not expressly defined by the Principles. They aim to avoid the inconveniences caused by applying a domestic law system to an international contract and their intrinsic aim is to preclude easy resort to the domestic law indicated by the conflict of

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[74] A.M.**Garro**, The Gap-filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG, 69 (1995) Tulane Law Review 1149, at 1160

[75] **Viejobueno** has commented on the disparities between the countries taking part in the creation of the convention in her article, note 2, at 203-226.

[76] **Garro**, note 74, at 1152 and 1163

[77] loc.cit. at 1155

[78] Such as contracts of carriage by sea or air, marine or air insurance or banking transactions.

law rules of the forum. The assumption is that the notion of international contract should be understood in the broadest possible sense so as "ultimately to exclude only those situations where no international element at all is involved, i.e. where all the relevant elements of the contract in question are connected with one country only." [79]

The same applies to the definition of *commercial*. The restriction does not repeat the distinction made between civil and commercial parties as this occurs in several civil law systems. It is only there to exclude the so-called *consumer transactions* from the scope of the Principles. These transactions are increasingly subject to specific, mostly mandatory, rules in many legal systems. This means that apart from those consumer transactions the Principles apply to all kinds of economic transactions.[80]

According to the drafters, the Principles should serve as rules of law governing the contract if the parties wish them to do so, or if they intend their contract to be subject to the *general principles of law* or the *lex mercatoria*.[81]
If the parties expressly choose the Principles to govern their contract, the effects of this choice will, to a large extent, depend on whether they did so in the context of an arbitration agreement, or whether they wished to have their disputes settled by a national court. Whereas it seems to be well recognised in the field of commercial arbitration that the Principles, as part of the modern lex mercatoria, can govern international contracts[82], it is questionable whether national courts in international commercial disputes are entitled to refer to non-national sets of rules on which to base their decision. National courts are bound to apply the conflict of law rules which, in principle, do not allow the parties to select non-national rules to govern their contract. Hence, before a state court, a reference by the parties to the Principles will generally be a mere agreement to incorporate them in the contract. The judge will only consider the Principles as long as they do not affect the rules of the applicable law from which the parties must not derogate.

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[79] Comment on the Preamble of the Principles, Internet: *http://www.unidroit.org/english/principles/chapter-0.htm* at p.1
[80] Comment on the Preamble, previous note, at p.1
[81] ibid, second and third paragraph.
[82] The rules will nevertheless be subject to those mandatory rules of the forum that are applicable, irrespective of the fact that the contract is governed by foreign law. See Article 1.4

Even if the Principles are not called upon to govern the contract itself, they might still be helpful for a judge or arbitrator when it comes to filling gaps that might have been left open by the otherwise applicable domestic law. Whenever it proves extremely difficult, if not impossible, to establish the relevant rule of domestic law (for instance, where a question of applying a foreign domestic law and ascertaining the precise content of this law arises, this would involve considerable and disproportionate efforts or costs), judges and arbitrators might refer to the Principles to obtain an appropriate solution to the dispute in question. It has to be stressed, however, that it should be seen as a last resort only.[83]

Furthermore, the Principles are considered a means of interpreting and supplementing existing international instruments. Most international conventions are of fragmentary character only, and, in the case of most uniform laws, no common interpreting practice among the different member states exists.[84]
Traditionally whenever the courts could not define the precise scope of a rule or found out that the international instrument did not contain a provision, they referred to their lex fori or to the rules of the system of law that would have been applicable in the absence of the uniform law. This method has been harshly criticised, for it entails different results depending on which court decides the case and therefore undermines the idea of obtaining identical results by applying rules of uniform law. The new tendency aims at an autonomous interpretation and gap-filling, and the Principles could serve as a guideline to help the judges find an adequate solution.

The Principles could also help those domestic legislators who either have to create a body of law applicable to commercial contracts, or who need to update their law. On an international level, the Principles could constitute a considerable point of reference for the drafting of new conventions in the field of commercial law.

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[83] Applying such a balanced international set of rules still appears to be more equitable to the parties than the traditional practice of the courts which is to simply apply the lex fori and thus have recourse to a legal system that usually is familiar to one of the parties only. See comment on the Preamble, note 79, at p.3

[84] Even though in most conventions there are provisions requiring uniformity of application and that regard should be had to their international character when interpreting the convention. See, for example, Article 7 para.(1) of the CISG.

## IV. THE EXPERIENCES OF THE FIRST TWO YEARS

A survey conducted by the UNIDROIT secretariat in 1996 evidenced the "more than favourable reception of the Principles in the international business and legal community".[85] This survey seems to counterargue the view of sceptical observers who had held that the creation of the Principles was little more than an academic exercise of no practical utility.[86] The results of the survey show that not only several countries throughout the whole world have already made reference to the Principles as a source of inspiration in their more recent codifications.[87] A large proportion of the respondents to the Secretariat's questionnaire indicated that they had used the Principles as the law governing the contract, or had at least referred to the rules in court in support of a particular argument. In addition, the Principles have gained considerable importance in a field un-foreseen by the drafters; that of using the Principles as a guide in contract negotiations. This has become one of the most important ways in which the rules are referred to in practice. One of the main assets of the Principles is that they will eventually exist in 17 different languages, making them widely accessible. Furthermore, there are several arbitral awards and even one decision by a state court using the Principles to fill a gap or to demonstrate that a particular solution provided for by the applicable domestic law conforms to internationally accepted standards.

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[85] M.J. **Bonell**, The UNIDROIT Principles in Practice - The Experience of the First Two Years, Internet: *http://www.unidroit.org/english/principles/pr-exper.htm* 05/14/98 at p.1: It should nevertheless be noted that the Secretariat bases its conclusion on a relatively small number of replies. However, the number of persons taking part in a survey is often only a small portion of the group of concerned people altogether, so that it might be assumed that the actual number of persons using the Principles is actually far higher.

[86] C. **Kessedjian**, Un exercice de rénovation des sources du droit des contrats du commerce international: Les Principes proposés par l'Unidroit, 1995 Révue critique de droit international privé at 641 et seq.; R. **Hill**, A Businessman's View of the UNIDROIT Principles, in 13 (1196) Journal of International Arbitration 163 et seq., both cited in **Bonell**, see previous footnote

[87] Such as Quebec, the Netherlands, the Russian Federation, the German Commission for the Revision of the law of obligations, Estonia, Lithuania, the Czech Republic, the Organisation for the Harmonisation of Business law in Africa and many more.

## PART THREE: THE UNIDROIT PRINCIPLES AND SOUTH AFRICAN CONTRACT LAW

The Principles are not intended to be binding and therefore do not constitute an instrument of international law which South Africa can adhere to. The Principles should only be applied by virtue of their persuasive authority.[88]

South African writers do not explicitly express their opinion on whether the parties are entitled to choose a non-national system of rules as the "law" governing their contract. Yet, it can be inferred from their discussion on the topic of party autonomy, in which no mention is made of this issue, that they did not consider the idea of applying non-national rules at all.[89] However, even if the Principles can not be taken into account by the national courts, they can still play a role in arbitration agreements where they are widely referred to.

Let us consider the Principles and the impact their application would have on South African traders with respect to the general aspects of the contract, such as its formation and validity, as well as performance and breach of performance.

### I. GENERAL PROVISIONS

#### (1) INTERPRETATION OF THE CONTRACT

The Principles deal with this question in chapter 4. Article 4.1 concerns the interpretation of a contract, whereas Article 4.2, literally taken from Article 8 of the CISG, provides the rules for the interpretation of statements, or other conduct, made by one of the parties. Para.(1) of the Articles 4.1 and 4.2 stipulate that the conduct in question, or the contract as a whole, should be interpreted according to the intention of the parties. This suggests a subjective approach[90], which in the case of

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[88] See the comment on their Preamble, note 79, at 2

[89] J. **Forsyth**, Private International Law, 3rd edition, 1996, at 276; E. **Kahn**, International Contracts, Businessman's Law, several editions of 1990 and 1991

[90] In consequence, a term may be given a meaning which differs from both the literal sense of the words and the meaning a reasonable person would attach to it, provided that this intention was common to the parties at the time of conclusion of the contract. See the comment on Article 4.1, internet: *http://www.unidroit.org/english/principles/chapter-4.htm*

unilateral statements or conduct of a party is nevertheless limited by the requirement of knowledge or imputed knowledge of such intent by the other party.[91]

Where intention cannot be established, the rules of para.(2) of the Articles 4.1 and 4.2 state that the contract or the parties' statement or conduct in question "shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances". In Article 4.3, a list of such circumstances is given. Some of the circumstances relate to the particular relationship which exists between the parties concerned, while others are of a more general nature. Regard should therefore be given to preliminary negotiations and established practices between the parties; the conduct of the parties subsequent to the conclusion of the contract; the nature and purpose of the contract; and in a more objective approach, the meaning commonly given to terms and expressions in the trade concerned.

Article 4.4 makes it clear that "terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear". Article 4.6 states that the *contra preferentem rule* is also applied in international contracts.[92] If one or more equally authoritative language versions of a contract diverge on specific points, Article 4.7 establishes the pre-eminence of the version in which the contract was originally drawn up. Lastly, Article 4.8 provides a guideline for judges on how to deal with omitted terms that are important in determining the rights and duties of the parties concerned.

In Roman-Dutch law, the legal position on the interpretation of contracts is far from clear. Although many judges believe[93] that the general approach is to determine the intention of the parties[94] (and thereby seem to support a purely subjective theory), others are reluctant to consider subjective criteria and apply the so-called *Golden Rule* created by Lord

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[91] Article 4.2 para(1) at the end

[92] "If contract terms supplied by one party are unclear, an interpretation against that party is preferred."

[93] See D.J. **Joubert**, General Principles of the Law of Contract, Cape Town, at 59 note 14

[94] By this, they follow the first of rule of interpretation of contracts set up by Pothiers and Van der Linden in the 19th century which provided: "In agreements should we consider what was the general intention of the contracting parties rather than follow the literal meaning of the words." The rule is cited in R.H. **Christie**, The Law of Contract in South Africa, 1996, Durban, at 228

Wensleydale in *Grey v. Pearson*[95]. The judge held that "intention is ambiguous" and restricted the interpretation of the contract to the language and meaning of the words. As a consequence, many conflicting dicta have been made by South African courts since then.

However, even if some judges seem to refer to the subjective approach by stressing the importance of the intention of the parties, and thereby stand in contradiction to the objective *Golden rule*, this is not the case. On closer examination, it becomes clear that the statements were mostly taken out of their context and therefore misinterpreted. In fact, even those judgements follow the *Golden rule*.

The legal position in South African law therefore appears to be the following: the common intention of the parties is the prevailing criterion by which the contract is interpreted, but the evidence relating to the intention is limited to the meaning of the words and symbols that were used by the parties when concluding the contract.[96] Although this view is shared by adherents of the two competing theories, there are nevertheless discrepancies as to how this rule is applied in practice.

Supporters of the subjective approach conclude that although the judge should consider the wording of a contract, he is nonetheless entitled to depart from their literal meaning where it is clear that the common intention of the parties is not reflected by the wording. Supporters of the objective, *Golden Rule* approach, attach such importance to the meaning of the words that, in at least two cases, they went so far as to hold that the literal sense of the wording should be applied even though the wording contradicted the common intention of the parties.[97]

This controversy in South African law makes it difficult to ascertain what changes the application of the Principles would imply. In sum, South African law appears to be consistent with the provisions of the Principles.[98] In addition, they may at least provide a clear rule. This

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[95] (1857) 10 ER 1216, 1234

[96] See **Joubert**, note, 93, at 59; **Christie**, note 94, at 229, and the cases he refers to in footnote 232.

[97] Van Pletsen v. Henning 1913 AD 82 99; Union Government v. Smith 1935 AD 232 240-1

[98] The *contra preferentem* rule of Article 4.6, as well as the rule that a word or clause have to interpreted in the context of the contract as a whole are also applied under South African law. See Christie, note 93, at 233 note 263

would be a considerable contribution to legal certainty in Roman-Dutch law and could thus be deemed an improvement with respect to the actual legal position.

**(2) FORM OF THE CONTRACT**

The Principles do not require a written contract.[99] This seems particularly appropriate in the context of international trade where transactions are concluded at great speed and are usually not paper-based.[100] The provision was literally taken from Article 11 of the CISG. However, the CISG recognises that in certain circumstances, the parties need to conclude a contract in writing.[101] Even if this is not mentioned in the text of the Principles, their drafters admit that the principle of freedom of form may be overridden by national laws or international instruments that impose special requirements as to form.[102] Articles 2.13, 2.17 and 2.18 illustrate this. Furthermore, Article 1.4 provides that mandatory rules (whatever their source) which are applicable according to the relevant rules of private international law, prevail over any inconsistent provision of the Principles.

In South African law, in general, there is no requirement of form either[103], unless there is a specific statute to impose it[104], or the parties themselves wish to have their contract concluded in a special form. [105] Roman-Dutch law is therefore in compliance with the provisions of the Principles concerning formal requirements as to contracts.

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[99] Article 1.2

[100] Comment by UNIDROIT on Article 1.2, internet, note 90

[101] Article 12 CISG; This is due to the fact that there was no consensus to be reached between countries from Eastern Europe and the Western industrialised countries. Since the drafters of the Principles did not have to take into account political issues they could opt for the solution which, in their opinion, was the best one.

[102] See comment on Article 1.2, note 90

[103] In Goldblatt v Fremantle 1920 AD 123 128, it was held: "Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity."

[104] e.g. Section 2 of the Alienation of Land Act 68 of 1981, and the Credit Agreements Act 75 of 1980, contracts of donation in terms of which performance is due in the future, atenupial contracts and suretyship. See P. **Havenga**, General Principles of Commercial Law, Cape Town, Wetton, Johannisburg 1992, at 98, and **Christie**, note 94, at 119 et seq.

[105] J.P.A. **Swanepoel**, Introduction to Mercantile Law, Butterworth 1984, at 51; **Ng'ong'ola** I, note 2, at 847; **Havenga**, note 104, at 97

### (3) USAGES AND PRACTICES

The Principles extend party autonomy to the incorporation of usages and practices into the contract.[106] In addition, para.(2) provides that the parties are even bound (irrespective of their expressed or implied consent), by the usages that are "widely known and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable". Article 1.8 reflects the rule of Article 9 CISG, but the drafters decided to supplant the requirement for actual or imputed knowledge by the parties, as required in Article 9 para.(2), with the more abstract and vague expression of "where the application of such a usage would be reasonable".[107]

To give an account of the legal position of South African law pertaining to this point, a distinction has to be drawn between usage and custom. The Principles do not give any definition of this term, but in the case of the CISG, it has been held that *usage* and *custom* are not necessarily coincident.[108]

Roman-Dutch law acknowledges that a usage, unlike a custom[109], need not have existed for a long time. A usage can be introduced in a contract even if one of the parties ignores its existence, "provided that it is shown to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain and does not conflict with positive law...or with the clear provisions of the contract."[110] The legal position of South African law is therefore consistent with the provisions of the Principles with respect to usages and practices.

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[106] Article 1.8 para.(1): "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."

[107] The explanations given by the commentators on the Principles can not give any further clarity with respect to this rule either. Regard has to be had to the "particular conditions in which one or two parties operate and/or the atypical nature of the transaction." See comment on Article 1.8., internet, note 90

[108] **Ng'ong'ola** I, note 2, at 846

[109] A custom is a "particular rule which has existed...from time immemorial and obtained the force of law in a particular locality although contrary to, or not consistent with, the general common law of the realm. See **Christie**, note 94, at 182

[110] Golden Cape Fruits Ltd. v. Fotoplate Ltd., 1973 2 SA 642, at 645

## II. FORMATION OF THE CONTRACT

Chapter 2 of the Principles contains 22 provisions relating to the formation of the contract. Concluding a contract requires, as a rule, agreement by consent of two or more parties. Article 2.2 states that such agreement can be established by acceptance of an offer, or by "conduct of the parties that is sufficient to show agreement." Today, the same is accepted in South African law. Whereas older authorities went so far to say that "every contract consists of an offer made by one party and accepted by the other"[111], it was held later that consensus was *normally* evidenced by offer and acceptance.[112] It can be inferred from this statement that a contract may be entered into without an identifiable sequence of an offer followed by an acceptance.

### (1) THE OFFER

Article 2.2 defines an offer as a "proposal for concluding a contract" which is "sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance." The requirement of "intention to be bound" helps to distinguish an offer from a mere invitation to make an offer addressed to other persons. Whereas Article 14 (1) of the CISG, from which the Principles have almost literally taken this definition, indicates when an offer can be considered "sufficiently definite", the Principles do not attempt to define this criterion. Unlike the CISG, the Principles, omitting this definition of "sufficiently definite" expressly recognise the possibility of open price contracts. This can be inferred from Article 2.14 which accepts the idea that a contract can be concluded even if the parties have deliberately left terms open but does not exclude the *essentialia negotii* from this.[113]

This stands in clear contradiction to Roman-Dutch law of sale. Besides *animus contrahendi*, the intention to be bound by the offeree's acceptance[114], Roman-Dutch law requires contracts to have a certain or ascertainable purchase price. In any other case, the contract is deemed invalid. This rule was stated by Corbett JA in the case of *Westinghouse*

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[111] Watermeyer v. Murray 1911 AD 61 70, followed by Reid Bros (SA) Ltd v. Fischer Bearings Co Ltd 1943 AD 232 241

[112] Estate Breet v. Peri-Urban Areas Health Board 1955 3 SA 523 (A) 532E

[113] **Garro**, note 74, at 1169

[114] That is what distinguishes a true offer from any statement.

*Brake & Equipment v Bilger Engineering*[115] and re-affirmed in the more recent decision of *Genac Properties JHB v NBC Administrators CC.* [116]

Articles 2.3 to 2.5 of the Principles deal with withdrawal, revocability and termination of an offer. The Principles, by taking the corresponding provisions from the CISG, maintain the distinction drawn in their Articles 15 and 16 between withdrawal and revocation of an offer. *Withdrawal* can only refer to an offer that has not yet become effective[117], whereas *revocation* relates to an effective offer. "An offer becomes effective when it reaches the offeree."[118] Up to this moment, the offeror can still withdraw his offer, i.e. the withdrawal has to reach the offeree "before or at the same time as the offer."[119] But once an offer has become effective, it can be rendered invalid exclusively by revocation. The general rule that the offeror may revoke his offer at any time[120], however, is permissible only if the offeree has not already dispatched an acceptance[121]. Furthermore, para.(2) of Article 2.4. can also prohibit the offeror from retracting the offer, by holding that an offer cannot be revoked if it contains an indication that it is irrevocable, or "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."

As to termination of an offer, Article 2.5 states that it is "terminated when a rejection reaches the offeror."[122] It follows that, in contrast to Article 2.4 para.(1) where dispatch of an acceptance is relevant, mere dispatch of the rejection by the offeree will not suffice to terminate the offer.

In South African law, no distinction is made between withdrawal and revocation of an offer, and the terms are used simultaneously. Like the

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[115] 1986 2 SA 555 (A) at 574B-C
[116] 1992 1 SA 56 (A) at 576I-577A
[117] Art.2.3 para.(1) and (2)
[118] Article 2.3 para.(1)
[119] Article 2.3 para.(2)
[120] This may be one of the most controversial issues in the context of the formation of contract. Two different basic approaches are followed by civil and common law systems: whereas common law considers an offer to be revocable, the opposite approach is followed by most of the civil law systems. As a compromise, one of the approaches was chosen as the basic rule, whereas the other is accepted in the form of exceptions. See comment on Article 2.4., internet, note 90
[121] Article 2.4 para.(1)
[122] This is, however, only one of the casuses of termination of an offer, others being, for instance, revocation (Article 2.4) or lapse of time (Article 2.7). See comment on Article 2.5., internet, note 90

Principles, South African law allows the offeree to revoke or withdraw his offer at any time before it has been accepted.[123] Yet, there seems to be disagreement as to whether the relevant moment is that of the acceptance becoming effective, or whether the offer ceases to be revocable at some earlier stage[124], such as the dispatch of the acceptance. Even if South African law has copied the doctrine of revocability from English law, it does not seem to follow the *mailbox rule*, for the courts favour the approach that declares the time of acceptance as relevant.[125] It follows that the South African legal position concerning this issue is that an offer can be revoked up to the time of acceptance. The Principles would therefore provide a solution that is slightly more in favour of the offeree than is the case in South African law.

Roman-Dutch law relating to the irrevocability of an offer shows a strong resemblance to the Principles. Even if it is unclear whether the offer becomes irrevocable by a unilateral declaration of the offeror, or whether there has to be agreement between the parties[126], South African law recognises that an offer can become irrevocable for a fixed time on the grounds of the parties' intention. In addition, the offer might be irrevocable on the grounds of estoppel. If the offeree can prove that the offeror, by declaring his offer to be irrevocable, has induced him to rely on this statement to his own detriment, the offeror would be estopped from revoking his offer.[127] South African law also regards rejection of the offer by the offeree as termination of the offer.[128]

**(2) THE ACCEPTANCE**

In Article 2.6 para.(1), an acceptance is defined as "a statement made by or other conduct of the offeree indicating assent to an offer". It is expressly stated that "silence or inactivity does not in itself amount to acceptance". Nevertheless, the drafters of the Principles acknowledge that the parties are perfectly free to agree on silence or inactivity to be expression of acceptance.[129] The legal position in Roman-Dutch law is

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[123] **Christie**, note 94, at 52-3
[124] See **Joubert**, note 93, at 42
[125] See list of the cases by **Christie**, note 94, at 53, footnote 142
[126] Loc.cit.at 53-55
[127] Loc.cit.at 55
[128] Loc.cit.at 51. Other grounds for termination of an offer are, for instance, effluxion of fixed time, lapse of reasonable time, loss of contractual capacity, withdrawal of revocation and implied rejection by counter-offer.
[129] Comment on Article 2.6, internet, note 90

consistent with the Principles, since it recognises that one party cannot, without the consent of the latter party, take the offeree's silence as acceptance.[130] This implies that if the other party agrees on silence amounting to acceptance, this is considered valid.

Para.(2) and (3) of Article 2.6 deal with the acceptance becoming effective. The basic rule in para.(2) is that it becomes effective "when the indication of assent reaches the offeror".[131] However, the offeree can also give his consent by performing an act due to practices established between the parties or usage. The time when the acceptance becomes effective would then be the time of performance of the act in question. In South African law, there exist several theories as to the time when an acceptance becomes effective. A survey of the cases shows that the prevailing one is the *information theory*[132] which provides that the contract comes into being at the time and place where the offeror learns of the acceptance. It has to be stressed, however, that this rule is subject to some exceptions that are expressed or implied by the offeror.[133] In addition, there are special rules for offers sent by post, where the so-called *mail box* or *expedition theory* taken from English law is applied.[134] The offerer is deemed to have impliedly chosen communication of the acceptance through post, and therefore the contract is considered to have been concluded at the time of posting.[135] These two theories applied in South African law are very much criticised for not being suitable to the modern means of telecommunication.[136] The *reception theory*, as followed by the Principles, would be more advantageous with respect to this issue.

As a consequence, the solution provided by the Principles departs clearly from the legal position taken by South African law, but it can be assumed that it would constitute a clear improvement of the matter.

An offer has to be accepted within the time fixed by the offeror, or within a reasonable time if the offeror failed to do so.[137] Further rules on

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[130] Collen v. Rietfontein Engineering Works 1948 1 SA 413 (A) 422
[131] The risk of transmission is therefore placed on the offeree. See comment on Article 2.6., internet, note 90
[132] See list of authorities in **Joubert**, note 93, at 46, footnote 82
[133] loc.cit. at 47
[134] **Ng'ong'ola** I, note 2, at 851
[135] **Joubert**, note 93, at 48
[136] **Ng'ong'ola** I, note 2, at 851
[137] Article 2.7

the calculation of such a fixed period of time with regard to the different means of communication are established in Article 2.8. An acceptance that reaches the offeror after the fixed period of time is without effect and may be disregarded by the offeror. However, a late acceptance can still be effective if the offeror "accepts" it despite the delay and, without undue delay, gives notice to the offeree. The underlying idea is that the offeror should be given the right to hold the offeree to the contract.[138] In the event that the acceptance only reaches the offeror late due to an unexpected delay in transmission, the drafters of the Principles held that the offeree, bearing alone the risk of transmission on the grounds of Article 2.6 para.(2), deserved protection, with the consequence that his acceptance is a priori considered effective.[139] This differs clearly from the position of Roman-Dutch law, for an offer that is not accepted in time lapses.[140] As there is nothing the offeree could accept, his conduct would be construed as a new offer that the offeror is free to accept or reject.

Article 2.11 relates to the issue of a modified acceptance: "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." However, if those modifications do not "materially alter the terms of the offer", it is held that the reply still forms an acceptance", unless the offeror objects to the discrepancy".[141] The provision of Article 2.11 on counter-offers was drafted according to Article 19 CISG, but the drafters refrained from taking over para. (3) which gives a list of terms that may "materially alter the terms of the offer".[142] UNIDROIT, by omitting such a list, wished to adopt a more flexible and favourable approach to the issue.[143] However, the rule in Article 19 para.(3) was at least clear, whereas the Principles may leave room for long controversies on this matter as to whether a change in the acceptance amounts to a material modification in the sense of Article 2.11 para.(2) or not.

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[138] see comment on Article 2.9, internet, note 90

[139] The offeror can nevertheless insist on the acceptance being late and thereby avoid conclusion of the contract. See Article 2.9 para.(2) at the end.

[140] Dietrichsen v Dietrichsen 1911 TPD 486 and Laws v. Rutherford 1924 AD 261

[141] Article 2.11 para.(2)

[142] Article 19 para.(3) CISG named, for instance, terms relating to the price, payment, quality and quantity of the goods, place and time of delivery, etc.

[143] **Garro**, note 74, at 1167-8

The concept of a counter-offer which impliedly rejects the initial offer, is not unknown to South African law, which also accepts that there are some exceptions to the main rule.[144] There does not seem to be a fixed range of exceptions, but as the provision of the Principles (as it has been demonstrated before) only gives a vague rule without strict criteria, the two legal positions can be considered very similar.

### (3) MISCELLANEOUS

There are, compared to the CISG, some new rules in the Principles that the drafters considered useful in the field of international contracts. Article 2.12, for instance, introduces the notion of *writings in confirmation* into international trade law. If one of the parties to a contract sends, within a reasonable time after the conclusion of the contract, a writing in confirmation that contains new terms, these will become part of the contract, "unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy."

Furthermore, the Principles provide liability for losses caused to a party imposed upon parties who negotiate or break off negotiations in bad faith.[145] This provision was included in the Principles in order to guarantee healthy competition among business people.[146]

In Articles 2.19 to 2.22, the Principles deal with standard terms - the definition of which is given in Article 2.19 para.(2). It would, however, go far beyond the scope of this essay to examine in detail the differences between South African law and the Principles in this field of law.

## III. VALIDITY OF THE CONTRACT

Unlike the CISG[147], the UNIDROIT Principles contain a chapter on the substantive validity of contracts the regulation of which reflects public policy concerns of such magnitude that no international convention on contract law has ever dared to include them within their scope of application.[148] One of the most obvious difficulties is that there are differing domestic conceptions of the classification of the cause of

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[144] Stephen v. Pepler 1921 EDL 70 and Parrow v. Schneider 1951 3 SA 183
[145] Article 2.15
[146] Comment on 2.15, internet, note 90
[147] In Article 4 (a) of the CISG, its application to the validity of the contract was expressly excluded.
[148] **Garro**, note 74, at 1173

action that vary between contractual remedies for non-performance and avoidance of the contract as a whole. The drafters of the UNIDROIT Principles decided to discard the substantive invalidity of the contract in favour of the contractual remedies,[149] in view of maintaining the contract. This is indicative of developments made in the law of international trade that focus on the preservation of the contract, as the inherent cost of returned or exchanged goods/currencies is undesirable in the international arena.

Accepted reasons in the Principles for the invalidity of the contract are: gross disparity;[150] the classical defects of consent, namely fraud;[151] threat[152] and relevant mistakes.[153] In the latter case, attention has to be drawn to Article 3.7, which prevents the party from avoiding the contract if "the circumstances on which the party relies afford, or could have afforded, a remedy for non-performance". Likewise, impossibility of performance *ab initio*, as well as the seller's lack of title to the property, do not affect the validity of the contract.[154]

**(1) MISTAKE**

In order to provide a right to avoid the contract, the mere existence of a mistake at the time of conclusion of the contract does not suffice. There must be a serious mistake that must have been of such importance that a reasonable person in the same situation than the party would not have concluded the contract as such.[155] Subpara.(a) of para.(1) adds some conditions regarding the party other than the mistaken party. It must either have "made the same mistake, or caused the mistake, or knew or ought to have known of the mistake" and it must have been "contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error". In addition, the mistaken party has to prove that it did not act in a grossly negligent way itself, for it would be unfair to the other party to allow avoidance of the contract in this case.[156] The same

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[149] loc.cit. at 1174
[150] Article 3.10
[151] Article 3.8
[152] Article 3.9
[153] Articles 3.4 to 3.7
[154] Article 3.3
[155] See Article 3.5; the provision thus suggests a combined objective/subjective approach to assess the importance of the mistake in question.
[156] Article 3.5 para.(2)(b). See comment on Article 3.5, internet, note 90

applies if the mistaken party has either assumed the risk of mistake, or where the circumstances are such that the risk should be borne by it.[157]

The requirements for avoidance of the contract on the grounds of mistake in South African law are the same: the mistake must have been material[158], which means that if the party had been aware of the mistake it would not have concluded the contract[159], as well as reasonable and justifiable.[160] It becomes clear from several judgments that even if those two requirements are met a mistaken party cannot escape liability without the other party either having caused or having had knowledge of the mistake.[161] However, if the party that wishes to escape the contract has been mistaken due to its own fault, it is not considered entitled to rescind the contract even if it can establish that the other criteria of avoidance are fulfilled.[162] In the case of a common error, which, under the Principles, gives a right to avoid the contract, South African law draws the following distinction. Where there is a mistake leading the parties to conclude a contract that is impossible of performance, the contract is considered void *ab initio*. But in principle, a common mistake of law has no effect on the validity of the contract[163]. It only gives the parties a right to rectify the contract. However, the general ideas of South African law and the Principles as regards avoidance of contract for mistake seem to be consistent.

**(2) THREAT**

Relating to threat, the position of the Principles can be reconciled with the legal position of South African law as well.

Threat itself is not sufficient to entitle the threatened party to avoidance of the contract. There is broad consensus as to the requirements of imminence and unlawfulness of the threat. According to Article 3.9 of the Principles, the threat must have been unjustified and of so imminent and serious a character that the threatened party was left no reasonable

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[157] see Article 3.5 para.(2)(b)
[158] National and Grindlays Bank Ltd v. Yelverton 1972 4 SA 114 117D
[159] See the wording of Article 3.5
[160] See the list of cases given by **Joubert**, note 93, at 83
[161] Regarding knowledge by the other party, see Diedericks v. Minister of Lands 1964 1 SA 49 (N) 56; as to causation of the mistake by the other party, see Khan v. Naidoo 1989 3 SA 724 (N)
[162] See the examples given by **Christie**, note 94, at 354
[163] loc.cit. at 369, and the cases cited in footnote 66

alternative but to conclude the contract.[164] Such threat should be established by applying an objective standard while taking into account the circumstances of the individual case.[165]

In South African law, however, it is not clear whether the approach applied to evaluate the reasonableness of fear should be an objective or subjective one. A review of the cases reveals that there are judgments in support of both theories. Some refer to the "mind of a person of ordinary firmness"[166] or "reasonable fear"[167], whereas others follow the subjective theory which held that there was no universal objective standard.[168]

As to the object of threat, it seems to be clear in South African law today that the threat must be exerted towards a party or his family. In case of threat to property only, there can be a right to rescind the contract, but there is a requirement of protest.[169] As a result, the contract is not deemed void *ab initio*, but voidable at the option of the innocent party.[170]
The language of Articles 3.8 and 3.9 also speaks in favour of such a conclusion. By stating that a party "may" avoid the contract. This suggests that the threatened party can also opt in favour of its existence. But the Principles are much broader as to the object of the threat. It suffices that threat affects purely economic interests or reputation of the parties.[171]

**(3) FRAUD**

In the case of fraud, unlike mistake and threat, such conduct is considered so reprehensible in nature that it is a sufficient ground for avoidance by itself without the need for the presence of any additional conditions.[172]According to the Principles, it therefore suffices to establish that the fraudulent non-disclosure of circumstances, which, according to reasonable commercial standards of fair dealing, should

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[164] Article 3.9
[165] Comment on Article 3.9, internet, note 90
[166] White Bros. v. Treasurer-General (1883) 2 SC 322 351
[167] Kruger v. Sekretaris van Binnelandse Inkomste 1973 1 SA 394 (C) 397H
[168] Block v. Dogon Dreier & Co. 1910 WLD 330, and Savvides v. Savvides 1986 2 SA 325 (T)
[169] Kapp v. TC Valuta 1975 3 SA 283 (T)
[170] **Christie**, note 94, at 345-6
[171] Comment on Article 3.9, internet, note 90
[172] Comment on Article 3.8, internet, note 90

have been revealed, has induced the defrauded party to enter in the contract.[173]

In South African law, a party who has been induced to conclude a contract by the misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, intended to induce the innocent party and eventually did so.[174] However, if the misrepresentation was fraudulent the contract is never treated as binding on the innocent party[175] and the innocent party is even entitled to damages.

The legal positions as to fraud seems to be consistent, as both the Principles and South African law consider fraud by one party and thereby inducing the other to enter into a contract as being a legal ground for avoiding the contract without the need for anything more. The fraudulent party is in both cases liable for damages.[176]

## IV. PERFORMANCE OF THE PARTIES

Chapter 6 of the Principles dedicates 20 articles to the issue of performance. Articles 6.1.1 to 6.1.17 describe the way in which performance is to be rendered, whereas Articles 6.2.1 to 6.2.3 deal with hardship.

South-African law, for the most part, seems to be consistent with the Principles' provisions on performance.

### (1) PLACE OF PERFORMANCE

Whereas the Principles provide a clear rule in this respect, the position of South African law appears rather confusing.

The Principles' rules are based on the assumption that, in most cases, the place of performance will be determined by an express term of the contract or will at least be determinable from it. As a consequence, they

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[173] See Article 3.8

[174] Uni-Erections v. Continental Engineering 1981 1 SA 240 (W) 245E which is in line with several older authorities listed by **Christie**, note 94, at 301 note 1

[175] Estate Schickerling v. Schicklering 1936 CPD 269 274-6

[176] Article 3.18

provide supplementary rules for those cases where the contract remains silent on the matter.
Article 6.1.6 para.(1) of the Principles lays down the general rule that a party is to perform its obligations at its own place of business. Only in the case of monetary obligations is the obligor to perform at the obligee's place of business.

In South African law, the place of performance is the one which has been agreed upon by the parties, either expressly or tacitly. Thus customs silently incorporated in the contract may serve as a guideline for the determination of the proper place of performance.[177] In the absence of any designation, the place of performance would depend entirely upon the circumstances.[178] Where specific movables have to be delivered, tender to the obligee has to be made at the place where they were at the time of the conclusion of the contract. Things still having to be manufactured or produced are to be delivered at the place of manufacture or production. Unascertained things, as well as money debts, are subject to the a legal regime which is not easy to discern. There is no room for a general or residual rule,[179] since Roman-Dutch authorities are conflicting on this point, and many differing circumstances have to be taken into account. The only ascertainable rule used to be that the creditor had to seek out the debtor when they had different domiciles. When they had the same domicile, it was on the debtor to seek out and pay the creditor.[180] Today the question as to where performance has to take place seems to be closely linked to the concept of mora debitoris. If a time has been fixed for performance the debtor has to seek out the creditor in order to avoid falling into mora debitoris. But where no time has been expressly or tacitly included in the contract, it is upon the creditor to go to the debtor's place.[181]

If the Principles were applied in transactions between South African and citizens from another country they would provide a much clearer rule without restraining the parties' freedom to make any other arrangement.

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[177] Goldfields Confectionary and Bakery (Pty.) Ltd v Norman Adam (Pty) Ltd 1950 2 SA 763 (T)
[178] **Joubert**, note 93, at 281
[179] **Christie**, note 94, at 479
[180] **Joubert**, note 93, at 281 and 282
[181] Taboryski v Schwarzer and Aperion NO 1917 WLD 152; Goldfiels Confectionary and Bakery Co. (Pty) Ltd v Norman Adam (Pty) Ltd 1950 2 SA 763 (T)

**(2) TIME OF PERFORMANCE**

Article 6.1.1 of the Principles distinguishes three situations. Where the contract itself stipulates a precise time or period of time or makes it at least determinable, performance has to be rendered at this time or at any time within that fixed period. In the absence of any fixed or determinable time of performance, performance is due within a reasonable time after the conclusion of the contract in the circumstances.

This is very similar to South African law, which underlines that determination by the parties of the time of performance is predominant. If there is no such agreement, performance will be due within a reasonable time as well.[182]

**(3) EARLIER PERFORMANCE**

The two systems do not share the same approach. The Principles state that "the obligee may reject an earlier performance unless it has no legitimate interest in doing so"[183]. Thus the basic rule is that the debtor is not entitled to tender his performance before maturity. Since the Prinicples are based on the idea that the time set for performance is geared to the obligee's activities earlier performance may cause him inconvenience and are deemed to constitute non-performance of the contract.[184] In exceptional cases, the creditor may not be allowed to refuse earlier performance. If his legitimate interest in timely performance does not become apparent to the debtor or if the earlier performance does not cause him any significant harm, he will have to accept such performance.[185]

In South African law, however, future dates for performance are usually deemed fixed for the benefit of the debtor. Whenever there is doubt as to whether a time clause in a contract operates in the interest of the creditor or the debtor it is assumed to be in the interest of the debtor.[186] It follows as a rule that the debtor can anticipate his performance.[187] An exception occurs only where the future date has been fixed entirely or

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[182] Mackey v Naylor 1917 TPD 530 537-8; Nel v Cloete 1972 2 SA 150(A) 169G
[183] Art. 6.1.5 para.(1)
[184] Comment by UNIDROIT on Article 6.1.5, internet, note 90
[185] ibid
[186] Bernitz v Euvrard 1943 AD 595
[187] Western Bank Ltd v Hamond 1975 2 SA 625 (T); Dodd v Bester 1984 1 SA 355 (D); Chandony v Fisheries Development Corporation of South Africa 1985 4 SA 700 (N)

partly for the benefit of the creditor.[188] In this case, the legal position is similar to the position under the Principles.

**(4) PARTIAL PERFORMANCE**

Both, the Principles and South African law, generally consider partial performance as a breach of performance and entitle the obligee to refuse an offer by the obligor to perform in part at the time when performance is due.[189] The Principles contain limits to this rule insofar as the obligee is not entitled to reject partial performance if his legitimate interest in receiving full performance is not apparent and where temporary acceptance will not cause any significant harm to him.[190]

Similarly, South African law accepts the idea that there are cases where the obligee is not authorised to reject performance in part. Only if the performance is indivisible there is a defective performance allowing the obligee to resort to the available remedies.[191] In the case of a divisible performance, the defence that the contract has not been performed can only be raised in respect of the part of the performance that has not been fulfilled.[192] Yet this does not seem to apply to a performance which consists in the payment of money. In *Shapiro v. Berry*,[193] the court held that the creditor was not obliged to accept payment in instalments of a debt that is payable in full. He can legitimately refuse the tender without prejudicing his right to full performance.

**(5) ORDER OF PERFORMANCE**

With respect to order of performance, the Principles and South African law show a very similar approach. As a basic rule, the parties to a contract are bound to render their performances simultaneously.[194]

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[188] Bernitz v Euvrard 1943 AD 595

[189] Art. 6.1.3 of the Principles, **Joubert**, note 93, at 232 and **Christie**, note 93, at 449; In relation with the payment of money, see Shapiro v Berry 1933 WLD 112

[190] Comment by UNIDROIT on Article 6.1.3, internet, note 90; This is a consequence of the general principle of good faith and fair dealing enunciated in Article 1.7.

[191] Kyte v McLeod (1891) 6 EDC 43; Scheinfeld's Trustee v Murray & Co. 1920 CPD 87

[192] Jamieson v Elsworth 1915 AD 115; SA Wood Turning Mills (Pty) Ltd v Price Bros (Pty) Ltd 1962 4 SA 263 (T) u.a.

[193] 1933 WLD 112

[194] Art. 6.1.4 para.(1) of the Principles; in South African law this is referred to as the *principle of reciprocity*.

In South African law, there is a presumption of the common intention of the parties that in bilateral or synallagmatic contracts neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations.[195]

The Principles state the same in para.(1), but they obviously assume that, as a rule, either the parties will make specific arrangements or that in practice much will depend on usages. A distinction is drawn between those cases in which performances can be rendered simultaneously[196] and in which performance of one party requires a period of time.[197] In the latter case, the Principles state that the performing party has to perform first, but recognise the fact that circumstances may frequently indicate the contrary.

The remedies available to the parties are identical albeit their differing designations. Art. 7.1.3, which has to be read together with Art. 6.1.4, allows either party to withhold performance unless the other party tenders its performance. This rule corresponds to the civil law concept of *exceptio non adimpleti contractus*[198] which is applied under South African law.[199] The idea is that one party can delay its performance until the other has performed.[200] It follows that if the creditor claims performance, the debtor can raise the defence of *exceptio non adimpleti contractus* and will not be condemned unless the creditor has proved that he has performed, is prepared to perform or is excused from performance.

**(6) PAYMENT BY CHEQUE OR OTHER INSTRUMENT**

The rules in this respect seem to be compatible in the two compared systems.

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[195] Hauman v Nortje 1914 AD 293 300; Wolpert v Steenkamp 1917 AD 493 499; Nesci v Meyer 1982 3 SA 498 (A) 513 F

[196] para.(1) of Art. 6.1.4

[197] para.(2) of Art. 6.1.4

[198] Comment by UNIDROIT on Article 7.1.3, internet, note 90

[199] Roman-Dutch and modern law of South Africa have accepted this principle of Roman law. See **Joubert**, note 93, at 230 and note 55.

[200] The defence can only be raised where the performances of the parties are reciprocal and the one is prerequisite for the other. This corresponds to the requirements enunciated in Art. 6.1.4 of the Principles.

The Principles state that payment of a monetary debt may be made in any form that is usual at the place of payment.[201] As a consequence, a debtor can freely choose how to settle his debt, as long as he makes use of a medium of payment that is used in the ordinary course of business at the place for payment.

In South Africa, however, a creditor who is entitled to payment in legal tender can refuse to accept payment by means of an instrument which would oblige him to collect payment from another.[202] But the two rules seem to be different only at first sight, since, in practice, they will often lead to the same result. A creditor in South African law is free to accept such an instrument of payment, and owing to the tremendous use made of cheques in modern commercial life, for example, the courts would very easily come to the conclusion that the creditor has agreed to accept a cheque in payment.[203] They will do so if this can somehow be inferred from the contract. In the absence of anything signifying the contrary, only some slight indication in the contract or evidence will generally suffice to infer or imply that payment of the creditor can be effected by cheque, as this has become a widely used and recognised medium of payment.[204] In other cases, when payment has to be made in legal tender a tender of payment by cheque, if objected by the creditor, is not valid.[205]

As to discharge of the money debt, it is held, both in the Principles under Art. 6.1.7 para. (2) and in South African law, that acceptance of a cheque is presumed to be on condition that it will be honoured.[206]

**(7) IMPUTATION OF PAYMENTS**

In both systems, the rules relating to the imputation of payments in those cases where an obligor owing several monetary obligations to the same obligee pays a sum which can only satisfy part of the entire debt, are widely identical. This may be a consequence of the fact that Article 6.1.12 of the Principles was inspired by generally recognised principles

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[201] Art. 6.1.7 para.(1)

[202] Jochelson, Yamey & Co. v Mahomed 1916 TPD 233; Schneier and London v Chapman 1917 TPD 497; Sultan Trust v Thaker 1935 NPD 108; Esterhuyse v Selection Cartage (Pty) Ltd 1965 1 SA 360 (W)

[203] Schneier and London v Chapman 1917 TPD 497

[204] Esterhuyse v Selection Cartage (Pty) Ltd 1965 1 SA 360 (W) 361

[205] ibid

[206] Tregellas v Hardy & Co. 1921 CPD 352; Milner v Webster 1938 TPD 598; Bold v Coooper 1 SA; see also **Joubert**, note 93, at 281 note 67

and that South African law on this question has remained virtually unchanged since Roman times.[207]

In general, the obligor is offered the possibility of stipulating the debt to which he is making full or partial payment.[208] The Principles add that any expenses and interest due have to be discharged before the principal.[209] In South African law, this question arises only where there has been no allocation of the debt and where the payment has to be appropriated according to the common law rules.[210]

If the debtor is silent on the matter of allocation, the creditor may, within a reasonable time after payment, choose the obligation to which he imputes the payment received.[211] The Principles require that the elected obligation must be due and undisputed.[212] In South African law, the creditor's choice is subject to similar limitations. The courts have held that the obligee must act equitably, and must not appropriate the payment to a disputed debt, or one not yet due, or a natural obligation not enforceable at law.[213] There is a slight difference insofar as, in South African law, the creditor's appropriation, to be effective, must be made before or at the time of payment, to enable the debtor not to make it upon the creditor's terms.[214]
It does not really become clear why this requirement should be upheld, since the debtor can easily avoid this consequence by appropriating the payment himself beforehand.

Failing imputation by the debtor and the creditor, the payments are appropriated according to the same criteria, i.e. an enforceable debt before an unenforceable debt; an unsecured before a well-secured debt; a more burdensome before a less burdensome, and an older debt before a younger debt. The only difference is that, under the Principles, this list of criteria is of exclusive character and has to be strictly followed within the given order, whereas in South African law, those criteria seem to be of equal value. If none of the proceeding criteria apply, i.e. if all debts are

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[207] **Christie**, note 94, at 475
[208] Art. 6.1.12 para.(1), and in South African law, Watermeyer's Executors v Watermeyer's Executor 1870 B 69
[209] Art. 6.1.12 para.(1)
[210] for authority see **Joubert**, note 93, at 284 note 99
[211] Art. 6.1.12 para.(2)
[212] Atz. 6.1.12 para.(2)
[213] See list of the cases in note 94 in **Joubert**, note 93, at 284
[214] Bulleid v Campbell (1904) 9 HCG 347 352

of the same date and equal in all other respects, the payment must be applied so as to discharge all debts proportionally.[215]

**(8) HARDSHIP**

South African law attaches considerable importance to the concept of *pacta sunt servanda*. It does, therefore, not give a party the right to demand modification of the contractual relationship in the face of an unforeseen change of circumstances. The fact that *vis maior* has made it uneconomical for a party to carry out its obligations does not mean that performance has become impossible for the debtor.[216] As a consequence, the party is still bound to perform in the way it has been agreed upon in the contract.[217] In cases of a change of circumstances falling short of supervening impossibility, Christie assumes that it may often be possible to prove a tacit term or condition[218], or that such situations may be avoided by including in the contract a force majeure, hardship or intervener clause, or to refer to arbitration.

The Principles, on the other hand, offer the disadvantaged party the possibility of requesting renegotiations from the other party. However, this is subject to very strict conditions. It is made clear in Article 6.2.1 that the party is still bound to perform its obligation.[219] Only where the supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished,[220] can there be hardship in the sense of section 6.2 of the Principles. Additionally, the requesting party will have to prove that (1) the events occured or became known to it after the conclusion of the contract, (2) that at that time those events could not reasonably have been taken into account by it and (3) were beyond the control of it and (4) that this risk was not to be assumed by the disadvantaged party. In this case, the disadvantaged party can without undue delay request renegotiations. If the parties fail to reach an

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[215] The relevant authority in South African law is Wolhuter v Zeederberg (1885) 3 HCG 437; in the Principles, the rule is stated at the end of para.(3) of Art. 6.1.12.
[216] This would mean that he would be excused from liability.
[217] See, for instance, Yodaiken v Angehrn & Piel 1914 TPD 254 260; Compagnie Interafricaine de Travaux v South African Transport Services 1991 4 SA 217 (A)
[218] note 94, at 526
[219] This flows from the general principle of the binding character of the contract, Article. 1.3
[220] see Article 6.2.2

agreement they can resort to the court.[221] If the court holds that there is indeed hardship it is vested with the power to adjust the contract with a view to restoring its equilibrium or to terminate it.[222]

The strict approach of South African law is not appropriate to international transactions where unforeseen changes of circumstances can easily occur due to political reasons, such as war or embargos. Applying the Principles would provide a more flexible solution. Since Article 6.2.2 imposes very strict conditions, it is made sure that the parties could not abuse this possibility of avoiding the binding force of the contract.

## V. Remedies against Breach Of Performance

Non-performance is defined in Article 7.1.1 as being the "failure by a party to perform any of its obligations under the contract, including defective or late performance". This means that the concept includes all forms of defective performance as well as complete failure to perform. Furthermore, Article 7.1.1 comprises both, non-excused and excused non-performance.[223]

Non-performance by a party is excused in terms of the Principles if it was due to an impediment beyond the control of the failing party.[224] The party must prove that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome it or its consequences. The concept of *force majeure* has as its only consequence that the non-performing party is excused from liability in damages. It does not restrict the other party's right to terminate the contract if the non-performance is fundamental, or to withhold performance.[225]

The legal position of Roman-Dutch law is in accordance with this approach. The authorities are clear insofar as a party is discharged from

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[221] Art. 6.2.3 para.(3)
[222] Art. 6.2.3 para.(4)
[223] see comment by UNIDROIT on Article 7.1.1 internet, note 90
[224] Article 7.1.7 para.(1)
[225] Article 7.1.7 para.(4)

liability if it is prevented from performing its contract by *vis major* or *casus fortuitus*.[226]

If there is a breach of performance, the remedies provided for by the Principles are compatible with the traditional principal remedies for breach of contract in Roman-Dutch law.
Specific performance is the primary remedy in both cases, and there is possibility of cumulating various remedies provided that the selected remedies are not inconsistent and the injured party is not overcompensated.[227] Other important remedies are cancellation of the contract and damages.

**(1) SPECIFIC PERFORMANCE**

Both systems acknowledge that the disadvantaged party is entitled to claim specific performance.[228] In *Farmers Co-op Society v Berry*,[229] the judge held that it "is against conscience that a party should have a right of election whether he would perform his contract or only pay damges for the breach of it. The election is rather with the injured party subject to the discretion of the court". The Principles, as opposed to common law systems that allow enforcement of non-monetary obligations only in special circumstances,[230] are compatible with the South-African approach. However, under both systems the right to claim specific performance may, as an exception, be excluded. The Principles provide in Art. 7.2.2 that a party may not obtain specific performance if performance is impossible, unreasonably burdensome or expensive, of exclusively personal character,[231] or where the party entitled to performance may reasonably obtain performance from another source. The last reason is not expressly accepted as grounds for refusing specific performance in South African law, but would be contained in the refusal

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[226] Peters, Flamman and Co. v Kokstad Municipality 1919 AD 427 434; Landmark v Van der Walt (1885) 3 SC 300

[227] **Christie**, note 94, at 577; this rule is not clearly expressed in the Principles, but it can be inferred from the comment on Article 7.4.2 where it is said that the aggrieved party must not be enriched by damages for non-performance.

[228] It has to be noted that, as opposed to the CISG where specific performance was only a discretionary remedy that the court could refuse, specific performance is considered obligatory under the Principles.

[229] 1912 AD 343 350

[230] see comment by UNIDROIT on Article 7.2.2, internet, note 90

[231] Enforcement of performance would interfere with the personal freedom of the obligor and quality of performance may be impaired. This makes clear that the exception does not apply to obligations undertaken by companies. See comment by UNIDROIT on Art. 7.2.2, internet, note 90

for grounds of undue hardship. Another reason for refusing specific performance is the failure of the injured party to require performance within a reasonable time after it has become aware of the non-performance.

In South African law, too, it is settled that, in accordance with the maxim *lex non cogit ad impossibilia* specific performance may not be ordered if compliance with it would be impossible.[232] Undue hardship is also an acknowledged reason for refusing specific performance[233], i.e. where it would operate unreasonably hard on the defendant or where specific performance would induce injustice or would be inequitable. Specific performance will also not be granted in the case of contracts for personal services because of the continuing nature and personal relationship involved.[234]

Both, South African law and the Principles, award damages or the right to cancellation of the contract to the injured party if the defendant fails to comply with an order for specific performance.[235]

**(2) CANCELLATION OF THE CONTRACT**

The positions in the Principles and in South African law concerning termination of the contract can easily be reconciled.

Under the Principles, termination of the contract is available to a party under three different situations: if the failure of the other party to perform an obligation under the contract amounts to a *fundamental* non-performance;[236] in the event of anticipatory non-performance of a fundamental character;[237] and, in the case of delay, if the additional period of time allowed to the failing party under Article 7.1.5 has expired without the performance having been rendered.[238]

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[232] Le Roux v Odendaal 1954 4 SA 498 (N)
[233] Haynes v Kingwilliamstown Municipalities 1951 2 SA 371 (A)
[234] **Christie**, note 94, at 584-5
[235] Article 7.2.5 of the Principles; authorities in South African law: Ras v Simpson 1904 TS 254 256; Clark v Cloete 1944 WLD 134. The judges held that the plaintiff may already include an alternative claim for cancellation and damages in the action in which he claims specific performance.
[236] Article 7.3.1 para.(1)
[237] Article 7.3.3
[238] Article 7.3.1 para.(3) in conjunction with Article 7.1.5 para.(3)

The decision whether a party should be given the right to terminate the contract depends upon the weighing of a number of considerations. On the one hand, termination may cause serious detriment to the non-performing party, since it may not be able to recover its expenses. On the other hand, the aggrieved party must have a right to rescind the contract if performance is rendered so late or of such bad quality that it is of no use it for its intended purposes. A second aspect is the behaviour of the non-performing party making it unreasonable for the aggrieved party to be compelled to the execution of the contract.[239]

The criteria as to when a failure to perform amounts to a fundamental non-performance under the Principles, are given in para.(2) of Article 7.3.1. They are intended to serve as a guideline only. The non-performance is deemed fundamental if it substantially deprives the other party of what it was entitled to expect under the contract.[240] Furthermore, the contract may be such that *strict* performance may be of essence,[241] for example, in the case of sales of commodities. If the non-performance is intentional or reckless, this should also allow the aggrieved party to terminate the contract.[242] In the event of performance in instalments, the non-performance may give the aggrieved party reason to believe that it cannot rely on the future performance. In this case, the party also has a right to rescind the contract.[243]

In South African law, except for an express forfeiture clause in the contract, a party is entitled to cancel the contract under the same circumstances as provided for by the Principles. But even if the basic rules are easy to name, it is quite hard to discern their exact ambit, since the concepts of *mora* and *material breach* have only been gradually developed by the courts which still do not manage to provide clear criteria for them.

First, in case of cancellation for material breach of performance, it was suggested that the breach was to be deemed material if the foundation of the contract was destroyed,[244] or where the effect of the breach was such

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[239] Comment by UNIDROIT on Article 7.3.1, internet, note 90
[240] para.(2)(a)
[241] para.(2)(b)
[242] para.(2)(c)
[243] para.(2)(d)
[244] Aucamp v Morton 1949 3 SA 611(A) 620

as to render it purposeless to carry on under the contract.[245] The modern approach seems to be to judge upon the question whether the occurred breach goes to the *root of the contract.*[246] This coincides with the concept of *fundamental breach* of the Principles.

Second, a party can cancel the contract in the event of mora if time is of the essence of the contract. This means that the failure to perform is regarded as a breach of such magnitude as to justify the other party in cancelling the contract. If time is not of the essence of the contract, the creditor would be confined to a claim for payment or specific performance, damages or mora interests.[247] However, under the pressure of commercial necessity, South African law has departed from this strict point of view and gives the creditor the possibility of making time of the essence by simple notice even when the contract does not contain a time for performance.[248]

Article 7.3.3 extends the aggrieved party's right to termination to those cases where the other party's performance is not yet due but where it is clear that there will be a fundamental non-performance. The most typical case is the party's declaration that it will not perform the contract. A suspicion, even a well-founded one, is not sufficient, there has to be clarity on this fact. If the party has only reason to believe but cannot establish with certainty that there will be a fundamental non-performance, it may, in accordance with Article 7.3.4, demand adequate assurance of due performance from the other party. Where this assurance is not provided within a reasonable time, the demanding party is equally entitled to cancel the contract.

As under the Principles, the innocent party can cancel the contract and sue for damages even before performance is due in the event of an anticipatory breach or repudiation.[249] But even if, in accordance with the *doctrine of election*, the innocent party is free to choose between enforcement of the contract and its cancellation,[250] it has to do so within a reasonable time, otherwise it will be estopped from doing so.

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[245] O'Connell v Flischman 1948 4 SA 191(T) 194
[246] Oatorian Properties (Pty) Ltd v Maroun 1973 3 SA 779(A) 784
[247] **Christie**, note 94, at 564
[248] Breytenbach v Van Wijk 1923 AD 541 549
[249] Geldenhuys and Neethling v Beuthin 1918 AD 426
[250] Segal v Mazzur 1920 CPD 634 644-5

The right to terminate the contract, under both systems, is exercised by simple notice to the other party without having to refer to the court.[251] The notice must be clear and unequivocal, and takes effect from the time when the non-performing party receives it.[252] Under the Principles, the aggrieved party will, however, lose its right to terminate the contract if it does not give notice to the other party within a reasonable time after it has or ought to have become aware of the non-performance.[253] What is reasonable depends upon the circumstances.[254]

Termination of the contract releases either party from their respective primary obligations.[255] The contract is not set aside *ab initio* as it is the case when there is rescission of the contract, but the reciprocal primary obligations of the parties are transformed into secondary ones. In this sense, either party can claim restitution of what it has supplied to the other, provided that such party concurrently makes restitution of whatever it has received.[256] Liability for damages is not affected either. Thus, the aggrieved party is not deprived of its right to claim damages in accordance with the rules laid down in section 4 of chapter 7.[257] Furthermore, any contract provision which is to operate even after termination is still valid and can be enforced.[258]

Since there are no profound differences with respect to cancellation in both, the Principles and South African law, applying the Principles would, in sum, not lead to any fundamental changes but could provide useful clarity to the confusing rules of South African law.

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[251] Article 7.3.2 para.(1); Swart v Vosloo 1965 1 SA 100 (A) 105G; Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd 1995 3 SA 836 (W) 841G
[252] Comment by UNIDROIT on Article 7.3.2, internet, note 90; for South African law, see previous note
[253] Article 7.3.2 para.(2)
[254] Comment by UNIDROIT on Article 7.3.2 p.4
[255] Article 7.3.5 para.(1)
[256] Article 7.3.6 para.(1)
[257] Article 7.3.5 para.(2); Under South African law, the non-performing party is still bound to pay damages as well, see Atteridgeville Town Council v Livanos 1992 1 SA 296 (A) 303I - 306C
[258] Article 7.3.5 para.(3)

**(3) DAMAGES**

Any non-performance except where it is excused under the Principles[259] gives the other party a right to damages either exclusively or in conjunction with any other remedies.[260] The right to damages arises from the sole fact of non-performance, which means, in particular, that it is not necessary for the aggrieved party to prove that the non-performance was due to the fault of the non-performing party. It suffices to establish that it has not received what it was promised. The right to damages may also arise during the pre-contractual period in the event of mistake, fraud, threat, gross disparity[261] or in case of negotiations in bad faith[262] or breach of the duty of confidentiality.[263]

The provisions of 7.4.2 to 7.4.4 embody the principle of limitation of the recoverable harm. The aggrieved party is only entitled to damages for harm that is causally linked with the non-performance, certain and foreseeable. It follows that compensation is due only for harm that is proved with a reasonable degree of certainty,[264] and was or could reasonably have been foreseen by the non-performing party at the time of the conclusion of the contract as being likely to result from its non-performance.[265]

The situation is fairly the same in South African law. Damages will not be awarded on presumption, but the plaintiff has to prove that the other party has committed a breach of contract out of which he has suffered a loss that the non-performing party can be held responsible for. He also has to establish the extent of that loss.[266] However, where it is clear that some damages have been sustained by a plaintiff, but that it is impossible or prohibitely expensive to produce evidence of the exact amount of loss, the court must endeavour to arrive at some amount which will meet the justice of the case.[267] It should award a sum that appears fair and reasonable in the circumstances.[268] If the plaintiff cannot prove the

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[259] In the case of force majeure, Article 7.1.7, or of an exemption clause, Article 7.1.6
[260] Article 7.4.1
[261] Article 3.18
[262] Article 2.15
[263] Article 2.16
[264] Article 7.4.3
[265] Article 7.4.4
[266] See, for example, Bhayroo v Van Aswegen 1915 TPD 195; Jayber (Pty) Ltd v Miller 1980 4 SA 280 (W)
[267] Stolte v Tietze 1928 SWA 51 52
[268] Fouche v Olivier 1929 GWL 27 31-2

damage he claims to have sustained, South African courts, unlike English courts, are not entitled to award nominal damages, except for the purpose of establishing the plaintiff's rights.[269] The Principles remain silent with regard to this issue.

As to the limitation of the non-performing party's liability, it is clear in South African law as well that there must be a causal link between the breach of contract and the suffered harm.[270] Furthermore, the non-performing party cannot be held liable for all consequential harm flowing from its breach. A distinction is drawn between general and special damages. The notion of general damages corresponds to the concept of foreseeable harm as it is used by the Principles. South African law also limits the debtor's liability to the loss which he did actually foresee and which he must have foreseen[271] at the time the contract was entered into. Special damages can be claimed only in accordance with the so-called *convention principle* which is highly disputed, but seems to be presently part of the South African law.[272] It is thus not sufficient that the damages were in the contemplation of the parties at the time of contracting, but the debtor must have contracted to pay the damages concerned.[273] Since this principle will often lead to special damages not being awarded in cases where it would generally be thought fair to award them, there is a lot of criticism urging to jettison the *convention principle* in favour of the *contemplation principle*.[274]

Under the Principles, the aggrieved party is entitled to full compensation, including loss of profit and non-pecuniary harm, such as pain and suffering, aesthetic prejudice, as well as harm resulting from attacks on honour or reputation.[275] In South African law, it is also held that the aggrieved party should be placed in the position it would have been in if the contract had been properly performed, provided that this can be done by the payment of money and without undue hardship to the defaulting

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[269] This has been the actual legal situation since Farmers' Co-op Society (Reg) v Berry 1912 AD 343
[270] Dhooma v Mehta 1957 1 SA 676 (D); Svorinic v Biggs 1985 2 SA 573 (W)
[271] See the whole series of cases listed in **Joubert**, note 93, at 252 note 237
[272] Shatz Investments (Pty) Ltd v Kalovyrnas 1976 2 SA 545 (A) 554C; Holmdene Brickworks (Pty) Ltd v Robers Construction Co Ltd 1977 3 SA 670 (A) 688A
[273] **Christie**, note 94, at 607-8
[274] loc.cit. at 608-9
[275] Comment by UNIDROIT on Article 7.4.2, internet, note 90

party.[276] However, the courts are concerned exclusively with patrimonial loss and take no account of intangible loss. In this respect, South African law has not followed the English approach. A series of cases in which it had been held that damages could be awarded for inconvience, discomfort or loss of time, was overruled by the decision in *Administrator, Natal v Edouard*[277]. The Appellate Division held that contractual damages must be confined strictly to patrimonial loss, an extension to intangible loss having to be implemented by legislation. Yet, it has to be borne in mind that the plaintiff is perfectly free to bring a delictual *actio iniuriarum* to claim sentimental damages.[278]

The basic rule that the aggrieved party is entitled to full compensation is restricted by the principle that the party must not be over-compensated. Saved expenses and reduced cost have to be deducted from the amount of damages.[279] This corresponds to the rule contained in Article 7.4.2 para.(1) of the Principles, which provides that account must be taken of any gain resulting to the aggrieved party from the non-performance, whether that be in the form of expenses which it has not incurred or of a loss that it has avoided.[280]

Under both, South African law and the Principles, the aggrieved party has to take reasonable steps for the purpose of the mitigation of harm. It is not a duty lying upon the party but rather a rule limiting its right of recourse against the non-performing party. The onus in respect of a failure to take reasonable steps rests on the initially non-performing party which must prove that the aggrieved party failed to limit its loss by taking the reasonable steps.[281] There is an express rule in the Principles entitling the aggrieved party to recover any expenses incurred in attempting to mitigate the harm on condition that those expenses were reasonable in the circumstances.[282]

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[276]Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 22; Hofmann and Carvalho v Minister of Agriculture 1947 2 SA 855 (T)
[277] 1990 3 SA 581 (A)
[278] Jockie v Meyer 1945 AD 354
[279] BK Toolings (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 1 SA 391 (A) 412-4
[280]Comment by UNIDROIT on Article 7.4.2 para.(1), internet, note 90
[281] See the South African cases listed in note 254 at **Joubert**, note 93, at 255; there is no clear rule in Article 7.4.8 dealing with the onus of proof, but it is clear from the wording that the non-performing party would use this article as a defence against the aggreived party's claim and would therefore have to establish the latter's failure.
[282]Article 7.4.8 para.(2)

The two systems agree in that a party which does not pay a sum of money when it falls due owes the aggrieved party interest for the period of delay.[283] The applicable rate of interest is, under the Principles, the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment. Under South African law, the "current" rate of interest is to be applied, which used to be 6% but could easily be proved to be higher or lower than that. Two statutory regulations have somewhat complicated the matter. The *Limitation and Disclosure of Finance Charges Act 73* of 1968 limits the interest that a moneylender can recover to a certain legal maximum. The *Prescribed Rate of Interest Act 55* of 1975 authorizes the Minister of Justice to prescribe a rate of interest from time to time by means of a notice in the Government Gazette. In 1986, this rate was at 15%, and the courts can award interest at this rate if the rate was not fixed by agreement, custom or in some other manner.[284]

In practice, the result may be identical whether the Principles are applied or the traditional South African law.

Furthermore, both, South African law and the Principles, authorize the parties to include clauses in their contract by which one or both parties promise to pay a specified sum of money in case of their failure to perform, the sum being independent of the actual harm sustained by the other party.[285] The purpose of this widely used instrument in international contract practice is to facilitate the recovery of damages by avoiding expensive litigation or problems of proof (the so-called *liquidated damages*) or, even more simple, to serve as a deterrent against non-performance (*penalty clauses*). Even if normally the non-performance must be one for which the non-performing party is liable, the Principles accept clauses covering excused non-performances, leaving it entirely to the discretion of the parties. On the other hand, the Principles allow the courts to reduce the specified sum to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance, even if there is an agreement to the contrary

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[283]Article 7.4.9 para.(1); in South African law, this interest is considered as general or foreseeable loss since the debtor could foresee that the creditor would lose its interest in the case of a delayed payment, see **Joubert**, note 93, at 261

[284]See **Joubert**, note 93, at 262-3

[285] Article 7.4.13 para.(1) of the Principles; see **Joubert**, note 93, at 264-5

in the contract. The parties may under no circumstances exclude such a possibility of reduction.[286]

## CONCLUSION

Despite the great efforts made by UNIDROIT, there are still several areas of the law of contract that are not covered by the Principles, such as transfer of property; capacity of the parties; immorality and illegality, as well as lack of authority. With respect to these issues, it is still necessary to refer to the rules of private international and domestic law. As it was demonstrated above,[287] this involves considerable legal uncertainty and discourages traders, and in particular those from poorer and developing countries. Further efforts are thus necessary to elaborate rules covering these fields of law in order to provide a complete set of uniform rules for international transactions.

However, in those areas of law that lie within the scope of the Principles, the rules would be widely compatible with South African law, since definitions and essentials of the contract are mainly coincident. Where the Principles depart from South African law, this mostly results in a clear improvement of the legal situation, in particular with respect to the provisions on hardship, interpretation and formation of the contract. Hence, the Principles constitute a very attractive set of rules for South African businessmen, since, due to their similarity with South African contract law, there would be no considerable changes in the legal treatment of their international transactions except for better and clearer rules.

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[286] Comment by UNIDROIT on Article 7.4.13, internet, note 90
[287] See Part one III