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INTERNATIONAL HARMONISATION OF CONTRACT LAW AND THE UNIDROIT PRINCIPLES

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ABSTRACT

This article aims to investigate the international harmonization of contract law and the UNIDROIT Principles. We highlight that the increase in commercial transactions between subjects who are linked to more than one legal system challenges traditional domestic legislation. We inquire whether the UNIDROIT Principles have the capacity to provide a cohesive legal basis for international commercial contracts, examining their applicability in various legal systems, also through jurisprudential analysis. We also analyze the legal nature of the principles, their practical use in national arbitrations and courts, and the obstacles faced, especially in jurisdictions that resist the adoption of non-state norms as applicable law.

Keywords: Harmonization of Law. UNIDROIT Principles. Contract Law. International trade.

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INTRODUCTION

In this work we will address the UNIDROIT Principles relating to international commercial contracts and the international harmonization of contract law. Despite the increase in international commercial transactions, domestic legislation is not prepared to offer reasonable legal solutions for international contracts. In addition, we can raise other problems such as the lack of knowledge of a national law on the part of the judge.

The truth is that the Principles have the purpose of overcoming these problems. For this reason, we will analyze how UPPICs are used in this context, as well as the possible problems in their application.

In addition to the general analysis of the principles, we will choose some articles to analyze more deeply and we will make a succinct comparative analysis between these articles and the provisions of the Brazilian Civil Code and its doctrine. Thus, we will be able to analyze in a more practical way the advantage of opting for the UNIDROIT Principles as the law to be applicable to the contract to the detriment, for example, of Brazilian law.

As for the work plan, we intend to make a historical introduction about what UNIDROIT is, as well as its purposes and objectives. Next, we will analyze concepts of harmonization and unification of private law.

In the second chapter we will address the UNIDROIT Principles and we will discuss its legal nature, its terminology and the reason why it is compared with the restatement. We will also take the opportunity to explain what international commercial contracts are, that is, to explain which contracts the Principles intend to regulate.

In the third chapter, we will address the contexts of application of the Principles, divided into three, when the parties stipulate it, when it is necessary to interpret or integrate other national or international legal instruments and to serve as a model for legislators.[2] Finally, we will deal with the contexts of use of the Principles in international arbitration.

Finally, in the last chapter, we will discuss the application of UPPIC in some countries outside the European Union. We will also make a small comparative analysis between the Principles and the Brazilian Civil Code.

The method used for the elaboration of this research will be the deductive analytical, premises will be used so that a logical and coherent line of reasoning can be built based on the principles of private international law to analyze the UNIDROIT Principles. As for the methodological procedures adopted, bibliographic research will be carried out, through

[2] Dário Moura Vicente. 2019. Comparative Law. pp 594-595.

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books, scientific journals, scientific articles and jurisprudence that concern the theme studied. In addition, the UNIDROIT Organic Statute and the UNIDROIT Principles commented on will be used.

As for the state of the art, renowned scholars have already written on the subject. Among the researchers cited, we can highlight professors Lauro Gama Júnior, Luís de Lima Pinheiro, Dário Moura Vicente and Michael Joachim Bonell.

Among the works worked on, we must highlight the work of 'Comparative Law, Volume II' by Dário Moura Vicente, the work 'International Commercial Law. International Commercial Contracts, Vienna Conventions on the International Sale of Goods. Transnational Arbitration' by Luís de Lima Pinheiro, the article 'The law governing international commercial contracts and the actual role of the UNIDROIT Principles' by Michael Bonell and the article 'Unidroit Principles relating to international trade contracts: a new harmonizing dimension of international contracts' by Lauro Gama Júnior.

The work intends to innovate by analyzing the jurisprudential advances on the subject, by exposing how the Principles are applied in different States and by performing a small comparative analysis between the guiding principles of the UPPIC and the Brazilian Civil Code.

THE CREATION OF UNIDROIT

UNIDROIT was created in a post-World War I context, with the objective of not only unifying the law, but also normalizing relations between countries. Created by Italy in the 1920s, the name UNIDROIT derives from the combination of the French terms 'unification' and 'droit'.[3] Until 1940, UNIDROIT served as an auxiliary organ of the League of Nations, serving the purpose of ensuring world peace through the development of cooperation between the various states.[4] The idea of the Italian government was to create an institute to study the harmonization of private law, preparing a uniform Private Law legislation, to be gradually adopted by the States.[5]

The institute began its activities on May 30, 1928, through an agreement between the Italian government, the host country of the international organization, and the League of Nations. In the first sessions of UNIDROIT, the responsibilities of the institute were

[3] João André Lima. 2008. The harmonization of private law. PP 21.
[4] Information obtained from: https://www.unidroit.org/about-unidroit/overview/.
[5] Mario Matteucci apud LIMA, João André Lima. 2008. Op cit. pp 22.

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discussed, considering that its activities should be restricted to only some fields of activity, and should not cover all areas of law. In this vein, it was considered that certain areas are more prone to unification due to their nature, for example an area such as commercial law would be more prone to unification, unlike family law.[6] This statement was due to the context of the time, since we already perceived areas of law formed and regulated by the different state legal systems. However, after the advent of industrialization, new norms needed to be created due to the new needs that arose.

Now, we can say that the unification of branches of law that already had centuries of evolution and customs is much more difficult than the unification of new areas, in which there is still no satisfactory solution presented by the national legal systems, nor an established practice. As an example of this area that still did not present a satisfactory legal solution, we have international trade law.

In addition, UNIDROIT should decide whether it would work with the unification of law through the creation of general rules for the various States or if it would work with harmonization through conflict resolution rules, in view of this, the body's Board of Directors chose to work with the creation of general rules within the area of private law, restricting its application only to legal relationships linked to more than one legal system.[7]

Over the years and due to the political movements of the pre-World War II period, UNIDROIT ceased to be linked to the League of Nations, through the dissolution of the agreement by the Italian government. However, it was declared that its existence could continue, as long as it was an autonomous organization.[8] In this sense, UNIDROIT ceased to be an auxiliary body of the League of Nations, becoming an autonomous association. Today, 65 states adhere to the new UNIDROIT statute.[9]

In fact, the Second World War was a temporary interruption to the movement for the unification of private law. However, in the second half of the twentieth century, with the end of the war, there was a revival of interest in the elaboration of uniform legal norms to regulate international relations. Interest even greater than during the pre-World War II period. Before, the interest in unification was restricted more to some European countries

[6] João André Lima. 2008. Op Cit p 24-25.
[7] Id. pp. 29-30.
[8] João André Lima. 2008. Op cit pp 31. See also Article 2 of the Organic Statute of UNIDROIT and https://www.unidroit.org/about-unidroit/overview/.
[9] Information obtained from: https://www.unidroit.org/about-unidroit/overview/.

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and some Latin American countries, now, the discussion of unification has begun to bring new interested parties.[10]

It was mainly at the European level that the discussion gained momentum, the Cecchini report[11] drew attention to the costs of a non-unification of Europe. Expenditures of more than 200 billion ECU per year have been estimated[12] . It was also possible to notice losses in relation to legal transactions that were no longer concluded, due to the parties not knowing which right would be applied to the contract.

OBJECTIVES OF UNIDROIT

After the historical introduction, we move on to the analysis of the institute's objectives, which can be seen in the first article of its organic statute.[13]

"The purposes of the International Institute for the Unification of Private Law are to examine ways of harmonizing and coordinating the private law of States and groups of States, and to gradually prepare for the adoption, by the various States, of uniform rules of private law" (our translation).

The institute clearly chooses not to act in the area of Public Law, nor in the area of conflict of laws.[14] However, it is perceived that some instruments adopted by the institute contemplate themes related to these branches of law.[15]

Generally, the institute adopts, in its work, the form of international conventions, that is, binding instruments that, in order to enter into force, need to be incorporated by the signatory country.[16] However, this was not the case with the Unidroit Principles, as it was decided that they would be created without binding pretension.

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[10] João André Lima. 2008. Op cit. pp 33-34.
[11] The Cecchini report, or the cost report of a 'non-Europe', was a study that showed the costs arising from the non-existence of a European internal market. For more details see: Paolo Cecchini. The big bet for Europe: the challenge of 1992. Translation of European Community Services. Lisbon: Perspectivas & Realidades, 1988, p. 21-166.
[12] The ECU or European Currency Unit was born with the establishment of the European Monetary System. This unit that preceded the euro was formed by the sum of 12 of the 15 currencies of the European Community. For more details on the history of European Economic and Monetary Union see: https://www.europarl.europa.eu/factsheets/pt/sheet/79/a-historia-da-uniao-economica- e-monetary
[13] In the same vein, on its website, UNIDROIT establishes as its purpose the harmonization of private law. Available at: https://www.unidroit.org/about-unidroit/overview/.
Article 1 of UNIDROIT's organic statute in the original: "The purposes of the International Institute for the Unification of Private Law are to examine ways of harmonising and coordinating 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."
[14] João André Lima. 2008. Op cit. pp38.
[15] The principles and rules of Transnational Civil Procedure, prepared by the institute, are an example of the aforementioned situation.
[16] João André Lima. 2008. Op cit. pp 66.

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CONCEPTS OF UNIFICATION AND HARMONISATION OF PRIVATE LAW

At this point in the work, it is decided to distinguish the unification of law from the harmonization of law. The unification of private law rules differs fundamentally from conflict of law resolution. The first "represents the overcoming of the contrast between conflicting or substantive legal norms, in which domestic legislation is replaced by uniform rules on a specific issue and materialized through a multilateral convention or bilateral agreement."[17]

As for the second, Paulo Borba Casella explains that harmonization will refer to conflict rules or rules of private international law, while national rules of substantive law will remain untouched.[18]

Thus, the solution of the conflict of laws seeks to establish which law should be applied to an international relationship. The expression "conflict of laws" does not mean a clash between the regulations in force in the legal systems analyzed, but rather to understand the solution of which country should be applied. That is, to examine the competition or concurrence of two or more rules on the same issue.[19]

Finally, standardization is a procedure through which several legislators adopt a norm formulated in the same way.[20] It integrates elements of private international law and substantive law, overcoming harmonization, but falling short of unification, which eliminates conflicts by completely replacing the various norms.[21]

From the teachings of Jacob Dolinger we can extract lessons in the sense that uniform law are rules of an internal nature that receive the same treatment by the laws of two or more legal systems, while in harmonization connecting rules must be sought to determine which law should be applied to the specific case.[22]

The fundamental difference, explained by Dolinger, would be that the standardization would avoid the so-called "1st degree conflicts", that is, it would avoid the divergence between the norms of two different legislations on the same matter.[23] Harmonization tries to

[17] Id. pp 116-117.
[18] Paulo Borba Casella apud Ediney Neto; MATA DIZ and Jamile Bergamaschine. A THEORETICAL APPROACH TO THE HARMONIZATION OF INTERNATIONAL INTELLECTUAL PROPERTY LAW. Pp. 636.
[19] Id. pp 119.
[20] MATEUCCI, 1957 apud Ediney Neto; MATA DIZ and Jamile Bergamaschine. A THEORETICAL APPROACH TO THE HARMONIZATION OF INTERNATIONAL INTELLECTUAL PROPERTY LAW. pp. 635.
[21] Paulo Borba Casella apud Ediney Neto; MATA DIZ and Jamile Bergamaschine. A THEORETICAL APPROACH TO THE HARMONIZATION OF INTERNATIONAL INTELLECTUAL PROPERTY LAW. Pp. 635 et seq.
[22] Jacob Dolinger, apud Ediney Neto; MATA DIZ and Jamile Bergamaschine. 2016. Op cit. pp. 639.
[23] Id.

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avoid a "2nd degree conflict", that is, to avoid a conflict as to the legislation that should be applied.[24]

Non-unification generates several problems for the parties involved in an international legal business. Due to the different national rules of private international law, the parties risk remaining uncertain as to the law governing their contract until the competent forum is established. Even when established, depending on the conflict rules, the same contract may be subject to two or more laws at the same time. Finally, in practice judges tend to favor the application of their own domestic law, and when they do not do so they may not be sufficiently qualified to interpret the law of another state correctly.[25]

In addition, there is another problem besides the great variation in the content of state legislation. We can also point out that these legislations are not developed enough to meet the needs of an international trade relationship.[26]

THE UNIDROIT PRINCIPLES RELATING TO INTERNATIONAL TRADE CONTRACTS

According to the lessons of Dário Moura Vicente, the first attempt at supranational unification of the Law of Obligations was materialized in the form of a code of obligations and contracts in 1927, however the project was not continued. As early as 1980, the most successful unification initiative was launched in the form of the CISG.[27]

The CISG itself influenced the UNIDROIT principles that despite having been started in the 70s, the work was only completed in 1994, the year of its approval and eventual publication. As for this influence, we can mention that if it were not for the adoption of the CISG, by so many countries, the attempt to weave rules for international commercial contracts would be unthinkable.[28]

The experts working on the principles of UNIDROIT understood, by observing the difficulties faced by the CISG, that UNIDROIT should seek other forms of unification that were not by binding means, that is, by the attempt of unification through non-legislative means.[29]

[24] The ROMA 1 regulation is an example of a convention that aims to avoid the so-called "conflicts of the 2nd degree".
[25] Michael Bonell. 2018. Op Cit. pp 17.
[26] Id. pp 16.
[27] Dário Moura Vicente.2019. Op Cit. pp 592
[28] Michael Bonell. The UNIDROIT principles of international commercial contracts and CISG: Alternative or complementary instruments? Pp. 29.
[29] Id.

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Thus, the Principles were designed without binding pretension, with the aim of making available to international trade operators harmonized rules on the elements of a contractual relationship on international trade. In this vein, these harmonized norms help contracting parties to overcome obstacles arising from the tendency to adhere to the legal system itself.

In the same vein, the Principles also propose to assist judges, both international arbitrators and national judges, with internationally recognized rules.[30] The Unidroit Principles can constitute, by themselves, the Contractual Statute, being incorporated into international contracts through a material reference made to them.[31]

We must see principles as the best rules of each of the issues governed by it and not a common core of national legal systems.[32] These best rules set out general rules on international trade contracts, and they should be applied: 1) when the parties so stipulate, 2) when it is necessary to interpret or integrate other national or international legal instruments, or 3) to serve as a model for legislators.[33]

Among these harmonized standards, we can mention rules related to formation, validity, interpretation, set-off, assignment of credits, debts, limitation periods, execution and non-execution.

The risks of an international contract are mitigated with greater certainty of how the chosen law will be applied. Thus, the Principles aim to overcome some difficulties that surround international trade relations, such as the application of poorly developed national legislation to deal with the particularities of international transactions.[34]

Normally, those businesses that resort to solutions based on conflict of laws rules and could start using the Principles as an alternative and thus simplify such legal relationships.

The principles were laid out in 1994. In 2004, there was its first reedition, with the inclusion of 5 (five) new chapters that address new themes not yet analyzed in the 1994 version. In 2010 there was another reprint, with the addition of 26 new articles. Finally, 2016 was the year of the release of the most recent edition of the principles, there was no change

[30] João André Lima. 2008. Op cit. pp 91-92.
[31] Dário Moura Vicente.2019. Op cit. pp 596.
[32] Id. pp 596.
[33] Id. pp 594-595.
[34] Id.

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in the number of articles from the previous edition, there was only a modification in six provisions, including the preamble.[35] The latest changes mainly aim to adapt the instrument to long-term contracts.

CONCEPT OF INTERNATIONAL COMMERCIAL CONTRACT

Ab initio, in order to define to which contracts the principles apply, we must conceptualize what an international commercial contract is. To elucidate the subject, we resort to the teachings of Luís de Lima Pinheiro. For the author, the expression 'international trade' is used in two different senses, the first refers to transactions carried out between States, or macroeconomic relations, the second refers to relations between economic operators subject to the economic life of more than one State, or microeconomic relations.[36]

Still following the teachings of Luís de Lima Pinheiro, the use of the first meaning does not bring any advantage, since the first refers to the regulation of macroeconomic relations addressed by international economic law/public international law.[37]

The commentaries on the principles also discuss the issue, dividing the topic into internationality of the contract and commerciality of the contract.

As for the internationality of the contract, according to the annotations to the principles, the premise is that the concept of international contracts should be interpreted as broadly as possible, so as to exclude only those situations in which there is no international element involved, that is, where all the relevant elements of the contract in question are connected with only one country.[38]

As for commerciality, the comments on the principles establish that it is intended to exclude consumer transactions from the scope of application of the Principles, given that they are subject to special rules, of a mandatory nature, aimed at protecting the consumer.[39]

[35] UNIDROIT Principles of International Commercial Contracts; Pp XII-XIX.
[36] Luís de Lima Pinheiro, International Commercial Law. International Commercial Contracts, Vienna Conventions on the International Sale of Goods. Transnational Arbitration 2005, pp. 15-16.
[37] Id. pp 16-17.
[38] UNIDROIT Principles of International Commercial Contracts. PP 1. Comments on the UNIDROIT principles
[39] Id. pp 2.

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LEGAL NATURE OF THE PRINCIPLES

The principles are a set of solutions that a group of experts considered to be more suitable for international contracts and not as a codification of uses and customs of international law.[40]

An analysis of the preamble of the principles is given, no indication is extracted as to their value as a legal norm, thus, according to Lauro Gama Júnior, "we should not fall into the simplistic and conservative temptation, when not rushed, to situate the Principles of UNIDROIT in any of the traditional legal categories (law, convention, customary law, commercial uses and practices, etc.), and from there draw conclusions about its value and hierarchical position in the legal system." [41]

In other words, we cannot classify the UNIDROIT principles as rules of law, because they are not valid in this way anywhere.[42]

On the subject, Dário Moura Vicente is in favor of such characterization, adding that although they are not binding, they are relevant in the decision of cases and for this reason are characterized as soft law.[43]

With the same understanding, Nadia de Araujo, explains that the authority of the Principles derives from the excellence of the work carried out, combined with the growing use in contracts and arbitrations, as well as their use by courts in different countries.[44]

We can verify the wide use of the principles by arbitral and judicial tribunals through databases. Today, we can access, electronically, more than 500 cases of application of the principles.[45]

As for the definition of Soft law, Lauro Gama Júnior explains that the concept

> "Soft law is, in fact, a multifaceted, plural concept. For some, it refers to rules of flexible law, which basically serve as a criterion for justifying decisions or for legitimising practices and conduct that are typical of a professional nature in the field of international trade, although they are not binding and act by persuasion or convincing that they are consistent with commercial law or ethics. For others, they are rules of limited normative value, either because the instruments that contain them are not legally binding, or because the provisions in question, even if they

[40] Luís de LIMA PINHEIRO. 2005. Op cit. pp 193-194.
[41] Lauro Gama JR. THE UNIDROIT PRINCIPLES FOR INTERNATIONAL TRADE CONTRACTS: A NEW HARMONISING DIMENSION FOR INTERNATIONAL CONTRACTS. 2008. pp. 99-100.
[42] Dário Moura Vicente. 2019. Op Cit. pp 596.
[43] Id. 595.
[44] Nadia de Araújo. International Contracts: autonomy of will, Mercosur and International Conventions. 2009. p. 323.
[45] The base from data Used towardsthe consultation Was the UNILEX, with address electronic https://www.unilex.info/principles/cases/date/all.

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> appear in a binding instrument, do not create obligations of positive law or create only obligations that are not very restrictive.[46]"

Soft law is sometimes seen as an intermediate step towards stricter legalization, but it may also be preferable as less rigid legalization, as it can offer some advantages in this way.

Importantly, because one or more elements of legalization can be relaxed, more lenient legalization is often easier to achieve than rigid legalization. This is especially true when the actors are states that are 'jealous' about their autonomy and when the issues at stake challenge state sovereignty.[47]

As another example of soft law, we can cite the resolutions of the UN General Assembly.

Thus, the principles are a set of general rules, with open content and flexible character, which aims to suggest solutions in the sphere of international contracts.

Thus, the principles are presented as alternative ways to hard law in the harmonization of international trade. Its mission is to guide and inform the parties, without the intention of being incorporated into state legal systems. Thus, this nature derives from the emphasis on commercial customs and uses, as well as the private autonomy of the parties.[48]

Terminology used

As for the terminology used, the specialists who prepared the UPPIC opted for terms and expressions of use from international practice, aiming to create a vocabulary specific to international commercial contracts. As an example of the above, Lauro Gama Júnior cites hardship, which covers situations treated differently in different national systems.[49]

In the same sense, the author explains that even in cases where the Principles used language of a certain legal system, such as force majeure, the understanding should be made only in the context of the principles themselves, without using any meaning given by national law.[50]

[46] Lauro Gama Júnior. 2008. Op cit. pp 99.
[47] Kenneth Wayne Abbott and Duncan Snidal. Hard and Soft Law in International Governance. pp 423.
[48] Lauro Gama JR. 2006.Op cit. pp 99-100.
[49] Id. pp 102-103
[50] Id.

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Comparison with the Restatement

The Restatement is traditionally conceived as a consolidation of jurisprudential law in common law countries, that is, in countries that had jurisprudence as their main source of law. In a more current conception, the Restatement is conceived as an opinion of some of the best academics on the law that should be applied to the contract by the court judging the merits.[51]

Part of the doctrine states that the principles were conceived in the form of a restatement.[52] However, this is not the understanding that the present work intends to follow. Our understanding is that the Principles were not designed in this way.

In this sense, Luís de Lima Pinheiro explains that the principles "are not based on arbitral jurisprudence" and "cannot be seen as a qualified opinion on the law that arbitral tribunals should apply".[53] Thus, for the author, the Principles should not be considered a Restatement.

Still following the author's line of reasoning, he points out that the experts who drafted the principles "were not based on the rules and autonomous principles in force, but on the comparison of the main national systems and on legal-political considerations."[54]

In another vein, Lauro Gama Júnior, despite calling the principles an "international restatement of contracts", [55] explains that the existing similarities are formal, that is, in the way the content is presented. According to the author's theory, these are the only similarities, the principles as to their content, are closer to the countries of civil law.[56]

CONTEXTS OF USE OF THE PRINCIPLES

In order to analyze the contexts of application of the principles, we first need to bring up its preamble, in which its possibilities of application are listed. The Principles are worded as follows:

> "These Principles establish general rules for international commercial contracts. They should be applied if the parties have agreed that their contract will be governed by them. They may be applied if the parties have agreed that their contract will be governed by general principles of law, the lex mercatoria, or similar. They can be

[51] Luís de Lima Pinhero.2005. Op Cit. pp 195.
[52] Michael Joachim Bonell. 1996. Op Cit. See also: Michael Joachim Bonell. The law governing international commercial contracts and the actual role of the UNIDROIT Principles Pp 20-21. Bonell says that it was decided to repeat at the international level something along the lines of the United States' restetaments.
[53] Luís de Lima Pinnheiro.2005. Op Cit. pp 195.
[54] Id.
[55] Lauro Gama Júnior. Prospects for the UNIDROIT Principles in Brazil. Pp. 620.
[56] Lauro Gama Júnior.2006. Op cit. pp 99.

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> applied if the parties have not chosen any law to regulate their contract. They can be used to interpret or supplement international instruments of uniform law. They can be used to interpret or supplement national laws. They can serve as a model for national and international legislators."[57] (our translation).

As already mentioned in topic 2.2, from the analysis of the preamble, we can see that the Principles can appear in three different ways in international commercial contracts. These general rules should be applied: 1) when the parties so stipulate, 2) when it is necessary to interpret or integrate other national or international legal instruments, or 3) to serve as a model for legislators.[58]

AS LAW APPLICABLE TO THE CONTRACT

The first context for the use of the Principles is their use as a law applicable to the contract. Our analysis of the application in national courts, in the European context, necessarily involves the analysis of the Rome 1 regulation. The majority doctrine understands that article 3 of the regulation does not allow the choice of a non-state source of law as the law applicable to the contract.[59]

It is important to note that it is not possible to have a contract that is not regulated by any law, that is, the contract will necessarily be bound by another law even if the parties have agreed to use the Principles as the law applicable to the contract.

Thus, contracts that go through the conflict solutions existing in the Rome 1 Regulation cannot have the Principles as the law that regulates the contract. Accordingly, a reference to the UNIDROIT Principles shall be an agreement to incorporate them into the contract and shall bind the parties only to the extent that they do not affect the mandatory provisions of the law applicable to the contract.[60]

In the same vein, the third commentary on Article 1.4 of the Principles explains that the prevailing approach adopted by domestic courts and the parties' reference to UPPICs are considered merely an agreement to incorporate them into the contract. And they will be limited by the domestic law that governs it. In addition, the mandatory rules of the state of the forum, and possibly of other countries, may also apply, if these mandatory rules claim to apply irrespective of the law governing the contract and, in the case of the mandatory rules

[57] INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW. UNIDROIT Principles of International
Commercial Contracts. PP 1.
[58] Dário Moura Vicente. Op cit. pp 594-595.
[59] In this sense, see: Luís de Lima Pinheiro – Private International Law, Volume II. Pp. 329 et seq.
[60] Michael Bonell. 2018. Op Cit. pp 25.

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of other countries, there is a sufficiently close connection between those countries and the contract in question.[61]

In fact, Paraguay was the first country to recognize in its domestic legislation the right of a party to choose non-state rules of law as the law applicable to the contract.[62] Article 5 of the 'Law on the Law applicable to international contracts' provides precisely that the parties may choose rules of non-State law.

Still on the subject, it is worth mentioning a discussion of the matter that took place in Europe through a draft Regulation in December 2005. One of the objectives of the project was the insertion of a new paragraph that would allow the parties to choose as applicable law the internationally recognized principles and rules of law, however, the proposal met with strong reservations from the member states of the European Union.[63] This position is a strong indication of how we should interpret the ROMA 1 regulation.

AUXILIARY APPLICATION OF THE PRINCIPLES IN INTERNATIONAL COMMERCIAL CONTRACTS

At this point in the work, we will analyze the application of the Principles as an auxiliary instrument, according to the preamble they can be used to interpret or supplement international instruments of uniform law and can be used to interpret or supplement national laws.

Its use as an instrument that helps in the interpretation and supplementation of international instruments is very common, we can find in the Unilex database several cases in which the Principles were used in this way. In addition, we can also note its use in the interpretation/supplementation of national laws, for example, the Brazilian doctrine sees the Principles as true general principles of law, resulting in their application through article 4[64] of the LINDB.

[61] Article 1.4. Comment 3. 'Mandatory rules applicable in case of reference to the Principles as law governing the contract.' UNIDROIT PRINCIPLES, 2016. Page 12.
[62] Michael Bonell. 2018. Op cit. pp 27.
[63] Id. pp 26.
[64] Article 4 of the LIDNB establishes: Article 4 "When the law is silent, the judge shall decide the case according to analogy, customs and general principles of law."

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Interpretation/filling of gaps in international instruments

We can remove from the Unilex database numerous cases in which the Principles were used as a tool for interpreting/filling in the gaps existing in international instruments, especially in filling the gaps of the CISG.

International commercial contracts deal with issues concerning contractual formation, interpretation, enforcement, default and remedies, and as the provisions contained in the UNIDROIT Principles are generally more detailed and comprehensive, they can in many cases provide a solution to ambiguities or gaps in the CISG.[65]

Despite the numerous cases of applying the principles in this way, it is not in common agreement for doctrine on the possibility of using the UNIDROIT Principles as a means of interpreting and supplementing the CISG. There are scholars who argue that it is not possible to use UPPIC in this way, due to both its non-binding nature and its private nature.[66]

However, this does not seem to us to be the correct answer. The majority doctrine seems to be allied with our thought that it is possible to use UPPIC in this way.[67]

On the subject, it is worth mentioning some decisions of European state courts, these courts applied the CISG in conjunction with the Principles defining them as a code of international contracts containing general principles governing international trade law.[68] These decisions were handed down in 2012[69] and another in 2015[70] by French courts and in 2009 by a Belgian court.[71]

Interpretation/filling of gaps in domestic law

According to its preamble, the UNIDROIT Principles can be used to interpret or supplement the domestic law which regulates the contract. This happens, especially, when a country's internal legislation lacks tools to regulate modern commercial transactions.

[65] Michael Bonell. 2018. Op cit. pp. 32.
[66] Id.
[67] Michael Bonell, Lauro Gama jr, Nádia de Araujo, among others, are allied to this thought.
[68] Michael Bonell. 2018. Op Cit Pp 28 and 34-35.
[69] Case 11/02698 of 04-09-2012 handed down by the Cour d'Appel de Reims. Available more specifically at: https://www.unilex.info/case.cfm?id=2121.
[70] Case 12-29.550, 13-18.956, 13-20.230, of 17-02-2015, handed down by the Cour de Cassation. Available more specifically at: https://www.unilex.info/case.cfm?id=1923.
[71] Case C.07.0289.N of 19-06-2009 handed down by the Court of Cassation of Belgium. Available more specifically at: https://www.unilex.info/case.cfm?id=1456.

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Even in highly developed legal systems, we can see the use of principles to interpret or supplement domestic law, as the issue may be controversial or not yet addressed.[72]

This form of use of principles seems to be very well accepted by international jurisprudence. However, the question we raise is whether we can use the Principles as a means of interpreting and supplementing national law in a purely domestic context. On the subject, Bonell explains that the answer to this question is "definitely affirmative". Following his line of reasoning, the author explains that in relation to current practice, the Principles were used, for the most part, to interpret and supplement domestic law in international disputes, however, there are decisions that refer to disputes of a totally domestic nature.[73]

Another question that arises is whether the Principles can be invoked in a way that supports a position contrary to a legal provision expressed in the domestic law in question. On this question, Bonell explains that the answer is more difficult because whenever the applicable domestic law provides a clear solution to the issue at hand, it should not be allowed to deviate from it in favor of a different solution unless there is an express request by the parties.[74]

However, we can state that in a number of cases, national courts and arbitral tribunals have resorted to the UNIDROIT Principles to support the adoption of one of several possible remedies under applicable domestic law or to fill a gap in the latter. Most importantly, there are decisions, which refer to the UNIDROIT Principles as a source of inspiration to openly revisit the current legislation of their countries. Thus, for example, courts in Australia and, although to a lesser extent, courts in England and New Zealand have, on several occasions, referred to the Principles as a source of inspiration in their attempt to affirm, also at the domestic level, the relevance of good faith in the formation and performance of contracts or to admit the use of extrinsic evidence for the interpretation of written contracts.[75]

On the issue in Portugal, the Uniliex database points to a case in which the Portuguese Supreme Court of Justice used the UNIDROIT principles as a means to interpret Portuguese domestic law.[76]

[72] Michael Bonell. 2018. Op cit. pp 35.
[73] Id. pp 36.
[74] Id. pp 36.
[75] Id. pp 37.
[76] On the subject, see: Decision of the Supreme Court of Justice number 1285/07. JVNF. P1. S1. Available more specifically at: https://www.unilex.info/principles/case/1653#PORTUGUESE_LAW

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A Portuguese buyer and a Spanish seller have concluded a contract for the sale of clothes. Upon delivery, the products turned out to be defective and the buyer sued the seller, claiming termination of the contract, refund of the price paid, and damages for breach of contract. The Court of First Instance granted the purchaser restitution of the price paid plus interest, but rejected his claim for profits which he failed to obtain, since, according to the Court, this claim could not be combined with the termination of the contract.

The court in which the appeal was heard[77] pointed out that there are differing opinions on the possibility of combining the termination of the contract with consequential damages, however, the Court ruled that the buyer was not entitled to compensation for the profits he failed to make. Ultimately, the Supreme Court of Justice reversed the Court of Appeal's decision and awarded the buyer compensation also for the loss of profit resulting from the failure to resell the products at a higher price. In support of its decision, the Court referred, among others, to the UNIDROIT Principles, using them in order to interpret and supplement Portuguese domestic legislation.

In its decision, the Supreme Court of Justice recognizes that in Portuguese law the contractual termination produces the same effects as the nullity/voidability of the transaction according to article 433 of the Portuguese Civil Code.[78] Thus, the position of the Portuguese doctrine is that in the event of contractual termination, the protection of the right to indemnity is limited to the negative contractual interest.[79] This was also the understanding of the STJ. However, in this specific case, the Portuguese court chose to follow the doctrinal current that defended positive damages.[80] In the reasoning for following this doctrinal current, the STJ explains that the cumulation of compensation (and an indemnity for non-performance) with the termination of the contract is in force in many European laws, as well as in the CISG, the UNIDROIT Principles and the Principles of European Contract Law.

The reference to the UNIDROIT Principles alongside the CISG and the Principles of European Contract Law, despite showing the relevance of the UPPICs, in practice, were not fundamental in the decision of the Portuguese court. The key argument of the STJ was based on the doctrinal current, led by the thesis of Paulo Mota Pinto.

[77] Or case also if Find available in base from data Unilex, more precisely in: https://www.unilex.info/principles/case/1610#PORTUGUESE_LAW.
[78] Article 433 of the Portuguese Civil Code: In the absence of a special provision, the termination is equated, as to its effects, to the nullity or voidability of the legal transaction, with the exception of the provisions of the following articles.
[79] This position is defended by Almeida Costa, Antunes Varela and Menezes Leitão.
[80] This position is defended by Vaz Serra, Romano Martinez, Ana Prata, Galvão Telles and Paulo Mota Pinto.

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USE AS A MODEL FOR NATIONAL AND INTERNATIONAL LEGISLATORS

Finally, the Principles can also be used as a model, their use in this way has become increasingly common, Unidroit, on its own website, provides several model clauses.[81] At the international level, UPPICs can collaborate as a model for international conventions, in addition to the terminology used can be extended to international legislation.

At the national level, in addition to the extension of terminology, the Principles have also been used as a model in the elaboration of national codes such as the Civil Code of Quebec of 94 and the Civil Code of Russia of 95. Other countries that need an update of national laws can use the Principles in this way.

APPLICATION OF PRINCIPLES IN INTERNATIONAL ARBITRATION

Transnational arbitration is currently the most popular form of dispute resolution in the international sphere[82], it is determined by the parties to the contract through an arbitration agreement where the applicable law and the court to which it will be submitted will be decided.

We can see through the Unilex database that in arbitration the UNIDROIT Principles are more applied, because when there is agreement between the parties, it is possible to apply them as the law applicable to the contract.

In this vein, the 4th commentary to Article 1.4 of the Principles establishes that according to the case that is brought before an arbitral tribunal, the Principles are applied as the law governing the contract, that is, they do not meet the limit of the ordinary mandatory rules of any domestic law and their application will depend on the circumstances of the case. This is because the arbitral tribunal does not have a predetermined lex fori, i.e., it can, but is not obliged to, apply the prevailing mandatory rules of the country in the territory of the award rendered.[83]

In determining whether to consider the prevailing mandatory rules of the State of the forum or of any other country with which the case in question has a significant connection, the arbitral tribunal, bearing in mind its task of making every effort to ensure that the award is enforceable in law, may be expected to pay particular attention to the prevailing

[81] See: https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/.
[82] Luís de Lima Pinheiro. Op Cit. 2005. Pp. 345 et seq.
[83] Article 1.4. Comment 4. 'Mandatory rules applicable in case of reference to the Principles as law governing the contract.' UNIDROIT PRINCIPLES, 2016. Pages 12-13.

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mandatory rules of those countries where enforcement of the award is likely to be sought. In addition, the arbitral tribunal may consider it necessary to apply those prevailing mandatory rules that reflect principles widely accepted as fundamental in legal systems around the world.[84]

Finally, it should be noted that UPPICs are also widely used by international arbitrators as tools for interpreting/filling gaps in arbitration.

OBSTACLES TO THE APPLICATION OF THE PRINCIPLES

At this point in the work, we chose to analyze some cases in search of possible problems in the application of the UNIDROIT Principles. In this topic, we will exclude the problems already addressed in topic 3 and expand on other topics not previously addressed.

CASE OF BRAZIL

Regarding the use of the Principles to supplement and/or interpret Brazilian law, we can say that there is a legal provision that allows the use of the Principles. On the subject, article 4 of the LINDB[85] establishes that when the law is silent, the judge will decide the case according to analogy, customs, and general principles of law.[86]

As for the application of the Principles, the problem arises when the contract opts for its application in contracts as the legislation to be applied. In Brazil, article 9 of the LINDB establishes that to qualify and govern the obligations, the law of the country in which they are constituted will apply.

Regarding the historical evolution of this legal provision, the law of introduction to the Brazilian civil code of 1916 seemed to respect the principle of autonomy of the parties' will to choose the law applicable to the contract, as there was the expression at the beginning of the provision: "unless otherwise stipulated." However, in 1942, with a new introductory law,

[84] These mandatory rules are also known as the 'transnational public order.'
[85] LINDB are the laws of Introduction to the Rules of Brazilian Law. The LINDB regulates Brazilian legal norms in general, being considered a norm on norms, or norm on law.
[86] On the subject, Lauro Gama JR points to case C-16424/JRF, ICC, number 16398/JRF, 17.01.2011. In this case, the Arbitral Tribunal invoked Article 4 of the LINDB to reject the application of the Principles stating that commercial usages and general principles of law can only be adopted to support a decision when there is a gap in the law.

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this expression was suppressed, generating the doctrinal discussion as to whether it was still possible for the parties to choose the law to be applicable.[87]

For a long time, the position of the majority doctrine and of renowned Brazilian jurists such as Lauro Gama Júnior and Nádia de Araujo is that, in fact, the Brazilian system of conflict of laws does not accept the principle of autonomy to choose the applicable law.[88] The rule of lex loci contractus applies, i.e. the law applicable to a contract based on the place where it was concluded. This application cannot be modified by the will of the parties, since article 9 of the LINDB is a cogent rule[89] of public order.[90] In other words, in contracts entered into in Brazil, the Principles cannot be used as applicable legislation.[91] It should be noted that the Principles, through Article 1.4, establish that none of their provisions will restrict the application of mandatory norms.[92]

The commentaries on the Principles extend the theme, stating that, due to their nature as a non-legislative instrument, neither they nor the individual contracts based on them can be considered superior to the mandatory norms of domestic law, whether of national, international or supranational origin.[93]

Finally, it should be noted that, in recent years, we have begun to witness a change in the position of Brazilian courts.[94] This change in thinking can be embodied in the form of Civil Appeal No. 70072362940 issued by the Court of Justice of Rio Grande do Sul. This

[87] Nadia de Araújo. Autonomy of will in international contracts - Current situation in Brazil and Mercosur. PP 159. See also, Lauro Gama Júnior. The UNIDROIT Principles of International Commercial Contracts and their Applicability in the MERCOSUR Countries. pp 394.
[88] On the subject see: Nadia de Araújo. Autonomy of will in international contracts - Current situation in Brazil and Mercosur and Lauro Gama Júnior. The UNIDROIT Principles of International Commercial Contracts and their Applicability in the MERCOSUR Countries.
[89] A cogent norm is a legal norm of an imperative nature, whose compliance is mandatory and cannot be set aside by agreement of the parties, as opposed to dispositive norms, which admit private autonomy.
[90] Ana Tereza Basilio. Application and interpretation of the Vienna Convention from the perspective of Brazilian law Pp.42.
[91] Guilherme Freire de Melo Barros and Marcelle Franco Espíndora Barros. Application of the UNIDROIT principles in the greater Brazil plan: filling a gap in the Brazilian policy of economic development. pp 170.
[92] INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW. UNIDROIT Principles of International
Commercial Contracts. Article 1.4 of the principles. pp 11.
[93] INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW. UNIDROIT Principles of International
Commercial Contracts. Comment 1 on Article 1.4. pp 11.
[94] It should be noted that here we are dealing with domestic courts, excluding arbitration. The arbitration law in Brazil enshrines the Principle of autonomy for the choice of the law to be applicable. More precisely, Article 2 establishes that the parties may choose the rules that will be applied in the arbitration, as well as agree that the arbitration will be carried out based on the general principles of law, uses and customs, and international trade rules. Thus, in arbitration, the parties may opt for the Principles as the law applicable to the contract.

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decision chose to remove the LINDB and use, as a law to be applied, in the contract both the CISG and the UNIDROIT Principles.[95]

In this case, the complainant, a Danish company, and the respondent, a Brazilian company, entered into a contract whereby the Brazilian company was to deliver to the Danish company, in Hong Kong, a certain quantity of frozen chicken. The Danish company made the initial payment, however, the Brazilian company did not deliver the goods in the agreed time, so the Danish company terminated the contract and claimed the due compensation.[96]

As for the law applicable to the contract, the TJRS noted that, according to Article 9(2) of the LINDB, Danish law would be the law applicable to the contract. However, the Court held that the traditional rule of lex loci celebrationis should be disregarded in favour of a more flexible approach, leading to the application of the CISG and the UNIDROIT Principles.

With regard to the UNIDROIT Principles, the Court considered that their content coincides to a large extent with the new lex mercatoria, that is, the principles and rules, model contracts and clauses, uses and customs, which have been developed independently of States by the practice of international trade and can therefore be considered an authentic transnational commercial law.

In this vein, there is a second decision, also rendered by the TJRS, which concluded that the laws applicable to the merits of the dispute were the 1980 Vienna Convention on Sales ("CISG") and the UNIDROIT Principles.[97]

In this case, a Venezuelan company bought 16 engines from the Defendant, a Brazilian company, for US$ 73,996.44. Because Venezuela's import, export, and foreign exchange regulations only allowed the purchase of the required dollar amount, the Claimant anticipated payment to the Defendant through a U.S. bank to facilitate the sale. When the goods arrived at the port of delivery in Venezuela, the Complainant had to comply with Venezuelan import and exchange regulations and repaid the purchase price to the Defendant. However, the Respondent refused to refund the overpayment made by the Complainant, despite having previously promised to do so.

[95] At this point we will analyze the concrete case and understand the application of the Principles, it should be noted that we will not discuss the application of the CISG, as this analysis is beyond the scope of this work.
[96] Civil Appeal No. 70072362940, TJRS, Brazil, February 14, 2017. Summary available more specifically at: https://www.unilex.info/principles/case/2035#BRAZILIAN.
[97] Civil Appeal No. 7004192500, TJRS Brazil, August 21, 2018. Available more specifically at: https://www.unilex.info/principles/case/2042#BRAZILIAN.

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On appeal, as a preliminary matter, the TJRS determined the law applicable to the merits of the dispute. First, the Court asked the parties to clarify the place of conclusion of the contract so that it could correctly identify the law applicable to the dispute. The Complainant stated that the sale contract was concluded in Venezuela, while the Respondent, on the contrary, stated that it was concluded in Brazil.

The Court concluded that the parties' claims about the place of conclusion of the contract were inconclusive, so that the locus actus could not be used as a connecting factor. The Court therefore decided to apply the "principle of proximity" or the "rule of the most significant relationship" and, following a recent precedent of the same Court[98], concluded that the laws applicable to the merits of the dispute were the CISG and the UNIDROIT Principles. And since the validity of the contract of sale is not a matter governed by the CISG, the Court ruled that, in accordance with the criteria for interpreting the Convention set out in Article 7(1) of the CISG, it would base its decision on the issues at stake in the UNIDROIT Principles, in particular the provisions set out in Chapter 3, Section 3 on illegality.

Thus, we can see that despite the majority understanding of the doctrine, there are decisions that understand to set aside article 9 of the LINDB by applying non-state sources such as the law applicable to the contract. These decisions seem to embody the beginning of a new understanding of Brazilian jurists to grant a broader interpretation of Article 9 in a way that allows the use of the CISG and the Principles as the law applicable to the contract.

However, while we await future advances on the subject in Brazil, we recommend the option for arbitration. In Brazil, the application of the Principles as the law applicable to the contract is much easier due to the Brazilian arbitration law. This law in its article 2, paragraphs 1[99]and 2.º[100] expressly authorizes the use of the UNIDROIT Principles.[101]

[98] The precedent that the TJRS refers to is the previously cited case of the Danish company against the Brazilian company.
[99] Paragraph 1 - The parties may freely choose the rules of law that will be applied in the arbitration, provided that there is no violation of good customs and public order.
[100] 99 § 2 The parties may also agree that the arbitration shall be carried out based on the general principles of law, uses and customs, and international trade rules.
[101] In the same sense, see Lauro Gama JR. 2008. Op Cit. Pp 142 see also Guilherme Freire de Melo Barros and Marcelle Franco Espíndola Barros in Application of the UNIDROIT principles in the greater Brazil plan: filling a gap in the Brazilian policy of economic development Pp 170-171.

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Unidroit Principles x Brazilian Civil Code of 2002

At this point we will examine some of the compatibility of the Brazilian Civil Code of 2002 with the UNIDROIT Principles.

Article 1.1[102] of the UPPIC enshrines the principle of freedom of contract. As for Brazil, article 421[103], with the wording given by Law 13,874/2019 that amended the Civil Code, also enshrines the same principle, but it goes beyond the UPPIC by introducing the principle of the social function of the contract that is not enshrined in the UPPIC. This principle imposes a limitation that we did not observe in the UPPIC, which establishes that contractual freedom will only be exercised within the limits of the social function of the contract.

In addition, it is important to note that article 421-A of the Brazilian CC establishes the "principle of minimum intervention by the state" which provides for two restrictions on contractual review, that the review must always be exceptional and that it must be limited, which implies ensuring the maximum conservation of what was agreed.[104]

It is important to bring up that the principle of contractual freedom finds limits even in UPPICs, article 1.4 establishes that nothing should restrict the application of mandatory rules, whether of national, international or supranational origin.

Article 1.2 of the UNIDROIT Principles enshrine freedom of form. UPPICs do not require any specific form, and can prove the conclusion of the contract by any means, including by witnesses. The only limitation would be those imposed by the law applicable to the contract[105], as mentioned in Article 1.4 already mentioned.

The Brazilian civil code, despite enshrining freedom of form in its article 107[106], adds an exception, this exception is given when the law expressly requires it. Such an exception does not exist in the UNIDROIT Principles when they are used as the law to be applicable to the contract.

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[102] Article 1.1 of the UNIDROIT Principles: "The parties are free to enter into a contract and to determine its content."
[103] Article 421 of the Brazilian Civil Code: Contractual freedom shall be exercised within the limits of the social function of the contract. Sole Paragraph: In private contractual relations, the principle of minimum intervention and the exceptionality of contractual review shall prevail.
[104] Otavio Luiz Rodrigues Jr; Rodrigo Xavier Leonardo; Augusto Cézar Lukascheck Prado-CONTRACTUAL FREEDOM AND THE SOCIAL FUNCTION OF THE CONTRACT- AMENDMENT OF ARTICLE 421-A OF THE CIVIL CODE: ART 7 in Comments on
Economic Freedom Law Law 13,874/2019. PP 324.
[105] Here we are dealing with situations when the UNIDROIT Principles are not the law applicable to the contract.
[106] Article 107 of the Brazilian Civil Code: The validity of the declaration of intent will not depend in a special way, except when the law expressly requires it.

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Article 1.3 of the UPPIC, in turn, establishes that a contract is binding between the parties and it can only be modified or terminated according to common agreement or in accordance with other provisions of the principles. This article enshrines the principle of pacta sunt servanda, serving as the affirmation that the contracts assumed must be respected. However, the second part of this provision restricts the very scope of this Principle, since, for example, it finds limitations in the articles that deal with force meajure and hardship.[107]

The pacta sunt servanda is also enshrined in the Brazilian civil code, articles such as 317, 389, 408, 418, 421, 422 and 427, all of the Civil Code, express in some way the sanctity of the contract. However, although these articles demonstrate that the obligations assumed must be fulfilled, there is no provision as clear as Article 1.3 of the UPPIC. In Brazilian law, we also find the same exceptions established in the principles in the form of force majeure[108] and excessive burdensomeness[109].

Article 1.7 of the Principles establishes the principle of good faith[110], which must be maintained throughout the contract, including during negotiation.[111] In this article, the comments on the principles also mention abuse of rights, which is contrary to good faith where one party exercises its right only to harm the other party or for a purpose other than what was intended. Another important point is that loyalty should not be applied according to the standards generally adopted in national legal systems, but rather as good faith in international trade.

Article 1.8, in turn, establishes that one party may not cause prejudice to the other by acting in an inconsistent manner contrary to the expectations about the contractual relationship raised in the other party.

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[107] Hardship is contained in Article 6.2.1 et seq. of the UPPIC and force meajure is contained in Article 7.1.7 of the same provision.
[108] Article 393 and its sole paragraph of the Brazilian Civil Code establish that the debtor is not liable for losses resulting from fortuitous events or force majeure.
[109] Excessive burdensomeness is contained in articles 478, 479 and 480 of the Brazilian Civil Code
[110] Article 1.7, in the English version, in addition to good faith, adds "fair dealing". And as an example of other principles in which the principle of good faith is applied, we can cite articles 1.9(2); 2.1.4(2)(b), 2.1.15, 2.1.16, 2.1.18, 2.1.20; 2.2.4(2),
2.2.5(2), 2.2.7, 2.2.10; 3.2.2, 3.2.5, 3.2.7; 4.1(2), 4.2(2), 4.6, 4.8; 5.1.2, 5.1.3; 5.2.5; 5.3.3, 5.3.4; 6.1.3, 6.1.5, 6.1.16(2),
6.1.17(1); 6.2.3(3)(4); 7.1.2, 7.1.6, 7.1.7; 7.2.2(b)(c); 7.4.8, 7.4.13; 9.1.3, 9.1.4 and 9.1.10(1).
[111] From the illustrations provided by the commentaries on article 1.7, we can extract some situations in which the experts who prepared the UPPIC considered whether or not good faith was used in the negotiation. For example, if A, who granted 48 hours for B to accept the proposal, refuses his acceptance (considering that B accepted within the deadline and only failed to inform within the time due to A's fault) he would be acting against good faith.

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Finally, it should be clarified that the parties cannot exclude or contractually limit the principle of good faith[112], but nothing prevents the parties from stipulating in the contract the duty to observe stricter standards of behavior.

Good faith in Brazilian law is enshrined in article 113[113] of the Civil Code, as well as in article 422.[114] In turn, Article 187 legislates on the abuse of rights.[115] It should be clarified that the inconsistent behavior dealt with in the UPPIC is dealt with in Brazilian law through article 422 and the principle of good faith.

We can extract, from the Brazilian doctrine, that objective good faith concerns the internal relations of the contracting parties. Complying with the principle of ethics, directing and guiding the obligatory relationship towards compliance, allowing the parties to regain the freedom granted at the beginning of the contractual relationship, through the imposition of additional duties, cooperation, information and protection, the partners create an environment of collaboration throughout the course of the contract.

Within the scope of its three functions (interpretive, integrative and corrective), good faith also serves as a control mechanism, adjusting private autonomy and preventing the excessive use of subjective and potestative rights through the abuse of rights.[116]

Article 1.9 deals with uses and customs. According to this article, the parties are bound by the uses, customs and practices they have established among themselves, as well as the uses and customs of international trade.[117] In addition, the uses and customs prevail over the conflicting provisions contained in the UPPIC, as they bind the parties as implicit terms of the contract.[118]

In Brazil, we found a problem regarding the use of uses and customs. According to article 113 of the Civil Code, legal transactions must be interpreted according to the uses of the place where they are celebrated, however, article 4 of the LINDB provides a more

[112] Article 1.7 (2) of the Unidroit Principles.
[113] This article establishes that legal transactions must be interpreted in accordance with good faith and the uses of the place of celebration.
[114] This article establishes that the parties must keep the principles of probity and good faith in the execution and concussion of the contract.
[115] Article 187 of the Brazilian Civil Code establishes that the holder of a right who, in exercising it, manifestly exceeds the limits of the
imposed by its economic or social purpose, by good faith or by good morals commits an unlawful act.
[116] Nelson Rosenvald apud Michael César Silva. CONVERGENCES AND ASYMMETRIES OF THE PRINCIPLE OF OBJECTIVE GOOD FAITH IN CONTEMPORARY CONTRACT LAW. pp 1147-1148.
[117] Article 1.9 (1) and (2) of the UNIDROIT Principles.
[118] Sixth comment on Article 1.9 of the UNIDROIT Principles. pp 26. The only exception over which usages and customs do not prevail are provisions of a mandatory nature.

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restrictive interpretation, because based on this article, the judge will decide the case according to customs and general principles of law only when the law is silent.

This is the interpretation that Case C-16424/JRF, ICC, number 16398/JRF, 17.01.2011 gave to the article when the Arbitral Tribunal invoked Article 4 of the LINDB to reject the application of the Principles stating that commercial usages and general principles of law can only be adopted to support a decision when there is a gap in the law.

Finally, the last article we will deal with is article 1.10 which provides for notification, this notification comprises statements, requests, requests or any other communication of intent.[119]

Regarding the types of notifications, UPPICs adopt the receipt principle, that is, notifications are not effective unless and until they reach the person to whom they are intended.[120] However, it is urgent to note that the parties can opt for the principle of dispatch, if they do so, this option must be made expressly.[121]

In an attempt to define the concept, paragraph (3) of this Article makes a distinction between oral communications and other communications. Oral communications are considered to have been reached to the recipient if they are made in person to him or to another person authorized by him to receive them. Other communications produce the same effect when they are delivered to the recipient at his or her personal location, business location or (electronic) mailing address. It should be noted that the communication does not need to be read by the recipient, nor does it need to arrive in his hand, it is only necessary that the notification is delivered to an authorized employee to receive or be placed in the mailbox, or when it becomes capable of being retrieved by the recipient at an electronic address designated by the recipient.[122]

In Brazil, as a rule, contracts are perfected from the issuance of acceptance, based on article 434 of the Civil Code. In other words, Brazil generally uses the dispatch principle.

Opting for dispatch can be beneficial if you do not want to put the risk of loss, error or delay in transmitting the message on the party issuing the notification.

[119] Article 1.10 (4) of the UNIDROIT Principles.
[120] Second commentary on Article 1.10 of the UNIDROIT Principles. pp 28.
[121] Third comment on Article 1.10 of the UNIDROIT Principles. pp 28.
[122] Fourth comment to Article 1.10 of the UNIDROIT Principles. Pp 28-29.

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CASE OF JAPAN

Regarding the application of the UNIDROIT Principles in Japan, we decided to analyze case 12446, decided by an international arbitral tribunal in 2004.[123] This is a dispute related to an international sales contract. The respondent refused to comply with its obligation to purchase a certain quantity of goods due to a sharp drop in demand for such goods in the market and invoked the hardship provisions contained in the UNIDROIT Principles.[124]

In this case, the Arbitral Tribunal, consisting of three Japanese members, ruled out the applicability of the UNIDROIT Principles on the grounds that they cannot be considered worldwide customs or business usages, let alone customs or business practices generally practiced by Japanese businessmen.

To understand the reason for the difficulty in applying the principles in the case in question, it is imperative to analyze the Japanese legislation and doctrine.

As for the incorporation of the Principles as the law applicable to the contract, the doctrine explains that Article 7 of the Law on 'General Rules for the Application of Laws'[125] only admits the application of laws made by a sovereign nation. In the case of the Principles, as they cannot be considered as law made by a sovereign nation they could not be used as the law applicable to the contract.[126]

Although it does not admit the incorporation of the Principles as a law applicable to the contract, the Japanese doctrine signals that the incorporation of the Principles as a contractual clause would be valid, as long as the provisions do not contradict a mandatory Japanese law.[127]

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[123] Case 12446. Available more specifically at: https://www.unilex.info/principles/case/1424#JAPANESE.
[124] The applicable law in the case was Japanese law and some specific Japanese laws were mentioned, such as: Article 98 of the Japanese Constitution states that international law must be observed. Article 2 of the Horei (Law No. 10 of 1898, as amended) provides that customs that do not conflict with public order or good customs have the effect of law to the extent that such customs are recognized by law or where there is no legal provision. Article 92 of the Civil Code establishes that customs that differ from legal provisions that do not relate to public order must be observed if the parties express their intention to follow such customs. Article 17(2) of the Rules provides that 'in all cases, the Arbitral Tribunal shall take into account the provisions of the contract and commercial usage'. On the subject see also: L'harmonisation du droit OHADA des contrats : l'influence des Principes d'UNIDROIT en matière de pratique contractuelle et d'arbitrage. Pp. 145 et seq.
[125] Article 7 of the 'Law of General Rules for the Application of Laws' stipulates: "The formation and effect of a legal act shall be governed
by the law of the place chosen by the parties at the time of the act". However, it is important to emphasize that this article only applies when dealing with a law made by a sovereign nation.
[126] Takashi Toichi and Kazuhide Ueno in Perspectives in Practice of the UNIDROIT Principles 2016. pp 76
[127] Id.

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As for the interpretation/supplementation of domestic legislation, there is no explicit legislation that allows the use of international rules in this way.[128]

In addition, based on Article 92 of the Civil Code of 1896, the parties are free to make certain customs binding between them.[129] When there is no agreement, customs can still be applied, as long as they are not against public order and are on matters authorized by the provisions of law or regulations.[130]

If it is found that the Principles reiterate customs, there may be room for their application in the courts, however, the Principles are not yet as well known among Japanese jurists as they are generally known in the West.[131]

With regard to the above-mentioned arbitral award, although there is no explicit legislation that allows the use of international rules to interpret or supplement Japanese legislation, the arbitral tribunal justified the non-use of UPPICs by claiming that they cannot be considered worldwide customs or commercial uses, much less customs or commercial practices generally practiced by Japanese entrepreneurs. In other words, we can argue that this decision shows that this decision was not made due to a legal obstacle, but rather due to a true lack of knowledge of UPPIC by Japanese jurists.

CONCLUSION

From the present study we can affirm that the UNIDROIT Principles are a set of solutions that were considered the most appropriate to deal with the specificities of international contracts. They emerged as an attempt to harmonize international commercial law, reducing the discrepant difference that exists between national systems (mainly between common law and civil law) largely due to the fact that national laws do not offer satisfactory answers to this type of contract. They also resulted from a need to update the rules on the matter, as national legislation is not in many cases modern enough to meet the needs of an international contract.

[128] Hiroo Sono and Tetsuo Morishita 'The UNIDROIT Principles as Reference for the Uniform Interpretation of National Laws: The Case of Japan' Pp.245.
[129] Id. pp 246.
[130] Article 3 of the Law on General Rules for the Application of Laws [Ho no Tekiyo ni kansuru Tsusoku Ho] (Law No. 78 of 2006) provides: "Customs which are not against public order shall have the same effect as laws, insofar as they are authorized by the provisions of laws and regulations, or which refer to matters not provided for in laws and regulations." Article 1 (2) of the Commercial Code [Shoho] (Law No. 48 of 1899), provides (our translation): "A commercial matter not provided for in this Code is governed by commercial custom and, if there is no commercial custom, is governed by the provisions of the Civil Code (Law No. 89 of 1896)." On the subject see also: Hiroo Sono and Tetsuo Morishita. 2021.Op Cit.Pp 246.
[131] Hiroo Sono and Testsuo Morishita. 2021.Op Cit.Pp 246.

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Despite their non-binding nature (and being characterized as soft law), the Principles have a lot of influence at the international level, being applied both by domestic courts and in international arbitration. From the analysis of the jurisprudence made, we can see that there are numerous cases in which the principles have been used. It should be noted that this use occurred mainly in the interpretation and filling in gaps of other international instruments such as the CISG. We can also say that in several decisions the UPPIC and the CISG were applied side by side.

As for the use of UPPIC with the law to be applicable to the contract, we can argue that the main advantage obtained is that legislators, whether international arbitrators or judges of one State, are more apt to apply UPPIC than the legislation of a third State. Furthermore, during the negotiation, it may be that the option for UPPICs is an alternative to one party wanting to impose its own domestic law on the other. Finally, we can argue that the Principles are better able to resolve cases of international commercial law than some domestic legislation.

We cannot fail to comment on the other ways of applying the Principles, either as a model or as a way of interpreting/supplementing the internal legislation of a State. Today, there are several decisions that somehow cite the UPPIC to decide a case of domestic law itself. However, we can argue that some decisions, such as Decision number 1285/07. JVNF. P1. S1 handed down by the Portuguese Supreme Court of Justice, the Principles were not the main argument used when interpreting/supplementing the national legislation.

As for use as a model, some countries can still benefit from this use. Brazil itself could revisit some contradictory topics of its internal legislation.

Within the scope of the countries analyzed, we noticed that, according to the doctrine and internal legislation, among Portugal, Brazil and Japan, none of the countries admits the use of the Principles as legislation applicable to the contract, although all of them allow their incorporation as contractual clauses. The parties usually make extensive contracts, with very detailed regulation, however, at least in proceedings before a domestic court, the terms of the contract are binding only to the extent that they do not conflict with the mandatory rules of the applicable domestic law.

When it came to jurisprudence, Brazil was the only country with decisions contrary to the law and to the understanding of the majority doctrine itself. In two separate cases, the UNIDROIT Principles were applied as the law applicable to the contract.

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As for the use as a mechanism to interpret/supplement national legislation, the Principles have already been used in Portugal in this way through the decision of the Supreme Court of Justice number 1285/07. JVNF. P1. S1. In Brazil, the doctrinal interpretation given to article 4 of the LINDB is that the Principles can only be adopted to support a decision when there is a gap in the law. In Japan, there is no legislation that allows the use of international rules to supplement or interpret domestic law, although the parties may make certain customs binding on each other.

In the context of international arbitration, the Principles are even more used than in the context of national courts, and may even be used as the law applicable to the contract, if there is an agreement between the parties. The only case analyzed where we found problems in the application of the Principles was case 12446, where three Japanese arbitrators understood that the UPPIC was not applied to the specific case, because "they cannot be considered worldwide customs or commercial uses, much less customs or commercial practices generally practiced by Japanese businessmen."[132]

As pointed out by the Japanese scholars themselves, we understand that such a decision derives from a lack of knowledge of the Principles on the part of Japanese jurists. However, it should be noted that this decision was handed down in 2004 and although there is not much evolution on the subject, as it is difficult to find Japanese decisions that mention UPPIC, we can argue that nowadays the application may be a little more accepted.

Regarding the practical study made through the comparison of some articles of the UPPIC and the Brazilian Civil Code, we can see that the two legal provisions present similar solutions.

With the exception of some nuances already discussed, the two provisions provide the parties with the freedom to contract and freedom of form, as well as enshrine principles such as good faith, for example.

Among the devices analyzed, we found a single major difference with regard to notification. The UNIDROIT Principles, based on article 1.10, use the principle of receipt while the Brazilian civil code uses the principle of dispatch.

Finally, regarding the future evolution of the theme, we can say that, according to the institute's work program, there is an ongoing project, considered a priority, entitled "UNIDROIT Principles on International Contracts and Investment Contracts".[132]

[132] Case 12446. Available more specifically at: https://www.unilex.info/principles/case/1424#JAPANESE.

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However, we cannot yet say how this work will impact the 2016 principles, so we need to wait for the development of the theme.

Although the Principles are treated as a new lex mercatoria, we are dealing with a soft law, that is, there is no obligation in the application of UPPIC, thus generating cases such as in Japan in which arbitrators understood that they are not applicable. Soft law can generate a little insecurity for the parties, as there is no certainty of its application, however, in the case of the Principles, the option of maintaining it as soft law seemed to us to be the right one, because, in addition to avoiding problems with States in the negotiation and in the future in the incorporation into domestic legal systems, it avoided a possible delay in ratification.

The Principles can be used from the date of their publication, without the need for incorporation into the legal system of a State. Since then, we can observe more and more jurists using the Principles in the context of international contracts.

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