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ARTICLES

THE UNIDROIT PRINCIPLES AND CISG – SOURCES OF INSPIRATION FOR ENGLISH COURTS?

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I. INTRODUCTION

Courts all over the world are notoriously rather reluctant to turn to foreign or international sources, whether statutes, court decisions, or writings, for inspiration when interpreting their domestic laws.[1] In the rare cases where courts do so, they normally refer only to legal systems linguistically and culturally close to their own.[2] Even when applying international conven-

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[1] For a comprehensive overview, see Ulrich Drobnig, *General Report: The Use of Comparative Law by Courts*, *in* THE USE OF COMPARATIVE LAW BY COURTS: XIVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 3-21 (Ulrich Drobnig & Sjef Van Erp eds., Kluwer Law Int'l 1999).

[2] This is particularly true of Anglo-American courts which traditionally refer mainly, if not exclusively, to decisions rendered in other common law jurisdictions

tions incorporated in their own legal systems, more often than not, they interpret and supplement them on the basis of principles and rules of the law of the forum despite the indication contained in most of these conventions that "[i]n [their] interpretation of this Convention, regard is to be had to [their] international character and to the need to promote uniformity in [their] application" and that "[q]uestions concerning matters governed by [them] which are not expressly settled in [them] are to be settled in conformity with the general principles on which [they are] based."[3]

A significant exception to this general attitude is represented by a recent decision of the English Court of Appeals. In *ProForce Recruit Ltd. v. The Rugby Group Ltd.*,[4] Lady Justice Arden, in *obiter dictum*, criticized some of the traditional rules on contract interpretation in English law and suggested a possible change in approach. In support of it, she made express reference to the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles")[5] as well as to the United Nations Convention on Contracts for the Interna-

(English decisions). Thus, with respect, in particular to Australian courts, see for example, Jianfu Chen, *The Use of Comparative Law by Courts: Australian Courts at the Crossroads*, *in* THE USE OF COMPARATIVE LAW BY COURTS: XIVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, *supra* note 1, at 25-57. With respect to Canadian courts, see for example, H. Patrick Glenn, *The Use of Comparative Law by Common Law Courts in Canada*, *in* THE USE OF COMPARATIVE LAW BY COURTS: XIVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, *supra* note 1, at 59-78. In addition, civil law courts normally restrict their comparative references to countries with a common linguistic and legal background. *See, e.g.*, Marc Elvinger, *The Use of Comparative Law by Common Law Courts in Canada, in* THE USE OF COMPARATIVE LAW BY COURTS: XIVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, *supra* note 1, at 231-34 (highlighting the fact that the courts in Luxembourg regularly refer to French and Belgian decisions).

[3] *See, e.g.*, United Nations Convention on Contracts for the International Sale of Goods, art. 7, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* http://www.cisg.law.pace.edu/cisg/text/treaty.html [hereinafter CISG]. For a critical analysis of the different approaches taken by domestic courts in interpreting and supplementing CISG, see F. Ferrari, *Gap-filling and Interpretation of the CISG: Overview of International Case Law*, *in* REVUE DE DROIT DES AFFAIRES INTERNATIONALES 221-30 (2003).

[4] ProForce Recruit Ltd. v. The Rugby Group Ltd., [2006] EWCA (Civ) 69 (appeal taken from Eng.).

[5] *See* UNIDROIT Principles of International Commercial Contracts with Official Commentary (1994), *available at* http://www.jus.uio.no/lm/unidroit.international.commercial.contracts.principles.1994.commented/ [hereinafter UNIDROIT].

tional Sale of Goods ("CISG").[6] The case is all the more remarkable not only because English courts are known for being particularly parsimonious in using foreign sources other than those of other common law jurisdictions,[7] but also, and most importantly, because the dispute was a purely domestic one with no international connotations. The case referred to two international instruments, one of which – the UNIDROIT Principles – has no binding force at all, while the other – the CISG – is not in force in the United Kingdom.

In this note – which I dedicate to the memory E. Allan Farnsworth, a highly esteemed scholar and personal friend who played a decisive role in the preparation of both the UNIDROIT Principles and CISG – I shall provide a summary of the *ProForce Recruit Ltd. v. The Rugby Group Ltd.* case (Section II) followed by a brief description of the relevant English rules on contract interpretation under consideration (Section III) as compared to those reflected in both the UNIDROIT Principles and CISG (Section IV).

II. *PROFORCE RECRUIT LTD. V. THE RUGBY GROUP LTD.*: FACTS AND RULINGS

ProForce Recruit Ltd. ("ProForce"), an employment and recruitment agency, entered into a contract with the Rugby Group Ltd. ("Rugby Cement"), a cement manufacturer, for the supply of labor, personnel, and cleaning equipment for a period of time of two years.[8] The written contract provided that during this two year period ProForce would hold "preferred supplier status" and contained a clause stating "[t]his Agreement . . . constitutes the entire contract between the parties and supersedes all prior representations, agreements, negotiations or understandings

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[6] *See* CISG, *supra* note 3.

[7] This is because – to quote a particularly eminent English judge – in the past, "it was an almost universal article of faith that English law and legal institutions were without peer in the world, with very little to be usefully learned from others." T. H. Bingham, *"There is a World Elsewhere?": The Changing Perspectives of English Law*, 41 INT'L & COMP. L.Q. 513, 514 (1992). On the recent increasing change in the attitude of English courts in this respect, see Esin Örücü, *Comparative Law in British Courts*, *in* THE USE OF COMPARATIVE LAW BY COURTS: XIVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW, *supra* note 1, at 252-87.

[8] *ProForce*, [2006] EWCA (Civ) 69, [6]-[11] (Eng.).

whether oral or in writing."[9] A few months after the conclusion of the contract Rugby Cement began to use other employment agencies to satisfy requirements exceeding those provide for in its contract with ProForce. ProForce then accused Rugby Cement of breach of contract and claimed that, under the terms of their agreement, Rugby Cement should have first asked ProForce to provide its additional personnel requirements before looking elsewhere.[10] Rugby Cement objected that the term "preferred supplier status" in its natural and ordinary meaning only conferred on ProForce the commercial advantage of being a supplier of labor approved by Rugby Cement and with whom Rugby Cement could choose to place business though without any obligation to do so.[11] ProForce insisted that, according to the meaning ascribed to the term by the parties through the individuals who conducted the negotiations and/or the representation made as to its meaning by Rugby Cement, Rugby Cement was obliged to offer ProForce the opportunity to: 1) supply contract labor and hire equipment in preference to other suppliers and 2) not engage other suppliers of contract labor and hire equipment without first having offered ProForce a reasonable opportunity to satisfy Rugby Cement's requirements in such respects.[12]

A decision by the Senior Master to dismiss Rugby Cement's application to have the case determined summarily was overturned by the English High Court (Queen's Bench Division).[13] Justice Field, relying on a series of precedential cases, including Lord Wilberfors' *Prenn v. Simmonds*[14] and Lord Hoffmann's *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*,[15] which excluded the admissibility of evidence of precontractual negotiations for the purpose of interpreting a written contract, held that ProForce was not entitled to adduce evidence of the negotiations between the parties and their subjective declarations of intent in support of the meaning it

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[9] *Id.* [11].

[10] *Id.* [14].

[11] *Id.*

[12] *Id.* [19].

[13] Rugby Group Ltd. v. ProForce Ltd., [2005] EWHC 70 (Q.B.) (Eng.).

[14] Prenn v. Simmonds, [1971] 3 All E.R. 237, [1971] 1 W.L.R. 1381 (Eng.).

[15] Investors Comp. Scheme Ltd. v. W. Bromwich Bldg. Soc'y, [1998] 1 All E.R. 98, [1998] W.L.R. 896 (Eng.).

claimed the term "preferred supplier status" had for them in the case at hand.[16] Moreover, the parties, by stating in their contract that "[t]his Agreement [. . .] supersedes all prior representations, agreements, negotiations or understandings," made it clear that, between themselves, all things superseded had no bearing on the meaning of their agreement.[17]

On ProForce's appeal, the Court of Appeal unanimously overruled the High Court's decision and deferred the case to trial for further findings of fact concerning the meaning the parties intended to attach to the expression in question in the course of pre-contractual negotiations.[18] In his opinion, Lord Justice Mummery first pointed out that the term "preferred supplier status" did not have an obvious natural and ordinary meaning and that its meaning could only be properly determined in the context of the agreement read as a whole and of all the surrounding circumstances.[19] He then denied that the exploration of the surrounding circumstances, including pre-contractual negotiations, was completely ruled out by the authorities. He referred in particular to Judge Kerr in *Partenreedesei Karen Oltmann v. Scarsdale Shipping Co. Ltd.*,[20] as well as to Chitty on Contracts,[21] and to a recent extra-judicial writing by Lord Nicholls, all admitting evidence of what the parties said in negotiations at least where it is sought to show that the parties negotiated on an agreed basis that the words used bore a particular meaning.[22] Lord Justice Mummery concluded that in the case at hand any evidence of pre-contract negotiations relevant for the purpose of ascertaining the meaning of the term "preferred supplier status" also should be admitted.[23] Nor was the "entire agreement clause" contained in the contract an impediment: indeed, in his view "it

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[16] *Rugby Group Ltd.*, [2005] EWHC 70 (Q.B.) [21]-[22].

[17] ProForce Recruit Ltd. v. The Rugby Group Ltd., [2006] EWCA (Civ) 69, [30] (Eng.) (quoting Partenreederei Karen Oltmann v. Scarsdale Shipping Co. Ltd., [1976] 2 Lloyd's Rep. EWHC (Comm) 708, 712, [31] (Eng.)).

[18] *Id.* [36], [38].

[19] *Id.* [24]-[25].

[20] Partenreederei Karen Oltmann v. Scarsdale Shipping Co. Ltd., [1976] 2 Lloyd's Rep. EWHC (Comm) 708, 712, [31] (Eng.).

[21] 1 JOSEPH CHITTY, CHITTY ON CONTRACTS (Hugh Beale et al. eds., Sweet & Maxwell Ltd. 2004) (1826) [hereinafter CHITTY ON CONTRACTS].

[22] *ProForce*, [2006] EWCA (Civ) 69, [30]-[36].

[23] *Id.*

[was] reasonably arguable" that by this clause the parties intended to exclude "ascertaining the contents of [their] written contract . . . by reference to prior representations, agreements, negotiations and understandings," but not to inhibit "ascertaining the meaning of a term contained in [their] written contract by reference to pre-contract materials."[24]

Yet, it is the opinion of Lady Justice Arden that is particularly significant in the present context. She concurred with Lord Justice Mummery that, since the parties had used a very unusual combination of words "preferred supplier status" without any explanation in the contract, it was reasonably arguable that, on their true interpretation, those words bore the meaning that the parties in common gave them in their pre-contractual communications.[25] The court, in receiving evidence concerning those communications, would be hearing that evidence not with a subjective view of the parties' intent for purposes of interpretation, but for the purpose of identifying the meaning that the parties in effect incorporated into their agreement.[26] However, Lady Justice Arden, though admitting that in order to decide the case at hand it was unnecessary to go further than such evidence, stated that "[e]vidence as to negotiations between the parties to a contract [. . .] may be admissible for the purposes of interpretation in wider circumstances than [those] indicated above."[27] Recalling that Lord Nicholls in his writing cited by Lord Justice Mummery also had suggested that the rule excluding evidence of pre-contractual negotiations on questions of interpretation should be relaxed, and that even Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* had recognized that the boundaries of the rule were unclear, Lady Justice Arden pointed out:

> The exclusion of pre-contractual negotiations is not on the face of it consistent with the general principle that a contract should be interpreted in the light of its context, nor, on the face of it, is the application of a meaning which is not that which the parties

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[24] *Id.* [39]-[41].

[25] *Id.* [45]-[60].

[26] *Id.* [55].

[27] *Id.* [57].

themselves gave to a term consistent with the general approach of contract law, which is to respect party autonomy.[28]

If the ruling of Justice Field in the first instance expressed the general position in law, the result would be that the parties' meaning would be adopted if they defined the term in their written contract, but not if they only did so in the course of pre-contractual negotiations. Moreover, in that latter event, the meaning given to the term by the court would prevail and, if the court's meaning was different from that on which both parties in fact proceeded, a party would be able to avoid its contractual obligations deriving from the parties' meaning. In defining these results as "anomalous," Lady Justice Arden concluded that, if in interpretation questions evidence of pre-contractual negotiations is to be admitted in the future on a wider basis than the law presently permitted, "careful consideration may have to be given to the aims to be achieved by contractual interpretation and the precise extent to which the law requires an objective interpretation."[29] She continued that "[i]t may be appropriate to consider a number of international instruments applying to contracts," such as "[t]he UNIDROIT Principles of International Commercial Contracts [which] give primacy to the common intention of the parties and on questions of interpretation require regard to be had to all the circumstances, including the pre-contractual negotiations of the parties (Article 4.3)."[30] Moreover, Lady Justice Arden stated "[t]he UN Convention on Contracts for the International Sale of Goods (1980) [which] provides that a party's intention is in certain circumstances relevant and, in determining that intention, regard is to be had to all relevant circumstances, including preliminary negotiations."[31]

III. Admissibility of Extrinsic Evidence to Interpret a Written Agreement Under English Law

The question of the admissibility of extrinsic evidence to interpret a written agreement is undoubtedly one of the most con-

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[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

troversial issues of contract interpretation in English law.[32] The traditional literal approach to contract interpretation is that a contract has to be interpreted according to the ordinary grammatical meaning of the words used therein. Only in very limited circumstances can the court go outside "the four corners" of the document has long been abandoned and replaced by a more flexible "purposive" approach.[33] Yet, the extent to which extrinsic evidence is admitted as an aid to the interpretation of a written contract is still controversial.

To be sure, nowadays it is generally accepted that there need not be ambiguity or uncertainty in the text before extrinsic evidence will be admitted. Since, to quote Lord Hoffmann's famous statement in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*,[34] "[i]nterpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract,"[35] a court can always look beyond the language of the document and see what the circumstances were with reference to which the words were used. However, in the words of Lord Steyn in *Sirius Int'l Ins. Co. (Publ) v. FAI General Ins. Ltd.*,[36] "[t]he aim of the inquiry is not to probe the real intention of the parties but to ascertain the contextual meaning of the relevant contractual

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[32] The question should not be confused with the other conceptually distinct (though sometimes associated) question of the so-called parol evidence rule. Indeed, whereas the former relates to contract interpretation and arises because of the limits inherent in the strictly literal approach traditionally followed by English law with respect to the interpretation of written contracts, the latter concerns the admissibility of evidence of prior negotiations, whether oral or written, to contradict or supplement the express terms of the final written document, and derives from the difficulty of establishing whether and if so to what extent the parties intended that document to express their entire agreement. On the role of the parol evidence rule in English law, see also CHITTY ON CONTRACTS, *supra* note 21, ¶ 12-096.

[33] *See* CHITTY ON CONTRACTS, *supra* note 21, ¶ 12-042 (quoting Arbuthnott v. Fagan, [1995] C.L.C. 1396, 1400) (stating that the current approach of the courts to the construction of contracts is "neither uncompromisingly literal nor unswervingly purposive.").

[34] Investors Comp. Scheme Ltd. v. W. Bromwich Bldg. Soc'y, [1998] 1 W.L.R. 896, 912 (UKHL) (Eng.).

[35] *Id.*

[36] Sirius Int'l Ins. Co. v. F.A.I. Gen. Ins. Ltd., [2004] 1 W.L.R. 3251 (UKHL) (Eng.).

language."[37] Moreover, as pointed out by Lord Wilberforce in *Reardon Smith Line v. Yngvar Hansen-Tangen*:[38]

> No contracts are made in a vacuum; there is always a setting in which they have to be placed. In a commercial contract . . . the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.[39]

It is with respect to whether, and if so to what extent, evidence of the pre-contractual negotiations between the parties and their subjective declarations of intent as to the meaning of the words used should be admitted that opinions are still sharply divided.

The prevailing view does not favor this type of evidence. To quote Lord Hoffmann from *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* again, "[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent."[40] According to Lord Hoffmann, the reasons of "practical policy," which explain these exclusions, are of both theoretical and practical nature. On the one hand, the rule that evidence of the pre-contractual negotiations of the parties or of their subsequent conduct cannot be used to interpret a written contract is seen as a corollary of the objective approach to contract interpretation peculiar to English law which, as pointed out by Lord Steyn, "serves the needs of commerce [and] tends to promote certainty in the law and predictability in dispute resolution."[41] On the other hand, and more practically, it has been argued that:

> [t]he reason for not admitting evidence of [the parties negotiations] . . . is simply that such evidence is unhelpful. By the nature of the things, where negotiations are difficult, the parties' positions . . . are changing and until the final document, though converging, still divergent. It is only the final document that records

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[37] *Id.* at 3258.

[38] Reardon Smith Line Ltd. v. Hansen-Tangen, (1976) 1 W.L.R. 989 (UKHL) (Eng.).

[39] *Id.* subsec. "Judgment – 1."

[40] *Investors Comp. Scheme Ltd.*, [1998] 1 W.L.R. at 913.

[41] J. Steyn, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, 113 L.Q.R. 433, 433-34 (1997).

a consensus. The only course then can be to try to ascertain the "'natural' meaning."[42]

Yet, the majority view has also met with criticism. As recalled by Chief Lord Justice Mummery, as early as 1976 Justice Kerr pointed out:

> If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only.[43]

More recently, similar views have also been expressed in legal writings. To quote one of the leading textbooks on English contract law:

> [T]he Court is not entitled to look at what the parties to the contract said or did whist the matter was in negotiation, nor are drafts or preliminary documents admissible in aid of its interpretation, except where it is sought . . . to show that the parties negotiated on an agreed basis that the words used bore a particular meaning.[44]

As Lord Nicholls stated:

> [T]here will be occasions where the pre-contract negotiations do shed light on the meaning the parties intended to convey by the words they used. There will be occasions, for instance, when the parties in their pre-contract exchanges made clear the meaning they intended by language they subsequently incorporated into their contract. When pre-contract negotiations assist in some way, the notional reasonable person should be able to take that evidence into account in deciding how the contract is to be interpreted.[45]

Yet, the predominant exclusionary rules have been challenged beyond cases where there is ambiguity in the written

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[42] *Prenn*, 1 W.L.R. at 1384-85.

[43] Partenreederei Karen Oltmann v. Scarsdale Shipping Co. Ltd., [1976] 2 Lloyd's Rep. EWHC (Comm) 708, 712 (Eng.).

[44] *See* CHITTY ON CONTRACTS, *supra* note 21, ¶ 12-119.

[45] Donald Nicholls, *My Kingdom for a Horse: The Meaning of Words*, 121 L.Q.R. 577, 583 (2005).

document and the evidence of pre-contractual negotiations is sought to show that the parties had attached a particular meaning to the ambiguous phrase. Lord Nicholls and Professor McMeel went much further.[46] After examining the arguments for and against the absolute prohibition of any evidence of the actual intention of the parties for the purpose of interpreting written agreements, they openly advocated, in general, "a liberalisation" of the traditional rules in this field[47] and "a more flexible approach . . . [permitting] courts to have regard, where appropriate, to the meaning intended by both parties or the meaning intended by one party where that party reasonably believes the other party accepted this meaning."[48] Significantly enough, in this context both Professor McMeel and Lord Nicholls referred, as did Lord Justice Arden in the case at hand, to "international restatements" such as the CISG[49] and the UNIDROIT Principles,[50] pointing out that "[they] all make provision to the effect that in interpreting contracts all the relevant circumstances are to be considered including negotiations between the parties and any subsequent conduct of the parties."[51] "Adherence to the exclusionary rule as an absolute rule would risk [the United Kingdom] becoming isolated on this point in the field of commercial law."[52]

IV. Admissibility of Extrinsic Evidence to Interpret a Written Agreement According to the UNIDROIT Principles and CISG

Article 4.1 of the UNIDROIT Principles provides:

> (1) A contract shall be interpreted according to the common intention of the parties.

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[46] *See generally id.*; *see also* Gerard McMeel, *Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation*, 119 L.Q.R. 272 (2003).

[47] *See* McMeel, *supra* note 46, at 289, 296.

[48] *See* Nicholls, *supra* note 45, at 586.

[49] *See* CISG, *supra* note 3, art. 8.

[50] *See* UNIDROIT, *supra* note 5, cmts. to art. 4.1.

[51] Actually both authors, unlike Lord Justice Arden, referred also to the relevant provision of the Principles of European Contract Law. *See* McMeel, *supra* note 46; *see also* Nicholls, *supra* note 45.

[52] Nicholls, *supra* note 45.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.[53]

Article 4.2 of the UNIDROIT Principles provides:

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.
(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.[54]

Article 4.3 of the UNIDROIT Principles provides:

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including
(a) preliminary negotiations between the parties;
(b) practices which the parties have established between themselves;
(c) the conduct of the parties subsequent to the conclusion of the contract;
(d) the nature and purpose of the contract;
(e) the meaning commonly given to terms and expressions in the trade concerned;
(f) usages.[55]

Article 8 of CISG provides:

(1) For the purpose of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been aware what that intent was.
(2) If the preceding paragraph is not applicable, statement made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established be-

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[53] *See* UNIDROIT, *supra* note 5, art. 4.1.
[54] *Id.* art. 4.2.
[55] *Id.* art. 4.3.

tween themselves, usages and any subsequent conduct of the parties.[56]

The two sets of provisions basically correspond except that, for contingent reasons, CISG formally deals only with the interpretation of unilateral statements and other conduct of a party[57] while the UNIDROIT Principles additionally address also the interpretation of contracts.[58]

Both instruments reject an exclusively subjective or exclusively objective approach to contract interpretation and provide for a combination the two. As pointed out in the Comments to Article 4.1 of the UNIDROIT Principles, in determining the meaning to be attached to the terms of the contract preference is to be given to the intention common to the parties, but where such common intention cannot be established, the contract shall be interpreted in accordance with the meaning which reasonable persons similar to the parties would give to it under similar circumstances.[59] Moreover, and even more importantly for the present purposes, both the UNIDROIT Principles and CISG indicate that among the circumstances which have to be taken into consideration when applying both the "subjective" test and the "reasonableness" test are the preliminary negotiations between the parties and the conduct of the parties subsequent to the conclusion of the contract.[60]

The approach taken by the two instruments with respect to contract interpretation reflects the current prevailing trend at the international level and, as such, has met with the approval of commentators from both civil law and common law jurisdictions.[61] Interestingly enough, while at the Vienna Diplomatic

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[56] *See* CISG, *supra* note 3, art. 8.

[57] For the legislative history of CISG Article 8, see E. Allan Farnsworth, *Interpretation of Contract, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE VIENNA SALES CONVENTION 95-97 (Cesare Massimo Bianca & Michael Joachim Bonell eds., Giufree 1987) [hereinafter Farnsworth].

[58] *See generally*, UNIDROIT, *supra* note 5.

[59] *See* UNIDROIT, *supra* note 5, art. 4.1, cmts. 1, 2.

[60] *See* UNIDROIT, *supra* note 5, art. 4.3; *see also* CISG, *supra* note 3, art. 8 (3); *see also* CISG-AC Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, ¶ 3.3, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA, *available at* http://cisgw3.law.pace.edu/cisg/CISG-AC-op3.html.

[61] With respect to the CISG, see generally Farnsworth, *supra* note 57. *See also* J.O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, 115-23 (Kluwer Law

Conference for the adoption of CISG in 1980, the delegation of the United Kingdom opposed – though unsuccessfully, also in view of the fact that none of the other common law delegations took the same position – the inclusion of Article 8 on the ground that it adopted too subjective an approach.[62] Ten years later, in the preparation of the UNIDROIT Principles, Articles 4.1 to 4.3 provided essentially the same solution.[63]

The provisions under consideration have been received favorably also in international case law as demonstrated by the many decisions rendered worldwide by domestic courts and arbitral tribunals applying Article 8 CISG and/or Articles 4.1 - 4.3 of the UNIDROIT Principles to settle disputes concerning contract interpretation.[64] Particularly significant for the present purposes are, in addition to *ProForce Recruit Ltd. v. The Rugby Group Ltd.* here under consideration, the decisions recently rendered by the Court of Appeals of New Zealand in *Yoshimoto v. Canterbury Golf Int'l Ltd.*[65] and by the English High Court in *Svenska Petroleum Exploration AB v. Lithuania*.[66]

Int'l 3d ed. 1999). *See also* Martin Schmidt-Kessell, *Article 8*, *in* COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 111-40 (Peter Schlectriem & Ingeborg Schwenzer eds., Geoffrey Thomas trans., Oxford Univ. Press 2d ed. 2005) (1998). With respect to the UNIDROIT Principles, see generally A. BAUMANN, REGELN DER AUSLEGUNG INTERNATIONALER HANDELSGESCHÄFTE. EINE VERGLEICHENDE UNTERSUCHUNG DER UNIDROIT PRINCIPLES, DER PRINCIPLES OF EUROPEAN CONTRACT LAW, DES UNIFORM COMMERCIAL CODE UND DES DEUTSCHEN RECHTS 58 (V&R Unipress 2004).

[62] *See* U.N. Conference on the Contracts for the International Sale of Goods, Mar. 10 – Apr. 11, 1980, *Summary Records – First Committee, 6th mtg.*, U.N. Doc A/Conf.97/C.1/Sr/6 (Mar. 14, 1980). This Summary Record also identifies the different position taken in this respect by the delegates of the United States and of Australia. *Id.*

[63] *See* UNIDROIT, *supra* note 5, arts. 4.1, 4.3. An English expert together with his colleagues from the United States, Australia and Ghana concurred. For a summary record of the Working Group's deliberations on this point, see UNIDROIT 1991 – Study L – Misc 15, 6-17, 22-29 (Working Group for the Preparation of Principles of International Commercial Contracts, 1991).

[64] *See generally* UNILEX, http://www.unilex.info (containing a database for the CISG and UNIDROIT case law). (For CISG, follow "CISG" hyperlink; then follow "By Article & Issue" hyperlink under "Cases"; then search "8" under "Article #" hyperlink. For UNIDROIT, follow "UNIDROIT Principles" hyperlink; then follow "By Article and Issue" hyperlink under "Cases"; then search under "Article #" hyperlink).

[65] Yoshimoto v. Canterbury Golf Int'l Ltd., [2001] 1 N.Z.L.R. 523, 2000 N.Z.L.R. LEXIS 118 (C.A.).

[66] Swenska Petroleum Exploration A.B. v. Lithuania, [2005] 1 EWHC (Comm) 2437, (2006) 1 All E.R. 731 (Eng.).

Yoshimoto concerned a contract for the sale of shares of a business for the planned development of a golf course in New Zealand by a Japanese businessman to a New Zealand corporation.[67] The contract contained a clause stating that the payment of the last installment was subject to the condition precedent that the purchaser obtain "all necessary authorizations or resource consents to the development" within a given period of time.[68] A dispute arose when the New Zealand corporation refused to pay the last installment on the ground that not all authorizations necessary to commence the development of the project had been obtained.[69] The Japanese seller objected that the clause in question referred only to those authorizations contemplated by the parties at the time of conclusion of the contract, and since the only missing consent was one that had become necessary only afterwards, the condition precedent envisaged in the clause had been fulfilled; contrary to the court of first instance, the Court of Appeal unanimously decided in favour of the Japanese seller.[70]

In a very elaborated and learned opinion, Judge Thomas conceded that on the basis of a strictly objective interpretation of the clause in question the conclusion might have been different, while only by taking into account the pre-contractual negotiations between the parties and their declarations of intention would it become clear that the parties actually attached to the clause in question the meaning contended by the Japanese seller.[71] However, although pointing out that the admission of such extrinsic evidence would be in accordance with Article 8 of CISG, in force in New Zealand, as well as with Articles 4.1 to 4.3 of the UNIDROIT Principles which he described as a "document which is in the nature of a restatement of the commercial contract law of the world [and which] refines and expands the principles contained in the United Nations Convention," he decided not to take a similar approach in the case at hand and to stick to a literal or objective interpretation of the clause in question.[72] Indeed, he argued, desirable as it may be for the courts

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[67] *Yoshimoto*, [2001] 1 N.Z.L.R. 523, 2000 N.Z.L.R. LEXIS 118 (C.A) [2].
[68] *Id.* [12].
[69] *Id.* [3]-[4], [14].
[70] *Id.* [15], [96]-[103].
[71] *Id.* [30]-[35].
[72] *Id.* [88]-[89].

in New Zealand to bring the law in line with the international instruments mentioned above, the Privy Council in London would not permit them to do so as England has not yet adopted the CISG and English common law was traditionally against the admissibility of extrinsic evidence for the purpose of interpreting written agreements.[73]

Svenska Petroleum, decided by the English High Court, concerned a joint venture agreement between a Swedish petroleum company and a previously state-owned Lithuanian petroleum company for oil exploitation in Lithuania.[74] The agreement contained an arbitration clause indicating that the "founders" (i.e. the two incorporating shareholders) would submit their disputes to arbitration under the ICC Rules of Arbitration, and that the applicable law was that of Lithuania "supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the law . . . of Lithuania."[75] The agreement also contained a separate provision stating that "[t]he Government of . . . Lithuania hereby approves the above agreement and acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement."[76] When a dispute regarding performance of the agreement arose, the Swedish company sued not only its Lithuanian partner but also the Government of Lithuania. The latter objected that sovereign immunity shielded it from liability, and even if sovereign immunity did not protect it, the arbitration clause was binding only on the two "founders" of the joint venture.[77] The claimant insisted that the Government of Lithuania, though not a "founder," was nevertheless subject to the arbitration clause because it signed the abovementioned separate clause in the agreement according to which it would be contractually bound as if it were a signatory to the agreement.[78]

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[73] The Privy Council actually revised the decision of the New Zealand Court of Appeal without however re-examining the law on the question raised by Judge Thomas. *See* Yoshimoto v. Canterbury Golf Int'l Ltd., [2002] UKHL 40 (discussing the lower court's failure to give meaning to the terms of the contract other than their plain and obvious meaning).

[74] *Svenska,* [2005] 1 EWHC (Comm) 2437, [1]-[2].

[75] *Id.* [24], [26].

[76] *Id.* [13].

[77] *Id.* [27].

[78] *Id.* [8].

On appeal from an arbitral award in favour of the claimant, Judge Gloster considered both the issue of whether the Government of Lithuania had waived sovereign immunity and whether it had agreed to arbitration.[79] In dealing with this latter issue, she examined the relevant rules of contract interpretation contained in Articles 6.193 to 6.195 of the Lithuanian Civil Code, and also extensively quoted the commentary by an eminent Lithuanian scholar pointing out that those articles "repeat Articles 4.1 to 4.6 of the UNIDROIT Principles."[80] Noting that contrary to English law, the above-mentioned rules of contract interpretation allow for a greater amount of factual material to assist in interpreting the meaning of a contract. In particular, it allows for evidence of pre-contractual negotiations and each party's subjective intent, Judge Gloster considered the pre-contractual negotiations, including previous drafts of the agreement, and in the light of the evidence concluded that the Government of Lithuania had waived sovereign immunity and was bound by the arbitration clause.[81]

V. Appendix: Admissibility of Extrinsic Evidence in the Presence of an "Entire Agreement Clause"

As will be recalled in *ProForce Recruit Ltd. v. The Rugby Group Ltd.*, the agreement between the parties contained a clause stating "[t]his Agreement . . . constitutes the entire contract between the parties and supersedes all prior representations, agreements, negotiations or understandings whether oral or in writing."[82] In the first decision, Justice Field held that the effect of this clause was that all superseded matters, including the pre-contractual negotiations between the parties, were to have no bearing on the meaning of the agreement.[83] On appeal, Lord Justice Mummery found, to the contrary, that it was reasonably arguable that by this clause the parties actually intended to exclude only ascertaining the contents of their written contract by reference to prior representations, agreements, negotiations and understandings, but not to inhibit ascertaining

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[79] *Id.* [28].
[80] *Id.* [30].
[81] *Id.* [31].
[82] *ProForce*, [2006] EWCA (Civ) 69, [11].
[83] Rugby Group Ltd. v. ProForce Ltd., [2005] EWHC 70 (Q.B.) (Eng.).

the meaning of a term in their contract by reference to pre-contract materials.[84]

While the CISG does not deal with "entire agreement" or "merger" clauses,[85] the UNIDROIT Principles contain a specific provision, Article 2.1.17,[86] regarding them. According to Article 2.1.17:

> A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.[87]

This is not the place to examine in greater detail the extent to which this provision corresponds to the approach taken by the various domestic laws with respect to the effects of "entire agreement" or "merger" clauses.[88] Rather, what is important to note is that according to the UNIDROIT Principles, unless clearly stated otherwise by the parties, prior statements or agreements are not deprived of any relevance by such clauses but may still be used as a means of interpreting the written document.[89] Since this is basically also the conclusion reached by Lord Justice Mummery in the case at hand, why exclude the possibility that the UNIDROIT Principles, even though not expressly mentioned in his opinion, also on this occasion served as a source of inspiration.

VI. CONCLUSION

Among the different ways in which the UNIDROIT Principles can be employed in practice, the Preamble expressly states that "[t]hey may be used to interpret or supplement domestic law."[90] Over the years arbitral tribunals as well as domestic

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[84] *ProForce*, [2006] EWCA (Civ) 69, [35]-[36].

[85] By virtue of Art. 6 of the CISG, which states the principle of party autonomy, the parties are of course free to stipulate such clauses in their contract. *See generally* Farnsworth, *supra* note 57.

[86] *See* UNIDROIT, *supra* note 5, art. 2.17.

[87] *See id.*

[88] For an extensive comparative analysis of the laws of Germany, England and the United States, see S. KAUFMANN, *Parol Evidence Rule and Merger Clauses*, *in* INTERNATIONALEN EINHEITSRECHT 204 (2004).

[89] *Id.* at 304.

[90] *See* UNIDROIT, *supra* note 5, pmbl., ¶ 6.

courts all over the world have extensively taken advantage of this possibility, referring in their decisions to specific provisions of the UNIDROIT Principles to interpret or supplement the applicable domestic law or simply to corroborate the solution provided by that law.[91] The question of the admissibility of extrinsic evidence under English law, in particular evidence of pre-contractual negotiation and parties' declarations of intent, for the purpose of interpreting written agreements is highly controversial. In recent times several voices have been raised in support of the relaxation of the traditional exclusionary rules and the adoption of a more liberal approach in line with the international prevailing view. The opinions of Lord Justice Mummery and Lady Justice Arden in *ProForce Recruit Ltd. v. The Rugby Group Ltd.* are only the most recent, though particularly authoritative, ones. The references they contain to the UNIDROIT Principles and CISG are a remarkable demonstration of the increasing openness of English courts towards foreign and international sources of inspiration.

[91] For an extensive analysis of the international caselaw in this respect see MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 294-300 (Transnational Publishers, Inc. 3d ed. 2005).