COLLECTION COLLOQUES VOLUME 41

40e anniversaire de la Convention des Nations Unies sur les contrats de vente internationale de marchandises

40th anniversary of the United Nations Convention on Contracts for the International Sale of Goods

SOUS LA DIRECTION DE / EDITORS
Iacyr de Aguilar Vieira
Gustavo Cerqueira

La Convention de Vienne en Amérique

The Vienna Convention in America

SOCIÉTÉ DE LÉGISLATION COMPARÉE

LA CONVENTION DE VIENNE EN AMÉRIQUE

THE VIENNA CONVENTION IN AMERICA

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LEX MULTIPLEX
JUS UNUM

SOCIÉTÉ
DE LÉGISLATION
COMPARÉE

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Le 11 avril 1980 la Convention des Nations Unies sur les contrats de vente internationale de marchandises fut adoptée. Cette Convention dote la vente internationale de marchandises de règles matérielles uniformes dont l'utilité pour le développement du commerce international est universellement reconnue. Conçue pour répondre aux besoins de ce commerce, la Convention fournit un cadre juridique assez ample en matière contractuelle – formation et exécution du contrat – permettant d'assurer le respect de la bonne foi, la sécurité et la réduction des coûts des transactions commerciales.

À l'heure où la Convention de Vienne fête ses quarante ans, son rayonnement en Amérique est révélateur de son succès. En effet, dix-neuf des quatre-vingt-treize États parties à la Convention se trouvent dans ce vaste continent. Or, ce continent réunit géographiquement ce que la convention a réussi à relier juridiquement : le droit civil et la *common law*.

Afin de célébrer ce quarantième anniversaire, la section Amérique latine de la Société de législation comparée a souhaité présenter l'état actuel de l'application de la Convention dans les différents pays américains et mesurer l'influence de ce texte sur les droits internes de la vente. Dans la mesure où le système d'applicabilité de la Convention et l'évolution des méthodes du conflit de lois permettent aujourd'hui d'étendre assez largement le champ d'application du texte conventionnel à des États non parties, cette perspective a également été intégrée.

Alors que les applications jurisprudentielles et les travaux universitaires se multiplient à l'occasion des adhésions américaines à la Convention, cette présentation entend offrir une meilleure connaissance du fonctionnement de la Convention dans ces pays et, par-là, soutenir l'effort de promotion de l'uniformité de l'application de ses règles.

Une approche comparée complète l'ouvrage. Il s'agit non seulement de rappeler l'importance de l'autonomie du régime de la Convention pour s'opposer aux volontés de différentiations nationales constatées dans la

jurisprudence, mais aussi, et plus positivement, de promouvoir le rayonnement de la Convention comme modèle de réglementation de la vente en Amérique et Europe.

L'ouvrage est ainsi l'occasion de comparer la mise en œuvre de la Convention de Vienne dans les pays d'Amérique et de profiter du regard des juristes américains sur cet instrument universel d'uniformisation matérielle de la vente internationale de marchandises. Ce faisant, il s'associe aux diverses manifestations prévues dans le monde pour célébrer l'âge de la maturité à laquelle parvient celle qui constitue l'œuvre la plus emblématique d'uniformisation internationale du droit privé.

L'ouvrage s'adresse tant au monde universitaire qu'aux praticiens du droit du commerce international.

Strasbourg, 24 février 2020.

Iacyr de AGUILAR VIEIRA
Gustavo CERQUEIRA

FOREWORD

On April 11, 1980 the United Nations Convention on Contracts for the International Sale of Goods was adopted. The Convention provides the international sale of goods with uniform substantive rules whose usefulness for the development of international commerce is universally accepted. Designed to address the longings of commerce, the Convention provides a broad legal framework for contractual issues – formation and performance of the contract – ensuring compliance with good faith, legal certainty and lowering the costs of commercial transactions.

On the occasion of the Vienna Convention on Contracts for the International Sale of Goods' fortieth anniversary, its success can be evidenced by its influence in America. In fact, 19 out of the 93 member-States are found in this vast continent. This continent is a geographic representation of what the Convention managed to achieve in the legal field : gather Civil Law and Common Law.

To celebrate its 40th anniversary, the Latin American section of the *Société de législation comparée* sought to present the Convention's current state of application in different American countries, as well as to measure its influence on domestic sales laws. The book also deals with non-Contracting States, to the extent that their conflict rules lead to the application of the Convention.

As court decisions and scholarly writing multiply with the ratification of the Convention by American States, this presentation seeks to offer a better understanding of how the Convention is being applied and, through that, support the efforts for its uniform application.

A comparative approach concludes the book. This initiative seeks not only to oppose the attempts that can be found in domestic cases to interpreting the Convention differently, but also, and on a more positive note, to promote the Convention as a model for the regulation of sales in America and Europe.

Thus, this book is the perfect occasion to compare the Vienna Convention's implementation in American States and to benefit from the view of American scholars on this universal instrument for the uniformization of sales of goods. In so doing, it joins numerous displays from around the globe to celebrate the adulthood of the instrument that succeeded in becoming the most emblematic work of international uniformization of Private Law.

This book is meant both for scholars and practitioners in the field of international commerce.

Strasbourg, February 24, 2020.

Iacyr de AGUILAR VIEIRA
Gustavo CERQUEIRA

THE CISG IN PARAGUAY

José Antonio MORENO RODRÍGUEZ*

Paraguay ratified in 2005 the United Nations Commission on International Trade Law (UNCITRAL) Convention on the International Sales of Goods (CISG)[1]. For this reason, and others advanced below, the country can proudly enjoin others in celebrating forty years of success of the CISG, and the lines that follow are a tribute to this feast in honor of which this book saw its conception.

This contribution describes the cosmopolitan scenario in Paraguay that makes conditions ripe for a flourishing of the CISG in practice, both in international and domestic settings – the latter considering its influence in precedents and scholarly writings interpreting local rules of Contract Law. These developments should unfold in hand with the amicable ambiance in which the UNIDROIT Principles of International Commercial Contracts (UPICC) found reception in Paraguayan case law and academia. Some accomplishments in this regard will also deserve particular mention.

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[1] Approved by Law 2611 of 2005.

I. LEGAL FRAMEWORK

A. – *Paraguayan Constitution*

In Paraguay, a written National Constitution stands at the pinnacle of legal norms hierarchy, following –as other countries in the region – the model pioneered in the United States of America. Enacted in 1992, the Constitution enshrines the classical separation of legislative, executive, and judicial powers. Constitutional norms prevail over lower order norms in cases of contradiction. At the same time, ratified treaties and other international instruments take precedence over laws enacted by Congress, which in turn prevail over normative bodies promulgated by other authorities, such as decrees, resolutions, ordinances, etc. (Article 137 of the Constitution).

The Constitution has a strong cosmopolitan flavor, reflected, for instance, in the Preamble, where it states that Paraguay is « part of the international community ». In addition, Article 143(4) expressly espouses the principle of « solidarity and international cooperation » while Article 145 stipulates that Paraguay « admits a supranational legal order ». In this way, the Constitution endorses modern international trends away from largely 19th Century Chauvinistic conceptions of the nation-state. This pluralistic spirit is apparent in statutes and rules enacted post-Constitution, such as, in private law matters, the new Paraguayan law on International Contracts (Law 5393 of 2015), drawn upon prestigious international sources[2], and the Paraguayan Arbitration Law (1879 of 2002) which almost entirely replicates the Model Law proposed by UNCITRAL. These laws are open, for instance, to non-national sources as applicable law[3].

The Paraguayan Civil and Commercial Code (the Civil Code), approved by law 1183 of 1985, and in force since 1987, contains the basic regulation on private law. The Code unified Civil and Commercial law, abolishing a distinction traceable to the Middle Ages that had survived in nineteenth-century Civil Law codifications, particularly the Argentine Civil Code previously in force in Paraguay from 1871 to 1986. The Paraguayan Civil Code comprises five « Books », preceded by a « Preliminary Title » and ending « Transitory Provisions », including Article 2810 which

[2] The Hague Principles on Choice of Law in International Contracts (accessible at the site www. hcch.net) ; and the Inter-American Convention on the Applicable Law to International Contracts (accessible at the site http://www.oas.org/dil/private_international_law.htm).

[3] See J. A. MORENO RODRÍGUEZ, « The New Paraguayan Law on International Contracts : Back to the Past ? », in *Eppur si muove: The Age of Uniform Law Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, Rome, UNIDROIT, 2016, vol. II, p. 1146 *et seq*.

derogates the 1891 Code of Commerce while effectively retaining its provisions in matters of Maritime Law and related conflict rules (Articles 871, 1091, 1121 and 1222). Other matters closely linked are distributed through several special laws dealing with specific matters, such as antitrust (Law 4956 of 2013), capital markets (Law 5810 of 2017), and bankruptcy (Law 169 of 1969), among others.

Scholarly work, referred to below, has shown the compatibility between the provisions of the Paraguayan Civil Code and the CISG, even though the latter was not taken into account in the drafting of the national legislation, mostly advanced in the 1960s and 1970s when the National Codification Commission concluded the bulk of its work.

B. – *International instruments*

Paraguay has been active in UNCITRAL since its first membership in 1998 and ratified many of its conventions regarding commercial law, such as the CISG, the Vienna Convention regarding Prescription in Matter of International Sales of Goods of 1974, amended by the Protocol of 1980[4], the United Nations Convention on the Carriage of Goods by Sea of 1978[5], and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade of 1991 (not in force)[6].

Moreover, Paraguay ratified in 2007 the United Nations Convention on the Use of Electronic Communications in International Contracts. Paraguay also adopted legislation drawn upon the UNCITRAL Model Law on Electronic Signatures of 2001[7], and the UNCITRAL Model Law on Electronic Commerce of 1996[8]. Paraguay also recently ratified the United Nations Convention on the Use of Electronic Communications in International Contracts[9].

Regarding UNCITRAL's sister organization, the International Institute for the Unification of Private Law (UNIDROIT), Paraguay has been a member state since 1940[10]. Only one UNIDROIT instrument has been

[4] Ratified by Law 2136 of 2003.
[5] Law 2614 of 2005.
[6] Law 2612 of 2005.
[7] Law 4017 of 2010.
[8] Law 4868 of 2013.
[9] Law 6055 of 2018.
[10] In December 2013, for the first time in history a Paraguayan national, José A. Moreno Rodríguez, was elected to the Governing Council of the institution. He was reelected in 2018.

ratified by the country, that is, the 1995 Convention on Stolen or Illegally Exported Cultural Objects (Law 1048 of 1997).

However, judicial and doctrinal developments, described below, have proven favorable to the reception of the UPICC for interpretative purposes. Moreover, by enacting Law 5393 of 2015, « regarding the applicable law to international contracts »[11], Paraguay became the first country in the world to implement the so-called « Hague Principles » regarding the applicable law to international commercial contracts, which openly allows the application of non-State law, such as the UPICC.

In Paraguay, international instruments emanating from private institutions are widely used in practice as « soft law », such as the International Chamber of Commerce (ICC) INCOTERMS, Rules and Uses on Documentary Credits, among others[12]. Notably, Law 861 of 1996, which regulates banking activities, subjects documentary credits to the rules established on this matter by the International Chamber of Commerce (Article 82).

C. – *Judicial system and legal academia*

In private law matters, Paraguayan law is heavily influenced by the so-called Civil Law System originated in continental Europe. In principle, court decisions do not bind Paraguayan judges, at least not to the degree as in common law jurisdictions. However, precedents can be considered a persuasive factor in predicting the outcome of potential legal issues.

Article 6 Civil Code provides criteria for judicial interpretation, stating that the judges should take into account the law and its spirit, and that interpretation and supplementation should be made taking into account provisions of analogous cases or disciplines and general principles of law. A similar provision is found in Article 9 Code of Organization of the Judiciary, which expressly provides that judges will have regard to judicial precedents.

Scholarly writings are not formally recognized as primary legal sources in Paraguayan law. However, doctrine is highly influential among judges and the legal community. Several seminal court decisions are based on doctrinal writing[13].

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[11] The title in Spanish is the following : « *Sobre el derecho aplicable a los contratos internacionales* ».

[12] See in www.iccwbo.org.

[13] For instance, the decision in *Reconstitución del Expte. Hans Werner Bentz c. Cartones Yaguareté S.A. s. Incumplimiento de contrato*, Acuerdo y Sentencia 82 of 2013, Supreme Court.

II. THE CISG AS APPLICABLE LAW IN PARAGUAYAN INTERNATIONAL CONTRACTING

Paraguay expressly recognizes the possibility of choosing the application of non-State law to international contracts. By Law 1879 of 2002, Paraguay adopted the UNCITRAL Model Law of Arbitration of 1985, reproducing it almost entirely, and transcribing its Article 28 (Article 32 in the Paraguayan Law) which admits the application of *rules of law* to the substance of the dispute, a term considered equivalent to non-State law[14]. The UPICC and the CISG – when not applicable under its own terms – are clearly comprised under this concept[15].

Article 5 of Law 5393 of 2015, « regarding the applicable law to international contracts », grants formal status to non-State law, becoming the first law in the world to do so openly for the purpose of court proceedings[16]. The provision was drawn upon Article 3 of the Hague Principles. When this rule was discussed, the Working Group projecting the Hague Principles pondered the question whether it should confine itself to admitting non-State law in arbitration or whether it should go beyond the

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This landmark decision recognized party autonomy in international contracts. Referring to the doctrine advanced by José A. Moreno Rodríguez, the Supreme Court declared that the parties' choice of law in the contract gives normative content to the agreement in question to regulate the parties' rights, provided these comply with public policy rules and principles of national law. See discussion in : J. A. MORENO RODRÍGUEZ, « Autonomía contractual transfronteriza », in *Libro homenaje a Roberto Ruíz Díaz Labrano* (CEDEP, 2013). The issue became moot with the new Paraguayan Law on International Contracts, discussed above, which openly admits party autonomy.

[14] See Official Comment of UNCITRAL to Article 28. See also the report of the WG of UNCITRAL, 18 meeting, March 1985 (A/CN.9/264, pp. 60-63). See in : J. A. MORENO RODRÍGUEZ, *Derecho Aplicable y Arbitraje*, Madrid, Thomson, 2014, p. 333.

[15] See, for instance, in : K. P. BERGER, « International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts », *46 Am. Comp. L. J. 129*, 1998, p. 2. J. D. M. LEW, « The UNIDROIT Principles as lex Contractus Chosen by the Parties and Without an Explicit Choice-of-Law Clause : The Perspective of Counsel – Special Supplement 2002 », *ICC International Court of Arbitration Bulletin*, 2002, p. 88 ; E. A. FARNSWORTH, « The Role of the UNIDROIT Principles in International Commercial Arbitration (2) : a US Perspective on their Aims and Application – Special Supplement 2002 », *ICC International Court of Arbitration Bulletin*, 2002, p. 22 ; P. MAYER, « The Role of the UNIDROIT Principles in ICC Arbitration Practice – Special Supplement 2002 », *ICC International Court of Arbitration Bulletin*, 2002, p. 105.

[16] The Paraguayan Law on international contracts comprises 19 Articles. Its first part (Articles 1-10, as well as Articles 13-14), regarding choice-of-law, basically reproduces the Hague Principles, with minor modifications. The following provisions (Articles 11-12, 15-16) mostly deal with the applicable law in the absence of choice, reproducing almost literally the above-mentioned Mexico Convention of 1994. Finally, the Law incorporates norms regarding public policy (Article 17, which is in line with the Hague Principles) and derogations (Article 18). The law is accessible at the site http://www.gacetaoficial.gov.py.

status quo[17]. The latter view triumphed, thereby « leveling the playing field »[18] or « bridging the gap »[19] between arbitration and litigation, at least in countries that have adopted the UNCITRAL Model Law. Therefore, it will no longer be necessary to include an arbitral clause to assure that the choice of non-State law will be respected.

Replicating the Hague Principle's norm almost literally, Article 5 of the Paraguayan Law states the following : « In this law, a reference to law includes rules of law of a non-State origin that are generally accepted as a neutral and balanced set of rules »[20]. The requirement of *neutrality* calls for a body of rules capable of resolving problems commonly encountered in transnational contracts, whereas the prerequisite of *balance* was established to address the problem of unequal bargaining power leading to the application of unfair or inequitable rules of law. In turn, the formula of a *set of rules generally accepted* seeks to dissuade parties from choosing vague or uncertain categories of rules of law[21].

Both the UPICC and the CISG – even if not applicable under its own terms – are expressly mentioned as examples of rules meeting these requirements by the official commentary to the Hague Principles[22].

III. PARAGUAYAN SOURCES ALLOWING THE USE OF THE CISG TO INTERPRET OR SUPPLEMENT NATIONAL CONTRACT LAW

A different matter is the application of the CISG (as well as the UPICC) in the domestic context. Can they be interpreted in reference to trade usages, or general principles of law?

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[17] L. GAMA JR., G. SAUMIER, « Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts », in *El Derecho internacional Privado en los procesos de integración regional*, *Jornadas de la ASADIP 2011*, San José, ASADIP y Editorial Jurídica Continental, 2011, pp. 62-63.

[18] M. PERTEGÁS, B.A. MARSHALL, « Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts », in 39 *Brooklyn Journal of International Law*, 2014/3, p. 979.

[19] G. SAUMIER, « Designating the UNIDROIT Principles in International Dispute Resolution » (November 8, 2011), *Uniform Law Review*, 2012, n° 17, p. 533. Available at : SSRN : http://ssrn.com/abstract=2012285, p. 547.

[20] Article 3 of the Hague Principles states : « The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise ». The general acceptance of an international, supranational or regional level requirement was deleted as a requirement in Paraguayan law to avoid controversies as to which bodies of law fulfill it. The final part of the article was deleted, of course, because it only makes sense as a text in « Principles » and not in a law.

[21] See note 18, pp. 997-998.

[22] Comment to Article 3 of the Hague Principles.

A. – *General Principles of Law*

Article 6 of the Paraguayan Civil Code states that in the absence of a response in accordance with the words and spirit of the norm or analogy, the adjudicator may recur to the general principles of law.

Velázquez Argaña addressed specifically the topic of the correspondence of the CISG and the UPICC to « general principles of law » in Paraguay, concluding in the affirmative[23]. This interpretation leads to their supplementary applicability. Moreover, the *Manzoni* case[24] expressly references that the UPICC are understood as a means of interpretation in legal systems that consider « general principles of law » a source of law, as does Article 6 of the Paraguayan Civil Code[25].

B. – *Usages, Custom and Practices*

Article 7 of the Civil Code states that usages, custom or practices cannot create rights, except when the law refers to them. In turn, Article 2 of the Law 1034 of 1983 (which regulates mostly formal obligations of Merchants) expresses that the Civil Code is complementary, and that commercial usages and custom can only apply when the law refers to them to determine the sense of words or technical phrases of commerce and to interpret acts and conventions of the same nature.

One may interpret these provisions literally (particularly Article 7 of the Civil Code), admitting at the most incorporation by reference of certain usages and practices[26]. However, a leading book on Paraguayan Commercial Law goes beyond[27]. It distinguishes between *usos interpretativos*, *usos técnicos* and *costumbre*.

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[23] E. VELÁZQUEZ ARGAÑA, « El Derecho Comercial Internacional y su Influencia en el Desarrollo del Derecho de Contratos », in *Código Civil de la República del Paraguay Comentado*, Third Edition, Asunción, Thomson Reuters La Ley, 2017, pp. 79-115, and in particular in pp. 114-115.

[24] *José Luis Andrés Manzoni Wasmosy c. Indert s. obligación de hacer escritura pública y otros*, Acuerdo y Sentencia 95 of 2014, Civil and Commercial Court of Appeals, Fourth Chamber, accessible at : http://www.unilex.info/case.cfm?pid=2&id=1866&do=case.

[25] It mentions that in Paraguayan doctrine there has been advocate to be applied by Paraguayan tribunals, citing J. A. MORENO RODRÍGUEZ, *Derecho aplicable y arbitraje internacional*, Asunción, Intercontinental Editora, 2013, p. 305.

[26] See the interpretation of E. VELÁZQUEZ ARGAÑA, note 23, p. 101. A more open interpretation in hand with the dynamic of commercial law is suggested in J. A. MORENO RUFFINELLI, *Derecho Civil, Parte General*, 13ª Edition, Asunción Intercontinental Editora, 2013, p. 102.

[27] J. H. ESCOBAR, *Derecho Comercial*, 2ª Edición, Asunción, La Ley Paraguaya, 2014.

The *usos interpretativos* (or contractual practices of the parties or in business) serve to interpret the will deficiently declared in contracts, operating as implied condition (*claúsula sobreentendida*). It is not necessary for them to be extensively accepted – it will suffice for them to be understood as a habitual way of dealing[28].

In turn, the *usos técnicos* (or technical usages) are objective rules of conduct practiced in commerce as norms of law. At times the parties adopt them, as when incorporating the INCOTERMS (*usos técnicos* incorporated by the parties). Other times the law has a blank permitting it to be filled by usages (*usos términos* invoked by the law). For instance, Article 2 of Law 5810 of 2017 « of capital markets » expresses that capital market usages and customs are of supplementary application to the laws and regulations governing capital markets[29].

A third category is the *costumbre* (custom), or usages generally accepted[30]. Which usages qualify as such is another matter of unsettled discussion.

Escobar recognizes that terminology is confusing in all this matter[31]. Regarding Article 7 of the Civil Code, he considers that usages by implied terms (*contractuales*) and invoked by law (*invocados por ley*) constitute sources of law that prevail over provisions of the Civil Code and are not mere auxiliary of interpretation[32].

An ample interpretation has also been strongly advocated in contractual matters invoking several norms, such as the ones referring to the good faith principle of Article 714 of the Civil Code, which in concordance with Article 715 and Article 301, consider that contracts oblige to the expressed as well as to the implied consequences (« *las consecuencias virtualmente comprendidas* »), and Article 6 that derive dubious interpretative matters to analog rules (« *disposiciones que regulan casos o materias análogas* »), of consuetudinary character in commercial matters[33].

[28] See note 27, p. 58.
[29] See note 27, pp. 58-59.
[30] See note 27, p. 60
[31] See note 27, p. 60.
[32] Escobar cites in support Zavala Rodríguez. See note 27, p. 63.
[33] See in J. A. MORENO RODRÍGUEZ, *Curso de Contratos*, 2ª Edición, Asunción, Intercontinental Editora, 2017, chapters 3 and 8. Moreover, several particular provisions of the Civil Code refer to usages, such as Article 786, 787 in sales contracts, 952 in brokerage contracts, etc.

C. – *Case Law and its correspondence to Uniform Law*

Ofelia is a remarkable recent decision invoking the CISG and UPICC regarding usages and practices[34]. The parties orally concluded a sales commission agreement. Sometime after, one of them withdrew from the deal, while the other filed a lawsuit claiming damages for non-performance. The Court of Appeals examined the contractual obligations, and found that despite the original agreement which provided that the goods had to be collected at the seller's premises, a different practice had been established between the parties according to which the seller delivered the goods directly to the customers.

In order to determine the relevance of this practice in the contractual relationship, the Court of Appeals referred both to Article 9 of the CISG and Article 1.9 of the UPICC. The Court then concluded the existence of an implied obligation of the seller to deliver the goods to customers, as set forth by Article 5.1.2 (b) of the UPICC, which considers the practices between the parties a source of implied obligations. The decision expressly refers to Article 7 of the Civil Code, according to which practices do not create rights except when the law refers to them. It further invokes Article 715 and party autonomy and the good faith principle emerging thereof, concluding that practices appear precisely as a product of conduct voluntarily accepted by the parties.

In the *Gómez Vaezken* case[35], the Court of Appeals also relied on the UPICC to interpret unilateral declaration of the parties, invoking Article 4.3 of the UPICC and its reference to usages and practices as implied obligations.

The Supreme Court dealt with other cases on similar grounds. In the *Haywood* case[36], a victim's heirs filed a lawsuit claiming for damages resulting from a traffic accident which led to the decease of their father. The Supreme Court concluded that the heirs were entitled to damages and, in doing so, referred to Articles 5.1.1. and 5.1.2 of the UPICC, which deal with express and implied obligations (*deberes secundarios de conducta*,

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[34] *Ofelia Valenzuela Fernández c. Paraguay Granos y Alimentos S.A. s. indemnización de daños y perjuicios por incumplimiento contractual*, Acuerdo y Sentencia 66 of 2016, Civil and Commercial Court of Appeals of Asunción, Sixth Chamber http://www.unilex.info/case.cfm?id=2134.

[35] *José Carlos Gómez Vaezken c. LJP S.A. s. reconocimiento de crédito y otros,* Acuerdo y Sentencia 90 of 2016, Civil and Commercial Court of Appeals of Asunción, Second Chamber, http://www.unilex.info/case.cfm?id=2104.

[36] *Engracia Marina Haywood de Balbuena y otro c. Empresa de Transporte Nueva Asunción S.A. y otros s. indemnización de daños y perjuicios*, Acuerdo y Sentencia 1074, Supreme Court, http://www.unilex.info/case.cfm?id=2140.

emerging from practices, usages, and good faith). In the decision of the Court, even though the heirs were not part of the contractual relationship between the deceased father and the transport company, the implied obligations of safety (also based on the good faith principle) gave them a legitimate claim for damages. However, the Supreme Court rejected the claim since the claimants failed to prove the other party's responsibility for the accident.

Another Supreme Court case also referred to express and implied obligations (*Garófalo* case)[37]. A cooking expert (chef) entered into a contract with a film producer, by which she accepted to participate in a TV series. In the course of the performance of the contract, the chef complained about the unsafe working conditions on the set, prompting the other party to terminate the agreement. The chef filed a lawsuit objecting to the termination and sustaining its unlawfulness and claimed damages for the other party's failure to fulfill its implied obligation of security on the set.

In deciding in favor of the claimant, the Supreme Court confirmed the existence of such an implied obligation, and in so doing referred not only to the general principle of good faith in the performance of contracts as stated in Article 715 of the Civil Code, but also to Articles 5.1.1 and 5.1.2 of the UPICC dealing with implied obligations.

IV. USE OF THE CISG AND THE UPICC IN PARAGUAY

The CISG and the UPICC form part of the legal discourse of Paraguayan legal practice and academia[38]. A contract law textbook comparing the CISG and the UPICC with the Civil Code's solutions is used in regular courses in major universities[39]. The 2010 and 2016 version of the UPICC were published in Asunción by Intercontinental Editora and the *Centro de Estudios de Derecho, Economía y Política (CEDEP)*. There is a specific subject in the Judicial School (*Escuela Judicial*) which deals with the interpretation of the Civil Code aided by UPICC[40]. For many years, teams of the National and Catholic Universities of Asunción have been

[37] *Sara Garófalo Benza c. Alejandro Mainero Maivolo y Dena S.A s. indemnización de daños y perjuicios*, Acuerdo y Sentencia 1478 of 2016, Supreme Court : http://www.unilex.info/case.cfm?id=2030.

[38] When doing comparative law, one must go beyond the positive rules and take into account component of legal discourse – Sacco referred to them as legal formants. See, for instance, in : U. MATTEI, « Three Patterns of Law : Taxonomy and Change in the World's Legal System », 45 *American Journal of Comparative Law* 5, Winter, 1997, p. 15.

[39] See note 33.

[40] www.ej.org.py.

participating in Arbitration Moot Competitions involving the application of the UPICC such as the Vis Moot, the Moot Madrid and the Moot jointly organized by the University of Buenos Aires and Rosario of Bogotá. Moreover, as stated, the UPICC are being used by courts for interpreting and supplementing national Contract Law[41].

The Supreme Court established a powerful precedent in favor of the UPICC as an interpretative tool in the *Etcheverry* case[42]. An application had been filed alleging that because a ruling of a Court of Appeals invoked the UPICC, which do not have binding force in Paraguay, it violated Paraguayan legislation.

The Court of Appeals had referred to Article 5.1.3 of the UPICC, which alludes to the principle of cooperation between the parties, affirming that this provision complements the principle of good faith in contractual relations recognized in Paraguayan law. Precisely, the other party pointed out that the Court of Appeals clearly indicated that the use of the UPICC was not of a binding nature, but instead supplementary or complementary to provisions included in the Paraguayan legislation.

Since the Court of Appeals used the UPICC as an interpretative tool regarding national legislation, the Supreme Court considered the reference to them as correct. The decision, however, was revoked on other grounds.

This precedent is key. Therein, the Supreme Court confirmed that the UPICC can be used to complement or supplement provisions of Paraguayan domestic law. Other three cases of the Supreme Court have also applied the UPICC for the same sake[43].

Further, more than fifteen appellate decisions referred for interpretative purposes[44]. Some examples follow below.

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[41] The following principles were used by Paraguayan State Courts : Article 5.1.3 (cooperation between the parties) ; Article 2.1.21 (conflict between standard terms and non-standard terms) ; Article 4.4 (reference to contract or statement as a whole) ; Article 4.6 (contra proferentem) ; Article 7.1.3 (withholding performance) ; Article 5.1.1, 5.1.2 (express and implied obligations) ; Article 1.2 (freedom of form) ; Article 7.1.1 (non-performance) ; Article 1.9 (usages and practices) ; Article 3.2.7 (gross disparity) ; Article 1.8 (inconsistent behavior) : Article 1.7 (good faith and fair dealing) ; Article 2.1.4 (revocation of offer) ; Article 2.1.18 (modification in a particular form) ; Article 2.1.20 (surprising terms) ; Article 2.2.5 (agent acting without or exceeding its authority) ; Article 10.4 (new limitation period by acknowledgement) ; Article 2.2.10 (termination of authority) ; Article 2.1.2 definition of offer ; Article 4.3 (relevant circumstances) ; Article 1.3 (binding character of contract) ; and Article 5.1.4 (2) duty of best efforts. See the cases in www.unilex.info.

[42] *Jorge Moises Etcheverry Alí c. Rosa María Ramona Etcheverry de Brizuela s. obligación de hacer escritura pública*, Acuerdo y Sentencia 62 de 2015, Civil and Commercial Court of Appeals of Asunción, Sixth Chamber, http://www.unilex.info/case.cfm?id=1971.

[43] The four cases can be found at the UNILEX website www.unilex.info.

[44] See at : www.unilex.info.

In *Duarte* Torres[45], the pioneer case invoking the UPICC (dated from 2013), the parties entered into a contract for the sale of a parcel of land which had to be chosen by the buyer, out of a larger tract which belonged to the sellers. The dispute initiated five months after the conclusion of the contract when the buyer presented a claim requesting the performance of the contract and subsequently offering full payment of the purchase price. The sellers submitted their counterclaim seeking the termination of the contract, considering that their obligation to conclude the administrative procedure to divide the land within sixty days had become impossible since the buyer failed to select the portion of the property which had to be transferred.

The Court of Appeals dismissed the buyer's claim and decided in favor of the sellers' counterclaim, therefore deciding in favor of the termination of the contact. This decision was mainly based on the buyer's duty of cooperation which was not complied with. The Court argued that the buyer had a duty to cooperate, which consisted in pointing out the portion of land he wished to buy within a reasonable time period within the sixty days after the conclusion of the contract. This would allow the seller to comply with his obligation to provide the necessary documents for the transfer of the land and the completion of the administrative procedures to fractionate the property.

The duty of cooperation is not expressly contemplated in Paraguayan domestic laws. However, the Court of Appeals sustained that it is derived from the duty of good faith in contractual relations, which, in turn, is contemplated by Paraguayan domestic laws. The Court supported its conclusion in the UPICC, relying on its Article 5.1.3, and also referring to its explanatory notes.

The Court of Appeals expressly stated (in Spanish) that the UPICC are « amply accepted principles in International Commercial Law targeting to propose uniform law responses to juridical problems, and as such, are an instrument that, among other uses, can serve to interpret and complement national law »[46].

[45] *Ramón Duarte Torres c. José Manuel Acevedo Oviedo y otros s. pago por consignación, cumplimiento de contratos y otros*, Acuerdo y Sentencia 11, Civil and Commercial Court of Appeals of Asunción, Sixth Chamber http://www.unilex.info/case.cfm?id=1692.

[46] In Spanish : « *…principios ampliamente aceptados en el Derecho Comercial Internacional que propenden a proponer soluciones uniformes a los problemas jurídicos, y que como tal, fungen como un instrumento que, entre otras funciones, permite interpretar y complementar el Derecho nacional* ».

In the two similar *Dirección General de Aduanas* cases[47], the same Court of Appeals refers to its first decision in the *Duarte Torres* case, stating that even if the UPICC do not have binding force, they are amply accepted principles in international commercial law with uniform solutions to similar legal problems, and as such can be used to interpret and complement national law. The same was expressed in the *Manzoni*[48] and the *Nitschke* cases[49].

The *Ofelia* case[50] reaffirmed that the UPICC, even though not binding, can be used to interpret and complement national law as they constitute a compendium of the international development in the field, reflecting the principal legal systems. In footnote 18 of the decision, *Ofelia* cites a ruling (and transcribes a whole excerpt) in this sense of the Supreme Court of Colombia[51]. The *Yacyretá* case again includes similar reasoning and the same reference to the Supreme Court of Colombia[52].

Other cases reaffirm that the UPICC are principles amply recognized (*Etcheverry*)[53], principles accepted by the community of international commercial law (*Ayala Zalazar)*[54], and norms of non-binding character but general rules of international commercial contracts accepted by great part of legal scholars (*Ozorio*)[55]. In the *Compasa* case, it was stated that even

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[47] *Dirección General de Aduanas c. El Comercio Paraguayo S.A. de Seguros Generales s. ejecución de resoluciones administrativas*, Acuerdo y Sentencias 17 and 18 of 2013, Civil and Commercial Court of Appeals of Asunción, Sixth Chamber, http://www.unilex.info/case.cfm?id=1695) (http://www.unilex.info/case.cfm?id=1696.

[48] See note 24.

[49] *Amanda Teofila Nitschke De Fayard c. Jose Domingo Vallena Balbuena, Acuerdo y Sentencia 15 of the year 2015,* Civil and Commercial Court of Appeals of Asunción, Sixth Chamber http://www.unilex.info/case.cfm?id=2143.

[50] See note 34.

[51] Corte Suprema de Justicia de Colombia, Fallo N° 11001-3103-040-2006-00537-01, Rafael Alberto Martínez Luna y María Bernal Cancino c. Granbanco S.A. www.unilex.info/case.cfm?id=1709 « *'los principios, simbolizan el esfuerzo significativo de las naciones para armonizar y unificar disímiles culturas jurídicas, patentizan la aproximación al uniforme entendimiento contemporáneo de las relaciones jurídicas contractual superan las incertidumbres sobre la ley aplicable al contrato, los conflictos, antinomias, incoherencias, insuficiencia, ambigüedad u oscuridad de las normas locales al respecto. Indispensable aclarar que las partes pueden regular 1 contrato mercantil internacional por sus reglas, en cuyo caso, aplican de preferencia a la ley nazilan31 no imperativa, y el juzgador en su discreta labor hermenéutica de la ley o del acto dispositivo, podrá remire a ellos para interpretar e integrar instrumentos internacionales y preceptos legales internos* ».

[52] *El Faro Producciones S.R.L. c. Entidad Binacional Yacyretá*, Acuerdo y Sentencia 48 of 2017, Civil and Commercial Court of Appeals of Asunción, Sixth Chamber http://www.unilex.info/case.cfm?id=2141.

[53] See note 42.

[54] See note 46.

[55] « … *reglas generales de los contratos mercantiles internacionales aceptados por una gran parte de los estudiosos del Derecho* ». *Nathalia Elizabeth Ozorio Ruíz Díaz c. Empresa*

though the UPICC have non-binding character, they have been applied in several legal systems of the world as complementary or soft law[56].

The *Ofelia* case[57] refers to the UPICC and CISG regarding usages and practices, as seen above. Also, in deciding whether or not a contractual relationship between the parties existed, it referred not only to national law on freedom of form concerning contract formation but also to Article 1.2 of the UPICC and Article 2:101 PECL (Principles European Contractual Law). Then the decision refers also to the rule of Article 74 CISG, regarding foreseeable recoverable damages, including loss of profits.

In the same line, when referring to gross disparity (*laesio*), the *Pavetti* case[58] alludes not only to the UPICC but also to the PECL which uses the phrase « excessive benefit or unjust advantage » (*beneficio excesivo o ventaja injusta*). Invoking uniform law texts has, thus, become common place in Paraguayan legal practice.

V. THE « UNIFORM LAW METHOD » IN PARAGUAYAN COURTS

The interpretation of the CISG, when applicable under its own terms, has not been tested in Paraguayan Courts.

However, interestingly, three Paraguayan cases have applied the Paraguayan arbitration law, inspired on the UNCITRAL Model Law on the subject, in hand with the « Uniform Law Method ». The *Educpa Case* referred that the national arbitration law was modernized following the modern arbitral practices[59], and the same tribunal, in the *Galiano Case*, referred to UNCITRAL Secretariat's explanatory notes for interpretative

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Automotores Guaraní S.A.E.C. E I. (A.G.S.A.) y otros s. indemnización de daños y perjuicios por responsabilidad extracontractual, Acuerdo y Sentencia 54 of 2017, Civil and Commercial Court of Appeals of Asunción, Sixth Chamber, http://www.unilex.info/case.cfm?id=2151.

[56] « *…han encontrado su aplicación en diversos sistemas jurídicos del mundo como derecho complementario o soft law* ». The statement is found in the dissenting opinion. The majority decision does not deal with the matter. See in : *Compañía de Petróleo y Asfalto (COMPASA) c. Petrobras Distribuidora S.A. s. indemnización de daños y perjuicios*, Acuerdo y Sentencia 36 of 2016, Civil and Commercial Court of Appeals, Fourth Chamber.
http://www.unilex.info/case.cfm?id=1958.

[57] See note 33.

[58] *Sindulfo Ruiz Pavetti c. Maria Esther Recalde de Aliendre y Policarpo Ramón Aliendre,* Acuerdo y Sentencia 77 of the year 2016, Civil and Commercial Court of Appeals of Asunción, http://www.unilex.info/case.cfm?id=2105.

[59] *Edupca c. Rosario del Pilar López s/ Indemnización de Daños y Perjuicios por Responsabilidad Extracontractual*, A.I. Nº 150 del 07 de abril de 2014, Tribunal de Apelación en lo Civil y Comercial, Tercera Sala, Asunción, Paraguay.

purposes[60]. In the Fundación TESAI case[61], another Appeals Court cited again the said explanatory notes, discarding the applicability of domestic criteria to interpret a uniform law instrument as is the arbitration law.

Interpretation in the same lines should be expected in CISG-related cases that may arise in the future, more so considering the express provision of its Article 7.1 imposing a uniform application of its norms. The UNCITRAL reform to the arbitration model law of 2006 has a similar provision, not contained in the original model law of 1985. However, even with a Paraguayan arbitral law enacted in 2002 (which followed the 1985 version), which did not contemplate the uniform interpretation expressly, Paraguayan tribunals already rendered interpretations in accordance with this method.

VI. PARAGUAY RATIFIED THE CISG WITH A VALID RESERVATION?

Paraguay ratified the Vienna Sales Convention without a reservation in the ratifying law. This legal enactment is an indispensable local constitutional requirement for the ratification of treaties and represents the will of the legislators in this regard. However, in the fulfillment of the final diplomatic step, when depositing the document, Paraguay made a reservation. It states :

« The Republic of Paraguay declares, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement, [or] any offer, acceptance or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in Paraguay »[62].

This reservation was not contemplated by the legislators ratifying the convention. Therefore, the following question arises : How to deal with this conundrum?

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[60] « *Recurso de Nulidad interpuesto por el Abg. Roberto Moreno en representación de la Procuraduría Gral. de la República c. proceso arbitral : "Julio Galiano Morán c. Estado Pyo*" ». Acuerdo y Sentencia Nº 79 del 28 de agosto de 2018, Civil and Commercial Court of Appeals of Asunción, Fourth Chamber, Asunción, Paraguay.

[61] « *Recurso de nulidad interpuesto por la Fundación TESAI c. proceso arbitral caratulado Cesar Luis Puente c. Fundación TESAI s. constitución de tribunal arbitral* ». Acuerdo y Sentencia Nº 85 del 22 de diciembre de 2017, Civil and Commercial Court of Appeals of Asunción, First Chamber, Asunción, Paraguay.

[62] https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10#EndDec

In response, the law of ratification (with no reservation) should prevail over a deposit of the instrument, which unduly went beyond what was approved by Congress[63]. The mandate was, therefore, exceeded in the diplomatic instance of depositing the instrument.

Importantly, the freedom of form principle must be interpreted as embedded in the Paraguayan Civil Code (Articles 302, 673, 676, 704, 705 and 703), in accordance to the evidentiary openness of the Code of Civil Procedure (Articles 246 and other related provisions.) This solution also goes in hand with the countries´ adoption of several texts dealing with electronic contracting[64].

The interpretation above moots the debate on the reservation regarding formalities imposed by local legislation.

[63] Regarding this issue, I consulted with world-renowned expert on the Law of Treaties, Professor Duncan Hollis. I did not give him all the elements to render me a definite opinion. Notwithstanding this fact, he was kind enough to provide me some of his ideas : The validity of the « understanding » of this question depends on whether it was a matter of International Law or Paraguayan Law. It could be argued that as a matter of International Law, the instrument of ratification that was deposited likely governs the extent of Paraguay's international obligations under CISG. There may be a question of whether the effect of the understanding is to simply clarify which of several reasonable interpretations of Paraguay's obligations it will follow versus actually modifying or excluding commitments it would otherwise receive under that treaty (that is, is it a real reservation or just an interpretative understanding). At first glance, however, Paraguay should be held to the CISG giving effect to this declaration. There might be arguments to the contrary, however, especially if argued that the statement was inadmissible as inconsistent with the CISG's object and purpose (see Vienna Convention on the Law of Treaties, Article 19). But, even then the result will more likely be that Paraguay is not a party rather than that it's reservation would be severable (the Nordic countries and some Human Rights Treaty Bodies have argued for severance in cases of inadmissible reservations, but Professor Hollis considers this a minority view). Moreover, treaty law is unlikely to give Paraguay much relief if the argument is that the Executive Branch added this understanding without proper authorization from the Legislature. The only relief it could claim would be to argue that under Article 46 of the Vienna Convention on the Law of Treaties there was a « manifest violation » of a « rule of fundamental importance » under Paraguayan Law that voids its original consent to the CISG (the result, however, would be that Paraguay is not a party instead of severing the understanding). Moreover, there are few cases where Article 46 arguments have worked ; on the contrary, it seems such arguments most often fail (see, for example, *Cameroon v. Nigeria*, where International Court of Justice expressed deep skepticism that other States must keep track of how foreign States authorize their consent to be bound). All of that said, of course, there could be relief under Paraguayan Law if the understanding was attached without appropriate authority. Professor Hollis does not give his opinion on this issue and reiterates that, in any event, this is not a simple case.

[64] See in J. A. MORENO RODRÍGUEZ, note 34, Chapter VII. The instruments on electronic commerce are referred to in Notes 7 to 9 of this contribution.

CONCLUSION

This contribution provides sufficient testimony of why Paraguay can proudly commemorate the CISG's fortieth birthday. The country ratified the convention itself, on the one hand, and on the other hand, it adopted most of the relevant international instruments in the field of commercial law. Moreover, Paraguayan case law and legal academia have proven amicable to recent developments in uniform law. Perhaps all these accomplishments just prologue promising developments to unfold in times to come, and hopefully, each year to follow, Paraguay will deservedly cheer anniversaries of the CISG.