The need for a harmonious interpretation of the rules applicable to international contracts

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Abstract

International trade, as of result of globalization and the consequent exponential growth in the operations volume, has brought a movement of reflection on the disciplinary rules of international trade relations. In this context and considering the significant divergences between the legal regimes of the different States, the instruments of standardization and harmonization of the international contracts' disciplinary rules assume special importance. Notwithstanding the existence of normative instruments that guide the formation and execution of the signed agreements, it is imperative that the hermeneutic activity of such texts is also harmonious, under penalty of distorting the purpose for which they were conceived. Through the analytical method, we will approach the unifying rules and principles of the process of interpreting contracts in the international scenario. Initially, we will present the principle that guides the entire process of interpreting international contracts, pointing out the fundamental principles in conducting the interpreter's activity. We will also note the importance of usages and customs in the interpretive process. Finally, we will analyze the rules on the interpretation of contracts and unilateral declarations of the parties contained in the Vienna Convention on the International Sale of Goods 1980, CISG, and in the UNIDROIT Principles applicable to international commercial contracts, version 2016.

Keywords: *international trade; harmonizing; standardization; interpretation; CISG; UNIDROIT Principles.*

JEL Classification: K12

DOI: 10.24818/TBJ/2022/12/1.05

1. Introduction

International trade relations have contributed to an intense normative production, either by supranational or by international organizations. The exponential growth in commercial transactions between parties from different countries increasingly requires a dynamic and flexible discipline capable of responding to the interests involved, taking into account the predictability and security that this type of relationship requires. The attempt to improve the regulation of commercial relations has revealed itself not only in terms of conflict, but also in

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instrumental norms that help to designate the applicable law through connection criteria (such as European regulations in Private International Law), as, essentially, in terms of the standardization of material rules, directly applicable to the agreements established between the parties.

The autonomy of the parties, a fundamental paradigm of international trade, makes it possible for trade operators to choose any legal system, from a state, supranational or international source, to discipline of their relations. They may even come to designate rules arising from the practice of international trade, revealing these through usages, customs, standard clauses and even arbitration awards.

We cannot forget the role of the United Nations Commission on International Trade Law, UNCITRAL, and the International Institute for the Unification of Private Law, UNIDROIT in terms of standardizing the rules applicable to international trade.

We refer particularly to the CISG and the UNIDROIT Principles.[3]

Since its conception, the Convention has aimed to present itself as an instrument of the of international substantive law. To achieve this purpose, its editors produced a text that could be widely accepted by States on a world scale.[4]

Regarding the Principles, we can say that they are a true guide for international commercial relations, intending to provide a catalog of standards with implementing criteria for a uniform interpretation, either of the standards themselves or of the contracts in question.[5]

n this way, it is up to us to clarify the interpretative rules that these instruments present, either regarding their meaning or in the definition of the meaning of the contractual clauses.

It is not enough to standardize the applicable legal regime; it is necessary that the respective interpretation does not vary due to the latitude of the place where we are located.[6]

2. The principle of international contracts' interpretation

International commercial contracts are those celebrated between parties that have establishments in different States, as provided for by the CISG in Article 1. More broadly, we can say that a contract is international when it is related to different

[3] Bonell, Michael Joachim. The UNIDROIT Principles of International Commercial Contracts and CISG–Alternatives or Complementary Instruments?. Uniform Law Review-Revue de droit uniforme, 1996, 1.1: 26-39. Bridge, Michael. The CISG and the UNIDROIT principles of international commercial contracts. Uniform Law Review, 2014, 19.4: 623-642.

[4] Grebler, Eduardo. A Convenção das Nações Unidas sobre contratos de venda internacional de mercadorias e o comércio internacional brasileiro. *Anuário Brasileiro de Direito Internacional*, 2008, 3.III.

[5] Botteselli, Ettore. Princípios do unidroit: internacionalização e unificação do direito comercial internacional. RJLB, Ano 2 (2016), nº 1; Mimoso, Maria Joao, et al. Unidroit principles in international trade contracts' regulation. 2019.

[6] Dimatteo, Larry A., et al. *The interpretive turn in international sales law: An analysis of fifteen years of CISG jurisprudence*. Nw. J. Int'l L. & Bus., 2003, 24: 299.

legal systems, due to the place of conclusion or execution, the location of its object, the nationality or domicile of the contracting parties.[7]

In view of the various forms of regulation that exist, even though placing the emphasis on the material or substantive path, an analysis of the various rules interpretation that leads to the formation and execution of international contracts is necessary. These are intended to help, especially, the parties and the judges, whether they are arbitrators or judges.

Among the contractual standardization instruments, we can cite international treaties and conventions ratified by States (hard law), as well as model laws, standard clauses, general contractual conditions, and principles relating to international contracting (soft law).[8]

However, in the global scenario, the CISG and the UNIDROIT principles stand out as sources of legal standardization.[9] Both instruments provide predictions regarding the interpretation of contracts.

As for the application of these standardization instruments in international contracting, it is necessary to mention, first, the principle of contractual freedom. This is because this freedom includes the possibility for the parties to determine the terms of the contract and, therefore, to designate the applicable law.

CISG enshrines contractual freedom in its article 6, providing that "*The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."*. Hence it is inferred that the parties may exclude the application of the whole CISG, or only some of its parts, and may indicate, if they so desire, a national law. The parties can also explain the terms used in the contract, define in detail the hypotheses of non-performance of the contract and establish the causes for the exclusion of liability.[10]

It is indeed observed that the CISG editors point out that the primary source of regulation for international commercial contracts is the autonomy of the parties, which, since the 16th century with Dumolin, the French statutory school, has played a central role in contractual relations.

According to their preamble, the UNIDROIT Principles can be applied if the parties have agreed that their contract will be governed by them, if the parties have agreed that their contract will be governed by general principles of law, by *lex mercatoria* and case the parties have not chosen any law to govern their contract. In this sense, article 1.1 of the UNIDROIT Principles provides that "*The parties are free to enter into a contract and to determine its content*".

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[7] Stranger, Irineu. *Aspectos da contratação internacional.* Revista da Faculdade de Direito, Universidade de São Paulo, vol. 96, janeiro de 2001, pp. 455-474.

[8] Martins, Amanda Athayde Linhares; Lopes, Luiz Felipe Calábria. *A interpretação de contratos internacionais segundo a CISG: uma análise comparativa com o Código Civil Brasileiro, à luz dos princípios do UNIDROIT*.

[9] Gotanda, John Y. *Using the Unidroit Principles to fill gaps in the CISG*. 2007.

[10] Martins, Amanda Athayde Linhares; Lopes, Luiz Felipe Calábria. *A interpretação de contratos internacionais segundo a CISG: uma análise comparativa com o Código Civil Brasileiro, à luz dos princípios do UNIDROIT*; Zuppi, Alberto. L. et al. *Comentários à Convenção de Viena Sobre Contratos de Compra e venda Internacional de Mercadorias*. Visão Geral e Aspectos Pontuais. São Paulo: Atlas, 2015.

The principle of contractual freedom is central in the contract theory of all legal systems, especially in state law, and is also a paradigm in international contracting. We can even affirm that the expression of the parties' autonomy of will in the regulation of their private interests is manifested through contractual freedom.[11]

However, contractual freedom is not unlimited, and it must respect mandatory norms of national, international, or supranational origin (see article 1.4 of the UNIDROIT Principles).

As already stated, the uniformity of the legal regime regulating international trade is not limited, however, to the simple possibility of applying the CISG or the UNIDROIT Principles. It is also necessary to have a harmonious interpretation of these texts. To prevent divergences, the instruments themselves present principles that should guide their interpretation.

From them it is possible to extract the fundamental principles to guide the interpreter. We speak particularly about the principles of internationality, uniformity, and good faith. See article 7 of the CISG and articles 1.6 and 1.7 of the UNIDROIT principles.[12]

According to the principle of internationality, the interpretation of the provisions and concepts applicable to a contract must be made in the context of international trade, without any binding to any national legal system. We are faced with an independent, operational system of rules that is adapted to the needs of international trade[13] and, therefore, that imposes an autonomous interpretation "shaped" by the objectives of the instrument itself. We should also methodologically use preparatory work and international jurisprudence.[14]

About the interpretation of treaties, see Article 31 of the Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, *„(a) treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"* which offers us the paradigm for the interpretation of the Treaties. In terms of International Trade Law, it gains an extraordinary dimension.

The principle of uniformity, in turn, reinforces the need to promote convergence in interpretation, as this is the main objective given the diversity of national legal regimes. One must, therefore, seek an interpretation detached, as far as possible, from the proper and traditional meaning of the terms.

Next, regarding the principle of good faith, it is observed that it has several functions, one of them of an interpretative nature. Contracts must be interpreted in

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[11] Bonell, Michael Joachim. UNIDROIT Principles of International Commercial Contracts: Why What How. Tul. L. Rev., 1994, 69: 1121.

[12] Martins, Amanda Athayde Linhares; Lopes, Luiz Felipe Calábria. *A interpretação de contratos internacionais segundo a CISG: uma análise comparativa com o Código Civil Brasileiro, à luz dos princípios do UNIDROIT*.

[13] Zuppi, Alberto. L. et al., *Comentários à Convenção de Viena Sobre Contratos de Compra e venda Internacional de Mercadorias*. Visão Geral e Aspectos Pontuais. São Paulo: Atlas, 2015.

[14] Fonseca, Patricia Galindo da. O Brasil perante uma nova perspectiva de Direito Mercantil Internacional. Revista Forense, vol. 341, abril de 1998, pp. 193-211.

good faith in both the primary and secondary relationships. It is an objective model of conduct, with an extensive list of duties attached to the main duty imposed by the contract. Contracting parties must act with honesty, loyalty, and honesty, before, during and even after contracting, regardless of express contractual provision.[15] As we know, disrespect for good faith can even configure a breach of contract. The principle of good faith encompasses the impossibility of venire contra factum proprium, which translates into the inadmissibility of contradictory behavior on the one hand, which could frustrate the legitimately created expectations on the other. This is found in article 1.8 of the UNIDROIT Principles, which establishes that *"A party cannot act inconsistently with an understanding of the other party to have and upon which another party has reasonably acted in reliance to its detriment."*.

It is also worth mentioning the principle of *favor contractus*. According to this, despite the defects that the contract may suffer, or the deficiencies verified in the fulfillment of the obligation of one of the parties, efforts should be made in order to privilege its maintenance, instead of terminating the contract.[16] This is particularly important in international trade, where costs are more expensive, taking into account the distances involved. This principle can be inferred from the possibility of remedying the non-conformity of a product, under the terms prescribed by articles 37 of the CISG and 7.1.4 of the UNIDROIT Principles, or from the mitigation of damage, present in articles 77 of the CISG and article 6.2.1 of the UNIDROIT Principles.

Some authors also mention the principle of reasonableness, which would be implicit in the CISG and in the UNIDROIT Principles. This principle was a contribution of North American law, revealing itself to be broader than the "*good family father*" criterion of French law.[17] Its function is to assist in the interpretation of the parties' will, translating common sense, that is, what is appropriate and right in certain circumstances, at a certain time and in a certain community.[18]

Finally, it is important to mention the principle of primacy of usages, customs, and practices. They consist of legal rules of interpretation or of statements that indicate how the expressions of will of the parties should be understood.

Contract clauses can provide them with shelter. However, even if not provided for in the contract, the parties are bound by the uses and customs known and observed by the operators in that specific sector of commerce[19], cf. article 9 of the CISG and article 1.9 of the UNIDROIT Principles, both provisions having similar wording.

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[15] Zuppi, Alberto. L. et al. Comentários à Convenção de Viena Sobre Contratos de Compra e venda Internacional de Mercadorias. Visão Geral e Aspectos Pontuais. São Paulo: Atlas, 2015.

[16] Bonell, Michael Joachim. UNIDROIT Principles of International Commercial Contracts: Why What How. Tul. L. Rev., 1994, 69: 1121.

[17] Zuppi, Alberto. L. et al. Comentários à Convenção de Viena Sobre Contratos de Compra e venda Internacional de Mercadorias. Visão Geral e Aspectos Pontuais. São Paulo: Atlas, 2015.

[18] Aguiar Junior, Ruy Rosado de. Aspectos da convenção de Viena sobre a compra e venda de mercadorias (CISG) – 1980. Revista Jurídica Luso-Brasileira, ano 2, nº 2, 2016, pp. 1407-1437.

[19] Glitz, Frederico Eduardo Zenedin. Contrato, Globalização e *Lex Mercatoria*: Convenção de Viena 1980 (CISG), Princípios Contratuais UNIDROIT (2010) e INCOTERMS (2010). Clássica Editora, São Paulo, 2014.

3. The international commercial contracts' rules of interpretation and the unilateral declarations

3.1 The United Nations Convention on International Sale of Goods – CISG

CISG has a broad, flexible, and reality-aware interpretive approach.[20] In the Convention's article 8, we find a rule that governs the interpretation of the declarations and conduct of the parties.

The first paragraph of article 8 brings a subjective approach, based on the party's real will, if the other party knew about that will or could not ignore it. The burden of proof regarding the knowledge of the other party about this will lies with the party who alleges the incidence of said provision. The party's intent to be considered must have been manifested or expressed by some means.

Thus, article 8 of CISG is applicable to the interpretation of both the express declarations and communications of the contracting parties, as well as the behavior of the parties observed before and after the conclusion of the contract, provided that a certain intention is expressed.

It should be noted that, to interpret the contract, the intention of the party is only questioned when the terms of the document are not clear, as, otherwise, their literal meaning must be attributed to them.

As for the second paragraph of article 8 establishes an objective approach, enshrining the principle of reasonableness. This paragraph has a subsidiary effect, as it will only apply if the previous paragraph cannot resolve the dispute. According to this provision, the interpretation must be done in the understanding of a "reasonable person", a person who is of the same quality as the interpreter, in the same circumstances.

Some authors also see in this device the principle of *contra proferentem* (counter-offence), enshrining the idea that the terms of contracts with standard clauses should be interpreted in favor of the party against which they are used.

The third paragraph of article 8 provides that all relevant circumstances of the case must be considered in the application of both the first and second paragraphs of the precept in question. It also provides a non-exhaustive list of special circumstances to be considered, e.g., the "*negotiations, practices adopted by the parties among themselves, uses and customs and any subsequent conduct of the parties*".

It is important to refer to the parole evidence rule of the common law system. By this rule, the final agreement of the parties cannot be contradicted by preliminary or subsequent negotiations to the written contract.[21]

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[20] Schwenzer, Ingeborg; Hachem, Pascal. The CISG—successes and pitfalls. The American journal of comparative law, 2009, 57.2: 457-478.

[21] Oliveira, A. S.; Medeiros, H. G. A nova Lex Mercatoria entre a Civil Law a Common Law: a Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias e

The doctrine has understood that CISG excludes the application of said rule by establishing that all circumstances must be considered in interpreting the intention of the parties or the meaning that a reasonable person would have given. The solution consists in the adoption, in the contracts submitted to the common law, of the so-called merger clauses, that is, integration clauses that could derogate or change the meaning of certain provisions of the CISG, such as, for example, article 8 nº 3.

3.2 UNIDROIT Principles

The UNIDROIT principles also contain provisions regarding the interpretation of international contracts and the declarations of the parties. We can even say that, in this headquarters, they are more advanced than CISG, as they establish rules of interpretive assistance and hermeneutic standards not contained in the latter. It is worth mentioning that the Principles are post-CISG, having been published for the first time in 1994 and updated in 2016 for the last time.

These principles have a soft law nature, without binding effect and with a more flexible legal form, with an emphasis on customs and commercial uses.[22/23]

Article 4.1 of the Principles provides, in its first paragraph, that the contract must be interpreted according to the common intention of the parties. Although the common intention of the parties is foreseen here, in contrast to the wording of CISG, there are, in practice, no differences in the interpretation of the contracts between the two instruments. This is because the CISG establishes that, to be considered the intention of one party, it must be known to the other party, which ends up configuring a common intention between them. In effect, the common intention is nothing more than the intention of one party that is shared by the other contracting party.

However, if such common intention cannot be determined, the contract shall be interpreted according to the meaning that reasonable persons of the same type of the parties would have assigned, in the same circumstances, as provided for in the second paragraph of article 4.1. A reasonable person is one who has the same linguistic knowledge, technical aptitude, or business experience as the parties.[24]

The parties' common understanding prevails even regarding the literal sense of the language used and the meaning attributed by a reasonable person, although rare verification, given the evidential difficulties surrounding the common intention of the parties.

Despite the subjectivity of the first paragraph and the reasonableness of the second, these criteria are not always adequate, especially in contracts with standard clauses. Indeed, given their special nature and purpose, the standard clauses must be

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a Harmonização do Direito Contratual Europeu. Direito Internacional. 1ed. Florianópolis: CONPEDI, 2014, 1: 36-57.

[22] Gama JR., Lauro. Os princípios do UNIDROIT relativos aos contratos do comércio internacional: uma nova dimensão harmonizadora dos contratos internacionais.

[23] Pablo-Romero Gil-Delgado, María Concepción. Avances en la aplicación de los Principios UNIDROIT sobre los Contratos Comerciales Internacionales. Cláusulas modelo para los contratantes. Cuadernos de Derecho Transnacional, 6 (1), 253-268, 2014.

[24] UNIDROIT Principles 2016 (Annotated version).

interpreted, predominantly, in accordance with the reasonable expectations of the standard user ("average"), regardless of the real understanding of either party about the contract or a reasonable person under the same conditions.[25]

As for the interpretation of the declarations and unilateral conduct of the parties, the principles have a specific provision, article 4.2, with the same wording as article 8 of the CISG. However, the rule provided for is the same as the one established for the interpretation of the contract. Initially, the intention of the party in question should be sought, considering that the other party knew (or could not ignore) this intention. If this provision is not fulfilled, the meaning that would be given by a reasonable person in the same circumstances must be considered.

The practical importance of this article 4.2 occurs in the process of formation of contracts, when the parties' manifest statements and conducts whose meaning may need to be interpreted to determine whether the contract was, in fact, concluded. There is also usefulness in the application of the provision when, after the conclusion of the contract, a unilateral act by the party raises doubts about its interpretation, such as, for example, in the notification of defect in the goods, in the notification of annulment or extinction of the contract.[26]

In order to establish the intention of the parties and to determine the understanding of a reasonable person, all the relevant circumstances of the specific case must be considered, the most relevant of which are listed in article 4.3 of the Principles. They are: "*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."*.

Of these circumstances, some are more general in nature, as others are related to the relationship established between the parties. If we compare with CISG, we verify that "*(d) the nature and purpose of the contract; (e) the commonly used meaning given to terms and expressions in the trade concerned*" are not covered in this last instrument.

It is important to underline that, of all the circumstances presented, sub-paragraphs (a), (b) and (c) assume greater importance in the subjective approach (first paragraph of articles 4.1 and 4.2); while the circumstances contained in items (d), (e) and (f) prove to be relevant in the objective approach (second paragraph of articles 4.1 and 4.2) (UNIDROIT, 2016). The circumstance referred to in (f) "usages" can only be used when the requirements of article 1.9 of the Principles in its subparagraph (b) are fulfilled *"(2) The parties are bound by usage that is widely known to regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable".*

Finally, paragraph *"(c) the conduct of the parties subsequent to the conclusion of the contract"* may only be used as an interpretation tool to clarify or expand the obligations contracted and may not contradict the terms of the contract originally accepted by the parties.[27]

[25] UNIDROIT Principles 2016 (Annotated version).
[26] UNIDROIT Principles 2016 (Annotated version).
[27] UNIDROIT Principles 2016 (Annotated version).

There are also, in chapter 4 of the Principles, rules that guide the interpretation of obscure terms, having as reference the contract system (article 4.4), its useful effect (article 4.5), as well as the rule *contra proferentem* (article 4.6).

Article 4.4 foresees the consistency of the contract, providing that the terms and expressions must be interpreted considering the contract as a whole or in view of the context of the declaration in which they are inserted and not in isolation. Basically, it is about its systematic insertion in the contract itself. As a rule, this denotes a lack of hierarchy between the clauses of the contract. However, the considerations in the preamble of the Principles may be relevant to the interpretation of the terms of the contract, in the same way that, in the event of a conflict, provisions of a specific nature prevail over those of a general nature.[28] In addition, the parties can establish a hierarchy between the different clauses or parts of the contract.[29]

On the other hand, according to article 4.5, the terms of a contract must be interpreted in such a way as to give effect to all of them, so as not to deprive any clause of meaning. In fact, the contract is supposed to contain no purposeless words. Such rule is only applicable when, after using the basic rules of interpretation, articles 4.1 to 4.3, a certain expression remains ambiguous.

Article 4.6 includes the *contra proferentem* rule, according to which, obscure contractual terms will be interpreted preferentially to the detriment of the party that proposed them. The extent to which this rule is applied depends on the circumstances of the case and the extent of the negotiations entered between the parties. The less a clause has been the subject of debate, the more justification there is for interpreting it to the detriment of the party that proposed it.

Finally, articles 4.7 and 4.8 deal, respectively, with linguistic differences between versions of the same international contract and contract omissions, which must be addressed, in the absence of other relevant rules of the Principles (such as, for example, the articles 5.1.6, 6.1.1, 6.1.4 and 6.1.6), by means of an appropriate clause.[30]

To determine the appropriate clause, the interpreter shall consider, in accordance with the second paragraph of article 4.8: "*(a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness".*

The criteria provided by this article must be appropriate to the circumstances of the case and, therefore, the intention of the parties must be considered, which can be measured in the terms expressed in the contract, in its preamble, in previous negotiations or in the conduct after the conclusion of the agreement, among other factors.[31]

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[28] Albán, Jorge Oviedo. Aplicaciones de los principios de UNIDROIT a los contratos comerciales internacionales. Criterio Jurídico, 2003, 3: 7-33.

[29] UNIDROIT Principles 2016 (Annotated version).

[30] Gama JR., Lauro. Os princípios do UNIDROIT relativos aos contratos do comércio internacional: uma nova dimensão harmonizadora dos contratos internacionais.

[31] UNIDROIT Principles 2016 (Annotated version).

When a contract has two or more equally mandatory language versions, it is preferred, in case of discrepancies, the interpretation that is in accordance with the version in which the contract was originally drawn up, article 4.7 of the Principles. The exception to this rule would be the use of known international instruments, *e.g.*, the INCOTERMS, a situation in which a different linguistic version of the proposals can lead us to a clearer interpretation.[32]

4. Conclusions

The consistency of the legal regime applicable to international trade is not limited to the normative instruments that guide the formation and execution of the celebrated agreements. A harmony in the interpretation of these texts is needed.

Thus, the rules that regulate the interpretation of contracts play a fundamental role in building the necessary uniformity for international trade, resulting in greater predictability and legal certainty.

In this context, the fundamental principles to guide the interpreter are those of internationality, uniformity, and good faith, as well as the primacy of usages and customs, provided for both in the CISG as well as in the principles of UNIDROIT.

As for the rules for interpreting the contracts and the unilateral declarations of the parties, the two analyzed texts (CISG and Principles) favor the common intention of the parties, in a subjective aspect, which is preponderant regarding the literal meaning of those.

Only when it is not possible to reach the intention of the parties will the meaning that would have been given by a reasonable person be sought, of the same type and in the same circumstances as the parties. It is an objective approach, presenting itself as subsidiary to the first.

Both CISG and the UNIDROIT Principles provide for special circumstances that must be considered by the interpreter in seeking the intention of the parties or the meaning to be attributed by a reasonable person. We talk about the preliminary negotiations, the practices adopted by the parties, the uses and customs, the subsequent conduct of the parties, the nature and scope of the contract and the meaning given to the terms in the commercial environment in question. The last two circumstances are only enshrined in the UNIDROIT Principles.

In addition to the mentioned criteria, the UNIDROIT Principles also refer to the interpretative rules on the consistency of the contract, the useful interpretation, the *contra proferentem* rule and the provision related to linguistic discrepancies.

In short, we can say that CISG is the result of hard work by the United Nations Commission on International Trade Law with the aim of unifying the rules relating to contracts for the purchase and sale of international goods, while the UNIDROIT Principles consolidated the principles of trade international, applicable to any international commercial contract, showing special commitment in the respective interpretation.

[32] UNIDROIT Principles 2016 (Annotated version).

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