PERFORMANCE AND THE UNIDROIT: AN EVALUATION OF ARTICLE 6.1

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SUMMARY: I. *Introduction.* II. *The UNIDROIT in Context.* III. *Article 6: the Law of Performance under the UNIDROIT.* IV. *The UNIDROIT and Documentary Transactions.* V. *Conclusion.*

I. INTRODUCTION

Article 6.1 of the UNIDROIT regulates the performance of contracts. Articles 6.1.1 to 6.1.6 deal with such recurrent performance issues as partial performance, performance at one time and in instalments, the order of performance and early performance. Articles 6.1.7, 6.1.8 and 6.1.9, among others, deals with performance in relation to documentary transactions. This short essay examines these provisions, first, in light of the general significance of the UNIDROIT and second, through an analysis of the provisions themselves. The intent is to evaluate their practical application, the extent to which they diverge from common and civil law rules on performance and their distinctive merit as part of a uniform body of law.

II. THE UNIDROIT IN CONTEXT

The UNIDROIT principles governing performance of a contract exemplify the difficulties faced in attempts to carve a new International Law Merchant out of domestic legal cloth.[2] Private law efforts at unifi-

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2 On the UNIDROIT, see International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (1994); International Institute for the Unification of Private Law (UNIDROIT), New Directions in International

cation are marked by attempts to provide business problems with functional solutions. This involves recognising that UNIDROIT Principles ought to satisfy supranational needs that transcend the peculiar legal traditions of one or another systems of law, while at the same time providing legal solutions that are comprehensible to parties with different legal and cultural backgrounds. This leaves UNIDROIT drafters with the difficult task of having to adopt novel solutions that straddle a pathway somewhere between common and civil law systems, in an attempt to create the possibility of a more expansive *ius commune* beyond both. The choice of uniform drafters is not always comfortable nor satisfying. Different legal systems adopt different approaches in resolving business disputes; and choosing one legal solution above another provides certainty for one community only at the expense of others. Uniform drafters also risk being accused of embracing a new legal formula to resolve what is perceived by some as being an old problem.[3]

Uniform lawyers who are serious about their task — and the UNIDROIT drafters clearly *are* serious — must deal with a number of philosophical and practical questions. Is there a unifying philosophy in existence upon which they can draw to reconcile different legal solutions existing in different legal systems? How are they to arrive at that reconciliation? And if a novel approach is preferable, how should it be formulated and applied in fact? The risks in responding to each question are high. Attempting to reach a compromise among different legal approaches may satisfy no one. Drafters who try to blend different methods of resolving conflict, risk producing a legal solution that is unworkable because it is unacceptable or incomprehensible to some.

These critical comments are not meant to undermine the accomplishments of the UNIDROIT drafters. Indeed, it is apparent that the UNIDROIT principles are already part of international practice, for example, in the recognition accorded them by the Inter-American Convention on the Law Applicable to International Contractual Obligations.[4] It is also

Trade Law (1977). On the Law Merchant in general, see Trakman, Leon E., *The Medieval Law Merchant: Our Forgotten Heritage* (1983).

3 Fontaine, Marcel, "Content and Performance", 40 *American Journal of Comparative Law* 645 (1992).

4 This Inter-American Convention was approved at the Fifth Inter-American Conference on Private International Law held in Mexico City on March 14-18, 1994. Article

evident that, in developing innovative rules to respond, *inter alia*, to the performance of documentary transactions, the UNIDROIT may be conceived as enhancing comparative jurisprudence in a multi-jurisdictional context.

As preliminary comments, the UNIDROIT has a variety of potential functions in relation to the performance of a contract. First, it can help to avoid deadlock over the choice of law in the event of two legal options. Here, the UNIDROIT principles can provide the parties with a uniform body of law in partial substitution for having to negotiate and rely upon detailed choice of law clauses. While the UNIDROIT does not displace choices of law decisions, it can afford parties use of clearer legal principles than those contained in many domestic systems of law.[5] Second, the UNIDROIT principles can serve as a model for legislation governing performance both at the domestic and the international levels. This promotes uniformity in devising and applying principles of performance to diverse contractual relations across national boundaries. It also enables parties in countries that lack a coherent body of principles governing performance to *find* one in the UNIDROIT itself. This need is especially significant in relation to non-documentary performance in which technological advances have transformed the nature of performance in recent decades. Third, the principles of the UNIDROIT governing performance can help to interpret and otherwise supplement existing international instruments. No matter how succinctly they are formulated, domestic and international legislation requires interpretation in light of constantly changing social and commercial facts. While the UNIDROIT itself is subject to different interpretations in varied commercial and legal re-

7 of the Inter-American Convention provides that contracts shall be governed by the law chosen by the parties, while Article 9 adds that "if the parties have not selected the applicable law, or if their selections provides ineffective, the contract shall be governed by the law of the State with which it has its closest ties." For the determination of such law, the court shall take into account not only all objective and subjective elements of the contract, but also general principles of commercial law embodied in, among other instruments, the UNIDROIT. On the virtue of the UNIDROIT principles, particularly in relation to technological developments and innovative methods of communication among persons conducting business across state boundaries, see Parra-Aranguren, G., "Conflict of Law Aspects of the UNIDROIT Principles of International Commercial Transactions", 69 *Tulane Law Review*, 1239 (1995).

5 See hereon, Perillo, J., "UNIDROIT Principles of International Commercial Contracts", 63 *Fordham Law Review 283*, 1994.

gimes, it *can* still provide a framework within which to interpret provisions governing performance in contract. This is especially apparent in efforts made by the uniform drafters to provide explanatory notes setting out both reasons for and illustrations of the UNIDROIT principles. Fourth, the UNIDROIT is useful as a guide in drafting provisions on performance in international commercial contracts. While trade and industrial associations have long resorted to model contracts, the UNIDROIT principles can be applied far more broadly than to any one distinct trade or industry. Neutral among trades and industries, they can also be applied more neutrally when compared to model contracts devised by trade associations that are sometimes viewed as unduly sympathetic towards the supplier, buyer, or some other party. Finally, the UNIDROIT principles offer a degree of flexibility that is often lacking in some domestic legal systems. This flexibility arises from the fact that the parties *themselves* can vary the application of UNIDROIT principles to their agreements. This flexibility is key to the acceptance of the UNIDROIT in the adoption of commercial arbitration over domestic litigation that is impeded by complex and inadequate domestic procedures and substantive laws. This resort is most likely to arise in non-documentary transactions in respect of which domestic legal regimes often are lacking.[6]

In summary, in adopting the UNIDROIT, the Parties do not avoid the application of the proper law of the contract as it is conceived by the private international law rules of the forum. At the same time, the UNIDROIT principles provide a coherent and vital alternative to conflicting and sometimes incomplete domestic laws governing performance.

III. ARTICLE 6: THE LAW OF PERFORMANCE UNDER THE UNIDROIT

Article 6.1 embodies the UNIDROIT principles governing the law of *Performance*. In a few short articles, it sets out a flexible yet clear body of principles. Suppletive in intent, these principles are comprehensible in nature and transcend both legal and national boundaries. In seeking to develop the law governing contract performance, article 6.1 re-

6 See generally hereon Bonnel, M.,"The UNIDROIT Principles of International Commercial Contracts: Why? What? How?", 69 *Tulane Law Review*, 1121, 1995.

sponds to the concern among businesses engaged in transnational commerce that conflicting rules governing performance should not impede contractual relations.[7]

Articles 6.1.1 to 6.1.6 deal with some of the crucial performance issues, including among others, partial performance, performance at one time and in instalments, the order of performance and early performance. These provisions are not always universally satisfying, particularly in relation to partial performance and performance at one time and in instalments. Nevertheless, in shifting from a distinctly civil law approach in earlier drafts of article 6.1. to a more balanced common law/civil law approach in the final version, the drafters have attempted a task that many would regard as impossible: to reconcile the sometimes irreconcilable and to arrive at a blend of certainty and flexibility in commercial practice.[8] This is especially evident in the extent to which provisions within article 6.1 attempt to arrive at principled yet practical solutions that minimize upon, among others, conflict of law problems.[9]

As is evident in admissions made by its drafters, article 6 proved to be one of the most difficult chapters to draft. While no difficulties were envisaged at the outset, ongoing controversy has surrounded the drafting, interpretation and application of its three drafts. The central concern has revolved around the extent to which its provisions have harmonized the law governing performance and provided sufficient clarity to be comprehended and interpreted effectively.[10] The intention, here, is to concentrate upon the more controversial aspects of Chapter 6.

Article 6.1.1

> Article 6.1.1 deals with the general issue, that a party must perform its obligations in the time specified in the contract, or within a reasonable time.

7 See *e.g.* Hyland, Richard, "On Setting Forth The Law of Contract: A Forward", 40 *American Journal of Comparative Law*, 543 (1992). See too, Rosett, Arthur, "Harmonization, Restatement, Codification, and Reform of International Commercial Law", 40 *American Journal of Comparative Law*, 683, 1992.

8 On the development of article 6.1 and the attitude which its drafters adopted towards it, see Fontaine, Marcel, *op. cit.*, *supra*, note 3, at 650.

9 Parra-Aranguren, G., *Conflict of Law Aspects of the UNIDROIT Principles of International Commercial Contracts*, *supra*, note 4, at 1245.

10 On the history of Chapter 6, see Fontaine, Marcel, *op. cit.*, *supra*, note 2, at 650.

(a) If a time is fixed by or determinable from the contract, at that time;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time;

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 6.1.1 reflects the principle, shared by both civil and common law systems, that determining the time at which to perform is distinguishable from deciding upon the substantive nature of that performance obligation. Whereas failure to perform, as a substantive matter, lies at the heart of breach of contract, failing to perform an obligation on time is less readily so construed. Indeed, it is precisely in regard to delays in performance that cause no appreciable damage that the common law of equity has evolved to offset often sanguine rules of breach that apply to a failure to perform at all.[11]

The UNIDROIT accomplishes flexibility in relation to time of performance simply by providing that, in cases other than when a period of time is fixed by or determinable from the contract, performance must be rendered within the fixed time, or the period expressed in the contract, or in any other case, "within a reasonable time after the conclusion of the contract".[12]

Despite the flexibility of article 6.1.1, it produces several practical problems. Most notable is its failure to deal with some controversial issues on the time of performance that arise in the common law. For example, significant differences arise before common law courts as to those circumstances in which time of performance is material or immaterial to the contract. The assumption that a failure to perform on time ought not to justify setting aside the contract when that failure is immaterial to the contract does not answer the further question as to when the time of performance is material in fact.

Article 6.1.1 also does not deal with the common law concern that courts, in determining the reasonable time of performance not "make a

11 See Linggren, K., *Time in the Performance of Contracts*, 1 (second edition, Butterworths, 1982).

12 See article 6.1.1 (b). Article 6.1.1 (a) embodies the general principle, evident throughout the Law Merchant, that the parties are themselves free to decide when to perform.

contract" for the parties.[13] Nor does the illustration in the UNIDROIT assist meaningfully in deciding how a tribunal ought to imply a reasonable time for performance. In excusing a building contractor for a performance delay in the event of "unusual difficulties in excavating a site," it provides that performance is due within a reasonable time thereafter. In defining that which is reasonable, it adds that reasonable performance is due "almost immediately" in such circumstances. This may be a reasonable construction on the facts, but common lawyers are likely to find problems with such a bland determination. They are likely to insist that "almost immediately" is wholly undefined and capable of having a meaning only in light of the context. For example, they might insist this context is circumscribed by the practice of the parties and the customs or usages of their trade. They might also insist, in light of this context, that performance may *not* be owed "almost immediately".

Articles 6.1.3 and 6.1.4

Articles 6.1.3, dealing with partial performance and 6.1.4, dealing with order of performance raises further doctrinal and interpretative difficulties. Article 6.1.3.1 provides for performance at one time or in instalments:

> In cases under Article 6.1.6(b) or (c), a party must perform its obligations at one time if that performance can be rendered at one time and the circumstances do not indicate otherwise.

Article 6.1.4 provides for partial performance in this manner:

> (1) The obligee may reject an offer to perform in part at the time performance is due, whether or not such offer is coupled with an assurance as to the balance of the performance, unless the obligee has no legitimate interest in so doing.

In adopting these two articles, the drafters sought to reconcile civil and common law approaches. This requires conciliating between a civil law approach which provides only that a obligee perform all that is due at a particular moment of time, and a common law approach which stipu-

13 Hyland, Richard, *op. cit., supra*, note 7, at 543.

lates for performance at different moments, as in an instalment contract. The comment following article 6.1.3 elaborates:

> The provision of 'performance at one time or in instalments' attempts to solve a preliminary question which concerns only certain special cases. If a party's performance can be rendered at one time or in instalments and if the contract does not make it clear and determinable how that party is to perform, it must in principle perform at one time.
>
> Art. 6.1.3 (Partial performance) has a more general scope. It provides that at the time performance is due the obligee may in principle reject an offer of partial performance. This applies at maturity, irrespective of whether what is due then is a global performance or an instalment of a wider obligation [...]

The assumption underlying this comment is that there is no conflict between articles 6.1.3 and 6.1.4. The obligee is required to perform all obligations that are due at a particular moment of time, but when performance is not due, part performance is permitted. The result is that the obligor is free to reject part performance that is due, but that payment by instalments is permitted when performance is rendered at more than one time. The provision for part performance, a concession to common law thinking, is most apparent when performance is due within a period of time or within a reasonable time.[14]

There is support for this novel position in the UNIDROIT. The issue of part performance is not controversial in civil law systems. Civil Codes deal with the principles governing partial performance succinctly: the obligee is entitled to receive full performance at one time and can decline

14 Fontaine, Marcel, *op. cit., supra* note 3. On common law definitions of performance, part performance and course of performance, see *Black's Law Dictionary* (6th edition). There *performance* is defined as "the fulfilment or accomplishment of a promise, contract, or other obligation according to its terms, relieving such person of all further obligations or liability thereunder." *Part performance* is defined as "doing some portion, yet not the whole, of what either party to a contract has agreed to do. Part performance of an obligation, either before of after breach thereof, when expressly accepted by the creditor in writing for that purpose, though without any new consideration, extinguishes the obligation". *Course of performance* is defined as "the understanding of performance which develops by conduct without objection between two parties during the performance of an executory contract."

to accept part performance. There is also little case law, indicating a comparative lack of conflict on the subject.[15]

The common law position, however, differs from that of civil law. Part performance *is* controversial in common law jurisprudence. In particular, the doctrine of consideration, strictly construed, provides that there is no good consideration for partial performance. The tempering doctrines of estoppel and waiver, however, permit part performance when the obligor has waived the right to receive full performance, or is estopped from insisting upon full performance.[16] As civil law has no doctrine of consideration that effect part performance, this doctrinal tension does not arise there.

Common law codes usually resolve disputes about partial performance by requiring performance to be rendered in full, unless circumstances indicate otherwise. The American Restatement (Second) of Contracts, for example, provides for full performance if it can be rendered at one time, but for performance by instalment "if the language [in the contract] or the circumstances [surrounding the contract] indicate to the contrary".[17]

However meritorious, the consolidation of common and civil law approaches in UNIDROIT articles 6.1.3 and 6.1.4 is not entirely logical. For example, if a party were required to perform over a specific period of time during which he tendered part performance only, that performance can constitute a default under article 6.1.3 on grounds that performance "can be rendered at one time and the circumstances do not indicate otherwise". However, the interpretation of article 6.1.4(1) could have the opposite effect, in establishing that "the obligee has no legitimate interest in so doing [*sic*: rejecting an offer to perform]".

A reconciliation between article 6.1.3 and 6.1.4 is possible. One article could be construed restrictively, the other expansively. For example, the circumstances in which the obligee has a "legitimate interest" in insisting upon full performance could be construed restrictively, while an expan-

15 *E.g.*, The Civil Codes of France and Belgium, article 1244; Italy, article 1181, the Swiss Code of Obligations, article 69; the Netherlands (N.B.W.), article 6.1.6.3; Germany, s. 266; Yugoslavia, article 310, Quebec draft Code of Obligations, article 211.

16 Larroumet, Christian, "Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law", 60 *Tulane Law Review*, 1986, at 1221.

17 The American Restatement (Second) of Contracts states more fully in s.233(1): "Where performances are to be exchanged under an exchange of promises, and the whole of one party's performance can be rendered at one time, it is due at one time, unless the language of the circumstances indicate to the contrary."

sive interpretation could be accorded the circumstances in which part performance is permitted. The problem is that the exact opposite interpretation is equally possible —the legitimate interest in receiving full performance could be construed expansive, while the circumstances in which part performance is permitted could be construed restrictively. The positive result is a flexible construction of part performance under the UNIDROIT. The negative result is that the clarity which the UNIDROIT strives for in private international relations ultimately lies within an interpretative community that is united neither by substantive doctrine, nor by a common method of interpreting codes of law.

The UNIDROIT drafters, in attempting to regulate part performance, have produced a questionable result, by their own admission.[18] Their dilemma is understandable. Common lawyers have debated endlessly over the circumstances in which an obligee reasonably can rely upon the obligor's representation to accept less than full performance.[19] However, in attempting to balance the clarity of civil law reasoning with conflicting common law reasoning, the UNIDROIT drafters have added a new dimension of confusion between the two in relation to partial performance.

Article 6.1.5

In other articles, the UNIDROIT drafters adopt novel approaches to avoid doctrinal and interpretative difficulties. This is most apparent in relation to earlier performance. Article 6.1.5 of the UNIDROIT entitles the obligee to reject earlier performance "unless he has no legitimate interest in doing so". The explanation, in comment 1 on article 6.1.5, is that "usually ... performance is geared to the obligee's convenience and that earlier performance may cause it inconvenience". The elaboration, in comment 2, is that "situations may arise in which the obligee's legitimate interest in timely performance is not apparent and when its accepting earlier performance will not cause it significant harm".

This novel article varies from both civil and common law. Civil codes works on the opposite assumption to UNIDROIT article 6.1.5. In civil law, the obligor ordinarily is entitled to perform earlier. The rationale is

18 See Fontaine, Marcel, *op. cit., supra*, note 2, at 652.
19 Larroumet, Christian, *op. cit., supra,* note 16, at 1209.

that earlier performance does not constitute default.[20] The common law generally avoids the issue by concentrating instead upon the order of performance, such as when the price for a good or service ordinarily is paid. In doing so in light of trade usage and party practice, it finds little need to consider earlier performance.[21]

UNIDROIT article 6.1.5 dispenses with the common law focus upon order of performance.[22] Instead, it adopts the civil law approach by concentrating upon earlier performance, but reverses the civil law assumption that earlier performance ordinarily favours the obligor. Similarly significant is its shift from the civil law rule which favours a right to perform earlier to a UNIDROIT rule which grants the obligee the right to reject that performance.[23]

IV. THE UNIDROIT AND DOCUMENTARY TRANSACTIONS

The UNIDROIT provisions on performance face practical hurdles in regulating documentary transactions. Payment by cheque, bank and related transfers are central ways in which to conduct business across national boundaries. The UNIDROIT reflects these commercial realities. Payment can be made in any form that is usual at the place of payment. For example, the obligor may pay in cash, by cheque, banker's draft, bill of exchange, credit card, or in any other form, including newly developed electronic means of payment, provided that mode of payment

20 See the Civil Codes of France and Belgium, articles 1187 and 1188; Italy, article 1185; the Netherlands (N.B.W.) article 6.1.6.9; Germany, s. 271; Swiss Code of Obligations, Article 81, Poland, article 457; Quebec Draft Code of Obligations, article 134. But cf. A. Weill and F. Terre, Droit Civil. Les Obligations n. 914 (14th Ed., 1986).

21 On the ordering of performance, see the Restatement (Second) of Contracts, s. 234.

22 Earlier performance in the UNIDROIT and order of performance in the common law clearly are distinguishable concepts. Order of performance concentrates upon the moment at which performance is due. Earlier performance is concerned with performance that is rendered earlier than *that* due date.

23 Article 6.1.5, however, can be applied flexibly to accommodate the civil law position on earlier performance. In particular, the right of the obligee to reject earlier performance can be construed restrictively, while the phrase "unless he has no legitimate interest in doing so" can be construed expansively. This approach allows for the variable interpretation of article 6.1.5 in different contexts. This satisfies a goal of the Law Merchant, to promote flexible solutions that respond to business need. But the result denies certainty.

is usual at the place of payment. The central purpose is to permit the obligor alternative means of satisfying documentary obligations, so long as these means are consistent with commercial practice.

In attempting to deal with electronic transactions, UNIDROIT drafters have accommodated the novel documentary transactions of the twenty first century. They have paid regard to the growing resort to electronic transactions, such as the wholesale wire transfer regulated by article 4A of the Uniform Commercial Code (UCC) and electronic transfer relating to consumer accounts in the Federal Electronic Transfer Act (FETA), both in the United States. Uniform drafters, however, have also recognised a third kind of electronic data interchange, known as EDI.[24]

Equally importantly, UNIDROIT drafters have sought to devise safeguards which permit parties who electronically affect or are effected by documentary transactions to be identified and which also ensure the authenticity of documentary records and related evidence.

Articles 6.1.7 and 6.1.8

With the enactment of the UNIDROIT Draft Model Law on International Credit Transfers, the UNIDROIT has also assumed a leadership role in the unification of documentary transactions.[25] Articles 6.1.7, 6.1.8 and 6.1.9. of the UNIDROIT take an appropriately novel approach to documentary transactions in light of these developments.

Article 6.1.7.1, for example, provides for payment of money in a form that is usual at the place of payment:

24 EDI follows the fax revolution that emerged almost twenty years ago and has since dominated governmental and business transactions. Electronic transmission from computer to computer, here, includes transmission of business documents, such as purchase orders, invoices, shipping notices, acknowledgements and receipts. Extension of the EDI to various kinds of contractual arrangements require radical reform of legislation in various countries, such as the requirement that writing is a necessary prerequisite in order for a documentary transaction to be valid. Perhaps more importantly, it will be necessary to establish legal safeguards to ensure that the identity of the parties to a electronic transmission are ascertained and also to ensure the authenticity of recording and other relevant evidence. See further, Zaphiriou, G., "Unification and Harmonization of Law Relating to Global and Regional Trading", 14 *Northern Illinois University Law Review* (1994) at 413.

25 See A/CN/9/318.

> (1) Payment made be made in any form used in the ordinary course of business at the place for payment.

This rule makes eminent sense: it stipulates for the place and form of payment in a manner that is certain and predictable. At the same time, article 6.1.7.2 tempers the rigidity of such an approach by providing that an obligee who accepts a documentary credit does so on condition that it will be honoured:

> However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured.[26]

Article 6.1.7.2 reduces the risk of reliance being placed upon an unacceptable usage governing the dishonouring of cheques at the place for payment. For example, a comment to this article explains, "[t]he presumption [that an obligee accepts only on condition that the documentary instrument will be honoured] can sometimes be overturned by usages." It also acknowledges problems that arise in unusual cases in which the form of payment at the place for payment fails to confirm to accepted international practice.

As a further qualification to article 6.1.7.1., article 6.1.8.1 provides for the admissibility of payments by transfer of funds to a financial institution in which the creditor has made it known that he has an account:

> (1) Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions in which the obligee has made it know that it has an account.

The rationale here is that, while the form of payment is ordinarily determined at the place for payment, it is reasonable to permit payment at the place where the obligee or creditor has indicated that he has an account. The comment to the article adds, "If however the obligee has indicated a particular account, payment should then be made to that account." That comment concludes, "Naturally, the obligee can also make it known that it does not wish payment to be made by transfer."

26 Article 6.1.7.2

This article and its accompanying comments offer a flexible way in which to identify the place and form of payment. The obligor is not forced to pay at an unreasonable place, while the obligee is free to require that payment be made to a particular account.

Article 6.1.8.2 provides for the completion of a documentary transfer:

> (2) In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective.

The comment to this article notes that completing a documentary transfer is a "difficult question" because such a transfer can occur at a variety of different times: on debiting the account of the transferor, on crediting the account of the transferee bank, on providing notice of credit to that account, on the transferee bank deciding to accept a credit transfer, on entry of the credit to the transferee's account, on notice of the credit to the transferee, etc. Also appreciated is the complication arising from changes to procedures governing the transfer of funds. While newer electronic systems for the transfer of funds offer their own rewards, they underscore the extent to which legal systems need to grapple with the demands of an always changing electronic era.[27]

Article 6.1.9

Article 6.1.9, dealing with currency of payment, recognises that fluctuations in currencies and the inability to convert certain currencies give rise to numerous problems in international commercial transactions. Parties often stipulate for a price in a particular currency, such as American dollars, Swiss francs, or German marks. Each is selected because it is internationally respected as a currency of account, even though the payment is not actually made in that currency. Article 6.1.9 recognises this practice. It stipulates that, unless the contract provides otherwise, even if the price is stated in another currency, such as American dollars, payment may still be made in the currency of the country in which payment is made, provided that the currency is convertible and the parties have not agreed otherwise. If that currency is not convertible, payment must

27 On these needs, see Zaphiriou, G., *op. cit.*, *supra*, note 24, at 413.

be made in the currency provided for in the contract. Should this prove not to be possible on account of exchange regulations or other instances of *force majeure*, payment must be made in the currency of the country in which payment is made. Finally, if payment is not made in a timely manner, the obligee has the option of choosing between the rate of exchange at the time payment was due and the rate at the time of payment itself.

Article 6.1.9, again, demonstrates the common sense approach that is adopted by the UNIDROIT drafters to modern commercial practice. This includes the realization that, requiring that payment be made in the currency of account is not practical when commerce itself is not practised in that manner. At the same time, to permit payment to be made in any currency solely on grounds that payment is made there would be to invite financial disaster, particularly in the presence of currencies that are neither convertible nor stable. While choosing the middle ground between flexible methods of currency payment and constraints to avoid excessive flexibility is often difficult to find, the UNIDROIT drafters made significant strides in arriving an a meaningful compromise between the two.[28]

V. CONCLUSION

Article 6.1 effects a compromise between strict and flexible rules on performance. The balance struck sometimes is tenuous and at worst, confusing. This is not a particular difficulty with the UNIDROIT, but with the conflicting legal systems with which the UNIDROIT drafters have had to contend. Much has happened since the heyday of the Medieval Law Merchant. Nation states have evolved, carrying with them their own distinct and often varied rules of law: and merchant practices have shifted from medieval simplicity to the complexity of a modern electronic data era.

The extent to which article 6.1 can successfully capture these recent developments in international business law and practice depends in part

28 Determining the currency of payment gives rise to a particular problem where that currency does not identify the currency in which a monetary obligation is due. In such situations, article 6.1.10 establishes that payment must be made in the currency of the place where payment is to be made.

upon the inventiveness of its drafters. Its success, however, depends as much upon the extent to which those charged with interpreting it are able to do so functionally and with perspicacity. This requires that they construe it realistically in regulating transnational contracts. It also means that they reconcile common law pragmatism that has evolved in the absence of a scientific grammar with civil law logic that often places doctrinal symmetry above pragmatism.[29] The UNIDROIT drafters have embarked upon such a reconciliation. Their success depends on how they are applied to specific cases. Aptly summed up by Richard Hyland:

> The contribution of the working group [on the UNIDROIT] has not only been to identify the best of the rules [governing international commercial contracts], but also to hone them and join them together in a convincing, workable whole [...]. Unfortunately [...] as the UNIDROIT *Principles* expressly recognise, even the elegant text will not suffice to resolve the cases. Even precise working cannot guarantee uniformity in a text whose fundamental premises point in more than one direction.[30]

Fathoming the *right* direction of the UNIDROIT depends *both* upon *a priori* qualities that inhere within it *and* textual references that are accorded to it *ex post facto*. Establishing a fitting balance between the two is the most challenging task that will be faced by the UNIDROIT to date.

29 See hereon *e.g.*, Damaska, Mirjan, "A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment", 116 *Pennsylvania Law Review*, 1968.

30 Hyland, *op. cit., supra*, note 7, at 543.