

# **IBA Working Group on UNIDROIT Principles**

Country Perspectives

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# Australia

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## Australia's legal environment

### *Constitutional structure*<sup>2</sup>

Australia is a constitutional monarchy with a federal system of government. There are six states, two territories (Northern Territory and Australian Capital Territory) and the Federal Government (Commonwealth of Australia). Each of has an elected parliament based on the United Kingdom's Westminster system. With the exception of Queensland, which has only one chamber, each parliament is bicameral, comprising two houses of almost equal power which enact legislation on any matter within their constitutional power.

The formal Head of State is the Queen of Australia, who is also the Queen of the UK and of 14 other Commonwealth realms. In practice, the Queen's representatives, the Governor-General (Commonwealth) and Governors (States), exercise her formal powers on a day-to-day basis. Their most important formal power is to sign Acts of Parliament to make them part of the statute law of Australia.

Today, despite the formal constitutional structure, Australia effectively functions more like a republic than a monarchy. Since the Australia Act 1986, the name given to two separate acts that eliminated the remaining associations between the laws and judiciary of Australia and their counterparts in the UK, the UK Parliament does not even have a theoretical legislative role in Australian affairs. The High Court of Australia is the supreme judicial authority for Australian law. Appeals to the Privy Council from all Australian jurisdictions were abolished progressively, with the process ending in 1986. But perhaps more significantly, the effective Head of State, the Governor-General of Australia, is nominated by the Australian Government for the formal approval of the Queen. Since 1965, all Australian Governors-General have been Australian born, and it seems inconceivable that this situation would change in the future.

### *Federal division of legislative powers*<sup>3</sup>

Australia has a written constitution that was enacted in 1900 and became effective on 1 January 1901. It comprises 128 articles in eight chapters. These cover the parliament, the executive government, the judicature, finance and trade, the states, new states, miscellaneous and alteration of the Constitution.

The Constitution was accepted by the people of Australia in a referendum, in which a majority of voters, and the majority of colonies (as the states then were) approved it as the fundamental law of the Commonwealth of Australia. The Australian Constitution was originally an Act of the UK Parliament. Changes to the Constitution require that the Commonwealth Government put any

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<sup>1</sup> Expert, Determination Chambers, [www.expertdetermination.net](http://www.expertdetermination.net).

<sup>2</sup> Donald Charrett and Matthew Bell, 'Statutory intervention into the common construction law of Australia – progress or regress?' (2011) 137 *Australian Construction Law Newsletter* 6; (2012) *Journal of the Canadian College of Construction Lawyers* 11.

<sup>3</sup> Ibid.

proposed change to the people in a referendum. A majority of the electorate comprising voters across the nation, plus a majority of the electors in a majority of the states, must agree to a change before the Constitution can be amended.

In terms of the split between the legislative power of the Commonwealth and the states, section 51 of the Australian Constitution defines 39 ‘heads of power’ that give the Commonwealth its legislative authority. Some of these powers are exclusive, and some are shared with the states. In respect of the latter however, if the Commonwealth legislation ‘covers the field’, then any state legislation is void to the extent of any inconsistency.<sup>4</sup> Those heads of legislative power not referred to in section 51 are the exclusive province of the states, and the Commonwealth has no powers to make laws in respect of them. However, over the past century, the legislative bailiwick of the Commonwealth has grown through a combination of favourable interpretations of the section 51 powers by the High Court, referenda, or the consent of the states and territories to refer their powers to the Commonwealth. The responsibility for private law generally rests with the states and territories, except where the Commonwealth relies on its heads of power in the Constitution.

Therefore, matters including taxation, company regulation, insolvency and industrial relations are now predominately within the control of the Commonwealth. Nonetheless, there remain a number of important issues over which the states and territories have exclusive and independent jurisdiction, and the Commonwealth is effectively powerless in respect of them in the absence of state cooperation.

In the event of a challenge to the constitutionality of any act of parliament, the High Court of Australia is the sole authority. In the 117 years since Federation, the High Court has ruled a number of acts of parliament unconstitutional, sometimes with very far reaching effects. For example, section 51(xx) provides that the Commonwealth has the power to make laws for the peace, order, and good government of the Commonwealth with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. The High Court traditionally construed section 51(xx) as giving the states the exclusive power to regulate the formation of companies,<sup>5</sup> making the Australia wide regulation of companies constitutionally difficult. This ultimately led to the states and territories ceding their constitutional power to regulate the formation of companies in favour of the Commonwealth, with the result that there is now a single Corporations Act which applies Australia wide.

In addition to the Australian Constitution of the Commonwealth of Australia, each state also has its own constitution, which is subject to the overarching provisions of the Australian Constitution.

### *The common law of Australia*<sup>6</sup>

Australia is a common law country, and in contrast to the United States, with a single common law applicable to all states and territories.<sup>7</sup> As with other common law jurisdictions, the common law in Australia grew from its single root in England. Applicable English common law was taken at a given point in time to the Australian colonies established by Great Britain and incorporated by the

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4 S 109.

5 See, eg, *Huddart Parker v Moorhead* (1909) 8 CLR 330.

6 See n2 above.

7 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2.

enactment of reception statutes. The received common law was, subsequently, gradually changed by judgments in local courts, and increasingly, by local statutes.<sup>8</sup>

### *The Australian court system<sup>9</sup>*

Each state and territory has a supreme court, which has appellate jurisdiction to hear all matters within its jurisdiction. State supreme courts are also vested with federal jurisdiction to hear actions arising under the laws of the Commonwealth of Australia.<sup>10</sup> Therefore, a single controversy involving matters arising under the common law, state law and federal law can be heard by a state supreme court. There is also a federal court which has jurisdiction to hear actions arising under federal law. Subject to the provisions of the Judiciary Act 1903 (Cth), the federal court also has delegated jurisdiction to hear matters arising under state law. The High Court of Australia is the ultimate court of appeal from both state and territory supreme courts, and the federal court.

In principle, judgments in other common law jurisdictions (particularly England, New Zealand and Canada, but also other former British colonies such as the US, South Africa and Singapore) may be consistent with the common law in Australia, and relied on by Australian judges if the factual circumstances are sufficiently similar. As Justice Paul Finn has put it, the High Court has viewed such foreign materials as being ‘persuasive to the extent they could persuade’.<sup>11</sup> However, any judgment from an extraneous jurisdiction, including another state of Australia, must be carefully reviewed for any relevant differences in the applicable statutory framework, or whether it has been overruled by a relevant court in the applicable jurisdiction.<sup>12</sup>

### *Contract law*

While there have been some attempts to reform and possibly codify contract law in Australia,<sup>13</sup> to date this has not received legislative support. Accordingly, except for the legislative interventions into specific aspects of contract law, contract law is part of the common law of Australia.

The most important Australian legislation affecting contract law comprises the following:

- the Australian Consumer Law (Cth)<sup>14</sup> and state and territory fair trading legislation;
- proportionate liability legislation;<sup>15</sup>
- frustrated contracts legislation;<sup>16</sup>

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8 See, eg, Paul Finn, ‘Internationalization or isolation: the Australian *cul de sac*? The case of contract law’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010), p 46.

9 See n2 above.

10 See, primarily, Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth).

11 See n8 above, p 45.

12 Eg, see n7 above at 135.

13 Eg, Manfred P Ellinghaus & Edmund Wright, ‘An Australian Contract Code’ (1992) Law Reform Commission of Victoria Discussion Paper No 27, reproduced in Philip Loots & Donald Charrett, *Practical Guide to Engineering and Construction Contracts* (CCH, 2009) 359.

14 Comprising a schedule to the Competition and Consumer Act 2010 (Cth), which is the harmonised re-enactment of the Trade Practices Act 1974 (Cth) and equivalent state-based fair-trading legislation.

15 Civil Law (Wrongs) Act 2002 (ACT) Chapter 7A; Civil Liability Act 2002 (NSW) pt 4; Proportionate Liability Act 2005 (NT); Civil Liability Act 2003 (Qld) Chapter 2 pt 2; Development Act 1993 (SA) s 72; Civil Liability Act 2002 (Tas) pt 9A; Wrongs Act 1958 (Vic) Part IVAA; Civil Liability Act 2002 (WA) pt 1F; Australian Consumer Law pt VI A; Corporations Act 2001 (Cth) pt 7.10 Div 2A; Australian Securities and Investments Act 2001 (Cth) pt 2 Div 2 Subdiv GA.

16 Frustrated Contracts Act 1978 (NSW); Frustrated Contracts Act 1988 (SA); Fair Trading Act 2012 (Vic) pt 3.2.

- legislation for limitation periods for commencement of actions;<sup>17</sup>
- contributory negligence and contribution from concurrent wrongdoers;<sup>18</sup>
- security interests in personal property;<sup>19</sup> and
- modifications to the Corporations Act to make ipso facto clauses unenforceable.

The Australian Consumer Law and state and territory fair trading legislation are perhaps the greatest constraint on freedom of contract in Australia. This legislation has had a pervasive impact on the conduct of economic activity in Australia. ‘It has set new norms of corporate behaviour in both competition and consumer protection, modifying our view of acceptable corporate behaviour and consequently improving the welfare of all Australians.’<sup>20</sup> The most powerful effect has been the banning of misleading or deceptive conduct in section 18, which states simply and broadly: ‘A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.’ The remedies available for breach of this ban include not only compensation for damages, but wide-ranging orders:

- declaring the whole or part of a contract void from the beginning;
- varying contracts or arrangements;
- refusing to enforce a contract;
- directing a person who engaged in contravening conduct to refund money or return property;
- for the payment of compensation;
- to undertake repairs or supply parts;
- to provide specified services; or
- to terminate leases and mortgages or require land to be transferred.

The principle of joint and several liability of joint wrongdoers has been repealed in favour of proportionate liability in respect of certain breaches of contract. Proportionate liability applies in a claim for economic loss or damage to property in an action for damages, whether in tort, contract under statute or otherwise, arising from a failure to take reasonable care. Where proportionate liability applies, the liability of a defendant who is a concurrent wrongdoer in relation to a claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just, having regard to the extent of the defendant’s responsibility for the loss or damage.<sup>21</sup>

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17 Primarily Limitation Act 1969 (ACT) ss 11 and 13; Limitation Act 1969 (NSW) ss 14 and 16; Limitation Act (NT) ss 12 and 14; Limitation of Actions Act 1974 (Qld) s 10; Limitation of Actions Act 1936 (SA) ss 34 and 35; Limitation Act 1974 (Tas) s 4; Limitation of Actions Act 1958 (Vic) s 5; Limitation Act 2005 (WA) ss 12 and 13; Australian Consumer Law s 236(2); Building Act 1993 (Vic) s 134.

18 Primarily, *Civil Law (Wrongs) Act 2002* (ACT), pt 7.3; *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), pt 3; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), pt V; *Law Reform Act 1995* (Qld), pt 3; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 7; *Wrongs Act 1954* (Tas), s 4; *Wrongs Act 1958* (Vic), pt V; *Law Reform (Contributory Negligence and Tortfeasors’ Contribution) Act 1947* (WA), s 4.

19 Personal Properties Securities Act 2009 (Cth).

20 Russell V Miller, *Miller’s Annotated Trade Practices Act* (26th edn, 2005), p viii.

21 Eg, *Wrongs Act 1958* (Vic) pt IVAA.

Recent amendments to the Corporations Act<sup>22</sup> provide for a temporary stay on enforcing contractual rights in certain circumstances. The stay on ipso facto clauses prevent express provisions in a contract being immediately enforced against a body merely because it has taken certain specified steps to restructure its affairs to avoid being wound up in insolvency.

There is legislation in a number of specific areas that puts further constraints on freedom of contract. The following are a few examples:

- Insurance Contracts Act 1984 (Cth);
- security of payment legislation<sup>23</sup> and, similarly, legislation providing for payment of contractor's debts<sup>24</sup> and for contractors' or subcontractors' liens<sup>25</sup>;
- statutory warranties in contracts for domestic building work;<sup>26</sup> and
- legislation mandating licensing of builders and building professionals.<sup>27</sup>

A doctrine of good faith in the execution of contracts is emerging in Australia, particularly in New South Wales. It could be considered as the most recent head of public policy to be used by some Australian courts to constrain freedom of contract.<sup>28</sup> This is still very much a developing area of contract law in Australia and has been the subject of much academic discussion. At the time of writing, the High Court has not addressed whether there is an implied obligation of good faith in the execution of all commercial contracts. Accordingly, the common law in this area is not settled, particularly given Dixon J's view that there is no general obligation of good faith implied in construction contracts as a matter of the law of the State of Victoria.<sup>29</sup>

However, the Australian Consumer Law has a provision in connection with the acquisition or supply of goods or services from a person that provides that a person must not, in trade or commerce, engage in conduct that is in all the circumstances, unconscionable.<sup>30</sup> It has been said that the prohibition on unconscionable conduct in the Australian Consumer Law goes some way towards legislatively enshrining many of the features of a duty of good faith such as is comprehended by the UNIDROIT Principles.<sup>31</sup>

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22 Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017 (Cth).

23 Primarily, Building and Construction Industry (Security of Payment) Act 2009 (ACT); Building and Construction Industry Security of Payment Act 1999 (NSW); Construction Contracts (Security of Payments) Act 2004 (NT); Building Industry Fairness (Security of Payment) Act 2017 (Qld); Building and Construction Industry Security of Payment Act 2009 (SA); Building and Construction Industry Security of Payment Act 2009 (Tas); Building and Construction Industry Security of Payment Act 2002 (Vic); Construction Contracts Act 2004 (WA)

24 Contractor's Debts Act 1997 (NSW).

25 Workers Liens Act 1893 (SA); Building Industry Fairness (Security of Payment) Act 2017 (Qld).

26 See, eg, Building Act 2004 (ACT) ss 42 and 88; Home Building Act 1989 (NSW) s 18B; Domestic Building Contracts Act 2000 (Qld) Div 2; Building Work Contractors Act 1995 (SA) s 32; Housing Indemnity Act 1992 (Tas) s 7; Domestic Building Contracts Act 1995 (Vic) s 8.

27 See, eg, Construction Occupations Licensing Act 2004 (ACT); Building Professionals Act 2005 (NSW); Building Act (NT); Queensland Building and Construction Commission Act 1991 (Qld); Building Work Contractors Act 1995 (SA); Building Act 2000 (Tas); Building Act 1993 (Vic); Builders Registration Act 1939 (WA).

28 Eg, *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Alcatel Australia Ltd v Scarcella* (1998) NSWSC 483; (1998) 44 NSWLR 349 at 369; *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) NSWCA 187 at 159, 164.

29 *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* (2012) VSC 99, (420).

30 S 21.

31 Paul Finn, 'The UNIDROIT Principles: Australia's Response' in *The Age of Uniform Law Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, (UNIDROIT, 2016) 1,387.

# Application of the UNIDROIT Principles in Australia

## *Governing law of the contract*

While the common law of Australia recognises the parties' freedom of contract to choose the law governing their contract, it is doubtful whether it recognises their right to choose non-state rules of law.<sup>32</sup> Australia has not implemented The Hague Convention on Choice of Law in International Commercial Contracts, and accordingly has not enshrined in legislation the ability of parties to choose 'rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules', which would of course include the UNIDROIT Principles.

It should be noted that while UNIDROIT 'reflect a distillation of vast wisdom about contract law from across the world'<sup>33</sup> and 'represent a system of principles and rules of contract law which are common to existing national legal systems or best adapted to the special requirements of international commercial transactions',<sup>34</sup> not all of its provisions are consistent with Australian common law. Articles 4.1 (Intention of the parties), Article 4.2 (Interpretation of statements and other conduct), Article 4.3 (Relevant circumstances) and Article 4.8 (Supplying an omitted term) allow for a greater amount of factual material to assist in interpreting the meaning of a contract, particularly in allowing for evidence of pre-contractual negotiations, earlier drafts of the contract, and each party's subjective intent than is generally applicable to many common law rules.

In *Chartbrook Ltd v Persimmon Homes Ltd*,<sup>35</sup> Lord Hoffmann confirmed the traditional common law exclusionary rule of the inadmissibility of evidence of pre-contractual negotiations. However, this issue is not without controversy, as several judges have argued in favour of a flexible application of the exclusionary rule whenever a cautious use of the pre-contract material would enable the court to arrive at a meaning of the contract that accorded with the ascertainable intention of the parties. In *Proforce Recruit Ltd v The Rugby Group Ltd*,<sup>36</sup> L J Arden suggested that consideration should be given to the possibility of admitting evidence of pre-contractual negotiations in interpretation questions on a wider basis than the law presently permits. In her view 'it may be appropriate to consider a number of international instruments applying to contracts', such as the UNIDROIT Principles which 'give primacy to the common intention of the parties and on questions of interpretation requires regard to be had to all the circumstances, including the pre-contractual negotiations of the parties' (Article 4.3).

At this point in time it appears that, even if parties selected the UNIDROIT Principles as the governing law of the contract in Australia, a court would nevertheless apply Australian common law as the governing law. This situation may well change in the future, as the Australian Attorney General has noted that it is intended that The Hague Principles on Choice of Law in International Commercial Contracts will be implemented together with The Hague Convention on Choice of Court Agreements domestically through new legislation.<sup>37</sup> When this occurs, it should be possible to select the UNIDROIT Principles as the governing law of a contract in Australia and have a contract construed by a court in accordance with the Principles.

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32 Ian Govey AM, 'Australia and UNIDROIT' in *The Age of Uniform Law Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, (UNIDROIT, 2016) 331.

33 Justice Paul, 'The UNIDROIT Principles: An Australian Perspective', (2010) 17 *Australian International Law Journal* 193, 196.

34 Preamble, UNIDROIT Principles, 2016.

35 (2009) UKHL 38.

36 (2006) EWCA Civ 69.

37 Attorney General, Commonwealth of Australia, *Annual Report 2015-2016*, 29.

## *Knowledge of the UNIDROIT Principles in Australia*

In my discussions with legal colleagues in Australia I have not found much awareness of the UNIDROIT Principles, and I am not aware of any Australian contracts which have specifically adopted them as the governing law of the contract. None of the Australian court cases that have referred to the UNIDROIT Principles have involved a contract that specifically referred to them.

However, Paul Finn notes that, from 1996, a small number of judges and scholars in both case law and legal scholarship drew attention to provisions in the UNIDROIT Principles as providing possible guidance for desirable, ordered development of the common law in Australia. The focus was on existing irritants or gaps within contemporary contract doctrine.<sup>38</sup> A search on the most extensive repository of references on legal materials in Australia<sup>39</sup> reveals that since 2000, there have been 75 academic papers that have referred to the UNIDROIT Principles. The majority of these are brief references to Article 1.7 (good faith), in the context of the international acceptance of the principle of good faith in the entry into and performance of contracts, and the appropriateness of this in the development of Australian common law. Some of these papers are on the topic of codification of contract law in Australia, an issue that does not appear to have significant support in the legal profession.

However, the extent of knowledge of the UNIDROIT Principles in Australia should increase over the next few years, since a number of teachers of contract law in Australian law schools have begun to use the UNIDROIT Principles and the US Uniform Commercial Code and the Restatement Second as ‘vehicles to illustrate how deficiencies, unfairness and antiquated doctrines could be rectified or replaced; how greater clarity or coherence could be achieved; and how international harmonisation could now be realised’.<sup>40</sup> Some contemporary Australian textbooks on the law of contract and university course materials refer to the UNIDROIT Principles.<sup>41</sup>

## *Application by Australian courts*

There are a number of judgments in Australia that have referred to the UNIDROIT Principles, generally as international support for development of common law in Australia.<sup>42</sup> Of the 16 Australian court cases identified in which judges have referred to the UNIDROIT Principles, only one of these cases was in the High Court of Australia. The other cases were from the superior courts of New South Wales, Queensland, Western Australia and the Federal Court. It is perhaps reflective of the limited knowledge and application of the UNIDROIT Principles in Australia that only 11 judges from four of Australia’s nine jurisdictions have referred to them, and that Finn J was a judge in five of these cases.

As part of the gradual move in Australia towards recognising a general duty of good faith in particular circumstances, ten cases have drawn support from Article 1.7 of the UNIDROIT Principles.<sup>43</sup> In upholding an extensive dispute resolution clause in a contract requiring the parties to meet and

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38 See n3 above, (UNIDROIT, 2016) 1388.

39 See [www.austlii.edu.au](http://www.austlii.edu.au) accessed 11 November 2019.

40 See n33, 1,388.

41 See, eg, the indices in E A Farnsworth, *Contracts* (4th edn, 2004).

42 Unilex cases 634, 648, 667, 845, 1134, 1135, 1232, 1366, 1517, 1518, 1519, 1520, 1614 and 1921. In addition to these 14 cases listed on the Unilex website, there are a further two court cases in which the judge has referred to the UNIDROIT Principles in the context of good faith (*Papale & Ors v Wilmar Sugar Australia Ltd* [2017] QSC 72 and *Lien v Clontarf Residential Pty Ltd* [2018] QSC 94). Also, a reference by the Commissioner of Patents referred to the provisions in the UNIDROIT Principles in respect of dispatch and receipt of an offer, which was different to the relevant Australian law (*Aristocrat Technologies* [2008] APO 33).

43 Unilex cases 634, 648, 667, 845, 1134, 1517, 1614 and 1921.

undertake genuine and good faith negotiations, Justice Allsop noted that good faith is not a concept foreign to common law, and is recognised as part of the law of performance of contracts in numerous sophisticated commercial jurisdictions, for example, the UNIDROIT Principles.<sup>44</sup>

In addition to the cases in which judges have referred to Article 1.7 in support of a good-faith principle,<sup>45</sup> judges have also used other articles of the UNIDROIT Principles as additional support for findings as to what the common law is. For example, in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*,<sup>46</sup> Finn J referred to Article 2.1.18<sup>47</sup> (Modification in a particular form) in relation to the parties' right to make an oral variation, and article 6.1.4 (Order of performance) in relation to the time at which instalment payments become due and payable under an 'entire contract' clause.<sup>48</sup>

In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*,<sup>49</sup> the Australian High Court noted that a distinction between breach of essential terms and 'intermediate' terms is not part of Australian law and referred to UNIDROIT Principles Articles 7.3.1 (Right to terminate the contract) and 7.3.3 (Anticipatory non-performance), implicitly recognising that the UNIDROIT Principles and Australian law coincide on this issue.<sup>50</sup>

In *Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd*,<sup>51</sup> Finn J recognised that a prior course of dealing between parties and practices and usages can provide for both the drawing of inferences as to the actual terms on which the parties have contracted, and also for the imputation of implied terms in their contract, and referred to UNIDROIT Principles Articles 1.9 (Usages and practices) and 5.1.2 (Implied obligations) in support.<sup>52</sup>

### *The UNIDROIT Principles and international arbitration in Australia*

If the seat of an international arbitration is in Australia, the International Arbitration Act 1974 (Cth) (IAA) will apply to the procedural rules applicable to the proceedings. The IAA incorporates the UNCITRAL Model Law on International Commercial Arbitration as the law governing the procedure of an arbitration held in Australia. Article 28(1) provides: 'The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.'

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's international dispute resolution institution. It was established in 1985 as an independent, not-for-profit organisation. ACICA published its most recent Rules for the conduct of international

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44 *United Group Rail Services v Rail Corporation of New South Wales* (2009) NSWCA 177, (58).

45 Unilex cases 634, 648, 667, 845, 1134, 1517, 1614, 1921 and two further Queensland Supreme Court cases not in Unilex.

46 (2003) FCA 50.

47 The article numbers in brackets are quoted as those in the 2016 edition, although the article number originally quoted from the 1994 edition was different.

48 Donald Charrett, *The Application of Contracts in Engineering and Construction Projects* (Informa Law from Routledge, 2018), 363.

49 (2007) HCA 61.

50 See n 48, above.

51 (2008) FCA 1591.

52 See n 48, above.

arbitration in Australia in 2016,<sup>53</sup> and these are frequently incorporated in international arbitration clauses where the seat of the arbitration is Australia. Section 39.1 provides as follows: ‘The Arbitral Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Arbitral Tribunal shall apply the rules of law which it considers applicable.’

This ACICA rule is consistent with the rules of other arbitral institutions, for example, Article 21.1 of the ICC Arbitration Rules (2017). It should be noted that the provisions of both the IAA and the ACICA Rules give the parties the autonomy to determine the rules of law applicable to the substance of the dispute, including the governing law of the contract. There is no restriction that these rules of law are required to be rules of law of a state.

In *Musawi v RE International (UK) Ltd*,<sup>54</sup> the High Court of England and Wales affirmed that section 46(1)(b) of the Arbitration Act 1996 (UK) ‘allows parties the freedom to apply a set of rules or principles which do not in themselves constitute a legal system’ and that ‘such a choice may include a non-national set of legal principles (such as the 1994 UNIDROIT Principles) or, more broadly, general principles of commercial law or the *lex mercatoria*.’

Section 46(1)(b) of the Arbitration Act 1996 (UK) is in similar terms to Article 28 (1) of the UNCITRAL Model Law, and there is no reason to expect that an Australian court would come to a different conclusion in respect of the parties’ autonomy to choose a non-national set of legal principles such as the UNIDROIT Principles under the IAA.

It is generally accepted that an arbitration has no *lex fori* (the law of the country in which an action is brought), and accordingly in the absence of any provisions in the IAA or the arbitration rules agreed by the parties that would require an arbitral tribunal to apply a national system of law, an arbitral tribunal sitting in Australia would be free to apply the UNIDROIT Principles as the governing law of the contract if appropriate.

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53 ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions [https://acica.org.au/wp-content/uploads/2016/02/ACICA\\_Rules\\_2016\\_Booklet.pdf](https://acica.org.au/wp-content/uploads/2016/02/ACICA_Rules_2016_Booklet.pdf) accessed 13 July 2018.

54 (2007) EWHC 2981 (Ch).

# Austria

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Austria joined UNIDROIT in 1948 together with France and the UK.<sup>56</sup> However, the attention the Austrian legal community has paid to the UNIDROIT Principles during these past seven decades has been somewhat limited as can be gathered from the following account. The main reason is probably, that the contents of the UNIDROIT Principles are little known, a feature that they share with the United Nations Convention on Contracts for the International Sale of Goods (CISG) the application of which is excluded in most contracts to which they would otherwise apply.

## Applicability of the UNIDROIT Principles in Austria

### *In courts*

As Austria has been a member of the European Union since 1995, Regulation (EC) No 593/2008 of the European Parliament and of the Council ('Rome I') constitutes the statutory law on, among others, the choice of law in Austria. Article 3 of Rome I provides for the freedom of the parties to choose the law applicable to a contract in general.

Any agreement on applying the UNIDROIT Principles to a contract must bear in mind that they are not a law which is valid in a certain state.<sup>57</sup> Although this does not prevent parties from agreeing on the principles to govern their contractual relationship,<sup>58</sup> such an agreement is not a choice of applicable law but a (contractual) incorporation of all provisions of the UNIDROIT Principles into the terms of the contract in question.<sup>59</sup>

Given the foregoing, the law of a state (determined by party agreement or otherwise) and, depending on the elements relevant to the situation at the time of the choice of law, the provisions of the law of the European Community will apply to the contract in addition to the UNIDROIT Principles.<sup>60</sup> In the event of conflict between the provision of the UNIDROIT Principles and mandatory provisions of the applicable state law, and possibly European law, the latter will prevail.<sup>61</sup>

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55 Managing partner at Binder Grösswang, Vienna; M C J (New York University, Fulbright Fellow), Dr iur (Vienna); admitted to the bars of New York and Vienna.

56 UNIDROIT membership, [www.unidroit.org/about-unidroit/membership](http://www.unidroit.org/about-unidroit/membership) accessed 20 May 2019.

57 Graf-Peter Calliess, 'Article 3, Rome I' in Graf-Peter Calliess (ed), *Rome Regulations* (2nd edn, Wolters Kluwer Law & Regulatory 2015) mn 8 (hereafter Calliess, 'Article 3 Rome I'); Franco Ferrari, 'Article 3 Rome I-VO' in Franco Ferrari, Eva-Maria Kieninger, Peter Mankowski, Karsten Otte, Ingo Saenger, Götz Schulze, and Ans Staudinger (ed) *Internationales Vertragsrecht* (2nd edn, C H Beck 2012) mn 6 (hereafter Ferrari, 'Article 3 Rome I-VO'); Bea Verschraegen, *Internationales Privatrecht* (Manz 2012) mn 1423 (hereafter Verschraegen, *Internationales Vertragsrecht*); Gottfried Musger, 'Article 3 Rome I' in Helmut Koziol, Peter Bydlinski, and Raimund Bollenberger (ed) *Kurzkommentar zum ABGB* (5th edn, Verlag Österreich 2017), mn 2 (hereafter Musger, 'Article 3 Rome I').

58 European Parliament and Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) (2008) OJ L 177/6 recital 13.

59 Calliess, 'Article 3 Rome I' mn 20; Ferrari, 'Article 3 Rome I-VO' (n 3) mn 7; Verschraegen, *Internationales Vertragsrecht* (n 3) mn 1425; Musger, 'Article 3 Rome I' (n 3) mn 2.

60 Ferrari, 'Article 3 Rome I-VO' mn 2; Musger, 'Article 3 Rome I' (n 3) mn 4; Calliess, 'Article 3 Rome I' (n 3) mn 26.

61 Musger, 'Article 3 Rome I' mn 2; Calliess, 'Article 3 Rome I' (n 3) mn 22; Ferrari, 'Article 3 Rome I-VO' (n 3) mn 8.

Further, overriding mandatory provisions<sup>62</sup> and Austrian public policy<sup>63</sup> will indirectly trump the provisions of the UNIDROIT Principles.

### *In arbitration proceedings*

The situation is different in Austrian arbitral proceedings. Sections 577 et seq of the Austrian Civil Procedure Code, *Zivilprozessordnung (ZPO)* contain statutory provisions on arbitration proceedings seated in Austria. In 2005, the Austrian Parliament amended the existing regulations on the basis of the UNCITRAL Model Law on International Commercial Arbitration.<sup>64</sup> Section 603 of the ZPO deals with the law to be applied by the arbitral tribunal. That is primarily constituted by such ‘provisions of law or rules of law’<sup>65</sup> as are agreed by the parties (section 603, paragraph 1 of the ZPO). In the event of the parties not choosing the applicable law, the arbitral tribunal has to apply such ‘provisions of law’ as it deems appropriate (*angemessen*) (section 603, paragraph 2 of the ZPO).

Following Article 28 paragraph 1 of the UNCITRAL Model Law, backed by legal history<sup>66</sup> and the prevailing view of other legal authority,<sup>67</sup> in arbitration, the parties need not only choose from state laws but may also agree on the application of sets of legal rules such as the UNIDROIT Principles.<sup>68</sup> Such choice will be limited to the extent it results in an arbitral award that is in contradiction to the fundamental principles of Austrian law (*ordre public*) (section 611 paragraph 8 of the ZPO).<sup>69</sup> Further, limitations may be present in the event there are overriding mandatory provisions of the law chosen by the parties (in our scenario this is only relevant if the parties agree on the application of state law and the UNIDROIT Principles), of Austrian law (at least if their disregard could lead to the award being set aside by Austrian courts) or, in certain limited cases, of the law of a third state.<sup>70</sup>

If the parties in arbitration have not agreed on the applicable law, such law has to be determined by the arbitral tribunal. Under this process, the arbitral tribunal is not bound by the provisions of Rome I nor by any general principle. It has to determine directly which provisions of law it deems appropriate (*angemessen*).

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62 Rome I Regulation (n 4) article 9.

63 Rome I Regulation (n 4) article 26.

64 National Council of the Parliament of Austria, ‘Schiedsgerichtsbarkeit Regierungsvorlage’ (19 October 2005) 1158 (d.B.) XXII. GP 1 (main feature mentioned in the preamble) (hereafter National Council, ‘SchiedsgerichtsbarkeitRV’).

65 Gerold Zeiler, ‘section 603 ZPO’ in Gerold Zeiler (ed) *Schiedsverfahren* (2nd edn, NWV 2014) mn 15 (hereafter Zeiler, ‘section 603 ZPO’).

66 National Council, ‘SchiedsgerichtsbarkeitRV’ (n 10) 22.

67 Christian Hausmaninger, ‘section 603 ZPO’ in Hans Fasching and Andreas Konecny (ed), *Zivilprozessgesetze* (3rd edn, Manz 2016) mn 39 (hereafter Hausmaninger, ‘section 603 ZPO’); Alfred Siwy, ‘Section 603 – Applicable Law’ in Gerold Zeiler (ed) *Austrian Arbitration Law* (NWV 2016) mn 1.

68 Zeiler, ‘section 603 ZPO’ (n 11) mn 12; Hausmaninger, ‘section 603 ZPO’ (n 13) mn 48 et seq.

69 Martin Wiebecke, Dorothee Rucktschler, and Markus Schifferl, ‘Anfechtung des Schiedsspruchs (Aufhebungsverfahren)’ in Hellwig Torggler, Florian Mohs, Friederike Schäfer, and Venus Valentina Wong (ed) *Handbuch Schiedsgerichtsbarkeit* (2nd edn, Verlag Österreich 2017) mn 1526 et seq (hereafter Wiebecke, Rucktschler, and Schifferl, ‘Anfechtung’); Gerold Zeiler, ‘section 611 ZPO’ in Gerold Zeiler (ed) *Schiedsverfahren* (2nd edition, NWV 2014) mn 34 et sequ (hereafter Zeiler, ‘section 611 ZPO’); Christian Hausmaninger, ‘section 611 ZPO’ in Hans Fasching and Andreas Konecny (ed), *Zivilprozessgesetze* (3rd edn, Manz 2016) mn 155 et seq (hereafter Hausmaninger, ‘section 611 ZPO’).

70 Nathalie Voser, Dorothee Schramm, and Florian Haugeneder, ‘Schiedsverfahren und anwendbares Recht’ in Hellwig Torggler, Florian Mohs, Friederike Schäfer, and Venus Valentina Wong (ed) *Handbuch Schiedsgerichtsbarkeit* (2nd edn, Verlag Österreich 2017) mn 825 (hereafter Voser, Schramm, and Haugeneder, ‘Schiedsverfahren und anwendbares Recht’); Hausmaninger, ‘section 603 ZPO’ (n 13) mn 54; Zeiler, ‘section 603 ZPO’ (n 11) mn 15 et seq.

However, if the European Convention on International Commercial Arbitration is applied, the arbitral tribunal would have to determine the applicable law under the conflict of law rules that it considers applicable.<sup>71</sup>

As section 603, paragraph 2, ZPO mandates the arbitral tribunal to choose ‘provisions of law’ but – contrary to the parties’ choice of law – not among ‘rules of law’; it is the unanimous view of legal scholars<sup>72</sup> that the arbitral tribunal, without the parties’ agreement, may not decide to apply sets of rules such as the UNIDROIT Principles but only (state) laws. This follows similarly from Article 28, paragraph 2 of the UNCITRAL Model Law.<sup>73</sup>

## Application in court and in arbitration

There is no published Austrian court case that has applied, or even discussed the UNIDROIT Principles. According to seasoned arbitration practitioners, there have been but ten Austrian arbitration cases in which the UNIDROIT Principles were applied in the last 20 years. In most of these cases, the applicability of the UNIDROIT Principles was not agreed by the parties at the outset but on the suggestion of the arbitral tribunal, for example, to clarify or cure an otherwise possibly invalid choice of legal clause.

There are four published awards that deal with the UNIDROIT Principles. They date from 1994, 2001 and 2007.<sup>74</sup>

The two awards from 1994 read in good parts verbatim, ruled that Austrian law including the CISG applied in either case and held that damages for the non-conformity of goods in one case and the difference between a contract price and a substitute sale price for goods in the other, was payable, in either case plus interest.

The next issue to be resolved was at which rate interest should be awarded. The CISG not expressly settling the issue, it had to be settled in conformity with general CISG principles. Both awards identified full compensation as one of those principles. Among merchants, it was expected that the creditor, due to the delayed payment, resorts to bank credit at the rate commonly practiced in its country with respect to the currency of payment (the currency of the creditor’s country or any other foreign currency agreed on by the parties) and both awards held accordingly.

In either case, the award observed that this solution was also stated in Article 7.4.9 of the UNIDROIT Principles. The first sentence of this article reads: ‘The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment...’ The published parts of the awards are silent on the place of payment in either case.<sup>75</sup>

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71 European Convention on International Commercial Arbitration (opened for signature on 21 April 1961, came into force on 7 January 1964 and 18 October 1965) Art VII; Zeiler, ‘section 603 ZPO’ (n 11) mn 5.

72 Hausmaninger, ‘section 603 ZPO’ (n 13) mn 67 et seq; Zeiler, ‘section 603 ZPO’ (n 11) mn 3.

73 UNCITRAL Secretariat, ‘Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006’ (2008) mn 35 (hereafter UNCITRAL Secretariat, ‘Explanatory Note’).

74 SCH case Nos 4318 and 4366, both dated 15 June 1994 (Unilex 635 and 636); ICC case No 11295, award December 2001 ([Unilex 1070]; award by the Vienna International Arbitral Centre, 19 March 2007 (Unilex 1178).

75 Michael Joachim Bonell, *Die UNIDROIT-Prinzipien der internationalen Handelsverträge: Eine neue Lex Mercatoria?* (1996) ZfRV 152.

In the 2001 case, a sole arbitrator turned to the UNIDROIT Principles without party agreement, which should not have happened. The published portions of the award do not provide much insight that could be applied to other cases.

In the latest case from 2007, an arbitral tribunal was called to rule on ‘whether memorials and exhibits filed in the proceedings at hand could be disclosed in parallel arbitral proceedings’. It held that: ‘The powers of arbitrators derived from the contract between the parties and the arbitrators and that contracts [were] to be performed in good faith under both, the law governing the substance of the dispute [(the law of an Eastern European Country)] and the *lex arbitri* [Austrian law].’

The arbitral tribunal referred in this context to Article 1.7(1) of the UNIDROIT Principles (2004), according to which ‘Each party must act in accordance with good faith and fair dealing in international trade’. It further quoted Michael Joachim Bonell,<sup>76</sup> pointing out that the principle had met with approval in numerous arbitral awards and court decisions.

## Knowledge of the UNIDROIT Principles

The UNIDROIT Principles are taught at Vienna University Law School but are not part of the compulsory curriculum. They are addressed to a limited extent in optional classes.<sup>77</sup>

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<sup>76</sup> Michael Joachim Bonell, *An International Restatement of Contract Law* (3rd edn, Ardsley NY, 2005) p 128 with citations in fn 105.

<sup>77</sup> Interview of the author with the Dean of the University of Vienna, Faculty of Law, oUniv-Prof Dr Drhc Paul Oberhammer and oUniv-Prof Dr Christiane Wendehorst.

# Brazil

Karina Goldberg<sup>78</sup>

## Overview of Brazil's legal framework

Brazil is a civil law jurisdiction, based on continental European law. Although for a certain time Brazil maintained an isolationist position regarding the acceptance of international treaties, this has changed a great deal in the past few years.<sup>79</sup> The country increasingly develops its foreign relationships and trade, and from the standing of an underdeveloped country receiver of foreign direct investment, Brazil has emerged as a foreign investor.

This current economic, political and social scenario of Brazil has a direct impact on its legal culture. In a globalised hypercomplex society, it becomes virtually impossible to overlook the development and the homogenisation process of the international law. The UNIDROIT Principles are a landmark of this evolutionary process.

The main rule on the subject of applicable law to obligations can be found in Article 9 of Law No 12376 of 2010: the Law of Introduction to the Rules of Brazilian Law (LINDB). This is a problematic issue since this law prescribes the obsolete criteria of *lex celebracionis*. Although LINDB was recently reformed (Law No 13665 of 2018), this rule remains untouched. However, despite the fact that Article 9 of LINDB was read as a ban on choice-of-law provisions, today it is settled that Brazil's legal system grants its parties the possibility of choosing the law applicable to the contract, pursuant to their autonomy of will.<sup>80</sup> Choice-of-law provisions have gained increasing recognition, thanks to the efforts of law-makers, judges and legal scholars.

Brazil's Arbitration Act, for instance, fully embraces the freedom of contract of the parties.<sup>81</sup> From the commercial perspective, the development of international arbitration, boosting the growth of the dispute resolution method in several national laws around the world, is a contributing factor. In Brazil, arbitration has undergone remarkable growth since the enactment of Law No 9307 of 1996 (Arbitration Act), recently amended by Law No 13129 of 2015.

The recent enactment of the 2015 Code of Civil Procedure is one of the most important innovations on the national legal system. The alignment of law-makers with international society is visible in this statute: the code contains an entire chapter dedicated to international judicial cooperation and a specific choice-of-law provision.<sup>82</sup>

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78 Partner at Ferro, Castro Neves, Dalto & Gomide Advogados, Rio de Janeiro. Masters of Law (LLM) in European Private Law by the Utrecht University, Holland (2003). Member of the ICC Commission in International Arbitration and Dispute Resolution; Licensed member of Ordem dos Advogados do Brasil (OAB), São Paulo section.

79 Carmen Tibúrcio, 'Vigência dos tratados: atividade orquestrada ou acaso?' (*Consultor Jurídico*, 4 July 2013), [www.conjur.com.br/2013-jul-04/vigencia-interna-internacional-tratados-atividade-orquestrada-ou-acaso](http://www.conjur.com.br/2013-jul-04/vigencia-interna-internacional-tratados-atividade-orquestrada-ou-acaso), accessed 8 July 2018.

80 Furthermore, Brazil has not ratified the Inter-American Convention on the Law Applicable to International Contracts.

81 Art 2: 'At the parties' discretion, arbitration may be at law or in equity.' Paragraph 1: 'The parties may freely choose the rules of law that will be used in the arbitration, as long as their choice does not violate good morals and public policy.' Paragraph 2: 'The parties may also agree that the arbitration shall be conducted under general principles of law, customs, usages and the rules of international trade.' Paragraph 3: 'Arbitration that involves public administration will always be at law and will be subject to the principle of publicity.'

82 Art 63: 'The parties can change the jurisdiction on the basis of the value of the claim and territory, choosing the venue where the action arising from rights and obligations is to be filed. (...)'

Despite these progressive tendencies, the UNIDROIT Principles are not frequently applied in Brazil yet the future outlook is optimistic.

## Applicability of the UNIDROIT Principles in Brazil

The UNIDROIT Principles can be applied to the merits of a case directly or indirectly. In the direct application, the parties specify the UNIDROIT Principles in their choice-of-law clause. The indirect application, in turn, provides a wider range of possibilities. In its Preamble, the UNIDROIT Principles prescribe diverse uses to its rules.<sup>83</sup> As noted by Gama Jr, the language of the principles is authoritative when referring to the direct application ('shall be applied...'), but when referring to the indirect application, it acquires a nature of 'recommendation' ('may be applied...').

Indirectly, the UNIDROIT Principles can be applied:<sup>84</sup>

- as integral part of *lex mercatoria* or as manifestation of general principles of law;
- as substitute, source of inspiration or justification of the applicable national law;
- for the purpose of interpretation or gap-filling of international instruments of uniform law;
- in other contexts; and
- as a legislative model.

In addition to the contrasting 'direct v indirect' application, a second dichotomy can be identified: the application of the UNIDROIT Principles as a 'general legal rule' or as a 'particular legal rule'.<sup>85</sup> In the first hypothesis, the UNIDROIT Principles are applied in their totality, as a concise normative set of rules. In the second, only one of its provisions is applied, according to the specificities of the case. The adoption of the second approach is more feasible by practitioners and judges.

### By the courts

Despite the development of choice-of-law provisions in Brazil, it is not possible to affirm with absolute certainty and complete legal security that such permission also encompasses non-state law.<sup>86</sup> This is mainly because state judges are intrinsically bound to national law. Therefore, the direct application of the UNIDROIT Principles by courts is controversial.

In principle, the indirect application of the UNIDROIT Principles as an integral part of *lex mercatoria* could also seem unlikely, since *lex mercatoria* itself could be associated with a non-state law,<sup>87</sup> stumbling upon the same problem. Fortunately, however, Brazil's judges seem to be increasingly taking the

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83 Preamble (Purpose of the Principles): 'These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. (\*) They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.' UNIDROIT Principles (2016).

84 Due to its clarity, it is adopted the division offered by Lauro Gama Jr, *Contratos internacionais à luz dos princípios do UNIDROIT 2004: Soft Law, arbitragem e jurisdição* (Renovar 2006) (hereafter Lauro Gama Jr, *Contratos internacionais à luz dos princípios do UNIDROIT 2004: Soft Law, arbitragem e jurisdição*) (free translation).

85 Emmanuel Jolivet, 'A Influência dos Princípios UNIDROIT em Matéria de Prática Contratual e Arbitral' (2009) *Revista Brasileira de Arbitragem*, vol VI, issue 23, 90, 109.

86 Lauro Gama Jr, *Contratos internacionais à luz dos princípios do UNIDROIT 2004: Soft Law, arbitragem e jurisdição* (n 9).

87 *Ibid.*

international law and the global tendencies into consideration when applying national law to settle internationally contextualised cases.<sup>88</sup> In this sense, the aforementioned indirect application does not seem to be excluded from the legal practice in the country.

The most promising form of indirect application by courts is the use of the UNIDROIT Principles as a way of placing the dispute in the international scenario, by using a specific provision as justification of the national law, ‘validating’ the judgment in the light of the international commercial community practices. This application is also useful to connect the facts of the case to general clauses such as the good-faith standard, very prominent in civil law jurisdictions.

In spite of the evolvement of case law, it must be noted that there are still very few decisions with similar reasoning. In addition, the majority of these judgments were rendered by judges from the same court of justice: the Court of Appeal of the State of Rio Grande do Sul. This tribunal is commonly considered to be Brazil’s most progressive and innovative court. However, there are 26 other state courts of appeal besides Rio Grande do Sul. Consequently, Brazilian case law related to the UNIDROIT Principles and soft law instruments is still scarce, lacking enough sampling to reach firm conclusions.

### *By arbitral tribunals*

On the other hand, the applicability of the UNIDROIT Principles does not face the same challenges in arbitrations as it does in courts. Brazilian law clarifies the application of the UNIDROIT Principles to the merits of both domestic and international arbitral procedures. The Brazilian Arbitration Act grants great autonomy<sup>89</sup> and legal security to the parties. Even if the UNIDROIT Principles are not selected as the directly applicable law, they can be indirectly applied by the arbitrators, not bound to national law, as a derivation of a ‘general principles’ provision.

Arbitrators have greater flexibility to apply the UNIDROIT Principles in cases where parties are silent regarding the choice of law. This possibility is covered in 9.4 of the Brazil–Canada Chamber of Commerce (CAM-CCBC) Arbitration Rules on applicable law for the proceedings: ‘The parties will be able to choose the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In case of omission or divergence, it falls upon the arbitral tribunal to decide in this regard’.<sup>90</sup>

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88 A perfect example can be read in the following extract of the reasoning of Judge Sudbrack during its reasoning on the applicability of Incoterms by courts: ‘Although bearing in mind the lack of consensus among scholars, *I shared the understand in the sense of the effective existence of the new lex mercatoria and of its unequivocal insertion in the field of Law, inasmuch as I agree with the authorities regarding the possibility of application of lex mercatoria by judges and tribunals of the state judicial system, without restricting its applicability only to decisions rendered by arbitral judges and tribunals.* Even if it is true that the *lex mercatoria* is mainly used by arbitrators – what is caused, among other reasons, as consequence of the possibility of settlement according to equity and of the choice of the applicable law by the parties in arbitrations – *I regard state courts as not prohibited to the present its decision on the grounds of a lex mercatoria rule, if this rule does not conflict with any rule of the national legal system.* In the present case, I do not recognise any conflict between any rule of the Brazilian legal system, whether created by internal statutory law or originating from ratified international instruments (...).’ (*Comissária Eichenberg SA v Agroindustrial Lazzeri SA* (2015) Appeal 0195167-23.2015.8.21.7000 (Court of Appeal of the State of Rio Grande do Sul) Reporting Judge Umberto Guaspari Sudbrack).

89 Art 2, Brazilian Arbitration Act (2015): ‘At the parties’ discretion, arbitration may be at law or in equity.’ Para 1: ‘The parties may freely choose the rules of law that will be used in the arbitration, as long as their choice does not violate good morals and public policy.’ Para 2: ‘The parties may also agree that the arbitration shall be conducted under general principles of law, customs, usages and the rules of international trade.’ Para 3: ‘Arbitration that involves public administration will always be at law and will be subject to the principle of publicity.’

90 The Centre for Arbitration and Mediation of the Brazil – Canada Chamber of Commerce (CAM-CCBC) is one of the top arbitral institutions in Brazil. Its arbitration rules are available at <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/arbitration/arbitration-rules-2012/>, accessed 10 October 2019.

Since 2004, the capability for ratifying foreign arbitral awards<sup>91</sup> has belonged exclusively to the Supreme Court of Justice (Superior Tribunal de Justiça). The recognition of the award by the court is an indispensable requirement to its effectiveness on Brazilian territory. The Supreme Court examines the foreign judgment sought to be confirmed following the model adopted by the New York Convention (*juízo de deliberação*, in Portuguese). According to this model, the court is only allowed to assess the compliance with formal requirements. It cannot review the merits of the case except in cases involving public order violations. Moreover, courts in Brazil usually assume a pro-arbitration position. Therefore, if the recognition is granted, foreign awards reasoned on the grounds of UNIDROIT Principles' provisions can take place in Brazil.

On *Atecs Mannesmann GmbH v Rodrimar S/A*,<sup>92</sup> the discontented party argued that the foreign award violated the Brazilian public order because arbitrators did not respect the choice-of-law clause. The agreement prescribed the application of the 'Swiss substantive law' to settle the merits of the dispute. According to the losing party, while this expression would cover only 'substantive Swiss statutory law', the tribunal applied the 'Swiss legal rules', considering other sources of law such as general principles. The Supreme Court decided that seeking the intended meaning of the expression 'Swiss substantive law' would demand an incursion to the merits of the case, falling outside the scope of the recognition proceedings.

## Application of the UNIDROIT Principles in Brazil

### *By the courts*

The UNIDROIT Principles were indirectly applied in *Noridane Foods v Anexo Comercial*<sup>93</sup> as an integral part of *lex mercatoria*. This case, known as the 'chicken feet case', represents the most important judgment rendered by Brazilian courts presenting the UNIDROIT Principles' provision as grounds for the decision, jointly with CISG. Judgment was entered by the Court of Appeal of the State of Rio Grande do Sul in February 2017. It was the first application of CISG to the merits of a judicial case,<sup>94</sup> more than two years after the Convention became effective in Brazil. The court also explicitly stated that the UNIDROIT Principles can also be applied by state judges to settle merits of disputes.

This decision reached international acknowledgement when Michael Joaquin Bonell mentioned it in his speech,<sup>95</sup> at the inaugural conference of the 2017 Private International Law Course offered by The Hague Academy. The distinguished scholar commended the court for reasoning on the grounds of the applicability of *lex mercatoria* to international commercial transactions.

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91 The recognition and enforcement of foreign awards proceedings is governed by the Law of Introduction to the Rules of the Brazilian Law (2010) art 12 and 15, by the Code of Civil Procedure (2015) art 36, 40 and 960 and by the International Regulations of the Supreme Court of Justice (2018) Art 216-A.

92 *Atecs Mannesmann GmbH v Rodrimar S/A Transportes Equipamentos Industriais e Armazéns Gerais* (2009) SEC 3.035 (Superior Court of Justice, Special Chamber) Reporting Justice Cesar Asfor Rocha.

93 *Noridane Foods v Anexo Comercial* (2017) Appeal 0000409-73.2017.8.21.7000 (Court of Appeal of the State of Rio Grande do Sul, 12th Civil Chamber) Reporting Umberto Guaspari Sudbrack.

94 In 2015, in a case discussing the applicable law to an international sales agreement, the same state court had already expressly affirmed that, in the case that the first instance judge concluded that Brazilian law was applicable, CISG would necessarily be applicable, once it was already implement into Brazilian legal system as hard law and it was not expressly excluded by the parties (*Voges Metalurgia Ltda v Inversões Metalmeccânicas ICA (IMETAL, CA)* (2015) Appeal 0219920.44.2015.8.21.7000 (Court of Appeal of the State of Rio Grande do Sul, 12th Civil Chamber) Reporting Judge Umberto Guaspari Sudbrack).

95 Reported at the Court of Appeal website [www.tjrs.jus.br/site/imprensa/noticias/?idNoticia=393758](http://www.tjrs.jus.br/site/imprensa/noticias/?idNoticia=393758) accessed 10 July 2018.

The dispute emerged after the buyer terminated the agreement and sought recovery of the price paid, alleging non-delivery of over 100 tonnes of frozen chicken feet, by the seller. The court affirmed the first instance decision, declaring the termination of the contract and upholding the judgment for recovery against the defendant. On the merits, the court reasoned on the grounds of CISG provisions such as *nachfrist* (additional period for late performance).

Several interesting points can be highlighted by this case. The court interpreted the conflict rules of Brazil's international private law, as well as defining the best criteria to assess when attempting to characterise an agreement as 'international'.

The tribunal used the UNIDROIT Principles' provisions (freedom of contract and good faith) with the function of strengthening the application of CISG. The court also considered the application of the UNIDROIT Principles as an outcome of the qualification of the agreement as international. Finally, it also argued for the possibility of application of treaties, conventions and of the UNIDROIT Principles regardless of their effectiveness on the internal positive law since they qualify as international usages and practices and constitute expression of the new *lex mercatoria*, available to both state judges and arbitrators.

In the cases *Tobacco Producers*,<sup>96</sup> *Poultry Farmers and others v Concessionaire of Electric Energy*<sup>97</sup> and in others, the UNIDROIT Principles have been applied though a particular legal rule, serving as justification and source of inspiration of national law.

The same legal question emerged in several cases: should the concessionaire of electric energy be held liable and bear the losses inflicted to rural business owners (tobacco producers, poultry farmers etc) caused by the non-supply of energy due to interruption of distribution?

The Court of Appeal of the State of Rio Grande do Sul, reasoning on the grounds of economic analyses, distributive justice and the social impact of apportioning particular losses among all consumers, decided that the losses should be supported proportionally by the parties.

Part of the reasoning was supported by the duty to mitigate the loss on behalf of the injured parties. Considering that energy supply interruptions and climate variations are predictable, it is reasonable to expect the farmers to take preventive measures, such as installing proper equipment in their properties.

After referring to the common law origins of the duty to mitigate the loss and its acceptance in several jurisdictions, the court quoted Article 7.4.8 of the UNIDROIT Principles (1994), establishing a connection with the Brazil's legal system, stating that such principle, regardless not having been literally expressed in the Civil Code, is aligned with the general clauses of the legal system, such as the good-faith standard.

It is interesting to notice that in 2010, approximately four years before the ratification of CISG, the Court of Appeal of the State of Rio Grande do Sul had already referred to the duty to mitigate the

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96 *Alvaro Renato Kwiatkowski v CEEE-D – Companhia Estadual de Distribuição de Energia Elétrica* (2018) Appeal 0133745-42.2018.8.21.7000 (Court of Appeal of the State of Rio Grande do Sul, 9th Civil Chamber) Reporting Judge Eugênio Facchini Neto.

97 *Lurdes Beatriz Schuh and Roberto Rivelino Schuh v AES Sul Distribuidora Gaucha de Energia AS* (2016) Appeal 0271992-71.2016.8.21.7000 (Court of Appeal of the State of Rio Grande do Sul, 9th Civil Chamber) Reporting Judge Carlos Eduardo Richinitti.

loss prescribed by the convention as an example of international legal provision. This decision shows a good acceptance of the internalisation of law.<sup>98</sup>

### *By arbitral tribunals*

Due to the confidentiality of arbitration proceedings, it is hard to measure the application of the UNIDROIT Principles in arbitration. However, as consequence of its flexibility, the chances of the UNIDROIT Principles being applied to the merits of disputes in arbitration are higher than during judicial proceedings.

Two cases are reported on the UNILEX database, both of which concern agreements between Brazilian parties. The older one is an ad hoc procedure decided in December 2005.<sup>99</sup> The arbitrator referred to the UNIDROIT Principles' hardship provisions in support of the conclusion reached under applicable domestic law.

The second case, *Delta v AES Infoenergy*,<sup>100</sup> discussed the termination of long-term energy supply contract and dates from February 2009. The arbitral tribunal, referencing Article 6.2.1 of the UNIDROIT Principles, considered that hardship did occur, since 'the mere fact that contract performance entails higher economic burden for one of the parties does not amount to hardship'.

From our practice, we can mention the final award of a domestic arbitration that discussed the review of a contract, in which arbitrators referred to the UNIDROIT Principles' hardship provisions in support of conclusion reached under applicable Brazilian law. In an award that also discussed termination of a contract – in this case, a construction agreement – the arbitral tribunal mentioned substantial performance and fundamental breach provisions of the UNIDROIT Principles in support of domestic law.

### *By lawyers*

In our experience, the UNIDROIT Principles are rarely used by lawyers and business people during pre-closing negotiations or during the drafting process of an agreement, especially when both parties are from Brazil.

We use the UNIDROIT Principles' provisions in our practice in support of the applicable law, mainly the provisions regarding interpretation of contracts, with the purpose of strengthening our claim by conferring international consistency to our rights. The lawyers of a Brazilian oilfield company relied strongly on the UNIDROIT Principles' hardship provisions in a defence submitted in the course of an audit process initiated by the Accounting Court.<sup>101</sup> The court, however, was silent regarding the use of the UNIDROIT Principles.

Interestingly, the research revealed a court case that incorporated the UNIDROIT Principles in its reasoning, as support to domestic law, by affirming the opinion of the prosecution office and

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98 *Carlos Augusto Weissmeier and Carlos Roberto Lago v Estado do Rio Grande do Sul* (2010) Appeal 70037651064 (Court of Appeal of the State of Rio Grande do Sul, 20th Civil Chamber) Reporting Judge Carlos Cini Marchionatti.

99 *Parties unknown* (2005) (Ad hoc Arbitration, Brazil) [www.unilex.info/case.cfm?pid=2&do=case&id=1532&step=Keywords](http://www.unilex.info/case.cfm?pid=2&do=case&id=1532&step=Keywords) accessed 10 July 2018.

100 *Delta Comercializadora de Energia Ltda v AES Infoenergy Ltda* (2009) Arbitral Procedure No 1/2008 (Câmara FGV de Conciliação e Arbitragem). [www.unilex.info/case.cfm?pid=2&do=case&id=1530&step=Sources](http://www.unilex.info/case.cfm?pid=2&do=case&id=1530&step=Sources) accessed 10 July 2018.

101 *Parties Unknown* (2000) TC 007.103/2007-7 (Accounting Court).

presenting them as grounds for the decision. That is to say that not only corporate private lawyers must be aware of international developments, but also legal practitioners working within the public sector.<sup>102</sup>

Surveys published by Kluwer in 2014<sup>103</sup> and 2016<sup>104</sup> reached the conclusion that:

‘The experiences in Latin America are highly fractioned. It is the only region where all instruments are said to “always” be applied, at least to some small percentage. Additionally, it is the only region where all of the instruments are reported to “never” be applied. As a result, all of the instruments are mostly used “occasionally”. Latin American respondents favour the UNIDROIT Principles with 23.1 per cent always applying them, 7.7 per cent regularly, 38.5 per cent occasionally, and 30.8 per cent never.’

## Relevant developments and future of the UNIDROIT Principles

The relevance of the court decisions listed below lies on the potential applicability by analogy of their reasoning to the UNIDROIT Principles, even if the judges have not expressly mentioned them. A wider comprehension of the subject can help identifying current tendencies and envisage the future of the UNIDROIT Principles in Brazil.

### *UNIDROIT Principles of Transnational Civil Procedure – indirect application as justification of a national public policy for promotion of ADRs*

The Superior Court of Justice quoted the UNIDROIT Principles of Transnational Civil Procedure with the purpose of emphasising the international relevance of the procedural equality among the parties of a dispute.<sup>105</sup> The same principles were also cited by the Court of Appeal of the State of Rio Grande do Sul.<sup>106</sup> In this case, the court dealt with the refusal of a consumer in coping with a resolution system based on mediation and specifically drawn to solve consumer disputes. The court stated that the promotion of alternative dispute resolution methods is not only in consonance with the Brazilian procedural law but also with the development of international consumer, with all societies striving for faster and cheaper solutions. To support this argument, the reporting judge cited principle 24.2 of the UNIDROIT Principles of Transnational Civil Procedure: ‘The court should facilitate parties’ participation in nonbinding alternative dispute-resolution procedures at any stage of the proceeding’.

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102 ‘In the face of the facts and of the nature of the alleged contract, the analysis of the question at the light of the principals that governs international commercial contracts, of the UNIDROIT Principles, that consist in an initiative of uniformization of the rules of international trade law, aiming the effective application of the new “*lex mercatoria*”, is fundamental. From the referred principles, it is worth mentioning the good faith as the duty of loyalty that contracting parties must keep in relation to the reasonable standards of international trade “reasonable commercial standards of fair dealing”, observing the behaviour and acts that are expected from an international trader and that are usually practiced in similar operations.’ (Free translation) (*Companhia de Geração Térmica de Energia Elétrica – CGTEE v Kreditanstalt für Wiederaufbau Bankengruppe* (2013) Appeal 70053386595 (Court of Appeal of the State of Rio Grande do Sul, 15th Civil Chamber) Reporting Judge Vicente Barroco de Vasconcellos).

103 Elina Mereminskaya, ‘Results of the survey on the use of soft law instruments in international arbitration’ (*Kluwer Arbitration Blog*, 6 June 2014) <http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/> accessed 3 April 2019.

104 Elina Mereminskaya, ‘Results of the survey on the use of soft law instruments in international arbitration’ (*Kluwer Arbitration Blog*, 16 February 2016).

105 *GE Medicals v Paramedics* (2013) Recognition of Foreign Judgment 804 (Superior Court of Justice) Reporting Justice Massami Uyeda.

106 *Mario Antonio Nolio v Grupo Santander Brasil SA* (2016) Appeal 0346391-71.2016.8.21.7000 (Court of Appeal of the State of Rio Grande do Sul, 9th Civil Chamber) Reporting Judge Eugênio Facchini Neto.

## *Lex Mercatoria – indirect application as interpretation instrument of statutory procedural law in a domestic dispute*

In the recent judgment of a *habeas corpus* action decided singularly by Justice Napoleão Nunes Maia Filho,<sup>107</sup> *lex mercatoria* was referenced in a peculiar way. Curiously, there was no international element to this case.

When the 2015 Code of Civil Procedure came into force, a discussion arose regarding the legality of certain atypical coercive remedies, since the new statute has invested judges with wider discretionary powers.<sup>108</sup>

Judging the suitability of the retention of the execution debtor passport documents and the suspension of his driving licence, Justice Maia Filho relied on the following *ratio*: such measures are personal afflicting measures. Therefore, they are appropriate in the context of consumers' unsecured credit markets, characterised by increasingly higher indebtedness levels. In disputes involving these markets, 'those judges that promote the determination that, during execution proceedings, the restriction of the citizen rights be restricted, as has been seen in the limitation on the use of the passport and the drivers' licence, aim to signalise to the market and to the international credit rating agencies that in Brazil the *lex mercatoria* is acknowledged and respected'. In the specific case, however, because it was a highly guaranteed tax execution, Justice Maia Filho found that these coercive measures were inappropriate and disproportional.

## *Incoterms – indirect application as manifestation of lex mercatoria*

The indirect application of Incoterms in this case<sup>109</sup> represents a significant development for the UNIDROIT Principles because the same *ratio decidendi* of this decision can be used in the application of the UNIDROIT Principles. Indeed, the reporting judge of this case, Judge Umberto Guaspari Sudbrack, is the same reporting judge for the above *chicken feet* case.<sup>110</sup> And on this occasion, the judge referred to that case. This shows how the reasoning used in applying a soft law instrument to the merits of a case can easily be transported to the application of another instrument.

The court considered the Incoterms to be an expression of the *lex mercatoria*.

In the centre of the case was the alleged breach of an international shipping agreement between a Brazilian party and an Italian party. In his vote, the reporting judge contended that the correct assessment of dispute would depend on the comprehension of the meaning of the clause 'Free Carrier' (FCA), inasmuch as its legal implications. Then, the reporting judge, relying on authorities, defined the meaning of the clause, stating that the Incoterms 'do not qualify as an international rule of immediate binding effect: they are not multilateral treaties that States can ratify, or to which they can adhere (...)'. They are, in fact, 'integral elements of the so-called new *lex mercatoria*' (free translation).

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107 *Affornalli e outros v Tribunal de Justiça do Estado do Paraná* (2018) Habeas Corpus 453.870-PR (Supreme Court of Justice) Justice Napoleão Nunes Maia Filho.

108 Art 139. The judge shall conduct the proceedings in accordance with the provisions of this Code, having a duty to: (...) IV – determine all the necessary inductive, coercive, injunctive or subrogation remedies to assure the performance of the court order, including claims whose subject matter is a cash benefit.

109 *Comissária Eichenberg SA v Agroindustrial Lazzeri SA* (2015) Appeal 0195167-23.2015.8.21.7000 (Court of Appeal of the State of Rio Grande do Sul, 12th Civil Chamber) Reporting Judge Umberto Guaspari Sudbrack.

110 *Anexo Comercial Importação e Distribuição Ltda – EPP v Noridane Foods SA* (2017) Appeal 0000409-73.2017.8.21.7000 (Court of Appeal of the State of Rio Grande do Sul, 12th Civil Chamber) Reporting Umberto Guaspari Sudbrack.

The syllabus of the case reads:

‘It is possible the application, by state courts, of norms that are integral parts of the “new *lex mercatoria*”, of which are examples the *Incoterms*, edited by the International Chamber of Commerce. Attribution of efficacy to the agreement between the parties, that takes place regardless of the non-binding nature of its rules and of its non-state origins and creation. *Incoterm* clause that does not violate any provision of Brazilian law, in foreseen the split of transport costs between the importer and the exporter. Contractual adjustment that is effective in court, under penalty of violation of the freedom of contract and of the binding effectiveness of the agreement between the contracting parties.’ (free translation)

### *Adoption of internationalist approach and unsigned conventions as source of interpretation of procedural national law*

Recently, the Court of Appeal of the State of Rio Grande do Sul was confronted with the necessity of interpreting Article 63 of the 2015 Brazilian Code of Civil Procedure,<sup>111</sup> which states the legality of forum selection clauses, to assess the applicability of this provision to consumer transactions. The previous code of civil procedure, which dated from 1973, did not contain the same provision. The court resorted to international private law to reach the conclusion<sup>112</sup> that ‘the contemporary international private law is imbued with social values (...) I reach the conclusion that the only interpretation of the head provision of article 63 of the CCP/2015 that is compatible with the current principle-based approach of private international law is that international consumer contracts are not encompassed by its scope.’ (free translation)

As source of inspiration of his conclusion, Judge Fachin Neto cited international conventions unsigned by Brazil, such as the 2005 Hague Choice of Court Convention and the Regulation (EC) No 1215/2012 (Regulation Brussels-I).

## **Possible reasons for lack of adoption**

In Brazil, the UNIDROIT Principles are rarely applied by either courts or by arbitrators, nor are they frequently considered by lawyers and business people in their daily practice.

Even though some issues regarding choice of law provisions are yet to be completely settled, a systemic analysis of the Brazilian legal framework indicates that the lack of use of the UNIDROIT Principles is not due to legal obstacles. Notwithstanding a need for improvements, courts, law-makers and legal scholars seem to be increasingly aiming the alignment of Brazilian law with the international law evolution. Even if this tendency is still in an early stage, there have been positive signs such as: the ratification of several private international law conventions; the upgrading and inclusion of several provisions in the civil procedure code regarding international cooperation, international jurisdiction and choice of court; and the promotion of arbitration and other international dispute resolution methods.

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111 Art 63: ‘The parties can change the jurisdiction on the basis of the value of the claim and territory, choosing the venue where the action arising from rights and obligations is to be filed. (1) The choice of venue is only enforceable when it is stated in a written document and is expressly stated in relation to a specific legal transaction. (2) The venue chosen in a contract is binding on parties’ heirs and successors.’

112 *Alvaro Renato Kwiatkowski v CEEE-D – Companhia Estadual de Distribuição de Energia Elétrica* (2018) Appeal 0133745-42.2018.8.21.7000 (Court of Appeal of the State of Rio Grande do Sul, 9th Civil Chamber) Reporting Judge Eugênio Fachini Neto.

It is difficult to reach a conclusion about the reasons behind the underuse of the UNIDROIT Principles in Brazil. Theoretically, there can be identified both subjective and objective reasons<sup>113</sup> for UNIDROIT Principles face some level of neglect directed at them.

Subjective factors of influence would include: the parties of the dispute; the arbitrators; and the arbitral institution. In our opinion, the most relevant factor in this equation is the first, specially pertaining the assistance of lawyer to clients. Brazil has more lawyers than any other country: in 2016, there were one million lawyers.<sup>114</sup> The urgency for structural reforms on legal education frequently contributes to several gaps in the lawyers' formation, such as a lack of international comprehension.

The objective reasons are mainly:

- discussion regarding the geographical reach of the UNIDROIT Principles, which would lack a strong international character as a result of being unknown to a large portion of the economic agents, resulting in a more regional than international application; and<sup>115</sup>
- the downside of its pretension of internationality would be a lack of autonomous applicability, demanding in practice always the joint application of another body of law.

In our opinion, this reason is not expressive to justify the lack of use of the UNIDROIT Principles in Brazil. As seen in the case study presented above, there are still a lot of possibilities of application by courts and arbitral tribunals, mainly indirectly, before we can say that the principles are not used more often because of some kind of insufficiency.

Finding a reason why the UNIDROIT Principles are not applied more frequently in Brazil is certainly a complex question with more than one possible answer. However, one significant factor is certainly the low level of lawyers' knowledge of the UNIDROIT Principles. Putting aside the critics of this international instrument, it is a tool with significant potential of application in commercial contracts, especially in fields where sectors work under internationalised practices, such as infrastructure, oil and gas, distribution and insurance.

More knowledge and understanding of UNIDROIT Principles by lawyers can help them to consider use of the Principles for contract drafting and finding arguments in litigation. A national practice in harmony with international law would benefit not only the legal practitioners, but also the country itself.

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113 This distinction is made by Lalive, *idem*.

114 *Consultor Jurídico*, 'Total de advogados no Brasil chega a 1 milhão, segundo a OAB' (*Consultor Jurídico*, 18 November 2016) [www.conjur.com.br/2016-nov-18/total-advogados-brasil-chega-milhao-segundo-oab](http://www.conjur.com.br/2016-nov-18/total-advogados-brasil-chega-milhao-segundo-oab) accessed 12 July 2018.

115 Lalive, *ibid*.

# Bulgaria

*Dimitar Kondev*<sup>116</sup>

## The applicability of the UNIDROIT Principles in Bulgaria

### *Use of the UNIDROIT Principles in court*

Bulgaria is a civil law jurisdiction and a member of the EU in which Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) ('Rome I Regulation') applies.

Recital 13 of the Rome I Regulation explicitly permits the incorporation of a non-state body of law, such as the UNIDROIT Principles, into a parties' contract, although Article 3, paragraph 1 requires that a state law is the law governing the contract. Article 9 of the Bulgarian Law on Obligations and Contracts recognises the principle of party autonomy. Therefore, Bulgarian courts should recognise and respect a parties' choice to incorporate the UNIDROIT Principles into their contract. However, under the parties' freedom to choose, the law applicable to the contract has traditionally been perceived as limited to that of a national law. Therefore, the incorporation of the UNIDROIT Principles without any reference to a domestic law supplementing these principles will likely be construed by Bulgarian courts as if there had been a contract without a choice of law. In this case, the law governing the contract will still have to be determined on the basis of the applicable private international law rules and the court will apply the UNCITRAL Principles referred to by the parties to the extent they do not contradict any mandatory provisions of the applicable law. If the applicable law is Bulgarian law, the courts will respect the parties' reference to the UNIDROIT Principles as the great majority of statutory provisions in Bulgaria applicable to commercial contracts are of non-mandatory nature.

### *Use of the UNIDROIT Principles in arbitration*

The Bulgarian Law on International Commercial Arbitration is based on the UN Commission on International Trade Law (UNCITRAL) Model Law of International Commercial Arbitration. However, the Bulgarian legislator decided to deviate from the reference to 'rules of law' in Article 28 of the Model Law. Therefore, Article 38 of the Law on International Commercial Arbitration stipulates that the arbitration court shall resolve the dispute by applying the 'law' (ie, the national law) chosen by the parties.

The two main arbitral institutions in Bulgaria are the Bulgarian Chamber of Commerce and Industry's Arbitration Court and the Bulgarian Industrial Association's Arbitration Court. The arbitration rules of both institutions follow Article 38 of the Law on International Commercial

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Arbitration and refer to ‘law’ chosen by the parties.<sup>117</sup> Therefore, a contractual provision referring solely to the UNIDROIT Principles as governing the contract will likely be construed by the arbitrator(s) in the same way as the Bulgarian courts, that is, as a provision that does not designate a chosen national law. The arbitrator(s) will have to determine the applicable law by following private international law rules, which they deem applicable. Unlike judges in Bulgarian courts, arbitrators have discretion to decide which conflict of law rules to apply and are not bound by the provisions of the Rome I Regulation. After determining the applicable law, the arbitrator(s) will apply the UNIDROIT Principles to the extent they do not violate mandatory provisions of the applicable law.

## **Application of the UNIDROIT Principles in Bulgaria**

### *Use by courts and arbitral tribunals*

Searches in the Bulgarian legal databases have revealed no court decisions where the UNIDROIT Principles were applied or relied upon by the parties. As arbitral awards are usually not published, it is difficult to assess whether there have been occasions where the UNIDROIT Principles have been applied in arbitration.

### *Use by lawyers*

The UNIDROIT Principles are not widely known by Bulgarian lawyers. Lawyers at larger law firms providing legal advice to international clients have certain knowledge of them, and there is anecdotal evidence suggesting that the UNIDROIT Principles are sometimes referred to in the negotiations of international commercial contracts. However, these cases are rare.

### *Other instances of application*

The author has come across two occasions where the UNIDROIT Principles have been chosen as rules of law governing certain contracts. The first concerns the framework agreement between The Global Fund to Fight AIDS, Tuberculosis and Malaria (‘Global Fund’) and the Republic of Bulgaria.<sup>118</sup> This framework agreement anticipates that the parties will enter into grant agreements for the implementation of certain programmes. Pursuant to Article 4.2 of the framework agreement, for each programme, the relevant grant agreement shall be governed by the UNIDROIT Principles (2004). There is no reference to any state law that would supplement these principles. There are several such grant agreements that are publicly available. For example, a grant agreement was signed between the Global Fund and the Ministry of Health for a programme related to the national anti-tuberculosis (TB) campaign in Bulgaria. The grant agreement stipulates that it shall be governed by the UNIDROIT Principles (2004).<sup>119</sup> There is a similar grant agreement concluded between the same parties in relation to prevention and control of AIDS<sup>120</sup> that contains the same provision.

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117 Art 36(1) of the Arbitration Rules of the Arbitration Court with the Bulgarian Chamber of Commerce and Industry and Art 45 of the Arbitration Rules of the Arbitration Court with the Bulgarian Industrial Association.

118 Framework agreement approved by the Bulgarian Council of Ministers, Decision No 758, 25 September 2015.

119 Grant agreement approved by the Council of Ministers, Decision No 27, 16 January 2013.

120 Grant agreement was approved by the Council of Ministers, Decision No 137, 4 March 2015.

The second occasion relates to a procedure initiated by the Bulgarian Minister of Finance for the conclusion of a framework agreement concerning procedural representation and legal advice in international arbitration cases as well as legal advice and representation in negotiations and mediation related to resolution of legal disputes.<sup>121</sup> The framework agreement anticipates that retainer letters will be issued to the law firms selected for the provision of particular legal services. Pursuant to the framework agreement, such retainer letters shall be governed by the UNIDROIT Principles (1994) with the exclusion of Articles 6.2.1, 6.2.2 and 6.2.3 relating to hardship.

### *Use, knowledge and future of the UNIDROIT Principles*

The UNIDROIT Principles are little known and rarely used in Bulgaria. The aforementioned examples of occasions when the UNIDROIT Principles have been used indicate that there may be increased application of the principles in the near future.

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<sup>121</sup> Procedure initiated by the Bulgarian Minister of Finance, Order No -173, 21 February 2018.

# Canada

*Jean Teboul, Louis-Martin O'Neill and George J Pollack*<sup>122</sup>

Canada is a bi-jurisdictional confederation, meaning that the federal government and the provinces operate within separate spheres of legislative competence, as defined by the constitution. Private law falls within the powers of the provinces. Certain matters, such as maritime, banking and patent law, fall within the federal sphere of power.<sup>123</sup> Canada is also a bi-juridical legal system with the common law applying in nine provinces and three territories, and the civil law prevailing in Quebec, Canada's second-most populous province.

Therefore, private law, including private international law, is governed by a civil legal tradition in Quebec and by common law principles in the other Canadian jurisdictions. The applicability and application of the UNIDROIT Principles in Canada reflect this dualism.

## Applicability of the UNIDROIT Principles

There is no legislation at either the federal or provincial levels explicitly permitting parties to choose the UNIDROIT Principles as the governing law of their agreements. While it remains unclear whether Canadian courts would apply a choice of law provision prescribing the UNIDROIT Principles, arbitral tribunals sitting in Canada are likely to do so.

In any event, some commentators argue that, even if possible, drafters should not choose the UNIDROIT Principles to the complete exclusion of state law, since they do not offer a complete set of rules, thereby leaving some uncertainties that may give rise to disputes between the parties.<sup>124</sup>

## Applicability in the judicial system

### *Common law jurisdictions*

Rules governing choice of law in Canadian common law jurisdictions have been developed by case law. The leading authority, *Vita Food Products Inc v Unus Shipping Co Ltd*,<sup>125</sup> states that the proper law of a contract is the law that the parties intended to apply and sets three limits to the parties' autonomy

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122 Louis-Martin O'Neill and George J Pollack are partners and Jean Teboul is an associate at Davies Ward Phillips & Vineberg, Montreal. The authors thank Anna Kirk for her invaluable research assistance. The views expressed in this country perspective are those of the authors, and cannot be attributed to Davies Ward Phillips & Vineberg.

123 See The Constitution Act, 1867, 30 & 31 Vict, c 3 s 91–92.

124 Alain Prujiner, 'Comment utiliser les Principes d'UNIDROIT dans la pratique contractuelle' (2002) 36 RJT 561, 567–570 (hereafter Prujiner).

125 [1939] 2 DLR 1 (PC) (hereafter *Vita Food*). This case is widely referred to in the doctrine and case law (see eg, *Douez v Facebook, Inc*, 2017 SCC 33, para 70; *Mohammadi v Safari*, 2017 ONSC 4696, para 36; *TFS RT Inc v Kenneth Dyck*, 2017 ONSC 2780, para 55; Janet Walker, *Castel and Walker: Canadian Conflict of Laws*, loose leaf (consulted on 30 July 2018) (vol 2, 6th edn, LexisNexis 2005) 31–5 and ff (hereafter Castel and Walker); Frédérique Sabourin, 'Le contrat sans loi en droit international privé canadien' (2006) 19:2 RQDI 35, 56 (hereafter Sabourin)).

with respect to choice of law:<sup>126</sup> the intention expressed must be legal,<sup>127</sup> it must be bona fide;<sup>128</sup> and, the choice must not go against public policy.<sup>129</sup>

That said, the law remains unsettled as to whether parties to a contract can agree to the application of a non-state law, such as the UNIDROIT Principles.

On the one hand, some commentators believe that ‘parties cannot insulate their contract from all national legal systems by stipulating that it is to be governed exclusively by *lex mercatoria* or by some other transnational set of legal rules’.<sup>130</sup> This view is based on the common law principle that ‘contracts are incapable of existing in a legal vacuum’<sup>131</sup> detached from any private law system that defines the parties’ obligations. It is also said that, given the integrated nature of a contract, parties should not be able to subject their agreement ‘simultaneously to two different systems, at least so far as the contract as a whole is concerned’.<sup>132</sup>

On the other hand, some authors argue that there is no logical prohibition against the parties agreeing to have certain issues be determined by non-state law, or to parties incorporating non-state rules into an agreement, barring any contradiction with the state law that governs the contract generally.<sup>133</sup>

### *Civil law jurisdiction – Quebec*

As opposed to Canada’s common law jurisdictions, private international law rules in Quebec are codified in the Civil Code of Quebec (CCQ).<sup>134</sup>

Several commentators have expressed the view that parties to a contract may supplement Quebec law by usage, including *lex mercatoria* or the UNIDROIT Principles,<sup>135</sup> although certain exceptions exist, for example, with respect to consumer and employment contracts.<sup>136</sup> For instance, in a recent decision where it confirmed that the hardship doctrine is not available in Quebec, the Supreme Court of Canada suggested that the parties can choose the UNIDROIT Principles. It indicated, among other things, that the ‘decision to subordinate one or more contractual relationships to the

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126 *Vita Food* (n 125) 8.

127 A contract will be deemed illegal in the rare case that a statute of the forum declares the choice of law invalid. Eg, some Canadian statutes impose mandatory laws or mandatory choice of law rules in areas such as banking, shipping and insurance (see eg, Bills of Exchange Act, RSC 1985, c B-4 s 9, 160; Insurance Act, RSO 1990, c I.8 s 123 (Ontario); see also *Agro Co of Canada Ltd v Regal Scout (Ship)*, 1983 FCJ 424, in which the choice of law was held invalid because it would potentially have the effect of reducing the parties’ liability below the legal threshold). However, parties from different jurisdictions who choose a neutral law are likely to be found bona fide (see Castel and Walker (n 4) 31–3).

128 Although it is a factual issue, it has been suggested that choosing a law for the purpose of evading a mandatory rule of the law that objectively is most closely connected to the contract would be considered a mala fide intention (see *Nike Infomatic Systems Ltd v Avac Systems Ltd*, (1979) 8 BLR 196 (BC Sup Ct) 202–203; *Bank of Montreal v Snoxell*, 1982 AJ 1018 (Alta QB), para 10; Castel and Walker (n 4) 31–3).

129 Public policy is a very demanding standard; it ‘turns on whether the foreign law is contrary to our [Canadian] view of basic morality’ (Castel and Walker (n 4) 31–67 citing the definition of the public policy standard stated in the context of the enforcement of foreign judgments in *Beals v Saldanha*, 2003 SCC 72, para 71). We are not aware of any instances where foreign rule of contract law was found to offend Canadian public policy; a very clear example of a contract contrary to public policy would be a contract for slavery.

130 Castel and Walker (n 4) 31–37.

131 *Amin Rasheed Shipping Corp v Kuwait Insurance Co*, (1983) 2 All ER 884, 891 (Diplock L), cited by Castel and Walker (n 3) 31–37.

132 Castel and Walker (n 4) 31–37.

133 *Ibid.*

134 CQLR c CCQ-1991 (hereafter *CCQ*).

135 See Art 1426 and 1434 *CCQ*; Sabourin (n 4) 45–46; Elise Charpentier, ‘L’émergence d’un ordre public...privé: une présentation des principes d’UNIDROIT’ (2002) 36 RJT 355, 371 (hereafter Charpentier); Jeffrey A Talpis and Jean-Gabriel Castel, ‘Le Code Civil du Québec Interprétation des règles du droit international privé’ in Barreau du Québec, *La Réforme du Code Civil* (Presses de l’Université Laval 1993) 807, para 275.

136 In consumer contracts, any stipulation that is not an Act of the Parliament of Canada or of Quebec is prohibited, per Art 19 of the Quebec’s Consumer Protection Act, CQLR c P-40.1. Art 3118 of the *CCQ* prohibits parties to an employment contract from choosing a law that results in depriving the worker of the protection afforded to him or her by the mandatory rules of the law of the state where the worker carries out his or her work.

doctrine of unforeseeability usually depends on the express will of parties who choose to be governed by, for example, the UNIDROIT Principles'.<sup>137</sup>

There is, however, a debate as to whether parties can, pursuant to Article 3111 of the CCQ, designate a non-state law to govern their contracts to the complete exclusion of Quebec law.<sup>138</sup> This provision, which was inspired in part by Article 3 of the *Rome Convention on the Law Applicable to Contractual Obligations 1980*,<sup>139</sup> provides that the applicable law of a contract is that expressly or impliedly chosen by the parties:

'3111. A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or whose designation may be inferred with certainty from the terms of the act.

'Where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the law of the State which would apply in the absence of a designation.

'The law may be expressly designated as applicable to the whole or to only part of a juridical act.'

According to the traditional view, the words 'law of the state' in the second paragraph prohibit parties from choosing a non-state law rather than Quebec law.<sup>140</sup>

However, some commentators argue that inasmuch as the first paragraph of Article 3111 of the CCQ does not specify that the designated 'law' must be a state law, and considering the considerable deference shown by Quebec contract law to the autonomy of the parties, courts should give a liberal interpretation to a choice of law made by the parties.<sup>141</sup>

This uncertainty has yet to be resolved by the courts of Quebec.

### *Applicability before arbitral tribunals*

Unlike courts, arbitral tribunals sitting in Canada are likely to enforce the parties' choice of the UNIDROIT Principles.<sup>142</sup> This is due to the fact that an arbitrator's mandate derives not from law, but from a private agreement, giving the parties full autonomy to choose the law that will govern their relationship.<sup>143</sup>

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137 *Churchill Falls (Labrador) Corp v Hydro-Québec*, 2018 SCC 46, para 97 (see also para 87) (hereafter *Churchill Falls* (SCC)).

138 See Gérald Goldstein, *Droit international privé* (vol 1, Yvon Blais 2011) 482 (hereafter Goldstein); Gérald Goldstein and Ethel Groffier, *Droit International Privé* (vol 2, Yvon Blais 2003) 486 (hereafter Goldstein and Groffier); Sabourin (n 4) 45–48.

139 See *Commentaires du ministre de la Justice: Le Code civil du Québec* (vol 2, Publications du Québec 1993); Goldstein (n 17) 475–476.

140 See Goldstein and Groffier (n 17) 482. See also Fabien Gélinas, 'Codes, silence et harmonie' (2005) 46 C de D 941, 954 (hereafter Gélinas).

141 See Jeffrey Talpis, 'Retour vers le futur: application en droit québécois des principes d'Unidroit au lieu d'une loi nationale' in *Les principes d'UNIDROIT et les contrats internationaux: aspects pratiques: les Journées Maximilien-Caron* 609, 620 (hereafter Talpis); H. Patrick Glenn, 'Droit international privé' in Barreau du Québec, *La Réforme du Code Civil* (Presses de l'Université Laval 1993) 713, para 44.

142 See Castel and Walker (n 4) 31–19; Charpentier (n 14) 371; Pierre J. Dalphond, 'Commentary on article 620 CCP' in Luc Chamberland (ed), *Le Grand Collectif: Code de Procédure Civile* (vol 2, 3rd edn, Yvon Blais 2018) 2746. See generally Michael Joachim Bonell, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law' (2002) 36 RJT 335, 353. That said, some Quebec authors, expressing a minority view, have doubts on whether such a choice could be done at the exclusion of state law, specifically public order provisions, as courts may not enforce arbitral awards rendered in contravention of such provisions (see Sabourin (n 4) 42; Talpis (n 20) 617–618; see generally Prujiner (n 3) 570–572). In any event, the parties should not choose the UNIDROIT Principles to the complete exclusion of state law (see Prujiner (n 3) 567–570).

143 See Castel and Walker (n 4) 31–19.

Common law provinces have adopted the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'),<sup>144</sup> which provides that arbitral tribunals 'shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute'.<sup>145</sup> Although the Quebec legislature has not integrated the Model Law into its legislation, it is reflected in the province's Code of Civil Procedure,<sup>146</sup> specifically Article 620's reference to 'rules of law'.<sup>147</sup>

The commentaries accompanying the Model Law explain that by referring to the choice of 'rules of law' instead of 'law', the Model Law gives the parties the freedom to agree on rules that have not been incorporated into any national legal system.<sup>148</sup> Therefore, international commercial arbitration rules in both the common law provinces and Quebec should allow parties to choose the UNIDROIT Principles as the governing law of their agreement.<sup>149</sup>

Additionally, Canadian international commercial arbitration centres' rules of procedures contain similar broad provisions that should accommodate parties' choice of non-state law.<sup>150</sup>

## Application of the UNIDROIT Principles in Canada

### *By the courts*

We have not been able to identify a case where a Canadian court has applied the UNIDROIT Principles.

In a limited number of cases, Quebec courts have turned to the UNIDROIT Principles for some guidance in the interpretation of Quebec law. For example, in rejecting the applicability of the theory of hardship in Quebec law, the Quebec Court of Appeal turned to the UNIDROIT Principles, indicating that they may shed light on the path for the case law to follow in civil law jurisdictions such as Quebec.<sup>151</sup> The Supreme Court of Canada also discussed these principles in confirming this ruling.<sup>152</sup> In another case, the Quebec Court of Appeal likewise referred to Article 1.8 of the UNIDROIT Principles on inconsistent behaviour.<sup>153</sup>

Courts in the rest of Canada have not engaged in such an exercise. They are more likely to look to the American Law Institute's Restatement (Second) of Contracts and Uniform Commercial Code for interpretative guidance.<sup>154</sup>

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144 See, eg, International Commercial Arbitration Act, RSBC 1996, c.233 (British Columbia) (hereafter *BCICAA*); International Commercial Arbitration Act, 2017, SO 2017, c 2, Sched 5 (Ontario) (hereafter *OICAA*); International Commercial Arbitration Act, RSA 2000 c I-5 (Alberta). See also John E C Brierley, 'Canadian Acceptance of International Commercial Arbitration' (1988) 40 Me L Rev 286, 291–293.

145 Model Law, Art 28.

146 CQLR c C-25.01 (hereafter *CCP*).

147 Art 620 *CCP* has at its source Art 28 of the Model Law, as explained in *Commentaires de la Ministre de la Justice: Code de procédure civile, c.25.01* (Wilson & Lafleur 2015) 450–451. See also Martin J Valasek and Stéphanie Bachand, 'Chapter 5: Arbitrage International' in *LegisPratique: Guide de l'arbitrage* (LexisNexis 2014), paras 5–19.

148 See *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (UN 2012) 121.

149 See, eg, *BCICAA* (n 23) s 28(1); *OICAA* (n 23) s 28(1); art 651 *CCP*.

150 See, eg, British Columbia International Commercial Arbitration Centre, *International Commercial Arbitration Rules of Procedure* s 30(1); Canadian Commercial Arbitration Centre, *International Arbitration Rules* s 24; Alternative Dispute Resolution Chambers, *Arbitration Rules* s 1.1(6); International Centre for Dispute Resolution Canada, *Canadian Dispute Resolution Procedures* s 31.

151 *Churchill Falls (Labrador) Corporation Ltd v Hydro-Québec*, 2016 QCCA 1229, para 150, confirmed by *Churchill Falls* (SCC) (n 16).

152 *Churchill Falls* (SCC) (n 16), para 88–91, 97, 110, 113.

153 See *Hydro-Québec v Construction Kiewit cie*, 2014 QCCA 947, para 92 (fn 41).

154 See, eg, *Bhasin v Hrynew*, 2014 SCC 71, para 82–84; *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9, para 12.

Perhaps one of the reasons why Quebec jurists are more inclined to seek guidance from the UNIDROIT Principles is the involvement of some prominent Quebec scholars in their development. For example, Anne-Marie Trahan, a retired judge of the Superior Court of Quebec, was part of UNIDROIT's governing council from 1998 to 2008. Professor Paul-André Crépeau was part of the UNIDROIT working group from 1994 to 2010. Both have produced doctrinal writings on the UNIDROIT Principles that may have fostered their consideration.<sup>155</sup>

In 1996, a Canadian author theorised about why the UNIDROIT Principles have sparked a keener interest in jurisdictions with civil codes than those without.<sup>156</sup> He suggested that because Canadian common law is predominantly judge-made, an instrument such as the UNIDROIT Principles will only be persuasive to 'the extent to which it resonates with courts, practitioners, and law professors'.<sup>157</sup> Furthermore, he noted that contract law in Canada has reached a high degree of maturity and acceptance in the business community, leaving little room for broadly gauged changes. For these reasons, he predicted that the UNIDROIT Principles' impact in the common law world would only be gradual and incremental. Twenty years later, it seems that this view still holds.

### *By arbitral tribunals*

Arbitral awards, which are usually confidential, may only become public if challenged before the courts. The principal arbitration organisations<sup>158</sup> in Canada do not publish arbitral decisions, making it difficult to assess how arbitral tribunals have been applying the UNIDROIT Principles.

### *By practitioners*

Although the use of *lex mercatoria* is a reality in international commercial contracts,<sup>159</sup> the UNIDROIT Principles are seldom used by Canadian lawyers when negotiating international commercial contracts. Instead, more circumscribed expressions of the *lex mercatoria*, specific to discrete matters, such as the International Chamber of Commerce's Incoterms and the Uniform Customs and Practice for Documentary Credits, are more widely used by contract drafters.<sup>160</sup>

That said, albeit scarcely used, the UNIDROIT Principles are sometimes referred to by lawyers in their submissions before Quebec courts for interpretive purposes, when the applicable principle of domestic law is unclear.

## **Future outlook for the UNIDROIT Principles**

The fact that the UNIDROIT Principles are rarely considered in Canada does not mean that they are irrelevant for Canadian lawyers and it is possible that, in the future, reference to the UNIDROIT Principles will gain traction.

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155 See Anne-Marie Trahan, 'Les Principes d'UNIDROIT relatifs aux contrats du commerce international' (2002) 36 RJT 623; Paul-André Crépeau, *The UNIDROIT Principles and the Civil Code of Québec: Shared Values?* (Thomson Reuters 1998).

156 Jacob S Ziegler, 'The UNIDROIT Contract Principles, CISG and National Law' (paper delivered at the seminar on the UNIDROIT Principles in Valencia, Venezuela (6–9 November 1996)).

157 *Ibid.*, 7.

158 See, eg, Arbitration Place, the ADR Institute of Canada, and the British Columbia International Commercial Arbitration Centre.

159 Goldstein and Groffier (n 17) 488–489.

160 *Ibid.*, 487; Gélinas (n 19) 950.

First, certain civil law doctrinal authorities in Quebec refer to the UNIDROIT Principles, for instance with regards to the concepts of gross disparity,<sup>161</sup> good faith,<sup>162</sup> nullity of the contract,<sup>163</sup> revocation,<sup>164</sup> threat,<sup>165</sup> usages,<sup>166</sup> restitution,<sup>167</sup> hardship<sup>168</sup> or for the principles governing the interpretation of contracts<sup>169</sup> and price determination.<sup>170</sup> These authorities are frequently relied on by practitioners and courts in Quebec, which may foster the incremental use of the UNIDROIT Principles.

A second source of change may come from legal education. A handful of law school professors, for instance in the field of contracts, make reference to the UNIDROIT Principles in their curricula, as an aspirational set of rules used for comparative purposes.<sup>171</sup> In a Quebec law review, an author likewise advocated the reliance on sources such as the UNIDROIT Principles to teach comparative law.<sup>172</sup> Projects such as the annual Willem C Vis International Commercial Arbitration Moot competition also offer an opportunity for students to gain exposure to UNIDROIT Principles.

In other words, although reference to the UNIDROIT Principles remains rare in Canada, there is an emerging awareness of the Principles in the legal community, especially in Quebec.

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161 Jean-Louis Baudouin and Pierre-Gabriel Jobin, *Les Obligations* (7th edn by Pierre-Gabriel Jobin and Nathalie Vézina, Yvon Blais 2013), para 131 (hereafter Baudouin and Jobin); Didier Luelles and Benoît Moore, *Droit des Obligations* (3rd edn, Thémis 2018), para 907 (hereafter Luelles and Moore).

162 See Baudouin and Jobin (n 40), para 138; Luelles and Moore (n 40), para 1975.

163 *Ibid*, para 1108.

164 *Ibid*, para 314, 317.1.

165 *Ibid*, para 762.

166 *Ibid*, para 1514, 1520.

167 *Ibid*, para 1251, 1255, 1295.

168 *Ibid*, para 2239-2239.1.

169 *Ibid*, para 1644; Baudouin and Jobin (n 40), paras 415, 419.

170 Luelles and Moore (n 40), para 1049.15.

171 See, eg, Rosalie Jukier, *Reading and Class Schedule: Contractual Obligations* (McGill University 2016).

172 See Thomas Kadner Graziano, 'Comment enseigner le droit comparé? Une proposition' (2013) 43 RDUS 61, 79, 82.

# China

Gary Gao<sup>173</sup> and Ronnia Zheng<sup>174</sup>

As a prominent achievement of the international unified private law movement, the UNIDROIT Principles have attracted attention from legislators, judicial officers, scholars and lawyers in China. They have had a massive influence on the development of Chinese civil law, especially Chinese contract law. Yet, the official application of the UNIDROIT Principles by Chinese courts in arbitration proceedings or in company's and lawyers' daily practice is rather limited.

The authors will briefly introduce the practice of UNIDROIT Principles from the legislative perspective, the law practices and discuss some future expectations of the development of the UNIDROIT Principles in China.

## Application of UNIDROIT Principles as a legislative supplement

The UNIDROIT Principles have no direct legal binding force on the judicial practice in China. Nevertheless, they do provide a compromise between civil law and common law systems. The UNIDROIT Principles have been revised several times in accordance with trends in commercial transactions and have been used as legislation references by many countries, including China.

### *Inspiring Chinese legislation and broadening the law's interpretation*

Initially, in the Chinese Contract Law drafting process, the legislators have established the following guiding principles:

1. a broad reference to the successful legislation experience from economically developed countries and regions;
2. adoption of common rules that reflect the objective pursuit of the modern market economy; and
3. accordance with international conventions and international practices.<sup>175</sup>

The UNIDROIT Principles in essence are a 'restatement' of international practices that balance the common law and civil law divergence and offer globally adopted principles, such as good faith and *pacta sunt servanda*. Therefore, it is no surprise that the UNIDROIT Principles have been recognised by Chinese legislators. For instance, it is widely acknowledged that Articles 42 (*culpa in contrahendo*) and 43 (duty of confidentiality) of Chinese Contract Law (1999) were influenced by Articles 2.15 (negotiations in bad faith) and 2.16 (duty of confidentiality) of the UNIDROIT Principles (1994).<sup>176</sup>

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175 Shiyuan Han, 'The Development of UNIDROIT Principles and Chinese Contract Law', *Global Law Review*, 2015, vol 6, p 69.

176 *Ibid.*

As for law interpretation, the courts (including arbitral tribunals) may apply international practices and usages when there are no corresponding substantive rules in Chinese legislation or international treaties. For instance, Article 142(2) of the General Principles of the Civil Law of the People's Republic of China (2009) and Article 268 of the Maritime Law of the People's Republic of China both stipulate that: '[i]nternational practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions'.

From a broad international perspective, the UNIDROIT Principles can be regarded as a model law, a set of unified rules and a reflection of international practices. Even though comparatively speaking, CISG is more often used in the supplement of international practices to Chinese legislation, we have observed a few cases where the courts/arbitral tribunals have used clauses in UNIDROIT Principles in support of their law interpretation. These are outlined in the summaries of selected cases in the second section of this book.

In addition to legislation supplement and law interpretation, the UNIDROIT Principles can be used as a choice of law by parties to a contract especially in cross-border business. This is endorsed by the 'party autonomy principle' of choice of law in foreign-related commercial contracts; references can be seen in Article 145(1) of General Principles of the Civil Law of the People's Republic of China (2009)<sup>177</sup> and Article 126 (1) of Chinese Contract Law.<sup>178</sup>

### *As a supplement to CISG*

The UNIDROIT Principles inherited most of the fundamental principles and ideas from the CISG. To the extent that the two instruments address the same issues, the rules laid down in the UNIDROIT Principles are normally taken either literally or at least in substance from the corresponding provisions of CISG. Cases where the former depart from the latter are exceptional.<sup>179</sup> Both instruments intend to promote uniform development of international commercial contractual legislation. There is a connate internal relation between CISG and the UNIDROIT Principles.

Article 7 of CISG provides a supplemental interpretation rule that: '[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law'. This reflects that in interpreting CISG, one shall give priority to the principles on which CISG is based, as is described in an Arbitration Award,<sup>180</sup> and make sure that the supplemental laws and regulations are consistent. Meanwhile, the regulation scope shall also fall with the scope of CISG.<sup>181</sup>

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177 It reads: 'The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law'.

178 It reads: 'The parties to a contract involving foreign interests may select the applicable law for the settlement of their contractual disputes, except as otherwise provided by law. If the parties to a contract involving foreign interests have not made a selection, the laws of the country to which the contract is most closely connected shall apply.'

179 Michael Joachim Bonell, The UNIDROIT Principles and CISG databases, respectively, [www.unilex.info](http://www.unilex.info) and [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) accessed 11 November 2019.

180 International Court of Arbitration, Award No 11849, 2003.

181 Michael Joachim Bonell, 'The CISG and the UNIDROIT Principles of International Commercial Contracts: Two Complementary Instruments', *10 International Law Review of Wuhan University* (2008-2009), pp 100-117.

As mentioned above, in most of the scenarios, UNIDROIT Principles mirror the general principles of CISG, it is therefore feasible to use UNIDROIT Principles as a supplement to CISG when there are loopholes.<sup>182</sup>

## The application of the UNIDROIT Principles in China

### *By law practices*

The UNIDROIT Principles' absorption of international commercial practices and usages generates a guiding influence on courts and arbitral tribunals in their law interpretation and case ruling.

We have observed the following types of UNIDROIT Principles practice cases in China:

1. In international commercial contracts:
  - (i) the UNIDROIT Principles are the parties' choice of law(s), which can be directly applied and used by courts/arbitral tribunals.
  - (ii) Due to the international element of the contracts, although not directly incorporated into the contracts, the UNIDROIT Principles are referred by courts/arbitral tribunals/lawyers as a law interpretation supplement of international practice.
2. In domestic litigation/arbitration cases, the UNIDROIT Principles are used as references in case review and case commentary.

It worth noting that, the parties are not entitled to choose foreign/international laws freely in Chinese domestic contracts that do not involve foreign elements, unless Chinese law explicitly regulates otherwise. But sometimes, when Chinese laws and regulations are stipulated in an abstract and broad manner, judges/arbitrators would need supplements for their interpretations. In addition, among the younger generations of Chinese law professionals, there is a trend of taking overseas legal education and/or keeping up to date with influential international cases and developments. These professionals are therefore more open-minded in referring to international instruments in practising law.

As opposed to CISG, an internationally well-accepted convention of which China is a member state, the UNIDROIT Principles are a set of 'soft laws' that do not have legal binding force. We will observe from the following cases that the application of the UNIDROIT Principles as the choice of law is rather limited, and the courts'/arbitral tribunals' hands are tied from using them directly if they are not selected as the choice of law.

### *In court*

Unilex lists 14 cases where the UNIDROIT Principles have been used in court proceedings.<sup>183</sup> Among these, the parties explicitly choose UNIDROIT Principles as the applicable law only in one case. In the other 13 cases, UNIDROIT Principles were not mentioned in the court judgments, but in judges' comments on the cases as supporting legal references, including the rules on: hardship, surprising

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182 Haicong Zuo and Mengsha Yang, 'Analysis of the Function of the UNIDROIT Principles in CISG Interpretation and Supplementation' (2016) *Journal of Comparative Law* 149.

183 See [www.unilex.info/principles/cases/country/29#country\\_China](http://www.unilex.info/principles/cases/country/29#country_China) accessed 11 November 2019.

term, manner of formation, right to terminate the contract, third person, mitigation of harm, withholding performance, negotiations in bad faith and full compensation.

Among these 13 cases, in the case of *Hengxing Company v Guangdong Petrochemical Subsidiary Company*,<sup>184</sup> the first-instance judgment referred to the relevant provisions of the UNIDROIT Principles to explain the legal concept of ‘hardship’. The appellant appealed to the Shaoguan Intermediate People’s Court and argued that the first-instance judgment erroneously applied the UNIDROIT Principles for the following reasons:

1. the case at hand was a dispute over a pure domestic leasing contract and hence the parties’ legal relationship shall not be subject to the UNIDROIT Principles;
2. the UNIDROIT Principles do not have binding force according to Chinese law; and
3. the parties did not choose to apply the UNIDROIT Principles.

The appellate court affirmed the decision on the termination of the contract based on the Chinese Contract Law without touching on the issue as to whether the reference to the UNIDROIT Principles was justified.

This case is in line with our afore-mentioned general observation that parties are restrained from freely choosing foreign/international laws in pure Chinese domestic contracts. Nevertheless, despite not touching on the justification of the UNIDROIT Principles application, the court neither objected nor overruled the first-instance court’s application of the UNIDROIT Principles. In other words, the appellate court did not prohibit judges from using the UNIDROIT Principles in understanding and interpreting laws. Yet, Chinese courts are conservative on a direct application of international instruments. Therefore, the UNIDROIT Principles are barely seen in official Chinese court judgments if not explicitly chosen by the parties.

In general, these 13 cases are pure domestic contract disputes, and the parties have not explicitly chosen to apply the UNIDROIT Principles. They played the role of a supplement to the interpretation of Chinese domestic law.

The 14th case, *Xiamen Xiangyu Group Corp v Mechel Trading AG*,<sup>185</sup> concerns the confirmation of the validity of an arbitration agreement. The parties entered into a steel sales contract in 2004 with a choice of law clause of ‘[t]he application and interpretation of this contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods. On Issues not covered by this Convention, the UNIDROIT Principles (1994) shall apply. In case both instruments cannot cover the issue under dispute, international customs and the law of Seller’s place of business (Swiss law) shall apply.’ The court explicitly ruled that the parties can lawfully agree to choose the UNIDROIT Principles as one of the applicable laws of the contract.

### *In arbitration cases*

Due to the confidentiality characteristic in arbitration, there are not too many available public sources to hand on the applicability of the UNIDROIT Principles in arbitration cases. We were, however,

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184 *Shao Zhong Fa Min Er Chu Zi* No 8 (2005) [www.unilex.info/principles/case/1120](http://www.unilex.info/principles/case/1120) accessed 11 November 2019.

185 *Xia Min Ren Zi* No 81 (2006) [www.unilex.info/principles/case/1121](http://www.unilex.info/principles/case/1121) accessed 11 November 2019.

able to get some reflection from public court rulings in the cases of recognition of the validity of arbitration agreements/arbitral awards and in cases of the application of arbitral award enforcement. The above *Xiamen Xiangyu Group Corp v Mechel Trading AG* case is a perfect example.

In the case *Shao ZhongFa Min San Ren Zi No 1 (2013)*<sup>186</sup> between the Swiss company Flame SA and the Chinese company Shaoguan Jiameng Fuel Ltd (Jiameng), Flame SA applied for the recognition of the validity of an arbitration award against Jiameng in front of the Shaoguan Intermediate Court. There was no dispute that the parties entered into a coal supply and purchase agreement with a dispute resolution clause of Hong Kong International Arbitration Centre (HKIAC) arbitration and the choice of law of the UNIDROIT Principles (2004). The HKIAC award applied Articles 7.4.6 and 7.4.9 of the UNIDROIT Principles regarding the assessment of proof of harm and the interest calculation. The core of the dispute is not about application of the UNIDROIT Principles as the substantive law, but rather whether the arbitration procedure is inconsistent with the parties' agreement. The court determined that the arbitral award was granted in accordance with HKIAC arbitration rules and other relevant laws and regulations, and ruled that the arbitral award shall be recognised and enforced. In the course of the court review, the court did not address the issue of the UNIDROIT Principles being the substantive law.

### *By companies and lawyers*

The advantage of UNIDROIT Principles easing the civil law and common law conflicts/differences offers the contractual parties a 'middle road' in conducting their business, especially in situations where nobody is willing to choose the other party's national law as the choice of law for their contracts.

There are many similarities between Chinese Contract Law and the UNIDROIT Principles. With the propagation and implementation of the UNIDROIT Principles in recent years, we could foresee that the companies and lawyers will become more aware of such neutral rules and be more willing to use the UNIDROIT Principles as a choice of law in their cross-border contracts.

## **Future of the UNIDROIT Principles in China**

CISG was enacted in 1980. Over three decades have elapsed since it came into effect in 1988, during which time the world economy has developed drastically. The International Institute for the Unification of Private Law, UNIDROIT's efforts in promoting UNIDROIT Principles to fit the constantly changing global market is evident. In line with the fundamental principles of CISG, the first version of the UNIDROIT Principles was published in 1994 and has since been renewed three times to its most up-to-date version.

Along with boom in international trade, the number of international disputes has also risen tremendously. China as one of the world's largest economic entities will certainly play an important role on the international dispute resolution stage. In situations where the UNIDROIT Principles are able to provide contractual parties with a smoother path in their contractual negotiations, reducing legal and cultural differences, UNIDROIT Principles will become more acknowledged and accepted. In general, we anticipate an increasing application of UNIDROIT Principles especially in cross-border commercial arbitration.

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<sup>186</sup> Chinese version of the judgment is available at China Judgment Online <http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=0a72ed33a5a24387a3c61d88f635a35c> accessed 10 October 2019.

# Colombia

*Eduardo Zuleta and Elena Peláez*<sup>187</sup>

## **Application of UNIDROIT Principles in Colombia as general principles of commercial law**

Article 8 of Law 153/1887 provides for the application of the general principles of law in resolving civil disputes as follows: ‘When there is not an exact applicable law to the controversial matter, rules which regulate similar cases or matter will be applied, and failing such, constitutional doctrine and the general rules of Law.’<sup>188</sup>

In 1971, with the enactment of the Commercial Code, some general principles of law such as the abuse of rights and unjust enrichment, which were developed by jurisprudence, were adopted and expressly included in the statute. Moreover, it was stated that commercial law would be applied to merchants and trade issues,<sup>189</sup> and that mercantile custom would have the same authority as commercial law.<sup>190</sup> In case of lacunae, the interpreter would resort to analogy and to the provisions of the contracts legally entered by the parties, overriding the supplemental legal rulings and the mercantile customs.<sup>191</sup> Civil law would be applied in the absence of any of the above.<sup>192</sup>

The Commercial Code also states that issues that cannot be resolved in accordance with the preceding rules should be resolved in accordance with: ‘[T]he international trade agreements or treaties not ratified by Colombia, the international trading custom that meets the conditions provided by article 3, as well as the general principles of commercial law, may be applied to trading affairs that cannot be resolved in accordance with the foregoing rulings.’<sup>193</sup>

Therefore, Article 7 of the Commercial Code allows the application of the UNIDROIT Principles in Colombia as general principles of commercial law, in the application and interpretation of commercial legislation.

## **Colombia’s legal framework and the application of the UNIDROIT Principles**

As the preamble to the UNIDROIT Principles states, the purpose of the principles is to set out general rules for international commercial contracts that shall be applied when the parties have agreed that their contract be governed by them. On this basis, it must be stated that for the UNIDROIT Principles to be applicable as the governing law in Colombia, the agreement at issue must comply with two requirements.

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188 Art 8 of Law 153/1887 (free translation by the author).

189 Art 1 of the Commercial Code.

190 Art 3 of the Commercial Code.

191 Art 4 of the Commercial Code.

192 Art 2 of the Commercial Code.

193 Art 7 of the Commercial Code.

The first requirement refers to ‘internationality’ of the commercial agreement. In Colombia, an agreement will be considered international when it complies with at least one of the following five conditions:<sup>194</sup>

1. the nationality of parties – one of the parties is foreign;
2. the domicile of the parties – a party is domiciled in a different state;
3. location of the establishment – the establishment is located in a different state;
4. the agreement is performed abroad; or the agreement affects the interests of international trade.<sup>195</sup>

The second requirement points out the scenarios in which the parties of an international contract may choose the applicable law.<sup>196</sup> Colombia has a restrictive, although debated approach regarding the parties’ possibilities to choose the law applicable to the agreement. Therefore, choice of law would only be allowed when:

- the agreement provides for arbitration as a dispute resolution mechanism and such arbitration qualifies as international under Article 62 of Law 1563/2012; or
- the agreement is to be performed abroad even though it has been executed in Colombia by a party domiciled in Colombia.<sup>197</sup>

The application of the UNIDROIT Principles as governing law for agreements in Colombia may be intricate but the other purposes of the principles are certainly met.

### *Application of UNIDROIT Principles in state courts*

State courts in Colombia use the UNIDROIT Principles ‘to interpret [and] supplement domestic law’. Some examples are presented below.

A case regarding the application of the UNIDROIT Principles exemption clauses came before the Supreme Court of Justice, Civil Cassation Court, on 8 September 2011, where the Reporting Judge was William Namén Vargas.

The case concerned the request to review the amount of compensation resulting from the contractual liability of Compañía Transportadora SA as shipping agent of Crowley American Transport Inc for the damages caused to the merchandise transported in the motorboat *Thorndale*. One of the claimant’s arguments was based in the non-application of section 1031 of de Commercial Code, which states the rules of the compensation when transported goods are lost, since the declaration of the ‘value of goods’ was missing. The Supreme Court ruled before the claimants, declaring that the parties ‘lack of full freedom to limit the responsibility of a shipper but may agree to other rules (other legal ones), without exceeding the regulatory limits’.<sup>198</sup>

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194 The hierarchy of relevance of the stated criteria to classify an agreement as international is the following: (1) the location of the establishment; (2) the effect in the interests of international trade; and (3) the traditional criteria – the nationality and domicile of the parties and the place where the agreement is performed.

195 Jorge Oviedo Albán, *Estudio de Derecho Mercantil Internacional*, (1st edn, Grupo Ed Ibañez 2009).

196 Antonio Aljure Salame, *El Contrato Internacional* (1st edn, vol 1, Legis 2011).

197 This scenario is implied in Art 869 of the Colombian Commercial Code.

198 Contractual liability (*Compañía Suramericana de Seguros SA v Compañía Transportadora SA*) Supreme Court of Justice, Civil Cassation Court, (Judgment of 8 September 2011) (free translation made by the author).

The court stated that new tendencies in the *lex mercatoria* confirmed the widespread interest in regulating the conditions in which the parties can agree on the contractual liability regime, and as an example, Article 7.1.6 of the UNIDROIT Principles was brought.

The most notable decision on the application of the UNIDROIT Principles was issued by the Supreme Court, Civil Cassation Court, on 21 February 2012 where the Reporting Judge was William Namén Vargas. The decision stated that: ‘The Principles symbolise the significant effort made by states to harmonise and unify different juridical cultures; they reveal a unified approximation of the present juridical contractual relations; they overcome the uncertainties surrounding the applicable law to the contract, the conflicts, the antinomies, the incoherencies, the insufficiencies, the ambiguities and the darkness of domestic provisions related thereof’.<sup>199</sup>

### *Application of the UNIDROIT Principles in arbitral tribunals*

Several decisions have been issued by arbitral tribunals following the application of the UNIDROIT Principles, particularly regarding good faith. The award rendered to settle de dispute between *Transportadora de Gas del Interior SA ESP (TGI) SA ESP* and *Empresa Colombiana de Gas – ECOGAS* – of 2 September 2009, stated that, in determining application of sources of law to the contract, and thus, in reconstructing the application of good faith and best efforts clauses, the UNIDROIT Principles proved applicable. The arbitral tribunal also used the UNIDROIT Principles to establish the distinction between the duty to achieve specific results and the duty of best efforts.<sup>200</sup>

The Award rendered to settle the disputes between *Construcciones CF Ltda* and *Banco de la República*, stated the duty among the parties to cooperate with each other in the performance of the agreement according to the principle of good faith established in section 1603 of the Colombian Civil Code, in section 871 of the Commercial Code and in Article 5.1.3 of the UNIDROIT Principles.<sup>201</sup>

Thus, the UNIDROIT Principles in Colombia are widely used to interpret domestic law, contracts and other judicial relations; despite the challenge they imply when the parties agree on them as the governing law. In Colombia, domestic provisions in the content of the parties’ obligations usually prevail but it is not unreasonable that if disputes arise the judge may interpret such provisions using the UNIDROIT Principles. Such interpretations may result in secondary obligations of the parties that perhaps exceed the literal interpretation of the contract but integrate the analysed obligation as a whole.

## Finland

### *Petri Taivalkoski*<sup>202</sup>

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199 Change in the condition of a credit agreement (*Rafael Alberto Martínez Luna and María Mercedes Bernal Cancino v Granbanco SA*) Supreme Court of Justice, Civil Cassation Court, (Judgment of 11 February 2012) (free translation made by the author).

200 Best effort Clauses (*Transportadora de Gas del Interior SA ESP (TGI) SA ESP v Empresa Colombiana de Gas - ECOGAS*) Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá, (Award of 2 August 2009).

201 Duty to perform a construction agreement in good faith (*Construcciones CF Ltda v Banco de la República*) Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogotá (Award of 5 March 2007).

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## Legal framework for application of the UNIDROIT Principles

Finland's legal framework allows application of the UNIDROIT Principles to various degrees, depending on the dispute resolution method.

Concerning the applicability of the UNIDROIT Principles in Finnish courts, courts are bound by Finnish conflict-of-law rules, which do not allow the selection of a non-national law as *lex causae*, the law applicable to the contract. If the parties have chosen the UNIDROIT Principles to govern their contract, they would be considered provisions incorporated by reference in the contract. In such cases, the Finnish court would apply the UNIDROIT Principles to the extent they do not deviate from obligatory rules of the law otherwise applicable to the contract under Finnish conflict-of-law rules.<sup>203</sup>

Regarding the applicability of the UNIDROIT Principles in arbitrations seated in Finland, it is well established that under the Finnish Arbitration Act an arbitral tribunal seated in Finland is not bound by Finnish conflict-of-law rules. The drafters of the act did not opt for the wording 'rules of law' used in the UNCITRAL Model Law on International Commercial Arbitration regarding a choice of law by the parties. The act stipulates that an arbitral tribunal must apply 'the law of a given state' designated by the parties. However, since the act also allows the parties to agree that the arbitral tribunal may resolve the dispute based on what it deems reasonable (*ex aequo et bono*), it has been viewed that the arbitral tribunal is certainly obliged to give effect to a selection of non-national law such as the UNIDROIT Principles by the parties. Therefore, if a contract refers to the UNIDROIT Principles, the tribunal will apply them as the law governing the contract without recourse to any national law.

Conversely, absent a choice of law by the parties, under the Arbitration Act, the arbitral tribunal shall primarily select the applicable national law according to the conflict-of-law rules that it considers applicable. However, in an arbitration conducted under the Arbitration Rules of the Finland Chamber of Commerce (or under the rules of any other arbitral institution that provide broader discretion for the arbitral tribunal in this regard, such as the International Chamber of Commerce (ICC)), the tribunal may, in the absence of a choice of law by the parties, apply the law or other rules of law it determines applicable or appropriate, including the UNIDROIT Principles.

Regardless of the dispute resolution method, the UNIDROIT Principles can be used as a non-binding legal source. For example, the principles can be used when the contract refers to general principles of law or *lex mercatoria*. Further, according to Finnish legal literature, the principles can also be used in interpreting national law, especially when the relevant rules are not codified.<sup>204</sup> Finnish contract law for the most part is not codified but rather consists of general principles developed and systematised in jurisprudence and legal doctrine, due to which the UNIDROIT Principles may be used in interpretation of Finnish contract law rules. The leading Finnish treatise on contract law also explicitly refers to the UNIDROIT Principles, among other international instruments, as one of the relevant sources from a Finnish contract law perspective.

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203 The practical importance of such rules is, however, limited since there usually are very few obligatory rules in the context of commercial contracts.

204 The UNIDROIT Principles can, eg, be used to corroborate a finding based on national law, as the arbitral tribunal did in an ad hoc arbitration seated in Helsinki. See the 1998 Finland Unilex case in the compiled summaries of selected cases section under Art 7.4.13.

## The role of the UNIDROIT Principles in Finland

There are no reported cases from Finnish Supreme Court where the UNIDROIT Principles were applied or referenced.<sup>205</sup> At the same time, the availability of arbitral awards for arbitrations seated in Finland is limited, which also limits the ability to make observations on application of the UNIDROIT Principles in arbitration. As indicated above, Finland's legal framework does not impose absolute impediments to application of the UNIDROIT Principles in arbitration. However, based on our experience, the UNIDROIT Principles are not often seen in international arbitrations seated in Finland such that parties would have referred to the UNIDROIT Principles or incorporated them into a contract or that a tribunal would have resorted to the UNIDROIT Principles on its own initiative. To the best of our knowledge, the UNIDROIT Principles are also not used very often in contractual negotiations. As expected, the role of the UNIDROIT Principles in respect of international contractual relationships governed by Finnish law and purely domestic contractual relationships is relatively modest.

The explanation for low practical importance of the UNIDROIT Principles in Finland may be twofold. The first is linked to the familiarity of practitioners and in-house counsel with the UNIDROIT Principles to start with. While many practitioners and in-house counsel are surely aware of the existence of the UNIDROIT Principles, it appears that not many have deeper knowledge or practical experience related to them. Second, the idea of submitting a contract to be governed by a non-national set of rules may as such seem risky to Finnish practitioners and in-house counsel, wherefore they may prefer the more traditional approach of choosing a national law as the governing law.

## Similarities between the UNIDROIT Principles and Finnish contract law

However, it is interesting to note that the general principles of Finnish contract law in broad terms correspond with the UNIDROIT Principles and the application of the latter would not necessarily lead to materially different results. The similarities between Finnish contract law and the UNIDROIT Principles can be found in particular in the rules of contract interpretation. For example, in Finnish Supreme Court cases KKO 2017:14, KKO 2016:10, KKO 2015:26 and KKO 2008:53, the Supreme Court applied rules of interpretation corresponding to rules contained in chapter 4 of the UNIDROIT Principles.<sup>206</sup> There are also similarities between the UNIDROIT Principles and Finnish contract law when it comes to performance of contractual obligations and remedies for non-performance.

Both systems also share certain underlying concepts. For example, the standard of good faith and fair dealing expressed especially in Article 1.7 of the UNIDROIT Principles<sup>207</sup> is one of them. Finnish contract law encompasses a corresponding overarching standard also known as the duty of loyalty. The duty of loyalty requires a party to take the interest of its contractual counterparty into account and denies opportunistic behaviour at the expense of the counterparty. It affects the parties

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205 However, the Helsinki Court of Appeal has in its case S 16/1616, 9 January 2019, explicitly referred to articles 9.3.1–9.3.3 of the UNIDROIT Principles (2010), 335–336, when considering if an assignment of a contract requires the consent of the other party.

206 Including, for example, interpretation in accordance with the parties' actual intention, interpretation having regard to all relevant circumstances and interpretation *contra proferentem*.

207 Also characterised as 'a fundamental idea underlying the Principles'. See Comment 1 on article 1.7 UNIDROIT Principles (2016), p 18.

throughout the lifespan of a contract.<sup>208</sup> Certain concrete obligations of the parties can be also derived from the general duty of loyalty, even without a specific provision included in a contract.<sup>209</sup>

## Knowledge and future

Although the practical importance of the UNIDROIT Principles in Finland is currently rather low, in our view, they could be a valuable tool especially with regard to contracts that are international by nature. From the Finnish perspective, the UNIDROIT Principles do not seem to contain features, due to which they could not be perceived as fair and neutral set of rules governing contractual relationships.

Increasing knowledge and experience related to the UNIDROIT Principles within the profession would also certainly reduce the potential cautious attitude towards the selection of the UNIDROIT Principles as a governing law and improve their practical importance in other respects. For example, academic studies related to international commerce, as well as projects such as Willem C Vis International Commercial Arbitration Moot for law students, can be viewed as channels that can increase awareness of the international instruments of contract law, including the UNIDROIT Principles, for coming generations of Finnish lawyers. The role of the UNIDROIT Principles may also increase if the number of international commercial disputes resolved in Finland through arbitration increases in the future.

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208 Eg, the interests of the contractual counterparty shall be taken into account when terminating a contract valid until further notice, as stated in the Finnish Supreme Court decision KKO 2018:37.

209 In the decision of the Finnish Supreme Court KKO 2007:72 it has been found that an obligation to share relevant information with the contractual counterparty can be derived from the duty of loyalty.

# France

*Eduardo Silva Romero, Michael Polkinghorne*<sup>210</sup>

## Applicability of the UNIDROIT Principles under French law

Under French law, the UNIDROIT Principles may apply in courts and before arbitral tribunals in at least three ways.

The first is if the parties to an international contract expressly select them as the law governing their contract. It is fully accepted, in French law, that arbitrators can, and even must, honour such a choice by the parties.<sup>211</sup>

The extent to which French courts are bound by such a choice is, however, still in debate. For some commentators, the Rome I Regulation requires that the parties choose the law of a given country, to the exclusion of bodies of rules such as the UNIDROIT Principles.<sup>212</sup> According to these commentators, the French courts will consider that the choice of law clause in favour of the UNIDROIT Principles is null and void. Most commentators, however, are of the view that the French courts, at least to a certain extent, should give effect to the parties' express choice in favour of the UNIDROIT Principles.<sup>213</sup>

What is clear is that such a choice will not result in the French courts completely disregarding the national law that would normally be applicable by virtue of the conflict of law rules.<sup>214</sup> This is because the mandatory provisions of the domestic law of the country ' [w]here all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen' will continue to apply.<sup>215</sup>

In addition, often the UNIDROIT Principles will not cover all of the legal questions that might arise during the parties' dispute.

Given the above, French commentators generally agree that, when choosing the UNIDROIT Principles to govern their contract, parties should do so in combination with a domestic law in order to benefit from a complete set of rules capable of governing all aspects of the disputes likely to arise out of their contractual relationship.<sup>216</sup>

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211 See, eg, Eric Loquin, *L'arbitrage du Commerce International* (Joly éditions 2015) s 416; Pierre Mayer and Vincent Heuzé, *Droit International Privé*, (11th edn, LGDJ 2014) s 742 (hereafter Mayer and Heuzé, *Droit International Privé*). One might also note ICC Case 16816/VRO, where the sole arbitrator, in a Paris-based arbitration between a US 'project manager' and a Chinese 'project client', who entered into an agreement for the design, development and manufacture of a product, found that in the silence of the agreement on the governing law, and 'in the light of the identity of the Parties and the obligations to be performed under the agreement (which were to be performed in a number of jurisdictions)', the 'lex mercatoria as reflected in the UNIDROIT Principles' should be applied (Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration* (vol XL, Kluwer Law International 2015) 236–293).

212 Mayer and Heuzé, *Droit International Privé* (n 1) ss 740–741.

213 Jacques Mestre et al, *Droit Commercial* (Tome 2, 30th edn, LGDJ Lextenso 2018) s 549.

214 Mayer and Heuzé, *Droit International Privé* (n 1) s 741.

215 Regulation (EC) 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (2008), Art 3.

216 Jérôme Ortscheidt and Christophe Seraglini, *Droit de l'arbitrage interne et international* (LGDJ 2013) s 883; Alain Prujiner, 'Comment utiliser les Principes d'UNIDROIT dans la pratique contractuelle' (2002) RJT No 36, 570.

The second way in which the UNIDROIT Principles can apply in court and arbitration under French law is if the parties invoke them in their pleadings. In other words, it is not necessary for the parties to foresee that their contract will be governed by the UNIDROIT Principles for these to apply at a later stage.

Article 1194 of the French Civil Code provides that '[a]greements are binding not only as to what is expressed therein, but also as to all the consequences brought about by equity, usage, or the law'.<sup>217</sup> This provision allows the parties to rely on the UNIDROIT Principles should they so wish, be it before a French judge or before an arbitrator.

The third way in which the UNIDROIT Principles are applicable under French law is if arbitrators choose to apply the principles when resolving a dispute. French law specifically provides that arbitrators are free to apply the rules they deem appropriate.<sup>218</sup> The French Cour de cassation has moreover confirmed on several occasions that arbitrators can lawfully apply the *lex mercatoria* when resolving a given dispute even if not chosen by the parties.<sup>219</sup> There can be no doubt that this applies in relation to the UNIDROIT Principles.

## Application of the UNIDROIT Principles under French law

In spite of the fact that, under French law, the UNIDROIT Principles can readily apply in courts and before arbitral tribunals, it appears that they are rarely applied in practice.

In particular, French courts seldom apply the UNIDROIT Principles. This is because parties rarely appear to invoke the principles before the French courts. Nor does it seem that French courts often confront contracts containing a choice of law clause in favour of the UNIDROIT Principles.

To the best of our knowledge, over the last five years, parties only invoked the UNIDROIT Principles before the French Cour de cassation on one occasion.<sup>220</sup> In this case, the appellant – who had failed to deliver heating machines to its counterparty at the contractually agreed price – argued that the Court of Appeal failed to determine whether the increase in the price of raw materials amounted to hardship in breach of the French Civil Code on the one hand, but also of Article 6.2 of the UNIDROIT Principles on the other. The French Cour de cassation rejected the appeal and, in doing so, simply stated that the Court of Appeal 'justified its decision', without referring to the UNIDROIT Principles. The uncertainty as to the Cour de cassation's willingness to apply the UNIDROIT Principles is no doubt one of the reasons that French practitioners do not make greater use of the principles.

Furthermore, it appears, based on the information available, that arbitral tribunals seated in France over the last five years only applied the UNIDROIT Principles barely more frequently. When arbitral tribunals did apply the principles, they did so on a supplemental basis. In other words, arbitral tribunals used the principles as further persuasive guidance to corroborate decisions grounded in a given domestic law.

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217 Unofficial translation of '*[U]es contrats obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que leur donnent l'équité, l'usage ou la loi*'.

218 Art 1511 of the French Code of Civil Procedure.

219 See, eg, *Société Primary Coal v Société Valenciana de Cementos Portland*, Civ 1<sup>re</sup>, 22 October 1991; *Banque du Proche-Orient v Société Fougerolle*, Civ 2<sup>e</sup>, 9 November 1981.

220 *Société Gabo v Société Dupiré Invicta Industrie*, Com, 17 February 2015, Nos 12-29550, 13-18956, 13-20230.

As such, in one ICC award rendered in 2014, an arbitral tribunal seated in Paris, in seeking to determine whether the principle of estoppel was applicable, first noted that the general duty of good faith was common to the law of the respondent state (which was also the governing law) and to US law (the law of the claimant). The US claimant referred to the UNIDROIT Principles and the respondent state, while arguing that the principles were inapplicable, accepted that it was legitimate for the tribunal to apply ‘analogous principles of international law’. The tribunal then considered that the UNIDROIT Principles ‘offer reasonable solutions’ and decided to ‘refer to the UNIDROIT Principles where appropriate, where no common principles between [the respondent state’s] law and US law are established’.<sup>221</sup> The arbitral tribunal went on to apply Article 1.8 of the UNIDROIT Principles, which provides that ‘a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably acted in reliance to its detriment’.

In another ICC award rendered in 2016, an arbitral tribunal seated in Paris ruled on a dispute governed by French law that presented the question of whether a series of terror attacks (including the 9/11 attacks and the 2003 Casablanca bombings), which negatively impacted the tourism sector amounted to an event of force majeure allowing the respondent (the operator of a hotel complex in North Africa) to suspend payment to the claimants (the complex’s owners) under a guarantee, and, provided that the duration of the event exceeds a contractually agreed period, to terminate the agreement. While the tribunal applied French law to resolve the dispute, it incidentally referred to Article 7.1.7 of the UNIDROIT Principles (2010) in further support of its finding that the notion of force majeure is well known in international commercial practice and that said notion could lead to the contract being temporarily suspended where an event of force majeure did not permanently prevent a party from performing its obligations.<sup>222</sup> The tribunal ultimately found that performance had been suspended for a period allowing the operator of the hotel complex to terminate the agreement.

## **Influence of the UNIDROIT Principles on French law**

The limited references to the UNIDROIT Principles in the recent case law of the French courts and arbitral tribunals seated in France should not be taken as an indicator of their actual impact on French law.

The extent of the influence the UNIDROIT Principles have had on French law is made clear by the French contract law reform of February 2016. Commentators note that the ‘principal modifications brought about by the reform sway towards an alignment with the models of international harmonisation, notably embodied by the Principles of European Contract Law and the UNIDROIT Principles’.<sup>223</sup> The Report to the President of the French Republic explaining the reform itself expressly indicates that the UNIDROIT Principles were used as a source of inspiration.

It follows that several crucial additions to the French Civil Code find their basis in some of the UNIDROIT Principles.

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<sup>221</sup> Final Award in Case 14108 (Extract), (2014) *ICC International Court of Arbitration Bulletin*, vol 25, No 2, 67.

<sup>222</sup> Final Award in Case 15949, (2016) *ICC Dispute Resolution Bulletin*, No 2, 47.

<sup>223</sup> Jean-Sébastien Borghetti, ‘Fixation et Révision du Prix’ (2018) *Revue des contrats*, No 2, 177; Alain Bénabent, *Droit des obligations* (LGDJ Lextenso 2017) s 4.

Article 1112-2 of the French Civil Code, for instance, was inspired by Article 2.1.16 of the UNIDROIT Principles. It provides that a party who discloses confidential information obtained in the course of negotiations can be held liable to pay compensation for such a breach. This new addition to the French Civil Code therefore aligns itself with the solution provided by the UNIDROIT Principles according to which ‘[w]here information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded’.

Similarly, the notion of hardship was introduced for the first time in the French Civil Code via Article 1195, which is based on Articles 6.2.2 and 6.2.3 of the UNIDROIT Principles. Article 1195 provides, as the relevant articles in the UNIDROIT Principles do, that a party is entitled to request renegotiations of a given contract in case of a change in circumstances if certain specific circumstances are met. Similar to the UNIDROIT Principles, the right to request renegotiations does not entitle the party to withhold performance, and any failure to reach an agreement entitles either party to resort to the court.

Even the method of contractual interpretation now enshrined in the French Civil Code under Article 1188 reflects, almost word for word, article 4.1 of the UNIDROIT Principles, which provides that a contract shall be interpreted according to the common intention of the parties, or according to the meaning that reasonable persons would give to it in the same circumstances.

In addition, the reform removed the notion of ‘cause’ (the civil law equivalent of ‘consideration’) as a condition for the validity of contracts, consistent with Article 3.1.2 of the UNIDROIT Principles, which excludes the requirement of ‘cause’.

Finally, the new Articles 1224 and 1226 of the French Civil Code provide that in cases of serious breach of a contract, the aggrieved party may terminate the contract by notice to the other party (ie, termination does not always have to be ordered by a court). Again, those provisions are similar to Article 7.3.2 of the UNIDROIT Principles, which states that ‘[t]he right of a party to terminate the contract is exercised by notice to the other party’.

The inclusion in the French Civil Code of these essential notions of contract law, which, up until now, were absent from French legislation, marks a clear willingness of the French legislator to align French contract law with legal standards and concepts recognised at an international level. This will facilitate and promote efficiency in contractual relationships involving French and foreign parties. The UNIDROIT Principles were a natural source of inspiration in achieving this aim.

# Germany

Eckart Brödermann<sup>224</sup>

Germany is a civil law jurisdiction and a member of the EU in which the Rome I Regulation<sup>225</sup> applies. Since 1997, it has an arbitration law that has been based on the UNCITRAL Model Law on International Commercial Arbitration, including its Article 28.<sup>226</sup> In view of this setting, the general picture of the application of the UNIDROIT Principles looks still as ‘grey’ as in other Member States of the EU, while its future may be considerably brighter.

## Applicability of the UNIDROIT Principles in Germany

The legal basis for the applicability of the UNIDROIT Principles is different depending on the combination of the choice of the UNIDROIT Principles with a choice of court or with an arbitration clause.

### *Incorporation into a contract by combining a choice of the UNIDROIT Principles clause with a choice of court clause*

To determine the applicable contractual regime of a cross-border business-to-business contract in dispute, a German state court will start the case analysis by applying the private international law on contracts which is contained, in relation to most states,<sup>227</sup> in the European Rom I Regulation.<sup>228</sup> Recital No 13 of Rome I explicitly permits the incorporation of the UNIDROIT Principles into cross-border contracts. It is therefore possible in Germany to submit a cross-border contract to the UNIDROIT Principles although Article 3, paragraph 1, Rome I requires that a state law is the contract law. If the contract simply submits an international contract to the UNIDROIT Principles without reference to any state law supplementing such choice<sup>229</sup>, the applicable law must be determined by Rome I as if there had been no choice of law because the UNIDROIT Principles are not state law in the sense of Article 3,

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225 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (2008) OJ L 177/6.

226 See below at subsection ‘Choice of the UNIDROIT Principles in combination with an arbitration clause’.

227 There are exceptions for very few states to which the ‘Rome Convention’ on the Law Applicable to Contractual Obligations of 17 June 1980 still applies. This concerns notably, eg, the Isle of Man or – a debated topic – Denmark, see for Denmark the Appellate Court of Koblenz, Decision of 19 September 2012 – 2 U 1050/11, (2015) IPRax 255, 256–257; and Eckart Brödermann, s 6 *Internationales Privatrecht in Piltz* (ed), *Münchener Anwaltshandbuch Internationales Wirtschaftsrecht* (C H Beck 2016) (hereafter Brödermann, ‘section 6 Internationales Privatrecht’), no 272, 276 et seq; Eckart Brödermann and Gerhard Wegen in Prütting/Wegen/Weinreich (ed), *BGB Kommentar* (14th edn, Luchterhand 2019) (hereafter Brödermann/Wegen in PWW), IPR-Anh 1/Rom I-VO Art 25 no 2 und no 1.

228 See, eg, Brödermann, ‘section 6 Internationales Privatrecht’ (n 4), no 204, 235.

229 See Preamble para 2 UNIDROIT Principles; UNIDROIT, *Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts* (2013), easily accessible online by searching ‘UNIDROIT Model clauses’ (hereafter UNIDROIT, *Model Clauses*), model clause 1.a; Klaus Peter Berger, ‘Die Musterklauseln für die UNIDROIT Principles of International Commercial’, in Cascante/Spahlinger/Wilske, *Global Wisdom on Business Transactions, International Law and Dispute Resolution, Festschrift für Gerhard Wegen zum 65. Geburtstag* (2015) 377, 381-382 (hereafter K P Berger, ‘Die Musterklauseln für die UNIDROIT Principles of International Commercial’).

paragraph 1 of Rome I. However, most laws, including sections 133 and 157 of the German Civil Code (Bürgerliches Gesetzbuch - BGB), will recognise such choice<sup>230</sup> as an expression of party autonomy.<sup>231</sup>

On rare occasions a need may arise to determine a contractual issue which is neither regulated in the contract or the UNIDROIT Principles themselves, nor solvable by applying Article 1.6, paragraph 2 of the UNIDROIT Principles.<sup>232</sup> In such rare cases,<sup>233</sup> the determination of the applicable provision can be left to the court who will then determine the residual state law by applying the provisions in Article 4 of Rome I which are applicable in the absence of choice of law.<sup>234</sup>

Such choice of the UNIDROIT Principles finds its limits in mandatory law, (see also Article 1.4 of the UNIDROIT Principles). As the UNIDROIT Principles, when chosen in combination with a choice of a German court provisions, apply against the background of Article 9, paragraph 2 of Rome I, all 'overriding provisions of the law of the forum' are applicable. This includes domestically mandatory state law.<sup>235</sup> Furthermore, issues which the German private international law qualifies separately (eg, issues of capacity)<sup>236</sup> will be subject to a distinct determination of the applicable law.

### *Choice of the UNIDROIT Principles in combination with an arbitration clause*

To determine the applicable contractual regime of a cross-border business-to-business contract in dispute, an arbitration tribunal governed by German arbitration law<sup>237</sup> will relate usually to:<sup>238</sup>

1. the choice of law clause, if any, in the contract;
2. the choice of law rules, if any, contained in the chosen institutional arbitration rules;<sup>239</sup> and, most importantly,

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230 Eckart Brödermann, 'The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – The Experience of a German lawyer', (2011) *Uniform Law Review* 589, 596 (hereafter Brödermann, 'The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – The Experience of a German lawyer' (translated by Fernández, Maximiliano Rodriguez, in: Rodriguez Olmos, Javier Mauricio (ed), *Principios Unidroit. Estudios en torno a una nueva 'linguafranca'* (2013) pp 183, 194); recently also, eg, Brödermann/Wegen in *PWW* (n 4), *IPR-Anh. I*, Art 3 no 4; see further, generally, Ralf Michaels in Stefan Vogenauer (ed), *Commentary on the Unidroit Principles of International Commercial Contracts* (2nd edn, Oxford 2015) (hereafter author in Vogenauer, *Commentary on the Unidroit Principles*), Preamble I no 34.

231 If the choice is contained in a clause with the heading 'Choice of law', it is a case of '*falsa demonstratio non nocet*'. The clause will be interpreted as an incorporation of the UNIDROIT Principles even if, technically, there is no choice of law. See in more detail recently Eckart Brödermann, 'The Choice of the UNIDROIT Principles of International Commercial Contracts in a "choice of law" clause' (2018) *Bucerius Law Journal* 79–86 (hereafter Brödermann, 'The Choice of the UNIDROIT Principles of International Commercial Contracts in a "choice of law" clause').

232 Art 1.6(2) of the UNIDROIT Principles. On the underlying principles see, eg, Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005), pp 87–172; or recently Brödermann, *UNIDROIT Principles Commentary* (n 1), Art 1.6 no 4.

233 Eg, to determine the law which determines the interest rate for interest on damages due pursuant to Art 7.4.10 of the UNIDROIT Principles, see Ewan McKendrick in Vogenauer, *Commentary on the Unidroit Principles* (n 7), Art 7.4.10 no 5; following him Eckart Brödermann, *UNIDROIT Principles Commentary*, (n 1), Art 7.4.10 no 2 (at pp 257–258). See also UNIDROIT, *Model Clauses*, comments on model clause 1.1.a.

234 This has been presented earlier, eg, recently Eckart Brödermann, (i) 'The Choice of the UNIDROIT Principles of International Commercial Contracts in a "choice of law" clause' (n 8) 7, 11; Eckart Brödermann und Joachim Rosengarten (ed) in *Internationales Privat- und Zivilverfahrensrecht (IPR/IZVR)* (8th edn, Vahlen 2019) (hereafter Brödermann/Rosengarten, *IPR/IZVR*), nos 300–305 (case study 30a), pp 87–89.

235 For details, see, eg Brödermann, *UNIDROIT Principles* (n 1), Art 1.4 no 4 and Preamble no 15–16.

236 See on this issue, eg, also Art 3.1.1 UNIDROIT Principles and article 1 para 3 Hague Principles on Choice of Law in International Commercial Contracts, approved on 19 March 2015 by the Hague Conference on Private International Law.

237 Ie, by choice in the arbitration clause and/or in view of the seat of the arbitration tribunal in Germany, see s 1025 para 1 German Code of Civil Procedure; Gerhard Wagner in Böckstiegel/Kröll/Nacimiento (ed), *Arbitration in Germany* (2nd edn, Wolters Kluwer 2015) s 1025 no 4; eg, Rolf Schütze in Rolf Schütze, Dieter Tscherning and Walter Wais (ed), *Handbuch des Schiedsverfahrens* (2nd edn, De Gruyter 1990), no 581; Brödermann/Rosengarten, *IPR/IZVR* (n 11), no 793.

238 Brödermann, 'section 6 Internationales Privatrecht' (n 4), no 272, 276 et seq, pointing at certain treaty restrictions on choice of law in the transportation industry (Art 34, no 3 Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999; Art 41 Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956; and Art III (8) of the Hague-Visby-Rules on carriage of goods by sea).

239 Brödermann, 'section 6 Internationales Privatrecht' (n 4) no 289.

3. the private international law on contracts as applicable in arbitration which is contained in the German Code of Civil Procedure (and not in the Rome I which did not intend to reach out to arbitration).<sup>240</sup> It sets the frame.

According to section 1051, subparagraph 1 of the German Code of Civil Procedure, which is based on Article 28 UNCITRAL Model Law, parties may choose the application of ‘rules of law’ for their contract. A combination of the choice of the UNIDROIT Principles as the contractual regime<sup>241</sup> with an arbitration clause providing for a seat of the (ad hoc or institutional) arbitration in Germany leads to the application of this open-minded provision. In this scenario, there is in most cases no need to determine any supplementing national contract law.

On the rare occasions where it becomes necessary to determine a contractual issue<sup>242</sup> that is neither regulated in the UNIDROIT Principles nor solvable by applying their Article 1.6 paragraph 2,<sup>243</sup> the determination of the applicable provision can be left to the arbitration tribunal. For this purpose, it will rely on the chosen institutional rules which, in the case of the new Article 24.2 of the rules of the German Arbitration Association (Deutsche Institution für Schiedsgerichtsbarkeit, DIS ‘DIS Rules’) released in 2018, give large discretion to the arbitral tribunal.<sup>244</sup> In cases in which an arbitration tribunal determines the German ‘rule of conflict’ to be applicable under Article VII, paragraph 1, sentence 2 of the Geneva Convention of 1961,<sup>245</sup> and in an ad hoc arbitration, section 1051, paragraph 2 would apply a test of the ‘closest connection’ between the contract and any one jurisdiction.

The advantage of combining the UNIDROIT Principles with an arbitration clause providing for arbitration in Germany implies a reduction of the scope of applicable mandatory law pursuant to Article 1.4 of the UNIDROIT Principles. In such circumstances, when the UNIDROIT Principles are the only applicable contractual regime, it has been submitted that only internationally mandatory state law may intervene.<sup>246</sup> Thus, the combination of the UNIDROIT Principles with arbitration in Germany enables commercial parties in business-to-business contracts to avoid the application of the extremely rigid (consumer law driven) German law on standard terms which is only domestically mandatory without an international vocation.<sup>247</sup> This is one of the reasons why the author regularly uses the UNIDROIT Principles.

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240 The key arguments are based on a broad reading of Art 1 para 2 lit e Rome I-Regulation, the history of the provision, the limited purpose of the Rome I-Regulation which was ‘judicial cooperation in civil matters with a cross-border impact’ (recital no 1, emphasis author’s own), and the treaty background of s 1051 German Code of Civil Procedure. See Brödermann, ‘The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – The Experience of a German lawyer’ (n 7), 589, 601 et seq; and recently eg Brödermann, ‘section 6 Internationales Privatrecht’ (n 4) no 288 contra Peter Mankowski, eg, ‘Rom I-VO und Schiedsverfahren’, (2011) RIW, 30 et seq.

241 See n 227 above.

242 Like in the case of choice of any state law as the law of the contract, the determination of the contractual regime does not exclude to determine separately with the applicable rules of arbitration and/or private international law which law applies to such additional, often preliminary questions (eg, on the capacity of a party). See n 234 above.

243 See n 232 above.

244 It states: ‘If the parties have not agreed upon the rules of law to be applied to the merits of the dispute, the arbitral tribunal shall apply the rules of law that it deems to be appropriate’. Similar rules are contained in Art 21, para 1, sentence 2 ICC Arbitration Rules and Art 35, para 1, sentence 4 CEAC Arbitration Rules.

245 European Convention on International Commercial Arbitration.

246 UNIDROIT Principles (2016), Art 1.4 no 4, p 12; following this analysis, eg, recently Brödermann, *UNIDROIT Principles Commentary* (n 1), Art 1.4 no 2–4.

247 See, eg, Ulrich Magnus in Julius von Staudinger (ed), *Kommentar zum Bürgerlichen Gesetzbuch*, vol EGBGB/IPR, Einl zur Rom I-VO (2016) Art 9 no 151; Harry Schmidt in Ulmer/Brandner/Hensen, *AGB-Recht* (11. ed., Otto Schmidt 2011) BGB Anh. s 305 no 2c; Klaus Peter Berger in Prütting/Wegen/Weinreich (ed), *BGB Kommentar* (14th edn, 2019), Vorb subs 305 et seq, no 6; and recently, eg, Brödermann, (i) ‘section 6 Internationales Privatrecht’ (n 4) no 394; and (ii) *UNIDROIT Principles Commentary*, (n 1), Art 1.4 no 4.

The rules of important German and international institutional arbitrations also permit the choice of the UNIDROIT Principles as rules of law. Since 2008, Article 35, paragraph 1 of the arbitration rules of the Chinese European Arbitration Centre in Hamburg, Germany ('CEAC Rules'),<sup>248</sup> explicitly provides for the possibility to choose the application of the UNIDROIT Principles, either on a standalone basis (Article 35, paragraph 1c) or as a supplement to the CISG.<sup>249</sup> The German DIS Rules have until recently been more restrictive by providing for only the possibility to choose a state law. The 2018 DIS rules have adapted the rules to a more modern approach, permitting in their Article 24.1, now explicitly, the choice of rules of law such as the UNIDROIT Principles. If the parties agree on the arbitration rules of the International Chamber of Commerce (the 'ICC Rules') with a seat in Germany, a choice of the UNIDROIT Principles as rules of law is accepted (Article 21 ICC Rules; section 1051, subparagraph 1 of the German Code of Civil Procedure).

## Application of the UNIDROIT Principles in Germany

The UNIDROIT Principles are used on three levels.

### *Very rare application by the courts*

A search in the standard electronic research tools for German court judgments has revealed one decision by the Court of First Instance (*Landgericht*) Frankfurt, dated 15 December 2011.<sup>250</sup> In this case, a German athlete filed a complaint against the German Sports Association for damages because he had not been selected for the German Olympic Team for 2008 Olympic Games in Beijing (an abstract can also be found on Unilex).<sup>251</sup> The German athlete argued that he should have been selected as he had fulfilled the requirements set out by the selection rules. Whether or not he had fulfilled these requirements depended on an interpretation of the rules. In this respect, the court in Frankfurt decided in favour of the athlete by using the general principle of interpretation *contra proferentem*. The Frankfurt Court thereby expressly referred to Article 4.6 of the UNIDROIT Principles by citing a decision of the German Court of Arbitration for Sports dated 17 December 2009.<sup>252</sup>

No further judgments citing the UNIDROIT Principles could be found. While the initial proposal of the European Commission for the wording of Article 3 of Rome I had explicitly provided for the possibility to choose recognised rules of law such as the UNIDROIT Principles,<sup>253</sup> this proposal was outvoted due to opposition from practice including, notably, the German Bar. As the compromise solution in Recital no 13 Rome I pointing at the possibility to incorporate the UNIDROIT Principles (see above subsection 'Incorporation into a contract by combining a choice of the UNIDROIT Principles clause with a choice of court clause') is well hidden, it must be concluded that, to date, few lawyers are aware of the possibility of choosing the UNIDROIT Principles, despite the restrictive approach of Rome I to choice of law.<sup>254</sup>

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248 See [www.ceac-arbitration.com](http://www.ceac-arbitration.com) accessed 11 November 2019.

249 UN Convention on the International Sale of Goods (11 April 1980) 1489 UNTS 3, 19 ILM 668.

250 LG Frankfurt, (Judgment) (2011) 2 -13 O 302/10.

251 See [www.unilex.info](http://www.unilex.info)

252 File Number: DIS-SV-SP-02/08.

253 Eckart Brödermann, The Growing Importance of the UNIDROIT PRINCIPLES in Europe (2006) Uniform Law Review 749–770.

254 On this issue, eg, Berger, 'Die Musterklauseln für die UNIDROIT Principles of International Commercial' (n 6), 377, 380–381

## *Rare application by arbitration tribunals*

While details are ignored due to the confidentiality of arbitration decisions, there are arbitrations which apply the UNIDROIT Principles. The decision of the German Court of Arbitration for Sport (referred to above under subsection ‘Very rare application by the courts’) provides an example. The author of this country perspective is aware of one 2017 CEAC arbitration in which the parties agreed, subsequently to the beginning of the arbitral proceedings, and on the proposal of the respondent, to arbitrate on the basis of the UNIDROIT Principles to avoid the presentation of Chinese law, upon which the claim was based, to an arbitration tribunal composed of German arbitrators. The arbitral award in that case, dated 30 April 2018, applied the UNIDROIT Principles.<sup>255</sup> At the (German) International Lawyers’ Day 2018,<sup>256</sup> several German colleagues mentioned that they have used the UNIDROIT Principles in international arbitrations. At the 3rd ICC European Conference in April, 2019 in Paris, a German in-house counsel of a major European communication company reported a similar experience, that is, that it has used the UNIDROIT Principles by agreement for the arbitration phase, after a dispute has arisen.

The author has also used the UNIDROIT Principles as an arbitrator to interpret the chosen international commercial law while drafting an arbitration award in a Germany and China-related Swedish arbitration. He knows of at least one German colleague who has reported a similar experience.

## *Regular application of the UNIDROIT Principles by some lawyers and companies*

Germany has about 165,000 lawyers, very few of whom use the UNIDROIT Principles in their daily practice. In this respect, it needs to be distinguished:

### CHOICE OF THE UNIDROIT PRINCIPLES AS THE CONTRACTUAL REGIME

From discussions, it can be noted that there is a slowly increasing number of lawyers who are aware of the combination of the cost efficient and risk minimisation tool<sup>257</sup> of combining a choice of the UNIDROIT Principles-clause with an arbitration clause.<sup>258</sup> At the (German) International Lawyers’ Day 2018,<sup>259</sup> about six colleagues reported that they had used the UNIDROIT Principles for contract drafting purposes, in several cases as supplementary rules to the CISG.<sup>260</sup>

The law firm in which the author of this report is active has been using the UNIDROIT Principles since 2001.<sup>261</sup> From about two years ago, it has used them in all its contracts with clients from abroad, in order to achieve the application of the regime for standard terms in Articles 2.1.19 to 2.1.21 of

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255 For a similar experience in Switzerland in 2001, where the parties agreed on the UNIDROIT Principles during the arbitration upon proposal of the Chairman of the Arbitral Tribunal, see recently Brödermann: (1) ‘The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – The Experience of a German lawyer’ (n 7), 589, 591–592 and (2) Brödermann, *UNIDROIT Principles Commentary* (n 1), Introductory Remarks to s 7.4 no 2 at p 237.

256 Organised in Berlin on 1 November 2018 by the Commission of International Business Law of the German Lawyers’ Association (Arbeitsgemeinschaft Internationales Wirtschaftsrecht des Deutschen Anwaltvereins).

257 Eckart Brödermann, ‘The UNIDROIT Principles as a Risk Management Tool’ in: UNIDROIT (ed.), in: *Eppur si muove, The Age of Uniform Law – Essays in honour of Michael Joachim Bonell, to celebrate his 70th birthday* (2016), pp 1283–1301 ( hereafter Brödermann, ‘The UNIDROIT Principles as a Risk Management Tool’).

258 See above subs ‘Choice of the UNIDROIT Principles in combination with an arbitration clause’.

259 See n 256 above.

260 Cf Preamble para 5 UNIDROIT Principles.

261 See Brödermann, ‘The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – The Experience of a German lawyer’ (n 7), 589, 590–592.

the UNIDROIT Principles,<sup>262</sup> which, read in combination with the general rules of the UNIDROIT Principles, such as Article 1.7, is commercially more reasonable and appropriate to international contracts with merchants than the German law on standard terms.<sup>263</sup> Furthermore, the law firm tends to use the UNIDROIT Principles for cross-border cooperation agreements, for example, with counsel in other jurisdictions. When contracting on occasion with international organisations headquartered in Washington, DC, (eg, in 2015), the choice of the UNIDROIT Principles was explicitly welcomed.

For its clients, the author also works regularly with the UNIDROIT Principles. This includes clients of all sizes, of common or civil law origin, and from various sectors, and for different types of contract.<sup>264</sup> Beyond an occasional explanation of the UNIDROIT Principles, there has never been an issue of discussion about the acceptance of such choice. Recent examples from 2018 include, inter alia:

- a contract in the cosmetics industry between a German and a US company on collaboration and research and development;
- a contract in the textile industry between a German and an Indian company on software development and long-term collaboration and;
- multiple non-disclosure agreements in the automotive industry.

Examples from 2019 include the incorporation of the UNIDROIT Principles into standard terms for contracts in the automotive and the shipping industries. In all cases the choice of the UNIDROIT Principles clause was combined with an arbitration clause.

In 2011, in a large major state contract project, the client had to accept the state law of the contracting state. However, with due regard to the UNIDROIT Principles, it was possible to ‘soften’ the effect of the state law by an agreed reference to international commercial law, to be applied when interpreting the chosen state law.<sup>265</sup> The client, a large German DAX company, then offered its subcontractors a choice between German law and the UNIDROIT Principles. This scheme functioned well. Many foreign subcontractors accepted the choice of the UNIDROIT Principles. The law firm has used this scheme ever since on several occasions.

The scheme of offering the UNIDROIT Principles as an alternative to foreign contract partners also functions in standard terms. Recently, on the proposal of the author, a major US group of companies in the automotive industry decided to integrate a choice of the UNIDROIT Principles (as well as an arbitration clause) into its standard terms and conditions of its German subsidiaries for the purchase of goods from foreign suppliers. In the same set of terms German law was chosen for the purchase of goods from German suppliers. For foreign suppliers, the choice of the UNIDROIT Principles was

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262 See above subs ‘Choice of the UNIDROIT Principles in combination with an arbitration clause’: ‘Thus, the combination of the UNIDROIT Principles with arbitration in Germany enables commercial parties in business-to-business contracts to avoid the application of the extremely rigid (consumer law driven) German law on standard terms which is only domestically mandatory without an international vocation. This is one of the reasons why the author regularly uses the UNIDROIT Principles’. The reasoning has been discussed in detail by Eckart Brödermann, ‘Choice of Law and Choice of UPICC Clauses in the Shadow of the Dispute Resolution Clause – Fundamental Aspects of Developing a Coherent Basis for Cross-Border Contracts’ *Hamburg Law Review* (2016) 21, 26–30 and in Brödermann, *UNIDROIT Principles Commentary* (n 1), Art 1.4 no 4.

263 In particular, it is more convenient to reach a binding agreement on standard terms pursuant to the regime of the UNIDROIT Principles (for which email exchange would be sufficient) as compared to German law on standard terms, Art 2.1.19, 2.1.6 of the UNIDROIT Principles; see Brödermann, *Unidroit Principles Commentary* (n 1), Art 2.1.19 no 3.

264 Brödermann, ‘The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – The Experience of a German lawyer’ (n 7) 589–612 (translated by Fernández, Maximiliano Rodríguez, in: Rodríguez Olmos, Javier Mauricio (ed.), *Principios Unidroit. Estudios en torno a una nueva ‘linguafranca’* (2013) pp 183–216).

265 First reported in *ibid*, 589, 593.

again formulated as an option. The neutral UNIDROIT Principles would apply unless the contract partner explicitly opted out during the contract conclusion, if it wishes to be treated like German contract partners.

On occasion, when acting on behalf of non-European (eg, US or Chinese clients), our law firm proposes to use the UNIDROIT Principles generally for all jurisdictions in the EU market. For example, if a US client acts in several European jurisdictions, including, for example, in one case Germany and Romania, the UNIDROIT Principles save research time and attorney fees. The UNIDROIT Principles are accessible in multiple European languages, including German and Romanian, so that the local European parties can study them in their own language, while the US general counsel can continue to operate in English. The UNIDROIT Principles thereby assist to overcome language and legal cultural barriers.

In contrast to the author's personal experience as reported above, very few colleagues, asked in a random questionnaire in preparation of this country perspective, report that they have seen contracts using the UNIDROIT Principles, but this will change in the future.

#### REFERENCE TO THE UNIDROIT PRINCIPLES TO SUPPORT AN INTERPRETATION OF DOMESTIC GERMAN LAW

In cases before state courts which have an international dimension, it is possible to argue with the UNIDROIT Principles to support an internationally oriented interpretation of the German law. The author of has done so on rare occasions, for example, in a litigation before a state court in Hamburg.<sup>266</sup>

#### USE OF THE UNIDROIT PRINCIPLES AS A CHECKLIST

On occasion, when the choice of the UNIDROIT Principles was not possible, for example, in the context of a tender proceeding for a foreign project, the author has used the UNIDROIT Principles as a checklist. In those situations, it was sometimes possible to incorporate specific UNIDROIT Principles into the contract, for example, Articles 6.2.1–6.2.3 on hardship (in a customised version).

#### *Influence of the UNIDROIT Principles on the German legislator*

When the German vendor and export-friendly contract law of 1900 was changed during a fast track law reform in 2002, the German legislator took inspiration from both the CISG and UNIDROIT Principles. Both instruments are explicitly mentioned in the legislative materials.<sup>267</sup> In the law reform of 2002, the German legislator added mandatory national law mainly (or initially) designed to protect consumers. As a result, German national sales law today is more restrictive on party autonomy than the CISG or UNIDROIT Principles. This is an aspect that is often overlooked in practice.

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266 On 1 November 2018, a Dutch colleague reported to the author that he recently used the UNIDROIT Principles to argue – in vain – in Dutch court against the Dutch 'first shot' rule in a Dutch court proceeding, see Art 2.1.22 UNIDROIT Principles and Brödermann, *UNIDROIT Principles Commentary* (n 1), Art 2.1.22 no 1.

267 BT-Drs (*Bundesdrucksache*) (2001) 14/6040, p 129, *Entwurf eines Gesetzes zur Modernisierung des Schuldrechts*.

# The future of the UNIDROIT Principles in Germany

## Practice

The discussion about the UNIDROIT Principles as a tool for contract negotiations and drafting has only just started in Germany on a broader scale. The Commission on International Business Law of the German Lawyers Association (Deutscher Anwaltverein, Arbeitsgemeinschaft Internationales Wirtschaftsrecht) has officially endorsed the appearance of the author's article-by-article commentary about the UNIDROIT Principles as a formal co-publisher of the version, which was published by Nomos for German-speaking countries (Germany, Austria, Switzerland and Luxembourg).<sup>268</sup> It placed the UNIDROIT Principles on its programme for the 2018 annual conference,<sup>269</sup> reaching key decision makers in the German internationally oriented community of the Bar. It published the speech of the author at that conference in two consecutive articles in the German journal of the Commission *Zeitschrift für Internationales Wirtschaftsrecht (IWRZ)*, which all members of the commission received. These articles included a report in German of successful use of the UNIDROIT Principles in practice as a fact;<sup>270</sup> and the provocative thesis that it may amount to malpractice (or non-compliance with the requirements of company law to manage business)<sup>271</sup> not to consider the risk minimising tool<sup>272</sup> of choosing the UNIDROIT Principles because, in many circumstance, they do reduce the exposure of the client. As demonstrated by a recent malpractice incident in Germany relating to a standard clause to opt out of the CISG (2018),<sup>273</sup> choice of law is indeed an issue when drafting international contracts. The inclusion of a choice of law clause without proper research and information may amount to malpractice.<sup>274</sup>

In September 2018, a CEAC Conference with 130 participants from 25 nations allocated two sessions to the UNIDROIT Principles.<sup>275</sup> In October 2018, the joint Bar Commission of the three Nordic German states Hamburg, Schleswig Holstein and Mecklenburg Vorpommern published a report with proposals to amend the German law with the criteria to become a Certified Specialist of International Economic Law,<sup>276</sup> proposing to include the UNIDROIT Principles into the curriculum.<sup>277</sup> Thus, the author of this report is positive that some momentum is presently being created in Germany<sup>278</sup> which

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268 See n 222 above. German book review projects include reviews in the journals IHR (*Burghard Piltz*); IWRZ (*Rolph A. Schütze*), RIW (*Klaus Vorpeil*); SchiedsVZ (*Antje Baumann*); Vertriebsrecht (*Claus Lenz*).

269 Attended on 1 November 2018 in Berlin by 122 lawyers who all specialise in cross-border business law.

270 Eckart Brödermann, 'Die Zukunft der internationalen Vertragsgestaltung – Risikomanagement durch die Wahl der UNIDROIT' [2018] IWRZ 246, 248–250.

271 Eckart Brödermann, 'UNIDROIT Grundregeln in der internationalen Vertragsgestaltung – 10 Thesen zur gezielten Nutzung der UNIDROIT Principles', (2019) IWRZ 7, 13 and 17 (5th thesis).

272 See n 255 above.

273 Reported by a participant during a CEAC conference in Hamburg, Germany, on China's Belt and Road Initiative on 13–14 September 2018, which had sessions entitled 'Common and Civil law Perspective of the UNIDROIT Principles', and 'Interaction between the CISG and the UNIDROIT Principles – a hot topic in China related contracts'.

274 In the German malpractice, the German lawyer, allegedly, selected German law and excluded the CISG without informing about the consequences while, in that case, the CISG regime would have been more favourable to the client.

275 On 'Common Law and Civil Law Perspective of the UNIDROIT Principles' and on 'Interaction between the CISG and the UNIDROIT Principles – a hot topic for China related contracts'.

276 Ss 1, 14n German Act on Certified Specialists (*Fachanwaltsordnung*).

277 See the report, *Fachanwalt für Internationales Wirtschaftsrecht 2020-2030, Zwischenbericht des gemeinsamen Fachausschusses Internationales Wirtschaftsrecht der Rechtsanwaltskammern Hamburg, Mecklenburg-Vorpommern und Schleswig-Holstein zur Fortentwicklung des Fachanwalts* (signed by Eckart Brödermann, Chairman), (2019) IWRZ 41, 43 with a proposal to amend Section 14n No 3 German Act on Certified Specialists (*Fachanwaltsordnung*).

278 By way of example, an event on the UNIDROIT Principles in February 2019, supported by the Hamburg division of the German Lawyers' Association (Hamburger Anwaltsverein), attracted many partners of Hamburg based mid-sized law firms.

practitioners, advising on cross-border contracts, can no longer ignore. There may be reasons to decide against the choice of the UNIDROIT Principles, but ignorance is not an option.<sup>279</sup>

### *Legal education*

Teaching about the UNIDROIT Principles constitutes the basis for their future use. The academic community also supports increasingly the use of the UNIDROIT Principles. At least in some of the German universities (including the Universities of Hamburg, Cologne), the UNIDROIT Principles are always mentioned in the specialised courses on private international law or on international contracting. Since 2012, the UNIDROIT Principles have been part of the facts of the cases developed for the annual Willem C Vis International Commercial Arbitration Moot competition with multiple pre-moots in Germany. For example, the case scenario of the 2018/19 competition requires a discussion of the UNIDROIT Principles. At the University of Cologne, Klaus Peter Berger has started a project that seeks to restate international principles of transnational commercial law, including the UNIDROIT Principles.<sup>280</sup> In the eighth edition 2019 of the author's student-orientated book on private international law and international litigation and arbitration<sup>281</sup>, the author devotes, for the first time, a section – and not just a note for advanced studies (*Arbeitsblock*) – on the choice of the UNIDROIT Principles, discussed once in connection with a choice of court clause<sup>282</sup> and once in connection with an arbitration clause.<sup>283</sup>

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279 First expressed in Brödermann, 'The UNIDROIT Principles as a Risk Management Tool' (n 34), 1283, 1301 (knowledge of the UNIDROIT Principles as a 'necessity').

280 See [www.trans-lex.org](http://www.trans-lex.org) accessed 11 November 2019.

281 Brödermann/Rosengarten, *IPR/IZVR* (n 11), on the market since 1990.

282 Brödermann/Rosengarten, *IPR/IZVR* (n 11), no 300–305 (case study 30a), pp 87–89.

283 *Ibid*, no 808, p 228. See on this distinction also Brödermann, 'The Choice of the UNIDROIT Principles of International Commercial Contracts in a "choice of law" clause' (n 8) 7, 11 et seq.

# India

*Sanjeev Kapoor and Rabindra Jhunjhunwala*<sup>284</sup>

India is a common law jurisdiction and much of its legal system and principles are aligned with the English common law. An increasing number of disputes in India, especially those pertaining to commercial contracts, are being subject to resolution through arbitration between the parties which may give greater flexibility and autonomy to parties to opt for the application of UNIDROIT Principles.

## Application of the UNIDROIT Principles in India

### *Use by courts*

The contractual regime in India is regulated by provisions of the Indian Contract Act 1872 (Contract Act). While we have not come across an instance where the parties have explicitly made their contract subject to the UNIDROIT Principles, courts and statutory tribunals in India are increasingly relying on or taking note of UNIDROIT Principles for persuasive guidance and assistance in interpreting contractual terms.

While a search on electronic databases in India flag ups a limited number of cases specifically citing UNIDROIT Principles, principles analogous to UNIDROIT Principles such as hardship and so on have been considered and dealt with by courts and statutory tribunals even on an equitable basis. Courts and statutory tribunals in India have also relied on legal works and commentaries of leading practitioners, which have in turn relied on the UNIDROIT Principles, in arriving at decisions.

For instance, the Delhi High Court in *Hansalaya Properties and Anr v Dalmia Cement (Bharat) Ltd*, 2008 SCC OnLine Del 953 and *Sandvik Asia Pvt Ltd v Vardhman Promoters Pvt Ltd*, 2006 SCC OnLine Del 926 has recognised and applied Article 4.1 (intention of the parties) and Article 4.4 (Reference to contract or statement as a whole) of UNIDROIT Principles, respectively. Similarly, the Telecom Disputes Settlement and Appellate Tribunal in *Hathway Cable and Datacom Ltd v Neo Sports Broadcast Pvt Ltd*, 2010 SCC OnLine TDSAT 931 considered and applied Article 4.3 (relevant circumstances) by considering the conduct of the parties subsequent to the conclusion of the contract on the basis of the emails exchanged between them regarding a proposed memorandum of settlement of disputes to determine whether there existed a concluded contract between the parties on that point.

Moreover, the Central Electricity Regulatory Commission in at least two instances in *Adani Power Ltd v Uttar Haryana Bijili Vitaran Nigam Ltd & Ors*, 2013 SCC OnLine CERC 180 and *Sasan Power Ltd v MP Power Management Company Ltd and Ors*, 2014 SCC OnLine CERC 20 has recognised arguments concerning the applicability of principles of hardship to commercial contracts as advanced by a party to work out a compensation package to deal with the impact of such hardship.

Therefore, there certainly appears to be a growing trend towards the applicability of UNIDROIT Principles in India. However, it should be borne in mind that such application is restricted by mandatory provisions of India's laws, including the Contract Act and the country's public policy.

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<sup>284</sup> Sanjeev Kapoor and Rabindra Jhunjhunwala are partners at Khaitan & Co in India.

### *Use by arbitral tribunals*

The Arbitration and Conciliation Act 1996 (the '1996 Act') which is the law governing arbitration in India, was drafted on the basis of the UNCITRAL Model Law on International Commercial Arbitration. Section 28 of the 1996 Act specifically allows parties to an international commercial arbitration seated in India to designate 'rules of law' applicable to the substance of the dispute and mandates the arbitral tribunal to determine the dispute in accordance with these rules. In the event parties have authorised the arbitral tribunal to determine a dispute *ex aequo et bono or as amiable compositeur*, section 28 grants the arbitral tribunal permission to determine disputes on this basis. Moreover, this provision also mandates that the arbitral tribunal in deciding and making an award should take into account the terms of the contract and 'trade usages' applicable to the transaction. Therefore, the 1996 Act provides sufficient leeway to parties to opt for the application of the UNIDROIT Principles in determining disputes. However, needless to say, the application of the UNIDROIT Principles is limited by mandatory provisions of the law of India.

The availability of arbitral awards in the public domain in India, however, is scarce since the awards only enter public domain if challenged before Indian courts. Moreover, since no database exists that makes access to such awards possible, it is difficult to gauge the extent to which the UNIDROIT Principles have been applied by arbitral tribunals. However, interestingly, the recent Arbitration and Conciliation (Amendment) Bill, 2018, which has been approved by the Cabinet of India, has proposed setting up an electronic depository of arbitral awards to be maintained by an accredited body. Whether these awards will be accessible to the public remains to be seen.

### *Use by lawyers*

Based on the limited material available in the public domain and reported cases mentioned above, it is evident that lawyers in India are conversant with the UNIDROIT Principles and their applicability to commercial contracts. They are increasingly using them in their submissions before courts and statutory tribunals in order to direct the courts/statutory tribunals to adopt a commercial approach aligned with internationally accepted standards. For instance, the electricity sector has seen multiple submissions made by counsel for renegotiation of the power purchase agreements or payment of adequate compensation on account of principles of hardship as embodied in Article 6.2.3 of the UNIDROIT Principles.

As far as using UNIDROIT Principles in contractual negotiations is concerned, we are personally unaware of instances where parties may have opted for the application of the UNIDROIT Principles. However, due to the confidential nature of contractual negotiations, its use cannot be ruled out.

### *Future trends and outlook*

While UNIDROIT Principles have not been put to extensive use in India, they are certainly gaining in popularity especially given India's global outlook and the increase in commercial disputes. Moreover, UNIDROIT Principles are also being promoted as part of legal education on comparative contract law and practice in the country's premier national law universities.

Given the acceptance of the UNIDROIT Principles as an international standard for interpretation of commercial contracts, it is safe to conclude that the trend of using UNIDROIT Principles is likely to increase in the near future.

# Ireland

*Ristead de Paor and Louise Reilly*<sup>285</sup>

The Republic of Ireland (Ireland) is a common law jurisdiction and has been a member of UNIDROIT since 1940. The following is a summary of the applicability and application of the UNIDROIT Principles 2016 in Ireland as at 10 July 2018.

## Applicability of the UNIDROIT Principles in Ireland

As a member of the EU, Ireland applies Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I'). Recital 13 of Rome I explicitly allows parties to a contract to incorporate 'by reference into their contract a non-State body of law or an international convention'. Article 3(1) of the same regulation states, in relevant part, that '[a] contract shall be governed by the law chosen by the parties' without specifying whether that law must be national or may be transnational. However, article 3(3) refers to 'the country whose law has been chosen', which creates uncertainty as to whether the parties' choice must be the choice of a national law.

In any event, in a 2006 paper on the topic of third-party contractual rights, the Irish Law Reform Commission stated that the UNIDROIT Principles are neither a complete legal system nor a convention to which Ireland is a party.<sup>286</sup> As a result, the commission added, should the parties to a contract adopt the UNIDROIT Principles, they would operate only as terms of the contract, not an effective choice of law.<sup>287</sup> A similar view was expressed by Mr Justice Gerard Hogan when questioned by the co-authors for the purposes of this country perspective. Judge Hogan is a past judge of the Irish Court of Appeal and was appointed as an advocate general of the Court of Justice of the EU in September 2018. Judge Hogan does not believe that 'one could safely conclude that Rome I would allow the parties to choose the UNIDROIT Principles as a choice of law' due both to the language of Article 3(3) of Rome I and the fact that the UNIDROIT Principles 'are not themselves a fully-fledged corpus juris such as a national system of contract law, be it from a common law country or a civil law country'.

Since 1998, Ireland's arbitration law is based on the UNCITRAL Model Law on International Commercial Arbitration and the law currently in force is the Irish Arbitration Act 2010. The Arbitration Act adopted the language of Article 28 of the Model Law which provides, in relevant part, that '[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute', and goes on to confirm that the arbitral tribunal must take into 'account the usages of the trade applicable to the transaction'.<sup>288</sup>

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286 Irish Law Reform Commission, *Privity of Contract (Consultation Paper)* (2006) IELRC CP40 (November 2006), [1.158]. The Irish Law Reform Commission is an independent statutory body the main aim of which is to keep Irish law under review and to make practical proposals for its reform.

287 *Ibid.*

288 Arbitration Act 2010, pt II, s 6 and Schedule 1, c VI, Arts 28(1) and 28(4).

Article 28 of the Model Law has been acknowledged, from as early as the *travaux préparatoires* stage, as allowing parties to choose a wide range of supranational instruments or denationalised norms as the applicable rules in an arbitration and the rules against which the parties' actions are to be judged.<sup>289</sup> Subsections 8(1) and 8(2) of the Arbitration Act require '[j]udicial notice' to be taken of the *travaux préparatoires* of UNCITRAL and its working group relating to the preparation of the Model Law and make clear that the *travaux* may be considered when interpreting any provision of the Model Law. As a result, parties to an international arbitration seated in Ireland may choose the UNIDROIT Principles as the governing law of the contract.

## Application of the UNIDROIT Principles in Ireland

From a survey of published Irish High Court, Court of Appeal and Supreme Court decisions, it appears that the UNIDROIT Principles have only been explored on one occasion.<sup>290</sup> This was in the context of an appeal against a High Court decision prohibiting the respondents' sale of shares otherwise than in accordance with certain terms of the relevant shareholders' agreement.<sup>291</sup> The appeal was allowed and the plaintiffs were unsuccessful in their argument that in Irish contract law, there existed a general principle of good faith which, they contended, required the shares to be disposed of in accordance with specific provisions of the shareholders' agreement. In contrasting the common law's approach of not recognising a standalone duty of good faith in contractual relations, Judge Hogan referred to the duty of good faith and fair dealing set out in the continental civil law codes and Article 1(7) of the UNIDROIT Principles (2010). Judge Hogan made an observation which is insightful in terms of understanding the difficulty of common law jurisdictions such as Ireland in embracing the necessarily broad concepts and duties in the UNIDROIT Principles:

'The fact that the Irish courts have not yet recognised such a general principle [of good faith] may over time be seen as simply reflecting the common law's preference for incremental, step by step change through the case-law, coupled with a distaste for reliance on overarching general principles which are not deeply rooted in the continuous, historical fabric of the case-law, rather than an objection per se to the substance of such a principle.'<sup>292</sup>

The duty to act in accordance with good faith and fair dealing is, of course, mandatory under the UNIDROIT Principles.<sup>293</sup> This may therefore be viewed as an impediment to either the incorporation of the UNIDROIT Principles as terms of the contract or their application as the governing law, beyond the Rome I-derived uncertainties.

A further factor that militates against such use of the UNIDROIT Principles is that Ireland is one of the few jurisdictions worldwide that retain the privity of contract rule. This is at odds with

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289 Summary Records of the UN Commission on International Trade Law for meetings devoted to the preparation of the UNCITRAL Model Law on International Commercial Arbitration, 326th Meeting, 17 June 1985 [www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/326meeting-e.pdf](http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/326meeting-e.pdf) accessed 11 April 2018, at which wide support was expressed for a broad reading of Art 28. P Fouchard et al, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 50. Dr Edana Richardson, 'Islamic Finance Disputes in Ireland: A Comparative Study of Dispute Resolution in Islamic Finance Contracts', (2017) *The Irish Jurist*, 57, 35–60.

290 Note that there was also a reference to 'UNIDROIT' in the Irish High Court case of *Ulster Bank v Costelloe* (2018) IEHC 289. The reference was in the defendant's affidavit in the context of an action by a lender to recover possession of a property over which it had a mortgage. However, the court held that the reference to 'UNIDROIT' was unclear and there was no further discussion on the issue.

291 *Flynn v Brecia* (2017) IECA 74, (2017) 1 ILRM 369.

292 *Flynn v Brecia* (n 7), [8] [Hogan J].

293 Art 1.7 (*Good faith and fair dealing*), Comment 4.

Article 5.2.1 of the UNIDROIT Principles, which provides for the enforcement of contracts by third-party beneficiaries.

In short, therefore, the application of the UNIDROIT Principles in Ireland is currently very limited.

## Future developments

Clearly, the future use of the UNIDROIT Principles is not confined to their use as the governing law of a contract. There is also scope for their use as evidence of international trade practices and as a complement and/or supplement to national law. However, this presupposes an increased level of awareness of the UNIDROIT Principles among lawyers and the judiciary in Ireland.

As to the narrowing of the substantive law gap between the UNIDROIT Principles and Irish law, it is encouraging that Judge Hogan identified, in the *Flynn* decision, numerous Irish law ‘doctrines and concepts which correspond, however approximately, to civilian concepts of good faith’<sup>294</sup> and held out the prospect of closer correspondence between the Irish common law and continental civil law approaches in this regard. It is also noteworthy that both judgments in the *Flynn* Court of Appeal decision refrained from deciding on whether Irish law contains a duty of good faith, given that such determination was unnecessary to decide the issues in the case, while noting the Canadian Supreme Court’s recognition of the duty in *Bhasin v Hrynew* (2014) SCC 71.

Similarly, the privity of contract rule is an obstacle that is unlikely to remain in the long-term since the Irish Law Reform Commission has recommended that the rule of privity be reformed to allow third parties to enforce rights under contracts made for their benefit.<sup>295</sup>

Finally, Ireland is in a unique legal position in the EU to the extent that, post-Brexit, it will be the only common law Member State that will still be subject to the full extent of EU law.<sup>296</sup> In response to a question by the co-authors as to whether Brexit may, over time, lead to a greater approximation of Irish contract law with that of continental civil law, Judge Hogan commented that it likely will. Judge Hogan gave the example of the European Commission’s draft Common European Sales Law (CESL) proposal from 2010/2012, which in the past has been essentially blocked by the UK and the City of London. He opined that it will almost certainly be advanced with greater urgency post-Brexit, with the result that the UNIDROIT Principles will have a greater chance of coming into their own. However, this future impact of the UNIDROIT Principles in Ireland will likely be indirect through influence of the UNIDROIT Principles on the CESL and any corresponding regulation.

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294 Judge Hogan also mentioned the equitable doctrines of unconscionability, fraud on a power, the principle that he or she who comes to equity must come with clean hands and the doctrine of constructive notice which, he stated, correspond to civil concepts of good faith – *Flynn v Breia* (n 7), [7] [Hogan J].

295 Irish Law Reform Commissions, *Privity of Contract (Consultation Paper)* (n 2), [4.02].

296 Note that, although the legal systems of Malta and Cyprus have common law underpinnings, they cannot be said to be common law legal systems as they are heavily influenced by other legal systems such as civil law.

# Italy

*Pietro Galizzi, Cristina Martinetti and Giacomo Rojas Elgueta*<sup>297</sup>

## Applicability of the UNIDROIT Principles in Italy

Italy is a civil law jurisdiction and a member of the EU in which Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (the ‘Rome I Regulation’) applies.

The applicability of the UNIDROIT Principles in Italy, as the rules governing the contract (or as the rules of law applicable to the substance of the dispute once the dispute has arisen), depends on whether the choice of the UNIDROIT Principles is combined with: (1) the choice to litigate before an Italian court; or (2) the agreement to refer the dispute to arbitration.

### *Use in courts*

Pursuant to Recital No 13 of the Rome I Regulation: ‘This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention’. On the other hand, pursuant to Article 3, paragraph 1, of the Rome I Regulation: ‘A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.’

Therefore, in case the parties to the contract choose the UNIDROIT Principles as the rules of law governing the contract without supplementing the UNIDROIT Principles with a particular domestic law, an Italian court would probably consider the UNIDROIT Principles not as a choice of law but, rather, as an agreement to incorporate them into the contract. In this case, the law governing the contract will still have to be determined on the basis of the applicable private international law rules (ie, pursuant to Article 57 of Law No 218/1995, which refers now to Rome I) and the court will apply the UNIDROIT Principles referred to by the parties to the extent they do not contradict any mandatory provisions of the applicable law.

### *Use in arbitration*

Under Italian law, both domestic and international arbitration proceedings are regulated by the Civil Code of Civil Procedure (as reformed by Legislative Decree No 40/2006). Italy’s arbitration rules are not based on the UNCITRAL Model Law of International Commercial Arbitration. Pursuant to Article 822 of the Italian Code of Civil Procedure: ‘Arbitrators decide according to rules of law [...]’. Therefore, when the seat of the arbitration is in Italy, in case of a combination of the choice of the UNIDROIT Principles with an arbitration agreement there is no need for the arbitral tribunal to determine any supplementing domestic law.

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In this case, an arbitral tribunal sitting in Italy will apply the UNIDROIT Principles, even in cases where they contradict Italian mandatory provisions of contract law, subject only (see Article 1.4. of the UNIDROIT Principles) to the application of those rules of domestic law which are mandatory irrespective of which law governs the contract (eg, mandatory rules of public law nature, such as antitrust rules, environmental protection rules, prohibition of corruption).

The application in arbitration proceedings with their seat in Italy of non-state rules such as the UNIDROIT Principles is also consistent with the rules of the most important Italian arbitration institution. According to Article 3 of the Milan Chamber of Arbitration's Rules: 'The arbitral tribunal shall decide on the merits of the dispute in accordance with the rules of law [...]' [author's own emphasis]. Being generally accepted that the expression 'rules of law' includes 'soft law' instruments such as the UNIDROIT Principles, it is therefore commonly understood that, when the parties have directed the arbitral tribunal to do so, an arbitral tribunal sitting in Italy can apply the UNIDROIT Principles as the rules of law applicable to the substance of the controversy.

## Application of the UNIDROIT Principles in Italy

### *By courts*

A research on Italian case law has shown that there are several cases where the UNIDROIT Principles have been directly applied or referred to by Italian courts, even in pure domestic cases, and sometimes independently from the legal arguments presented by the parties or from the applicable law. On the other hand, the same research has revealed that Italian courts, despite parties' reference in their submissions, have sometimes ignored the UNIDROIT Principles in their reasoning.<sup>298</sup>

In a pure domestic case concerning a transfer of real estate subject to condition precedent, the court<sup>299</sup> made reference to Articles 1.7 and 1.8 of the UNIDROIT Principles (ie, good faith and inconsistent behaviour) stating that the UNIDROIT Principles are rules of reference to interpret a contract when there are still gaps that the judge shall clarify. The contract at stake did not mention the UNIDROIT Principles.

Article 1.8 of the UNIDROIT Principles has been referred to in a previous case of Corte dei Conti,<sup>300</sup> a pure domestic case related to the payment of pension. The court affirmed that Articles 1175 and 1375 of the Italian Civil Code (fairness and good faith) shall be construed according to Article 1.8 of the UNIDROIT Principles, *nemo venire contra factum proprium*. In other words, a party cannot claim to have a right if the same party has acted inconsistently and has caused the other party (the debtor) to rely upon an expectation inconsistent with the claimed right.

Reference has been made to the principle of reasonableness contained in Articles 4.8(d) and 5.1.2(d) of the UNIDROIT Principles in order to introduce this concept in a dispute on the limitation period to pay the subscription of Italian company's capital stock and when it shall start.<sup>301</sup>

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298 *Court of Brescia 1990/2016* (Judgment); *Court of Milan 16354/2013* (Judgment).

299 *Court of Pisa 1301/2016* (Judgment).

300 *Corte dei Conti – Sez. Reg. Sicilia 197/2012* (Judgment).

301 *Court of Naples 3637/2017* (Judgment) ; reasonableness in UPICC, quoted also in *Court of Rome 197/2004* (Judgment) and *Court of Milan 1850/2017* (Judgment)

### *By arbitral tribunals*

In Italy, most arbitrations are ad hoc and are rarely published.<sup>302</sup> Searching the Unilex database has revealed some cases under the Rules of the Milan Chamber of Arbitration (CAM) and some under ICC rules of arbitration, where the seat of arbitration was in Italy.

In a 1996 ICC case, the arbitral tribunal decided that the substance of the contract was governed by Kuwaiti law, and took into account ‘principles generally applicable in international commerce’, making several references to the UNIDROIT Principles in the final award.

In one of the two CAM cases reported in Unilex, the parties decided to refer to the UNIDROIT Principles at the start of the proceedings.

In most of the cases, the arbitral tribunals made reference to the UNIDROIT Principles to interpret the contract and uphold the provisions of the law governing the contract as decided by the arbitral tribunal.

### *Use, knowledge and future of the UNIDROIT Principles*

Italian lawyers are still not entirely familiar with the UNIDROIT Principles and their applicability to commercial contracts. UNIDROIT Principles are taught in Italy, generally within the course of private comparative law, but only in Italy’s most prestigious law schools. Also, similarly to the CISG, they have often been considered as a mere subject for academic studies and a theoretical exercise.

Nonetheless, there has recently been growing interest in the UNIDROIT Principles, partially due to the acknowledgement that they are being increasingly used as a reference in international arbitration. In the last few years, there have been important conferences at a national level, among others in Rome, Milan and Bologna, with a large participation of in-house counsel, where the UNIDROIT Principles have been presented and promoted as the new governing law of international commercial contracts. It is also worth noting that they are often used by in-house counsel and external counsel during the drafting of an international commercial contract and, in particular, when they have to find a common ground for fundamental principles, such as hardship and good faith/fiduciary duties. Furthermore, the fact that French law, which has significantly inspired the current Italian Civil Code, has recently been extensively influenced by the UNIDROIT Principles (see the French contract law reform of February 2016), this could have interesting reverberations in the Italian legal environment.

As a further development, some multinational companies based in Italy have started introducing the UNIDROIT Principles as the governing law of some of their contracts. The reaction of the counterparties is generally positive, even if in a number of cases there still is a complete lack of knowledge of what these principles are and whether they can be a valid reference for international agreements.

While, for the time being, the UNIDROIT Principles have not been extensively used in Italy, they are gaining popularity. It is safe to conclude that Italian lawyers are ready to welcome any increased use of them in the near future.

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<sup>302</sup> See ad hoc arbitration proceeding at [www.unilex.info/case.cfm?id=631](http://www.unilex.info/case.cfm?id=631) accessed 11 November 2019.

# Japan

*Takashi Toichi and Kazuhide Ueno*<sup>303</sup>

Japan is a civil law jurisdiction. Japanese laws or court decisions do not give a decisive guidance on how the UNIDROIT Principles would govern the contractual relationships between parties. There are no Japanese court cases that refer directly to UNIDROIT. The compiled summaries of selected cases section of this book contains summaries of court cases that can be compared with UNIDROIT applicability if that would have been the case. The understanding of what parties are agreeing to when choosing the UNIDROIT Principles to govern their contractual relationship is discussed among scholars.

## Scholars' discussion

The prevailing opinion is that the parties' intention of referring to the UNIDROIT Principles in the governing law clause of their contract would mean that they intend to incorporate the clauses under the UNIDROIT Principles into their contract instead of actually writing out the clauses. The conclusion of this opinion is that such parties' choice of the UNIDROIT Principles is valid, so long as the provisions do not contradict mandatory Japanese law.

The prevailing opinion is based on the interpretation that the 'law' under Article 7 of the Act on General Rules for Application of Laws (General Rules for Application) would only mean a law made by a sovereign nation, and not an international organisation or an international customs law.<sup>304</sup> Courts refer to the General Rules for Application to determine the governing law. Article 7 stipulates: 'The formation and effect of a juridical act shall be governed by the law of the place chosen by the parties at the time of the act'. If any set of rules can be considered as a 'law', such rules would be valid regardless of any contradictions between other Japanese laws. Since the UNIDROIT Principles are not a law by a sovereign nation, the court will not consider the principles as a 'law', according to the prevailing opinion of scholars. Therefore, as mentioned above, prevailing opinion concludes that the UNIDROIT Principles are valid, so long as their provisions do not contradict mandatory Japanese law.

Although there are several variations of opinions proposed by scholars, the minor opinion states the opposite – the UNIDROIT Principles qualify as 'laws' under the General Rules for Application and thus gives more validity to the principles.<sup>305</sup> Therefore, the minor opinion would affirm the validity of the UNIDROIT Principles, including any provisions that may contradict mandatory Japanese law.

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304 Eg, Takao Sawaki, *Kokka to Keiyaku* [States and Contracts], *Gendai Keiyakuho Taikei Dai Hachi Kan* [Textbook of Modern Contracts Law, vol 8] (Yuhikaku, 1983), p 158. *See also* Keiichi Nakabayashi, *Yunidorowa Kokusai Shouji Keiyaku Gensoku to Kokusai Shiho* [The UNIDROIT Principles and Conflicts of Law] (*Ritsumeikan Law Journal*, 2004, vol 1 (consecutively, Vol 293)), fn 52, noting that Professor Sawaki had pointed out the possibility of revisiting his conclusion.

305 Eg, Naoshi Takasugi, *Kokusai Kaihatsu Keiyaiku to Kokusai Shihou* [International Development Agreement and Conflicts of Law] (*Osaka University Law Journal*, 52(3,4), 2002), p 475.

## Recent developments

Major amendments to the Japanese Civil Code regarding law of obligations passed the National Diet on 26 May 2017, and most of the amendments will come into force from 1 April 2020.

The UNIDROIT Principles were compared and referred to when the draft amendments were discussed in working groups. Although Japanese laws or court decisions do not give a decisive guidance on how the UNIDROIT Principles apply to contractual relationship among the parties, the UNIDROIT Principles are increasing in popularity through discussions held by participants of these working groups.

# Mexico

*Diego Sierra*<sup>306</sup>

Mexico is a federation with a civil law tradition. Private law in Mexico is primarily divided between civil and commercial matters. Under Mexico's Constitution, commercial matters are the exclusive responsibility of the federal legislative body, while civil matters are both overseen by the federal legislative body and each local legislative body.

Mexican conflict of law rules are provided for under each of the 32 civil codes as well as the Federal Civil Code and the Inter-American Convention of the Law Applicable to International Contracts. The rules applicable to commercial arbitration are provided for under the Commercial Code, but should be interpreted as an independent set of rules.

In this chapter, I will distinguish between the applicable law of an international contract subject to the jurisdiction of a state, where Mexican conflict of law rules apply, and an international contract subject to commercial arbitration. I will also analyse the application of the UNIDROIT Principles when incorporated by reference into a contract. Finally, I will analyse the role of Mexican courts, arbitral tribunals and lawyers regarding the application of the UNIDROIT Principles.

## Mexican conflict of law rules

### *Federal Civil Code*

Under Article 13, section V of the Federal Civil Code, regarding Mexican conflict of law rules, the parties may 'validly designate the application of another law', with certain exceptions such as the legal status of a person and rights *in rem*. Notwithstanding the above, questions can arise regarding the validity of applying the UNIDROIT Principles as a 'valid law' or even as 'foreign law', which has been interpreted as the law of another state.<sup>307</sup> However, in my opinion the UNIDROIT principles, as originating from *lex mercatoria*, would pass muster under Mexican law to qualify as 'another law'.

Additionally, under Article 19 of the Federal Civil Code, in relation to the Preamble of the UNIDROIT Principles, if Mexican law applies, the UNIDROIT Principles could be applied by a court or an arbitral tribunal as general principles of law in the absence of any other applicable provisions under the Federal Civil Code. However, this would depend on the interpretation of the term 'general principles of law' by courts or arbitral tribunals.

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<sup>307</sup> See Non-binding precedent *Derecho Extranjero. Puntos De Conexión Que Lo Hacen Aplicable* (Foreign Law. Points of contact that make it applicable), *Tercer Tribunal Colegiado en Materia Civil del Primer Circuito* (Third Collegiate Court on Civil matters for the First Circuit), *Semanario Judicial de la Federación y su Gaceta, Novena Época*, vol XIV, September 2001, Tesis I.3o.C.261 C, p 1,312 (MEX).

## *Inter-American Convention on the Law Applicable to International Contracts*

The Inter-American Convention on the Law Applicable to International Contracts, to which Mexico is a signatory,<sup>308</sup> recognises the application of the *lex mercatoria*.

Articles 7 and 17 of the convention<sup>309</sup> provide that the parties to a contract shall choose the governing law of the contract, which shall be understood as the law currently in force in a state. However, under the convention's Article 10, it is provided that in addition to the applicable law, 'the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case'. Furthermore, under Article 9, when the parties do not choose the applicable law, a court shall take into account 'the general principles of international commercial law recognised by international organisations'. All of these provisions are applied taking into account the mandatory provisions or *lois de police* of the forum or a state to which the contract has close ties.<sup>310</sup>

Therefore, while the UNIDROIT Principles are not expressly incorporated under statutory law in Mexico as the applicable law to an international contract, courts may apply them based on the Inter-American Convention of the Law Applicable to International Contracts. As mentioned above, they may also supplement the applicable law.

### *Commercial Code (commercial arbitration)*

Regarding commercial arbitration, Article 1445 of the Commercial Code, provides the rules applicable to substantive law, following Article 28 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides that '[t]he arbitral tribunal shall decide the dispute in accordance with the rules of law as are chosen by the parties as applicable to the substance of the dispute'. The parties may therefore agree on any substantive law they find appropriate, including the UNIDROIT Principles.<sup>311</sup>

Furthermore, paragraph 4 of Article 1445 of the Commercial Code provides that the arbitral tribunal must take into consideration the agreement of the parties as well as the applicable trade usages.

In the same vein, an ICC arbitral tribunal concluded that it could take into consideration the UNIDROIT Principles with no need of a previous agreement between the parties, as long as it was not contrary to the default rules incorporated within Mexican legislation. The arbitral tribunal concluded that the UNIDROIT Principles, as an expression of the *lex mercatoria* for the interpretation

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308 The Convention was signed in Mexico City on 17 March 1994, ratified by Mexico on 20 August 1996, and entered into force on 15 December 1996.

309 Art 7: 'The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behaviour and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.'

Selection of a certain forum by the parties does not necessarily entail selection of the applicable law. Art 17: 'For the purposes of this Convention, "law" shall be understood to mean the law current in a state, excluding rules concerning conflict of laws.'

310 Art 11: 'Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements.'

It shall be up to the forum to decide when it applies the mandatory provisions of the law of another state with which the contract has close ties.

311 In this regard, in a case administered by the Mexican Arbitration Centre (*Centro de Arbitraje de México – CAM*), in which the parties expressly referred to the UNIDROIT Principles as the law governing the substance of any potential dispute, the arbitral tribunal confirmed the validity of the parties' choice of the UNIDROIT Principles as the law applicable to the substance of the dispute, in view of Art 1445 of the Commercial Code, which states that the arbitral tribunal shall decide the dispute according to the 'rules of law' chosen by the parties, and the fact that the UNIDROIT Principles have been applied in a great number of international arbitration proceedings. Centro de Arbitraje de México (CAM), Arbitral Award (2006), [www.unilex.info/case.cfm?id=1149](http://www.unilex.info/case.cfm?id=1149) accessed 11 November 2019.

of commercial obligations and the will of the parties, is a valuable instrument that is consistent with Mexican law as a complementary set of rules, in accordance with trade usages.<sup>312</sup>

In my experience, arbitral tribunals tend to be more receptive than domestic courts, and favour the applicability of international law or even principles of international law, such as the UNIDROIT Principles and the IBA Guidelines on Conflicts of Interest, Party Representation and on the Taking of Evidence.

### *Incorporation by reference*

Regardless of the possibility of applying the UNIDROIT Principles under Mexican conflict of law rules, Article 6 of the Federal Civil Code and its correlative articles in the state civil codes, provide that private rights might be waived by the parties if they do not directly affect the public interest and when said waiver does not affect the rights of third parties. Hence, the UNIDROIT Principles could be incorporated by reference into a contract, to implement them as the governing law of the contract.

Where the UNIDROIT Principles are incorporated as the applicable law to a contract, I believe that courts should apply them under the principles of autonomy of the parties<sup>313</sup> and freedom of contract.<sup>314</sup>

## **Application of the UNIDROIT Principles**

### *By Mexican courts*

There are no published cases where the UNIDROIT Principles have been applied by Mexican courts. This may be due to three reasons:

- the recent digitalisation of only a limited number of court cases and rulings;
- the low application and/or reference to comparative law and doctrine in judicial rulings; and
- the lack of specialisation in complex international commercial matters by Mexico's courts.

### *By arbitral tribunals*

I have found that arbitration tends to be a forum that is more familiar with the application of the UNIDROIT Principles as the governing law of a contract, given that the Mexican arbitration practitioners tend to have more knowledge and experience in international commercial matters and international instruments such as the UNIDROIT Principles.

Furthermore, in my practice, I have found arbitral tribunals also apply the UNIDROIT Principles as 'trade usages'<sup>315</sup> or 'Principles of International Law'. In an unpublished case administered under the UNCITRAL Arbitration Rules, the parties agreed to apply the law of a Latin American state and the 'Principles of International Law'. In the proceedings, the parties argued that certain provisions of the

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312 ICC International Court of Arbitration, Mexico City, Arbitral Award (2004), Unilex 12949 [www.unilex.info/case.cfm?id=2115](http://www.unilex.info/case.cfm?id=2115) accessed 11 November.

313 Art 6, Federal Civil Code (MEX).

314 *Ibid*, Art 1832.

315 See Commercial Code section (above).

UNIDROIT Principles were applicable, particularly regarding the interpretation of contracts. In its award, the arbitral tribunal applied both the law of the state and the UNIDROIT Principles regarding the interpretation of the contract.

### *By lawyers and in negotiations*

Outside of arbitration, the UNIDROIT Principles are not frequently applied in Mexico. I consider that this is mainly due to the following:

First, arbitration and in general international commercial matters have been on the rise over the past two decades, mainly due to North America Free Trade Agreement (NAFTA) and the growth of foreign direct investment in Mexico. However, the application of UNIDROIT Principles has not grown to the same extent for international transactions. Moreover, due to Mexico's proximity to the US, and its economic direct correlation, often the most relevant M&A and financial cross-border transactions end up being governed by New York law.

Second, while the *Incoterms* are more commonly used, they are sometimes supplemented by national law instead of principles of international law or supra-national regulations, such as the UNIDROIT Principles.

Third, the Mexican practitioners' lack of awareness and familiarity with the UNIDROIT Principles as a consequence of the principles' absence in ordinary international private law courses.

In this context, I have seen the UNIDROIT Principles being used and negotiated into contracts where there is a balanced commercial relationship between the parties (eg, a 50:50 joint venture with parties from multiple jurisdictions), where the parties do not want to submit themselves to any specific country's substantive law and where the parties' counsel are sufficiently sophisticated to recognise the benefits of accepting the UNIDROIT Principles as their governing law.

## **Future of the UNIDROIT Principles in Mexico**

In my experience, a relevant area of opportunity for the UNIDROIT Principles is in raising awareness of and familiarity with them within the Mexican legal community. Two main conduits would serve this purpose.

First, encouraging law schools in cities exposed to relevant international business transactions, such as Mexico City, Monterrey and Guadalajara, to include the UNIDROIT Principles into their international law curricula. While there exists some encouragement from certain universities in this regard through the establishment of extra-curricular events such as The Annual Willem C Vis International Commercial Arbitration Moot, the principles would vastly benefit from a higher degree of exposure in law schools' ordinary curricula.

Second, the organisation of workshops on the practical benefits for businesses of using the UNIDROIT Principles in their international transactions in fora such as chambers of commerce (eg, International Chamber of Commerce, Cámara Mexicano-Alemana de Comercio e Industria (CAMEXA) and American Chamber of Commerce) as well as the Mexican Bars (eg, Barra Mexicana Colegio de Abogados, Asociación Mexicana de Abogados de Empresa and Ilustre y Nacional Colegio de Abogados) would raise the profile of the UNIDROIT Principles' practical benefits.

# The Netherlands

Gerard J Meijer<sup>316</sup> and Pauline E Ernste<sup>317 318</sup>

The UNIDROIT Principles are a body of law prepared to be applied to international commercial contracts. In that process, the interests of the international legal and business communities had a prevalent position.<sup>319</sup> In the Netherlands, the legal system allows for their application and Dutch courts and arbitral tribunals seated in the country have made reference to these principles on several occasions. The specific context of which will be explored in this country perspectives chapter.

## Applicability of the UNIDROIT Principles in the Netherlands

### *In court proceedings*

The Netherlands is a civil law jurisdiction and a Member State of the EU. It is well established that Dutch law recognises the principle of freedom of contract.<sup>320</sup> Therefore, parties to an agreement are in principle free to choose the set of rules to govern their contractual relationship and may, for example, choose to have their contract governed by a specific national law (eg, Dutch law) and at the same time incorporate into their contract rules from other bodies of law such as the UNIDROIT Principles. They may also only refer to the UNIDROIT Principles as the applicable law to their contract without any express reference to any applicable national law.

The aforementioned options are not without limits. In relation to EU legislation, Dutch courts are bound by Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (the ‘Rome I Regulation’). Pursuant to Recital 13 therein, parties can incorporate a non-national body of law, such as the UNIDROIT Principles, into their agreement. However, under Article 3 of the Rome I Regulation, it is the law of a state that must be selected by the parties as the applicable law. This is indeed the position taken by Dutch authoritative scholarly writings. Several authors have emphasised that the possibility to choose a non-national body of law is not included in the Rome I Regulation.<sup>321</sup> Therefore, if the parties have only referred to the UNIDROIT Principles as the applicable law without an express reference to any applicable national law, the UNIDROIT Principles will be applicable as part of the parties’ contract. But they may not contravene mandatory provisions of the applicable (national) law, which will be determined by the court in accordance with Articles 4–8 of the Rome I Regulation.

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318 The authors would like to express their gratitude to Lin Xu, Associate, and to Juan Pablo Valdivia Pizarro, Foreign Associate, NautaDutilh NV, for their preparatory work on this contribution.

319 UNIDROIT Principles of International Commercial Contracts (2016), Introduction to the 2016 edition.

320 Dutch contract law recognises the principle of contractual freedom, by which contracting parties may shape (within the limits provided by mandatory law) their contractual relationship in the way that they deem fit, including the determination of the applicable law. See, eg, JC Duivenvoorden-van Rossum and A Buitenkamp, *Privaatrecht*, 2nd edition, Noordhoff 2018, 16.

321 S Hartkamp, *Mr C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht 3. Vermogensrecht algemeen. Deel I. Europees recht en Nederlands vermogensrecht* (Kluwer 2015), para 302 (hereafter Asser/Hartkamp, *Europees recht*). See also N Schelhaas, ‘Optioneel internationaal contractenrecht in de Nederlandse praktijk’ (2014) 4 OPR 23, 27 (hereafter Schelhaas, ‘Optioneel internationaal contractenrecht’) and Vonken, ‘Een apologie voor een rechtskeuze van *Principles*; voorstel tot wijziging van artikel 3 lid 1 Rome I’ (2014) 3 NIPR 339.

## In arbitral proceedings

The situation in the context of arbitral proceedings is different. The Rome I Regulation is not automatically applicable in arbitral proceedings and, unlike Dutch courts, arbitrators are not bound by it.<sup>322</sup> The relevant legal framework is the Dutch Arbitration Act, which is contained in Book 4 of the Dutch Code of Civil Procedure (DCCP). In particular, Article 1054(2) of the DCCP covers questions relating to the applicable law. It provides that the arbitral tribunal shall decide in accordance with the rules of law designated by the parties. Failing such designation by the parties, the arbitral tribunal shall decide in accordance with the rules of law that it considers appropriate. The scope of the wording ‘rules of law’ present in Article 1054(2) of the DCCP is wide and does not limit the freedom of the parties, or the power of the arbitral tribunal, only to the selection of the law of a state.<sup>323</sup> Therefore, under Dutch arbitration law, parties and arbitral tribunals are not obliged to choose the law of a country as the applicable law and may decide on the application of non-national bodies of law as the governing law of the contract.

This has been further confirmed by Dutch authoritative commentary, which underline that the parties may agree that the arbitral tribunal will decide according to internationally accepted trade usages and/or according to supranational general legal principles. In this context, commentators have expressly made reference to the UNIDROIT Principles, indicating that parties may agree that such rules are directly applicable to their contract. If the parties have not expressly agreed on the application of the UNIDROIT Principles, Article 1054(2) of the DCCP also empowers the arbitral tribunal to, should it consider it appropriate, designate a non-national body of law (such as the UNIDROIT Principles) as the applicable substantive contract law.<sup>324</sup> On the basis of the above, in arbitration, the UNIDROIT Principles, which are considered ‘rules of law’ under Dutch arbitration law, can be applied independently from any national law.

In addition and by way of further illustration, Article 42 of the Arbitration Rules of the Netherlands Arbitration Institute, that is, the most important non-sector specific Dutch arbitration institute, which regulates the governing law of the dispute, is a verbatim copy of Article 1054 of the DCCP.<sup>325</sup> Therefore, an analysis of the issue at hand regarding an arbitration in the Netherlands under the Netherlands Arbitrage Instituut (NAI) rules would lead to the same conclusion as the one outlined above. The result would be identical for arbitrations conducted in the Netherlands under the auspices of other major arbitral institutions.<sup>326</sup>

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322 See, eg, Pedro A De Miguel Asensio, ‘The Rome I and Rome II Regulations in International Commercial Arbitration’ in F Ferrari (ed), *The Impact of EU Law on International Commercial Arbitration* (Juris, 2017) 177–243 and N Peters, *IPR, Proces & Arbitrage. Over grondslagen en de rechtspraktijk* (Maklu 2016) 306–07. A different approach is taken by E Kramer and L E Verhage, *Mr C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk recht 10. Internationaal privaatrecht. Deel III. Internationaal vermogensrecht* (Kluwer 2015), para 657.

323 See Sanders, *Het Nederlands arbitragerecht. Nationaal en internationaal* (4th edn, Kluwer 2001) 143 (hereafter Sanders, *Het Nederlands arbitragerecht*); J Snijders, *GS Burgerlijke Rechtsvordering*, Article 1054 DCCP, para 3.1 (hereafter Snijders, *GS Burgerlijke Rechtsvordering*) and J Meijer, *T&C Burgerlijke Rechtsvordering* (Kluwer 2016) Art 1054 DCCP, para 2b and 2c (hereafter Meijer, *T&C Burgerlijke Rechtsvordering*).

324 See, eg, Snijders, *GS Burgerlijke Rechtsvordering* (n 8) para 3.1 and Meijer, *T&C Burgerlijke Rechtsvordering* (n 8) para 2b and 2c.

325 Nederlands Arbitrage Instituut [www.nai-nl.org](http://www.nai-nl.org) accessed 11 November 2019.

326 See, eg, Art 21(1) of the International Chamber of Commerce (ICC) Arbitration Rules; Art 22(3) of the London Court of International Arbitration (LCIA) Arbitration Rules; and Art 27(1) of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules.

# Application of the UNIDROIT principles in the Netherlands

## *In court proceedings*

Research into publicly available sources shows that, to date, there have been no cases in which the UNIDROIT Principles were directly applied by Dutch courts as the governing contract law. Nevertheless, there have been instances in which Dutch courts have made express reference to the UNIDROIT Principles. In the cases where the UNIDROIT Principles were mentioned or acknowledged, this was done mainly by describing, in court proceedings in relation to arbitration, the substantive law applicable to the underlying dispute in the arbitration<sup>327</sup> and/or in order to support or illustrate a specific finding or legal reasoning.<sup>328</sup>

In one case, a more direct reference to the Principles was made.<sup>329</sup> In that instance, a Dutch lower court took Article 2.22 of the UNIDROIT Principles as a basis for the application of the ‘knock-out’ doctrine in case of a ‘battle of forms’.<sup>330</sup> Under Dutch law, where offer and acceptance refer to different standard terms and conditions, the second reference is without effect if it does not expressly reject the applicability of the standard terms and conditions referred to in the first place.<sup>331</sup> The claimant in this case asserted that Dutch law was not applicable and that, instead, where both parties use standard terms, the contract was concluded only on the basis of standard terms which are common in substance (‘knock-out’ doctrine). The lower court indicated that, if the CISG were applicable, the UNIDROIT Principles would be relevant in case of a ‘battle of forms’ because the CISG itself does not contain a special rule in relation thereto. However, since the court found that the CISG was not applicable to the case at hand, the court decided that it could not follow the rule laid down in the UNIDROIT Principles and the specific rule in the Dutch Civil Code for the issue at hand had to be applied.<sup>332</sup>

In addition, the UNIDROIT Principles have been referenced on several occasions by the Advocate General – or where applicable, the Procurator General – in his or her opinion preceding a ruling by the Netherlands Supreme Court. However, the references to the Principles therein did not amount to the principles being used as the direct basis of the Advocate General’s legal reasoning. In certain cases (as illustrated below), the UNIDROIT Principles were referred to from a comparative law

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327 See, eg, Court of Appeal of The Hague, 3 September 2013, ECLI:NL:GHDHA:2013:3403 (*BAe/Modsaf*), para 6. In this decision, relating to an application for the setting aside of two arbitral awards, the Court of Appeal indicated that, as far as the substantive law is concerned, the arbitral tribunal had declared applicable ‘the general legal rules and principles regarding international contractual obligations enjoying a wide international consensus, including the UNIDROIT Principles.’ See also the Court of Appeal’s references to the UNIDROIT Principles in para 7–16, 25, 29 and 30; cf also the decisions of the District Court of The Hague, 11 May 2011, ECLI:NL:RBSGR:2011:BQ6165 and of the Netherlands Supreme Court, 22 May 2015, ECLI:NL:HR:2015:1272 (*BAe/Modsaf*), including the preceding opinion of AG H Wissink, ECLI:NL:PHR:2015:127. The more specific relevance of the UNIDROIT Principles in this case is the arbitral proceedings section (below).

328 Eg, in a case before the Court of Appeal of Den Bosch, the court had to decide a dispute involving a sales contract between a French seller and a Dutch buyer governed by the CISG. The court specifically referred to the UNIDROIT Principles and, more precisely, to Article 2.20 relating to so-called surprising terms (Art 2.1.20 in the 2016 edition on ‘surprising terms’, which is identical to Art 2.20 in the 1994 edition) and the commentary on that article, in order to support its interpretation of the CISG (see Court of Appeal of Den Bosch, 16 October 2002, ECLI:NL:GHSHE:2002:BA7248, para 2.7).

329 District Court Gelderland, 2 March 2016, ECLI:NL:RBGEL:2016:1328, para 7.8–7.10.

330 Art 2.1.22 of the 2016 edition on ‘battle of the forms’, which is identical to Art 2.22 in the 1994 edition.

331 Dutch Civil Code, s 6:225(3).

332 Other court cases in which the UNIDROIT Principles were mentioned or referred to, eg, District Court of Rotterdam 29 August 2012, ECLI:NL:RBROT:2012:BX6646; the Netherlands Supreme Court 6 April 2018, ECLI:NL:HR:2018:522 (*Staatssecretaris van Financiën/X B.V.*) and Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba 5 September 2017, ECLI:NL:OGHACMB:2017:94.

perspective. By way of example, in the three cases listed below, the Advocate General (or Procurator General) specifically referred to the UNIDROIT Principles.<sup>333</sup>

In one case, the Advocate General compared the Dutch approach to limitation of liability clauses to the international approach, with reference to Article 7.1.6 of the UNIDROIT Principles, stating that limitations of liability are internationally widespread and that the starting point should be that they may be invoked, although this may (only) be different under special circumstances.<sup>334</sup>

In another case, the Procurator General explained that the agreement reached in relation to essential elements of a to-be-concluded contract does not per se lead to the conclusion that a contract is indeed concluded. In this respect, the Procurator General referred to Article 2.13 UNIDROIT Principles (1994),<sup>335</sup> when making the statement that the parties in the case at hand could have assumed that the contract was only concluded if it was made in writing.<sup>336</sup>

In a third case, the Advocate General compared the Dutch perspective on the so-called ‘surprising terms’ as part of standard terms with the, in his eyes more attractive, provision laid down in Article 2.20 of the UNIDROIT Principles (1994).<sup>337</sup> In the UNIDROIT Principles, a non-surprising term, which may include terms that are customary in the relevant sector, could indeed have effect, while under Dutch law, a customary non-surprising term may not have effect on rather formal grounds.<sup>338</sup>

It is important to note, however, that, even though the Advocate General’s opinion is considered as a highly valuable source in the Dutch legal system, since it often gives a detailed explanation regarding the development of significant legal issues, the opinion of the Advocate General does not as such bind the Netherlands Supreme Court or any lower court. However, decisions of the Netherlands Supreme Court are interpreted in light of the preceding opinions of the Advocates General.

### *In arbitral proceedings*

The frequently confidential nature of arbitration makes it difficult to assess how frequently the UNIDROIT Principles are applied by arbitral tribunals seated in the Netherlands. Nevertheless, through setting aside proceedings before Dutch courts or through otherwise publicly available sources, it is possible to affirm that, in several occasions, the UNIDROIT Principles have been applied in arbitration as the governing contract law.

For example, in a case between a Dutch seller and an Italian buyer regarding the application of the general conditions of the seller to a number of disputed contracts,<sup>339</sup> an arbitral tribunal, applying

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333 For a very recent case in which the Advocate General made reference to the UNIDROIT Principles, see the opinion of AG H Wissink, ECLI:NL:PHR:2018:787. For other cases in which the Advocate General made reference to the UNIDROIT Principles, see, eg, ECLI:NL:PHR:2001:ZC3632; ECLI:NL:PHR:2017:1164; ECLI:NL:PHR:2017:483; ECLI:NL:PHR:2016:1077; ECLI:NL:PHR:2017:23; ECLI:NL:PHR:2016:1174; ECLI:NL:PHR:2011:BQ1684; ECLI:NL:PHR:2015:806; and ECLI:NL:PHR:2009:BH3137.

334 Opinion of AG Spier, ECLI:NL:PHR:2008:BD1394, preceding the Netherlands Supreme Court, 11 July 2008, NJ 2008, 416 (*Lommerse/Atria*), para 3.31.

335 See Art 2.1.13 in the 2016 edition (‘Conclusion of contract dependent on agreement on specific matters or in a particular form’), which is identical to Art 2.13 in the 1994 edition.

336 Opinion of Procurator General A S Hartkamp, ECLI:NL:PHR:2001:AA9771, preceding the Netherlands Supreme Court, 2 February 2001, ECLI:NL:HR:2001:AA9771, NJ 2001/179 (*Sint Maarten Veterinary Hospital NV/Animal Hospital of the Netherlands Antilles NV*), para 5.

337 See Art 2.1.20 in the 2016 edition (‘surprising terms’), which is identical to Art 2.20 in the 1994 edition.

338 Opinion of AG Spier, ECLI:NL:PHR:2007:BA9610, preceding the Netherlands Supreme Court, 21 September 2007, ECLI:NL:HR:2007:BA9610, NJ 2009, 50 (*Ammerlaan/Enthoven*), para 3.36.1–3.36.3.

339 Interim Award the Netherlands Arbitration Institute 10 February 2005, *Seller (the Netherlands)/Buyer (Italy)* (see Van den Berg (gen ed), ICCA Yearbook Commercial Arbitration, vol 32 (Kluwer Law International 2007) 93106 (hereafter Van den Berg, ICCA Yearbook Commercial Arbitration)).

Article 7(2) of the CISG,<sup>340</sup> made reference to the UNIDROIT Principles, in particular Article 2.19 (1994), which specifically relates to general conditions.<sup>341</sup> The arbitral tribunal ruled that the question of whether or not the general conditions of the seller applied to the disputed contracts had to be assessed in line with the provisions of the CISG and in accordance with the general principles upon which it is based. The tribunal then found that the UNIDROIT Principles were indeed principles within the meaning of Article 7(2) of the CISG. The arbitral tribunal found, however, that Article 2.19 only gave limited guidance as to the issue at stake.<sup>342</sup>

In a different case, which reached the Netherlands Supreme Court in setting aside proceedings (see footnote 326), the arbitral tribunal found that the relevant contracts were governed by, and should be interpreted in accordance with, the UNIDROIT Principles. And, where the principles were silent, also in accordance with general legal rules and principles applicable to international contractual obligations enjoying wide international consensus. From the court judgments in this matter, it can be derived that the arbitral tribunal rendered a decision in relation to the question of whether the relevant claims were time-barred. In its decision, the arbitral tribunal referred to the UNIDROIT Principles, but did not base its decision on them since the relevant 1994 edition of the principles did not contain specific provisions in this respect and because the tribunal did not consider that the 2004 edition, which did contain a provision on limitation periods in Article 10, had achieved 'general consensus'.

In addition to the two examples outlined above, there have been other reported cases where arbitral tribunals seated in the Netherlands have referred to, and also actually applied, the UNIDROIT Principles as the applicable law to the dispute.<sup>343</sup>

## Current knowledge and future use

The UNIDROIT Principles have been the subject of numerous academic articles and debates in the Netherlands, especially in the years following the publication of the first edition in 1994.<sup>344</sup> By way of illustration, a notable Dutch scholar on the UNIDROIT Principles, who was a member of the initial special working group constituted in 1980 for the drafting of the principles, has published extensively on the topic.<sup>345</sup> For example, and in relation to the applicability of the principles, already in the mid-

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340 Art 7 of the CISG reads: '(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'

341 Art 2.19(1) of the 1994 edition of the UNIDROIT Principles reads: 'Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to articles 2.20-2.22.'

342 Instead, in this case, the arbitral tribunal decided to rely on the Principles of European Contract Law, which it also found applicable to the question at hand. In this regard, the arbitral tribunal ruled as follows: 'The [UNIDROIT] Principles only answer the question whether explicit acceptance of a certain clause is necessary and not whether the accepting party had a reasonable possibility to know the content of the conditions and whether good faith entails that the user of the general conditions takes the initiative to offer such a possibility to the accepting party. In order to answer this question support may be found in the Principles of European Contract Law prepared by the Commission on European Contract Law of the European Union, which commission included lawyers from the Netherlands and Italy.' (see Van den Berg, *ICCA Yearbook Commercial Arbitration* (n 24) 93–106).

343 Eg, ICC Case No 14633, Final Award (May 2008), also reported in *Unilex*, case 2114; ICC Case No 13009, Final Award (2006), also reported in *Unilex*, case 1661; Ad hoc arbitration, Partial Award on Merits (March 2010), also reported in *Unilex*, case 1534; Permanent Court of Arbitration Case No 2010-8, Award (December 2010), also reported in *Unilex*, case 1640.

344 Eg, De Ly, 'An interim report regarding the application of the UNIDROIT Principles of International Commercial Contracts in the Netherlands' in W Grosheide and Boele-Woelki (eds), *Europees Privaatrecht* (Molengrafica, Vermande 1998) 6.

345 Eg, S Hartkamp, 'The UNIDROIT Principles for International Commercial Contracts and the new Dutch Civil Code' in CJHB Brunner-bundel (Kluwer 1994) 127–137; A S Hartkamp, 'Principles of Contract Law' (1994) 6131 WPNR 253–254; A S Hartkamp, 'The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law' (1994) 2 *European Review of Private Law* 341–357.

1990s, Dutch academics maintained that the UNIDROIT Principles should be directly applicable to international contracts, arguing that relevant European regulations (such as the Rome I Regulation) should be interpreted (or amended) to allow for such option.<sup>346</sup> Other scholars, however, took a more restrictive approach arguing that national laws were better equipped to deal with international commercial contracts.<sup>347</sup> On various occasions, the UNIDROIT Principles have also been discussed in relation to the Principles of European Contract Law.<sup>348</sup>

More recent literature and information about the use of the UNIDROIT Principles in the Netherlands, however, is less abundant. Among the authors commenting on this issue, some have maintained that the principles, although popular, do not yet occupy a prominent position and that, in practice, they play a limited role.<sup>349</sup> Others have argued that, even though it was the hope of the drafters of the principles to see them being declared applicable to contracts, such expectations have not been met in practice.<sup>350</sup> Recently, authors have also pointed at a perceived lack of attention that the UNIDROIT Principles have received in the Netherlands.<sup>351</sup> Nonetheless, there is reason to believe that the principles will become more relevant in years to come. Dutch authors not only see the UNIDROIT Principles as a potential example for national legislators, but also mention that international legislators can find a basis in the UNIDROIT Principles when issuing new regulations.<sup>352</sup> Dutch scholars have further identified a number of important functions that the principles can fulfil, from serving as a guideline to parties negotiating a contract in order to recognise potential issues and find rules to solve them, to encouraging the trend towards the construction of a *ius commune Europae*.<sup>353</sup>

In this vein, one of the most authoritative voices in the Netherlands on the topic of the UNIDROIT Principles also explains that judges can derive inspiration from the principles when interpreting uniform law. The author further suggests that the UNIDROIT Principles can inspire judges and arbitrators in deciding disputes arising from international contracts, not only where the judgment or award must be rendered on the basis of a national law that provides no clear solution, but also when arbitrators, who are not necessarily restricted by the application of a specific national law, are entitled to decide as *amiables compositeurs* or to render an award *ex aequo et bono* or on the basis of general

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346 Cf Boele-Woelki, *Principles en IPR. Enkele beschouwingen over de toepassing van de UNIDROIT Principles of International Commercial Contracts en de Principles of European Contract Law op internationale overeenkomsten (oratie)* (Vermande 1995). See also in support of this position: Strikwerda, 'Kroniek van het internationaal privaatrecht' (1996) 11 NJB 411.

347 Eg, V Polak, 'Principles en IPR: geen broodnodig en pasklaar alternatief "recht"' (1996) 6225 WPNR 391–392. Also reported by De Ly in his 1998 interim report (cf F De Ly, 'An interim report regarding the application of the UNIDROIT Principles' (n 29) 9).

348 Eg, Wessels, 'Enkele opmerkingen over de betekenis van de UNIDROIT Principles of International Commercial Contracts en de Principles of European Contract Law in de adviespraktijk' (1996) 3 NTBR 75–76; also Busch and EH Hondius, 'Een nieuw contractenrecht voor Europa: de Principles of European Contract Law vanuit Nederlands perspectief' (2000) 16 NJB 837, 839–840.

349 Cf Schelhaas, 'Optioneel internationaal contractenrecht' (n 6) 28–29.

350 Cf F de Vries, *De overeenkomst in het algemeen* (Monografiën BW, deel B54, Kluwer 2016) 30.

351 eg, R Verkerk and Verkijk, 'Principles of transnational civil procedure, vanuit een Nederlands perspectief' (2006) 30 NTBR section 4, in which the authors did not only point out the lack of attention given to the UNIDROIT Principles, but also appeal for such situation to change.

352 See Asser/Hartkamp, *Europees recht* (n 6) para 302.

353 See S Hartkamp, 'Principles of Contract Law' in S Hartkamp et al (eds), *Towards a European Civil Code* (Kluwer Law International 2011) 243–246.

principles of law or the *lex mercatoria*.<sup>354</sup> This country perspective of the application of the UNIDROIT Principles in court and arbitral proceedings provide pertinent illustrations thereof.

Unfortunately, no specific information is available as to whether the UNIDROIT Principles are often taken as a reference in the drafting of international commercial contracts in the Netherlands. In the authors' experience, however, Dutch lawyers working with parties from different legal systems, frequently clarify legal ambiguities by making references to the UNIDROIT Principles as a benchmark. Moreover, the references made to the UNIDROIT Principles by Dutch courts and arbitral tribunals, either as guidance or by way of comparison, and the support that the principles have found in authoritative Dutch commentary are all reasons to be rather optimistic about a more widespread use of the principles in the future.

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354 See Asser/Hartkamp, *Europees recht* (n 6) para 302. On the issue of arbitral tribunals applying non-national bodies of law, see also Sanders, *Het Nederlandse arbitragerecht* (n 8) 145, where the author addressed the *Pabalk/Norsolor* case (ICC arbitral award of 26 October 1979, No 3131, published in ICCA Yearbook 1984, 109 et seq.) as one of the first cases in which arbitrators, in the absence of sufficiently compelling reasons to choose between Turkish or French law, decided to apply the international *lex mercatoria*. The author stressed that arbitrators may apply the *lex mercatoria* and also the UNIDROIT Principles of International Commercial Contracts not only when they may decide as *amiable compositeurs*, but also when they need to decide the dispute according to the rules of law, as is shown by the *Pabalk/Norsolor* case.

# Norway

*Jan Einar Barbo, Øystein Myre Bremset and Fredrik Backer*

## The applicability of the UNIDROIT Principles in Norway

### *Use of the UNIDROIT Principles in court*

Norway is a civil law jurisdiction with some modifications. Some legal scholars have used the expression ‘Scandinavian legal system’, as decisions of the courts are not binding but are regularly used as an important source of law. Norway is not a member of the EU. Therefore, Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (the ‘Rome I Regulation’), which explicitly in Recital no 13 permits incorporation of a non-state body of law, does not apply.

In Norway, most of the rules regulating ‘choice of law’ are non-statutory. However, The Norway Choice of Law Act 1964 (kjøpslovsvalgsloven) concerning international private law rules for sales of goods (the ‘1964 Act’) which is based on the Convention on the Law Applicable to International Sales of Goods, The Hague, 1955 (the ‘Convention’), regulates the choice of law in international sales of goods. Article 2 of the Convention states that ‘A sale shall be governed by the domestic law of the country designated by the contracting parties’. The wording in the 1964 Act, section 3 is similar, and as opposed to Rome I Regulation, it does not explicitly permit the incorporation of a non-state body of law, as the sale has to be governed by the domestic law of a country.

Even if the 1964 Act does not explicitly permit the incorporation of a non-state body of law such as the UNIDROIT Principles, there is not a large material difference between the Rome I Regulation and the 1964 Act, as Norwegian contract law, for the most part, is non-mandatory. Therefore, the parties may implement the UNIDROIT Principles into their contract, and this regulation will be enforceable in court as long as it is not contrary to any mandatory Norwegian law. Similarly, the Rome I Regulation states that the parties may incorporate the UNIDROIT Principles, but Article 3, section 1 requires that the state law is the contract law, and the UNIDROIT Principles will apply as long as they are not contrary to the state law.

### *Use of the UNIDROIT Principles in arbitration*

The 2004 Norwegian Arbitration Act (the ‘2004 Act’) (voldgiftsloven) is based on the UNCITRAL Model Law, including its Article 28. Section 31 of the 2004 Act states that an arbitral tribunal shall apply the ‘rules of law’ as the parties have chosen. ‘Rules of law’ does not make reference to the domestic law of a country, but any law that the parties have agreed to use, for example, *lex mercatoria* or the UNIDROIT Principles. This implies that if the parties have chosen the UNIDROIT Principles to govern their contract, then they will prevail over Norwegian contract law.

## Application of the UNIDROIT Principles in Norway

### *Use by courts*

A search in Norwegian legal databases has revealed that there are no cases (available in the databases) where the UNIDROIT Principles was directly applicable. However, the courts have used the UNIDROIT Principles both to support their arguments and as a supplement to Norwegian law, for example, the courts have ruled in favour of one interpretation of the law in conformity with the UNIDROIT Principles as opposed to another interpretation that did not conform to them.

One of the cases where the UNIDROIT Principles have been used to support the court's arguments was in a case before the Supreme Court in 2014 (Rt 2014 s 100). In this case, two parties had entered into negotiations for the purchase of the majority of shares in a Swedish company. At the opening of the negotiations, the Norwegian buyer had made a reservation that neither party could make a claim against the other party if the negotiations did not lead to a signed agreement. After completion of the negotiations, the buyer declined to sign the agreement with reference to the reservation. The Supreme Court ruled that the reservation should be understood as a binding precondition, whereby the parties' signature was a condition precedent for a purchase agreement to have been reached. The buyer could thus refuse to sign the agreement without giving any further reasons. The Supreme Court used the UNIDROIT Principles to interpret and supplement Norwegian law, with regard to the question of whether the reservation could be interpreted in a case where no valid agreement was made before both parties had signed the agreement. The Supreme Court pointed out that, in this context, reservations of this character are not specific to Norway, and referred to a similar provision in Article 2.1.13 of the UNIDROIT Principles (2010).

### *Use by arbitration tribunals*

As most arbitration awards are not published, it is difficult to assess whether the UNIDROIT Principles are applied by arbitration tribunals. However, the search revealed that at least one case exists where a tribunal used the UNIDROIT Principles to interpret and supplement Norwegian law. The case was decided on 8 January 2010 by an ad hoc tribunal (ND-2010-69), and the main question in the case concerned a shipyard's right to substitute a hull with another hull after the construction of the hull had begun. The arbitral tribunal ruled that such substitution could not take place without the consent of the buyer, and that this was established both by Norwegian law, and in international law. The tribunal stated that the statement made by the seller, that the specific hull that was under construction would not be delivered, was sufficient to establish anticipatory delay, in accordance with Norwegian law, and that Norwegian law was consistent with international law, Article 7.3.3 of the UNIDROIT Principles.

### *Use by lawyers*

Most of the cases found in the Norwegian legal databases where the UNIDROIT Principles have been applied, are cases where one of the lawyers has argued for an interpretation in conformity with the UNIDROIT Principles as opposed to another interpretation. One of the cases was argued before the Supreme Court in 2008 (Rt 2008 s 969). In this case a salmon breeder had entered into a framework

agreement for the delivery of smolt to its fish farm. The smolt breeder subsequently leased out its production facility and simultaneously transferred the obligation for the delivery of smolt. The salmon breeder received smolt from the new company, but when this company had problems with the smolt deliveries after two years, the salmon breeder required fulfilment from the original smolt breeder. The salmon breeder's lawyer argued among other things that the original smolt breeder could not be free of its obligation to fulfil the agreement unless the salmon breeder had explicitly accepted the transfer of obligations and that this principle was consistent with international principles in the UNIDROIT Principles. The Supreme Court found that the salmon breeder had accepted the change of debtor through their conduct and that the original smolt breeder no longer had a delivery obligation under the framework agreement. The salmon breeder's lawyer did not point to any specific article, merely the general principles in the UNIDROIT Principles. The most applicable principles in the UNIDROIT Principles would be Articles 2.1.6 and 9.2.3.

### *Use, knowledge and the future of UNIDROIT Principles*

In general, the UNIDROIT Principles are not frequently used in Norway. However, knowledge of the UNIDROIT Principles is increasing, especially among younger lawyers, as some of the most important text books on contract law, for example, *Obligasjonsrett* by Viggo Hagstrøm (2nd edition, 2011) emphasises the relevance of the UNIDROIT Principles and compares them with Norwegian contract principles. Norwegian lawyers are therefore getting more acquainted with the UNIDROIT Principles. This might also explain recent developments in the use of the principles. A search of Norwegian legal databases reveals 21 court cases where the UNIDROIT Principles are mentioned. The oldest was decided in 2003. It would therefore seem like the UNIDROIT Principles are more relevant as a source of law now than in the past and, as explained above, even the Supreme Court has used the UNIDROIT Principles in its reasoning.

# Paraguay

*Sigfrido Gross Brown and Pablo Debuchy*<sup>355</sup>

## Applicability of the UNIDROIT Principles in Paraguay

Paraguay is a civil law jurisdiction. Its legal system does not follow the *stare decisis* doctrine, and as such, previous judicial decisions are not binding, albeit being regularly used as a source of law.

Law No 1,183/85, the Paraguayan Civil Code expressly requires judges to apply general principles of law as a supplementary source for their decisions, in case of silence of the law and absence of provisions in regulating similar matters.

Paraguay has recently enacted Law No 5,393/2015 on choice of law applicable to international contracts (the ‘Choice of Law Act’). This legal instrument adapts The Hague Principles on Choice of Law in International Commercial Contracts and recognises parties’ autonomy to select the substantial law applicable to their contractual relations. Paraguay is the first country to implement these principles into a domestic body of law, which enhances the increasing trend of its legal system towards globalisation.

The Choice of Law Act applies to the choice of law in international contracts when parties act within the scope of their businesses or professions. Consumer, labour, franchise, representation, agency and distribution contracts are expressly excluded. As to the international nature of contracts, the act admits the broadest possible interpretation, thus excluding only those in which all relevant elements are linked only to one state. Article 5 of the act expressly recognises the validity of the parties’ choice of non-state law, generally accepted as a neutral and balanced set of rules.

### *By the courts*

Accordingly, the application ex-officio by local practitioners of provisions of a non-state body of law such as the UNIDROIT Principles are generally accepted as a supplement to state law. However, when parties choose the UNIDROIT Principles as the body of law applicable to their international contracts, local courts are bound to apply them. The sole exception admitted under the Choice of Law Act is when the chosen law collides with overriding mandatory provisions of local law, in which case courts shall apply the latter irrespective of the law chosen by the parties.

### *By arbitral tribunals*

The Paraguayan Arbitration Law No 1879/2002 (the ‘Arbitration Act’) is an almost verbatim adoption of the 1985 UNCITRAL Model Law. In this sense, Article 32 of the Arbitration Act establishes that arbitral tribunal shall decide the dispute in accordance with the ‘rules of law chosen by the parties’ as applicable to the substance of the dispute. ‘Rules of law chosen by the parties’ are not solely referred to the domestic law of a state, but rather to any law that the parties have agreed upon, including the UNIDROIT Principles. Accordingly, arbitral tribunals are bound to apply the UNIDROIT Principles if they have been chosen by the parties as the set of rules applicable to the substance of a dispute.

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## Application of the UNIDROIT Principles in Paraguay

### *By the courts*

The application of the UNIDROIT Principles by local courts has become increasingly frequent over the last decade.<sup>356</sup> The first reported case dates from 2013, in which a Court of Appeal of Asunción invoked the duty of cooperation recognised by the UNIDROIT Principles as implicit within the general duty of good faith set out in the Civil Code.<sup>357</sup>

The case involved a contract for the sale of a parcel of land to be selected by the buyer out of a larger plot of land which belonged to the sellers. Five months after the conclusion of the contract the buyer filed a civil claim requesting the performance of the contract and offering full payment of the purchase price. The sellers filed a counterclaim requesting the termination of the contract. The sellers stated that their obligation to complete the administrative procedures of the division of the land and the procurement of the documents required to enable the transfer of the land within the agreed term had become impossible, as a consequence of the buyer's failure to select the precise portion of land that was to be transferred. Upon rendering a partial annulment of the decision of the first instance court, the Court of Appeal dismissed the buyer's claim and decided in favour of the sellers' counterclaim declaring the termination of the contract.

The Court of Appeal based its decision on the fact that the buyer had a duty of cooperation which it failed to comply with. That is, the duty to communicate to the sellers the portion of land they wished to acquire within a reasonable period of time.

In rendering its decision, the Court of Appeal sustained that the duty of cooperation is derived from the duty of good faith throughout all stages of the contractual relationship, as set out in general terms under Articles 689, 714 and 715 of the Civil Code, which the court complemented with a reference to Article 5.1.3 of the UNIDROIT Principles (2010), and its official explanatory notes.

The UNIDROIT Principles have been consistently used to supplement and reinforce state law provisions ever since. In a reported case in 2013, a Court of Appeal invoked the *contra proferentem* principle as set out in the UNIDROIT Principles to support the interpretation under the Civil Code of the hierarchy of specific contractual terms over standard non-negotiated terms.<sup>358</sup>

The case involved the Paraguayan Customs Office, which filed a civil claim against an insurance company, requesting the payment of the insured sum, which guaranteed unpaid import taxes of merchandise that had entered Paraguay with temporary tax suspension. Among a series of arguments sustained by the respondent, it submitted that the claimant could not seek payment of the insured sum through an expedited procedure. The court sustained that Paraguayan law allowed such procedure when the insurance policy covered import taxes in favour of the Paraguayan Customs and whenever the Paraguayan Customs met any pre-established conditions set out in the insurance policy.

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356 Since 2013, there have been 19 reported cases available on the UNILEX database [www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13619&x=1](http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13619&x=1) accessed 12 November 2019.

357 *Ramon Duarte Torres v José Manuel Acevedo Oviedo* (2013), Sixth Court of Appeal of Asunción, Decision No 11. Full text (in Spanish) available at [www.unilex.info/case.cfm?pid=2&do=case&id=1692&step=FullText](http://www.unilex.info/case.cfm?pid=2&do=case&id=1692&step=FullText)

358 *Dirección Nacional de Aduanas v El Comercio Paraguayo SA de Seguros Generales* (2013), Sixth Court of Appeal of Asunción. Decision No 18. Full text (in Spanish) available at [www.unilex.info/case.cfm?pid=2&do=case&id=1696&step=FullText](http://www.unilex.info/case.cfm?pid=2&do=case&id=1696&step=FullText)

In order to determine what conditions had to be fulfilled by the Paraguayan Customs under the insurance policy, the Court of Appeal established that the policy terms required adequate interpretation. First, the Court of Appeal noted that the policy contained both standard and non-standard terms and it sustained that the latter prevailed over the former, with an explicit reference to Article 2.1.21 of the UNIDROIT Principles (2010). Furthermore, the court established that the standard terms in the insurance policy also had diverse hierarchy. It considered that the so-called ‘particular and specific terms’ prevailed over the ‘particular terms’ and the latter over the so-called ‘general terms’. In ascertaining this principle the Court of Appeal, referred to the official commentary of Article 4.4 of the UNIDROIT Principles (2010), which sustains that the parties may themselves expressly establish a hierarchy among the different provisions or parts of their contract.

After establishing the hierarchy of the terms of the insurance policy, the Court of Appeal determined that the pre-conditions that the Paraguayan Customs had to meet, in order to seek payment by way of an expedited procedure, were established in the ‘particular and specific terms’. The court noted, however, that under the ‘particular and specific terms’ there was one clause that required two pre-conditions and another clause that required only one of the two pre-conditions contained in the other clause. The court understood that these standard terms were ambiguous and should be interpreted *contra proferentem*, as implicitly admitted under the Civil Code, with a reference to Article 4.6 of the UNIDROIT Principles (2010) for interpretation purposes.

In another relevant decision in 2014, a Court of Appeal invoked the *venire contra factum proprium* principle under the UNIDROIT Principles to sustain that an administrative decision made by a government office refusing to receive payment for a land adjudication, on the basis of an alleged reversal of the decision adjudicating the land for the originally agreed price, was contrary to the duty of good faith under the Civil Code.<sup>359</sup>

The case involved a Paraguayan citizen, who filed a civil claim against the governmental institution on land issues, regarding payment of a land adjudication made in his favour by a decision of the President of the said institution. The institution refused to receive the payment because it afterwards reversed the decision and established a new and higher price for the adjudicated land.

Among several arguments sustained by the Court of Appeal regarding the invalidity of the second decision made by the institution, it indicated that it was contrary to the good faith that the institution first stated one price and later refused to recognise the fixed amount. The opinion states that the institution cannot rely on a new President’s pronouncement disregarding the former decision on the *venire contra factum proprium* principle established by Article 1.8 of the UNIDROIT Principles (2010), citing also other Articles, such as 1.7, 2.1.4(2) (b), 2.1.18, 2.1.20, 2.2.5(2) and 10.4.

The applicability of the UNIDROIT Principles, regardless of their non-binding nature, has been frequently sustained by local courts by referring to them as ‘a set of principles widely accepted in international commercial law, which offer uniform solutions to legal problems, and which serve as an instrument that allows to interpret and supplement national law’.

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359 *Jose Luis Andres Manzoni Wasmosy v Indert* (2014), Third Court of Appeal of Asunción. Decision No 95. Full text (in Spanish) available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=1866&step=FullText> accessed 12 November 2019.

This is the case, for instance, in a decision of the Court of Appeal issued in 2015.<sup>360</sup> Two Paraguayan siblings concluded a contract for the transfer of a property from defendant, the sister, to claimant, the brother. A dispute arose when the claimant accused the defendant of non-performance of the contract by refusing to grant a public deed necessary to comply with the legal formalities required for an effective transfer of the property. The defendant objected that only the last page of the three pages of the sales contract presented by the claimant had been signed, and that the entire contract was falsified and therefore invalid. However, subsequently she recognised the signature written on the last page as her own. The Court of Appeal noted an inconsistency in the defendant's behaviour and found that the burden of proof regarding the alleged falsification of the contract was on defendant since she was in a better position to demonstrate that, even though the last page of the contract presented by the claimant was authentic, the first two were not. According to the court, this also followed from with the general duty of cooperation existing between the parties as laid down in Article 5.1.3 of the UNIDROIT Principles (2010).

In the last few years, an important milestone has been reference to the UNIDROIT Principles by the Supreme Court of Justice, the highest jurisdictional authority in Paraguay. The first reported case dates to 2016, which involved claimant, a Paraguayan cookery expert, who entered into a contract with defendant, a Paraguayan film producer, by which she accepted to participate in her capacity as a cookery expert in a television series produced by the latter. In the course of performance of the contract, the claimant complained that the defendant did not provide safe working conditions on the set, prompting the defendant to terminate the contract. The claimant objected that the termination was unlawful and claimed damages for defendant's failure to fulfil its implied obligation of security on the set. In its decision, the Supreme Court referred to the implied contractual obligations set out in Articles 5.1.1 and 5.1.2 of the UNIDROIT Principles (2010). To sustain that the ancillary duties of conduct in a contract, resulting from the application of the duty of good faith under the Civil Code, are extended in favour of both the contracting parties and third parties to the contract, when the breach of a contractual obligation might constitute a direct and immediate cause for damages.<sup>361</sup>

From time to time local courts rely on the UNIDROIT Principles to supplement state law provisions. Nevertheless, there are no reported cases to date (available in databases) in which local courts have applied the UNIDROIT Principles as the mandatory set of rules to a certain contract based on the parties' choice as per the Choice of Law Act.

### *By arbitral tribunals*

No reported case law has been identified, since there are no databases available for the search of arbitral awards, and it is common practice for parties to agree on confidentiality of proceedings both in ad hoc and institutional arbitration.

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<sup>360</sup> *Jorge Moises Etcheverry Alí v Rosa María Ramona Etcheverry de Brizuela* (2015), Sixth Court of Appeal of Asunción. Decision No 62. Full text (in Spanish) available at [www.unilex.info/case.cfm?pid=2&do=case&id=1971&step=FullText](http://www.unilex.info/case.cfm?pid=2&do=case&id=1971&step=FullText) accessed 12 November 2019.

<sup>361</sup> *Sara Garófalo Benza v Alejandro Mainero Maivolo & Dena SA* (2016), Supreme Court of Justice, Civil and Commercial Chamber. Decision No 1478. Full text (in Spanish) available at [www.unilex.info/case.cfm?pid=2&do=case&id=2030&step=FullText](http://www.unilex.info/case.cfm?pid=2&do=case&id=2030&step=FullText) 12 November 2019.

## *By local lawyers*

There is relevant case law of the Supreme Court showing that local lawyers utilise the UNIDROIT Principles as a source or part of their arguments, as a supplement to state law. The most recent reported case is from 2017, in which the defendant argued that the appealed judgment was null and void, since it referred to the UNIDROIT Principles, a non-binding set of rules that cannot modify state law. The claimant argued that reference to the UNIDROIT Principles in the appealed judgment was for the sole purpose of emphasising the implied duty of cooperation within the general duty of good faith set out in the Civil Code, and as such the UNIDROIT Principles served as a supplement to state law.<sup>362</sup>

There are, however no reported cases to date that show local lawyers are advising clients to agree to the UNIDROIT Principles as primary source of law in their contracts as admitted under the Choice of Law Act and the Arbitration Act.

## **Use and level of knowledge of the UNIDROIT Principles in Paraguay**

The use of the UNIDROIT Principles is becoming more frequent in Paraguay, especially among young professionals.

One of the main factors for this development is the growing participation of local scholars and professionals in the works of UNIDROIT. In turn, this has resulted in a growing amount of local literature and research on the use of the UNIDROIT Principles as a state-of-the-art set of rules that could supplement, or even serve as the basis for amendments in the Civil Code.

Another important boost for the UNIDROIT Principles in recent years has been the involvement of local universities in international moot court competitions (eg, the Willem C Vis International Commercial Arbitration Moot), where the UNIDROIT Principles are generally used as a main source of law. This has had a multiplier effect, since there are a growing number of academic institutions incorporating the UNIDROIT Principles as part of their syllabus in contract law and private international law.

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<sup>362</sup> Supreme Court of Justice, Civil and Commercial Chamber, Decision No 238, 27 March 2017.

# Poland

*Tomasz Wardyński and Karolina Przygoda*<sup>363</sup>

In Poland, the UNIDROIT Principles can be used against the background of conflict of law rules ensuing from Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) and arbitration law largely based on the UNCITRAL Model Law. Poland is a civil law jurisdiction where the framework for application of UNIDROIT Principles is similar to that in most other EU Member States.

## Applicability of the UNIDROIT Principles in Poland

### *In state courts*

Polish state courts apply state law specified by the conflict-of-law rules or by a contract. This was clearly explained by the Polish Supreme Court in one of its judgments: ‘[private codification] provisions, [such] as UNIDROIT principles... cannot be relevant for the state court which rules on the basis of law.’<sup>364</sup> The applicable law ensues from the conflict of law rules or the parties’ choice. With respect to the latter, under Article 3.1 of Rome I, only state law can be chosen as the law governing a contract. If non-state rules, such as the UNIDROIT Principles, are specified in a contract as governing law, such a choice would not be enforced by Polish courts.

However, Recital 13 of Rome I explicitly allows the incorporation of the non-state law into cross-border contracts by way of incorporation by reference. This does not amount to a choice of applicable law but merely means that the parties refer to a certain body of rules such as the UNIDROIT Principles, which then become part of the contract. In such case, the UNIDROIT Principles are applicable, but they are not treated as law, but as contractual provisions. The validity of such an incorporation by reference is always assessed in the light of the law otherwise applicable to the contract.

Under Polish law, such an incorporation is valid as long as the incorporated norms, that is, the UNIDROIT Principles do not conflict with the peremptory norms of Polish law. The incorporation can only take place within the limits of mandatory provisions of otherwise applicable provisions of state-law, so the parties cannot derogate from *ius cogens*.

### *In Polish-seated arbitration*

The regulations regarding the applicability of non-state rules, such as UNIDROIT Principles, are more flexible in arbitral proceedings.

Generally, arbitral tribunals decide based on applicable state law. However, if expressly authorised by the parties, they can resolve disputes based on so-called general principles of law (*ogólne zasady*

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<sup>363</sup> Tomasz Wardyński and Karolina Przygoda, Wardyński and Partners.

<sup>364</sup> Judgment of Polish Supreme Court, 9 October 2008 (case No V CSK 63/08). Translations of a few excerpts from the judgment can be found under Art 7.4.9 of the UNIDROIT Principles in the Compiled summaries of selected cases section of this book.

*prawa* in Polish) or equitable rules (*zasady słuszności*). This follows directly from the Polish Code of Civil Procedure and is included in the rules of two leading Polish arbitral institutions: the Court of Arbitration at the National Chamber of Commerce and the Court of Arbitration at the Confederation of Lewiatan. Such authorisation can be included in the arbitration clause or made during the arbitral proceedings, for instance, in the terms of reference.

The notion of ‘general principles of law’ refers to well established, internationally accepted legal principles or concepts such as the obligation to act in good faith, principles of *rebus sic stantibus* or *pacta sunt servanda*. The term ‘equitable rules’ is interpreted in various ways but is generally considered to encompass the values such as fairness and the parties’ joint interests. Adjudication based on equitable rules is usually tantamount to deciding *ex aequo et bono* and *as amiable compositeurs*, although some authors point towards differences between the two concepts.

Therefore, the tribunal can apply the UNIDROIT Principles if the parties requested that the general principles of law apply to the dispute, and the tribunal considers those to be enshrined, at least to some extent, in the UNIDROIT Principles. Legal scholars have also suggested that in exercising their right to have a dispute settled based on general principles of law, the parties can specifically request the tribunal to apply a compilation of rules such as the UNIDROIT Principles. They are seen as an embodiment of general provisions, clarifying their application in particular situations.

If the parties do not explicitly request that general principles of law or, for example, UNIDROIT Principles apply to their dispute, the arbitral tribunal cannot base its decision on the UNIDROIT Principles and must apply the applicable national law determined on the basis of the contract and/or the conflict of law rules.

Stricter rules apply to disputes involving consumers. In such cases, the general principles of law, for example, those enshrined in UNIDROIT Principles, can be applied, but only as far they do not deprive the consumer of the protection afforded to them by mandatory provisions of a national law applicable to the given legal relationship.

## Application of the UNIDROIT Principles in Poland

### *In state courts*

There appears to be no Polish reported case law regarding contracts into which the UNIDROIT Principles have been incorporated by reference by the parties.

In certain rare instances, the courts *do* refer to the UNIDROIT Principles, but only as a side note or in order to reinforce their interpretation of contentious issues made under Polish law. Translations of a few excerpts from Polish Supreme Court judgments as can be found in the Compiled Summaries, section 2 in this book.<sup>365</sup> In these cases the UNIDROIT Principles were not a basis for the decision, but were merely used as an additional argument, for instance to show that the advocated or applied interpretation is in line with international instruments. UNIDROIT Principles are therefore not treated as a source of law but as an element in the comparative study. Judges draw on particular

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<sup>365</sup> Compiled summaries cases XI, 6 under Art 7.4.2 , XVIII , 4 under Art 7.4.9 , XX, 2 under Art 7.4.13 and I, 1 under Art 9.1.13 of the UNIDROIT Principles.

solutions included in the UNIDROIT Principles to reinforce their argument, especially if there appear to be no sufficiently clear or satisfying solutions in the applicable law. In this sense, it seems fair to say that the solutions included in the UNIDROIT Principles are seen as being of high quality and expressing generally accepted rules. They are, nevertheless, only one of several compilations of legal rules that judges refer to in their analysis, the other popular one being the Principles of European Contract Law.

### *In Polish-seated arbitration*

Due to the default confidentiality of arbitral proceedings of most Polish institutions, most arbitral awards of Polish arbitral institutions are not publicly available. There appear to be no published awards that would rely on the UNIDROIT Principles or even use them as an element of legal argumentation.

Nevertheless, in practice, it is not uncommon for counsel to refer to UNIDROIT Principles in arbitral proceedings as an element of the parties' legal argument, to interpret or supplement the provisions that are at stake. This is especially frequent and, even desirable, if the parties requested that the tribunal decide as *amiable compositeur* or *ex aequo et bono*. In such cases, invoking and discussing specific solutions provided by the UNIDROIT Principles is seen as good practice.

The reference to UNIDROIT Principles is more frequent in international disputes and in cases where the parties refer to *lex mercatoria*, trade customs and similar concepts. Although requests for decisions as *amiable compositeur* or *ex aequo et bono* tend to be made at the beginning of arbitral proceedings, specific reference to UNIDROIT Principles, or other non-state bodies of law, is usually made at a later stage of the proceedings, when presenting a more elaborate legal argument and usually concerns specific provisions included in the UNIDROIT Principles, rather than the principles in their entirety. We are aware of arbitrations where counsel referred to provisions of the UNIDROIT Principles such as those interfering with conditions, good faith or fair dealing.

Importantly, two factors limit the application of UNIDROIT Principles by arbitral tribunals, both in cases involving and not involving consumers.

First, regardless of the content of the UNIDROIT Principles, the tribunal must consider the provisions of an agreement and established customs applicable to a given legal relationship.

Second, the tribunal can only apply the UNIDROIT Principles provided they do not contradict the so-called rules of public order. The latter are understood as general rules concerning the social and economic order of the state, enshrined in the Constitution, and overriding rules of particular branches of the law otherwise applying to the merits of the dispute. Breach of the rules of Polish public order by the arbitral tribunal constitutes grounds to set aside an arbitral award.

What this means in practice is that if a tribunal applies solutions included in the UNIDROIT Principles, its decision must comply with Polish public order rules and have regard for the agreement (if any) and relevant legal customs. In the case of the UNIDROIT Principles, it does not appear plausible that they would be deemed to contradict Polish public order rules, however in theory this cannot be ruled out.

## **Knowledge and use of the UNIDROIT Principles in Poland**

The UNIDROIT Principles are present in the academic debate and in the mindset of lawyers dealing with international disputes, particularly arbitration. They are seen as containing high-quality solutions and are commonly referred to in legal argument, especially in the course of a comparative analysis. It is not, however, common to invoke the UNIDROIT Principles directly into contracts or use the solutions they provide in the course of negotiations.

Poland's legal profession is becoming gradually more aware of foreign and international law. The greater awareness of, and potentially use of, the UNIDROIT Principles comes hand-in-hand with this.

# Romania

*Sorina Olaru*<sup>366</sup>

We have not been able to identify Romanian jurisprudence concerning the 2016 edition of the UNIDROIT Principles. However, as noted in its introduction, this latest edition is not a revision of the previous one, but merely a marginal alteration. We therefore consider the cases we will reference are of current relevance.

## Application of the UNIDROIT Principles in Romania

The UNIDROIT Principles can be applied in Romania either due to directly provide governing contractual rules, or to indirectly influence the applicable governing norms. This can be take place on several grounds.

The Preamble of the UNIDROIT Principles represents a starting point for identifying the different ways in which the principles can apply in a particular legal system. It states both the instrument's purpose, as well as the different circumstances in which the principles may apply. Accordingly, it can be argued that the UNIDROIT Principles can be applied to the Romanian legal system in the instances presented below.

### *At the expressed agreement of the parties*

The parties to a contract may expressly designate the UNIDROIT Principles as the governing body of substantive rules of the contract (or in other roles, such as those found in the Model Clauses for the use of the UNIDROIT Principles). The Preamble of the UNIDROIT Principles refers to the parties' option of applying them exclusively or in conjunction with a national law. However, in Romania's legal system, pursuant to Article 3 of EU Regulation No 593/2008 (Rome I), it is a mandatory requirement to chose a national law, as opposed to solely a soft law instrument. Therefore, the UNIDROIT Principles may not be applied exclusively by a national court. The drafters of the Rome I explored the option of extending the range of choices to exclusively applying instruments such as the UNIDROIT Principles, but ended up not adopting that approach.<sup>367</sup>

However, clarification No 13 in the Rome I's Preamble does allow the parties to incorporate by contractual reference a non-state body of law. Therefore, the UNIDROIT Principles may be applied as contractual clauses. Consequently, as also stated in Article 1.4 of the UNIDROIT Principles, they are applicable to the extent that they do not conflict with the mandatory provisions of Romanian law, or other national law that may be applicable pursuant to conflict of laws rules. This view has also been confirmed by Romania's legal scholars.<sup>368</sup>

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<sup>367</sup> Heiss, *Part Autonomy* in Franco Ferrari, Stefan Leible, *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, Sellier, 2009, pp 9–12.

<sup>368</sup> Deleanu, *Semnificații și Implicații ale Clauzelor Standard privind Utilizarea de către Părți a Principiilor UNIDROIT Aplicabile Contractelor Comerciale Internaționale* ('Significance and implications of the Model Clauses for the use of the UNIDROIT Principles of International Commercial Contracts'), in *Revista Română de Drept Privat* 6 din 2014.

## Under the Romanian Civil Code

The Romanian Civil Code<sup>369</sup> provides the following sources of Romania's civil law under Article 1(1): law, usages and general principles of law. Romania's legal scholars have recognised that this provision accords usages the vocation of being a primary source of law.<sup>370</sup>

In this regard, the Civil Code's Article 1(2) states that when the law is silent, usages shall provide the governing rule. Furthermore, pursuant to Article 1(3), when the law is not silent on a particular issue, usages may be applied only if the law itself expressly states so. However, it has been noted that even when the law is not silent, nor does it expressly reference usages, certain usages that should be viewed as implied contractual clauses will still be applicable.<sup>371</sup> Moreover, Article 1.268(2) of the Romanian Civil Code expressly states that vague contractual clauses shall be interpreted according to, inter alia, usages. Legal scholars in Romania have called this category of usages 'interpretive'.<sup>372</sup>

The UNIDROIT Principles have been regarded in international practice as representing international trade practises.<sup>373</sup> To the extent that the principles could also be regarded as representing local trade usages in Romania, Article 1 of the Civil Code could serve as legal grounds for applying the principles.

Moreover, it has been stated in Romanian legal literature that local practices could become part of the *lex mercatoria*, analysed below.<sup>374</sup> The role of the UNIDROIT Principles as *lex mercatoria* is expressly mentioned in the Preamble. Consequently, article 1 of the Romanian Civil Code can be applied jointly with the Preamble of the UNIDROIT Principles.

## As the *lex mercatoria*

The UNIDROIT Principles can also be applied in their role as *lex mercatoria* when the parties contractually incorporate them by using terms such as 'general principles of law' or 'international trade practices'. Such references could be construed by Romania's courts or arbitral tribunals as referring to the principles, rendering them applicable in certain cases.

However, Romanian legal scholars<sup>375</sup> have emphasised that a contract needs at least one national law to govern it. Therefore, it was considered that the UNIDROIT Principles cannot serve as the sole governing body of rules in this instance either, when being applied by a national court. Their application by arbitral tribunals is analysed below.

This stops being an issue when the CISG is applicable because the CISG is constitutionally regarded as part of the Romanian legal system. Pursuant to Article 9(2) of CISG, the parties are considered

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369 Enacted in 2011

370 F Popa, *Ierarhia surselor în noul Cod civil – rolul uzanțelor*, ('Hierarchy of sources in the new Civil Code – the role of usages'), in *Revista Română de Drept Privat* 3 din 2013.

371 *Ibid.*

372 *Ibid.*

373 ICC Arbitration, case No 9333, October 1998.

374 See n 368.

375 See, eg, T R Popescu, *Drept Internațional Privat* ('Private International Law'), Romfel, Bucharest, 1994, pp 187–191; N Costin, S Deleanu, *Dreptul Comerțului Internațional. Partea Specială* ('International Commercial law, Special Part'), Vol II, Lumina Lex, Bucharest, 1995, pp 45–52; G Buzan, *Principiul lex voluntatis și lex mercatoria universalis – aspecte de drept comparat* ('The principle of *lex voluntatis* and *lex mercatoria universalis* – comparative law aspects'), in *Revista de Drept Comercial* 3/2000, pp 58–71.

to have implied incorporation in their contract international trade practices. As stated above, the UNIDROIT Principles have been considered in practice to represent such practices.<sup>376</sup>

It is important to note, however, that it is controversial whether or not the UNIDROIT Principles truly represent the *lex mercatoria*. The view that they are not (at least not in their entirety) has also been expressed by esteemed Romanian legal scholars.<sup>377</sup> Therefore, a Romanian court or arbitral tribunal would first have to settle this controversy.

### *By arbitral tribunals*

The UNIDROIT Principles can be applied by arbitral tribunals, in absence of an express choice by the parties. Unlike Romanian courts, which are bound to apply the law of a particular national legal system, international arbitral tribunals have a greater freedom in applying the rules they deem most fit to a particular case. With regards to international arbitrations seated in Romania, Article 1.120(1) of the Romanian Code of Civil Procedure provides that if the parties have not chosen the applicable law, the tribunal shall apply the law it deems most appropriate and shall always take into account usages and other professional rules.

A similar provision was recently included in Article 30(2) of the Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania,<sup>378</sup> which states that if the dispute is international and the parties did not choose the governing law themselves, the tribunal shall decide the matter on the basis of the law or other legal norms that it considers appropriate.

Therefore, in international arbitration cases seated in Romania, the UNIDROIT Principles may be applied by tribunals as usages under Article 1.120(1). Moreover, in arbitrations governed by the Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania, the tribunal is not bound to apply a particular national law, and it could directly apply the UNIDROIT Principles.

### *To interpret or supplement international law instruments*

The UNIDROIT Principles can be applied to interpret or supplement international law instruments. Historically, state courts have used national laws to interpret or supplement international law instruments when these contained gaps. Most international instruments contain specific mechanisms to fill such gaps, for example, Article 7(2) of CISG, which requires decision makers to fill the gaps using international principles before looking at conflict of laws rules. Therefore, the UNIDROIT Principles may be applied by Romanian courts and arbitral tribunals to solve issues not dealt with by other applicable international instruments.

However, it is debatable as to whether the UNIDROIT Principles truly represent the principles to which Article 7(2) of CISG refers, with high-profile international and Romanian legal scholars stating

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376 See n 370 above.

377 See n 368 above.

378 In force as of 1 January 2018.

that they do not.<sup>379</sup> It is important to note, however, that the view favouring the use of the UNIDROIT Principles to supplement CISG pursuant to Article 7(2), as well as other international instruments, has been expressed in a reputable Romanian treatise.<sup>380</sup> Therefore, a Romanian court or arbitral tribunal may reach the same conclusion.

## The UNIDROIT Principles can be used to interpret or supplement the national law

In applying Romanian law, courts and arbitral tribunals may be faced with issues of legal interpretation or gaps in the law. In such cases, analysed in more detail in Section 2 below, some Romanian courts<sup>381</sup> have used the principles to interpret, or even more so to supplement certain provisions of Romanian law (albeit in an unclear manner). The role of the UNIDROIT Principles as an interpretive and supplemental instrument with regards to national law is expressly stated in the Preamble, as well as in Model Clauses for the use of the UNIDROIT Principles, No 4.

### *As a source of inspiration for the Romanian legislature*

The UNIDROIT Principles were devised to establish a common approach on matters of international commercial contracts. The Romanian Civil Code's official Statement of Reasons, expressly reference the UNIDROIT Principles as being a significant source of inspiration for several chapters. Many of the Civil Code's provisions are equivalent of similar to the Principles. For example, Article 1.266 of the Civil Code, which states that consideration should be given to the nature of the contract, the parties' negotiations, practices between the parties and their subsequent conduct, is also contained in Article 4.3 of the UNIDROIT Principles.

Other provisions in the Romanian Civil Code are presumably inspired by the UNIDROIT Principles as well, given their similarity to provisions of the latter. Examples include:

- Article 1.182(2) of the Civil Code – in comparison to Article 2.1.14 of the UNIDROIT Principles;
- Article 1.188 of the Civil Code – in comparison to Article 2.1.2 of the UNIDROIT Principles;
- Article 1.191 of the Civil Code – in comparison to Article 2.1.4 (2) of the UNIDROIT Principles;
- Article 1.196 of the Civil Code – in comparison to Article 2.1.6 of the UNIDROIT Principles;
- Article 1.197 of the Civil Code – in comparison to article 2.1.11 of the UNIDROIT Principles;  
and
- Article 1.198 of the Civil Code – in comparison to Article 2.1.9 of the UNIDROIT Principles.

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379 See, eg, M Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, in *The 1980 Uniform Sales Law, Old Issues Revisited in the Light of Recent Experiences*, 2003, pp 189–197 (Franco Ferrari ed.); see n 368 above.

380 A Sitaru, *Dreptul Comerțului Internațional, Tratatul Partea Generală* ('International Commercial Law Treatise General Part'), Universul Juridic, 2017, pp 145–146.

381 See, eg, Bucharest Court of Appeal, Ruling No 1815, 24 October 2014; Hunedoara Tribunal, Ruling No 519, 26 May 2017; Targu Mures Court, Ruling No 5559, 19 December 2014.

The fact that certain provisions in the Romanian Civil Code are inspired by the UNIDROIT Principles is also confirmed by Romanian jurisprudence,<sup>382</sup> as well as legal scholars.<sup>383</sup>

## Application of the UNIDROIT Principles in Romania

### *By the courts*

Jurisprudence of Romanian courts that references the UNIDROIT Principles is scarce. However, two approaches can be observed in the rare cases that do touch on them.

First, some courts seem to have applied the UNIDROIT Principles in particular cases, albeit they were not referenced by the parties in their contracts or invoked in their arguments before the court:

- **Bucharest Court of Appeal, 2014**

Ruling No 1815, 24 October 2014

In this case, the court held that the usages of international commerce governed a certain issue at stake, pursuant to Article 23 of EU Regulation No 2001/44. It then went on to apply the UNIDROIT Principles to solve the matter, applying the principles in their role as usages or *lex mercatoria*.

- **High Court of Cassation and Justice of Romania, 2010**

Ruling No 576, 16 February 2010

It cannot be identified from the available excerpt of this case whether any of the parties argued the applicability of the UNIDROIT Principles. In any event, the court held that the principles were applicable with regards to the performance of the contract. It is not clear on what grounds the court reached this conclusion, but it seems that the UNIDROIT Principles were used to supplement Romanian law.

- **Bucharest Court of Appeal**

Ruling No 119, 25 January 2016

In this case, the judge held that an agreement between a Romanian and an alien to offset their claims should have conformed to the UNIDROIT Principles. It is unclear how the judge reached this conclusion and the parties do not seem to have referenced or invoked the UNIDROIT Principles.

- **Târgu Mureş Court**

Ruling No 5559, 19 December 2014

In a similar manner to the above cases, the court applied the UNIDROIT Principles without specifying the reasons.

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382 See, eg, Hunedoara Tribunal, Ruling No 540, 27 May 2016; Timiş Tribunal, Ruling No 351, 22 April 2013.

383 See, eg, C.Popa, *Stabilirea și ajustarea prețului contractual de către un terț* ('Determination and adjustment of the contractual price by a third party'), in *Revista Română de Dreptul Afacerilor* no 4 din 2015.

A second approach has been observed in which, although the parties to a dispute invoked the UNIDROIT Principles as grounds for a claim or defence, the courts ignored this and solved the cases on other independent national legal grounds.<sup>384</sup> However, given the similarity between the national norms under which these cases were solved and the UNIDROIT Principles provisions invoked, it can be reasonably argued that the rulings were consistent with the principles.

### *By arbitral tribunals*

Although arbitration awards in Romania are generally not published, one award in particular has been identified and is important to mention. The award is No 261, 29 September 2005 of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania. The three-member tribunal in this case comprised Professor Ion Băcanu, Professor Octavian Căpăţînă and Professor Viorel Mihai Ciobanu. The highly esteemed professors held that the UNIDROIT Principles represent a codification of ‘general principles of international commercial law’, language which the parties had incorporated in their contract. Consequently, the arbitral tribunal held that in this case, the principles were applicable as part of the *lex contractus*.

It has been written in a reputable treatise that this particular award illustrates a case of applying the UNIDROIT Principles as *lex mercatoria*.<sup>385</sup> This is also in line with the freedoms enjoyed by arbitral tribunals seated in Romania, along with arbitral tribunals constituted under the Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania, in applying the practices or legal norms considered most appropriate.

## **Conclusion**

While national and arbitral jurisprudence with regards to the UNIDROIT Principles remains scarce in Romania, there are several grounds under which they can arguably be applied. These are in line with the Preamble of the UNIDROIT Principles, and some have already been confirmed in practice.

In addition, the Romanian legislature accorded great weight to the UNIDROIT Principles when drafting the latest Civil Code. Its drafters paid tribute to UNIDROIT by expressly referencing the principles as an important source of inspiration for the Code. Therefore, even when the UNIDROIT Principles are not directly applied in a case, there is a significant chance that the solutions will be consistent with them.

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384 See, eg, Bucharest Tribunal, Ruling No 189, 28 January 2015; Arad Court, Ruling No 1759, 31 March 2016.

385 See A Sitaru, *Dreptul Comerţului Internaţional, Tratatul Partea Generală*, ('International Commercial Law Treatise General Part'), Universul Juridic, 2017, p 145.

# Russia

*Sergey Petrachkov and Anastasia Bekker*<sup>386</sup>

Russia is a civil law, non-EU country. The UNIDROIT Principles are not a part of Russian national law.

In Russia, UNIDROIT Principles are deemed to be *lex mercatoria* or ‘soft law’. The principles may have a binding force in certain cases. However, the application of UNIDROIT Principles by Russian *arbitrazh* (state commercial) courts and arbitration is quite controversial. In Russia, the UNIDROIT principles are more commonly applied by arbitral tribunals and, on rare occasions, by Russian state courts. The difference between the application of UNIDROIT Principles by these two systems can be explained by the existing legislative framework. Nevertheless, nowadays, UNIDROIT Principles are more actively used by traders, as well as legislators in modelling their legislation.

In order to define the status of the UNIDROIT Principles in Russia, the following issues may be raised:

- Will *arbitrazh* (state commercial) courts, or arbitral tribunals, consider the dispute on the basis of the principles chosen by the parties, in the same way as they would consider the dispute on the basis of national substantive law?
- May judges or arbitrators, in the absence of parties’ agreement on governing law, apply the UNIDROIT Principles as applicable law?

## Application in international arbitration in Russia

### *As chosen by the parties*

It is generally accepted that Russian law on international arbitration provides arbitral tribunals with the possibility of applying both national and non-national rules.<sup>387</sup> Paragraph 1 of Article 28 of the Law No 5338-1, dated 7 July 1993 ‘On International Commercial Arbitration’, which is based on the UNCITRAL Model Law on International Commercial Arbitration, sets out the following rule: ‘The arbitral tribunal shall settle the dispute in accordance with such rules of law as the parties have chosen as applicable to the merits of the dispute. Any indication of the law, or the system of law, of any state should be interpreted as directly referring to the substantive law of that state, and not to its conflict of laws rules.’

The indication for the possibility to apply ‘rules of law’, as opposed to national law, includes, inter alia, rules as adopted by international organisations and conferences on an international level.

At the same time, Article 13, paragraph 1 of Law No 382-FZ dated 29 December 2015, On Arbitration (Arbitration Proceedings) in the Russian Federation, provides the following rule:

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<sup>387</sup> AS Komarov (2012) ‘Application of cross-border rules in international commercial arbitration’, *International commercial arbitration: modern problems and solutions: Collection of articles for the 80th anniversary of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation*, 182; AN Zhiltsov (2014) ‘Application of Division VI “Private International Law” of the Russian Civil Code in the Practice of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry’, *Bulletin of International Commercial Arbitration*, 10.

‘The arbitral tribunal shall settle the dispute in accordance with the rules of Russian law or, if in accordance with Russian law the parties may choose foreign law as applicable to their legal relations, in compliance with the rules of the law which the parties have chosen as applicable to the merits of the dispute or, in the absence of such choice, in accordance with the rules of substantive law specified by the arbitral tribunal in compliance with the conflict of laws rules which it deems applicable’.

Such wording provides less grounds to conclude that the arbitral tribunal can apply rules as adopted by international organisations and conferences on an international level. However, arbitral tribunals apply such rules.

Thus, in the practice of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) the UNIDROIT Principles are applied as a non-national set of rules governing the parties’ relations and having priority over other sources of national law.

For example, in the ICAC award, case No 166/2012, dated 24 May 2013, the parties stipulated in the contract that ‘all disputes arising out of, or in connection with, the contract shall be resolved in accordance with the UNIDROIT Principles (2004), supplemented, if necessary, by the provisions of Russian substantive law’. The arbitrators concluded that the UNIDROIT Principles are the main statute governing parties’ relations under the contract; the CISG shall be applied as a secondary statute and, in the event certain issues are not regulated by the UNIDROIT Principles and the CISG, Russian substantive law shall be applied as a third priority statute.

### *In the absence of parties’ agreement*

In the absence of the parties’ agreement on governing law, the practice of the ICAC demonstrates arbitrators’ readiness to apply the UNIDROIT Principles, as guided by the applicability criteria contained in the Preamble.

While justifying application of the UNIDROIT Principles, the arbitrators reason that the ICAC, in the absence of the parties’ agreement, ‘has the right to take into account the provisions of the UNIDROIT Principles, which in modern international commercial trading and in the practice of many international arbitration centres are considered to be a recommended and optional legal tool that regulates general issues of performance of contractual obligations of international character’.<sup>388</sup> The UNIDROIT Principles were also applied by arbitrators as a set of general rules of *lex mercatoria*,<sup>389</sup> or as existing customary practice in international trade.<sup>390</sup>

Sometimes the UNIDROIT Principles were applied as a justification of parties’ use of certain contractual tools and instruments,<sup>391</sup> or as a justification of a certain national rule.<sup>392</sup>

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388 ICAC award, 23 August 2012, case No 173/2011; ICAC award, 9 October 2017, case No M-17/2017.

389 ICAC award, 2 June 2009, case No 148/2008.

390 ICAC award, 22 December 2008, case No 83/2008; ICAC award, 30 June 2010, case No 224/2009; ICAC award, 1 July 2013, case No 218/2012.

391 ICAC award, 30 August 2012, case No 67/2012; ICAC award, 10 September 2012, case No 66/2012; ICAC award, 6 February 2013, case No 99/2012; ICAC award, 26 March 2013, case No 152/2012.

392 ICAC award, 15 March 2012, case No 89/2010; ICAC award, 25 June 2014, case No 224/2013.

In certain cases, the arbitrators refuse to apply the UNIDROIT Principles, due to absence of parties' agreement on application of the UNIDROIT Principles,<sup>393</sup> or due to the lack of any controversial issue which was not covered by national law and which would require application of the UNIDROIT Principles.<sup>394</sup>

Therefore, the ICAC arbitral tribunals quite commonly apply the UNIDROIT Principles as a set of rules of general nature containing fundamental principles or customary practices.

## Application by state courts in Russia

The legal framework for the application of the UNIDROIT Principles by *arbitrazh* (state commercial) courts differs from the international arbitration. Article 13, paragraph 5 of the Arbitrazh Procedure Code of Russia provides the following rule: 'Arbitrazh courts may apply the foreign national law in accordance with the international treaty, the federal law, or the agreement of the parties. This rule does not affect the effect of mandatory rules of the legislation of the Russian Federation, the application of which is regulated by section VI of the Civil Code of the Russian Federation.'

The parties' agreement on the governing law shall be in compliance with Article 1210 of the Russian Civil Code, which states that the parties to the contract may, by agreement choose the law that will govern their rights and obligations. Therefore, Russian legislation provides the possibility for the application of foreign national law.

However, paragraph 1 of Article 5 of the Russian Civil Code and paragraph 2 of the Resolution of the Plenum of the Supreme Court dated 23 June 2015 No 25 'On applying some provisions of the section I of the first part of the Civil Code of the Russian Federation', stipulate that the court may apply common practice which is rule of conduct not provided by law, but widely applied when exercising civil rights and duties including business activity. The common practice may either be set out in writing or not. The common practice which contradicts binding law or a contract between parties shall not apply.

Moreover, paragraph 32 of the Resolution of the Plenum of the Supreme Court dated 9 July 2019 No 24, On Applying Private International Law Rules by the State Courts of the Russian Federation, expressly states that the parties have the right to choose, as the applicable law, documents containing rules recommended by international organizations or associations of states (eg, UNIDROIT Principles, the Principles of European Contract Law and Draft Common Frame of Reference). Such rules apply only if there is an express agreement of the parties.

If the parties do not choose the UNIDROIT Principles, the state court cannot consider the dispute applying the UNIDROIT Principles as governing law. Furthermore, according to paragraph 10 of the Resolution of the Plenum of the Supreme Court dated 9 July 2019 No 24, 'On applying private international law rules by the state courts of the Russian Federation', the freedom of the parties to choose the law governing their relations is limited to the extent they do not affect the overriding rules of national law.

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393 ICAC award, 22 August 2007, case No 93/2006; ICAC award, 5 September 2014, case No 33/2014; ICAC award, 5 April 2016, case No 64/2016.

394 ICAC award, 26 January 2010, case No 83/2009; ICAC award, 5 September 2014, case No 33/2014.

Overriding rules include only such mandatory rules that are expressly stated as overriding or which can be deemed as overriding because of their special significance. For example, rules that protect rights and interests of participants of civil circulation or protect public interest connected with the foundations of the economic, political or legal systems of the state can be deemed as overriding. There is also an opinion that parties' reference to the UNIDROIT Principles may be considered as an agreement on incorporation of the UNIDROIT Principles into the contract.<sup>395</sup>

Nevertheless, Russian courts may apply and refer to the UNIDROIT Principles as evidence of universally recognised practice. In such cases, Russian courts acknowledge that the UNIDROIT Principles reflect general principles. However, the courts do not expressly recognise the UNIDROIT Principles as governing law.

According to our analysis, Russian *arbitrazh* (state commercial) courts relied on the UNIDROIT Principles to justify interpretation of: force majeure;<sup>396</sup> *pacta sunt servanda* principle ('treaties shall be complied with');<sup>397</sup> *contra proferentem* rule of interpretation (the *contra proferentem* rule is a rule in contract law which states that any clause considered to be ambiguous should be interpreted against the interests of the party that requested that the clause is included);<sup>398</sup> execution of a non-monetary obligation;<sup>399</sup> inconsistent behaviour;<sup>400</sup> and applying of the limitation period (the limitation period shall be applied by the court only under the party's respective application).<sup>401</sup>

For example, in a Resolution of the Federal Arbitrazh Court of Volga-Vyatka District dated 10 December 2010, case No A82-1970/2010, the court, while referring to force majeure articles as contained in Russian Civil Code, additionally referred to Article 7.1.7 (force majeure) of the UNIDROIT Principles and ruled that global financial crisis cannot constitute a force majeure obstacle and be the basis for exemption of a party's liability. In a Ruling of the Supreme Arbitrazh Court dated May 5, 2012, case No A40-25926/2011-13-230 and a Resolution of the Arbitrazh Court of the Moscow district, dated 20 August 2014, case No A41-67682/13, the courts pointed out that qualification of circumstances as force majeure is widely recognised in world practice and referred to Article 7.1.7 of the UNIDROIT Principles.

Article 4.6 of the UNIDROIT Principles (the *contra proferentem* rule of interpretation) is also widely applied by Russian courts. This rule was first elaborated in court practice and then confirmed by the Plenum of the Supreme Arbitrazh Court in Resolution dated 14 March 2014 No 16, On contract freedom and its limitation, and by the Plenum of the Supreme Court in Resolution dated 25 December 2018 No 49, On Certain Issues of Application of the General Provisions of the Civil Code of the Russian Federation on Conclusion and Interpretation of a Contract, which contains obligatory instructions to lower courts on application of civil legislation. Sometimes, the judge's reasoning on

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395 MP Bardina (2016) 'The grounds for the application of the Principles of International Commercial Contracts UNIDROIT in resolving international commercial disputes on the merits of the dispute', *Legal aspects of modern practice of international trade*, 20.

396 Resolution of the Federal Arbitrazh Court of Volga-Vyatka District, 10 December 2010, case No A821970/2010; Ruling of the Supreme Arbitrazh Court, 5 May 2012, case No A40-25926/2011-13-230; Resolution of the Arbitrazh Court of the Moscow district, 20 August 2014, case No A41-67682/13; Resolution of the Ninth Arbitrazh Appeal Court, 2 April 2019, case No A40-42441/18.

397 Resolution of the Federal Arbitrazh Court of East Siberian District, 24 July 2003, case No A19-6862/01-13-48-Φ02-2202/03-C2.

398 Resolution of the Arbitrazh Court of West Siberian District, 10 June 2016, case No A45-9847/2015.

399 Resolution of the Arbitrazh Court of West Siberian District, dated 5 March 2015 in the case No A45-12354/2014; Resolution of the Arbitrazh court of Povolzhskiy district, 15 May 2018, case No A57-16399/2017.

400 Resolution of the Tenth Arbitrazh Appeal Court, 14 November 2014, case No A41-26400/14.

401 Resolution of the Arbitrazh Court of the Moscow district, 6 February 2019, case No A41-28999/2016.

application of the *contra proferentem* rule of interpretation is additionally supported by the UNIDROIT Principles comprising the general principles on interpretation of international commercial contracts, as in a Resolution of the Arbitrazh Court of West Siberian District dated 10 June 2016, case No A45-9847/2015, Resolution of the Ninth Arbitrazh Appeal Court dated 11 November 2017, case No A40-111124/18, and Resolution of the Arbitrazh Court of the Moscow district dated 1 November 2018, case No A40-96289/2017.

## **Influence of the UNIDROIT Principles in Russia**

### *Legal education*

Law students in Russia learn about the UNIDROIT Principles at the law universities, where they analyse the principles in seminars and lectures, comparing them with Russian legal traditions when learning Russian civil law, commercial law and business law. The UNIDROIT Principles may also be mentioned in specialised courses such as international contracting.

The UNIDROIT Principles can also be studied during preparation for the annual Willem C Vis International Commercial Arbitration Moot competition. This competition is becoming increasingly popular among Russian students and Moscow pre-moots have been held since 2012.

### *Influence on the Russian legislator*

Over the last decade, the Russian legislator has been carrying out a campaign to modernise Russian civil law. In 2009, the President's Council on Codification and Improvement of Civil Legislation adopted a Concept on Development of Civil Legislation, which has become the basis for further changes to Russian civil law. The concept is stated to be based on a vast analysis of Russian court decisions and reflects the best solutions found in the UNIDROIT Principles of the EU legal system.

The UNIDROIT Principles are also subject to academic research in Russia. There are many articles and books devoted to them, which increases their familiarity and stimulates interest from the legal community. In our opinion, despite the conservative approach of Russian courts as to non-recognition of the UNIDROIT Principles as 'the law', the principles may have a future in Russia and have become an inspiration to students, legal practitioners, academic researchers and judges.

# Singapore

*Koh Swee Yen*<sup>402</sup>

Singapore is a common law jurisdiction.

To date, the UNIDROIT Principles have yet to take root in Singapore's legal jurisprudence, although reference has been made to them in some Singapore court judgments.

## Applicability of the UNIDROIT Principles in Singapore

The principle of party autonomy is well established in Singapore's choice of law rules. Where there is an express choice of law clause stipulating the application of the UNIDROIT Principles, the clause would typically be given effect, except that this would not affect the application of mandatory rules (see Article 1.4 of the UNIDROIT Principles). This would be so regardless of whether the dispute is resolved in court or via arbitration.

Specific to arbitration, the parties' choice of the UNIDROIT Principles as the governing law of contract would likely be upheld by an arbitral tribunal.

By way of background, the UNCITRAL Model Law on International Commercial Arbitration (Model Law) has the force of law in Singapore by virtue of section 3 of the International Arbitration Act. Pursuant to Article 28 of the Model Law, the arbitral tribunal 'shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute'. There is commentary which states that 'rules of law' could be interpreted to allow for the application of 'non-national rules of law', and this could include *lex mercatoria* or other principles of commercial law, such as the UNIDROIT Principles.<sup>403</sup> This is also reflected in Rule 31 of the Singapore International Arbitration Centre Rules 2016 which states that '[t]he Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute'.

## Application of the UNIDROIT Principles in Singapore

A brief search of Singapore court judgments and arbitral awards would show that the application of the UNIDROIT Principles in Singapore is rare.

Although the UNIDROIT Principles have not been applied as a guiding principle in the context of commercial contracts, they have been positively referred to in some Singapore Court judgments. For example, in the case of *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal [2013] SGCA 43*, reference was made by the Singapore Court of Appeal to Article 4.3 of the UNIDROIT Principles, as an example of a transnational convention dealing with contractual construction that permit the admission of extrinsic evidence, including pre-contractual negotiations, business practices and subsequent conduct.

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<sup>403</sup> Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer International Law 2014), p 2,661.

As most arbitral awards are not published in view of confidentiality constraints, it is difficult to assess the extent to which the UNIDROIT Principles are applied in Singapore-based arbitrations.

## **Future of the UNIDROIT Principles in Singapore**

The UNIDROIT Principles have taken a back seat in the contract law jurisprudence in Singapore. While parties and their legal advisers may be aware of the existence of the UNIDROIT Principles, their usage and application have been rare, and seldom feature in commercial negotiations. While the UNIDROIT Principles may not currently be an authoritative source of law in Singapore, with the increasing application of similar principles in commercial contracts cases (eg, the principle of good faith and fair dealing), the extent of the influence of the UNIDROIT Principles remains to be seen over the next few years.

# Spain

*Claudio Doria, Alex Llevat and Álvaro Mateo Sixto*<sup>404</sup>

## Applicability of the UNIDROIT Principles in Spain

As Spain is a member of the EU, Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (the ‘Rome I Regulation’), applies directly and is part of its body of law.

Recital 13 of the Rome I Regulation explicitly mentions the possibility of parties referring to or incorporating a non-state body of law such as the UNIDROIT Principles into their contracts.

The modern interpretation of the Spanish tribunals when applying the civil code, as, for example, in respect of Articles 1281 and 1258, enables the application of the UNIDROIT Principles as a reference to inform Spanish principles of law.

A special mention must be given to the new draft of the Commercial Code which has been elaborated by the Section of Commercial Law of the General Codification Commission presented to the Ministry of Justice and which is still under review. It specifies that fundamental matters of the general section on the obligations and commercial contracts have been addressed following the works of UNIDROIT. In such sense, the introduction to the code mentions that the section on General Dispositions contains basic rules on obligations and commercial contracts, which are inspired by work performed at international level to unify rules which are to be applied to the traffic in commerce. Among these works, it mentions the UNIDROIT Principles.

More specifically, the different articles of the draft of the code on such matters capture various articles of the UNIDROIT Principles. In particular, most of those covered under Chapter 1; section 1 of Chapter 2; Chapter 4; Chapter 6; Chapter 7; and some of those contained in Chapter 11 (in particular Article 11.1.2).

## Application of the UNIDROIT Principles in Spain

### *Application by the courts*

There are several cases in Spanish case law where the UNIDROIT Principles have been used as a reference to interpret national law. Since 2005, the Spanish Supreme Court (Tribunal Supremo) has published at least 20 judgments where the different Courts of Appeal (Audiencias Provinciales) have resolved important cases based on the UNIDROIT Principles.<sup>405</sup>

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<sup>405</sup> Supreme Court judgments dated: 4 July 2006 (RJ 2006/6080), 16 May 2007 (RJ 2007/4616), 9 July 2007 (RJ 2007/5433), 23 July 2007 (RJ 2007/4702), 21 December 2007 (RJ 2008/335), 17 February 2010 (RJ 2010/1284), 15 June 2010 (RJ 2010/5151), 2 May 2011 (RJ 2011/3725), 27 June 2011 (RJ 2011/5839), 4 October 2011 (RJ 2011/6701), 12 December 2011 (RJ 2012/32), 18 January 2012 (RJ 2013/1604), 29 February 2012 (RJ 2012/4053), 8 May 2012 (RJ 2012/6117), 28 June 2012 (RJ 2012/8353), 10 September 2012 (RJ 2013/2266), 27 September 2012 (RJ 2012/9707), 17 January 2013 (RJ 2013/1819), 18 January 2013 (RJ 2013/1604), 20 March 2013 (RJ 2013/4594), 3 May 2013 (RJ 2013/461017), (RJ 2013/5200), 17 September 2013 (JUR 2013/322699).

The most numerous and common are those in which the UNIDROIT Principles are used to justify the performance or breach of contract, although there are also quite a few in which the principles are used for the interpretation of an agreement, to claim for damages or indemnification for loss of profit, hardship, formation and the existence of good faith or the unfaithful exercise of contractual rights.

In those cases where the principles have been referred to for breach of contract, most relate to sale and purchase agreements, supply of raw materials or the exploitation of intellectual property rights.

It is important to note that most of the cases referred to above had no international elements. The parties were Spanish nationals or residents and the transactions took place in Spain.

When applying the principles for the interpretation of contracts or the good faith of the parties, it must be highlighted that they have been applied in connection with the Spanish Civil Code, more specifically in relation to Articles 1281 and 1258.

#### *By arbitration courts*

Although references to UNIDROIT Principles are now more common also in arbitration practice in Spain, given that Spanish arbitral awards handed down by national arbitration courts are not published, it is difficult to know on how many occasions the principles have been applied by Spanish arbitration courts.

#### *By lawyers*

In the research carried out reviewing the most recent case law, references to the UNIDROIT Principles made by the courts seem to be on the judge's initiative and not as a consequence of citation by the parties' legal counsel.

# Sweden

Boel Flodgren<sup>406</sup>

## General background to contract law in Sweden<sup>407</sup>

Sweden is a civil law jurisdiction but, like other Nordic countries, it lacks a civil code. Thus, there is no abstract law of contract or of obligations stemming from a comprehensive civil code, such as can be found in countries on the European continent. Swedish contract law consists mainly of case law. The main piece of legislation is the Contracts Act of 1915 which contains only rudimentary parts of general contract law (formation of contract, authority of agents and invalidity). In 1976, a general modification clause was included in the act (Article 36), which, under certain circumstances, makes it possible to adapt or set aside a contract clause or a whole contract deemed to be unacceptable. This provision was introduced to protect the weaker party to a contract, for instance, a consumer. Some aspects of Swedish law of obligations are found in the domestic Sale of Goods Act of 1990, which is used as a basis for analogies also for other types of contracts than sale of goods contracts. The Swedish Sale of Goods Act builds on the CISG, both systematically and with regard to content. Sweden is a signatory to CISG and the convention has been incorporated in full (except for inter-Nordic sales) as Sweden's International Sale of Goods Act. Furthermore, in Swedish contract law, international soft law instruments, such as the Draft Common Frame of Reference, the Principles of European Contract Law and UNIDROIT Principles, are recognised as general contract law principles.

In the absence of statutory concepts and principles based in a civil code, Swedish contract law is considered to be pragmatic with legal reasoning building on common sense without being restricted by either common law or civil law thinking. Rather, Swedish contract law provides a middle ground, similar to both common law and civil law systems, and it gives the parties significant opportunity to find pragmatic solutions while still maintaining the necessary predictability.<sup>408</sup> As a result, Swedish contract law is often the choice of law in international transactions between parties where one comes from a common law country and the other from a civil law country.

Situated on the Northern periphery of Europe but, ever since the Vikings, an active participant in world trade, Sweden is today globally integrated, economically, culturally and legally. In 1995, Sweden became member of the EU, and in the same year it incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) into Swedish law. The Europeanisation of Swedish law has been intense but the integration of European law (both EU law and ECHR) into the Swedish legal system has not taken place without difficulty. Today, Swedish domestic courts have become accustomed to

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406 Professor of Law, Lund University.

407 Contract law, when used in a Swedish context, might include both 'general contract law' (in Swedish *allmän avtalsrätt*) dealing with formation of contract, authority of agents, invalidity, interpretation and such general issues pertaining to all types of contracts, and 'law of obligations', so-called *special contract law* (*speciell avtalsrätt*) dealing with the parties' rights and obligations under the contract. When used in this chapter, 'contract law' is used in this broad sense, except for when a distinction between the two areas of contract law is clearly made. From a comparative Swedish perspective, it is important to note that UNIDROIT Principles contain contract law principles pertaining to both general contract law and special contract law. Contract law as a subject also includes consumer protection law but that part of the law is not dealt with here since the UNIDROIT Principles only cover commercial contracts.

408 Mads Bryde Andersen and Eric Runesson, 'An Overview of Nordic Contract Law' in Torgny Håstad (ed), *The Nordic Contracts Act. Essays in Celebration of its One Hundredth Anniversary* (DJØF Publishing Copenhagen 2015) 17, 41 (hereafter Håstad, *The Nordic Contracts Act*).

using the instrument of preliminary ruling (in the Court of Justice of the EU) and to implementing the individual rights in the ECHR.

Sweden has a longstanding tradition to support and respect arbitration and, known as a neutral, non-corrupt country, it has since long played a prominent role in international dispute resolution. The Swedish Arbitration Act, which does not completely mirror the UNCITRAL Model Law on International Commercial Arbitration, has recently (as of 1 March 2019) been updated to meet and maintain high standards of international dispute resolution. It applies to both domestic and international arbitration. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is one of the world's leading institutes for international dispute resolution.

## The UNIDROIT Principles in Sweden

### *General principles of law in Swedish domestic law*

Since no comprehensive civil code exists in Sweden, general principles of contract law are often referred to as a source of law when courts and arbitral tribunals solve domestic disputes between parties to a contract. In authoritative Swedish textbooks on domestic contract law, the UNIDROIT Principles (together with the Draft Common Frame of Reference and the Principles of European Contract Law) have enjoyed increased attention in recent decades. They are described as examples of general contract law principles also valid in Sweden.<sup>409</sup> However, their legal authority in Swedish contract law is somewhat unclear judging from the most well-known textbooks. Some legal authors consider them a regular source of (domestic) law since 'the Supreme Court continuously refers to them',<sup>410</sup> whereas other authors see them more as a source of inspiration for the courts in their legal reasoning<sup>411</sup> or simply as non-binding recommendations.<sup>412</sup> There is no doubt that the increased attention given to the principles in textbooks will bring a familiarity to new generations of law students (and probably to judges and other practitioners) which can be expected to influence future legal reasoning in domestic contract law.

The UNIDROIT Principles are never used as domestic law by domestic courts, but they can be found being referred to in court rulings, although this is still very unusual. In the Supreme Court database I have only found three cases which refer explicitly to the UNIDROIT Principles. In two of the cases,<sup>413</sup> one of the justices referred to UNIDROIT Principles in the special statement he made in addition to the court's judgment, that is, the principles were not referred to by the whole court in its judgments in these two cases. In a rather recent case,<sup>414</sup> dealing with the validity of an exemption clause, the Supreme Court explicitly referred to Article 7.1.6 of the principles in its reasoning. It happens that the principles are referred to and used as basis for argumentation in the pleadings by counsel in cases before the courts, but there is no systematic information available about the extent to which this happens.

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409 Axel Adlercreutz and Lars Gorton and Eva Lindell-Frantz, *Avtalsrätt I*, (14th edition, Juristförlaget i Lund 2016) 43, Jan Ramberg and Christina Ramberg, *Allmän avtalsrätt*, (10th edition, Wolters Kluwer 2016) 22, 27, and Rolf Dotevall, *Avtal*, (Studentlitteratur 2017) 19.

410 *Ibid*, Ramberg and Ramberg 27.

411 Torgny Håstad 'DCRF Rules in the Swedish Supreme Court' in Håstad, *The Nordic Contracts Act* 180.

412 Jori Munukka, *Kontraktuell lojalitetsplikt* (Jure förlag 2007) 10.

413 NJA 2006 p 638 and NJA 2010 p 467.

414 NJA 2017 p 113.

When attempting to trace how the UNIDROIT Principles have come to be recognised and referred to by the Swedish Supreme Court in domestic cases, it is interesting to note that the two justices who have so far referred to the principles<sup>415</sup> in the three above cases are former law professors who have both participated as Swedish representatives on various working groups in preparing, for instance, the Draft Common Frame of Reference and the Common European Sales Law (which never came into existence). Participating in this work has, no doubt, made them more familiar with international contract law which, in turn, might have made it natural for them as justices to refer to the UNIDROIT Principles, thereby clearly aligning Swedish domestic contract law and law of obligations to international contract law.

In arbitration between domestic parties, the tribunal shall apply the law or the rules of law (*regelverk* in Swedish) agreed by the parties (Article 27a, the first sentence, of the Arbitration Act). Thus, the parties are free to choose ‘rules of law’, for instance soft law instruments like the UNIDROIT Principles. In the limited investigation I have carried out for this chapter in the form of interviews with four well-known arbitrators, experienced in both domestic and international arbitration, none of them has met with a situation in domestic arbitration where the UNIDROIT Principles have been selected as the parties’ choice of law to be applied to their Swedish contract. One of the arbitrators has, however, often seen and heard reference being made to the principles by counsel in its briefs and pleadings and by expert witnesses in their witness statements.

## Discrepancies between the UNIDROIT Principles and Swedish contract law

Even if it were true to say that the UNIDROIT Principles are recognised as general contract law principles in Swedish domestic law, it is also important to clarify that not all of the provisions of the principles find their equivalents in Swedish contract law or law of obligations. Here are some of the more important discrepancies.

All of the general provisions of chapter 1 of the UNIDROIT Principles mirror general principles of Swedish contract law. The widely discussed Article 1.7 regarding good faith and fair dealing has its equivalent in the Swedish ‘loyalty principle’ which governs all contract relations under Swedish law. However, on closer examination, Swedish judges and law professors would probably disagree on the exact content of this loyalty principle. Most of them would not choose to express it as one formula as in Article 1.7 of the principles. Rather, they would prefer to enumerate examples where such a loyalty principle finds its expression, for instance in the form of a duty to disclose or not to disclose information between bargaining parties, a duty to mitigate one’s harm, a duty to give notice to the other party within reasonable time, and so on, varying from one type of contract to another.<sup>416</sup> The extensive recognition generally given to a party’s good faith reliance and reasonable expectations in Swedish contract law is also an expression of the loyalty principle.

The provisions in Chapter 2 of the UNIDROIT Principles about formation of contract differ in some respects from Swedish contract law. For instance, under Swedish law, an offer is binding (one-sidedly for the offeror) during the so-called acceptance period, contrary to the contract principle under

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415 Former Supreme Court Justice Torgny Håstad and Supreme Court Justice Johnny Herre.

416 Jori Munukka, ‘The Contractual Duty of Loyalty: Good Faith in the Performance and Enforcement of Contracts’ in Håstad, *The Nordic Contracts Act 203*.

which nobody is bound (and the offer may be revoked) until both parties are bound. The battle of forms provision in Article 2.1.22 is not so clearly spelt out in Swedish contract law but this is, no doubt, a situation where, if such a dispute arose and was taken to the Supreme Court, one could expect the UNIDROIT Principles to be used as a guideline for solving the dispute.<sup>417</sup> With regard to the provisions on authority of agents, an important difference is that under Swedish law on authority of agents (*fullmakt*), the agent can act in the name of the principal but not in its own name. In other words, the agent – when acting as an agent – never becomes a party to the contract.

Gross disparity (Article 3.2.7 of the UNIDROIT Principles) is treated somewhat differently under Swedish law. According to the principles, a party is entitled to avoid the contract or an individual term if at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. This provision corresponds to provisions of invalidity in the Swedish Contracts Act (a contract is invalid from its conclusion, ie, *ex tunc*), but a contract or a term may also in the course of the performance of the contract result in giving a party an excessive, unjustifiable advantage, and in that case Article 36 of the Swedish Contracts Act provides the other party with a possibility to have the term or the contract adapted or declared void *ex nunc* (which under the Principles may also be possible, but then under the rules on hardship which are different). Article 36 of the Contracts Act encompasses reasons for avoidance or adaptation existing not only at the conclusion of the contract but also reasons for avoidance/adaptation which occur later during the life of the contract.

The important provisions on hardship in chapter 6, section 2 of the UNIDROIT Principles have no equivalent in Swedish contract law. There is no duty to renegotiate a contract if the conditions change, not even where the occurrence of events ‘fundamentally alters the equilibrium of the contract’ (Article 6.2.2). The remedies under Swedish contract law would, as a main rule, be those under Article 36 of the Contracts Act, according to which a provision of the contract – or the whole contract – can be adapted or set aside altogether if the provision appears ‘unconscionable’ (*oskälilig*) in the circumstances. Rules on force majeure (a temporary or permanent impediment for a party to perform under the contract and which postpones or may alleviate a contract party’s obligation to perform) similar to those in the Principles (Article 7.1.7) are also found in the general law of obligations in Sweden.

It is impossible within the limited format of this country perspectives chapter to provide a comprehensive presentation of all the discrepancies between the UNIDROIT Principles, on the one hand, and Swedish contract law and law of obligations, on the other. The main point remains that to a large extent, Swedish contract law and law of obligations correspond to the principles. For instance, the rules on interpretation in Articles 4.1–3 of the principles are, I would say, very similar to Swedish contract interpretation rules, although these are considered difficult to pinpoint more exactly.<sup>418</sup> The principle expressed in Article 4.3 that ‘regard shall be had to all the circumstances’, even circumstances belonging to the preliminary negotiations between the parties, corresponds to Swedish law where the principle of freedom of production and assessment of evidence (*fri bevisföring* and *fri bevisprövning*) prevails.

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417 Ulf Bernitz, *Standardavtalsrätt*, 8th edn. (Norstedts Juridik 2013), 80.

418 Boel Flodgren and Eric M Runesson, *Contract Law in Sweden* (Wolters Kluwer 2015), 94–100.

As was pointed out above, since most of Swedish contract law is not found in legislative texts or can be derived from abstract rules in a civil code, ‘the Swedish way’ is to see contract law as building on general principles of contract law. Such general principles are expressed in the UNIDROIT Principles, and here the principles provide an important foundation for argumentation in dispute settlement.

## Application of the UNIDROIT Principles in Sweden

### *In the courts*

In international litigation, as a main rule, the Swedish court is not entitled to apply the UNIDROIT Principles as its choice of law since it is bound to apply its own domestic law, including its conflict-of-law-rules. This leads to the court applying either its own domestic law or the law of another state, not any soft law or transnational law instruments.

In disputes between parties of EU Member States, the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) applies. This means that the court may only apply the domestic law of a state, either chosen by the parties (Article 3), or as the result of other international private law rules found in Rome I. However, under Recital 13 of Rome I, the parties are free to incorporate by reference into their contract a non-state body of law such as the UNIDROIT Principles. When applying its domestic Swedish law including the international private law rules to find the proper law governing the contract, the court has to apply that law (eg, with regard to rules of interpretation) to find out whether the parties have in due manner by reference incorporated UNIDROIT Principles into their contract. If this is found to be the case, the court shall apply the UNIDROIT Principles as the governing law of the contract on issues covered by the principles, unless it violates mandatory national law.

### *In arbitration in international disputes*

In arbitration it is different. As was explained above, under the Swedish Arbitration Act, Article 27a, the first sentence, which applies to both domestic and international arbitration, the arbitral tribunal shall apply UNIDROIT Principles as the governing law of the contract, provided that the parties have agreed on them as their choice of law. The same is true according to the 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules), Article 27.

If the parties have not agreed on a choice of law, according to the Arbitration Act the tribunal cannot choose the Principles as applicable law but has to choose a domestic law of a state (Article 27a, paragraph 2). However, according to the SCC Rules (Article 27), ‘in the absence of such agreement, the arbitral tribunal shall apply the law or rules of law that it considers most appropriate’. This implies that the tribunal is free to choose the UNIDROIT Principles even when the parties have not agreed on this, or made any other choice of law or of rules of law. In an early (separate) arbitral award rendered in 2001 in SCC Case 117/1999,<sup>419</sup> which was made public,<sup>420</sup> the tribunal applied that article (then Article 24(1) of the SCC Rules) in a dispute between a Luxembourg claimant

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419 See, eg, Loukas Mistelis, ‘UNIDROIT Principles Applied as “Most Appropriate Rules of Law” in a Swedish Arbitral Award’ *Uniform Law Review/Revue de droit uniforme*, vol VIII (2003-3) pp 631–640.

420 *Stockholm Arbitration Report 2002:1*, pp 59–65.

and a Chinese respondent regarding a contract on a cross-licence arrangement which did not contain any provision on applicable law to the dispute, and found – after a lengthy analysis of the choice-of-law issue – that: ‘...the issues in dispute between the parties should primarily be based, not on the law of any particular jurisdiction, but on such rules of law that have found their way into international codifications of suchlike that enjoy a widespread recognition among countries involved in international trade. Apart from international conventions..., the only codification that can be considered to have this status is the UNIDROIT Principles.’

In this case, the tribunal found, under the *voie directe* method, the UNIDROIT Principles (1994) to be the appropriate rules of law to be applied on the merits of the issues in dispute, supplemented by Swedish law to the extent the principles did not give guidance on a particular issue.

One could have expected that this case would have opened up for a more frequent use of the principles as choice of rules of law in arbitration under the SCC Rules. However, this does not seem to have happened. In a recently published collection of over a hundred selected SCC arbitral awards between 1992 and 2017,<sup>421</sup> mention of UNIDROIT Principles is found in only a few cases. One case concerned an agreement on the delivery of metal products and the transfer of shares where the claimant sought damages for loss of profit and late payment,<sup>422</sup> and where Swedish law was to be applied to the contract (Swedish International Sale of Goods Act, ie, CISG). The tribunal, when deciding on substance, referred to Russian legal doctrine, Russian law, Russian court and arbitration practice, international commercial law, CISG and the UNIDROIT Principles.<sup>423</sup> In another case,<sup>424</sup> concerning the leasing of commercial vehicles and amendment to the contract, the majority of the tribunal decided that New York State law was applicable to the dispute. Here, in a dissenting opinion, one arbitrator stated:<sup>425</sup>

‘As a general observation I wish to underline that the difference between the majority and the dissenting opinion mainly lies in the domain of how agreements should be construed. It is my further contention that the UNIDROIT Principles are to be viewed as a useful tool in this regard, especially when the agreement refers the matter of construing simultaneously to two different legal systems: ‘The laws of Russian Federation and the State of New York (USA)’... The UNIDROIT Principles are widely considered as solid guidelines of international quality or sometimes even a reflection of international trade usages concerning appropriate contracts.’

In a case decided in 2008 regarding the failed delivery of goods,<sup>426</sup> the parties had agreed to the contract being governed by ‘international commercial law’. The tribunal referred to CISG and UNIDROIT Principles and made a comparative analysis of national law of the parties’ respective home countries in order to confirm its findings under CISG and the UNIDROIT Principles.<sup>427</sup>

Since arbitral awards are usually only available for the parties, it is hard to find out to which extent and how UNIDROIT Principles are actually used in arbitration practice in Sweden. In order to try

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421 Linn Bergman, *Casebook on Choice of Law in Arbitration. A comprehensive Collection of 101 Previously Unpublished SCC Decisions*, Landa (2017).

422 SCC Arbitration, Code 170 (2000): *P (Ireland) v S (Russia)*.

423 See n42 above p 121.

424 SCC Arbitration, Code 175 (2002): *R (US) v A & C (Russia)*.

425 See n42 above p 140.

426 SCC Arbitration, Code 428 (2008): *B (China) v E (Germany)*.

427 See n42 above p 214.

to get some first-hand information about this, I have, as mentioned above (in the form of email correspondence) interviewed four experienced, highly regarded Swedish arbitrators – experienced also in international arbitration – about how often they have encountered (in arbitral proceedings) the UNIDROIT Principles, being mentioned or used as basis for argumentation by the parties, or as the parties’ choice-of law. None of them has ever seen the principles being selected by the contracting parties as their choice-of law. Only in very few cases have they encountered reference to the principles being made by the parties in their argumentation but in some cases, legal counsel refers to the principles in their pleadings. None of the interviewed arbitrators seem to have used or referred to the principles when formulating the award.

## **Future use and knowledge of the UNIDROIT Principles**

In up-to-date, authoritative textbooks on contract law, comparison between Swedish contract law and UNIDROIT Principles as general principles of law is made regularly, so today all Swedish law students graduate with at least some familiarity with the principles and this can be expected to influence future legal reasoning in domestic contract law.

In court and in arbitration, reference to the UNIDROIT Principles is seldom made by judges and arbitrators in their judgments and awards. However, in both domestic and international disputes, legal counsel seems to, to an increasing extent, use and make reference to the principles.

# Switzerland

*Nathalie Voser and MLaw Sanela Ninković*<sup>428</sup>

Switzerland is a civil law country which is not a member of the EU. The issue of the law applicable to contractual obligations is regulated in the Swiss Private International Law Act of 18 December 1987 (PILA).

## The applicability of the UNIDROIT Principles in Switzerland

Whereas Articles 116 et seq PILA regulate the applicable law before state courts, Article 187(1) PILA determines the applicable law in international arbitration. Both Articles 116(1) and 187(1) PILA recognise party autonomy with regard to the applicable law. However, differences exist as to the possible content of the choice as well as consequences of choosing non-national rules of law.

### *Choice of the UNIDROIT Principles and a choice of court clause*

The wording of Article 116(1) PILA does not provide a clear answer to the question whether parties may choose only national law or also non-national rules of law. In this regard, a divergence of views can be found in Swiss legal doctrine.

In 2004, the Commercial Court of the Canton St Gallen<sup>429</sup> addressed the issue of whether the FIFA (the international governing body of football) Rules as non-national rules can be subject to parties' choice of law. After noting the opinions against such a possibility, the court referred to authors opining that such a choice should be permitted if the non-national rules of law are transnational in character and 'have an internal coherence which satisfies the idea of legal certainty as well as a material content which takes into account the postulate of individual case justice, as is the case with the UNIDROIT Principles'.<sup>430</sup> The court came to the conclusion that the FIFA Rules can be equated with the UNIDROIT Principles and are transnational in character, and that, consequently, parties' choice of law was valid.

This decision was overturned the following year by the Swiss Supreme Court,<sup>431</sup> which, after setting out the diverging views in the Swiss legal doctrine, held that rules of law issued by private associations such as FIFA do not constitute 'law' in the sense of Article 116(1) PILA and that the choice of such rules can only be understood as an agreement to incorporate them into a contract. Therefore, the rules of law of private associations are only applicable if in conformity with mandatory provisions of the national law, which can be chosen by the parties in addition to the rules of private association or, if not, must be determined in accordance with Article 117 PILA.

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428 Professor Dr Nathalie Voser is a Partner and MLaw, Zurich. Sanela Ninković is a trainee lawyer at Schellenberg Wittmer Ltd, Zurich. This country perspective is based on Swiss legislation and case law until March 2018 as well as the authors' practical experience. If not referring to legislation and case law, the views expressed in this report are those of the authors. The authors are not aware of any relevant developments in Switzerland regarding the UNIDROIT Principles, neither did an internet search reveal any additional information.

429 Decision of the Commercial Court of the Canton St Gallen of 12 November 2004, HG.2003.10.

430 *Ibid*, reason III 2. The English translation of the German original represents a free translation by the authors.

431 Decision of the Swiss Supreme Court, 20 December 2005, 4C.1/2005.

It can be assumed that parties' choice of the UNIDROIT Principles will be subject to the same treatment as the choice of rules of private associations.

### *Choice of the UNIDROIT Principles with an arbitration agreement*

Parties who agree to submit their disputes to arbitration are able to choose national law as well as non-national rules of law to govern their contract. The parties are therefore free to choose the UNIDROIT Principles.

Please note that under Swiss law the question remains open as to whether parties' choice of law can be limited through the application of the mandatory rules of a third state by the arbitral tribunal. To date, neither the Swiss Supreme Court nor arbitral tribunals seated in Switzerland have issued a clear opinion in this regard.<sup>432</sup>

Parties who wish their contract to be governed by the UNIDROIT Principles are advised to opt for arbitration and include an arbitration agreement in their contract. If, however, the parties prefer to submit their disputes to state courts, the parties should choose a national law in addition to the UNIDROIT Principles. In that way, the parties could at least incorporate the UNIDROIT Principles into their contract as substantive law as far as permissible under the chosen national law. Otherwise, the state court will determine the national law based on article 117 PILA.

## **Application by state courts and arbitral tribunals in Switzerland**

### *The greater flexibility of arbitral tribunals*

The number of decisions of Swiss state courts and arbitral tribunals seated in Switzerland referring to or applying the UNIDROIT Principles is rather limited.

Regarding state courts, no decisions were identified where the courts applied the UNIDROIT Principles or where they mentioned but rejected them as a potential legal source for the decision-making. This is due to the fact that state courts cannot apply non-national rules of law unless explicitly agreed by the parties. In the absence of a choice of law by the parties, the contract is governed by the national law ('law of the state') with which it is most closely connected (cf Article 117(1) PILA).

The legal framework is less strict with regard to arbitral tribunals seated in Switzerland. As is the case with the state courts, arbitral tribunals will decide the dispute according to the rules of law chosen by the parties. However, contrary to state courts, in the event that the parties have not made a particular choice, arbitral tribunals are not limited to national laws but are also allowed to apply non-national rules of law (cf Article 187(1) PILA which refers to 'rules of law with which the case has the closest connection'). Consequently, several cases have been identified where the arbitral tribunals made references to or even applied the UNIDROIT Principles.

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<sup>432</sup> For more information see Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd edn, Schulthess 2016), paras 1380 et seq.

## *Typical circumstances where arbitral tribunals refer to the UNIDROIT Principles*

Most arbitral awards refer to the UNIDROIT Principles only as an additional argument. Arbitral tribunals seated in Switzerland invoked, for example, the UNIDROIT Principles to demonstrate that their interpretation under Swiss law reflects a worldwide consensus and use in international trade. Moreover, an arbitral tribunal even held that the common opinion in international contract law, which is influenced by the UNIDROIT Principles, must be taken into account when applying national law to international transactions.

The UNIDROIT Principles were also used by arbitral tribunals as an aid to interpretation. By way of example, the UNIDROIT Principles were resorted to as a source of common understanding in international trade to interpret a concept unknown under the applicable national law.

In cases where the parties did not specify the rules of law governing their relationship or where they authorised the arbitral tribunal to decide in accordance with international law or take into account general principles, the tribunals applied or at least made references to the UNIDROIT Principles, and even opined that they represent a restatement of principles enjoying universal acceptance.

Finally, where the CISG has been chosen by the parties but did not give any answer to the issue to be decided, arbitral tribunals applied the provisions of the UNIDROIT Principles. This is also the consequence of the fact that without the choice of a national law (which the CISG is not) by the parties, arbitral tribunals seated in Switzerland are entitled to apply also non-national rules of law which include the UNIDROIT Principles. Indeed, if the parties have chosen a supranational instrument such as the CISG, it seems appropriate not to apply national law but rather harmonised rules of law for any issues not regulated by the CISG. Moreover, cases where the parties have chosen the UNIDROIT Principles, this area is therefore the most important one for an application of the UNIDROIT Principles.

The cases in the compiled summaries show that arbitral tribunals seated in Switzerland indeed rely on the UNIDROIT Principles for issues not regulated by the CISG. This is particularly the case with regard to interest on amounts awarded where an arbitral tribunal applied the average bank short term lending rate to prime borrowers as provided for in the UNIDROIT Principles.

## **Practice and future of the UNIDROIT Principles**

With the exception of lawyers practicing in the area of international arbitration and commercial law, Swiss lawyers' knowledge of the UNIDROIT Principles and the possibilities of their use in practice seems rather limited. This comes as no surprise given the traditional domestic law-oriented (bachelor) curriculum at Swiss universities, which, if at all, tends only to touch on this issue briefly and as a side note. However, younger generations seem to be more familiar with the UNIDROIT Principles since universities increasingly provide courses on international contract/business law, especially at masters level, and enable law students to participate, inter alia, at the Willem C Vis International Commercial Arbitration Moot, which focuses on legal questions under the CISG and other uniform international commercial laws in the context of arbitration. This is particularly the case because it is recognised that the UNIDROIT Principles will come into play regarding issues not provided for in the CISG.

As explained above, there is a great potential for the use of the UNIDROIT Principles in international contracts, especially in connection with arbitration. Yet, this potential will be fully unfolded only once the awareness of the legal advisers arises, as well as of the internationally active commercial entities about the possible use of the UNIDROIT Principles. Helpful tools for the achievement of this goal would certainly include specialised seminars and training, both of which are lacking in Switzerland.

# United Kingdom (England and Wales)

*Philip Clifford QC, Hanna Roos, Robert Price and Paul Cowan*<sup>433</sup>

England and Wales is a common law jurisdiction in which contract law remains primarily governed by common law principles developed by the courts over centuries, with very limited ‘codification’ provided by certain specific statutory interventions.<sup>434</sup> As such, English contract law has developed as a sophisticated body of law, reflecting English history and traditions, and the practical applied perspective of the English courts, separately and distinct from the causes and influences of the codification of laws in continental Europe and elsewhere, which developed with a more abstract and conceptual perspective.

Approaching matters from this position, English law has rarely applied the UNIDROIT Principles, which are more commonly associated with civil law principles. The English courts have noted in the context of the admissibility of evidence on contract interpretation that:

‘Supporters of the admissibility of pre-contractual negotiations draw attention to the fact that Continental legal systems seem to have little difficulty in taking them into account. Both the UNIDROIT Principles (1994 and 2004 revision) and the Principles of European Contract Law (1999) provide that in ascertaining the “common intention of the parties”, regard shall be had to prior negotiations: articles 4.3 and 5.102 respectively. The same is true of the United Nations Convention on Contracts for the International Sale of Goods (1980). But these instruments reflect the French philosophy of contractual interpretation, which is altogether different from that of English law.’<sup>435</sup>

Similarly, as regards the application of principles of good faith, a leading English contract law text cites the UNIDROIT Principles to contrast them with the English law position.<sup>436</sup>

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434 Eg, the Unfair Contract Terms Act 1977 governing the application of exclusion clauses in contracts.

435 *Per* Lord Hoffmann in *Chartbrook Ltd (Respondents) v Persimmon Homes Ltd and others (Appellants) and another (Respondent)* (2009) UKHL 38, para 39. The House of Lords was the highest Court in the UK until it was replaced by the Supreme Court in 2009.

436 ‘Contracts of any complexity are likely to be negotiated through a series of communications with one side responding to the other’s proposals. The starting point in English law is that, until the contract is concluded, either party is free to decide not to contract and to withdraw from further negotiations without incurring any liability. This position upholds freedom of contract (which includes freedom from contract), and assumes that parties must take the risk that negotiations may fail to yield an enforceable contract. However, such a position may, in some cases, come into tension with considerations of good faith and fair dealing; for example, when the party refusing to proceed with the negotiations or claiming that the agreement reached lacks contractual force has induced the other party to believe that a contract will be concluded, and perhaps even to commence its performance. Many European continental civil law systems recognise a duty to negotiate in good faith. The Draft Common Frame of Reference states that: “A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing”. Likewise, the UNIDROIT Principles of International Commercial Contracts, state that while “[a] party is free to negotiate and is not liable for failure to reach an agreement”, he is “liable for the losses caused to the other party” if he “negotiates or breaks off negotiations in bad faith”; and “[i]t is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.”’ (Chitty on Contracts, 32nd edn, para 2–200. See also paras 31–064 and fn 402).

However, the UK Supreme Court recently noted that the UNIDROIT Principles are among ‘widely used codes’ and cited them in relation to principles of contract formation and non-waiver clauses,<sup>437</sup> and has also acknowledged them as one of the ‘influential attempts to codify the law of contracts internationally’.<sup>438</sup> As such, especially in recent years, the UNIDROIT Principles have been referred to by the UK Supreme Court as providing valuable insight into international legal approaches to common issues which have been a useful reference as the UK Supreme Court has been called upon to reconsider and redefine important points of legal principle in English contract law.

We examine below the interface between English law and the UNIDROIT Principles in relation to illegality (Articles 3.3.1 and 3.3.2), interpretation of contracts (chapter 4), good faith and fair dealing (Article 1.7), hardship (Article 6.2) / force majeure (Article 7.1.7), limitations on exclusion clauses (Article 7.1.6) and the limitation of penalty clauses (Article 7.4.13).

## Illegality (Articles 3.3.1 and 3.3.2)

The approach in the UNIDROIT Principles with respect to illegality resonates with English law, as recast by the Supreme Court in *Patel v Mirza* (2016) UKSC 42.<sup>439</sup> Both hold that where a contract is illegal (infringes a mandatory rule), in the absence of expressly prescribed effects of the infringement, a claim is only allowed in reasonable circumstances or, as expressed under English law, where enforcing the claim would not harm the integrity of the legal system. The tests set out in Article 3.3.1(3) and *Patel v Mirza* for determining when a claim is permissible examine, for example, the underlying purpose of the prohibition which has been transgressed.

However, in contrast with the UNIDROIT Principles, English law does not permit restitution following performance under the illegal contract. Whereas Article 3.3.1(2) bestows ‘the right to exercise such remedies under the contract as in the circumstances is reasonable’, and Article 3.3.2 permits restitution following ‘performance under a contract’, English law treats an illegal contract as void and hence incapable of performance. The question is rather whether one party is unjustly enriched at the claimant’s expense: this is not a claim ‘under the contract’ but a claim under a separate branch of the law of obligations which can only be made once the contract has been set aside, although the practical effect of a successful claim under both Article 3.3.2 and unjust enrichment would be a recovery of monies.

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437 *Rock Advertising Ltd* (Respondent) *v* *MWB Business Exchange Centres Ltd* (Appellant) (2018), UKSC 24, paras 13 and 16: ‘Similarly, article 1.2 of the UNIDROIT Principles of International Commercial Contracts, 4th edition (2016), provides that “nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form.” Yet article 2.1.18 provides that “A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.” These widely used codes suggest that there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation. ... It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct.’

438 *Cavendish Square Holding BV* (Appellant) *v* *Talal; El Makdessi* (Respondent) *ParkingEye Ltd* (Respondent) *v* *Beavis* (Appellant) (2013) EWCA Civ 1539, paras 37, 164 and 265.

439 In *Patel v Mirza* (2016) UKSC 42, Mr Patel transferred sums totalling £620,000 to Mr Mirza for the purpose of betting on the price of RBS shares, using insider information which Mr Mirza expected to obtain from RBS contacts regarding an anticipated government announcement which would affect the price of the shares. Mr Mirza’s expectation of a government announcement proved to be mistaken, and so the intended betting did not take place, but Mr Mirza failed to repay the money to Mr Patel despite promises to do so. Mr Patel brought a claim for the recovery of the sums. The agreement between Mr Patel and Mr Mirza amounted to a conspiracy to commit an offence of insider dealing under s 52 of the Criminal Justice Act 1993. The court allowed Mr Patel to rescind the contract and recover the money. The majority judgment emphasised that the monies were never used for the purpose for which they were paid, and Mr Patel was ‘seeking to unwind the arrangement, not to profit from it’.

## Interpretation (chapter 4)

English law and the UNIDROIT Principles take different approaches to contractual interpretation. In particular:

Article 4.1(1) provides that '[a] contract shall be interpreted according to the common intention of the parties'. This has no direct equivalent in English law. If the parties' common intention can be proved and the words used do not reflect this, then the contract may be rectified on the basis of their common mistake so that it reflects what was intended by both parties. However, in the absence of rectification, the interpretation of contracts under English law involves an objective test to determine the meaning and effect of the contract terms as the parties have written them and which involves 'disregarding subjective evidence of any party's intentions'.<sup>440</sup> The fallback position in Article 4.1(2)<sup>441</sup> better reflects English law.<sup>442</sup>

Similarly, Articles 4.3(a) and 4.3(c), which consider the preliminary negotiations and post-contractual conduct of the parties in order to ascertain the intention of the parties, are fundamentally different to the position in English law.<sup>443</sup> Articles 4.3(b), (d), (e) and (f) on the other hand find parallels in English law, in allowing for the consideration of established practices between the parties or in the market and the nature and the purpose of the contract.<sup>444</sup> That said, English law considers these factors with a view to ascertaining what the parties must have, objectively, intended, and not what the parties had, in fact, intended. The same can be said of Articles 4.4 (reference to contract or to statement as a whole), 4.5 (all terms to be given effect) and 4.6 (the *contra proferentem* rule).<sup>445</sup>

Article 4.7 concerning linguistic discrepancies has no equivalent in English law: there does not appear to be a general rule of contractual interpretation relating to contracts drawn up in two or more languages, which is commonly addressed expressly.

Article 4.8(1) (supplying an omitted term) is broadly similar to, although wider in scope than, a general rule for implying terms under English law.<sup>446</sup> However, Article 4.8(2)(a) (having regard to the intention of the parties to supply an omitted term) has no equivalent in English law, which considers the objective rather than subjective intention of the parties and is driven by what is necessary to give effect to the parties' agreement and the need to remain consistent with the express terms of the contract. While Articles 4.8(2)(b) and (d) (having regard to the nature and purpose of the contract and reasonableness to supply an omitted term) have no direct English law equivalent, the nature and purpose of the contract

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440 *Arnold v Britton* (2015) UKSC 36, para 15.

441 'If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.'

442 See, eg, *Wood v Capita Insurance Services Ltd* (2017) UKSC 24. Similarly, Art 4.2(1) (interpretation of statements or other conduct in accordance with a party's intention) has no equivalent in English law, but see *BSkyB Ltd and another v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd) and another* (2010) EWHC 86, paras 475–480, in support of Art 4.2(2) which provides a 'reasonable person' as the fall-back standard.

443 In *Chartbrook Ltd v Persimmon Homes Ltd* (see fn 433), the Court held that '[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent' unless it is to 'establish that a fact which may be relevant as background was known to the parties' so that it is part of the factual matrix. Further, cases such as *Hyundai Merchant Marine Company Ltd v Trafigura Beheer BV, 'The Gaz Energy'* (2011) EWHC 3108 (Comm), para 13, affirms the principle that 'the subsequent conduct of the parties cannot be looked at to interpret a written contract'. Subsequent conduct may, however, give rise to an estoppel or a claim for rectification.

444 See, eg, *Ebberron v Fowler* (1909) 1 Ch 578 (re article 4.3(b)), *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* (1992) 1 AC 233 (re Art 4.3(d)), and *Grant v Maddox* (1846) 15 M & W 737 (re Art 4.3(f)).

445 See, eg, *Ravenavi SpA v New Century Shipbuilding Co Ltd* (2006) EWHC 733 (Comm) (upheld on appeal) (Art .4), *Secretary of State for Defence v Turner Estate Solutions Ltd* (2015) EWHC 1150 (TCC) (Art 4.5) and *Houghton v Tragalfar Insurance Co* (1954) 1 QB 247 (Art 4.6).

446 See, eg, *The Moorcock* (1889) 14 PD 64.

are considered to identify the objectively presumed intention of the parties and whether it is necessary for additional terms to be implied to give effect to the purpose of the contract. By contrast, Article 4.8(2) (c) (having regard to good faith and fair dealing to supply an omitted term) has no support in English law, which refuses to imply a term merely because it appears fair.<sup>447</sup>

## Good faith and fair dealing (Article 1.7)

As already noted above in introduction, in contrast with the UNIDROIT Principles, English law does not recognise nor impose a general duty of good faith. In accordance with previous case law, this was restated by the Court of Appeal, which recalled that, if parties wish to impose such a duty, they must do so expressly in their contracts.<sup>448</sup> As such, the scope of any such express duty will depend on its context, and will be subject to the ordinary principles of contractual interpretation. On similar lines, in the circumstances of that case, the court rejected an argument that there should be an implied term to act in good faith, as that was unnecessary for the operation of the contract's express terms.

Nevertheless, the Court of Appeal acknowledged earlier case law which recognised that an implied term to act honestly and in good faith would be imposed where the contract confers a general discretion on a party to undertake an assessment that would need to take account of the interests of both parties. Such an implied term is necessary in such circumstances to prevent the party from being able to exercise the contractual discretion in a capricious, arbitrary or irrational manner.

## Hardship (Article 6.2) / force majeure (Article 7.1.7)

Again, in contrast to the UNIDROIT Principles, English law does not contain any concept of 'hardship' that is equivalent to Article 6.2.

Similarly, force majeure does not exist in English law as an independent substantive doctrine (cf the much narrower English law doctrine of frustration).<sup>449</sup> Instead, the application of force majeure in commercial contracts will depend on the parties themselves introducing it by express contractual provision. As such, the concept of force majeure is not a legal term of art but instead depends on the terms of the contract and the application of ordinary principles of contractual interpretation.

The English law position was thrown in to sharp relief by a case arising from the 2008 financial crisis, in which a party claimed relief from non-performance of a contract due to the 'unanticipated, unforeseeable and cataclysmic downward spiral of the world's financial markets' and relied on a contractual force majeure clause. Rejecting that claim, the Commercial Court emphasised that it is well established under English law that a change in economic/market circumstances affecting the profitability of a contract or the ease with which the parties' obligations can be performed is not regarded as being a force majeure event, nor as an event of frustration.<sup>450</sup>

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447 *Marks and Spencer plc v BNP Paribas Securities Services Trust Company Ltd* (2015) UKSC 72, para 21.

448 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* (2013) EWCA Civ 200. Deciding the case purely on well-established principles of English law and contractual interpretation, the Court made no reference to the UNIDROIT Principles.

449 The English common law doctrine of frustration applies where there has been a supervening and unforeseen circumstance of such potency that the contract is rendered incapable of performance. Mere hardship or difficulty in performing is not enough. See the House of Lords' judgment in *Davis Contractors v Fareham UDC* [1956] AC 696. In addition, even where an event of frustration does occur, this only has the effect of terminating the contract and releasing the parties from further obligations thereunder. The doctrine does not permit the adjustment of the parties' agreement – eg, providing for any additional time for performance or monetary relief for the costs of doing so.

450 *Tandrin Aviation v Aero Toy Store* (2010) EWHC 40, Commercial Court. No reference was made to the UNIDROIT Principles.

## Exclusion of non-performance (Article 7.1.6)

While not as wide in scope as Article 7.1.6 of the UNIDROIT Principles, the concept of exclusion clauses permitting non-performance by one party against another being unenforceable where their application would be ‘grossly unfair’ finds some parallel in English law. This is not in the common law, but in the statutory code provided in the Unfair Contract Terms Act 1977 (as amended). However, this is limited to exclusion clauses contained in one party’s standard terms of business and which are found to be ‘unreasonable’ within the meaning of the statute.

Also within the ambit of Article 7.1.6 of the UNIDROIT Principles is the general civil law concept which prohibits clauses limiting or excluding a party’s liability for damage caused by acts or omissions of intentional misconduct or gross negligence. There is no direct equivalent to this in English law as an independent legal concept. However, there has been some increasing tendency in commercial contracts to introduce such a concept by express contractual provision. Where the parties do so, this will be interpreted and applied by the English courts.

This was seen, for example, in another case arising from the 2008 financial crisis.<sup>451</sup> The Commercial Court determined that the clause required proof of something more than mere negligence, and that the distinction with gross negligence is ‘is one of degree and not of kind’. The court applied dicta from earlier case law that found that: ‘“Gross” negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence’, and ‘... as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious regard of or indifference to an obvious risk.’ This is comparable to definitions encountered in civil law jurisdictions in respect of the legal concept of gross negligence.

## Agreed payment for non-performance (Article 7.4.13)

The approach of the UNIDROIT Principles to restrict obligations to pay specified sums for non-performance where they are ‘grossly excessive in relation to the harm’ found resonance with the UK Supreme Court when it was required to re-examine the principles underlying the English law against ‘penalties’.<sup>452</sup>

The court made several references to Article 7.4.13 of the UNIDROIT Principles, together with UNCITRAL texts, as influential attempts to codify the law of contracts internationally and which recognised the utility and desirability of judicial control over ‘grossly excessive’ or ‘manifestly excessive’ or ‘substantially disproportionate’ penalty clauses. With such sources described by the Court as ‘soft law’, this was characterised as consistent with civil law approaches in many jurisdictions that all provide for the modification of contractual penalties using tests such as ‘manifestly excessive’, ‘disproportionately high’, or ‘excessive’.

Drawing support from this, the court determined that secondary obligations to pay specified sums for breach of contract would be unenforceable penalties where this: ‘...imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the

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<sup>451</sup> *Camerata Property Inc v Credit Suisse Securities (Europe)* (2011) EWHC 479 (Commercial Court).

<sup>452</sup> *Cavendish Square Holding BV v Talal El Makdessi*; and *ParkingEye Ltd v Beavis* (2015) UKSC 67.

enforcement of the primary obligation.’ Elsewhere in the judgment, other judges expressed the test using language such as ‘disproportionate’ and ‘extravagant, exorbitant or unconscionable’, similar to the language used in Article 7.4.13 of the UNIDROIT Principles.

# United States: Restatement

Jonathan M Moses and Ina C Popova<sup>453</sup>

## The Restatement of Contracts and the UNIDROIT Principles: a tale of two harmonisations

Courts in the US often use the American Law Institute (ALI) 's Restatement (Second) of Contracts (the 'Restatement') to resolve contractual disputes. The Restatement embodies common doctrinal rules that are well understood and widely, albeit not uniformly, applied by US courts. Although parties cannot choose the Restatement as a governing law for their contracts, the Restatement provides judges with reliable signposts for legal reasoning, and helps generate predictable outcomes for parties.<sup>454</sup> The UNIDROIT Principles, in turn, aim to establish 'a balanced set of rules designed for use around the world' and can be selected as the governing law,<sup>455</sup> but they have found less purchase in US courts.<sup>456</sup> This may be unsurprising given not only the differences in substantive approach, but also the different purpose and nature of each instrument.

### *Foundational differences*

The more limited influence of the UNIDROIT Principles, as compared to the ALI's Restatement, in US legal decision-making to date may be largely attributable to several foundational differences.

First, while the Restatement is intended as a guide for US judges in interpreting contracts subject to the laws of one of the 50 states, the UNIDROIT Principles are primarily intended to be applied as a substantive set of rules governing international commercial contracts in place of a particular national law.

Second, the ostensible goal of the Restatement is to 'reflect the law as it presently stands.'<sup>457</sup> When crafting the Restatement, the drafters survey precedent in the US to ascertain the majority rule.<sup>458</sup>

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454 Gregory E Maggs, 'Ipse dixit: The Restatement Second of Contracts and the Modern Development of Contract Law', (1998) 66 Geo Wash L Rev 508, 535–540.

455 International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (2016 edn) p xxix: 'The objective of the UNIDROIT Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied'.

456 A Westlaw search on 19 June 2018 for cases referencing the UNIDROIT Principles in all US state and federal jurisdictions, without any time limit, returned a total of only ten contract cases. Of those cases that addressed the principles, most declined to follow them. See, eg, *Koda v Carnival Corp*, No 06-21088-CIV, 2007 WL 7757994, at \*1 (SD Fla 7 September 2007) ('UNIDROIT does indeed provide a definition of unequal bargaining power; however, it is one that the Court is not bound to adopt...'). By contrast, a similar search for cases referencing the Restatement (Second) of Contracts yielded many thousands of results.

457 American Law Institute, *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* (revised edn, 2015) 3.

458 *Ibid*, at 5.

As a result, the Restatement's persuasive authority lies not merely in the imprimatur of the ALI, but rather in the fact that it reflects the law as interpreted by the courts.<sup>459</sup>

The UNIDROIT Principles are similarly intended to 'reflect concepts to be found in many, if not all, legal systems.'<sup>460</sup> However, the drafters sometimes diverged from established law, instead offering principles that 'embody what are perceived to be the best solutions, even if still not yet generally adopted'.<sup>461</sup> Thus, while the thoughtful analysis of expert drafters supports the UNIDROIT Principles, in some cases they lack the backing of established precedent. Relatedly, the UNIDROIT Principles also do not marshal precedent supporting a rule in the same way that the Restatements do. This may be a crucial consideration for the common law system within which US courts, and US parties, function.

Nevertheless, US state laws and practices are not uniform, and the Restatement is not purely descriptive. A Restatement does not always follow the majority rule. Where appropriate, it instead offers the 'better rule' taken from the perspective of the law as a whole.<sup>462</sup> As a result, both the Restatement (Second) of Contracts and the UNIDROIT Principles sometimes offer approaches that differ from those adopted by courts and legislatures. For example, both the Restatement and the UNIDROIT Principles propose that courts can invalidate contract terms on the basis of unfair surprise<sup>463</sup> – a position that US jurisdictions generally reject.<sup>464</sup> The Restatement's occasional adoption of the minority rule reflects a goal, shared by the UNIDROIT Principles, of offering a body of law superior to that of any particular jurisdiction and around which disparate courts can unify.<sup>465</sup>

### *Substantive differences*

Still, some notable substantive differences between the Restatement (Second) of Contracts and the UNIDROIT Principles do exist. For example, under the Restatement, specific performance is granted only at 'the discretion of the court' and the primary remedy for breach of contract is the payment of damages.<sup>466</sup> In contrast, consistent with the primary rule in many civil law jurisdictions, the UNIDROIT Principles assert that 'specific performance is *not* a discretionary remedy.'<sup>467</sup> The tribunal must order performance unless one of the five conditions enumerated in Article 7.2.2(a)–(e)

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459 A noteworthy point of comparison for the Restatement is the Uniform Commercial Code (UCC), a joint project of ALI and the Uniform Law Commission. See American Law Institute, *Uniform Commercial Code*, [www.ali.org/publications/show/uniform-commercial-code](http://www.ali.org/publications/show/uniform-commercial-code) accessed 19 June 2018. Like the Restatement, the UCC is drafted by non-governmental third parties. However, unlike the Restatement, the UCC is intended to be legislatively enacted into law, thus becoming binding authority. All 50 US states have enacted at least some portions of the UCC. See James A Stuckey, 'Louisiana's Non-Uniform Variation in UCC Chapter 9', (2002) 62 La L Rev 793, 795. The UCC notes that 'the parties may vary the effect of such provisions by stating that their relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions. Such bodies of rules or principles may include, for example, those that are promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT (see, eg, UNIDROIT Principles of International Commercial Contracts) [.]' *Uniform Commercial Code*, s 1-302, comment 2.

460 *UNIDROIT Principles*, see n 455, at xxix.

461 *Ibid.*

462 American Law Institute, see n 457, at 3.

463 See *UNIDROIT Principles*, see n 455, Art 2.1.20; *Restatement (Second) of Contracts* s 211 (American Law Institute 1981) [hereinafter '*Restatement of Contracts*'].

464 Ian Ayres and Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, (2014) 66 Stan L Rev 545, 560 ('Few courts have relied on [the Restatement] to strike unread terms except in insurance cases').

465 Benjamin N Cardozo, *The Growth of the Law* (Yale University Press, 1924) 9 ('I have great faith in the power of such a restatement to unify our law').

466 *Restatement of Contracts* s 357. See also *ibid.*, s 357(1) ('Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party').

467 *UNIDROIT Principles*, see n 455, Art 7.2.2, comment 1.

applies. This list of conditions is more limited than the set of factors the Restatement directs courts to consider when determining whether specific performance is appropriate.<sup>468</sup>

The Restatement and the UNIDROIT Principles also diverge on the issue of liability for conduct during pre-contractual negotiations. Article 2.1.15 of the UNIDROIT Principles imposes liability on a party ‘who negotiates or breaks off negotiations in bad faith’, consistent with the good faith obligation in Article 1.7.<sup>469</sup> On the other hand, the Restatement section on good faith states that it ‘does not deal... with the formation of a contract’, and notes that remedies for bad-faith negotiations may be found elsewhere in statutory duties, tort law, or overlapping rules on fraud and duress.<sup>470</sup>

A third difference deals with unforeseen circumstances. The Restatement provides that performance may be excused in a limited set of circumstances where some subsequent, unexpected event has either made performance ‘impracticable’<sup>471</sup> or ‘substantially frustrated’ the purpose of the contract.<sup>472</sup> These exceptions are only triggered where some ‘extraordinary circumstance’ undermines a ‘basic assumption’ on which the contracting parties relied.<sup>473</sup> The UNIDROIT Principles contain a parallel article, excusing non-performance under the doctrine of force majeure.<sup>474</sup> As the comments note, force majeure functions similarly to the frustration and impossibility doctrines in the common law.<sup>475</sup>

However, the UNIDROIT Principles also contain a provision relating to hardship that has no parallel in the Restatement. When a hardship arises that ‘alters the equilibrium of the contract’,<sup>476</sup> the UNIDROIT Principles require that the parties renegotiate the contract in good faith – even empowering the court to adapt the contract itself if no agreement is reached.<sup>477</sup> The UNIDROIT Principles envisage a somewhat more expansive role for the principle of good faith than does the Restatement.

## Conclusion

Neither the reluctance of US parties and courts to rely on the UNIDROIT Principles, nor their substantive and foundational differences from the Restatement, should lead to a conclusion that they are irrelevant to US contract law. Just as US courts look to the Restatement to guide their analysis without necessarily being dispositive, so too, the UNIDROIT Principles can provide valuable guidance, especially in contracts and disputes with an international character. Indeed, this would be in line with the increasing use of the UNIDROIT Principles in international arbitration, both as governing law and as interpretative tool.

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468 See *Restatement of Contracts* s 365, comment a (noting that courts should not grant specific performance when doing so would ‘would adversely affect some aspect of the public interest’).

469 UNIDROIT Principles, see n 455 above, Art 2.1.15.

470 *Restatement of Contracts* s 205, comment c.

471 *Ibid*, s 261.

472 *Ibid*, s 265.

473 *Ibid*, c 11, intro.

474 UNIDROIT Principles, see n 455 above, Art 7.1.7.

475 See *ibid*, comment 1.

476 *Ibid*, Art 6.2.3, comment 1.

477 *Ibid*, Art 6.2.3.

# Uruguay

Nicolás Piaggio and Emilia Cadenas<sup>478</sup>

## UNIDROIT Principles as applicable law to an agreement

In principle, under Uruguayan conflict of law rules, parties to an agreement are not allowed to choose the applicable law to such agreement. On the contrary, the applicable law shall be determined in accordance with the Uruguayan conflict of law rules, ie, through the connecting factor. This is set out under section 2403 of the Uruguayan Civil Code and section 5 of the Additional Protocol to the Montevideo Treaties of 1940, which state: ‘...the applicable law cannot be changed by the parties’ will. The parties’ will may only act within the scope admitted by the applicable law’.

Therefore, in principle, party autonomy does not exist. However, party autonomy is admitted when ‘the competent law so authorises’. In this sense, choice of law clauses are generally disregarded, except for the case where the Uruguayan conflict-of-law rules determine the application of a law that allows party autonomy in relation to the *lex causae*.

As a consequence, the application of the UNIDROIT Principles as applicable law in Uruguay is limited to those cases in which the law determined to be applicable to the agreement under Uruguayan conflict-of-law rules admits choice of law clauses, and the application of the UNIDROIT Principles.

The Uruguayan conflict of laws system requires a two-tier analysis to apply the UNIDROIT Principles to an agreement:

1. determining which is the applicable law to the agreement according to the Uruguayan conflict of laws rules (ie, through the connecting factor); and
2. analysing whether under the applicable law, the parties are allowed to choose the UNIDROIT Principles as applicable law to an agreement.

Article 1.4 of the UNIDROIT Principles states: ‘Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law’. The UNIDROIT Principles then recognise that a legal order of reference always exists, indicated by the applicable rules of private international law. This suggests that a contract cannot be governed by the principles alone, but must always have a legal order of reference.<sup>479</sup>

A choice of law shall only be considered valid and upheld by a Uruguayan court if the law that results applicable pursuant to Uruguayan conflict of law rules, allows such a choice. Uruguayan law also states that the competent jurisdiction will be that of the country whose laws are applicable, or that of the domicile of the party against whom actions are brought.

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478 Nicolas and Emilia are lawyers at Guyer & Regules in Montevideo.

479 Cecilia Fresnedo, ‘The UNIDROIT Principles of International Commercial Contracts: A Uruguayan Approach’ in *Eppur si muove: the age of uniform law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, vol 2, p 1,401.

## UNIDROIT Principles as applicable law to an agreement with an arbitration clause

Notwithstanding the above, it must be noted that some Uruguayan scholars are of the opinion that whenever the parties agree on an arbitration clause within an international commercial relationship, the prohibition to choose the applicable law to an agreement set out under Uruguayan conflict of law rules, does not apply. Such understating is due to the fact that Uruguay has ratified the following treaties that also provide for international commercial arbitration:

- the 1958 New York Convention;
- the 1975 Inter-American Convention on International Commercial Arbitration (the ‘Panama Convention’);
- the 1979 Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Awards (Montevideo);
- the *Las Leñas Protocol* (‘Mercosur’); and
- the 1889 Treaty of Civil Law (Tratado de Derecho Civil de 1889).

Under these treaties, and in particular under the 1958 New York Convention, the state before whose courts the arbitral award’s enforcement is sought should not refuse the award’s recognition and enforcement but for the limited reasons set out under Section V of the New York Convention. Said provision does not specifically provide for the possibility of refusing recognition and enforcement of an award on the grounds of the incorporation in the agreement of a choice of law clause that does not follow the conflict of law rules of the state where said recognition and enforcement is sought. Thus, under this view, including an arbitration clause in an agreement could be a way of sorting out the partial prohibition to party autonomy regarding choice of law clauses included in Uruguay’s Civil Code.

Another group of scholars however, are of the opinion that the prohibition set out under section 2403 of the Uruguayan Civil Code is a matter of international public policy and therefore parties are not freely allowed to choose the governing law, including the case where they have agreed an arbitration clause. The said scholars understand that Uruguayan courts may refuse enforcement of an arbitral award on public policy grounds if a case was decided in accordance with a law that parties could not have agreed on pursuant to Uruguayan conflict of law provisions.

In spite of the above, recently Uruguay’s parliament finally approved legislation on international commercial arbitration,<sup>480</sup> based on the UNCITRAL Model Law on International Commercial Arbitration with minor changes, which has brought the aforementioned discussion to light. In this sense, section 28 of the recently approved law states that the arbitral tribunal will resolve the dispute in accordance with the rules of law chosen by the parties as applicable to the agreement. Therefore, it is now clear that choice of law clauses are admitted within the scope of international commercial arbitration.

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480 Law No 19.636 on International Commercial Arbitration, dated 13 July 2018.

## Incorporating the UNIDROIT Principles into an agreement

Another way of introducing the UNIDROIT Principles into the parties' commercial relationship is by incorporating either certain sections of the principles, or the whole set into the agreement. This could be done by reproducing the UNIDROIT Principles into the agreement's body, by means of an annex to the agreement and even by reference. According to Uruguayan law, the agreements lawfully executed create a rule to which the parties must abide by as to the law itself (section 1291 of the Uruguayan Civil Code). Thus, including the UNIDROIT Principles to the agreement is another way of causing their application, provided they do not contradict any mandatory rule existing under the applicable law.

It has been said that this exercise is not to delocalise the contract geographically, and to withdraw it from a national legal order of reference, but rather to modify this order of reference for the particular agreement and to the extent possible under the applicable law (ie, within the limits allowed by said law and notwithstanding the mandatory rules non-changeable by parties' will). Also, as this way of introducing the UNIDROIT Principles does not interfere with nor disregard the applicable law (in fact, it will only apply provided it does not contradict the applicable law), there is no risk of breaching the partial prohibition set in Uruguay's conflict of laws rules regarding party autonomy in relation to the applicable law to an agreement.

## The UNIDROIT Principles as a non-binding legal source

Regardless of which dispute resolution method is selected, the UNIDROIT Principles can always be used as a non-binding legal source, even when parties have not made a specific reference to them. Under section 16 of the Uruguayan Civil Code, general principles of law are a source of interpretation and of integration of legal vacuums. As the UNIDROIT Principles may be deemed as 'general principles of law' within the area of international commercial contracts, they may therefore be applied even if no reference is made to them in the agreement. Section 16 of the Uruguayan Civil Code is perfectly consistent with paragraph 3 of the UNIDROIT Principles' preamble which makes a specific link between the UNIDROIT Principles and the general principles of law: 'They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like'. Also, paragraphs 5 and 6 of the UNIDROIT Principles' preamble expressly deem the principles as a source of interpretation or supplementation of the applicable law.

Another example of tacit reference to the UNIDROIT Principles is that of 'usages or customs' or 'customary law'. Pursuant to section 9 of the Uruguayan Civil Code, 'usages or customs' are not a formal source of law, except when it is expressly mentioned by a law as such. There are some examples in the Uruguayan Civil Code that make express reference to 'usages and customs' (ie, section 594.2 of the Uruguayan Civil Code and sections 296.6 and 297 of the Uruguayan Commercial Code). This is also the case of both the Inter-American Convention on the Law Applicable to International Contracts (section 10) and the Vienna Convention on the International Sale of Goods (section 8.3), both of which are in force in Uruguay. UNIDROIT Principles are a clear expression of *lex mercatoria* and international customary law, and are therefore also applicable in Uruguay through this means.

Furthermore, section 28 of Law No 19.636, when addressing the issue of the applicable law to the merits of an international commercial arbitration case, states that in every case the arbitral tribunal shall decide in accordance to the agreement's provisions and that shall take into consideration the international commercial usages.

Moreover, the Uruguayan Project for a General Act on Private International Law (not currently in force), provides, in section 13.4, that, where applicable, the usages renowned that are commonly followed in the commercial practice by the parties, or generally accepted in said practice, and the general principles of international commercial law recognised by international organisations to which Uruguay is part, shall be applicable.

Since the UNIDROIT Principles are a systematic expression of the customs and usages in the field of international commercial contracts, which are occasionally updated and adjusted, they shall be regarded as a key element when (even though the parties may not have provided for their application), there is a need to interpret or supplement a regulation in the mentioned field or the usages and customs need to be consulted.

### *Uruguayan case law*

There are a few cases from Uruguayan state courts where the UNIDROIT Principles have been invoked. Arbitration awards are not available due to reasons of confidentiality. As an example, oblique references were made in Judgment 680/2012 dated 20 July 2012 issued by the Supreme Court of Justice of Uruguay and in a judgment issued by the 2nd Civil Court of Appeal in case file 0005-000155/2014. In the first decision that mentioned, the Supreme Court stated that the UNIDROIT Principles cannot be applied against Uruguayan law. In the latter, reference is made to the principles to interpret section 1346 of the Uruguayan Civil Code regarding the calculation of damages.

Furthermore, Uruguay's 1st Civil Court of Appeal clearly applied UNIDROIT Principle 7.1.6 in its judgment in case file 0003-000176/2014 dated 22 October 2014, in the case *Meritz Fire & Marine Insurance Co Ltd v Tsakos Industrias Navales SA* – claim for damages, File No 2-3579/2012.

Meritz Fire & Marine Insurance Co Ltd (the claimant) sued Tsakos Industrias Navales S A (respondent) as a consequence of a fire in the respondent's shipyard which affected the claimant's ship. On first instance, the respondent was ordered to pay the claimant for the damage caused.

The respondent challenged the decision and stated that certain contractual provisions should be taken into special consideration such as the exemption clause that stated that respondent's liability was exclusively limited to the cases of wilful misconduct and gross negligence of managerial technical staff. Moreover, such exemption clause was printed on the back of the offer, whereas the adherent party had only signed the front page.

The appellate court revoked the lower court's decision and among other reasons, the appellate court mentioned that the parties had included an exemption clause that clearly limited the respondent's liability to wilful misconduct and gross negligence, which had not been proven by claimant. Indeed, no evidence was found to prove wilful misconduct or gross negligence as causes of the fire.

The appellate court held that exemption clauses, although inadmissible in consumer-related agreements, are admissible when agreed among private companies, let alone when it refers to international contracts. In this regard, the appellate court made reference to the *lex mercatoria* and especially to Article 7.1.6 of the UNIDROIT Principles as admitting exemption clauses provided they are not grossly unfair.

Certain scholars have used this judgment as a bad example of a reference made to the UNIDROIT Principles by stating that even if Article 7.1.6 was mentioned, the judge failed to provide an in-depth analysis that could have possibly changed the result of the findings.<sup>481</sup>

## Recent developments involving the use of the UNIDROIT Principles

Progress has been made regarding the application of UNIDROIT Principles in Uruguay. However, further training in the matter of legal operators is needed in order to expand their use.

Also, it is possible to identify recent developments in Uruguay that will possibly favour the applicability of the UNIDROIT Principles in relation to party autonomy. Even if the general rule continues to be that parties are not freely allowed to choose the law applicable to an agreement, this currently coexists with laws enabling parties to choose their governing law and competent courts.

Parties are further entitled to include the content of such principles as contractual clauses in their agreement; and may sort out the restrictive approach towards party autonomy innate to Uruguayan Law.

Finally, it is worth highlighting once again the importance of the recently approved a Law No 19.636 based on the UNCITRAL Model Law. This represents major progress in efforts to harmonise Uruguay's national legislation with international standards. Besides, it expressly allows the choice of the applicable law to an agreement provided a valid arbitration clause is included and that the arbitration is international (ie, it is not allowed for domestic arbitration).

The International Commercial Arbitration Act places Uruguay as an interesting seat for international arbitrations, particularly for other Latin American nations, that may wish to benefit from Uruguay's long-standing tradition of trustworthy legal institutions and judiciary, as well as its neutrality and political stability. Considering that several arbitration clauses coincide with the choice of the UNIDROIT Principles as applicable law, the aforementioned act will definitely boost the applicability of the principles in Uruguay, while favouring arbitration as the preferred dispute resolution method.

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481 Cecilia Fresnedo, 'The UNIDROIT Principles of International Commercial Contrats: A Uruguayan Approach' in *Eppur si muove: the age of uniform law – essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, vol 2, p 1,409.