

# Perspectives in Practice of the UNIDROIT Principles 2016

Views of the IBA Working Group on the  
practice of the UNIDROIT Principles 2016





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# Acknowledgements

This book originated through a discussion between Chris Seppälä and the Executive Director of the International Bar Association (IBA), Mark Ellis. The discussion then expanded to include the Vice-President of the UNIDROIT Counsel, Don Wallace, who is also Chairman of the International Law Institute. Ellis and Wallace developed the idea that the IBA and UNIDROIT could work together on this project and have both given very valuable guidance all through our work.

Ellis for the IBA and José Angelo Estrella Faria (then Secretary General at UNIDROIT) worked out a memorandum of understanding for this project.

Peter Bartlett now Vice-Chair of the IBA Legal Practice Division and Seppälä have inspired this project by selecting our group and giving us guidance throughout.

This book provides 28 country perspectives and over 250 summaries of cases on the applicability of the UNIDROIT Principles 2016. It is written and compiled by IBA members. They were carefully selected and are all top lawyers in international litigation and arbitration. I, as coordinator, am immensely thankful for the talent and commitment of this group. Their names are mentioned on pages viii–x.

The UNIDROIT Principles 2016, like their previous editions of 1994, 2004 and 2010, have been developed by groups of independent experts representing all the major legal systems of the world. They were coordinated by its Chairman, Professor Michael Joachim Bonell, professor emeritus at the University of Rome I ‘Sapienza’ and Legal Consultant of UNIDROIT. The 2016 edition (ISBN 978-88-86449-37-3) represents a private codification or ‘restatement’ of international contract law, which is most valuable for international lawyers and the international business community.

UNILEX, a database set up and continually updated under the direction of Professor Bonell, is freely accessible at [www.unilex.info](http://www.unilex.info). To date it has collated 450 arbitral awards and court decisions rendered worldwide and referring in one way or another to the UNIDROIT Principles. UNIDROIT holds the intellectual property (IP) rights of the UNIDROIT Principles 2016. The IP rights for UNILEX are with its editor in chief, Professor Bonell.

We, IBA members, have undertaken research in connection with the UNIDROIT Principles 2016, and made standardised summaries of cases, many found in UNILEX and many others outside UNILEX, that refer to the UNIDROIT Principles. We have also compiled 28 country perspective reports on the applicability of the UNIDROIT Principles 2016. Professor Bonell has helped us by reading all these reports and giving positive suggestions for improvement.

In May and October 2018, the IBA Working Group met UNIDROIT President, Professor Alberto Mazzoni, at UNIDROIT’s headquarters in Rome. The Working Group also met UNIDROIT’s Secretary General, Professor Ignacio Tirado, as well its Deputy Secretary-General, Professor Anna Veneziano, and Professor Bonell. As the Working Group’s Coordinator, and on behalf of the entire Working Group, I expressed our sincere appreciation to our hosts for their cooperation, most valuable knowledge and inspirational commitment in helping us put this book together.

Willem Calkoen

*Coordinator, IBA Working Group on the practice of the UNIDROIT Principles 2016*

# Foreword

International trade and investment is growing exponentially. Thus, although lawyers continue to be grounded in their own national jurisdictions, the international trade and business community increasingly expects seamless assistance globally. The IBA, as the global voice of the legal profession, has a key goal of bringing lawyers and legal systems closer together, thereby facilitating the wishes of the international trade and business community – including the desire for the harmonisation and convergence of law across the globe.

This goal of international unification has been pursued in several ways. One common approach has been to negotiate binding instruments, such as supranational legislation, international conventions, or model laws, but these have, in many cases, been rather fragmented.

An alternative approach has been to pursue non-legislative means of unification and harmonisation of law. I call such efforts ‘bottom-up’ (as opposed to ‘top-down’) harmonisation of law. Such efforts include the development of ‘international commercial customs’ in model clauses in special business circles, such as charter parties in transport, insurance policies and the ISDA Master Agreement for derivatives.

Others have advocated for the elaboration of an international ‘restatement’ of general principles of contract law. The International Institute for the Unification of Private Law (now known as UNIDROIT) is an intergovernmental organisation with 63 member states drawn from all five continents. It has been working on such a project since the 1970s. In 1994, it published the first edition of The UNIDROIT Principles of International Commercial Contracts (the ‘UNIDROIT Principles’), followed by three subsequent editions in 2004, 2010 and 2016. Prepared by a group of independent experts representing all the major legal systems of the world, they represent the first attempt to ‘codify’, though merely in the form of a non-binding or ‘soft law’ instrument, the general aspects of international contract law.

The UNIDROIT Principles are ground-breaking, first of all, on account of their broad scope. While most international uniform law instruments, whether legislative or non-legislative in nature, are restricted to particular types of transactions (sales, leasing, carriage of goods by sea, road or air, derivatives etc) or to specific topics (delivery terms, modes of payment etc), the UNIDROIT Principles provide a comprehensive set of principles relating to international commercial contracts in general. They are comparable to the – codified or unwritten – general part of contract law found in domestic law. Indeed, they cover a wide range of subjects, such as freedom of contract; good faith and fair dealing and usages; duty to negotiate; contract formation including contracting on the basis of standard terms; interpretation; validity including illegality; third party rights; conditions; performance; non-performance and remedies; excessive penalty clauses; set-off; assignment of rights; limitation periods; and plurality of obligors and of obligees.

The IBA is of the view that the UNIDROIT Principles, available in all the major international languages, are extremely valuable for international trade and business. Knowledge and application of the UNIDROIT Principles by lawyers, advocates, the judiciary, arbitrators, transactional lawyers and lawmakers will lead to the international harmonisation of contract law.

To that end, four IBA committees (International Sales, Arbitration, Litigation and Corporate M&A Law) and the European Regional Forum created a working group of 51 specialised practitioners, advocates, arbitrators, professors, former judges, corporate counsel and transactional lawyers from 28 countries. Its aim was to give

their views on the practice of the 2016 UNIDROIT Principles. What the Working Group's members all have in common is their expertise and enthusiasm for facilitating the international practice of law.

This book represents the culmination of the Working Group's efforts. The first half of the book comprises country perspective reports describing the application of the UNIDROIT Principles in their respective jurisdictions. The reader can use these reports, in international cases, to get a sense of the background thinking of those involved. For example, if there is a case between a Spanish buyer and a Chinese supplier and the arbitrators are from Germany, France and the United Kingdom, it can be helpful to read the country reports of the five jurisdictions involved (two parties and three arbitrators) to get a good idea of where these persons are coming from, and especially as to how relevant they may think the UNIDROIT Principles are.

The second half of this book contains compiled summaries of selected cases, consisting of a collection of over 250 summaries of court and arbitration cases where the UNIDROIT Principles were referred to or relied on either by the parties themselves or by the arbitrators or judges. The members of the IBA Working Group have compiled these summaries to illustrate the manner in which domestic courts and international tribunals apply the UNIDROIT Principles to the resolution of real disputes.

For ease of review, the cases are organised according to the articles of the UNIDROIT Principles referenced.

The summaries of court and arbitration cases can be used as a reference guide by practitioners in future cases involving the subject matters covered by the UNIDROIT Principles.

When and how are the UNIDROIT Principles applied or used to interpret and supplement the law in international contract cases?

The UNIDROIT Principles are only expressly chosen a few cases by the parties in their contract as the sole *lex contractus*. More often, the parties agree on the application of the UNIDROIT Principles after the commencement of the court or the arbitral proceedings, sometimes at the suggestion of the court or arbitral tribunal itself. Indeed, once a dispute has arisen, the parties know what the issues at stake are and are therefore in a better position to appreciate the advantages of choosing the UNIDROIT Principles as the rules of law applicable to the substance of the dispute instead of a particular domestic law.

In other cases, the parties agree that their contract will be governed by or that the courts or the arbitral tribunal should decide the merits of the dispute in accordance with principles and rules of supranational or transnational character, such as the *lex mercatoria* or 'general principles of international contract law', and the court or the arbitral tribunal apply the UNIDROIT Principles on the ground that they constitute a particularly authoritative and reliable expression of the principles and rules in question.

There are examples of cases where the court or arbitral tribunal has used the UNIDROIT Principles for interpretation to fill a gap when parties have not chosen any law to govern their contract.

There is a good number of decisions referring to the UNIDROIT Principles to interpret or supplement international uniform law instruments such as UN Convention on Contracts for the International Sale of Goods or other treaties.

In view of their intrinsic qualities, the UNIDROIT Principles may furthermore be used to interpret or supplement the domestic law governing the contract chosen by the parties or applicable by virtue of the relevant conflict-of-laws-rules of the forum. This is the case in particular when the domestic law in question is that of a country in transition from a planned to a market economy or lacks experience in

regulating modern business transactions. Yet also highly developed legal systems do not always provide a clearcut solution to specific issues arising out of commercial contracts, especially if international in nature, either because opinions are sharply divided, or because the issue at stake has so far not been addressed at all. In both cases, the UNIDROIT Principles may be used for interpretation and supplementation of the respective domestic law consistent with internationally accepted standards and/or the special needs of cross-border trade relationships.

In most cases, the UNIDROIT Principles are used as a means of interpreting and supplementing the applicable domestic law.

The majority of the compiled summaries concern international disputes, but there are also decisions referring to the UNIDROIT Principles that relate to disputes of a purely domestic nature. It is of interest to see that the domestic laws governing individual contracts in the cases in question were far from being only those of less-developed countries or so-called emerging economies. Indeed, they include, inter alia, the laws of Australia, Brazil, England, Finland, France, Germany, Italy, the Netherlands, Norway, Quebec, Spain, Sweden, Switzerland and the State of New York, confirming that even highly sophisticated legal systems do not always provide clear and/or satisfactory solutions to the special needs of current international commercial transactions, while the UNIDROIT Principles may actually offer such a solution.

While often the reference in an award to the UNIDROIT Principles does not have a direct impact on the decision of the merits of the dispute at hand, individual provisions of the principles are cited, essentially to demonstrate that the solution provided by the applicable domestic law is in conformity with current internationally accepted standards of rules. Yet even such ‘additional remarks’ may assume considerable importance in an international context where normally at least one of the parties involved is confronted with a foreign law that is virtually unknown to them. For that party, the assurance that the solution adopted under the foreign law basically corresponds to the solution provided by a balanced and internationally accepted set of rules, such as the UNIDROIT Principles, may well have a beneficial psychological effect and increase its confidence in a fair judgment.

However, in a number of cases, the courts and arbitral tribunals resorted to the UNIDROIT Principles in support of the adoption of one of several possible solutions under the applicable domestic law, or in order to fill a veritable gap in such law, for example, the case of duty to negotiate (Compiled Summaries, Case II, 4 under Article 1.3 of the UNIDROIT Principles).

Even more important, there are awards, including decisions of courts of second and last instance, referring to the UNIDROIT Principles as a source of inspiration for openly revisiting their country’s current law. For instance, courts in Australia and, although to a less extent, courts in Canada and England have recently referred to the principles as a source of inspiration in their attempt to affirm also at domestic level the relevance of good faith in contract formation and performance. The Court of Appeal in Quebec and the UK Supreme Court did this in the examples on hardship and excessive penalty clauses (Compiled Summaries, Case XI, 4 under Article 6.2.2 and XX,1 under Article 7.4.13 of the UNIDROIT Principles) mentioned above.

This all shows that the UNIDROIT Principles are an important source for practitioners in international contracts. Our hope is that the readers will enjoy the practical insight the IBA Working Group gives into the UNIDROIT Principles, with its 28 country reports and over 250 compiled summaries of selected cases, as a reference guide.

**Willem Calkoen**

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# **IBA Working Group on UNIDROIT Principles**

Country Perspectives

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# Australia

*Donald Charrett<sup>1</sup>*

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

2 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.

3 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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<sup>4</sup> S 109.

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

<sup>6</sup> See n2 above.

<sup>7</sup> *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 6A; 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>

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 R E 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

*Michael Kutschera*<sup>55</sup>

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 Gralf-Peter Calliess, 'Article 3, Rome I' in Gralf-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) *Kurzkomentar 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, Daltro & 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 evolvement. 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 Facchini 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

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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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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 G  rald Goldstein, *Droit international priv  * (vol 1, Yvon Blais 2011) 482 (hereafter Goldstein); G  rald Goldstein and Ethel Groffier, *Droit International Priv  * (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 Qu  bec* (vol 2, Publications du Qu  bec 1993); Goldstein (n 17) 475–476.

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

141 See Jeffrey Talpis, 'Retour vers le futur: application en droit qu  b  cois des principes d'Unidroit au lieu d'une loi nationale' in *Les principes d'UNIDROIT et les contrats internationaux: aspects pratiques: les Journ  es Maximilien-Caron* 609, 620 (hereafter Talpis); H. Patrick Glenn, 'Droit international priv  ' in Barreau du Qu  bec, *La R  forme du Code Civil* (Presses de l'Universit   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 Proc  dure Civil* (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 inc*, 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 Goffier (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

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

<sup>183</sup> 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 the 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 the 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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<sup>208</sup> 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.

<sup>209</sup> 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 'where 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 Rome 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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224 Founding partner of Brödermann Jahn (Hamburg); Professor at the University of Hamburg; Arbitrator; Licencié and Maître en droit (Paris); LLM (Harvard); *dr iur* (Hamburg); FCI Arb (London); admitted to the bars of New York and Hamburg (Germany); Certified Specialist of International Economic Law (Hamburg Bar). This country perspective is based on assessments explained in more detail in Eckart Brödermann, *UNIDROIT Principles of International Commercial Law, An article-by-article commentary*, 531 pages (Wolters Kluwer and Nomos, 2018) (hereafter Brödermann, *UNIDROIT Principles Commentary*) (reviewed, eg, by Klaus Peter Berger, (2018) *Arbitration International* 1–3; Petra Butler, (2018) *Victoria University of Wellington Law Review* 409–412; Lauro da Gama, (2019) *Revista Brasileira de Arbitragem* 222–225).

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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<sup>230</sup> 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 Rodríguez, in: Rodríguez Olmos, Javier Mauricio (ed), *Principios Unidroit. Estudios en torno a una nueva ‘linguafranca’* (2013) pp 183, 194); recently also, eg, Brödermann/Wegen in PWV (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.

<sup>231</sup> 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’).

<sup>232</sup> 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.

<sup>233</sup> 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.

<sup>234</sup> 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.

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

<sup>236</sup> 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.

<sup>237</sup> 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.

<sup>238</sup> 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).

<sup>239</sup> 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>

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

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

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

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

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

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

<sup>254</sup> 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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<sup>266</sup> 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.

<sup>267</sup> 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 Jhunjunwala*<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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### *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

*Risteard 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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285 Risteard de Paor (LLB, *ling franc* (TCD), Masters in European Governance (IEP Bordeaux), Masters in Environmental Regulation (Complutense Madrid)) is a qualified *Avocat à la cour* at the Paris Bar and an English-qualified solicitor, specialising in international dispute resolution. Louise Reilly (LLB, (TCD), BL, JSM (Stanford)) is a barrister at the Irish Bar with a specialisation in international arbitration.

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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<sup>294</sup> 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].

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

<sup>296</sup> 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 Mexicana-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 Nederlands 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 grondbeginselen 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

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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<sup>354</sup> 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 Manzoní Wasmoy 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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360 *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.

361 *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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<sup>376</sup> See n 370 above.

<sup>377</sup> See n 368 above.

<sup>378</sup> 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 şi ajustarea preţului contractual de către un terţ* ('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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<sup>384</sup> See, eg, Bucharest Tribunal, Ruling No 189, 28 January 2015; Arad Court, Ruling No 1759, 31 March 2016.

<sup>385</sup> See A Sitaru, *Dreptul Comerţului Internaţional, Tratat 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>386</sup> Sergey Petrachkov and Anastasia Bekker are respectively partner and associate at Alrud in Moscow.

<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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402 Partner, Commercial & Corporate Disputes and International Arbitration Practices, WongPartnership, Singapore.

403 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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<sup>407</sup> 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.

<sup>408</sup> Mads Bryde Andersen and Eric Runesson, 'An Overview of Nordic Contract Law' in Torgny Hästad (ed), *The Nordic Contracts Act. Essays in Celebration of its One Hundredth Anniversary* (DJØF Publishing Copenhagen 2015) 17, 41 (hereafter Hästad, *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’ (*oskäligen*) 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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<sup>429</sup> Decision of the Commercial Court of the Canton St Gallen of 12 November 2004, HG.2003.10.

<sup>430</sup> *Ibid*, reason III 2. The English translation of the German original represents a free translation by the authors.

<sup>431</sup> 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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<sup>434</sup> Eg, the Unfair Contract Terms Act 1977 governing the application of exclusion clauses in contracts.

<sup>435</sup> *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.

<sup>436</sup> ‘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, *Ebborn 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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<sup>479</sup> 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 1,401.

## 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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<sup>480</sup> 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 Uruguay 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.

# **IBA Working Group on UNIDROIT Principles**

**Compiled Summaries of Selected Cases**



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# Chapter 1: General provisions

## I. Article 1.2: No form required

### 1. Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2013

**Case:**<sup>482</sup> Company A from country X and company B from country Y entered into a joint venture agreement (JVA) to provide technical assistance to the government of country Z in the framework of a project in country Z. According to the JVA, any net margin of the joint venture company was to be divided equally between company A, which was the manager of the joint venture company, and company B. The JVA provided that the parties could refer their disputes to arbitration (*‘pourront faire appel à la Cour d’Arbitrage’*) and that the International Federation of Consulting Engineers (FIDIC) rules prevailed in such cases.

After the completion of the project, company B sent an invoice to company A for 50 per cent of the joint venture company’s net margin. Company A refused to pay, alleging that company B’s employees did not provide any assistance to its employees during the project. After first referring the case to the courts in country X, company B initiated arbitration proceedings against company A, which contested the jurisdiction and alleged that the arbitration clause was too vague to constitute a valid agreement to arbitrate and that company B has waived its right to arbitration by first commencing state court proceedings.

In their submissions on jurisdiction, the parties did not specify the rules of law determining the substantive validity of the arbitration agreement. For this reason, the arbitral tribunal seated in Switzerland considered that, within the boundaries of Swiss law, it had certain discretion when deciding which rules of law it will apply to this issue. After considering the different sets of rules of law that came into play in determining the applicable law, the arbitral tribunal held that the lack of an agreement of the parties can be interpreted as implied negative choice and that the contract’s connection with the different countries is not predominant enough to justify the application of one national law to the exclusion of others. Based on the foregoing, the arbitral tribunal decided to apply the UNIDROIT Principles and Swiss law to the question of the substantive validity of the arbitration agreement. In determining whether the parties consented to submit their dispute to the arbitral institution, the arbitral tribunal applied Article 4.1 as well as Article 4.3(c) of the UNIDROIT Principles. In the context of interpretation of the subsequent conduct of the parties, the arbitral tribunal considered that company B’s statements evidenced the fact that, in its view, the arbitration clause was defective and inoperable. The arbitral tribunal held that claiming the opposite would go against the principle of *venire contra factum proprium*, which is applicable under UNIDROIT Principles Article 1.7 and Article 1.8 as well as Swiss law.

The arbitral tribunal further found that both parties revoked the arbitration agreement and accepted the jurisdiction of the state courts. It stated that ‘such mutual waiver can be concluded without observing any requirement of form and must be interpreted according to the generally applicable

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<sup>482</sup> ICC, Case No 19127, Final Award, 2013.

principles for the interpretation of private statements of intent', thereby referring to and applying article 1.2 of the UNIDROIT Principles.<sup>483</sup>

Based on the foregoing, the arbitral tribunal decided that it has no jurisdiction to decide on company B's claims.

## II. Article 1.3: Binding character of contract

### 1. *Paraguay / National Court / Nunziante / Unilex 2143 / 2017*

**Case:**<sup>484</sup> Seller A terminated a contract for the sale of land to B, alleging that B had not paid the full amount for the land. B argued that the terms of the contract allowed for the payment to be made in two instalments and that the property was to be transferred before both payments were made. The matter reached the court, where it was decided that A had a duty to cooperate with B in order to ensure proper performance of the contract.

In the court's view, A was primarily responsible for a contractual breach and therefore not able to terminate the contract. While quoting Article 1.3 of the UNIDROIT Principles, which relates to the binding character of a contract, the court also affirmed that the contract had to be performed correctly by both parties, who had a duty to cooperate with each other.

### 2. *Russia / Arbitration / Petrachkov, Bekker / Unilex 1325 / 2007*

**Case:**<sup>485</sup> A claimant, an Estonian company, filed a lawsuit against a defendant, a Kazakh company, for collection of advance payment paid by the claimant for the goods, which were partially delivered by the defendant, and incurred interest. The arbitral tribunal ruled in favour of the claimant. The contract for the sales of goods provided that Russian law was the law governing the contract.

The court's reasoning is explained below.

In determining the applicable law, the arbitral tribunal found that the contract for the sale concluded between the claimant and the defendant, whose commercial enterprises are in different states, contains a provision that: 'applicable law shall be the substantive and procedural law of the Russian Federation'.

Since the substantive law of the Russian Federation as a contracting state is applicable in this case, the provisions of the Vienna Convention, which is part of the legal system of the Russian Federation, should be applied in the dispute between the parties.

In the Vienna Convention (clause 2 of Article 81), it is established that: 'A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract.' It is clear from this provision that the buyer who paid the price, but did not receive the goods in return, may require the seller to pay back the amounts paid.

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<sup>483</sup> Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XLII* (Kluwer 2017) 275 et seq.

<sup>484</sup> Tribunal de Apelación en lo Civil y Comercial de Asunción, 2017.

<sup>485</sup> The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC), Case No 23/2006, Award, 2007.

Arbitral tribunal interprets the provision of Article 81 of the Vienna Convention as not only fixing the obligations of the defaulting party, in this case the seller, but also as reflecting the general legal principles: ‘If the party obligated to pay money does not perform it, the other party may demand payment’, as well as the compulsory execution of the agreed contract (according to Articles 7.2.1–7.2.2 and 1.3 of the UNIDROIT Principles).

The fact that the above provisions of the Vienna Convention and the UNIDROIT Principles are universally recognised is confirmed by the existence of the same principles in the Civil Code of the Russian Federation. For example, according to Article 309 of the Civil Code of the Russian Federation, obligations shall be properly fulfilled; Article 487 of the Civil Code of the Russian Federation contains a general rule that a buyer who made an advance payment for goods, which were not delivered or were delivered in part, is entitled to demand the transfer of goods or the return of the amount of advance payments for the goods.

On the basis of the foregoing, the ICAC considered that the fact of the defendant’s indebtedness is proved, and the claims of the claimant shall be satisfied in accordance with Article 81 of the Vienna Convention.

### 3. *Switzerland / Arbitration / Nunziante / Unilex 863 / 2002*

**Case:**<sup>486</sup> This case came about pursuant to a dispute that arose based on a contract entered into between A and B, a company from Country Y and two individuals from Country X, respectively. One of the terms in the contract required B to provide A with certain information pertaining to production and sale/marketing of its products.

A terminated the contract and instituted arbitration proceedings. The arbitration clause mentioned the European Convention on Commercial Arbitration of 1961 and provided for Country Z to be the seat of arbitration. The contract did not have a clear provision containing a chose of law. B argued for the application of neutral law, that is, law of Country Z, but recognised that the contract contained a reference to ‘general principles of law applicable to international commercial contracts.’ Therefore, B accepted the application of the UNIDROIT Principles. Since A also agreed on their application, the arbitral tribunal applied the principles as the law governing the substance of the disputes chosen by the parties themselves. Further, it was also noted that no law of countries X, Y and Z prohibited the application of such principles. The tribunal also observed that the contract at hand involved the marketing of new products in a dozen or so countries, and that applying domestic law would not be as reasonable as applying the UNIDROIT Principles. As the contract involved contracts of services, sale of goods and contract for works the UNIDROIT principles were found to be suitable.

In conclusion, the tribunal found that the termination by A of the contract was unjustified. It went on to mention Article 1.3 to iterate that an unjustified termination went against the sanctity of the contract. The reference made at the end of Article 1.3 is to Article 3.13, Article 5.8 (Article 5.1.8 of the 2004 edition), Article 6.1.16, Article 6.2.3, Article 7.1.7, Article 7.3.1 and Article 7.3.3.

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486 Arbitration Court of the Lausanne Chamber of Commerce and Industry, Award, 2002.

#### 4. *France / Arbitration / Nunziante / Unilex 644 / 1996*

**Case:**<sup>487</sup> Certain pre-bid agreements in the telecoms systems sector were entered into between A (a supplier) and B (a manufacturer), located in country X and Y, respectively. These agreements stipulated that a good-faith negotiation for the supply of cables would take place if A succeeded in winning a bid to be the prime contractor in a telecoms expansion project. However, though A won the bid, A and B could not negotiate a final deal for the supply of cables and thus A terminated the preliminary agreements. A dispute arose and the matter was to be heard by an arbitral tribunal.

The agreements did not provide for a clear choice of law clause and parties A and B requested that the tribunal apply the law of different countries. Party B also asked the tribunal to apply the general principles of law as under the UNIDROIT Principles. Although the tribunal saw the merit of applying the general principles over applying municipal laws of any one country, in the case at hand it decided that the law of a neutral country, J, would be applicable. However, the tribunal also referred to the UNIDROIT Principles, which evidenced the general principles of international commercial contracts.

In particular, Article 1.3 of the UNIDROIT Principles was referred to. They confirmed, in the tribunal's view, a source for establishing general rules for international commercial contracts. The tribunal used those rules to support its conclusion, under the law of the state of New York, on the issue of the enforceability of the parties' agreement to negotiate in good faith. Thus, it was finally held that A and B were to restart their discussions on the supply of cables in accordance with the pre-bid agreements and aim to reach a consensus.

#### 5. *Italy / Arbitration / Nunziante / Unilex 622 / 1996*

**Case:**<sup>488</sup> A dispute arose when A (principal) terminated a commercial agency contract entered into with B (agent) for breach of the contract by B. B claimed that the termination was unlawful and instituted arbitration proceedings. At the start of the arbitral proceedings, the parties agreed that the UNIDROIT Principles would be referred to, along with the general principles of equity, since the contract did not have a clear choice of law clause.

The tribunal in its decision cited many articles of the UNIDROIT Principles and even the accompanying comments. To unambiguously iterate the binding character of the parties' original agreement, Article 1.3 specifically was quoted.

#### 6. *Switzerland / Arbitration / Voser, Ninković / Unilex 630 / 1996*

**Case:**<sup>489</sup> Company A from country X entered into a contract with company B from country Y by means of an order confirmation for the sale of a plant for manufacturing a certain product for the market of country Y. Due to financial difficulties caused by a sudden fall in the price of the product on the market of country Y, company B made an advance payment in the amount of only three per cent of the contractual price and did not open the letter of credit within the agreed time limit, which was a condition for the delivery of the equipment by company A. Nonetheless,

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487 International Court of Arbitration of the International Chamber of Commerce (ICC), Case No 8540, Award, Paris, 1996.

488 Camera Arbitrale Nazionale ed Internazionale di Milano, Award, 1996.

489 ICC, Case No 8486, Final Award, 1996.



company A offered to deliver half of the equipment and following company B's acceptance of the offer, issued an invoice in the amount of 50 per cent of the contractual price. However, company B was not ready to pay the amount as invoiced and offered to pay approximately 60 per cent of the invoiced amount. Company A did not accept this and reserved its rights under the original contract concerning the full delivery. Company A initiated arbitration proceedings against company B and claimed damages. In addition to the compensation for the part of the equipment which it could not sell to other buyers because they have been made according to the special requirements of company B, company A requested payment of interest and legal fees. Company B argued that it was discharged from payment because of the sudden fall in the price of the relevant product on the market of country Y, which amounted to hardship, and counterclaimed for repayment of its advance payment to company A.

The general conditions to the contract provided for the application of Dutch law and the arbitral institution fixed Zurich (Switzerland) as the seat of the arbitration.

The arbitral tribunal granted the claim for damages of company A, denied in part its claim for interest and denied the counterclaim of company B. In particular, the arbitral tribunal found that the circumstances raised by company B fell within the economic risk to be borne by company B and did not constitute unforeseen circumstances in the sense of the hardship provision; thus, the requirement for discharge from payment was not met. In reaching its decision, the arbitral tribunal held that the relevant mandatory provisions of Dutch law must be applied with utmost restraint. It stated that 'Dutch common opinion of law' is 'replaced by the common opinion in international contract law when the provision is applied in an international context', both of which are 'influenced in a decisive manner by the principle of contractual good faith (*pacta sunt servanda*) expressed in Article 1.3 of the UNIDROIT Principles for International Commercial Contracts.'<sup>490</sup> According to the arbitral tribunal, 'this common opinion of law must also be taken into account for the application of national law to international relationships'.<sup>491</sup>

The arbitral tribunal held that 'the termination of a contract for unforeseen circumstances (hardship, *clausula rebus sic stantibus*) should be allowed only in truly exceptional cases' and that, in international commerce, 'one must rather assume in principle that the parties take the risks of performing under and carrying out the contract upon themselves, unless a different allocation of risk is expressly provided for in the contract'.<sup>492</sup> In that context, while not directly applying the provision, the arbitral tribunal referred to article 6.2.1 of the UNIDROIT Principles, which expressly provides that the mere fact that the performance of the contract entails a higher economic burden for one of the parties does not suffice to assume that there is hardship.

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490 Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XXIVa* (Kluwer 1999) 24, 166 et seq.

491 *Ibid* at 167.

492 *Ibid*.

### III. Article 1.7: Good faith and fair dealing

#### 1. Ireland / Court of Appeal / De Paor / Not Unilex / 2017

**Case:**<sup>493</sup> The case involved 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. The appeal was allowed and the appellants were unsuccessful in their argument that 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 Irish contract law.

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 like Ireland in embracing the necessarily broad concepts and duties in the 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.'

#### 2. Italy / National Court / Nunziante / Not Unilex / 2017

**Case:**<sup>494</sup> Claimant A, following an allotment approved by the municipality and by the region, undertook to build in its area two buildings, called X and X1. During the construction, claimant A had serious economic problems and, therefore, renounced the construction of the second building.

Notwithstanding said declaration, the municipality, believing that the instalments for the supplementary contributions imposed with the building permits were not paid, formally requested the company to pay the amount of €241,891.92 for urbanisation and construction costs, as well as the forfeiture of the guarantee policies.

The court, in examining the issue, on one side acknowledged that it is not enough to renounce the construction of a building to obtain the reduction of the urbanisation costs; on the other, that the cost of construction should have been proportional to the actual construction of the building.

In light of these considerations, the court established that the formation of credit by the Municipality assumed, as a condition of enforceability, the actual construction activity and entailed the payment of a contribution proportional to the overall construction cost, referring to the entire work actually performed.

In addition to this, the court acknowledged that the municipality should nevertheless have considered the company's renunciation to construct the building by virtue of two principles of law:

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<sup>493</sup> *Flynn v Brecia* (2017) IECA 74, (2017) 1 ILRM 369.

<sup>494</sup> Judgment of the Administrative Regional Court of Molise – Campobasso, 17 May 2017.

first, the obligation to renegotiate in good faith, which regulated the conventions of the allotment; and second, the privatistic instruments on a contractual or negotiation basis.

In such thought, the court recalls the general clause of good faith, which under Articles 12 and 41 of the Constitution stands as a hermeneutical rule and supplements the contract in its execution (so called good faith *in executivis*). The judge, moreover, states that: ‘Such hermeneutics on negotiations find solid anchors in international law and European law (UNIDROIT Principles)’.

### 3. *France / Arbitration / Sierra / Not Unilex / 2016*

**Case:**<sup>495</sup> Company A, of country X and company B, of country Y, entered into a joint venture agreement (JVA), by which both parties created companies C and D for the production and commercialisation of certain products in country X. The parties agreed that the JVA would be subject to the UNIDROIT Principles, supplemented if necessary by the laws of Country X. One of the obligations provided under the JVA, was that the parties would be able to allow the rotation of the chairman of company C.

In the first years of operation of the JVA, company B did not require the rotation of the chairman, entrusting company A to continue holding such position. However, after company A restricted company B with access to certain information pertaining to the JVA, company B required company A to appoint a new chairman.

Company A did not attend the meeting where the new chairman was to be appointed arguing a deadlock prevented the chairman rotation. The JVA foresaw that if both parties failed to pass a resolution in two shareholders or board of directors meetings, of companies C or D, with no less than 15 days between each other, a ‘deadlock’ provision would be triggered and which would eventually lead to the JVA dissolution.

Furthermore, company A argued that company B’s behaviour was to be interpreted as a waiver of its right to require chairman rotation, given that the parties were bound by the usage and mutual understanding they had established between themselves pursuant to Article 1.9 of the UNIDROIT Principles.

The arbitral tribunal ruled that the fact that company B did not request the strict application of the JVA could not be interpreted as a waiver of its right.

Furthermore, the arbitral tribunal found that even though the deadlock could lead to the dissolution of the JVA, until the dissolution takes place, the parties were obliged to comply with the JVA in good faith. Consequently, the arbitral tribunal held that company A breached its obligation to renew the chairman position of companies C and D under the JVA and thus breached its good faith obligation, pursuant to Article 1.7 of the UNIDROIT Principles.

### 4. *The Netherlands / National Court / Meijer / Unilex 1924 / 2015*

**Case:**<sup>496</sup> The claimant, a company, and the respondent, the government of a country, entered into nine related contracts for the supply of anti-missile systems. Pursuant to the end of an internal

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<sup>495</sup> ICC, Case No 18795/CA/ASM (C-19077/CA).

<sup>496</sup> Supreme Court of the Netherlands, *BAE Systems PLC, UK v Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran*, 2015.

conflict within the country, the respondent terminated the contract. The claimant initiated arbitral proceedings claiming damage. The respondent on the other hand claimed restitution of the advance payments it had made.

The contracts did not contain a choice of law provision but did contain references to ‘natural justice’ and ‘laws of natural justice’ or ‘rules of natural justice’.

Arbitral proceedings were initiated by the claimant and several awards were rendered by the tribunal. In its first partial award the tribunal found that the UNIDROIT Principles were applicable. It stated that: ‘[...] the Contracts are governed by, and should be interpreted in accordance with, the UNIDROIT Principles with respect to all matters falling within the scope of such Principles and that for all other matters, by such other general legal rules and principles applicable to international contractual obligations enjoying wide international consensus which would be found relevant for deciding controverted issues falling under the present arbitration.’

In another partial award, the tribunal dealt with the issue of whether the claims of the respondent were time-barred. This is an issue that was not dealt with in the UNIDROIT Principles at the time. However, the tribunal found that it might be a general principal of law that a claim is time-barred if it is pursued with unreasonable delay. This duty stems from the duty of parties to act in accordance with good faith and fair dealing, also affirmed in Article 1.7 of the UNIDROIT Principles. However, the tribunal found that the passing of 11 years did not stop the respondent from pursuing its claim, and the claim was not made with unreasonable delay.

The claimant pursued a setting-aside action and made arguments for the annulment of all four partial final awards issued by the arbitral tribunal. The claimant argued that the UNIDROIT Principles, namely Articles 10.2.2 and 10.9, as they were written in 2004 and which contained a chapter on limitation periods, contradicted the tribunal’s conclusion that the respondent’s claims were not time-barred. The respondent, in opposition, asserted that such retroactive application of the UNIDROIT Principles was not to be permitted and that the 2004 edition of the principles had not yet achieved general consensus.

The claimant’s arguments did not succeed, and the District Court confirmed all four partial final awards, a decision upheld by both the Court of Appeal and then the Supreme Court. The Supreme Court ruled that the tribunal’s decision, being on the merits, could not be reviewed in setting aside proceedings before the courts. It also held that the fact that the tribunal’s decision regarding the application of the UNIDROIT Principles was at least partly procedural in nature did not affect the Court’s finding in this respect.

## 5. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2013*

**Case:**<sup>497</sup> Company A from country X and company B from country Y entered into a joint venture agreement (JVA) to provide technical assistance to the government of country Z in the framework of a project in country Z. According to the JVA, any net margin of the joint venture company was to be divided equally between company A, which was the manager of the joint venture company, and

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<sup>497</sup> ICC, Case No 19127, Final Award, 2013.

company B. The JVA provided that the parties could refer their disputes to arbitration (*pourront faire appel à la Cour d'Arbitrage*) and that the FIDIC rules prevailed in such cases.

After the completion of the project, company B sent an invoice to company A for 50 per cent of the joint venture company's net margin. Company A refused to pay, alleging that company B's employees did not provide any assistance to its employees during the project. After first referring the case to the courts in country X, company B initiated arbitration proceedings against company A, which contested the jurisdiction and alleged that the arbitration clause was too vague to constitute a valid agreement to arbitrate and that company B had waived its right to arbitration by first commencing state court proceedings.

In their submissions on jurisdiction, the parties did not specify the rules of law determining the substantive validity of the arbitration agreement. For this reason, the arbitral tribunal seated in Switzerland considered to have, within the boundaries of Swiss law, certain discretion when deciding which rules of law it will apply to this issue. After considering the different sets of rules of law that came into play in determining the applicable law, the arbitral tribunal held that the lack of an agreement of the parties can be interpreted as implied negative choice and that the contract's connection with the different countries is not predominant enough to justify the application of one national law to the exclusion of others. Based on the foregoing, the arbitral tribunal decided to apply the UNIDROIT Principles and Swiss law to the question of the substantive validity of the arbitration agreement. In determining whether the parties consented to submit their dispute to the arbitral institution, the arbitral tribunal applied Article 4.1 as well as Article 4.3(c) of the UNIDROIT Principles. In the context of interpretation of the subsequent conduct of the parties, the arbitral tribunal considered that company B's statements evidenced the fact that, in its view, the arbitration clause was defective and inoperable. The arbitral tribunal held that claiming the opposite would go against the principle of *venire contra factum proprium*, which is applicable under Article 1.7 and Article 1.8 of the UNIDROIT Principles as well as Swiss law.

The arbitral tribunal further found that both parties revoked the arbitration agreement and accepted the jurisdiction of the state courts. It stated that 'such mutual waiver can be concluded without observing any requirement of form and must be interpreted according to the generally applicable principles for the interpretation of private statements of intent', thereby referring to and applying Article 1.2 of the UNIDROIT Principles.<sup>498</sup>

Based on the foregoing, the arbitral tribunal decided that it had no jurisdiction to decide on company B's claims.

## 6. Italy / National Court / Martinetti / Not Unilex / 2013

Case:<sup>499</sup> Company A lodged an opposition to an order for payment issued on request of company B for payments and sanctions related to an off-take of gas from strategic storage sites that, according to company B, company A unduly withdrew without a subsequent restitution or payment. The opposition was notified also to company C and D because of their alleged responsibilities in relation to the closing of the gas pipeline.

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498 Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XLII* (Kluwer 2017) 275 et seq.

499 Tribunale of Milano, Case No 16351/2013 and Case No 16354/2013.

In this judgment the court deals with UNIDROIT Principles only by reporting a part of the claimant's legal argument concerning the duty to inform and the good faith. In particular, company A states that company D (the managing operator of the gas pipeline) had a specific duty to inform about the risk conditions of the pipeline. Company A considers that the non fulfilment of such duty is, inter alia, a breach of UNIDROIT Principles.

## 7. *Singapore / National Court / Koh / Not Unilex / 2013*

**Case:**<sup>500</sup> Company A, the appellant, and company B, the respondent, entered into a lease agreement which contained a rent review mechanism (rent review mechanism), which provided that the rent for each new rental term after the first rental term was to be determined by agreement between the parties, or, failing agreement, by 'three international firms of licensed valuers' appointed either jointly by parties or the President of an institute of surveyors and valuers. In particular, the lease agreement provided that parties shall 'in good faith endeavour to agree on the prevailing market rental value' of the premises prior to the appointment of the designated valuers. Despite this, the respondent unilaterally approached all eight 'international firms of licensed valuers', and subsequently engaged seven firms to prepare valuation reports.

The court held that there was no reason why such an express agreement between two contracting parties that they had to negotiate in good faith should not be upheld. Reasonable commercial standards of fair dealing call for the disclosure of all material information which could have an impact on the negotiations and/or ultimate determination of the new rent. The fact that company B had valuations carried out would surely have qualified as material information. Given that the respondent commissioned reports from seven of the eight international valuation firms eligible for appointment, its failure to disclose the existence of these valuation reports constituted a breach of its 'good faith' obligation. For disclosure of time-sensitive information to have any real impact, disclosure had to be made as soon as practicable. The respondent was contractually obliged to make full disclosure of these valuations in a timely manner, as part of the parcel of obligations imposed on the parties to 'in good faith' negotiate the new rent.

## 8. *Spain / National Court / Doria / Unilex 1651 / 2011*

**Case:**<sup>501</sup> Two Spanish individuals, A and B, were debtors of the Spanish bank C by a loan granted by the latter to the individuals, which was secured with a mortgage over a property. Following outstanding payments of the loan, the bank started an enforcement procedure in February 1985 before the Spanish courts. As a result of this procedure, in December 1985 the bank and the debtors agreed to settle by means of the assignment of the property to the bank to cancel part of the debt.

Eighteen years later, in March 2003, the bank reactivated the same enforcement procedure and obtained the embargo of the salaries and other properties of the individuals. The latter appealed against the court decision based on statute of limitations. The decision was reversed in July 2003 and the embargos were released.

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<sup>500</sup> *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* (2012) SGCA 48.

<sup>501</sup> Spanish Supreme Court, First Chamber, Ruling 872/2011, 12 December 2011.



The individuals started a civil procedure against the bank claiming material damages (legal expenses and costs) and moral damages (psychical stress, affectation of professional reputation and family life) caused by the bank.

Following two court rulings (first instance and appeal) dismissing the claim, the Spanish Supreme Court finally upheld the claim in a ruling, declaring that the bank failed to act in good faith due to unfair delay in the exercise of the bank's rights. The decision of the Supreme Court was based on Article 7.1 of the Spanish Civil Code (Rights must be exercised in accordance with the requirements of good faith), with express mention to the concept of good faith in European law, among others, as provided for in Article 1.7 of the UNIDROIT Principles.

## 9. *Australia / National Court / Koh / Unilex 1614 / 2010*

**Case:**<sup>502</sup> The government of country X entered into a 'heads of' agreement for the construction of a private hospital by company A on land that was owned by the government. The agreement required the parties 'to act with the utmost good faith in the performance of their respective duties, in the exercise of their respective powers, and in their respective dealings with one another'. It was expressly agreed that the private hospital would be located next to and be physically linked to a public hospital and also that there would be other agreements that the parties would enter into.

The government soon took on an asset strategic plan which was not disclosed to company A. By virtue of this plan, there was no proposal of any link between the public hospital and the private hospital. Thus, company A instituted a case against the government claiming that the non-disclosure of the asset strategic plan during the negotiations in relation to the subsequent agreements was an act in breach of the good faith obligations under the 'heads of' agreement.

The court decided the case in favour of company A and reasoned that the government should indeed have disclosed the required information to company A. The court noted that any information that would have made a substantial difference to company A's reasonable expectations under the agreement was required to be shared with company A pursuant to the good faith obligation under the 'heads of' agreement. The good faith obligation in the agreement was indeed enforceable and in coming to its decision, the court took into account Article 1.7 of the UNIDROIT Principles, thus confirming its increased recognition on a global scale.

## 10. *Australia / National Court / Koh / Unilex 1517 / 2009*

**Case:**<sup>503</sup> Company A contracted with company B for the construction of rail infrastructure. A dispute arose between the parties regarding the content and operation of a dispute resolution clause in the contract. Under the dispute resolution clause, parties are required to undertake 'good faith negotiations'. The question for the court was whether such a requirement was valid.

In its consideration of the concept of good faith, the court made reference to Article 1.7 of the UNIDROIT Principles, stating that this concept is 'recognised as part of the law of performance of contracts in numerous sophisticated commercial jurisdictions.'

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502 *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) NSWCA 268.

503 *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) NSWCA 177.



## 11. *Australia / National Court / Koh / Unilex 845 / 2003*

**Case:**<sup>504</sup> The government of a country and two companies, company A and company B, entered into contracts for software development and systems integration. The contract between the government and company A was the head contract, while the contract between company A and company B was the subcontract.

The dispute arose when company B served a notice of termination on company A on the grounds of company A's alleged failures to comply with its contractual obligations. These included company A's alleged failure to deliver specific devices in order for company B to develop the software, and also company A's failure to pay company B as required under the subcontract. Company A argued: first that the terms of the contract had been changed; and, second, that company B was not entitled to be paid under the subcontract as it failed to meet the requirements of payment under the subcontract.

As to company A's arguments that the contract had been amended, the court referred to UNIDROIT Principles, Article 2.1.18. The contract contained a 'no oral modification clause' but company A argued that they were estopped from enforcing this clause by their own conduct. Referring to Article 2.1.18, which states that a party may be precluded by its conduct from invoking such a clause to the extent that the other party has acted in reliance on that conduct. The tribunal found that the contract was indeed amended and that company B could not invoke the 'no oral modification' clause, since it had already acted in accordance with the oral modification of the contract.

Further, company A argued that the subcontract had contained an 'entire obligation' clause, which the court rejected. The court referred to comment 2 to Article 6.1.4 of the UNIDROIT Principles, which stated that, although as a rule if the performance of only one party's obligation by its very nature requires a certain period of time, that party is bound to render its performance first, circumstances indicating the contrary should be taken into consideration, for example, where the contract provides for payments to be made in agreed instalments throughout the duration of the work.

Company A argued that company B was in breach of its duty to act honestly and in good faith due to its termination of the contract. In this respect, company B argued that due to the 'entire agreement clause', these concepts were not part of the contract. An 'entire agreement clause' is used to indicate that the contract constitutes the whole agreement between the parties, thereby preventing a party from relying on previous agreements and negotiations that are not included in the agreement. Company B argued that a duty of good faith could not be implied in the contract when an 'entire agreement clause' was involved. The court found that an entire agreement clause could not exclude good faith from a contract and that good faith and fair dealing are to be considered implied terms of all contracts, and the court referred to Article 1.7 of the UNIDROIT Principles in its reasoning.

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<sup>504</sup> *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, FCA 50 (2003).

## 12. *Russia / Arbitration / Petrachkov, Bekker / Unilex 856 / 2002*

**Case:**<sup>505</sup> A claimant, a Russian company, filed a lawsuit against a defendant, a Canadian company, for collection of damages (advance payment) incurred due to the breach of the sale and purchase agreement. The contract for the sale of goods provided that Russian law was the law governing the contract. The arbitral tribunal ruled in favour of the claimant.

The court reasoned as follows:

‘While analysing these provisions of the contract, the arbitral tribunal stated that the provision of the contract for the procedure for payments had not been subject to any changes. A 100 per cent advance payment was to be made by the claimant for each shipment of goods on the basis of the defendant’s invoice indicating the value of the goods, which proves (if otherwise is not evidenced) that the final price of the goods to be paid by the claimant to the defendant is agreed in the prescribed manner. This conclusion is also confirmed by the contract, according to which the term for shipment of goods or the return of advance payment is established from the date of making the advance payment.

‘Thus, the Arbitral Tribunal concluded that by virtue of the agreement the defendant was not entitled to delay the shipment of the goods. Moreover, the arbitral tribunal drew attention to the fact that the actions of the defendant, even if he had the right to delay the shipment, would be contrary to the principles of good faith and fair business practices recognised in international trade (articles 1.7 and 5.2 of the UNIDROIT Principles) and would constitute an abuse of law, which directly contradicts article 10 of the Civil Code of the Russian Federation.’

## 13. *Russia / Arbitration / Petrachkov / Not Unilex / 2002*

**Case:**<sup>506</sup> While analysing these provisions of the contract, the arbitral tribunal stated that the provision of the contract for the procedure for payments had not been subject to any changes. A 100 per cent advance payment was to be made by the claimant for each shipment of goods on the basis of the respondent’s invoice indicating the value of the goods, which proves (if otherwise is not evidenced) that the final price of the goods to be paid by the claimant to the respondent is agreed in the prescribed manner. This conclusion is also confirmed by the contract, according to which the term for shipment of goods or the return of advance payment is established from the date of making the advance payment.

Thus, the arbitral tribunal concluded that by virtue of the agreement the defendant was not entitled to delay the shipment of the goods. Moreover, the tribunal drew attention to the fact that the actions of the respondent, even if he had the right to delay the shipment, would be contrary to the principles of good faith and fair business practices recognised in international trade (Articles 1.7 and 5.2 of the UNIDROIT Principles) and would constitute an abuse of law, which directly contradicts Article 10 of the Civil Code of the Russian Federation.

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505 ICAC, Case No 217/2001, Award, 6 September 2002.

506 ICAC, Case No 11/2002, Award, 5 June 2002.

## IV. Article 1.8: Inconsistent behaviour

### 1. *Italy / National Court / Nunziante / Not Unilex / 2017*

**Case:**<sup>507</sup> Claimant A, a company from country X, advanced a claim for damages against the Defendant B, a municipality. Claimant A claimed to be the owner of several plots of land that had originally been designated for use as a natural park. One of the plots of land became available for construction, after the adoption of a partial variation issued by the administration. The variation was subsequently revoked by the municipality, and the first instance court confirmed the legitimacy of the revocation.

Claimant A sought compensation for the damages suffered due to the ban on building on the land. Claimant A affirmed that the behaviour of the municipality, in the period between the adoption of the partial variation and its revocation, created a legitimate expectation that was to be protected. Defendant B replied affirming that the land was purchased before the adoption of the partial variation and that the latter did not affect claimant A's ability to build on its property.

The court recognised the principle of protection of the legitimate expectation between an administration and a citizen in an administrative procedure and, in doing so, recalled the UNIDROIT Principles, and in particular Article 1.8, according to which '[a] party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.'

The court, on the merits, rejected the claimant's action since claimant had bought the land before the adoption of the administrative measures.

### 2. *Italy / National Court / Martinetti / Not Unilex / 2016*

**Case:**<sup>508</sup> Ms A brought an action against Ms B for the return of the deposit agreed at the conclusion of the 'preliminary contract' for the sale of an immovable property. The sale was subordinated to a condition (the regularisation of a wall from the competent authority). Since the municipality denied such regularisation, Ms A claims the return of the deposit because of the fulfilment of the condition.

The court considers the claim well founded. In particular, in relation to a specific point raised in defendant's legal argument, the court specifies that the condition cannot be considered impossible on the ground of an objective assessment of the events. Moreover, the court notes that Ms B pointed out in the 'preliminary contract' that the request for regularisation had already been filed creating in the counterparty the legitimate expectation that the wall could have been regularised. In this context, the court recalls UNIDROIT Principles in order to affirm that the legitimate expectation is an expressly codified principle, quoting for that purpose Articles 1.7 and 1.8.

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<sup>507</sup> Administrative Regional Court of Piemonte – Torino, Case No 713, 8 June 2017.

<sup>508</sup> Tribunale of Pisa, n 1301/2016.

### 3. Russia / National Court / Petrachkov, Bekker / Not Unilex / 2014

**Case:**<sup>509</sup> The Russian individual, the claimant, filed a lawsuit against several defendants on invalidation of the sale and purchase agreement. The sale and purchase agreement provided for sale of the immovable property.

The court rejected the claims on the ground that, inter alia, the claimant previously accepted the agreement and performed its term, thus claimant's behaviour contradicts her previous behaviour. In its resolution, the court additionally referred to the UNIDROIT Principles.

The court reasoned as follows:

'The plaintiff's claims, based on the rejection of the terms of the contract, which she had approved and considered as binding, are in conflict with the previous behaviour of the plaintiff, which is the violation of the principle of international commercial law, enshrined in article 1.8 "Principles of International Commercial Agreements [UNIDROIT Principles]" (1994), according to which the parties are bound by any custom they have agreed upon and practices that they have established in their relations.'

### 4. Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2013

**Case:**<sup>510</sup> Company A from country X and company B from country Y entered into a JVA to provide technical assistance to the government of country Z in the framework of a project in country Z. According to the JVA, any net margin of the joint venture company was to be divided equally between company A, which was the manager of the joint venture company, and company B. The JVA provided that the parties could refer their disputes to arbitration (*pourront faire appel à la Cour d'Arbitrage*) and that the FIDIC rules prevailed in such cases.

After the completion of the project, company B sent an invoice to company A for 50 per cent of the joint venture company's net margin. Company A refused to pay, alleging that company B's employees did not provide any assistance to its employees during the project. After first referring the case to the courts in country X, company B initiated arbitration proceedings against company A, which contested the jurisdiction and alleged that the arbitration clause was too vague to constitute a valid agreement to arbitrate and that company B had waived its right to arbitration by first commencing state court proceedings.

In their submissions on jurisdiction, the parties did not specify the rules of law determining the substantive validity of the arbitration agreement. For this reason, the arbitral tribunal seated in Switzerland considered it had, within the boundaries of Swiss law, certain discretion when deciding which rules of law it would apply to this issue. After considering the different sets of rules of law that came into play in determining the applicable law, the arbitral tribunal held that the lack of an agreement of the parties could be interpreted as implied negative choice and that the contract's connection with the different countries was not predominant enough to justify the application of one national law to the exclusion of others. Based on the foregoing, the arbitral tribunal decided

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509 Tenth Arbitrazh Appeal Court, Case No A41-26400/14, Resolution, 14 November 2014.

510 ICC, Case No 19127, Final Award, 2013.

to apply the UNIDROIT Principles and Swiss law to the question of the substantive validity of the arbitration agreement. In determining whether the parties consented to submit their dispute to the arbitral institution, the arbitral tribunal applied Article 4.1 as well as Article 4.3(c) of the UNIDROIT Principles. In the context of interpretation of the subsequent conduct of the parties, the arbitral tribunal considered that company B's statements evidenced the fact that, in its view, the arbitration clause was defective and inoperable. The arbitral tribunal held that claiming the opposite would go against the principle of *venire contra factum proprium*, which is applicable under Article 1.7 and Article 1.8 of the UNIDROIT Principles as well as Swiss law.

The arbitral tribunal further found that both parties revoked the arbitration agreement and accepted the jurisdiction of the state courts. It stated that 'such mutual waiver can be concluded without observing any requirement of form and must be interpreted according to the generally applicable principles for the interpretation of private statements of intent', thereby referring to and applying Article 1.2 of the UNIDROIT Principles.<sup>511</sup>

Based on the foregoing, the arbitral tribunal decided that it had no jurisdiction to decide on company B's claims.

## 5. *Italy / National Court / Nunziante / Unilex 1638 / 2012*

**Case:**<sup>512</sup> Claimant A from country X filed a case against B, the government of country Y, for the failure to pay some part of A's pension. B alleged that, as the claim was time-bared, and A did not have a case.

The court reasoned that, despite the expiry of the limitation period, B was not permitted to raise an objection, owing to its own behaviour. B's failure to adequately inform A of a new law pertaining to the re-evaluation of pensions that had come into force resulted in A believing that there was no such change in the laws of country X. The court went on to illustrate that B should have informed A of the change in law during the issuances of the monthly payment slips that were sent to A. As a consequence of B not doing this, A did not file its case within the supposed limitation period.

The court, in support of its decision, made a reference to Article 1.8 of the UNIDROIT Principles. This article states, '[a] party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.'

## 6. *Italy / National Court / Nunziante / Unilex 1873 / 2012*

**Case:**<sup>513</sup> A dispute arose in country X between a construction company, A, and certain homeowners, B, all from country X who had bought seven apartments in a building constructed by A. B alleged that the common areas in their apartment complex, such as the swimming pool, were not in proper working order due to certain construction defects, and notified A of the same. A agreed to fix the defects promptly but only cured a part of the defects. B instituted a suit requesting cure of all defects or, alternatively the payment of damages for the loss suffered as a result. However, A argued that this

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511 Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XLII* (Kluwer 2017) 275 et seq.

512 Corte dei Conti - Sezione Giurisdizionale per la Regione Siciliana, Case No 197, 24 January 2012.

513 Tribunale di Varese (Sezione distaccata di Luino), 5 January 2012.

suit was time-barred, as a year had passed, a year being the limit under the Article 1669 of the Civil Code of country X.

The court, while hearing this matter, held that, since A had acknowledged the existence of such construction defects and agreed to fix them pursuant to intimation from B, it would be fair for B to assume that no further action on their part was required. Such is stated in the general principle of good faith, under Article 1175 of the Civil Code of country X.

The court in its decision quoted article 1.8 of the UNIDROIT Principles while discussing both the application of the prohibition of inconsistent behaviour and the general principle of good faith.

## 7. *Italy / National Court / Nunziante / Unilex 1636 / 2011*

**Case:**<sup>514</sup> A dispute arose between a company, A, and the National Pension Institute, B, of country X. B alleged both that A had failed to discharge the full amount owed as contributions and that it had delayed its communications to B regarding the amount of salaries paid to its employees. A, however, argued that, after the expiry of the prescribed time limit, B had required A to submit certain information that B had not initially required, and then B objected to the delayed submission. Thus, A attributed the delay to B's inconsistent behaviour. The matter reached the court, where the case was decided in favour of A.

The court cited Article 1.8 of the UNIDROIT Principles to justify its decision. It reasoned that, according to the principle of prohibition against *venire contra factum proprium*, private and public subjects must behave consistently, with the consequence that, if they fail to do so, they are allowed no remedy. Thus, B had violated this principle, a principle that had been affirmed at the international level by the UNIDROIT Principles.

## 8. *Italy / Arbitration / Nunziante / Not Unilex / 2008*

**Case:**<sup>515</sup> Claimant A and defendant B entered into a framework agreement for the supply of steel components (the 'agreement'), according to which defendant was bound to purchase, either directly or through its subsidiaries, components for a certain amount per year. Moreover, while claimant undertook to sell them at 'the best market price', defendant was obliged to place its orders well in advance according to a fixed time schedule.

Soon after the conclusion of the agreement, it became clear that the parties had different views as to how it was actually to be implemented. While claimant insisted that defendant had strictly to follow the agreed procedure for the placement of the orders, defendant objected that it could not reasonably be expected to do so since this would be contrary to the general practice in the trade sector concerned and therefore put it at a severe disadvantage vis-à-vis its competitors. After defendant's failure to fulfill its annual minimum purchase commitments, claimant commenced arbitral proceedings claiming damages for breach of the agreement. Nevertheless, the parties continued their business relationship, defendant placing orders for the components and claimant delivering them, though with considerable delays, until defendant, invoking a special provision of the

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514 Tribunale di Torino – Sez. Lavoro, 2 February 2011.

515 Corte Arbitrale Nazionale ed Internazionale di Milano, Case No 212, March 2008.



agreement, according to which it was entitled to terminate the agreement by mere notice in case of delayed deliveries by claimant, actually terminated the agreement.

The agreement was governed by the law of country X.

As to the merits of the case, the arbitral tribunal had to decide, among others, whether claimant – as argued by defendant – was under a duty to cooperate with defendant in order to allow it to fulfill its annual minimum purchase commitments; whether defendant – as argued by claimant – by continuing the business relationship with claimant despite the delayed deliveries by the latter, was prevented by preclusion to terminate the agreement for that very reason; and whether defendant was entitled to claim damages for alleged breaches by claimant of the agreement requesting that the amount be assessed by the arbitral tribunal at its discretion, without providing sufficient proof that a loss had actually been suffered. In deciding the first and the second issue in favour of defendant and the third against it, the arbitral tribunal based itself primarily on Italian law (and in particular on Articles 1375 and 1226 of the Civil Code of Country X as well as on relevant case law and legal writings), but also referred – as ‘a confirmation of the same principles at international level’ – to Articles 5.1.3, 1.8 and 7.4.3 of the UNIDROIT Principles (2004).

## V. Article 1.9: Usages and practices

### 1. *France / Arbitration / Sierra / Not Unilex / 2016*

**Case:**<sup>516</sup> Company A, of country X and company B, of country Y, entered into a JVA, by which both parties created companies C and D for the production and commercialisation of certain products in country X. The parties agreed that the JVA would be subject to the UNIDROIT Principles, supplemented if necessary by the laws of country X. One of the obligations provided under the JVA, was that the parties would be able to allow the rotation of the chairman of company C.

In the first years of operation of the JVA, company B did not require the rotation of the chairman, entrusting company A to continue holding such position. However, after company A restricted company B with access to certain information pertaining to the JVA, company B required company A that a new chairman be appointed.

Company A did not attend the meeting where the new chairman was to be appointed arguing a deadlock prevented the chairman rotation. The JVA foresaw that if both parties failed to pass a resolution in two shareholder or board of directors meetings, of companies C or D, with no less than 15 days between each other, a ‘deadlock’ provision would be triggered and which would eventually lead to the JVA dissolution.

Furthermore, company A argued that company B’s behaviour was to be interpreted as a waiver to its right to require chairman rotation, given that the parties were bound by the usage and mutual understanding they had established between themselves pursuant to Article 1.9 of the UNIDROIT Principles.

The arbitral tribunal ruled that the fact that company B did not request the strict application of the JVA could not be interpreted as a waiver of its right.

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<sup>516</sup> ICC, Case No 18795/CA/ASM (C-19077/CA).



Furthermore, the arbitral tribunal found that even though the deadlock could lead to the dissolution of the JVA, until the dissolution takes place, the parties were obliged to comply with the JVA in good faith. Consequently, the arbitral tribunal held that company A breached its obligation to renew the chairman position of companies C and D under the JVA and thus breached its good faith obligation, pursuant to Article 1.7 of the UNIDROIT Principles.

## 2. *Russia / National Court / Charrett / Unilex 1775 / 2007*

**Case:**<sup>517</sup> Claimant A from country X entered into a contract with company C from country Y for the supply of materials to be used by A in the manufacture of windows. A used the contract price as the basis for the calculation of the customs value of the goods.

The respondent B, the customs authority of country X, found discrepancies in the customs documents prepared by A, and assessed the customs duty at a higher value than the contract price. B asserted that the contract was invalid because it was signed by a facsimile.

A sought return of overpaid customs duty court proceedings in country X. A submitted that, in accordance with Article 1.9(2) of the UNIDROIT Principles, the use of a facsimile signature is widely known to and regularly observed in the international trade of goods to conclude a valid contract. As the law of country X was silent in respect of whether a facsimile signature could be used to conclude a valid contract, the court relied on Article 1.9(2) to determine that the contract was valid, and that the contract price was therefore appropriate to determine the customs value of the goods imported from country Y.

## 3. *N/A / Arbitration / Charrett / Not Unilex / date unavailable*

**Experience of author:**<sup>518</sup> Contractor A from country X entered into a construction contract with company B to construct a mineral processing plant in country Y. The conditions of contract were based on the general conditions in a widely used standard form international construction contract. Those conditions provided for a time-bar on claims for which the circumstances were not notified within 28 days of the contractor becoming aware, or should have become aware, of circumstances entitling it to claim additional payment. If the contractor failed to provide timely notification, it had no contractual entitlement to additional payment. The contract did not specify the governing law.

During the course of the project, the contractor submitted numerous notices of possible claims within the required 28-day period. Company B's authorised representative had difficulty in responding to these claims within the contractually mandated 42-day period, and requested the contractor to submit a claim only when it knew that it had a contractual entitlement, even if this was after the 28-day notification period. The contractor subsequently submitted claims for additional payment two to three months after it had become aware of circumstances that may have entitled it to a claim.

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<sup>517</sup> Commercial Court of Primorsky Territory, Russian Federation, Case No A51-10752/2007, 2007.

<sup>518</sup> Case illustration based on writer's experience of circumstances where the UNIDROIT Principles could be applied as the governing law of the contract.

Company B's first authorised representative died, and was replaced by another representative, who rejected the contractor's claims where the circumstances had not been notified within the 28-day period.

The contractor initiated an international arbitration, claiming the payments that had been rejected by company B's second authorised representative. Under the arbitration rules agreed to by the parties, the arbitral tribunal had jurisdiction to determine the governing law of the contract. It determined that, in view of the international nature of the contract, it was not appropriate to adopt the law of either the contractor's country (X), or the law of company B's country (Y). Instead, it adopted the UNIDROIT Principles as the governing law of the contract.

The arbitral tribunal found, pursuant to Article 1.9(1), that the parties had agreed that the time-bar provision in the contract had been superseded by their agreement to waive the 28-day provision for notification of circumstances that might give rise to a claim. Accordingly, the arbitral tribunal found that the contractor was entitled to payment of its claims.

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# Chapter 2: Formation and authority of agents

## I. Article 2.1.15: Negotiations in bad faith

### 1. *Japan / National Court / Toichi, Ueno / Not Unilex / 2015*

**Case:**<sup>519</sup> Company X executed a basic service agreement with company Y in which company X undertook to perform system development services for company Y. In connection to the basic service agreement, there were three-stages of individual service agreements, among which company X and company Y proceeded to the execution of a second-stage individual agreement; however, company Y refused to enter into the third-stage individual agreement.

Company X claimed compensation for damages from company Y based on its bad faith. Company X alleged that company Y promised, or caused company X to expect, that company Y would make an order for operations at the third stage. Company X added that, based on such expectation, company X reduced the amount of fees in the prior stage, etc, but company Y failed to meet such expectation.

The court dismissed the claim made by company X. The court held that the execution of the basic service agreement did not automatically promise the execution of the individual agreements of all three stages. The court added that, if a party to the agreement expressed its intention in the negotiation that the placement of an order in the third stage is provisional, the other party's expectation towards the execution of the third stage individual agreement would not be protected legally. Here, the court ruled that company Y did not act in bad faith when it did not place an order in the third stage. Any expectation by company X would not be protected under the situation that company Y merely made a provisional expectation to placing an order of the third stage.

Article 2.1.15 of the UNIDROIT Principles describes that it would be considered unfaithful for a party to enter into or continue negotiations when intending not to reach an agreement with the other party. Although the court did not make a clear statement, its decision was consistent with Article 2.1.15 of the UNIDROIT Principles. The court did not consider it unfaithful to make orders in the third stage because Company Y intended that it may provisionally make orders at the third stage as well when it entered into the stage one and two of the agreements – meaning that the company did not enter into an agreement when it intended not to reach an agreement.

### 2. *China / National Court / Nunziante / Unilex 1740 / 2008*

**Case:**<sup>520</sup> Two companies in country X, A and B, entered into a preliminary contract, wherein B was to test the quality of components manufactured by A, components that were to be used in the trial production of televisions by B. Subject to this quality check, a formal contract was to be concluded. B began the sale of televisions. One year later when the prices of televisions fell in the market, the parties agreed to a decrease in the price of the components manufactured by A. Later, the prices of such televisions fell much further. Although B agreed that the parts manufactured by A passed

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<sup>519</sup> Tokyo High Court, Judgment, 21 May 2015.

<sup>520</sup> *Shaanxi Xianyang Nebula Machinery Ltd v Rainbow Electronics Group Inc*, Supreme People's Court, Comments, 2008.

the quality test, B requested a steep decrease in the price of the components owing to the fall in the prices of the televisions. Party A refused, and a dispute arose. B then decided to break off the negotiations. Party A subsequently filed suit against B, suing for ‘culpa in contraendo’.

The court of first instance and the appellate court held that B had a right to break off the negotiations. The matter then reached the highest court in country X, where it was published as a ‘guide’ case. Two members of the Supreme Court ‘commented’ that the law of country X dealt only with entering or continuing negotiations in bad faith that may arise while concluding a contract. The law did not deal with the possibility of a party breaking off negotiations in bad faith. In light of this, the two justices mentioned Illustration 5 to Article 2.1.15 of the UNIDROIT Principles, which, it said, was a base for the decision of the first- and second-instance courts.

### 3. *ICSID / Arbitration / Nunziante / Unilex 1670 / 2007*

**Case:**<sup>521</sup> This investor-state dispute arose pursuant to a grant of a concession contract by the government of country Y to A (a company and its wholly owned subsidiary located in country Y). The contract was to build a coal mine and a power plant in country Y. However, pursuant to continuous changes in country Y’s regulations in the energy sector, the negotiations were delayed. Finally, A terminated the investment project.

An International Centre for Settlement of Investment Disputes (ICSID) arbitration was instituted by A, who claimed that country Y had breached its fair and equitable treatment obligations under the bilateral investment treaty between X and Y (X-Y BIT). Thus, A claimed compensation for its losses, calculated either in terms of the fair market value of the investment, or lost future profits, or at least the actual investments they had made. Country Y, however, argued that there was no breach of the X-Y BIT and as A had not provided any evidence to the contrary, the negotiations should be assumed to be carried out in good faith. Further, country Y took Article 2.1.15 to mean that there was neither an obligation to reach an agreement, nor a liability for the failure to do so. Article 2.1.15 of the UNIDROIT Principles was quoted in this regard.

The tribunal held that country Y had indeed breached its obligations to provide a stable and predictable environment for foreign investors under the fair and equitable standard agreed upon in the BIT with the repeated changes in its laws in the energy sector. Since this claim related to a project in its ‘pre-investment’ or ‘pre-construction’ phase, compensation was awarded by the tribunal of an amount equal to actual expenses related to the investment, rather than an amount equal to the claims for the loss of profits.

### 4. *Lithuania / National Court / Nunziante / Unilex 1185 / 2006*

**Case:**<sup>522</sup> A suit for damages was filed by A against B, based on a preliminary sale contract entered into between them. A alleged that, as per the terms of the preliminary contract, B had an obligation to further finalise the sale but had refused to stipulate the final contract.

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521 *PSEG Global & others v Republic of Turkey*, ICSID Case No ARB/02/5, Award, 17 January 2007.

522 *VŠ v AN*, Supreme Court of Lithuania, Decision, 6 November 2006.

The court ruled in favour of A and finally held that ‘the party which breaks off negotiations without having good reason for this, and having at the same time created “a founded trust and belief” that the contract will be concluded, is to be qualified as a party which breached the principle of good faith, and is therefore obliged to pay damages caused to the other party consisting not only of negotiation expenses, but also of the value of the lost opportunity’. While coming to this conclusion, the court referred to Article 6.165, paragraph 4 of the Civil Code of Country X, the UNIDROIT Principles and the Principles of European Contract Law to analyse whether damages could be granted for the breach of preliminary contracts. Specifically, a reference was made to comments accompanying Article 2.15 (now Article 2.1.15), which relates to negotiations in bad faith.

## 5. *Lithuania / National Court / Nunziante / Unilex 1181 / 2005*

**Case:**<sup>523</sup> Construction company B had emerged the winner of a bidding procedure for a construction deal conducted by company A, both in country X. After the terms of the agreement had been agreed upon, B broke off the negotiations at the last moment on account of being offered a more profitable deal. A instituted proceedings against B for this *culpa in contrahendo* or ‘fault in conclusion of a contract’ and claimed damages.

The court ruled in favour of the claimant and found that the defendant had acted in bad faith and was liable to pay both expenses incurred as well as the value of the loss of opportunity. This decision was based on the Civil Code of Country X, which mirrors Article 2.1.15 of the UNIDROIT Principles and its accompanying comments.

## 6. *ECJ / Supranational Court / Nunziante / Unilex 813 / 2002*

**Case:**<sup>524</sup> A, a company in country X, instituted suit against B, a company in country Y, alleging that B had not concluded an agreement with C, a leasing company located in country X. According to A, B had initially agreed to purchase a moulding plant from C that would then be leased to A. A alleged that B had halted the negotiations with C in bad faith and hence infringed A’s legitimate expectations of having a valid sales contract between B and C. Thus, A demanded compensation for losses suffered.

As the defendant argued that courts of country Y did not have jurisdiction over the claim, the claimant approached the Supreme Court of Country Y for a declaration of jurisdiction. The Supreme Court made a preliminary ruling request to the Court of Justice of the EU (CJEU) to answer the question of whether, under the Brussels Convention, an action seeking to establish pre-contractual liability, on the one hand, falls within the scope of matters relating to tort, delict, or quasi-delict, or whether it, on the other hand, falls within the scope of matters relating to a contract.

The Advocate General, while quoting Article 2.1.15(2) of the UNIDROIT Principles, suggested to the CJEU that pre-contractual liability should fall under the ambit of delictual matters. In his view, it is the law that imposes upon parties an obligation to act in good faith during the negotiations and the liability for breaking off negotiations in bad faith. This view, in his opinion, has been enshrined in the

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<sup>523</sup> *UAB ‘Vingio kino teatras’ v UAB ‘Eika’*, Supreme Court of Lithuania, 19 January 2005.

<sup>524</sup> *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, Court of Justice of the European Communities, Decision, 17 September 2002.

quoted article of the UNIDROIT Principles, as well as in the comments to this article, which details the point in time at which the parties must refrain from discontinuing negotiations abruptly and without proper reasoning.

Though the CJEU in their decision did not quote the UNIDROIT Principles, it agreed with the Advocate General's opinion.

## 7. *France / Arbitration / Nunziante / Unilex 692 / 2000*

**Case:**<sup>525</sup> Company A from country X and company B from country Y entered into two contracts concerning the delivery and installation of industrial equipment from A to B. Then, a dispute arose between the parties following an alleged defective delivery. When B declared its intention to return the equipment, the claimant A filed a request for arbitration. The defendant B argued that the contract was null and void due to the fraudulent representation on A's part and that the claimant had delayed delivery and delivered defective equipment.

The contract contained a provision stipulating that the law applicable to the contract was the law of country Z. B, however, contended that the claimant obtained the contract by fraud and material misrepresentation, which, in B's view, was not covered by the law of country Z. This led the arbitral tribunal to interpret the choice-of-law clause in respect of whether it covered issues other than purely contractual issues.

The arbitral tribunal applied the law of country Z to the interpretation of the said clause. In doing so, it noted that if the law of country Y were to be applied, the issue of fraudulent misrepresentation would not be adjudged otherwise. The tribunal referred to Articles 2.1.15(2) of the UNIDROIT Principles and held that the circumvention of an agreement by willful deception is 'a common understanding of all civilised jurisprudence'.

## 8. *France / Arbitration / Nunziante / Unilex 644 / 1996*

**Case:**<sup>526</sup> Certain pre-bid agreements in the telecoms systems sector were entered into between A (a supplier) and B (a manufacturer), located in country X and Y respectively. These agreements stipulated that a good-faith negotiation for the supply of cables would take place if A succeeded in winning a bid to be the prime contractor in a telecoms expansion project. However, although A won the bid, A and B could not negotiate a final deal for the supply of cables, and, thus, A terminated the preliminary agreements. A dispute arose, and the matter was to be heard by an arbitral tribunal.

The agreements did not provide for a clear choice of law clause and, hence, after a discussion on the appropriate law, the tribunal held that the law would be of a neutral country, J. However, the tribunal also held that it was permitted to apply the general principles of international commercial contracts, which were evidenced in the UNIDROIT Principles.

In particular, Article 2.1.15 of the UNIDROIT Principles was referred to, since, in the tribunal's view, the principles are a useful source for establishing general rules for international commercial

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<sup>525</sup> ICC, Case No 9651, Award, 2000.

<sup>526</sup> ICC, Case No 8540, Award, Paris, 1996.



contracts. This was done by the tribunal to demonstrate support for its conclusion, under the law of the state of New York, on the issue of the enforceability of the parties' agreement to negotiate in good faith. Thus, it was finally held that A and B were to restart their discussions on the supply of cables in accordance with the pre-bid agreements and aim to reach a consensus.

## II. Article 2.1.17: Merger clauses

### 1. *United States / Arbitration / Piaggio, Cadenas / Unilex 661 / 1998*

**Case:**<sup>527</sup> This dispute involved the alleged breach of a sales contract between A (seller) and B (buyer), established in countries X and Y, respectively. While A could deliver a certain amount of goods during the existence of a valid import licence for country Z, the remainder of such goods was delivered post the expiry of such licence. B alleged that its exclusive right to import goods into country Z had been violated, and A had not transferred the goods in a timely manner. Hence, and B refused to make full payment.

An ICC arbitration was instituted by A in accordance with the dispute resolution clause of the contract. There was no choice of law clause in the contract. The Arbitral Tribunal decided that the relevant usages of trade and the CISG would apply. And for matters not agreed upon in the contract and which were not covered by the trade usages or the CISG, the law of country X would apply. While dealing with the merits of the case, the tribunal referred to the UNIDROIT Principles and held that, although they may not be directly applied, they did 'reflect a worldwide consensus in most of the basic matters of contract law' and, hence, could be taken into account in this case. The tribunal, while quoting the rule laid down in Article 29(2) of the CISG, held that verbal promises, assurances, or written references of any kind, which were not at the same time reflected in an amendment or supplement to the contract, could not be relied upon by B.

The articles of the UNIDROIT Principles cited by the tribunal included Articles 2.17 (merger clauses) and 2.18 (written modification clauses), both of which confirmed the above rule.

### 2. *United States / Arbitration / Piaggio, Cadenas / Unilex 2116 / date unavailable*

**Case:**<sup>528</sup> Company A and B entered into a contract for the supply of gas turbine engines for the construction of two warships. The contract contained a choice of law clause choosing the law of country X. The relationship between the parties worsened when B allegedly transmitted A's proprietary and confidential information to its principal thereby breaching the A's intellectual property rights. Denying the claim, B claimed that it was entitled to the payment of the performance bond as A had supplied defective goods in breach of the contract.

The tribunal found that the B and its principal had acted within the scope of the contract and did not breach the A's intellectual property rights. Taking into account the written contract, the tribunal applied Article 2.1.17 of the UNIDROIT Principles and states that 'the meaning to be derived from the plain contract language shall be presumed to correspond to the common intention of the parties'.

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<sup>527</sup> ICC, Case No 9117, Zürich, 1998.

<sup>528</sup> ICC, Case No 16314, New York, undated.

It pointed out that this corresponded to the law of country X. The tribunal applied this rule and concluded that the contract as it is could not be contradicted or supplemented, unless the intent of the parties could not be derived from the literal text of the contract. Thus, B had not breached its contractual obligations towards A.

### III. Article 2.1.18: Modification in a particular form

#### 1. *Australia / National Court / Koh / Unilex 845 / 2003*

**Case:**<sup>529</sup> The government of a country and two companies, company A and company B, entered into contracts for software development and systems integration. The contract between the government and company A was the head contract, while the contract between company A and company B was the subcontract.

The dispute arose when company B served a notice of termination of the subcontract on company A on the grounds of company A's alleged failures to comply with its contractual obligations. These included company A's alleged failure to deliver specific devices in order for company B to develop the software, and also company A's failure to pay company B as required under the subcontract. Company A argued first that the terms of the contract had been changed and, second, that company B was not entitled to be paid under the subcontract as it failed to meet the requirements of payment under the subcontract.

As to company A's arguments that the contract had been amended, the court referred to Article 2.1.18 of the UNIDROIT Principles, which states that a party may be precluded by its conduct from invoking such a clause to the extent that the other party has acted in reliance on that conduct. In this case, the discussion evolved around a 'no oral modification' clause and whether a party could be estopped from invoking such a clause in a case where it has already acted upon an oral modification of the contract. The tribunal found that the contract had indeed been amended and that company B could not invoke the 'no oral modification' clause, since it had already acted in accordance with the oral modification of the contract.

Company A argued that company B was in breach of its duty to act honestly and in good faith due to its termination of the contract. In this respect, company B argued that due to the 'entire agreement clause', these concepts were not part of the contract. An 'entire agreement clause' is used to indicate that the contract constitutes the whole agreement between the parties, thereby preventing a party from relying on previous agreements and negotiations that are not included in the agreement. Company B argued that a duty of good faith could not be implied in the contract in case an 'entire agreement clause' was involved. The court found that an entire agreement clause could not exclude good faith from a contract and that good faith and fair dealing are to be considered implied terms of all contracts, and the court referred to Article 1.7 of the UNIDROIT Principles in its reasoning.

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<sup>529</sup> *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, FCA 50, 2003.

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# Chapter 3: Validity

## I. Article 3.1.2: Validity of mere agreement

### 1. *Mexico / Arbitration / Moses / Unilex 1149 / 2006*

**Case:**<sup>530</sup> Company A contracts with company B for company B to supply goods to company A. Both company A and company B are residents of different countries. The agreement between the parties is an exclusive one whereby company B is to only supply its product to company A. Meanwhile, under the laws of the country of company A, such exclusivity agreements must be registered and formalised with the relevant state authorities.

Disagreement arose between company A and company B, where company A claimed that company B did not meet its duties and obligations under the contract. Company B counterclaimed that the agreement was invalid because it was never registered and formalised in accordance with the prerequisites as required by company A's country. Nonetheless, the tribunal, relying generally on Article 3.1 of the UNIDROIT Principles, held that the agreement should still be considered valid, since the mere agreement between the parties was sufficient to satisfy the contract's validity.

## II. Article 3.1.3: Initial impossibility

### 1. *Spain / National Court / Moses / Unilex 1215 / 2007*

**Case:**<sup>531</sup> A and B entered into an agreement for the sale of an apartment. A, the owner of the apartment, had not registered the apartment because it was not constructed with the required building permit. B sued A, claiming that the non-registering of the apartment was a breach of the contract between them for the sale of the apartment.

A counterclaimed, stating that since the registering of the apartment was impossible at the outset, the contract for the sale of the apartment was invalid. Regardless of whether A's performance was impossible from the outset, the court generally reasoned under Article 3.1.3 of the UNIDROIT Principles (then cited as Article 3.3), that this does not automatically render the agreement invalid.

## III. Article 3.2.2: Relevant mistake

### 1. *Lithuania / National Court / Moses / Unilex 1891 / 2013*

**Case:**<sup>532</sup> The parties to this dispute were a company, the claimant, and a bank, the respondent. The respondent granted a loan to the claimant secured by both a mortgage on real estate owned by the claimant and a suretyship by the shareholders of the claimant. The suretyship in this case meant that the shareholders of the claimant would perform the claimant's obligations under the loan in case of

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<sup>530</sup> Centro de Arbitraje de México (CAM), Arbitral Award, 30 November 2006.

<sup>531</sup> Audiencia Provincial de Lleida (Cataluña), Case No 289/2007, Decision, 13 September 2007.

<sup>532</sup> *Danske Bank A/S v JJ, et al*, Supreme Court of Lithuania, Case No 3K-3-702/2013, 23 December 2013.

non-payment by the claimant. The dispute arose when the claimant failed to repay the loan and the respondent exercised its security rights.

The shareholders filed a counterclaim arguing that the loan agreement was void, operating under the mistaken belief that the suretyship would only be in effect until the mortgage component was triggered.

The court did not agree with the shareholders of the claimant, holding that the shareholders could not void the agreement based on the ground of serious mistake as they should have understood the consequences of a suretyship. In its reasoning, the court referred to Article 3.2.2 of the UNIDROIT Principles, which states that a contract may be voided on the basis of serious mistake only if the mistake is of such importance that a reasonable person in the position of the mistaken party would not have entered into the contract unless the terms were materially different or would not have entered into the contract at all if the truth of the terms had been known. Accordingly, the court's decision suggested that a party is not entitled to void a contract based on a serious mistake on the grounds that they do not fully understand the effect of each contract clause.

## 2. *Switzerland / Arbitration / Voser, Ninković / Unilex 642 / 1994*

**Case:**<sup>533</sup> Company A entered into a contract with company B for the sale of reinforcing steel bars. Due to problems in respect of the letter of credit to be opened by company B, company A initiated arbitration proceedings against company B, which contested the jurisdiction of the arbitral institution on the basis that the institution was not specifically named in the arbitration clause.

In deciding in favour of company A, the arbitral tribunal seated in Switzerland applied the relevant provisions of the applicable Swiss law and concluded that parties to a contract are bound by the meaning of the contractual provision as must be understood by the average honest and diligent business person. In order to show that this interpretation rule reflects a worldwide consensus, the arbitral tribunal referred to Articles 4.1 and 4.2 of the UNIDROIT Principles 'which have been established by a large international working party consisting of specialists in contract law selected from all different parts of the world [...]'.<sup>534</sup>

Having established that it has jurisdiction, the arbitral tribunal addressed the question of whether company B could invoke a material mistake and thereby invalidate the arbitration clause. The arbitral tribunal denied such a possibility and in that context made again a reference not only to the relevant provision of the applicable Swiss law, but also to the similar rule contained in Article 3.5 UNIDROIT Principles 1994 (ie, now Article 3.2.2).

## IV. Article 3.2.5: Fraud

### 1. *France / Arbitration / Moses / Unilex 690 / 2001*

**Case:**<sup>535</sup> Bank A entered into a contract with company B to print banknotes. Company B's delivery of the banknotes did not satisfy the specifications detailed in the contract. Both parties then entered

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<sup>533</sup> *Europe v The Canadian Affiliate of a Chinese Group*, Zurich Chamber of Commerce, Preliminary Award on Jurisdiction, 25 November 1994.

<sup>534</sup> ASA Bulletin (1996) 14(2), 313.

<sup>535</sup> ICC, Case No 9474, Award, Paris, 1999.

into a second agreement which stipulated that if company B produced banknotes in satisfaction of the contract, bank A would make an order of those banknotes. After the second production of banknotes was completed, bank A claimed that they still did not conform to its specifications.

Bank A sued, claiming that company B failed to meet contractual specifications. Bank A also claimed that the second agreement was void because of fraudulent non-disclosure by company B since person C – a former employee of bank A – promoted the second agreement and was paid by company B.

The tribunal reasoned that the facts in the case did not meet the standard of fraud as set out by the UNIDROIT Principles (then citing to Articles 3.5 and 3.8). Therefore, bank A's claim based on fraudulent non-disclosure was rejected by the tribunal since it was not sufficiently proved that bank A entered into the second agreement through fraudulent inducement by company B because of the mere intervention of person C. The decision suggests that a party must prove concrete fraudulent facts that were intended to mislead them, instead of making general allegations, in order to prevail under this principle.

## V. Article 3.2.6: Threat

### 1. *France / Arbitration / Moses / Unilex 2109 / 2000*

**Case:**<sup>536</sup> Company A and company B entered into a contract where company B agreed to compensate company A for losses incurred due to a loss of goods that were allegedly under company B's care and control. The loss of the goods was attributed to fraud.

Company A threatened company B with business retaliation if it refused to compensate it in accordance to the agreement. Since the contract was signed under coercive pressure, the tribunal reasoned under Article 3.2.6 of the UNIDROIT Principles (then cited as Article 3.9) that this left company B without a reasonable alternative and that the damages should be reduced accordingly. As a result, the tribunal considered that the damages should be reduced, at least in part, due to imminent and serious threat. Moreover, although in theory the tribunal could have found the contract void, the decision demonstrates a tribunal's discretion and flexibility in applying the UNIDROIT Principles, as in this case the tribunal did not void the contract but rather reduced the amount of damages awarded.

### 2. *United Kingdom / Galizzi / Not Unilex / date unavailable*

**Experience of author with a negotiation on a no-names basis:**<sup>537</sup> Company A, of Portugal, entered into a shipbuilding contract for the refurbishment of a vessel with company B, of Italy. This contract was governed by English law.

The refurbishment of the vessel is clearly a material and complex project, where client and contractor assume long-term obligations to each other and bear significant commercial risks. The pertinent

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<sup>536</sup> ICC, Case No 10504, Award, Paris, 2000.

<sup>537</sup> Case illustration based on writer's experience of circumstances where the UNIDROIT Principles could be applied as the governing law of the contract.

contract is a non-maritime contract, because it is insufficiently related to any rights and duties pertaining to sea commerce and/or navigation.

The refurbishment of this vessel, which was done at a yard based in Italy, faced a number of problems and delays, and company A decided to take the ship and bring it to another yard in order to complete the works there. As a matter of fact, every day of delay could cause serious economic problems to company A, which had already signed a contract with a client for the use of such vessel.

Company B threatened not to deliver the vessel if it was not paid a material amount of money, thus compelling company A to sign a settlement agreement.

Once the vessel was out of the yard, company A investigated whether the settlement agreement could be annulled because it was signed under a situation of threat. Unfortunately, under English law, it is very difficult to obtain the annulment of an agreement on the basis that it was signed under duress. Similarly, under Italian law, it is very difficult to obtain the annulment because of a situation of threat, and in any case it is necessary to ask for a decision by a court.

On the contrary, Article 3.2.6 of the UNIDROIT Principles indicates that, in case of threat, ‘A party may avoid the contract when it has been led to conclude the contract by the other party’s unjustified threat’. In such a case, the annulment of the contract would not need a decision by a judge but a simple notice of annulment. Furthermore, the commentary to the same article clearly indicates that such ‘threat need not necessarily be made against a person or property, but may also affect reputation or purely economic interest’.

## VI. Article 3.2.7: Gross disparity

### 1. *Paraguay / National Court / Moses / Unilex 2105 / 2016*

**Case:**<sup>538</sup> A agreed to sell a piece of property to B. A later argued that the agreement for the property purchase should be considered invalid because the sale price reflected in the land sale contract was a small fraction of the true value of the property. A argued that the contract reflected an excessive advantage and a gross disparity between the parties.

However, the court, referring to Article 3.2.7 of the UNIDROIT Principles, found that there was no excessive advantage in the transaction given A’s experience as a businessman. As a result, the land sale contract reflected an equitable agreement and therefore was not invalid based on excessive advantage or gross disparity.

### 2. *United States / National Court / Moses / Unilex 1528 / 2007*

**Case:**<sup>539</sup> Person A, while employed for company B, sued company B for injuries sustained. Both person A and company B are residents of different countries. The employment agreement between person A and company B contained an arbitration provision that would govern any potential disputes.

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<sup>538</sup> *Sindulfo Ruiz Pavetti v Maria Esther Recalde de Aliendre y Policarpo Ramón Aliendre*, Tribunal de Apelación en lo Civil y Comercial de Asunción, Paraguay, Case No 77/2016, 17 October 2016.

<sup>539</sup> *Koda v Carnival Corp* (SD Fla 2007), Case No 06-21088, 30 March 2007.



The arbitration agreement selected country C, a different country from person A's residence, as the place for arbitration.

Person A brought suit against company B and further argued that the arbitration clause was unenforceable, given the economic hardship, excessive advantage, and gross disparity that would run in favour of company B if person A was compelled to seek relief in a different country. However, the court reasoned, that given person A's full acknowledgment of the arbitration provision before agreeing and signing it, this signalled a lack of excessive advantage on the part of company B that would necessitate voiding the agreement. The court did not directly rely or quote from Article 3.2.7 in reaching its conclusion but the motions filed in court generally cited to that UNIDROIT principle.

## VII. Article 3.2.8: Third persons

### 1. *France / Arbitration / Moses / Unilex 2109 / 2000*

**Case:**<sup>540</sup> Company A and company B entered into a settlement in which company A agreed to reimburse company B for the damages brought about through the loss of goods that were in the care of company A. The loss of the goods was attributed to fraud.

Company A then refused to pay the full amount that was agreed to in the settlement and thereafter the dispute went to arbitration. However, the arbitration proceedings revealed that company A had signed the agreement under immediate threat by a third party who was not a legal and valid representative of company B but was acting on the behalf of company B.

The tribunal reasoned, relying in part on Article 3.2.8 of the UNIDROIT Principles (then cited as Article 3.11), that the settlement agreement between company A and company B should be reduced in light of the false statements perpetuated by company B because the third party in this case was not one to which company A owed a responsibility. The case also demonstrates a tribunal's flexibility in applying the UNIDROIT Principles as it did not void the contract but rather reduced the amount of damages awarded.

## VIII. Article 3.3.2: Restitution

### 1. *United Kingdom / National Court / Legum / Not Unilex / 2016*

**Case:**<sup>541</sup> A and B entered into an illegal agreement to trade on insider information. A paid B a large sum of money to bet on the price of certain shares. B was to be granted access to inside information enabling him to predict or anticipate movements in the market price of the shares. However, the inside information never arrived. The bet was not placed and B refused to return the money to A. A sought the return of the money.

As a defence, B claimed that he was under no legal obligation to return the money since the agreement was illegal. B invoked the two traditional principles of *ex turpi causa non oritur actio* (no action arises from a disgraceful cause) and *in pari delicto potior est conditio defendentis* (where both parties are equally

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<sup>540</sup> ICC, Case No 10504, Award, Paris, 2000.

<sup>541</sup> *Patel v Mirza* (2016) UKSC 42.

in the wrong, the position of the defendant is the stronger, ie, ‘the loss should lie where it falls’). Nonetheless, the court rejected B’s argument and unanimously ordered the return of the money to A, reasoning that the illegal act envisioned by the agreement in fact never took place, due to matters beyond the control of either party. Although the court did not make express reference to Article 3.3.2 of the UNIDROIT Principles, its analysis exemplifies the flexible approach adopted in Article 3.3.2 that holds that ‘restitution may be granted where this would be reasonable in the circumstances’.

## 2. *ICSID / Arbitration / Legum / Not Unilex / 2013*

**Case:**<sup>542</sup> A and state B entered into an investment agreement. Around the time of entry into the agreement, A made payments to several individuals including government officials of state B. These payments were presented as remuneration for various consultancy services.

A brought a claim in arbitration against state B concerning the investment agreement. The tribunal found the supposed consultancy services to be insufficiently supported and the payments to be corrupt. The tribunal declined its jurisdiction because the investment was illegal and therefore not covered by the bilateral investment treaty providing for jurisdiction. However, because state B had also engaged in corruption the tribunal found it should equally share, with A, the arbitration costs.

Although this case does not refer to the UNIDROIT principles, the coordinator is of the view that this case is important to arbitration practice and that it comes close to the background of Article 3.3.2 of the UNIDROIT Principles.

## 3. *United Kingdom / Arbitration / Legum / Not Unilex / 2008*

**Case:**<sup>543</sup> A, a businessman who had many years of experience working with or for the government of state X, entered into a consultancy agreement with B, a US company, to conduct seismic surveys prior to oil extraction off the coast of an African state. The agreement provided for lump sum payments and ongoing payments of commission on sale of procured data pursuant to the surveys conducted by B.

A brought a claim in arbitration for breach of contract and unlawful deductions from the commissions due to him. B argued in response that A had engaged in unlawful activity, including bribing state officials. The arbitral tribunal found that the commission paid by B was intended to be used by the A to bribe officials. The tribunal declared the contract null and void. The tribunal also concluded that B was aware of the true purpose of the commission. It held that B could not recover monies paid under the agreement. It found, inter alia, that ‘what has been given with illegal intent cannot be reclaimed under theories of equity or unjust enrichment’. This decision confirms the trend taken by some arbitral tribunals refusing to order restitution in cases of corruption, when both parties took an equally active part in the illegal practice.

Although this case does not refer to the UNIDROIT Principles, the coordinator is of the view that this case is important to arbitration practice and that it comes close to the background of Article 3.3.2 of the UNIDROIT Principles.

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<sup>542</sup> *Metal-Tech Ltd v The Republic of Uzbekistan*, ICSID Case No ARB/10/03, Final Award, 2013.

<sup>543</sup> ICC, Case No 13914, Final Award, London, 2008.

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# Chapter 4: Interpretation

## I. Article 4.1: Intention of the parties

### 1. *France / Arbitration / Sierra / Not Unilex / 2016*

**Case:**<sup>544</sup> Company A, of country X and company B, of country Y, entered into a JVA by which they agreed to create two joint companies (companies C and D), in which company B would provide the technology and company A the commercial know-how in order to produce and commercialise certain products in country X. The parties agreed that the JVA would be subject to the UNIDROIT Principles, supplemented if necessary by the laws of country X.

The JVA foresaw that if both parties failed to pass a resolution in two shareholders or board of directors meetings of companies C or D, with no less than 15 days between each other, a deadlock provision would be triggered. Whenever a deadlock situation was triggered, according to the JVA, each party was entitled to start a process for the transfer of shares, where the other party was obliged to participate in good faith. In case any party failed to do so, legal arbitration proceedings would be available.

Company A claimed that there was a deadlock because there had been two board of directors meetings where the board had been unable to reach an agreement and pass resolutions on different topics. Company B argued that the deadlock provision was not triggered. It claimed that failure to pass resolutions at two board of directors meetings needed to be on exactly the same topic for the deadlock provision to be triggered.

The arbitral tribunal found that there was indeed a deadlock. The arbitral tribunal determined that under Article 4.1 of the UNIDROIT Principles, in case the intention of the parties is not 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’. Thus, the arbitral tribunal held that a reasonable person would be more concerned by the impossibility to decide two different unrelated issues at two consecutive meetings than the repeated impossibility to decide the same issue. According to the arbitral tribunal, such hypothesis may reflect a symptom of the inability of the partners to work together, whatever the matter at stake, while the other hypothesis may only reflect the difficulty to deal with a specific issue.

On the issue of the transfer of shares process, the arbitral tribunal held that the parties had not activated the process to transfer companies C and D’s shares.

Company A claimed specific performance under Article 7.2.2 of the UNIDROIT Principles seeking the transfer of companies C and D’s shares. On the other hand, company B contended that the arbitral tribunal did not have the power to order the transfer of shares. The arbitral tribunal found that there had been no breach to the deadlock provisions for the transfer of shares because the process for the transfer of shares had never been activated by any of the parties.

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<sup>544</sup> ICC Case No 18795/CA/ASM (C-19077/CA).

The arbitral tribunal held that it could not order company B to transfer any shares. Moreover, it ruled that the parties were entitled to activate the process for the transfer of shares provided for under the JVA, with both parties being obliged to participate therein in good faith, in light of Article 1.7 of the UNIDROIT Principles.

## 2. Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2013

**Case:**<sup>545</sup> Company A from country X and company B from country Y entered into a JVA to provide technical assistance to the government of country Z in the framework of a project in country Z. According to the JVA, any net margin of the joint venture company was to be divided equally between company A, which was the manager of the joint venture company, and company B. The JVA provided that the parties could refer their disputes to arbitration (*pourront faire appel à la Cour d'Arbitrage*) and that the FIDIC rules prevailed in such cases.

After the completion of the project, company B sent an invoice to company A for 50 per cent of the joint venture company's net margin. Company A refused to pay, alleging that company B's employees did not provide any assistance to its employees during the project. After first referring the case to the courts in country X, company B initiated arbitration proceedings against company A, which contested the jurisdiction and alleged that the arbitration clause was too vague to constitute a valid agreement to arbitrate and that company B has waived its right to arbitration by first commencing state court proceedings.

In their submissions on jurisdiction, the parties did not specify the rules of law determining the substantive validity of the arbitration agreement. For this reason, the arbitral tribunal seated in Switzerland considered to have, within the boundaries of Swiss law, certain discretion when deciding which rules of law it will apply to this issue. After considering the different sets of rules of law that came into play in determining the applicable law, the arbitral tribunal held that the lack of an agreement of the parties can be interpreted as implied negative choice and that the contract's connection with the different countries is not predominant enough to justify the application of one national law to the exclusion of others. Based on the foregoing, the arbitral tribunal decided to apply the UNIDROIT Principles and Swiss law to the question of the substantive validity of the arbitration agreement. In determining whether the parties consented to submit their dispute to the arbitral institution, the arbitral tribunal applied article 4.1 as well as Article 4.3(c) of the UNIDROIT Principles. In the context of interpretation of the subsequent conduct of the parties, the arbitral tribunal considered that company B's statements evidenced the fact that, in its view, the arbitration clause was defective and inoperable. The arbitral tribunal held that claiming the opposite would go against the principle of *venire contra factum proprium*, which is applicable under the UNIDROIT Principles, Article 1.7 and Article 1.8 as well as Swiss law.

The arbitral tribunal further found that both parties revoked the arbitration agreement and accepted the jurisdiction of the state courts. It stated that 'such mutual waiver can be concluded without observing any requirement of form and must be interpreted according to the generally applicable principles for the interpretation of private statements of intent', thereby referring to and applying the UNIDROIT Principles, Article 1.2.<sup>546</sup>

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<sup>545</sup> ICC, Case No 19127, Final Award, 2013.

<sup>546</sup> Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XLII* (Kluwer 2017) 275 et seq.

Based on the foregoing, the arbitral tribunal decided that it has no jurisdiction to decide on company B's claims.

### 3. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2012*

**Case:**<sup>547</sup> As a continuation of an earlier agreement, a supply agreement for leasing equipment and licensing technology was concluded by two ministries of country X and the lessor from country Y. The agreement contained an arbitration clause providing for a dispute to '[...] be brought before the International Arbitration Court in Switzerland. This court will proceed in accordance with the international law.'<sup>548</sup> While the lessor initiated arbitral proceedings before the ICC, the ministries of state X initiated arbitration proceedings before the national arbitral institution of country X.

Considering the ambiguous wording of the arbitration clause, the arbitral tribunal seated in Switzerland had to decide whether it was the parties' mutual intention to refer their disputes to the ICC. The arbitral tribunal held in that respect that under Swiss law the arbitration clause may be interpreted under either Swiss or international law and consequently decided to apply both Swiss law and international law in that regard. Considering that both parties invoked the UNIDROIT Principles as internationally recognised principles of law, the arbitral tribunal consulted the UNIDROIT Principles alongside the Principles of European Contract Law and the CISG. In particular, it referred to Articles 4.1, 4.2, and 4.3 of the UNIDROIT Principles.

The arbitral tribunal compared the provisions for the interpretation of contracts as set out in Swiss law and the afore-mentioned sets of rules. Both Swiss and international law, including the UNIDROIT Principles, provide that that parties' common intent is to be established first (subjective interpretation). In case such common intent cannot be established, the Swiss law requires the court or arbitrator to examine and establish 'how an average honest and diligent person had to reasonably understand or interpret the other party's declarations and the particular provisions' (objective interpretation). The arbitral tribunal found this to be in line with Article 4.2(2) of the UNIDROIT Principles which calls for 'the understanding which a reasonable person of the same kind as the parties would give to the term'. Thus, the arbitral tribunal concluded that the provisions for the interpretation of contracts contained in all these sets of rules are very similar and do not lead to conflicting results.

The arbitral tribunal finally held that it has not been properly constituted in accordance with the parties' agreement and that, for that reason, it cannot decide on the request for arbitration.

### 4. *Russia / Arbitration / Petrachkov, Bekker / Unilex 1447 / 2008*

**Case:**<sup>549</sup> A claimant, a German company, filed a lawsuit against a defendant, a Russian company, for collection of indebtedness under a sale and purchase agreement. The contract for the sales of goods provided that Russian law was the law governing the contract.

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547 ICC, Case No 14581, Final Award on Jurisdiction, 2012.

548 Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XXXVII* (Kluwer 2012) 37, 62.

549 ICAC, Case No 83/2008, Award, 22 December 2008.



The dispute arose when claimant asserted that after the conclusion of the contract the parties had by agreement modified its terms concerning the quantity of the goods and the time of delivery and of payment, and accused defendant, which insisted on performing the contract according to its original terms, of breach of contract and claimed damages. The contract was governed by the law of the Russian Federation, according to which a modification of a written contract must be made in writing. Claimant argued that this formal requirement was met by the exchange between the parties of messages and documents, some of which in electronic form, while defendant objected that the alleged modifications should have been laid down in a single document signed by both parties. The arbitral tribunal ruled in favour of the claimant.

The court's reasoning is explained below.

According to clause 9.2 of the contract, the disputes that may arise out of it or in connection with it 'are subject to consideration in accordance with the legislation of the Russian Federation'.

While interpreting the contract in accordance with Article 431 of the Civil Code of the Russian Federation, the ICAC took the literal meaning of the terms of the contract into account, and in so far as it does not allow to determine the content of the contract, it establishes the actual will of the parties, taking into account the negotiations and correspondence precedent to the contract, the practice as established in the relations between the parties, customary business practices and behaviour of the parties. At the same time, the ICAC took into account the customs in international trade, stipulated in Articles 2.1, 4.1, 4.2, and 4.3 of the UNIDROIT Principles (2004), according to which a contract can be concluded by accepting an offer or as a result of the conduct of the parties that sufficiently indicates the acceptance of the agreement; the contract shall be interpreted in accordance with the common intent of the parties.

On the basis of the foregoing, the ICAC came to the conclusion that after the conclusion of the contract the parties changed the terms of the quantity of goods and the procedure for payments and established such practice in their relations according to which the goods under the contract are not delivered in one instalment in the total amount provided for by the contract, but by separate instalments on the basis of the claimant's orders, while the payment procedure is established by the parties with respect to each individual instalment.

## 5. *India / National Court / Kapoor / Unilex 1454 / 2008*

**Case:**<sup>550</sup> Company A agreed to purchase two floors of a property from company B at an agreed rate per square foot. The offer of purchase and sale was reduced into writing by the exchange of letters between the parties. Company B requested company A to make an initial deposit of ten per cent of the cost calculated on the basis of carpet area. Thereafter, seven instalments of ten per cent and one instalment of five per cent were paid by company A on this basis. However, disputes arose between the parties regarding the actual price payable for the property. In view of the express terms of the letters exchanged between the parties (constituting the agreement between them) and the subsequent conduct of company B, the court concluded that it was evident that the price was to be calculated on the carpet area and not the floor area.

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<sup>550</sup> *Hansalaya Properties and Anr. v Dalmia Cement (Bharat) Ltd*, High Court of Delhi, 2008 SCC, 20 August 2008.

In arriving at the above conclusion, the court relied on Article 4.1 of the UNIDROIT Principles on interpretation of contracts and held that a contract shall be interpreted according to the common intention of parties. The intention of the parties is to be gathered from the words used in the agreement. It is only when such intention cannot be established that contract is to be interpreted according to the meaning that reasonable persons of the same kind would give to it. The court clarified that not only will the terms expressly agreed between the parties be enforceable but also those that are logically implied from those express terms. The court further clarified that the construction of a contract cannot be governed by the belief of one party not communicated to the other.

## 6. *The Netherlands / Arbitration / Taivalkoski / Unilex 2114 / 2008*

**Case:**<sup>551</sup> The parties entered into a contract for sale of goods. The contract required payment for the goods to be effected by an irrevocable letter of credit. The contract also required the buyer to arrange necessary amendments to the letter of credit requested by the buyer. The seller purported to terminate the contract on the basis of the buyer failing to comply with the aforementioned obligations.

The contract provided that the governing law was the CISG and to an extent not covered by the CISG, reference had to be made to the UNIDROIT Principles. By reference to Article 4.1 of the UNIDROIT Principles the sole arbitrator followed the principle that a contract shall be interpreted according to the common intention of the parties. The sole arbitrator also found that the contract itself is the foremost expression of the parties' intention and used the language of the contract in its plain and ordinary meaning as the starting point of its analysis. The sole arbitrator found that the unequivocal language of the contract imposed obligations on the buyer, which it did not comply with.

The sole arbitrator also took into account the fact that earlier the buyer had arranged amendments to the letter of credit requested by the seller. The sole arbitrator found that the buyer's conduct indicated that it was aware of its obligations under the contract.

## 7. *Russia / Arbitration / Petrachkov, Bekker / Unilex 857 / 2002*

**Case:**<sup>552</sup> A claimant, a Russian company, filed a lawsuit against a defendant, a German company, for collection of indebtedness under the marketing services agreement, and incurred interests. The parties submitted different positions as to the interpretation of the marketing services agreement. The arbitral tribunal applied the UNIDROIT Principles to interpret the agreement. The contract provided that the dispute between the parties should be resolved in accordance with general principles of law (*lex mercatoria*).

The court's reasoning is explained below.

In relation to the disagreements between the parties on the interpretation of the terms of the agreement, the arbitral tribunal took into account the nature and purpose of the agreement in accordance with Article 4.3 of the UNIDROIT Principles. The very title of the agreement, which appears in its text, directly indicates that purpose of the agreements is to provide services, the scope of which is defined in clause 1 'Subject of the agreement'. The price for the services and the terms of

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<sup>551</sup> ICC, Case No 14633, Final Award, May 2008.

<sup>552</sup> ICAC, Case No 11/2002, Award, 5 June 2002.

payment are provided in clause 2 of the agreement, according to which the evidence of the rendered services, which should serve as the basis for the payment, is the act of acceptance of services as signed by the parties to the agreement. These provisions of the agreement provide grounds for concluding that the intentions of the parties were expressed unequivocally, ie, it was their common intention. Taking into account paragraph 1 of Article 4.1 of the UNIDROIT Principles, according to which the contract should be interpreted in accordance with the common intention of the parties, the arbitral tribunal concluded that such common intention was clearly expressed in the agreement.

## 8. *Undefined / Arbitration / Taivalkoski / Unilex 957 / 2001*

**Case:**<sup>553</sup> The parties concluded two exclusive distribution contracts for the resale of the goods manufactured by the defendant. The defendant terminated the contracts alleging that the plaintiff failed to reach the minimum sales stipulated in the contract which gave rise to the dispute between the parties. One of the questions to be resolved by the arbitral tribunal was whether a poorly drafted jurisdiction clause included in the contracts could be interpreted as an arbitration clause providing for ICC arbitration.

Following its analysis of the said clause, the arbitral tribunal concluded that the parties had not expressly selected the applicable law. In absence of such selection the arbitral tribunal considered that application of *lex mercatoria* was the most appropriate solution. The arbitral tribunal further noted that for questions of general contract law, reference can be made to the UNIDROIT Principles.

By reference to Article 4.1 of the UNIDROIT Principles the arbitral tribunal held that the clause has to be interpreted by searching for the parties' common intention, without dwelling on the literal meaning of the words. The arbitral tribunal considered that in order to understand the meaning of the provision one would have to put oneself in the position that the parties were in or that of a reasonable person of the same kind as the parties. The arbitral tribunal noted that the clause had been negotiated and drawn up by persons without legal training, who did not have a clear idea of the meaning of the concepts of competent forum, arbitration and applicable law from a legal perspective.

The clause also excluded jurisdiction of the courts of the parties' respective countries. Taking these circumstances into account, the arbitral tribunal concluded that the parties' intention was to settle any dispute that might arise in a neutral way, having recourse to the ICC, which they considered an instrument well known to be suitable for that purpose.

The arbitral tribunal also referred to Article 4.5 of the UNIDROIT Principles and held that the above interpretation is in line with the principle that all terms of a contract should be given effect. Since the clause also excluded jurisdiction of the state courts, the arbitral tribunal found that interpreting it not as an arbitration clause would lead to the parties not being able to have recourse to either arbitration or state courts. The arbitral tribunal further held that this would deprive the parties of any possibility to act in the case of a dispute, unless the clause is considered entirely ineffective. Considering the exclusion of state courts' jurisdiction, interpreting the clause not as an arbitration clause would deprive the parties of any possibility to act in the case of a dispute, unless the clause is considered entirely ineffective.

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<sup>553</sup> ICC, Case No 10422, Award, 2001.

## 9. *Switzerland / Arbitration / Taivalkoski / Unilex 692 / 2000*

**Case:**<sup>554</sup> The parties entered into a contract concerning supply of industrial equipment. A dispute arose between the parties following loss of promissory notes, agreed as an instrument of payment, delayed delivery of the equipment and malfunctions. The contract contained a provision stipulating that the law applicable to the contract is the law of Switzerland. The defendant, however, contended that the claimant obtained the contract by fraud and material misrepresentation which in the defendant's view was not covered by the choice-of-law clause. This led the arbitral tribunal to interpret the choice-of-law clause in respect of whether it covered other than purely contractual issues.

The arbitral tribunal applied the law of Switzerland to the interpretation of the said clause but also referred to the corresponding articles of the UNIDROIT Principles. The arbitral tribunal stated that no interpretation is needed, when the true and common intention of the parties is clearly expressed in contract. However, it further noted that seemingly clear wording may be shown not to convey the true intention of the parties, wherefore the wording of the clause alone is not decisive.

As it was not clear what the parties had intended by the formulation of the clause, the arbitral tribunal applied the standard of a reasonable third person. The arbitral tribunal stated that it is not obvious that reasonable businesspeople would be aware of the difference between a contractual issue and an issue arising in connection with a contract. Furthermore, the arbitral tribunal noted that it would appear somewhat strange if businessmen as a matter of common intent were to choose two different laws to rule on their relationship. Consequently, the arbitral tribunal found that the choice-of-law clause was intended to cover any issue relating to the conclusion of the contract.

## 10. *Switzerland / Arbitration / Taivalkoski / Unilex 668 / 2000*

**Case:**<sup>555</sup> The parties were members to a worldwide business group. The group consisted of the member firms and the umbrella entity established for the purpose of coordinating cooperation between the member firms. This cooperation enabled the member firms to benefit from technological expertise developed by other member firms. Coordination between member firms was achieved by way of agreements, known as Member Firm Interfirm Agreements (MFIFAs). As skills and services offered by different units evolved, they began to overlap causing a conflict between certain member firms. Consequently, claimants initiated arbitral proceedings against certain member firms and the umbrella entity, alleging that respondents breached their obligations under MFIFAs. The arbitral tribunal found that the UNIDROIT Principles were applicable to the extent a matter is not addressed in the relevant contractual material.

One of the questions addressed by the arbitral tribunal was whether the umbrella entity had an obligation to coordinate the practices of the member firms, which it contested. The arbitral tribunal interpreted the provisions of the MFIFAs in the light of the purposes and policies set out in the preamble thereto and in the umbrella entity's articles and bylaws, finding that the umbrella entity's purpose has been coordination of member firms on an international basis and that the umbrella

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<sup>554</sup> ICC, Case No 9651, Award, August 2000.

<sup>555</sup> ICC, Case No 9797, Award, 28 July 2000.

entity had to exercise its best efforts to ensure cooperation, coordination and compatibility among member firms' practices.

Another question addressed by the arbitral tribunal was whether the member firms, which did not participate in funding and development of certain technology, had the right to it in the event the member firms, which funded and developed the said technology, left the group. In this respect the arbitral tribunal found that the matter was not addressed in the contractual material and expressly referred to Article 4.1 of the UNIDROIT Principles stating that contracts must be interpreted according to the common intention of the parties and, when it cannot be established, according to the reasonable third-person standard. The arbitral tribunal found that the reasonable persons of the same kind as the parties could not possibly claim that the member firms not paying for or participating in the development of the relevant technology are the joint owners of such technology or that the entities which funded and developed it are bound to forfeit their rights to those who have no title thereto.

#### 11. *France / Arbitration / Taivalkoski / Unilex 694 / 1999*

**Case:**<sup>556</sup> A financial institution entered into a credit contract with a company. The contract was guaranteed by another company. In order to recover payments due to it, the financial institution initiated arbitration proceedings against both companies on the basis of an arbitration clause contained in the credit contract. Both respondents contested the validity of the arbitration clause due to its imperfect formulation.

The credit contract was subject to the law of the country of the financial institution (not specified further). In determining the principles of interpretation of an arbitration agreement the arbitral tribunal sought support from the UNIDROIT Principles alongside other sources.

The arbitral tribunal considered that in the interpretation of an arbitration agreement it had to look for the parties' real intent, taking inter alia into account the consequences, which they have reasonably and legitimately contemplated and to give effect to parties' intent. The arbitral tribunal also referred to Article 4.5 of the UNIDROIT Principles, finding that the contract terms shall be interpreted so as to give effect to all terms. The arbitral tribunal found that, despite defects in the formulation of the arbitration clause, the intention of the parties was to submit their dispute to arbitration under the ICC Rules of Arbitration.

#### 12. *Switzerland / Arbitration / Voser, Ninković / Unilex 642 / 1994*

**Case:**<sup>557</sup> Company A entered into a contract with company B for the sale of a quantity of reinforcing steel bars. Due to a problem in respect of the letter of credit to be opened by company B, company A initiated arbitration proceedings against company B, which contested the jurisdiction of the arbitral institution on the basis that the institution was not specifically named in the arbitration clause.

In deciding in favour of company A, the Zurich Chamber of Commerce arbitral tribunal seated in Switzerland applied the relevant provisions of the applicable Swiss law. The tribunal concluded that

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<sup>556</sup> ICC, Case No 9759, Preliminary Award, August 1999.

<sup>557</sup> *Europe v The Canadian Affiliate of a Chinese Group*, Zurich Chamber of Commerce, Preliminary Award on Jurisdiction, 25 November 1994.

parties to a contract are bound by the meaning of the contractual provision as must be understood by the average honest and diligent business person. In order to show that this interpretation rule reflects a worldwide consensus, the arbitral tribunal referred to Articles 4.1 and 4.2 of the UNIDROIT Principles ‘which have been established by a large international working party consisting of specialists in contract law selected from all different parts of the world [...]’.

Having established that it has jurisdiction, the arbitral tribunal addressed the question whether company B could invoke a material mistake and thereby invalidate the arbitration clause. The arbitral tribunal denied such a possibility and in that context made again a reference not only to the relevant provision of the applicable Swiss law, but also to the similar rule contained in Article 3.5 of the UNIDROIT Principles 1994 (ie, now Article 3.2.2).

## II. Article 4.2: Interpretation of statements and other conduct

### 1. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2012*

**Case:**<sup>558</sup> As a continuation of an earlier agreement, a supply agreement for leasing equipment and licensing technology was concluded by two ministries of country X and the lessor from country Y. The agreement contained an arbitration clause providing for a dispute to ‘[...] be brought before the International Arbitration Court in Switzerland. This Court will proceed in accordance with the international law.’<sup>559</sup> While the lessor initiated arbitral proceedings before the ICC, the ministries of state X initiated arbitration proceedings before the national arbitral institution of country X.

Considering the ambiguous wording of the arbitration clause, the arbitral tribunal seated in Switzerland had to decide whether it was the parties’ mutual intention to refer their disputes to the ICC. The arbitral tribunal held in that respect that under Swiss law the arbitration clause may be interpreted under either Swiss or international law and consequently decided to apply both Swiss law and international law in that regard. Considering that both parties invoked the UNIDROIT Principles as internationally recognised principles of law, the arbitral tribunal consulted the UNIDROIT Principles alongside the Principles of European Contract Law and the CISG. In particular, it referred to Articles 4.1, 4.2, and 4.3 of the UNIDROIT Principles.

The arbitral tribunal compared the provisions for the interpretation of contracts as set out in Swiss law and the aforementioned sets of rules. Both Swiss and international law, including the UNIDROIT Principles, provide that that parties’ common intent is to be established first (subjective interpretation). In case such common intent cannot be established, the Swiss law requires the court or arbitrator to examine and establish ‘how an average honest and diligent person had to reasonably understand or interpret the other party’s declarations and the particular provisions’ (objective interpretation). The arbitral tribunal found this to be in line with Article 4.2(2) of the UNIDROIT Principles which calls for ‘the understanding which a reasonable person of the same kind as the parties would give to the term’. Thus, the arbitral tribunal concluded that the provisions for the interpretation of contracts contained in all these sets of rules are very similar and do not lead to conflicting results.

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<sup>558</sup> ICC, Case No 14581, Final Award on Jurisdiction, 2012.

<sup>559</sup> Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XXXVII* (Kluwer 2012) 37, 62.



The arbitral tribunal finally held that it has not been properly constituted in accordance with the parties' agreement and that, for that reason, it cannot decide on the request for arbitration.

## 2. *Russia / Arbitration / Petrachkov, Bekker / Unilex 1477 / 2008*

**Case:**<sup>560</sup> A claimant, a German company, filed a lawsuit against a defendant, a Russian company, for collection of indebtedness under sale and purchase agreement. The contract for the sales of goods provided that Russian law was the law governing the contract.

The dispute arose when claimant asserted that after the conclusion of the contract the parties had by agreement modified its terms concerning the quantity of the goods and the time of delivery and of payment, and accused defendant, which insisted on performing the contract according to its original terms, of breach of contract and claimed damages. The contract was governed by the law of the Russian Federation, according to which a modification of a written contract must be made in writing. The claimant argued that this formal requirement was met by the exchange between the parties of messages and documents, some of which in electronic form, while the defendant objected that the alleged modifications should have been laid down in a single document signed by both parties. The arbitral tribunal ruled in favour of the claimant.

The court's reasoning is explained below.

According to clause 9.2 of the contract, the disputes that may arise out of it or in connection with it 'are subject to consideration in accordance with the legislation of the Russian Federation'.

While interpreting the contract in accordance with Article 431 of the Civil Code of the Russian Federation, the ICAC took the literal meaning of the terms of the contract into account, and in so far as it does not allow to determine the content of the contract, it establishes the actual will of the parties, taking into account the negotiations and correspondence precedent to the contract, the practice as established in the relations between the parties, customary business practices and behaviour of the parties. At the same time, the ICAC took into account the customs in international trade, stipulated in Articles 2.1, 4.1, 4.2, and 4.3 of the UNIDROIT Principles, 2004, according to which a contract can be concluded by accepting an offer or as a result of the conduct of the parties that sufficiently indicates the acceptance of the agreement; the contract shall be interpreted in accordance with the common intent of the parties.

On the basis of the foregoing, the ICAC comes to the conclusion that after the conclusion of the contract the parties changed the terms of the quantity of goods and the procedure for payments and established such practice in their relations according to which the goods under the contract are not delivered in one instalment in the total amount provided for by the contract, but by separate instalments on the basis of the claimant's orders, while the payment procedure is established by the parties with respect to each individual instalment.

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560 ICAC, Case No 83/2008, Award, 22 December 2008.



### 3. *Switzerland / Arbitration / Voser, Ninković / Unilex 642 / 1994*

**Case:**<sup>561</sup> Company A entered into a contract with company B for the sale of reinforcing steel bars. Due to a problem in respect of the letter of credit to be opened by company B, company A initiated arbitration proceedings against company B, which contested the jurisdiction of the arbitral institution on the basis that the institution was not specifically named in the arbitration clause.

In deciding in favour of company A, the arbitral tribunal seated in Switzerland applied the relevant provisions of the applicable Swiss law and concluded that parties to a contract are bound by the meaning of the contractual provision as must be understood by the average honest and diligent business person. In order to show that this interpretation rule reflects a worldwide consensus, the arbitral tribunal referred to Articles 4.1 and 4.2 of the UNIDROIT Principles ‘which have been established by a large international working party consisting of specialists in contract law selected from all different parts of the world [...]’.<sup>562</sup>

Having established that it has jurisdiction, the arbitral tribunal addressed the question whether company B could invoke a material mistake and thereby invalidate the arbitration clause. The arbitral tribunal denied such a possibility and in that context made again a reference not only to the relevant provision of the applicable Swiss law, but also to the similar rule contained in Article 3.5 of the UNIDROIT Principles 1994 (ie, now Article 3.2.2).

## III. Article 4.3: Relevant circumstances

### 1. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2013*

**Case:**<sup>563</sup> Company A from country X and company B from country Y entered into a JVA to provide technical assistance to the government of country Z in the framework of a project in country Z. According to the JVA, any net margin of the joint venture company was to be divided equally between company A, which was the manager of the joint venture company, and company B. The JVA provided that the parties could refer their disputes to arbitration (*pourront faire appel à la Cour d'Arbitrage*) and that the FIDIC rules prevailed in such cases.

After the completion of the project, company B sent an invoice to company A for 50 per cent of the joint venture company’s net margin. Company A refused to pay, alleging that company B’s employees did not provide any assistance to its employees during the project. After first referring the case to the courts in country X, company B initiated arbitration proceedings against company A, which contested the jurisdiction and alleged that the arbitration clause was too vague to constitute a valid agreement to arbitrate and that company B has waived its right to arbitration by first commencing state court proceedings.

In their submissions on jurisdiction, the parties did not specify the rules of law determining the substantive validity of the arbitration agreement. For this reason, the arbitral tribunal seated in Switzerland was considered to have, within the boundaries of Swiss law, certain discretion when

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561 *Europe v The Canadian Affiliate of a Chinese Group*, Zurich Chamber of Commerce, Preliminary Award on Jurisdiction, 25 November 1994.

562 ASA Bulletin (1996) 14(2), 313.

563 ICC, Case No 19127, Final Award, 2013.

deciding which rules of law it will apply to this issue. After considering the different sets of rules of law that came into play in determining the applicable law, the arbitral tribunal held that the lack of an agreement of the parties can be interpreted as implied negative choice and that the contract's connection with the different countries is not predominant enough to justify the application of one national law to the exclusion of others.

Based on the foregoing, the arbitral tribunal decided to apply the UNIDROIT Principles and Swiss law to the question of the substantive validity of the arbitration agreement. In determining whether the parties consented to submit their dispute to the arbitral institution, the arbitral tribunal applied Article 4.1 as well as Article 4.3(c) of the UNIDROIT Principles. In the context of interpretation of the subsequent conduct of the parties, the arbitral tribunal considered that company B's statements evidenced the fact that, in its view, the arbitration clause was defective and inoperable. The arbitral tribunal held that claiming the opposite would go against the principle of *venire contra factum proprium*, which is applicable under Article 1.7 and Article 1.8 of the UNIDROIT Principles as well as Swiss law.

The arbitral tribunal further found that both parties revoked the arbitration agreement and accepted the jurisdiction of the state courts. It stated that 'such mutual waiver can be concluded without observing any requirement of form and must be interpreted according to the generally applicable principles for the interpretation of private statements of intent', thereby referring to and applying Article 1.2 of the UNIDROIT Principles.<sup>564</sup>

Based on the foregoing, the arbitral tribunal decided that it has no jurisdiction to decide on company B's claims.

## 2. Spain / National Court / Llevat / Not Unilex / 2012

**Case:**<sup>565</sup> A buyer purchased a certain amount of shares of a company by means of a loan. The shares and interest of the loan were not paid on time, and hidden liabilities were found in the company, causing two parallel proceedings to arise: the seller and lender claimed the part of shares due and the interest of the loan, whereas the buyer and guarantor of the loan claimed a compensation for the hidden liabilities in the company, and intended to compensate these amounts with the pending debt.

The first court ruling declared a smaller hidden liability than the ones that were claimed, and said buyer and guarantor knew the 'real situation of company' (referencing the liabilities), condemning them to pay the debt.

The second ruling declared that the buyer and guarantor did not know the 'real situation of company', as they only had access to information provided by the seller, and condemned the seller.

In view of the second ruling, the seller appealed in cassation, alleging an incorrect interpretation of the contracts entered into by the parties, as well as a violation of estoppel doctrine by the courts.

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<sup>564</sup> Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XLII* (Kluwer 2017) 275 et seq.

<sup>565</sup> Supreme Court of Spain, Case No 285/2012 (First Chamber), Ruling, 8 May 2012.

The Supreme Court used Article 4.3 of the UNIDROIT Principles in order to avoid the general principle of literal interpretation which generally prevails in Spanish law, and referred to the importance of the common intention of the parties as an interpretative tool.

The court finally dismissed the appeal for considering that the grounds on which it was based were insufficient and improper for cassation.

### 3. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2012*

**Case:**<sup>566</sup> As a continuation of an earlier agreement, a supply agreement for leasing equipment and licensing technology was concluded by two ministries of country X and the lessor from country Y. The agreement contained an arbitration clause providing for a dispute to ‘[...] be brought before the International Arbitration Court in Switzerland. This Court will proceed in accordance with the international law.’<sup>567</sup> While the lessor initiated arbitral proceedings before the ICC, the ministries of state X initiated arbitration proceedings before the national arbitral institution of country X.

Considering the ambiguous wording of the arbitration clause, the arbitral tribunal seated in Switzerland had to decide whether it was the parties’ mutual intention to refer their disputes to the ICC. The arbitral tribunal held in that respect that under Swiss law the arbitration clause may be interpreted under either Swiss or international law and consequently decided to apply both Swiss law and international law in that regard. Considering that both parties invoked the UNIDROIT Principles as internationally recognised principles of law, the arbitral tribunal consulted the UNIDROIT Principles alongside the Principles of European Contract Law and the CISG. In particular, it referred to Articles 4.1, 4.2, and 4.3 of the UNIDROIT Principles.

The arbitral tribunal compared the provisions for the interpretation of contracts as set out in Swiss law and the afore-mentioned sets of rules. Both Swiss and international law, including the UNIDROIT Principles, provide that the parties’ common intent is to be established first (subjective interpretation). In case such common intent cannot be established, the Swiss law requires the court or arbitrator to examine and establish ‘how an average honest and diligent person had to reasonably understand or interpret the other party’s declarations and the particular provisions’ (objective interpretation). The arbitral tribunal found this to be in line with Article 4.2(2) of the UNIDROIT Principles which calls for ‘the understanding which a reasonable person of the same kind as the parties would give to the term’. Thus, the arbitral tribunal concluded that the provisions for the interpretation of contracts contained in all these sets of rules are very similar and do not lead to conflicting results.

The arbitral tribunal finally held that it has not been properly constituted in accordance with the parties’ agreement and that, for that reason, it cannot decide on the request for arbitration.

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<sup>566</sup> ICC, Case No 14581, Final Award on Jurisdiction, 2012.

<sup>567</sup> Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XXXVII* (Kluwer 2012) 37, 62.

#### 4. *Singapore / National Court / Koh / Not Unilex / 2010*

**Case:**<sup>568</sup> Company A and company B were initially joint venture partners, each owning 50 per cent of a JVC. Three per cent of company B's shares were owned by its subsidiary, company B1. The terms of the JVA, and the JVC's articles of association stipulated that company A and company B were entitled to appoint three directors each in the JVC as they both held 50 per cent of the shares in the JVC. Subsequently, company A increased its stake to 85 per cent by purchasing 35 per cent from company B under a supplemental agreement. Thereafter, Company A proceeded to appoint another three directors on the board of the JVC, bringing the total number of Company A-appointed directors to six. Thereafter, company B sold its remaining 15 per cent shares to a third party. The JVC's six company A-appointed directors proceeded to pass certain resolutions which had the effect of reducing company B's board influence and executive control in the JVC.

Among other issues, Company A argued that the JVA and JVC's articles of association contained an implied term which has the effect of disapplying certain clauses relating to board representation and control once the 50:50 joint venture proportion changed.

The court discussed various principles, including that of interpretation of contracts. In doing so, the court discussed the contextual approach, and the admissibility of extrinsic evidence in the adoption of this approach. In the discussion on the admissibility of extrinsic evidence, reference was made to Article 4.3 of the UNIDROIT Principles.

#### 5. *India / Statutory Tribunal / Kapoor / Not Unilex / 2010*

**Case:**<sup>569</sup> Company A which was a cable television service provider was receiving signals from company B for its channels and was obliged to report regularly the subscriber base on the basis of which invoices were to be raised by company B for payment of subscription fee by company A. However, company A's failure to make the requisite reporting led to disputes between the parties. Company A approached the tribunal, inter alia, seeking a restraint against company B from disconnecting the signals for its channels. The tribunal directed company A to disclose information concerning its subscriber base to company B and further directed both parties to arrive at a mutual settlement of dues. However, various settlement efforts failed resulting in company B approaching the tribunal again for grant of appropriate relief in terms of enforcing its earlier order.

In determining whether subsequent conduct of parties could be taken into account for determining whether there exists a concluded contract between the parties for settlement of disputes, the tribunal, among others, relied on the text of Kim Lewison QC in *Interpretation of Contracts* which stipulates that UNIDROIT Principles state that in interpreting a contract, regard shall be had to all circumstances including 'any conduct of the parties subsequent to the conclusion of the contract'. The tribunal on considering the emails exchanged between the parties regarding the proposed memorandum of understanding for settlement of disputes between the parties held that such an agreement had been reached.

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<sup>568</sup> *Sembcorp Marine Ltd v PPL Holdings Pte Ltd et al* (2013) SGCA 43.

<sup>569</sup> *Hathway Cable and Datacom Ltd v Neo Sports Broadcast Pvt Ltd*, 2010 SCC.

## 6. *United Kingdom / National Court / Cowan / Unilex 1512 / 2009*

**Case:**<sup>570</sup> A entered into a contract with B for the development of a site owned by A, under which B was granted a licence to construct residential and commercial buildings and to ‘sell’ the properties on long leases, which would be granted by A at the direction of B. B would receive the sale proceeds from the purchasers and would pay a proportion of the proceeds to A, according to an agreed land price per unit. According to the terms of the contract, this had two elements: the basic land price by reference to an agreed price per square foot of area of the relevant residential and commercial development; and an additional payment in respect of the proportion of any increase in residential sale value of the development after the date of the contract. The parties were in dispute over the latter as a matter of contractual interpretation.

A argued by reference to a literal interpretation of the words used in the written contract. B argued for a contrary interpretation, informed by evidence of the factual background to the transaction and the negotiations of the parties.

The House of Lords upheld the long-standing rule in English law that contracts are to be interpreted objectively by reference to what a reasonable observer would regard as the intention of the contractual language, and not by reference to the actual intentions of the parties. As a result, the primary English law rule was to construe contracts according to their written terms, and not by reference to evidence as to what the parties’ subjective intentions actually were, which evidence is consequently inadmissible for the purpose of contractual interpretation.

In emphasising this important distinction, the court made reference to Article 4.3 of the UNIDROIT Principles. It was described as reflective of the French legal philosophy of contractual interpretation which sought to establish and apply the parties’ actual intentions and, thus, permits and requires examination of the evidence needed to determine the parties’ intentions as a matter of fact, such as the negotiations of the contract. This was held up in contrast to the very different philosophy applied in English law.

Nevertheless, having upheld the traditional view of English contract law and contractual interpretation (and ruling that evidence of the parties’ negotiations is inadmissible for the purpose of determining what the contract meant), the court held that such evidence may be admissible for other purposes – such as to establish the general background facts that would have been known to the parties at the time of entering into the contract. This was held to be legitimate as the ultimate objective of the court is to ascertain the meaning of the words in the contract by reference to ‘what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean’.

## 7. *Russia / Arbitration / Petrachkov, Bekker / Unilex 1477 / 2008*

**Case:**<sup>571</sup> A claimant, a German company, filed a lawsuit against a defendant, a Russian company, for collection of indebtedness under a sale and purchase agreement. The contract for the sales of goods provided that Russian law was the law governing the contract.

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<sup>570</sup> *Chartbrook Ltd v Persimmon Homes Ltd* (2009) 1 AC 1101.

<sup>571</sup> ICAC, Case No 83/2008, Award, 22 December 2008.

The dispute arose when claimant asserted that after the conclusion of the contract the parties had by agreement modified its terms concerning the quantity of the goods and the time of delivery and of payment, and accused the defendant, which insisted on performing the contract according to its original terms, of breach of contract and claimed damages. The contract was governed by the law of the Russian Federation, according to which a modification of a written contract must be made in writing. The claimant argued that this formal requirement was met by the exchange between the parties of messages and documents, some of which in electronic form, while the defendant objected that the alleged modifications should have been laid down in a single document signed by both parties. The arbitral tribunal ruled in favour of the claimant.

The court's reasoning is explained below.

According to clause 9.2 of the contract, the disputes that may arise out of it or in connection with it 'are subject to consideration in accordance with the legislation of the Russian Federation'.

While interpreting the contract in accordance with Article 431 of the Civil Code of the Russian Federation, the ICAC took the literal meaning of the terms of the contract into account, and in so far as it does not allow to determine the content of the contract, it establishes the actual will of the parties, taking into account the negotiations and correspondence precedent to the contract, the practice as established in the relations between the parties, customary business practices and behaviour of the parties. At the same time, the ICAC took into account the customs in international trade, stipulated in Articles 2.1, 4.1, 4.2, and 4.3 of the UNIDROIT Principles, 2004, according to which a contract can be concluded by accepting an offer or as a result of the conduct of the parties sufficiently indicating on making of the agreement; the contract shall be interpreted in accordance with the common intent of the parties.

On the basis of the foregoing, the ICAC came to the conclusion that after the conclusion of the Contract the parties changed the terms of the quantity of goods and the procedure for payments and established such practice in their relations according to which the goods under the contract are not delivered in one instalment in the total amount provided for by the contract, but by separate instalments on the basis of the claimant's orders, while the payment procedure is established by the parties with respect to each individual instalment.

## **8. Russia / Arbitration / Petrachkov, Bekker / Unilex 857 / 2002**

**Case:**<sup>572</sup> A claimant, a Russian company, filed a lawsuit against a defendant, a German company, for collection of indebtedness under the marketing services agreement, and incurred interests. The parties submitted different positions as to the interpretation of the marketing services agreement. The arbitral tribunal applied UNIDROIT Principles in order to interpret the agreement. The contract provided that the dispute between the parties should be resolved in accordance with general principles of law (*lex mercatoria*).

The court's reasoning is explained below.

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<sup>572</sup> ICAC, Case No 11/2002, Award, 5 June 2002.



In relation to the disagreements between the parties on the interpretation of the terms of the agreement, the arbitral tribunal took into account the nature and purpose of the agreement in accordance with Article 4.3 the UNIDROIT Principles. The very title of the agreement, which appears in its text, directly indicates that purpose of the agreements is to provide services, the scope of which is defined in clause 1 ‘Subject of the agreement’. The price for the services and the terms of payment are provided in clause 2 of the agreement, according to which the evidence of the rendered services, which should serve as the basis for the payment, is the act of acceptance of services as signed by the parties to the agreement. These provisions of the agreement provide grounds for concluding that the intentions of the parties were expressed unequivocally, that is, it was their common intention. Taking into account paragraph 1 of Article 4.1 of the UNIDROIT Principles, according to which the contract should be interpreted in accordance with the common intention of the parties, the arbitral tribunal concluded that such common intention was clearly expressed in the agreement.

## 9. *Belgium / Arbitration / Taivalkoski / Unilex 697 / 2000*

**Case:**<sup>573</sup> The parties concluded a contract, which gave the claimant an exclusive licence to sell and distribute the respondent’s products in Europe. At the same time an identical contract was concluded between the respondent and company X for the North American market. Later the respondent entered into a new contract with company X. The claimant contended that the new contract between the respondent and company X infringed its exclusivity in Europe as the new contract did not contain corresponding limitation of the extent of company X’s distribution.

The arbitral tribunal decided that *lex mercatoria* should be applied noting that the UNIDROIT Principles reflect the rules of law and usages of international trade. The arbitral tribunal found that the predominant principle of interpretation is to consider the intention of the parties and stated further that the intention of the parties can be determined by all circumstances. The arbitral tribunal emphasised that in the case at hand the contractual set-up as a whole and the parties’ conduct before and after the conclusion of the contracts were of particular importance.

In order to determine whether the respondent had breached the exclusive licence given to the claimant, the arbitral tribunal had to interpret the new contract concluded between the respondent and company X. The arbitral tribunal considered that the intention of the parties should be determined in the full context of the whole contractual set-up between the respondent and its two licensees. By assessing the relevant provisions of all of the contracts the arbitral tribunal came to the conclusion that, as opposed to the original contract, the new contract between the respondent and company X was identical to the contract between the claimant and the respondent with regard to indirect sales on the territory of the other licensee. The arbitral tribunal found that the new contractual set-up was the result of a deliberate intent to alter the symmetry of the licensees’ positions, rather than bad drafting. The arbitral tribunal further stated that such interpretation was confirmed by the conduct of the parties as the negotiation of the new contract with the company X was not disclosed to the claimant which can be considered contrary to the parties’ prior practice concerning cooperation and exchange of information. The arbitral tribunal also took into account communication between the respondent and company X subsequent the conclusion of the new contract which pertained to company X’s entrance in the European market via indirect sales.

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573 ICC Case 9875, Award, March 2000.



## IV. Article 4.4: Reference to contract or statement as a whole

### 1. *India / National Court / Kapoor / Unilex 1242 / 2006*

**Case:**<sup>574</sup> Buyer A and seller B had entered into an agreement to buy and sell a certain property for an agreed sale consideration. A certain portion of money was paid upfront. Under the terms of the agreement, seller B was to obtain a no objection letter from a statutory authority and inform buyer A, after which the balance sale consideration was to be paid by buyer A. In the event the balance sale consideration was not paid within ten days from the knowledge of buyer A of the permission having been received, Seller B was entitled to send a notice calling upon buyer A to make the payment within ten days failing which the money paid upfront was liable to be forfeited.

The agreement stipulated that simultaneously, on receipt of payment, seller B was to execute an irrevocable and registered general power of attorney, no objection affidavits for mutation in the records of the statutory authority, an indemnity bond for property tax and other encumbrances, and/or 'any other relevant document requested' by buyer A. Seller B informed buyer A regarding receipt of the no objection letter and requested that the balance payment be made within ten days. Buyer A expressed its willingness to complete the transaction and requested the execution of a sale deed in addition to the other stipulated documents. Due to continued non-payment by buyer A, seller B forfeited the monies received.

The court held that on a harmonious construction of clauses 3, 4 and 5 of the agreement, it was only the irrevocable and registered general power of attorney that was required for completion of this transaction and non-execution of the sale deed would not be fatal to the transaction. In interpreting the agreement, the court relied on the principle that an agreement/deed should be read as a whole to ascertain its true meaning. The court relied on works of various authors including Mulla in *Indian Contract and Specific Relief Acts*, 12th edition at page 267 which in turn relies on Article 4.4 of the UNIDROIT Principles in reaffirming the above position.

## V. Article 4.5: All terms to be given effect

### 1. *France / Arbitration / Taivalkoski / Not Unilex / 2015*

**Case:**<sup>575</sup> The contract between the parties contained an arbitration clause. According to this clause the arbitration institution should be designated in a separate contractual document, which, however, did not contain such designation. Due to lack of reference to an arbitration institution, the respondent contested the validity of the arbitration clause, which led the arbitral tribunal to resolve the question of its interpretation.

The contractual documents did not stipulate the applicable law. As the parties refrained from taking specific positions on the applicable law, the arbitral tribunal found that the existence, validity and scope of an arbitration agreement has to be examined by reference to transnational rules and trade usages. The arbitral tribunal further noted that these rules are the same as those commonly adopted

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<sup>574</sup> *Sandvik Asia Pvt Ltd. v Vardhman Promoters Pvt. Ltd.*, 2006 SCC.

<sup>575</sup> ICC, Case No 17146, Award, 2015.

for the interpretation of contracts in national laws. The arbitral tribunal identified that these rules encompass the principle of good faith, the principle of effective interpretation and the principle of *interpretation contra proferentem* stating that it would interpret the arbitration clause pursuant to these generally accepted principles. With regard to the principle of effective interpretation, the arbitral tribunal also referred to Article 4.5 of the UNIDROIT Principles.

The arbitral tribunal analysed the contractual documents finding that the parties' intention was to resolve possible differences or disputes between them through administered arbitration. In addition to examination of the contractual material and other circumstances as a whole in order to establish the parties' intent, the arbitral tribunal also resorted to the principle of effective interpretation. As a part of its analysis the arbitral tribunal noted that neither of the parties had argued that their intention would have been to have an ad hoc arbitration, which was in line with the arbitration clause, as otherwise it would have deprived a part of the arbitration clause, according to which the seat of arbitration is determined by location of headquarters of selected arbitration institution, of any meaning.

## 2. *India / National Court / Llevat / Unilex 1242 / 2006*

**Case:**<sup>576</sup> Two Indian companies subscribed an agreement for the sale of an apartment. The buyer was to pay 20 per cent of the price immediately and the rest after receiving a liquidation of the seller's tax on income. If the buyer did not pay the remaining amount within 20 days after receipt of the liquidation, he would lose the 20 per cent advance. The contract also required that the seller obtained a registered and irrevocable power of attorney. If the power was not granted within five months, the agreement would be cancelled and the buyer would be reimbursed the 20 per cent.

When the 20 per cent was paid and the seller had handed in the liquidation, the buyer asked to execute the power of attorney together with the sale of deed. When the seller failed to provide the deed within the five months agreed, the buyer demanded the 20 per cent which he had paid, whereas the seller demanded the payment of the remaining 80 per cent or he would keep the advance.

The court ruled in favour of the seller, considering that only the default regarding the execution of the power implied the cancellation of the sale and reimbursement of the advance, whereas the failure in executing the sale deed was not enough to cause the same result. When reaching its ruling, the court decided that in order to interpret the individual clauses, the contract had to be interpreted as a whole, and that the individual clauses should be interpreted in a way that all of them are given effect. For these purposes, the court took into consideration Articles 4.4 and 4.5 of the UNIDROIT Principles as well as Indian and British jurisprudence.

## 3. *Undefined / Arbitration / Taivalkoski / Unilex 957 / 2001*

**Case:**<sup>577</sup> The parties concluded two exclusive distribution contracts for the resale of the goods manufactured by the defendant. The defendant terminated the contracts alleging that the plaintiff failed to reach the minimum sales stipulated in the contract which gave rise to the dispute between

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<sup>576</sup> Supreme Court of Delhi, Case No CS (OS) No 1599/1999, Ruling, 21 August 2006.

<sup>577</sup> ICC, Case 10422, Award, 2001.

the parties. One of the questions to be resolved by the arbitral tribunal was whether a poorly drafted jurisdiction clause included in the contracts could be interpreted as an arbitration clause providing for ICC arbitration.

Following its analysis of the said clause, the arbitral tribunal concluded that the parties had not expressly selected the applicable law. In absence of such selection the arbitral tribunal considered that application of *lex mercatoria* was the most appropriate solution. The arbitral tribunal further noted that for questions of general contract law, reference can be made to the UNIDROIT Principles.

By reference to Article 4.1 of the UNIDROIT Principles the arbitral tribunal held that the clause has to be interpreted by searching for the parties' common intention, without dwelling on the literal meaning of the words. The arbitral tribunal considered that in order to understand the meaning of the provision one would have to put oneself in the position that the parties were in or that of a reasonable person of the same kind as the parties. The arbitral tribunal noted that the clause had been negotiated and drawn up by persons without legal training, who did not have a clear idea of the meaning of the concepts of competent forum, arbitration and applicable law from a legal perspective.

The clause also excluded jurisdiction of the courts of the parties' respective countries. Taking these circumstances into account, the arbitral tribunal concluded that the parties' intention was to settle any dispute that might arise in a neutral way, having recourse to the ICC, which they considered an instrument well known to be suitable for that purpose.

The arbitral tribunal also referred to Article 4.5 of the UNIDROIT Principles and held that the above interpretation is in line with the principle that all terms of a contract should be given effect. Since the clause also excluded jurisdiction of the state courts, the arbitral tribunal found that interpreting it not as an arbitration clause would lead to the parties not being able to have recourse to either arbitration or state courts. The arbitral tribunal further held that this would deprive the parties of any possibility to act in the case of a dispute, unless the clause is considered entirely ineffective. Considering the exclusion of state courts' jurisdiction, interpreting the clause not as an arbitration clause would deprive the parties of any possibility to act in the case of a dispute, unless the clause is considered entirely ineffective.

## VI. Article 4.6: Contra proferentem rule

### 1. *Russia / National Court / Petrachkov, Bekker / Not Unilex / 2016*

**Case:**<sup>578</sup> The Russian company, the claimant, filed a lawsuit against the Russian bank, the defendant, for collection of the indebtedness under the bank guarantee, issued by the Russian bank in favour of the claimant.

The Russian bank refused to pay the indebtedness. In the court hearings the Russian bank referred to the fact that claimant did not apply in writing to the bank with the application to pay the amount under the bank guarantee, which, however, was not indicated as a ground for non-payment in the official reply of the bank to the claimant. The court rejected the arguments of the Russian bank and referred to the applicable provision of the Russian law and legal position elaborated by the

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<sup>578</sup> Ninth Arbitrazh Appeal Court, Case No A40-118358/2015, Resolution 09AP-24129/2016, 23 June 2016.

Supreme Arbitrazh Court (Russia's supreme commercial court). The court also referred to the *contra proferentem* rule as contained in the UNIDROIT Principles.

The court's reasoning is explained below.

As explained in paragraph 11 of the Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation dated 14 March 2014 No 16 'On freedom of contract and its limits', in the event of unclear contract terms and the impossibility to establish the actual common will of the parties, taking into account the purpose of the contract and its wording, previous negotiations, the correspondence of the parties, the practice established in mutual relations between the parties, the customs and also the subsequent conduct of the parties to the contract (Article 431 of the Civil Code of the Russian Federation), the interpretation of the terms of the contract by the court should be in favour of the counterparty of the party that drafted the contract or proposed the wording of the relevant condition; until proven otherwise, it is assumed that such a party was a person who is a professional in the relevant field, requiring a special knowledge (eg, a bank under a loan agreement, a lessor under a leasing agreement and an insurer under an insurance contract). A similar rule is applied as generally accepted rule of interpretation of international commercial contracts (Article 4.6 of the UNIDROIT Principles).

## 2. *Austria / Arbitration / Llevat / Unilex 1659 / date unavailable*

**Case:**<sup>579</sup> An Australian seller and a businessman of unknown nationality (the buyer) engaged in a sales contract, which stated that the goods were to be sent within 60 days, and in the event of a delay, the seller was to pay the buyer 0.1 per cent of the cost of the non-delivered goods for each day of delay, with a maximum of three per cent of the cost. The contract was governed by English law and was submitted to arbitration in Vienna, Austria.

The dispute arose when the seller informed the buyer that they were not able to deliver the goods, and consequently the buyer claimed three per cent of the price paid as liquidation for the default of delivery. The sole arbitrator interpreted the commitment clause applying the *in favorem validitatis* and *contra proferentem* principles and referencing Article 4.6 of the UNIDROIT Principles, which, according to the arbitrator include wider rules that complement the law and help to avoid the uncertainty that poorly drafted contracts cause.

The arbitrator ruled in favour of the buyer, as the agreed clauses were considered to be valid under the applicable law.

## VII. Article 4.7: Linguistic discrepancies

### 1. *Italy / National Court / Martinetti / Not Unilex / 2016*

**Case:**<sup>580</sup> Company A lodged an opposition to an order for payment issued on request of company B for the payment of a service (the research and selection of private surveillance companies and the management and coordination of the security services). Company A based her opposition on various

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<sup>579</sup> ICC, Case No 11869, Award, Undated.

<sup>580</sup> Tribunale of Brescia, Case No 1990/2016.

grounds, including the lack of competence of the seised court. Indeed, according to company A's defence the competent court is X, as provided by the English version of the contract, and not Y (the court seised) as provided by the version translated in Italian. Company A argues that the English text prevails over the Italian translation according to Article 23 letter (C) Regulation 44/2001 and Article 4.7 of UNIDROIT Principles.

The court dismissed the opposition. In particular, the claim based on Article 23 letter (C) Regulation 44/2001 and Article 4.7 of UNIDROIT Principle is rejected because the provisions mentioned are not applicable to such a case since they imply that the two versions are a mere translations of a common text. On the contrary, in the case under the scrutiny of the court, what can be perceived is not an ambiguity in the translation, but a serious discrepancy corresponding to a changing willing of the parties. Therefore, the criterion to be applied is the chronological order of the contracts that entails the prevalence of the last contract.

## 2. *Russia / Arbitration / Llevat, Petrachkov, Bekker / Unilex 856 / 2002*

**Case:**<sup>581</sup> Claimant (Russian company) and plaintiff (Canadian company) subscribed a sales agreement initially drafted in Russian and later translated into English, determining that both versions were to have the same authority in regards to interpretation of the agreement. However, the clauses referring to the arbitration clause, which were essential to the contract, were contradictory if analysed in both languages, and the official competence of the arbitration court to which the dispute was to be submitted was not explained clearly.

The arbitral tribunal, applied Article 4.7 of the UNIDROIT Principles and decided that the Russian version was to prevail, as it was the one in which the contract had been originally drawn up.

The court's reasoning is explained below.

The contract, made in Russian and English languages, has provisions that both versions have the same legal force; however, it contains different wording of the arbitration clause. The version in Russian language stipulates the transfer of disputes to the Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. The version in English language provides for the transfer of disputes 'to the Arbitration court of Russia'. The defendant's position that the English version meant transferring of disputes to the Russian State Arbitration Court, cannot be considered as justified. It is generally known that the term 'arbitration court' in English is equivalent in the Russian language to the term 'arbitration court'.

Part 2 of Article 431 of the Civil Code of the Russian Federation provides for the procedure for defining the content of the contract in cases where the literal meaning of the words and expressions contained in it does not allow it to be determined. It states that in determining the general will of the parties, all relevant circumstances shall be taken into account, including, in particular, the business practices. In view of this, considering that in the English wording there is no specific arbitration court, in order to determine it, the arbitral tribunal considered it reasonable to use the rules of interpretation of contracts that are becoming more common as a business practice, widely used in international commercial trade, contained in the UNIDROIT Principles. The application

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581 ICAC, Case No 217/2001, Award, 6 September 2002.

of this document in international commercial practice is frequently covered in foreign and Russian literature and it is used in a number of published ICAC awards.

According to Article 4.7 of these principles, in such cases, preference is given to interpretation in accordance with the version of the text of the contract which was originally drafted. In view of this, it should be concluded that in the English version the words ‘at the Chamber of Commerce and Industry’ mentioned in the Russian version were omitted.

## VIII. Article 4.8: Supplying an omitted term

### 1. *Italy / National Court / Martinetti / Not Unilex / 2017*

**Case:**<sup>582</sup> Ms A lodged an opposition to an order for payment issued by the judge presiding at the bankruptcy procedure of company B on the ground of her failure to pay some tenths of the capital. The grounds of such opposition were the exceeding of the limitation period.

The court considers the opposition well founded. In particular, it stated that, in case of omission of the term for the payment, the limitation period shall be calculated from the capital subscription. Since it is controversial in case law what shall be the starting date for the calculation of the limitation period, the court explains the line of reasoning followed based on the principle of reasonableness. In this context, the court made reference to the UNIDROIT Principles in order to show the various declinations of the use of the principle of reasonableness. In particular, it has been cited Article 4.1 as a criterion for interpreting law and Article 4.8 as a source for the integration of a contract.

### 2. *Austria / Arbitration / Llevat / Unilex 1070 / 2001*

**Case:**<sup>583</sup> Claimant (Swiss company) had received certain exclusive rights from plaintiff (Polish company), which claimant transferred to one of its subsidiaries. Consequently, claimant initiated arbitration proceedings on the grounds of a breach of said rights by plaintiff. During the proceedings, the question arose as to whether only the aforementioned rights or the whole contract had been transferred, including plaintiff’s obligations.

The tribunal applied Article 4.8 of the UNIDROIT Principles together with Polish Civil Law when interpreting the contract, and determined that it was to be interpreted in accordance with the parties’ intention, the nature and purpose of the contract, good faith and fair and reasonable treatment.

### 3. *N/A / Arbitration / Charrett / Not Unilex / date unavailable*

**Case:**<sup>584</sup> Contractor A and company B entered into an engineering, procure and construct (EPC) contract for an offshore gas platform, onshore and offshore pipelines, and an onshore gas plant in country X, a common-law country. The contractor’s design of the facilities was to be based on the specified composition of the gas expected to be supplied from the wells to be drilled by a third-party

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<sup>582</sup> Tribunale of Napoli, Case No 3637/2017.

<sup>583</sup> ICC, Case No11295, Award, December 2001.

<sup>584</sup> Case illustration based on writer’s experience of circumstances where the UNIDROIT Principles could be applied as the governing law of the contract.



contractor, C in gas field Z. The contract provided detailed performance requirements to be met by the completed facilities, with substantial penalties for non-conformance. The governing law of the contract was that of country X.

The contract provided for contractor A to provide access on the offshore platform to contractor C to drill the wells, prior to commissioning of the offshore and onshore gas processing equipment. After contractor C had completed drilling of the wells, an analysis of the well fluids indicated that they contained a contaminant not foreseen or provided for in the contract. The presence of this contaminant required redesign of the facilities, and provision of additional equipment before the well fluids could be introduced into the already installed equipment for commissioning. At the time that this issue arose, contractor A was in serious delay, and there were a number of disputes between the parties in respect of the quality of installed equipment.

Contractor A issued a notice of delay to B as a consequence of the contaminated wells fluids and requested B to issue a variation for the additional design, procurement and installation of the new decontamination equipment. Instead of issuing a variation to A, B terminated the contract with A and engaged another contractor to install the decontamination equipment and commission the facilities designed and installed by A.

A instigated arbitration, claiming that B had wrongfully terminated the contract, and that B was required to issue a variation for the decontamination equipment so that A could complete the contract. B denied that it had wrongfully terminated the contract, or that it had any obligation to issue a variation to A to install the decontamination equipment.

In respect of the variation for the decontamination equipment, the arbitrator noted that, although there were detailed provisions in the contract for the issuing and pricing of variations, there was no contractual provision that determined whether or not B was obliged to issue a variation to A. While the common law provisions in country X provided criteria for the implication of terms in a contract, those provisions did not address whether or not, in the circumstances, a term should be implied that B was obliged to issue a variation for A to install the decontamination equipment.

The arbitrator referred to the UNIDROIT Principles, embodying widely accepted principles of contract law, to supplement the provisions of the common law of country X. She referred to Article 4.8 as providing support for supplying an omitted term that B was obliged to issue a variation to A for the decontamination equipment. She referred to the intention of the parties being that A was to provide a 'turnkey' gas processing plant that could be operated by B, and that the nature and purpose of the contract was for A to provide all of the design, procurement, construction, commissioning and defect rectification as required to process the well fluids from offshore gas field Z into saleable products as specified in the contract. The arbitrator also noted that, in the circumstances, good faith and fair dealing required that A be permitted to complete the contract in accordance with its terms. Furthermore, implication of a term that B was to issue a variation for the decontamination equipment was a reasonable course of action, as the time and cost consequences of issuing a variation was specifically regulated by provisions of the contract.



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# Chapter 5: Content, third-party rights and conditions

## I. Article 5.1.3: Cooperation between the parties

### 1. *Colombia / National Court / Charrett / Unilex / 2000*

**Case:**<sup>585</sup> This arbitration proceeding involved an energy contract for the sale of electricity between the claimant company A, and the respondent company B. The contract was never performed. Company A sued company B for breach of contract. Company A alleged that company B had breached the contract through their failure to perform. Company B countered that the contract was never registered with the public registry, rendering it null and void.

The contract's choice of law clause stated that the contract would be adjudicated under the laws of Country X, a civil law country. The arbitral tribunal applied both the law of Country X and the provisions of the contract. In deciding the case on its merits, the arbitral tribunal applied the relevant provisions of the Country X's Commercial Code and both the black letter rules and comments of the UNIDROIT Principles.

The tribunal rejected company B's line of reasoning and ruled in favour of company A. The tribunal considered the registration of the contract a joint effort by the parties. The requirement of cooperation between the parties to register the contract can be found in both article ZZ of the Commercial Code of country X and also in Articles 5.1.3 and 5.1.8 of the UNIDROIT Principles. Specific actions were required from company B to register the contract with the public registry. Company B did not perform these actions. Company A had a reasonable expectation that company B would perform such actions and failure to do so is a breach of contract. The tribunal found that the invalidity of the contract from the lack of registration due to the respondent's failure to perform their specified duties could not be brought as a defence.

## II. Article 5.1.4: Duty to achieve a specific result

### 1. *ICSID / Arbitration / Silva Romero / Unilex 1533 / 2010*

**Case:**<sup>586</sup> An American investor (the claimant) invested in a radio broadcasting business in Ukraine in 1995, after the government opened that sector to private participation. Although the claimant's company had obtained some radio frequencies for that business, the claimant alleged that, from 1999 to 2008, the respondent improperly and repeatedly denied its bids for additional frequencies, awarded broadcasting licences to other companies, and thereby thwarted its plans of developing several nationwide radio networks. It argued that the above actions and omissions notably breached a prior settlement agreement between the parties. The respondent asserted that the state committee responsible for the tender processes had justifiably awarded frequencies to other applicants.

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<sup>585</sup> ICC, Case No 10346, Award, December 2000.

<sup>586</sup> *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010.

It explained that the claimant lacked the necessary resources and capabilities to prevail in its applications, and that other bidders were more qualified.

Regarding the law applicable to the settlement agreement, the arbitral tribunal noted that the clauses on interpretation and implementation reproduced the UNIDROIT Principles. It held that given the parties' implied negative choice of any municipal system, the most appropriate decision was to submit the settlement agreement to the rules of international law, and within these, to have regard to the UNIDROIT Principles. On this basis, it held that the respondent's obligation to grant frequencies by a certain date was a duty of best efforts – and not to achieve a specific result – pursuant to Article 5.1.4 of the UNIDROIT Principles. Accordingly, the arbitral tribunal found that the claimant had failed to prove that the respondent had not made such efforts as would be made by a reasonable government in the same circumstances.

## 2. *The Netherlands / Arbitration / Silva Romero / Unilex 1661 / 2006*

**Case:**<sup>587</sup> The parties had entered into a sales contract in respect of certain goods to be delivered to a Spanish port. Payment was to be made by an irrevocable letter of credit to be opened by the respondent on a certain date and payable 90 days from the date mentioned on the bill of lading. The contract provided for arbitration in the Netherlands. Two conflicting bills of lading were issued for the same shipment, a clean bill and a bill mentioning defects as per an independent surveyor's report. In view of this discrepancy, delivery of the goods was not completed. Several domestic court actions ensued, following which the parties signed a settlement agreement, whereby the contract was terminated and compensation agreed. The claimant started an arbitration and claimed, *inter alia*, that the respondent had violated its duty to achieve a specific result under the contract, that is, to take the goods physically, in breach of Article 5.1.4 of the UNIDROIT Principles.

The arbitral tribunal dismissed the claimant's argument under Article 5.1.4 of the UNIDROIT Principles, noting that the respondent could not take delivery of the goods, because their ownership had been transferred to the 'end buyer' on the termination of the contract, and in any event taking delivery was physically impossible since the master of the vessel had ordered the closing of the hatches.

## 3. *France / Arbitration / Silva Romero / Unilex 1662 / 2006*

**Case:**<sup>588</sup> A joint venture and a state entered into a production sharing agreement (PSA) to explore and develop the geological resources of a specific area. It was concluded for 20 years, included an option for a five-year extension by mutual agreement of the parties, and provided for arbitration in Paris. A subsequent written agreement providing for the contract's extension was prepared. Following the respondent's assurances that the extension had been granted, the claimant commenced a new exploration programme. The respondent's parliament, however, refused to ratify the extension, and the claimant was evicted from the area. The claimant started an arbitration, arguing that the PSA had been validly extended, and sought damages for breach of said extension. The claimant further

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<sup>587</sup> ICC, Case No 13009, Final Award, 2006.

<sup>588</sup> ICC, Case No 14108, Final Award, 2006.

argued that the respondent was estopped from denying that the contract had been extended because of its failure to use its best efforts to have said extension ratified.

The arbitral tribunal held that the PSA had not been renewed and accordingly denied the claim for damages, noting that the PSA did not in itself provide for an extension, but merely allowed the parties to agree on an extension in a subsequent contract. The extension agreement provided that it would be binding upon exhaustion of the respondent's constitutional procedures, which was not the case here, as it had not been ratified by parliament. The arbitral tribunal found that the claimant's argument relating to the duty of best efforts was based on the concept of estoppel, which was generally applicable here as part of the principle of good faith. As the respondent's law was silent on the content of the duty of good faith, it referred to the UNIDROIT Principles. On this basis, the arbitral tribunal held that the argument that the respondent did not use its best efforts to have the extension ratified was factually wrong. The respondent did submit the extension agreement to parliament, and even wrongly stated that the extension was already binding to encourage parliament to ratify the agreement. It was found that the respondent had used its best efforts to obtain the ratification. This being said, the arbitral tribunal ultimately found that the respondent had breached its duty to act in good faith under Articles 1.8 and 5.1.4 of the UNIDROIT Principles and the claimant was compensated for the costs of the exploration programme.

### III. Article 5.1.5: Determination of kind of duty involved

#### 1. *Australia / Arbitration / Charrett / Not Unilex / 1968*

**Case:**<sup>589</sup> Government rail authority A took out a policy of insurance with insurance company B. The policy covered loss or damage arising out of or in connection with a contract for the supply and erection of a railway bridge, and it excluded 'loss or damage arising from faulty design'.

A sustained loss when certain bridge piers collapsed in an unprecedented flood, due to the inadequacy of their design to withstand the forces experienced. The design of the piers complied with the standards expected of designing engineers at the time of their design.

B refused to indemnify A for the loss of the bridge, relying on the faulty design exclusion. A referred this refusal to arbitration, asserting that the designers had fulfilled their duty of best efforts, and that accordingly the design was not faulty. B submitted that the insurance contract would only indemnify A if it achieved the specific result of a design that was not faulty, and that as the bridge piers did not resist the flood forces, the design was faulty even though the designers had fulfilled their duty of best efforts.

The arbitral tribunal expressed the opinion that in modern international practice of many arbitration courts, the UNIDROIT Principles are viewed as the recommended source of rules governing general issues of performance and interpretation of contracts of an international character. The arbitral tribunal referred to Article 5.1.5(a) and noted that that the exclusion against loss from 'faulty design', was more comprehensive than 'negligent design', a term frequently used in contract works insurance contracts. It should therefore be construed as referring to loss from a design which did achieve the specific result of not being defective, even though the designers had not breached their duty of best efforts in preparing the design.

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<sup>589</sup> Case illustration based on the facts in *Manufacturers Mutual Insurance Ltd v The Queensland Government Railways* (1968), 118 CLR 314, and cases where an arbitral tribunal has referred to the UNIDROIT Principles as guidance on the law to be applied to international contracts.

## IV. Article 5.1.8: Termination of a contract for an indefinite period

### 1. *Colombia / National Court / Charrett / Unilex 700 / 2000*

**Case:**<sup>590</sup> This arbitration proceeding involved an energy contract for the sale of electricity between the claimant company A, and the respondent company B. The contract was never performed. Company A sued company B for breach of contract. Company A alleged that company B had breached the contract through their failure to perform. Company B countered that the contract was never registered with the public registry rendering it null and void.

The contract's choice of law clause stated that the contract would be adjudicated under the laws of country X, a civil law country. The arbitral tribunal applied both the law of country X and the provisions of the contract. In deciding the case on its merits, the arbitral tribunal applied the relevant provisions of the country X's Commercial Code and both the black letter rules and comments of the UNIDROIT Principles.

The tribunal rejected company B's line of reasoning and ruled in favour of company A. The tribunal considered the registration of the contract a joint effort by the parties. The requirement of cooperation between the parties to register the contract can be found in both Article ZZ of the Commercial Code of country X and also in Articles 5.1.3 and 5.1.8 of the UNIDROIT Principles. Specific actions were required from company B to register the contract with the public registry. Company B did not perform these actions. Company A had a reasonable expectation that company B would perform such actions and failure to do so is a breach of contract. The tribunal found that the invalidity of the contract from the lack of registration due to the respondent's failure to perform their specified duties could not be brought as a defence.

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<sup>590</sup> ICC, Case No 10346, Award, December 2000.

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# Chapter 6: Performance

## I. Article 6.1.1: Time of performance

### 1. *N/A / Arbitration / Charrett / Not Unilex / date unavailable*

**Experience of author:**<sup>591</sup> A construction contract for a power station provides for the following time for completion: ‘The contractor shall complete the whole of the works within the time for completion for the works’. The contract data specifies a time for completion of two years from the date that the contractor is provided with full access to the site. After the contractor has completed the whole of the works in accordance with the contract and handed the site over to the employer, the employer is responsible for the works.

Pursuant to Article 6.1.1 of the UNIDROIT Principles, if the contractor completes the works in accordance with the requirements of the contract at the end of one year, they may hand the site over to the employer, notwithstanding that the contract for the transmission lines to distribute the generated power will not be completed for another year. The employer would incur additional expenses for insurance and maintenance for the second year, even though it would not derive any commercial benefit from the power station.

## II. Article 6.1.3: Partial performance

### 1. *N/A / Arbitration / Charret / Not Unilex / date unavailable*

**Experience of author:**<sup>592</sup> Contractor A enters into a contract with company B to construct 100 houses by a certain date, with liquidated damages payable for every day that the houses have not been handed over to company B.

On the specified date for completion, the contractor has completed 98 houses, and offers to hand these over to B, with the remaining two houses to be completed within a month. Completion of the two incomplete houses will not affect B’s ability to market and sell the completed 98 houses. B has no legitimate interest in refusing to accept the 98 completed houses, and pursuant to Article 6.1.3(1) must do so.

**Variation:** The facts are the same, except that the two incomplete houses are in a very prominent position, affecting the ambience of and access to the 98 completed houses. In this situation B has a legitimate interest in refusing to accept the 98 completed houses pursuant to Article 6.1.3(1).

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591 Case illustration based on writer’s experience of circumstances where the UNIDROIT Principles could be applied as the governing law of the contract.

592 Case illustration based on writer’s experience of circumstances where the UNIDROIT Principles would provide an appropriate contractual outcome to specific factual circumstances.

### III. Article 6.1.4: Order of performance

#### 1. *Australia / National Court / Koh / Unilex 845 / 2003*

**Case:**<sup>593</sup> The government of a country and two companies, company A and company B, entered into contracts for software development and systems integration. The contract between the government and company A was the head contract, while the contract between company A and company B was the subcontract.

The dispute arose when company B served a notice of termination of the subcontract on company A on the grounds of company A's alleged failures to comply with its contractual obligations. These included company A's alleged failure to deliver specific devices in order for company B to develop the software, and also company A's failure to pay company B as required under the subcontract. Company A argued first that the terms of the contract had been changed and, second, that company B was not entitled to be paid under the subcontract as it failed to meet the requirements of payment under the subcontract.

As to company A's arguments that the contract had been amended, the court referred to article 2.1.18 of the UNIDROIT Principles, which states that a party may be precluded by its conduct from invoking such a clause to the extent that the other party has acted in reliance on that conduct. In this case, the discussion evolved around a 'no oral modification' clause and whether a party could be estopped from invoking such a clause in a case where it has already acted upon an oral modification of the contract. The tribunal found that the contract had indeed been amended and that company B could not invoke the 'no oral modification' clause, since it had already acted in accordance with the oral modification of the contract.

Company A argued that company B was in breach of its duty to act honestly and in good faith due to its termination of the contract. In this respect, company B argued that due to the 'entire agreement clause', these concepts were not part of the contract. An 'entire agreement clause' is used to indicate that the contract constitutes the whole agreement between the parties, thereby preventing a party from relying on previous agreements and negotiations that are not included in the agreement. Company B argued that a duty of good faith could not be implied in the contract in case an 'entire agreement clause' was involved. The court found that an entire agreement clause could not exclude good faith from a contract and that good faith and fair dealing are to be considered implied terms of all contracts, and the court referred to Article 1.7 of the UNIDROIT Principles in its reasoning.

### IV. Article 6.1.8: Payment by transfer of funds

#### 1. *Russia / Arbitration / Petrachkov, Bekker / Not Unilex / 2013*

**Case:**<sup>594</sup> A claimant, a Cypriot company, filed a lawsuit with the International Commercial Arbitration Court of the Russian Federation Chamber of Commerce and Industry (ICAC) against a defendant, an Austrian company, for collection of purchase price for shares in accordance with the terms of the

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<sup>593</sup> *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*, FCA 50, 2003.

<sup>594</sup> ICAC, Case No 218/2012, Award, 1 July 2013.

share purchase agreement (SPA). The SPA for shares provided that Russian law was the law governing the contract.

The court's reasoning is explained below.

The ICC received a statement of claim of the Cyprus Company (the claimant) against the Austrian company (the defendant) for recovery of the debt.

As it follows from the statement of claim and the documents attached thereto, on 14 June 2012 the claimant and the defendant entered into a contract for the sale of shares in the limited liability company (the Contract), according to which the claimant (seller) was obliged to transfer the shares in the limited liability company, registered in the territory of the Russian Federation, with the nominal value of X rubles, which represented 18.96 per cent of the share capital of the limited liability company (the share).

In the statement of claim, the claimant submitted that the ICAC had the competence to hear the dispute, the legislation of the Russian Federation was the applicable law and nominated the arbitrators.

The ICAC stated that in the civil legislation of the Russian Federation there were no direct indications as to when the monetary obligation should be deemed to have been performed when the payments were made by payment orders – on the date when the funds were wrote off from the debtor's account or on the date when the funds were debited to the creditor's account. State *arbitrazh* courts proceeded from rule that creditor's bank should be deemed as a proper place of performance of the monetary obligation, the date of performance of monetary obligation was the date when the funds were debited to the creditor's account, and not the date when the funds were wrote off from the debtor's account (Resolution of the Seventeenth Arbitrazh Appeal Court as of 18.10.2012 N PAP-10585/2012-GK in case N A50-7303 / 2012).

Considering that payments between the parties were made through two foreign banks, the ICAC concluded that it is possible to apply the UNIDROIT Principles (1994), a document of unification of private law, which in the practice of majority of international arbitration centres, including the ICAC, is considered as a recommended document, regulating general issues of the performance of international contractual obligations.

According to paragraph 2 of Article 6.1.8 of the UNIDROIT Principles, in case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective. Thus, the monetary obligation to pay the purchase price for a share should be considered as performed by the defendant 3 September 2012, when the funds were debited to the claimant's bank account. The defendant himself adhered to the same position, the defendant's representative at the arbitration hearing admitted that they had been in arrears in paying the first price for three days.

## V. Article 6.1.9: Currency of payment

### 1. *Ukraine / National Court / Charrett / Unilex 1706 / 2010*

**Case:**<sup>595</sup> Respondent, the government of country X, issued a guarantee for a loan granted by a foreign bank to claimant, a company situated in country X. The dispute arose when the claimant failed to repay the loan and the respondent consequently became liable for repayment of the loan. After the respondent paid the foreign bank, it claimed repayment from the claimant at an increased amount. The increase was due to changes in the exchange rates between the currencies of country X and the country of the foreign bank.

The claimant initiated a suit over this increased amount, asking the court to invalidate the respondent's request. The court held that the respondent was permitted to claim payment at the increased exchange rate. In its decision, the court referred to Article 6.1.9 of the UNIDROIT Principles, which states that, to the extent the debtor of a loan does not repay the loan when payment is due, the creditor 'may require payment according to the applicable exchange rate prevailing either when payment is due or at the time of the actual payment'. In this case, therefore, the increased amount requested by the respondent was appropriate, as actual disbursement of the loan payment had been made at the increased exchange rate.

## VI. Article 6.1.11: Cost of performance

### 1. *United Kingdom / National Court / Charrett / Not Unilex / Several Dates*

**Case/experience of author with several cases:**<sup>596</sup> In a line of cases arising from a seminal case from 1876, the courts have increasingly made reference to Article 6.1.11 of the UNIDROIT Principles.

In the original 1876 case, contractor A contracted with B to take down an old bridge and build a new one. B provided plans and a specification to A, prepared by B's engineer. A was required to obey the directions of B's engineer. The descriptions given in the plans and specification were stated as 'believed to be correct', but were not guaranteed. Part of the plan showed the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wasted, and the bridge had to be built in a different manner. Considerable labour and time were expended in attempting to use the caissons. A issued court proceedings, seeking compensation for its loss of time and labour occasioned by the failure of the caissons, and alleged that B had warranted that the bridge could be built inexpensively according to the plans and specification. There was no express warranty to that effect in the contract.

The court held that no warranty could be implied that the bridge could be built according to the engineer's plans and specifications. A had contracted to build the bridge, and had to bear the cost of performing its obligations, even though these were more onerous than expected because the use of caissons was not feasible.

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<sup>595</sup> *Dnipropetrovsk company Dnepryanka v Inter-state Tax Administration of Dnipropetrovsk city and Department*, Dnipropetrovsk Regional Administrative Court of Ukraine, Judgment, 21 June 2010.

<sup>596</sup> Facts are based on *Thorn v Mayor and Commonality of London* (1876) 1 App Cas 120.

More recent decisions of courts applying this precedent have made their decisions in accordance with the governing English law but have also made reference to the principles in Article 6.1.11 of the UNIDROIT Principles as support for the widely-accepted principle that each party shall bear the costs of performance of its obligations.

## VII. Article 6.1.14: Application for public permission

### 1. *Ukraine / National Court / Charrett / Unilex 1700 / 2010*

**Case:**<sup>597</sup> Company A, located in country X, and company B, located in country Y, entered into a contract for the supply of 14,000 tonnes of corn for industrial processing. At a later point, company B sent company A, the supplier, a letter request to halt its export of corn, as a government authority in country Y had not issued the requisite import quarantine permit. Company B then followed with a notice seeking termination of the contract, citing non-receipt of this import permit.

Company A refused to terminate the contract and instead initiated a suit for damages, including penalties, for breach of contract by company B. Although the contract specified the law of country X as governing law, the UNIDROIT Principles were applicable in practicality, as the High Court of country X had previously issued an explanatory note incorporating the UNIDROIT Principles as trade customs within the country.

The court ruled in favour of company A, finding that company B had indeed breached the contract. The court reasoned that company B should have been aware that the amount of corn it had contracted for was beyond its permitted import amount and that the government authority was unlikely to grant it a second permit for an excess quantity. In knowingly entering into a contract for an excess quantity, company B had contributed, by its own actions, to the authority's subsequent refusal to grant a new permit. In reaching its decision, the court cited Articles 6.1.14 and 6.1.15 of the UNIDROIT Principles, as supplements to domestic law.

## VIII. Article 6.1.15: Procedure in applying for permission

### 1. *Unknown / Arbitration / Charrett / Unilex 863 / 2002*

**Case:**<sup>598</sup> Party A (two individuals from country X) and party B (a company from country Y) entered into a contract under which party A was required to provide party B with certain information pertaining to the production and marketing of its products.

Party B later alleged that party A had breached the contract by failing to obtain certain specific results in its product sales. Party B subsequently terminated the contract and instituted an arbitration proceeding in country Z in accordance with the European Convention on Commercial Arbitration (1961), pursuant to the contract's dispute resolution clause. Parties A and B agreed to application of the UNIDROIT Principles as governing law, as the contract did not contain a clear mention of

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<sup>597</sup> *Arcada PP v Hobotovske enterprise Krahmaloproduct*, High Commercial Court of Ukraine, Case No 42/90-10, Decision, 30 November 2010.

<sup>598</sup> Arbitration Court of the Lausanne Chamber of Commerce and Industry, Award, 25 January 2002.

choice of law. In its decision to apply the UNIDROIT Principles, the arbitration tribunal noted that none of countries X, Y or Z had a mandatory law forbidding application of such principles. The tribunal additionally noted that the UNIDROIT Principles were more appropriate than any domestic law, since the contract at hand involved both the manufacture and marketing of new products in approximately a dozen countries and the principles are applicable to contracts for services, as well as for sale of goods.

The tribunal held that party A did not have an obligation to obtain any explicit results, merely to communicate its experiences in manufacturing and marketing the products. In so doing, the tribunal relied on Article 5.1.4(2) of the UNIDROIT Principles.

The tribunal noted that party B had failed to request the official authorisation necessary for marketing of the product and, subsequently, had failed to inform party A of its inaction, thereby breaching Article 6.1.15(2) of the UNIDROIT Principles. The tribunal further held that both parties, but particularly party B, had to exercise good faith in performing the contract pursuant to Article 1.7 of the UNIDROIT Principles. Since party B had not acted in good faith by breaching the contract itself, the tribunal determined that, per Article 1.7.2, party B was barred from invoking allegedly unsatisfactory performance on the part of party A.

## 2. *Unknown / Arbitration / Charrett / Unilex 1660 / date unavailable*

**Case:**<sup>599</sup> Party A, a company from country X, and party B, a state agency from country Y, entered into a JVA for the cultivation of agricultural products. A disagreement arose when party A subsequently alleged that party B had transferred the land which had been granted to party A under the contract to an international organisation for the purpose of accommodating refugees from a neighbouring country. Party A initiated an arbitration proceeding seeking damages for breach of contract.

The tribunal held the laws of country Y to be applicable to the substance of the dispute. In deciding the case on its merits, the tribunal noted that party B had indeed failed to provide party A with the land and other facilities as stipulated in the joint venture agreement. The tribunal held that party B could not claim a defence of force majeure for failure to perform its obligations, as party B was aware that the social climate of country Y could make its performance under the contract infeasible. In the opinion of the tribunal, party B, as a national public partner, bore the responsibility of ensuring that the necessary verifications, including an assessment of the social climate, had been made such that performance would be possible at the promised time. As the tribunal noted, any national public partner failing to perform such duty ‘must bear all consequences towards its foreign contractual partner’. The tribunal cited Articles 6.1.14–6.1.17 of the UNIDROIT Principles in support of its decision.

The tribunal also referred to Article 6.1.15(1) of the UNIDROIT Principles in holding that the contract could not be performed due to party B’s default, which resulted from party B’s failure to obtain permission. Party B was therefore liable for breach under Article 7 of the UNIDROIT Principles.

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<sup>599</sup> ICC, Case No 12112, Award, Undated.



## IX. Article 6.1.17: Permission refused

### 1. *Unknown / Arbitration / Charrett / Unilex 1660 / date unavailable*

**Case:**<sup>600</sup> Party A, a company from country X, and party B, a state agency from country Y, entered into a JVA for the cultivation of agricultural products. A disagreement arose when party A subsequently alleged that party B had transferred the land which had been granted to party A under the contract to an international organisation for the purpose of accommodating refugees from a neighbouring country. Party A initiated an arbitration proceeding seeking damages for breach of contract.

The tribunal held the laws of country Y to be applicable to the substance of the dispute. In deciding the case on its merits, the tribunal noted that party B had indeed failed to provide party A with the land and other facilities as stipulated in the joint venture agreement. The tribunal held that party B could not claim a defence of force majeure for failure to perform its obligations, as party B was aware that the social climate of country Y could make its performance under the contract infeasible. In the opinion of the tribunal, party B, as a national public partner, bore the responsibility of ensuring that the necessary verifications, including an assessment of the social climate, had been made such that performance would be possible at the promised time. As the tribunal noted, any national public partner failing to perform such duty ‘must bear all consequences towards its foreign contractual partner’. The tribunal cited Articles 6.1.14–6.1.17 of the UNIDROIT Principles in support of its decision.

The tribunal also referred to Article 6.1.15(1) of the UNIDROIT Principles in holding that the contract could not be performed due to party B’s default, which resulted from party B’s failure to obtain permission. Party B was therefore liable for breach under Article 7 of the UNIDROIT Principles.

## X. Article 6.2.1: Contract to be observed

### 1. *Spain / National Court / Meijer / Unilex 1694 / 2013*

**Case:**<sup>601</sup> Party A, an advertising company in country X, and party B, a first-division football club also in country X, entered into a marketing agreement. Party A later brought a civil claim against party B seeking renegotiation of the terms of the agreement. Party A argued that, due to substantial change in the economic climate of country X, the contract had become more onerous. Party A also argued that a number of key terms had been altered over the course of the relationship and, therefore, party B should pay a higher price to account for these changes.

The court ruled that party A’s request for modification could not be granted. In its reasoning, the court noted that, under the law of country X, the doctrine of *rebus sic stantibus* (hardship), the argument upon which party A relied, is permitted only in exceptional circumstances where the equilibrium of the contract has been altered. The court held that party A had failed to prove either that a shift in equilibrium had occurred or that exceptional circumstances had caused the alleged alteration. As the court noted, simply because one party is at a disadvantage is not sufficient reason

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<sup>600</sup> ICC, Case No 12112, Award, Undated.

<sup>601</sup> *Grupo Santa Monica Sports v Real Club Deportivo de la Coruña*, Audiencia Provincial de A Coruña, February 2013.

for that party to no longer have to comply with the terms of the contract. In support of its decision, the court cited Articles 6.2.1 and 6.2.2 of the UNIDROIT Principles, among others.

## 2. *Colombia / National Court / Polkinghorne / Unilex 1709 / 2012*

**Case:**<sup>602</sup> Citizen A had entered into a loan agreement with bank B for buying a house. During the 1998 crisis in the country, the loans for buying houses became significantly more expensive and the contract between A and B more onerous. In view of this change in circumstances, A invoked hardship to revise the contract. The lower courts rejected A's claim on the basis that A did not bring the necessary evidence to demonstrate that the events in question caused an alteration of the contract's equilibrium. The Supreme Court later upheld the lower courts' decisions, deciding that the plaintiffs did not bring sufficient evidence that the contract had become excessively onerous. The Supreme Court further recalled that the government had implemented measures with a view to mitigate the economic effects of the crisis on existing contracts.

## 3. *United Kingdom / National Court / Cowan / Not Unilex / 2010*

**Case:**<sup>603</sup> Company A contracted with company B for the sale and delivery of a new executive jet aircraft. After A had procured the aircraft from the manufacturer, B failed or refused to take delivery of the aircraft or to pay the balance of the purchase price. A exercised its contractual right to terminate the contract due to B's breach and claimed financial compensation from B. B defended by reference to the 'unanticipated, unforeseeable and cataclysmic downward spiral of the world's financial markets' and claimed that this triggered the force majeure provision in the contract.

The court determined 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. The court cited with approval previous case law which had held that: 'It does not at all follow that the supplier is entitled to rely upon an increase in the market price in comparison to the contract price as a force majeure circumstance. ...This conclusion is consistent with a line of cases, both on force majeure clauses and on frustration, ...to the effect that the fact that a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure or frustration.'

As force majeure does not exist in English law as an independent substantive doctrine (cf the English law doctrine of frustration), its application depends on the parties introducing it by express contractual provision. As such, the scope of force majeure is not a term of art but instead depends on the terms of the contract and the application of ordinary principles of contractual interpretation. In this case, the wording of the force majeure referred to various events, such as acts of God, wars, government action and fire. There was also a wider category in respect of 'other causes', but these were limited to other causes beyond A's reasonable control. The court held that B was not entitled to rely on this clause for such 'other causes' and, in any case, interpreting this *ejusdem generis* with

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602 *Rafael Alberto Martínez Luna y María Mercedes Bernal Cancino v Granbanco SA*, Supreme Court of Columbia, Judgment, 21 February 2012.

603 *Tandrin Aviation v Aero Toy Store* (2010) EWHC 40.

the earlier examples, there was nothing that suggested that this should include circumstances of economic downturn, market circumstances or the financing of the deal.

Reflecting the contrary stance of English law following a significant line of prior case law from the English courts, the court did not cite to the UNIDROIT Principles, such as Article 6.2 or Article 7.1.7.

#### 4. *Ukraine / National Court / Charrett / Unilex 1703 / 2009*

**Case:**<sup>604</sup> Party A, an insurance company in country X, and party B, a bank in country X, entered into an insurance contract for the bank's loan portfolio. Party A later terminated the contract on the grounds that party B had breached the agreement and that there had been a substantial change in circumstances due to an ongoing global economic crisis. Party A argued that it was as a result of this crisis that a number of party B's clients had become insolvent. Party B then, instead of attempting to collect against those clients, had merely relied upon insurance payouts from party A.

The court held that party A could not rely on the economic crisis as a basis for proving the substantial change of circumstances necessary for termination of the contract. In support of its decision, the court referred to Article 6.2.1 of the UNIDROIT Principles, which states that a party to a contract is obligated to perform its duties even when performance under the contract has become more burdensome for that party.

#### 5. *Brazil / National Court / Charrett / Unilex 1530 / 2009*

**Case:**<sup>605</sup> In May 2006, A and B, both energy traders in Country X, entered into a long-term agreement. It was agreed that A would supply B an average of 22 megawatts of electric energy on a monthly basis from 1 January 2007 until 31 December 2011 for an agreed-upon price, which was to be decided annually. A suspended the delivery of power in January 2008 and commenced arbitration proceedings against B.

A argued for termination of the contract on the grounds of hardship and claimed damages for exposure to the 'spot price' imposed by country X's Chamber of Trade on Electric Energy (CTEE) for short-term energy transactions. Based on energy market regulations in country X, delivery of power is made directly to the seller in the national integrated system. The buyer, however, could withdraw the energy at any other point of the system. A 'liquidation price' or 'spot price' established by the CTEE reflects any difference in the amount supplied or withdrawn from the system. A fine would then be levied on the party who had provided less power than promised.

A argued that the year 2007 had seen a large and unexpected increase in short-term power prices and claimed that, as a result, B had been unjustly enriched by the supply agreement in a manner which amounted to a fundamental modification of the contractual balance between the two parties. A argued that this shift had led to the contract terms being unfairly onerous to it, thus permitting it to terminate the contract for 'excessive onerousity' under Article ZZ of country X's Civil Code.

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604 Kyiv Regional Commercial Court, Case No 17/059/060/061-09, Judgment, 17 October 2009.

605 Câmara FGV de Conciliação e Arbitragem, São Paulo, Judgment, February 2009.

The arbitral tribunal rejected A's claim. The tribunal noted that, given the constantly shifting nature of the positions held by energy market participants, it can be expected that such participants harmonise their positions so as to assure both compliance with their contractual undertakings and maximisation of their results, and that any deviations from this position are the result of risk-taking on the part of parties in a marketplace corresponding with ordinary contractual risk. The tribunal reasoned that, as the code's fundamental principles were legal certainty and binding character of contract, and there had been no disruption in the economic environment of country X, the contract could not be terminated on the basis of Article ZZ of the Civil Code. The tribunal held that, not only had there not been an 'excessively onerous' change in circumstances, but also that any change had not been to the extreme advantage of B, as required cumulatively by law.

The tribunal made reference to Article 6.2.1 of the UNIDROIT Principles, which states that the fact that the performance of a contract becomes more onerous for one party does not necessarily constitute a 'hardship'.

## 6. *Switzerland / Arbitration / Voser, Ninković/ Unilex 630 / 1996*

**Case:**<sup>606</sup> Company A from country X entered into a contract with Company B from country Y by means of an order confirmation for the sale of a plant for manufacturing a certain product for the market of country Y. Due to financial difficulties caused by a sudden fall in the price of the product on the market of country Y, company B made an advance payment in the amount of only three per cent of the contractual price and did not open the letter of credit within the agreed time limit, which was a condition for the delivery of the equipment by company A. Nonetheless, company A offered to deliver half of the equipment and following company B's acceptance of the offer, issued an invoice in the amount of 50 per cent of the contractual price. However, company B was not ready to pay the amount as invoiced and offered to pay approximately 60 per cent of the invoiced amount. Company A did not accept this and reserved its rights under the original contract concerning the full delivery. Company A initiated arbitration proceedings against company B and claimed damages. In addition to the compensation for the part of the equipment which it could not sell to other buyers because they have been made according to the special requirements of company B, company A requested payment of interest and legal fees. Company B argued that it was discharged from payment because of the sudden fall in the price of the relevant product on the market of country Y, which amounted to hardship, and counterclaimed its advance payment to company A.

The general conditions to the contract provided for the application of Dutch law and the arbitral institution chose Zurich (Switzerland) as the seat of the arbitration. The arbitral tribunal granted the claim for damages of company A, denied in part its claim for interest and denied the counterclaim of company B. In particular, the arbitral tribunal found that the circumstances raised by company B fell within the economic risk to be borne by company B and did not constitute unforeseen circumstances in the sense of the hardship provision; thus, the requirement for discharge from payment was not met. In reaching its decision, the arbitral tribunal held that the relevant mandatory provisions of Dutch law must be applied with utmost restraint. It stated that 'Dutch common opinion of law' is 'replaced by the common opinion in international contract law when the provision is applied in

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606 ICC, Case No 8486, Final Award, 1996.

an international context', both of which are 'influenced in a decisive manner by the principle of contractual good faith (*pacta sunt servanda*) expressed in Article 1.3 of the UNIDROIT Principles.'<sup>607</sup> According to the arbitral tribunal, 'this common opinion of law must also be taken into account for the application of national law to international relationships'.<sup>608</sup>

The arbitral tribunal held that 'the termination of a contract for unforeseen circumstances (hardship, *clausula rebus sic stantibus*) should be allowed only in truly exceptional cases' and that, in international commerce, 'one must rather assume in principle that the parties take the risks of performing under and carrying out the contract upon themselves, unless a different allocation of risk is expressly provided for in the contract'.<sup>609</sup> In that context, while not directly applying the provision, the arbitral tribunal referred to Article 6.2.1 of the UNIDROIT Principles, which expressly provides that the mere fact that the performance of the contract entails a higher economic burden for one of the parties does not suffice to assume that there is hardship.

## **XI. Article 6.2.2: Definition of hardship**

### **1. France / National Court / Polkinghorne / Not Unilex / 2018**

**Case:**<sup>610</sup> State entity A had entered into a loan agreement with bank B, in order to finance landscaping projects on a lake. State entity A then entered into a swap agreement with bank C, whereby the loan's interest rate in currency from country X would be exchanged with the interest rate in currency from country Y. Following a twofold increase of the interest rate of currency from country Y, state entity A refused to pay the remaining of the cancellation balance and argued that the cancellation balance should be revised in the light of the unpredictable events which caused the increase in country Y's interest rate.

The lower court rejected state entity A's claims that bank C had failed in its obligation to advise A on the risks, and to renegotiate the cancellation balance. According to the lower court, the disclaimers in the swap agreement excluded any advisory duty on the part of bank C. The judge also found that state entity A was not entitled to claim that bank C had failed to give proper advice and inform on the risks, as A had a long experience of this type of financing transactions, what is more acting of part of public interest. The appeal judge upheld the lower court's judgment, finding that state entity A could not rely on changed circumstance as the new Article 1195 of the French Civil Code provided that the disadvantaged party could not invoke hardship when it was the one bearing the risk. The appeal judge further found that the swap agreement should be characterised as an 'aleatory contract' (*contrat aléatoire*), which is a category of contracts under French law whose outcome depends on the unpredictable occurrence of an event. In such a contract, each party bears its part of the risk, and the appeal judge thus concluded that state entity A could not rely on hardship to claim that the cancellation balance should be reduced. There is no express reference to the UNIDROIT Principles in this case, but it is clear that Article 1195 of the French Civil Code mirrors the provisions of Article 6.2.2 on risk allocation.

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<sup>607</sup> Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XXIVa* (Kluwer 1999) 24, 166 et seq.

<sup>608</sup> *Ibid* at 167.

<sup>609</sup> *Ibid*.

<sup>610</sup> Paris Court of Appeal, Case No 16/08968, 16 February 2018.

## 2. *France / National Court / Polkinghorne / Not Unilex / 2017*

**Case:**<sup>611</sup> Company A acted as the subcontractor of company B for the installation of windows in the context of the construction of a new building for archives in country X. Company B refused to pay for one of the invoices sent out by company A, claiming that the work done for this invoice had not been contractually agreed upon by the parties. Company A therefore started litigation against company B, requesting for payment of the amount left unpaid. The lower court judge found that company B failed to define the services under the contract precisely, and that it should pay for all of the work performed by company A. Company B filed an appeal of this decision, claiming that the lower court judge had made an erroneous application of hardship in considering that the additional work performed by A had affected the equilibrium of the contract, creating an unforeseeable debt that should be paid by B. The appeal judge quashed the lower court's decision, finding that there was no alteration of the equilibrium, as the agreed price remained unchanged and company A had in any case the responsibility to evaluate precisely the amount of work necessary and communicate any change thereof to its contractor. This decision comes before the entry into force of the French contracts law reform admitting hardship. However, this decision illustrates the French judge's acceptance of the theory of changed circumstances (even though not found here) and its use of the notion of fundamental alteration of the equilibrium of the contract.

## 3. *United States / National Court / Popova / Not Unilex / 2017*

**Experience of author:**<sup>612</sup> A and B enter into a settlement agreement, pursuant to which B is to pay agreed sums to members of a class. After B falls behind on payments, B seeks to renegotiate its payment schedule on the grounds of an industry-wide downturn that has affected its revenue stream. B's performance is not excused by economic hardship.

**Case:**<sup>613</sup> The parties concluded a settlement agreement following a class action lawsuit alleging violations of the Fair Labor Standards Act. The settlement agreement required defendant to pay a certain amount to each member of the class within ten days of plaintiffs' counsel filing a notice with the court. The defendant fell behind on its payment schedule and sought to amend the timetable for making payments pursuant to the settlement agreement. The plaintiffs refused to grant this amendment and filed a motion to enforce the settlement order.

The defendant argued that it was financially unable to fulfil its contractual obligation because of low demand from its customers during an industry-wide downturn. The defendant petitioned the court to modify the terms of the settlement agreement to allow it to pay in compliance with the amended agreement.

The court rejected the defendant's argument, holding that economic hardship did not excuse the defendant from fulfilling its contractual obligations or entitle it to a renegotiation or court-mandated revision of those obligations. The court relied on state common law of contractual obligations and did not cite the UNIDROIT Principles.

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611 Lyon Court of Appeal, Case No 15/0798827, June 2017.

612 Case illustration based on writer's experience of circumstances where the UNIDROIT Principles could be applied as the governing law of the contract.

613 *Bergeron v Benton Energy Serv Co*, 15-cv-1006 (WD Pa, 7 February 2017).



#### 4. Canada / National Court / Charrett / Unilex 1968 / 2016

**Case:**<sup>614</sup> A power contract was entered into between A and B, a corporation operating a hydroelectric power station, and a public utility company distributing electricity, respectively. The terms of the contract stated that A would sell B all of the electricity output of its station at a fixed price for a period of 40 years, with an option to renew for another 25 years. The agreed-upon price was calculated based upon a schedule which permitted A to recover costs incurred from the construction of the power station and B, which had assisted A in obtaining financing for the construction, to avoid risk of inflation by virtue of the fixed price model.

Due to various supervening circumstances over a period of years, the market price of hydroelectric energy in the country increased considerably. As a result, A requested a renegotiation of the contract price based on the principle of good faith as stated in certain articles of the Civil Code, in order to adapt the contract price to the changed market price. A argued that a price revision was justified, as it would restore the original equilibrium of the contract and keep B from obtaining an unjust profit. B argued that both parties had been aware that the market price of hydroelectric energy was subject to considerable fluctuations and, after lengthy negotiations, had still decided upon a fixed price for the entire duration of the contract, agreeing that the amount was a fair allocation of the risks undertaken by both parties.

Both the court of first instance and the Court of Appeal ruled in favour of B, holding that only the conduct of the parties in the course of performance of the contract was within the scope of ‘good faith’ as laid out in the Civil Code. That is to say, the principle could not be invoked to support a revision of the contract terms once they had already been agreed upon. Furthermore, both courts found the *théorie de l'imprévision* (or doctrine of hardship) to be far from generally accepted within the law of the country and, at any rate, could also not be cited in this case, as the conditions required for its application had not been met.

In support of its reasoning, the Court of Appeal referred to Articles 6.2.1, 6.2.2 and 6.2.3 of the UNIDROIT Principles, and noted that the two basic requirements (the fundamental alteration of the equilibrium of the contract and the unpredictability of the event causing hardship) had not been met. The first requirement had not been met because the increase in market price of hydroelectric energy did not result in either an increase in the cost of A’s performance or a decrease of the value of B’s performance, but merely less profit realised by A. The second requirement had not been met because, at the time the contract was finalised, both parties were aware that the price of hydroelectric energy was subject to change over the years; by accepting a fixed price term, A assumed the risk of such fluctuations.

#### 5. France / National Court / Polkinghorne / Not Unilex / 2015

**Case:**<sup>615</sup> Companies A and B entered into a contract whereby company A ensured the maintenance of plane engines for company B. The contract contained a hardship clause that enabled A to put an end to the contract in the case the contract became excessively onerous or the conditions for the

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<sup>614</sup> Cour d’Appel, Province de Québec, District of Montreal (Canada) Case No 500-09-024690-141, 8 August 2016.

<sup>615</sup> Paris Court of Appeal, Case No 15/0002019, March 2015.



performance of the contract substantially changed. Company A triggered the hardship clause and terminated the contract on the basis that the cost of the manufactured parts for the maintenance had become too expensive to buy. The lower court did not find that company A had rightly triggered the hardship clause. The appeal judge upheld the lower court's judgment, finding that company A failed to demonstrate that the price for the manufactured parts had increased more than 7.5 per cent (threshold to trigger hardship, as provided by the clause) and that the manufactured parts had become increasingly rare on the market, inducing a rise in their price. While not making express reference to UNIDROIT Principles, this decision is nevertheless a clear illustration that, even before the entry into force of the French law on contract admitting hardship, the French judge was following the UNIDROIT Principles' notion of fundamental alteration of the equilibrium of the contract.

## 6. *Spain / National Court / Polkinghorne / Unilex 1950 / 2015*

**Case:**<sup>616</sup> Madam A had entered into a contract with company B for the sale of a farm property. The contract negotiations were based on the expectations that there would be urban development in the zone where the farm was situated, and the contract contained a hardship clause. Following the fall in property prices resulting from the 2008 financial crisis, B refused to pay the sale price, and requested a reduction of the price provided in the contract, on the basis of hardship clause contained therein.

The lower court declared that, at the time the parties entered the contract, it was impossible to foresee the subsequent financial crisis. The court therefore ordered that the price for the sale shall be reduced as a result of the exceptional changes of circumstances having arisen after the conclusion of the contract. The appellate judge later annulled this decision, considering that the fall in property prices did not qualify as an exceptional or unforeseeable event, but was merely a simple risk.

Following an appeal by company B, the Supreme Court upheld the appellate judge's decision that no revision of the price should result from the changes in circumstances, making express reference to the UNIDROIT Principles. The Supreme Court found that the simple fact that the financial crisis occurred did not suffice to trigger the application of the hardship clause, and that the appellant failed to demonstrate the real incidence of such crisis on the contract between the parties. Applying Article 6.2.2 of the UNIDROIT Principles, the Court further stated that it was not demonstrated that the costs of the appellant's performance had increased or that the value of performance it received had diminished. Indeed, the appellant did not prove the causal link between the financial crisis and the cost of the performance of the contract, notably the impact of the crisis on the conditions for financing the price of the sale. The appellant did not either demonstrate the significant decrease in the value of performance received, the price of the property being in line with the average price of property in the sector.

## 7. *France / National Court / Meijer, Popova / Unilex 1923 / 2015*

**Case:**<sup>617</sup> The parties to this dispute were active in a cooking-stove business. The claimant and the respondent, respectively the buyer and the seller, concluded a contract for the sale of stoves, whereby it was agreed that the claimant would not only buy the stoves, but would also become the exclusive

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616 Supreme Court of Spain, Case No 64/2015, 24 February 2015.

617 *Dupiré Invicta industrie (D21) v Gabo*, French Cour de Cassation, Case No 12-29.550 13-18.956 13-20.230, February 2015.

distributor of the respondent's stoves in both the claimant's country and one of the claimant's neighbouring countries. During the course of the agreement, the price of raw materials, which were required to fabricate the stoves, increased. As a consequence, the respondent refused to deliver the stoves for the agreed price, invoking hardship. Eventually, the claimant initiated proceedings, claiming incurred damages, losses of profits, and the payment of a penalty for a delay in delivery, all of which were based on the contract.

Proceedings before several courts followed. In the first instance the respondent relied on the CISG and Article 6.2 of the UNIDROIT Principles. The respondent in turn argued that the claimant did not comply with its contractual obligations because the claimant refused to renegotiate the terms of the contract after the increase in price. The respondent disputed the applicability of the UNIDROIT Principles, arguing that they could not be deemed to be trade usages under Article 9 of CISG. The court of first instance found that the respondent was not entitled to withhold performance, although it did not make any references to the UNIDROIT Principles.

The Court of Appeal confirmed this decision. It did not say anything about the applicability of the UNIDROIT Principles, but it referred to them to interpret and supplement the CISG, thereby implicitly stating that the CISG and the UNIDROIT Principles can indeed be used to define hardship.

Eventually, the case reached the Supreme Court level. The main legal issue in this phase of the proceedings was whether there was a case of 'excusable hardship'. The respondent argued that the increase in costs of raw materials exceeded normal fluctuations in the relevant marketplace. It stated that this issue was not assessed properly by the Court of Appeal. The Supreme Court agreed with the respondent that indeed the Court of Appeal had not assessed properly whether the price fluctuations had transformed the additional burden on the respondent on excusable hardship. However, it confirmed the ruling of the Court of Appeal since the respondent was not able to prove the existence of a situation that substantially affected the balance of the contract. By confirming the decision of the Court of Appeal, the Supreme Court seemed to imply that the CISG governs situations of hardship and that the UNIDROIT Principles can be used to define its scope and consequences.

## 8. *Spain / National Court / Meijer / Unilex 1950 / 2015*

**Case:**<sup>618</sup> A, the seller, entered into a contract with a company, B, for the sale of building plots. The contract negotiations were based on the expectation that there would be urban development in the zone where the plots were situated, and the contract contained a hardship clause. Following the fall in property prices, which resulted from the 2008 financial crisis, B refused to pay the price of the sale. B requested a 50 per cent reduction of the price provided in the contract on the basis of the hardship clause contained therein.

The lower court declared that, at the time when the parties entered the contract, it was impossible to foresee the subsequent financial crisis. The court, therefore, ruled that B had breached the contract, which entitled A to either terminate the agreement or to require its performance. But it also found that B was entitled to have the price of the sale reduced as a result of the exceptional changes of circumstances that had arisen after the conclusion of the contract. The appellate judge later

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618 Supreme Court of Spain, Case No 64/2015, February 2015.

annulled this decision, considering that the fall in property prices did not qualify as an exceptional or unforeseeable event, but was merely a risk.

Following an appeal by B, the Supreme Court upheld the appellate judge's decision that no revision of the price should result from the changes in circumstances, making express reference to the UNIDROIT Principles. The Supreme Court found that the simple fact that the financial crisis occurred did not suffice to trigger the application of the hardship clause, and that the appellant failed to demonstrate the real incidence of such crisis on the contract between the parties. Applying Article 6.2.2 of the UNIDROIT Principles, the court further stated that there was no demonstration that the costs of the appellant's performance had increased, nor that the value of performance it had received had diminished. Indeed, the appellant did not prove the causal link between the economic crisis and the cost of the performance of the contract, notably not proving the impact of the crisis on the conditions for financing the price of the sale. The appellant also did not demonstrate a significant decrease in the value of performance received, the price of the property being in line with the average price of property in the sector.

## 9. *Spain / National Court / Popova / Not Unilex / 2015*

**Case:**<sup>619</sup> Company A, an owner of real estate, sold real estate properties to company B, a developer, with payment due three years later, after the project had been developed. Two years after the sale, however, a serious economic crisis led to a crash in the housing market and company B was unable to pay the price agreed in the contract.

Company A filed a claim for specific performance, seeking payment of the agreed price. company B, in turn, filed a counterclaim asking for a revision of the price. B argued that the economic crisis had a direct impact on the real estate market and had critically changed the circumstances that originally motivated the agreement, which included the expectation that the area in which the properties were located would be urbanised.

The Supreme Court affirmed the decision of the Court of Appeal, allowing the claim and dismissing the counterclaim. With a general reference to the UNIDROIT Principles, the court held that there was no grounds for revision of the contract on the grounds of hardship. The court held that, for a change of the circumstances to qualify as hardship, it must affect the objective purpose of the contract and its economic goal and cause a substantial change in the equilibrium of the contract. In this particular case, the fluctuation in the housing market was a risk assumed by the buyer, not an unforeseen change of circumstances, and the temporary decrease in value was not such as to cause the buyer to operate at a loss or deprive the buyer of any benefit from the transaction. As a result, the conditions for revision of the contract on the grounds of hardship were not met.

## 10. *Brazil / National Court / Popova / Not Unilex / 2015*

**Case:**<sup>620</sup> A physician, A, contracted to buy ultrasound equipment for his practice from General Electric, the equipment's manufacturer. The parties agreed to peg the contract price to the \$US,

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619 *Gregoria y otros v Riocerezo Green SL*, Case No 64/2015 (2015) [www.poderjudicial.es/search/openDocument/ae2d1df7cde06d1e/20150511](http://www.poderjudicial.es/search/openDocument/ae2d1df7cde06d1e/20150511), accessed 1 April 2019.

620 Superior Court of Justice (STJ), REsp 1321614/SP, Rel. Ministro Paulo de Tarso Sanseverino, Rel. p / Acórdão Ministro Ricardo Villas Bôas Cueva, Terceira Turma, Case No DJe 03/03/2015, 16 December 2014.

to be paid in five yearly instalments in Brazilian reais (BRL). Halfway through the instalment plan, Brazil devalued the BRL vis-à-vis the US dollar, causing the outstanding instalment amounts, in BRL, to rocket. A invoked the ‘economic basis of the contract’ doctrine, seeking to revise the contract price in light of the BRL’s crash.

The Superior Court of Justice, by majority, held that A could not revise the price. Outside the scope of protected consumer relationships (as was the case here), hardship requires not only a fundamental alteration of the burden of one party’s outstanding obligation, but also that this alteration be caused by an unforeseeable event. Given Brazil’s long history of currency volatility, the recent period of stability, during which the contract had been executed, was insufficient to place a drastic devaluation beyond the realm of foreseeable events. The parties chose to allocate risk between them accordingly, and the court would not revise the contract’s terms. The court did not cite the UNIDROIT Principles, but reasoned by reference to analogous provisions in Articles 317 and 478 of the Brazilian Civil Code, which address unforeseen changes in circumstances that cause one of the parties’ obligation to become unduly onerous.

#### **11.     *Lithuania / National Court / Meijer / Unilex 1892 / 2014***

**Case:**<sup>621</sup> Two companies in country X agreed in a works contract that the contract would not be paid in money, but with goods produced by the customer (plastic windows). The contractor later requested renegotiation of this term when it became insolvent and ended its activity, seeking revision of the payment method to money and asking to be paid in money for the work it had already done.

A dispute arose and the court rejected the contractor’s claim. The court referred to Article 6.2.2 of the UNIDROIT Principles, as well as the civil code of country X, in holding that, in order for a party to claim hardship, there must be a fundamental alteration of the equilibrium of the contract. The court stated that the contractor’s insolvency was not a sufficient reason to change the agreed method of payment, as the contractor had not demonstrated that the originally agreed-upon method of payment had resulted in a fundamental increase in its cost of performance or had diminished the value of the counter-performance.

#### **12.     *Spain / National Court / Polkinghorne / Unilex 1949 / 2014***

**Case:**<sup>622</sup> Company A entered into a contract with company B for the operation of advertising space on the city’s buses. According to the contract, company A was to perceive all revenues from the advertisement and pay a monthly fee to company B. The contract was validly executed during two years, but in May 2009, company A unilaterally decided to pay only 70 per cent of the perceived revenues to company B. Company A did so following a severe drop in revenues that year, arguing that the contract’s equilibrium had been fundamentally altered and that the fee needed to be revised.

The judge of first instance followed A’s reasoning and decided that company A should only pay company B in the amount of 80 per cent of the perceived revenues. This decision was annulled by the appellate judge, which decided that the first instance judge failed to show that the decrease in

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<sup>621</sup> Supreme Court of Lithuania, Case No 3K-3-514/2014, November 2014.

<sup>622</sup> Supreme Court of Spain, Case No 333/2014, 30 June 2014.

revenues of the advertising market was an extraordinary alteration of the circumstances at the time the parties entered the contract, and that these changes were radically unforeseeable. The Supreme Court overruled the appeal decision, stating that the appellate judge had not considered the degree of alteration of the circumstances for the performance of the contract. Through an express reference to Article 6.2.2(c) of the UNIDROIT Principles, the Supreme Court found that it cannot be considered that the risk was assumed by company A, as this risk was outside that party's sphere of control. The judge found that any company, just like company A, and despite its consciousness of the commercial risk linked to business operations, would have been faced with an unforeseeable and extraordinary change of circumstances.

### 13. *Ukraine / National Court / Meijer / Unilex 1738 / 2012*

**Case:**<sup>623</sup> An agreement between A and B was entered into for the transformation of natural gas in country X. The gas was to be ultimately converted into heat for a local community. As A was a public utility company, it made a request to the authority supervising the public utilities sector in country X (the National Commission) to ensure compliance of the agreement with X's regulations. On hearing that the tariffs for the supply of heating were above the normal rate, A sought the termination of the agreement. A claimed that there was a substantial change in circumstances and cited the civil code of the country which it argued allowed termination of the contract.

The court, while hearing this matter held that A's reliance on the opinion of the authority was not valid as such opinion could not be regarded as forming a 'substantial change of circumstances'. Even otherwise, the court held that as A knew of the risk of a change in circumstance when it entered into the agreement, A was not entitled to terminate the agreement. It reasoned that the concept of 'substantial change of circumstances' (as referred to in X's civil code) was a flexible concept, and in this context referred to Article 6.2.2 of the UNIDROIT Principles. It defines hardship caused by a fundamental alteration of the equilibrium of a contract as one which arises either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished. Thus, the court rejected A's request for termination.

### 14. *Colombia / National Court / Charrett, Polkinghorne / Unilex 1709 / 2012*

**Case:**<sup>624</sup> Party A (two citizens from country X) entered into a loan agreement with party B (a bank with its place of business in country X) for the purpose of buying a house. A then brought a civil claim against B in relation to that loan agreement. A claimed that the 1998 crisis in country X had affected the economy and the liquidation of loans for buying houses, resulting in the contract becoming more onerous for A to perform. The lower courts rejected A's claim on the basis that A did not bring forth sufficient evidence showing that the 1998 crisis had caused an imbalance under the contract.

The case was appealed before the Supreme Court. The Supreme Court affirmed the lower courts' decisions, finding that A did not bring sufficient proof that the contract had become more onerous.

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623 *Public utility company Lytskheplo v TOV Zakhidna teploenergetychna grupa*, Volyn Regional Commercial Court, Ukraine, Case No 5004/579/12, June 2012.

624 *Rafael Alberto Martínez Luna y María Mercedes Bernal Cancino v Granbanco SA*, Supreme Court of Columbia, Judgment, 21 February 2012.

The Supreme Court further noted that the government of country X had made arrangements to mitigate the economic effects of the crisis on existing contracts.

The Supreme Court recognised a general principle of contract revision in the case of supervening exceptional circumstances under the law of Country X. The court reasoned that this principle is part of the *lex mercatoria*, referring to Articles 6.2.1 and 6.2.3 of the UNIDROIT Principles in support of its conclusion. The court went on to add that, under the laws of country X, parties may choose soft law as the law applicable to their contracts, as long as such law does not contradict the mandatory provisions of applicable domestic law. Further, in order to interpret international instruments and domestic legal concepts, judges are permitted to use the UNIDROIT Principles. In its interpretation of the contract in this case, the Supreme Court referred to Article 6.2.1 of the UNIDROIT Principles to determine that a supervening event should be exceptional and to Article 6.2.2(a) of the UNIDROIT Principles to determine that relevant events must be supervening (as opposed to pre-existing).

#### 15. *Brazil / Domestic Administrative Instance / Meijer / Unilex 1655 / 2011*

**Case:**<sup>625</sup> A number of agreements were entered into between a state-run oil company (in country X) with foreign companies for the construction of oil platforms off the coast of country X. The consideration for this was to be paid in US dollars. The terms of the agreement stipulated that a portion of the work would be allocated to local companies in country X and the payment of such portion would be calculated in X's local currency. Due to some significant fluctuations in foreign exchange rates (substantial increase of X's currency against the US dollar), the foreign companies claimed that there was a sizeable decrease in their profits and asked for a renegotiation of the contract price. The oil company agreed to revise the price to re-establish the original proportion between it and the work allocated to the companies. However pursuant to such amendments, the tax authorities of country X filed a case before the Federal Accountability Court in country X stating that the conditions for the principles of hardship as set out in country X's Civil Code had not been adhered to.

The court while hearing the matter observed that it was English law that governed the contracts by choice of the parties and hence an analysis had to be undertaken on whether the civil code of country X (national public order) or international public order, as set forth in the *lex mercatoria*, were applicable. Without taking a final decision on the applicable law point, the court held that even if the *lex mercatoria* – and in particular Articles 6.2.1–6.2.2 of the UNIDROIT Principles which represent one of its main sources – were applied, the decision that it arrived at would be the same, that is, in the case at hand the requirements for hardship had not been established. The appreciation of X's currency against the US dollar was indeed foreseeable at the time of entering into the agreements and hence such risk would be said to have been assumed by the parties. Thus, the foreign companies were ordered to pay back the sum that corresponded to the increase in profit that they had obtained due to the change in the contract price.

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625 Tribunal de Contas da União, Brazil, Case No TC 007.103/2007-7, December 2011.



## 16. *ICSID / Arbitration / Meijer / Unilex 1658 / 2011*

**Case:**<sup>626</sup> This case related to an investor-state dispute between A, a company in country X and B, the government of country Y. A number of investments were made by A in the energy sector. However, pursuant to a financial and economic crisis in country Y, A was directly affected by certain emergency measures taken by B to mitigate the effects of the crisis.

An ICSID arbitration followed the ensuing dispute. A argued that the bilateral investment treaty between X and Y was breached by B and claimed damages for the losses suffered due to such breach. B took the defence of Article XI of the treaty which stated that '[t]his Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests'.

The tribunal rejected B's objection and decided the matter in favour of A. The tribunal reasoned that B could not invoke the plea of necessity as it had created that necessity or substantially contributed to it. This was the basis of the general principle of 'preclusion of wrongfulness' which was also enshrined in UNIDROIT Principles, particularly in Article 6.2.2. The tribunal described the UNIDROIT Principles as 'a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems'.

While analysing the issue at hand the tribunal noted that under the UNIDROIT Principles, an exemption from liability for an inability to perform the contract is excluded if the party taking such defence was 'in control' of the situation or if it would be 'grossly unfair' to allow for such exemption. It went on to add that an event causing hardship must be, according to Article 6.2.2 'beyond the control of the disadvantaged Party'. Further, the tribunal also cited Article 7.1.6 which 'prescribes that a party may not claim exemption from liability if it would be grossly unfair to exempt it having regard to the purpose of the contract'. Article 7.1.7 was quoted by the tribunal to state that non-conformity with a contract could be excused in the case of a force majeure event '[...] if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences'.

## 17. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2011*

**Case:**<sup>627</sup> Company A from country X entered into a contract for the supply of a commodity with company B from country Y, which provided for several deliveries and a purchase price formula with fixed and variable parameters. The contract was governed by 'the substantive law of Switzerland'. A few days after, company B entered into a contract with a third company C for the onward sale of the commodity. On the date the first shipment was to be loaded, the price of the commodity collapsed and consequently the purchase price was minimal and even negative in respect of certain deliveries. Since company A did not deliver the agreed quantities, company B could not fulfil its obligations towards company C. Company B initiated arbitration proceedings against company A claiming loss

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626 *El Paso Energy International Company v The Argentine Republic*, ICSID Case No ARB/03/15, October 2011.

627 ICC, Case No 16369, Final Award, 2011.



of profit, damage to its reputation, reimbursement of contractual penalties paid to company C and compensation for consultancy and legal fees and the time spent in connection with attempts to remedy the situation.<sup>628</sup>

The arbitral tribunal seated in Switzerland addressed the issue of hardship. It stated that under the CISG parties are free to include in their contracts hardship clauses, which ‘address an unforeseen shift in the economic equilibrium, not unforeseen (factual, legal etc) impediments’ [emphasis omitted].<sup>629</sup> After pointing out that such a distinction is not always made in commercial practice, the arbitral tribunal stated that the distinction was introduced to transnational commercial law by the UNIDROIT Principles, which may be used, according to its preamble, as an interpretation help or as a supplement to international uniform law instruments. Consequently, the arbitral tribunal applied the requirements as set out in Article 6.2.2 of the UNIDROIT Principles. After it found that these requirements were met, the arbitral tribunal addressed the effects of hardship as set out in Article 6.2.3 of the UNIDROIT Principles and found that the requirements of Article 6.2.3 were met as well since the parties failed to reach an agreement during their negotiations. For this reason, according to Article 6.2.3(3) of the UNIDROIT Principles, it was up to the arbitral tribunal to take the adequate measure pursuant to subsection (4) of the same article. The arbitral tribunal held that it enjoys substantial discretion in this regard and decided that adaptation, rather than termination, was both ‘reasonable’ and ‘fair’.

In the context of the loss of profit claim, the arbitral tribunal applied interest at the statutory rate provided for in Swiss law, as requested by company B, starting from the time when the loss occurred. Yet, the arbitral tribunal mentioned in an aside that it saw much merit in the uniform law approach taken by some arbitral tribunals which have applied, in light of CISG’s silence on the issue of the rates of interest, the rate provided for in Article 7.4.9 of the UNIDROIT Principles.

## 18. *Ukraine / National Court / Charrett / Unilex 1736 / 2009*

**Case:**<sup>630</sup> This case arose in relation to a dispute based on an agreement between A, a bank in country X, and B, an individual entrepreneur in country X, for A’s lease of office space from B. A claimed that, due to the economic meltdown in 2008 and resulting difficulties in the rental market, there was a substantial change in circumstances from the conclusion of the contract, and it was unable to make the agreed-upon rental payments to B. A sought the termination of the agreement through court proceedings, relying on the civil code of country X, which provided for change or termination of a contract due to substantial change of circumstances, to support its claim. The court ruled in favour of A and terminated the lease agreement.

The court reasoned that neither of the parties could foresee changes such as the steep fall of prices in the real estate rental market or the appreciation of the US dollar (the currency in which the rental rate was calculated in the contract) at the time of entering into the agreement. The court further added that A could not reasonably overcome the circumstances that caused the financial crisis, as such circumstances were outside of A’s control. The court illustrated this point with the choice of the

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628 Albert Jan van den Berg, *Yearbook Commercial Arbitration Vol XXXIX* (Kluwer 2014) 39, 170 et seq.

629 *Ibid* at 201.

630 Cherkasy Regional Commercial Court (Ukraine), Case No 02/2625, 30 November 2009.

parties to rely on the stable US dollar, which later sharply appreciated due to the devaluation country X's currency. The court noted that performance of the agreement in this instance would deny A the expectations it had had at the conclusion of the agreement. The financial crisis not only led to a devaluation of country X's currency, resulting in a doubling of the rental cost, but had also had an adverse effect of A's business as A's customers were diminished.

The court held that neither the substance of the agreement nor applicable trade customs, such as the UNIDROIT Principles, allocated the risk of the change in circumstances at stake to A. The court referred to Article 6.2.2 of the UNIDROIT Principles as sufficient grounds for termination of the contract.

#### **19. Mexico / Arbitration / Polkinghorne / Unilex 1149 / 2006**

**Case:**<sup>631</sup> Company A entered into a supply agreement with company B, whereby company A would buy the vegetables grown by company B. Various climatic events, among which was a major hurricane, have precluded company B from delivering the products to company A. Company A therefore started arbitration proceedings against company B, which based its defence on force majeure and hardship. In order to determine whether hardship could be upheld, the tribunal referred to Article 6.2.2 of the UNIDROIT Principles and determined that a vegetable grower typically takes on the risk of crop destruction by rainstorms and flooding and cannot therefore invoke hardship. According to the tribunal, the supply agreement is, in essence, an agreement by which the risk is dissipated. The bidder no longer has to worry about the market situation, since this risk is now borne by the buyer (who has undertaken to acquire a certain volume); and the buyer no longer has to worry about the existence of the product, since this risk is borne by the seller (who has committed to produce the product and volume in question). However, the tribunal goes on by stating that the risk of occurrence of an event affecting the production is the responsibility of the producer. To understand why, the tribunal considers the reverse invocation of hardship: if there had been a decrease in demand for the product, company A could not (validly) argue this circumstance as a reason not to fulfil its obligation to pay for the products provided by company B. The tribunal concluded that the risk of the meteorological event was borne by company B, which cannot invoke hardship pursuant to Article 6.2.2 of the UNIDROIT Principles.

#### **20. Brazil / Arbitration / Charrett / Unilex 1532 / 2005**

**Case:**<sup>632</sup> A dispute arose between parties to a domestic contract pertaining to carriage by sea. The contract, which was subject to the law of country X, contained a hardship clause but did not list out the elements and conditions in relation to adapting the clause in the event of hardship. Subsequent to devaluation in the currency of country X, the parties concluded an agreement to share the costs of the devaluation, expressly indicating that the agreement would be applicable to performance of the contract in 2005. Dissatisfied with the agreement, however, A instituted an arbitration proceeding.

A requested that the tribunal consider country X's Civil Code and amend the contract to account for the devalued currency. B objected that the agreement that had been reached was merely an application of the hardship clause that had been contained in the contract and that, therefore,

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631 Centro de Arbitraje de México (CAM), Award, 30 November 2006.

632 Ad hoc arbitration, Brazil, 21 December 2005.

country X's Civil Code could not be applied. Both parties cited the UNIDROIT Principles in support of their respective arguments.

The arbitral tribunal noted that the UNIDROIT Principles set out elements defining hardship as a state of adversity that, by imposing substantial onerousity on one of the parties, results in a fundamental alteration of the equilibrium of the contract. As observed by the tribunal in the case at hand, the hardship clause in the contract complied with international standards and the laws of country X. The tribunal also noted that the parties, on the basis of freedom of contract, had the ability to agree on circumstances that were not contemplated by the applicable domestic law and establish flexible criteria for hardship to be constituted under their contract, stating that 'once the hardship clause is inserted in the contract, it must be observed in deference to party autonomy and the constitutional principle of free initiative'. The tribunal concluded that the agreement for the year 2005 was a fair indication of the parties' joint intention to share costs arising from the devaluation of the domestic currency – thus fulfilling the parties' intention to re-establish the equilibrium of the contract – until the end of the contract.

## 21. *Lithuania / National Court / Charrett / Unilex 1183 / 2003*

**Case:**<sup>633</sup> A, a company in country X, entered into a contract with B, an individual in country X, for the sale of its shares. B made a down payment of 20 per cent, but a dispute arose when B subsequently refused to pay the balance. A filed a court proceeding requesting payment of the outstanding amount. B claimed hardship owing to the fact that the company had become insolvent and the value of its shares considerably diminished as a result.

The courts of both first and second instance decided in favour of B. The Supreme Court however, reversed and decided in favour of A. The court held that, in this case, B was not entitled to invoke the doctrine of changed circumstances or hardship, as hardship does not apply to monetary obligations. The court further noted that, regardless, B had assumed the risk of fluctuation in the price of shares when it entered into the contract. In its reasoning, the court referred to Article ZZ of the Civil Code of country X, which substantively corresponds to Articles 6.2.1 to 6.2.3 of the UNIDROIT Principles.

## 22. *Lithuania / Arbitration / Charrett / Unilex 832 / 2000*

**Case:**<sup>634</sup> A and B entered into a shareholders' agreement governed by the law of country X for the purpose of ensuring cooperation between the parties to improve the production and export of cement. B later declared the agreement terminated and started negotiating with a competitor. A requested the arbitral tribunal order B to abide by the agreement. B argued that it had a right to unilaterally terminate the agreement and that the disruption of the relationship between the parties constituted hardship.

In deciding the case, the tribunal referred to both the relevant provisions of the Civil Code of country X and, in accordance with Article 17 of the ICC Rules of Arbitration on the relevant trade usages, the UNIDROIT Principles, which it declared to be 'codified trade usages', though 'of persuasive [rather] than binding nature'.

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<sup>633</sup> *G Brencius v 'Ukio investicine grupe'*, Supreme Court of Lithuania, Case No 3K-3-612, 19 May 2003.

<sup>634</sup> ICC, Case No 10021, Award, 2000.

With respect to unilateral termination, the tribunal noted that neither the shareholders' agreement nor the civil code permitted unilateral termination with immediate effect. Article 5.1.8 of the UNIDROIT Principles merely states that contracts for an indefinite period of time may be terminated by either party only by giving advance notice within a reasonable timeframe. With respect to hardship, the tribunal did not accept B's argument that the disruption of the relationship between the parties constituted a hardship, as the principle of hardship implies an advantaged and a disadvantaged party. Regardless, however, under both Article ZZ of the Civil Code and Article 6.2.3 of the UNIDROIT Principles the disadvantaged party in a hardship situation is not permitted to terminate an agreement on its own accord. Rather, the party must request the court or arbitral tribunal terminate such agreement. Moreover, additionally under Article 6.2.3 of the UNIDROIT Principles, the party can only make such a request for termination after it has requested renegotiation and the renegotiation has failed.

### 23. *Indonesia / Arbitration / Polkinghorne / Not Unilex / 1999*

**Case:**<sup>635</sup> Project company A from country X entered into an energy sales contract with energy company B from country Y to explore and develop geothermal resources in country Y. The contract entitled the project company to build two power plants in country Y and sell the power to company B. In the wake of the economic crisis which befell country Y, Company B failed to purchase the energy supplied by company A. Company A thus started arbitration proceedings against company B, in order to recover damage resulting from the non-performance of the contract. Invoking the calamitous economic crisis and a drastic change in circumstances, company B requested that the tribunal should leave the parties to renegotiate the contract. In order to decide on such renegotiation, the tribunal found that the risk of the event causing the change in circumstances should not be borne by the disadvantaged party. The tribunal further found that the risk was precisely being borne by company B, as the parties had agreed on a price in the currency of company A's country, rather than in the currency of company B's country. Consequently, the tribunal found that the parties had unambiguously allocated the risk of a depreciation of the local currency to company B, and that company B could thus not invoke the change in circumstances to request a renegotiation of the terms of the contract.

### 24. *France / Arbitration / Polkinghorne / Unilex 680 / 1999*

**Case:**<sup>636</sup> Company A entered into an agreement with company B on the use of a dissolved company's name. The contract provided that A would use the name as a registered trademark and that B would use it as manufacturer of goods. Company A started arbitration proceedings against company B, alleging that company B had voluntarily created confusion between its name and company A's trademark. Company B contended that the European Directive on Trademarks (89/104/EEC) had introduced more liberal terms than those agreed with A and that the contract with A should thus be revised.

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<sup>635</sup> *Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award, 4 May 1999.

<sup>636</sup> ICC, Case No 9479, Award, February 1999.

The arbitral tribunal rejected B's counterclaim and found that the European Directive on Trademarks may not be characterised as hardship, as the evolution of the legislative context of a contract does not represent a fundamental alteration of the contract's equilibrium. According to the tribunal, company B failed to demonstrate that the change introduced was sufficiently substantial.

## 25. *Italy / Arbitration / Polkinghorne / Unilex 660 / 1998*

**Case:**<sup>637</sup> In search of the capital required to finance an aeronautical manufacturing and marketing project, company A entered into a shareholder agreement with company B. Arguing that the contract had become excessively onerous, company B unilaterally decided to withdraw from the agreement. Company A later started arbitration proceedings against company B for breach of the contract. The arbitral tribunal rejected the respondent's defence that hardship entitled respondent to withdraw from the contract. Citing Article 6.2.2 of the UNIDROIT Principles, the tribunal found that hardship may only be upheld insofar as the disadvantaged party did not have knowledge of the event at the time of the conclusion of the contract. Even though the tribunal found that it did not matter whether the event effectively took place before or after the conclusion of the contract, the tribunal observed that company B did not demonstrate it was ignorant of the event at the time it entered the contract.

## 26. *France / Not Unilex / date unavailable*

**Experience of author:**<sup>638</sup> Company A, of France, as contractor, entered into a lump-sum contract for the construction of a regasification plant with company B, of Belgium, as client. The contract was governed by French law.

During the works, the price of steel, which was fundamental for the construction of the plant, increased in a way that was completely unforeseeable.

Company A asked to review the lump-sum price of the contract. A's request was rejected by the client. At that time, in 2011, the only remedy available under French law was the *revision pour imprévision*, which has almost never been applied by the courts.

UNIDROIT Article 6.2.2 indicates that, if there is a fundamental alteration of the equilibrium between the parties, the court may: (1) terminate the contract at a date and on terms to be fixed; or (2) adapt the contract with a view to restoring its equilibrium. The solution available under the UNIDROIT Principles would be in line with the needs of the relevant market. It is important to highlight that the French Commercial Code introduced the same principle of hardship in 2016.

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<sup>637</sup> ICC, Case No 9029, Award, March 1998.

<sup>638</sup> Case illustration based on writer's experience of circumstances where the UNIDROIT Principles could be applied as the governing law of the contract.

## XII. Article 6.2.3: Effects of hardship

### 1. *Italy / National Court / Martinetti / Not Unilex / 2017*

**Case:**<sup>639</sup> Mr A claimed that the default and statutory interests related to a loan agreement concluded with bank B were extortionate. Indeed, Mr A considered that the sum of the default and statutory interests would lead to an exorbitant interest rate or, in alternative, he submitted that in any case the rates respectively from the first half of 2003 and 2004 shall be considered above such a threshold.

The court dismissed the first claim in the light of the well settled case law establishing that is not possible to sum up default and statutory interests in order to determine the exceedance of the threshold. In relation to the second claim, the court stated that such a circumstance shall be qualified as ‘intervening usury’. In relation to this peculiar type of usury, the exceedance of the threshold shall be assessed on the date of the agreement on interests. Prevailing case-law established that in such cases the borrower can claim the exception *doli generalis* with the consequence that the payment of the ‘intervening’ extortionate interest cannot be required. Against this backdrop, the court referred to European Contract Law and UNIDROIT Principles to establish the duty for renegotiating interest rates.

### 2. *Italy / National Court / Martinetti / Not Unilex / 2017*

**Case:**<sup>640</sup> As a result of a public tender, municipality A concluded a contract with company B conferring to the latter the revenue collecting service, including the voluntary collection of ICI (Italian municipality tax). In 2011, an amendment of the tax system introduced a new tax called IMU intended to replace ICI. The law introducing this new revenue also provided for a compulsory collecting method differing from the one used previously that rendered the collecting service carried out by company B inappropriate and ineffective, exclusively in relation to that specific revenue. Company B claims that municipality A shall be declared the defaulting party because of the breach of the obligation to renegotiate the contract.

The court dismissed the claim on the following grounds. The parties agreed a renegotiation clause that was included into the contract. The court referred to the UNIDROIT Principles and to the Principles of European Contract Law in order to mention soft law sources that provide for hardship clauses, considered a good contractual technique aimed at avoiding the termination of the contract. The court considered that municipality A fulfilled its obligation to carry out the renegotiation of the contract and therefore the claim was dismissed.

### 3. *France / National Court / Polkinghorne / Not Unilex / 2017*

**Case:**<sup>641</sup> The contract entered into between companies A and B provided that company A would buy a certain quantity of food flavouring substances from company B over the period of one year, with defined quantities for each of the quarters of that year. After having duly executed the terms of the

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<sup>639</sup> Tribunale of Salerno, Case No 2698/2017.

<sup>640</sup> Tribunale of Bergamo, Case No 2342/2017.

<sup>641</sup> Paris Commercial Court, Case No 20160760927, April 2017.



contract for the first six months of the year, Company A contended that an unforeseeable change in legislation had caused very important costs to the company, and that it could no longer meet its commitment to buy the agreed volume. Company A therefore requested a renegotiation of the contract's terms with company B.

Following a failure in the negotiations, Company B started litigation against company A for breach of contract. As a defence, Company A invoked hardship and the unforeseeable change in circumstances which caused it to request a renegotiation and company B's bad faith in this negotiations. On the basis of the new Article 1195 of the French Civil Code, which provides that the disadvantaged party must continue to perform its obligations during the renegotiations, the judge found that company A was liable for not performing its obligations under the contract at the time it requested the renegotiations. No express reference was made to the UNIDROIT Principles in this case, but it is clear that Article 1195 of the Civil Code mirrors the provisions of Article 6.2.3(2), excluding that the disadvantaged party may withhold performance of its obligations when renegotiating.

#### 4. *Spain / National Court / Polkinghorne, Charrett / Unilex 1949 / 2014*

**Case:**<sup>642</sup> Company A entered into a contract with company B for the operation of advertising space on the city's buses. According to the contract, company A was to perceive all revenues from the advertisement and pay company B a monthly fee. The contract was validly executed for two years, but in May 2009, company A unilaterally decided to pay company B only 70 per cent of the perceived revenues. Company A did so because of a severe drop in revenues that year, arguing that the contract's equilibrium had been fundamentally altered and that the fee needed to be revised.

The judge of first instance followed A's reasoning and decided that company A should only pay company B 80 per cent of the perceived revenues. This decision was annulled by the appellate judge, who decided that the first instance judge failed to show that the decrease in revenues of the advertising market was an extraordinary alteration of the circumstances at the time the parties entered the contract, and that these changes were radically unforeseeable. The Supreme Court overruled the appeal decision, stating that the appellate judge had not considered the degree of alteration of the circumstances for the performance of the contract. Through an express reference to Article 6.2.2(c) of the UNIDROIT Principles, the Supreme Court found that it cannot be considered that the risk was assumed by company A, as this risk was outside that party's sphere of control. The judge found that any company, just like company A, and despite its consciousness of the commercial risk linked to business operations, would have been faced with an unforeseeable and extraordinary change of circumstances.

#### 5. *India / Regulatory Commission / Kapoor / Not Unilex / 2014*

**Case:**<sup>643</sup> Company A incorporated in country X successfully won the bid for the development and implementation of a power project based on linked captive coal mine in state Y of country X and entered into power purchase agreements (PPAs) with certain utilities for distribution of electricity. However, the currency of country X subsequently depreciated significantly. Company A consequently

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<sup>642</sup> Supreme Court of Spain, Case No 333/2014, 30 June 2014.

<sup>643</sup> *Sasan Power Ltd v M P Power Management Company Ltd and Others*, (2014) SCC OnLine CERC 20.



filed a petition before the central regulator of country X seeking a declaration that unprecedented, unforeseeable and uncontrollable depreciation of the currency was a force majeure event under the PPA, and company A ought to be restituted to the same economic condition as if the force majeure event never occurred.

The central regulator took note of the fact that company A had relied on UNIDROIT Principles in support of its contention that the international practices provide for and allow readjustment of terms of contract in comparable situations. Although the central regulator held that depreciation in currency of country X is not a force majeure event under the PPA, it noted that the unprecedented and unforeseen foreign exchange rate variations were beyond company A's control and beyond normal expectations, and therefore may need to be considered for quantification and compensation by the procurers appropriately. It however reserved its final decision to be determined based on company A's project records.

## 6. *Lithuania / National Court / Charrett / Unilex 1893 / 2013*

**Case:**<sup>644</sup> This case is related to the principle of contract equilibrium alteration as justification for contract adaptation, as well as supervening hardship within the same context. A, two individuals, and B, a bank, entered into a loan agreement. A did not repay the loan, because the interest of the loan increased due to a financial crisis. B refused to grant A's request to revise the repayment terms of the contract. After withholding performance, A brought action, claiming that the financial crisis was a supervening hardship.

The court rejected A's claim, invoking not only Civil Code Article Z of country Z, but also Articles 6.2.2 and 6.2.3 of the UNIDROIT Principles. The court reasoned that the required justification for contract adaptation, that its original equilibrium be fundamentally altered, was absent. The court concluded that A's withheld performance was not permitted.

## 7. *India / Regulatory Commission / Kapoor / Not Unilex / 2013*

**Case:**<sup>645</sup> Company A which was incorporated in country X was declared as the successful bidder for supply of power to certain state utilities in country X on the basis of the non-escalable tariff quoted by it. In order to fulfil its obligations under the PPAs entered into with the state utilities, company A was procuring coal from country Y. However, due to changes in certain regulations in country Y, the cost of such procurement increased considerably.

Consequently, company A approached the central regulator requesting a mitigation of the hardship caused by the said regulations through either a discharge from performance of the PPA due to frustration of contract or evolving a mechanism to restore company A to the same economic position prior to the occurrence of such event which it claimed was in the nature of a 'force majeure/change in law' event under the PPA. The central regulator took note of the submissions and reliance placed by counsel for company A on the UNIDROIT Principles which recognise 'hardship' as the basis of renegotiation of the long-term contracts. The central regulator held that while the terms of the PPA

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644 Supreme Court of Lithuania, Case No 3K-3-523/2013, 13 November 2013.

645 *Adani Power Ltd v Uttar Haryana Bijli Vitaran Nigam Ltd and Others*, (2013) SCC OnLine CERC 180.

could not be altered, the parties should work out a compensation package to deal with the impact of the change in regulations solely for the intervening period of the hardship, over and above the applicable tariff as per the PPA.

## 8. *Lithuania / National Court / Charrett, Meijer / Unilex 1896 / 2012*

**Case:**<sup>646</sup> This dispute is related to a debtor, A, who was a party to a loan agreement and who claimed that the termination of the loan agreement by B, the bank, was ineffective. A had previously requested on multiple occasions that B revise the repayment terms of the loan agreement, due to a change in the country's financial climate. However, B, pursuant to its having turned down this request, terminated the agreement. A then brought action against B, asking the court to declare the termination invalid. The court ruled in favour of B.

While citing the Civil Code of country X and Articles 6.2.1, 6.2.2, and 6.2.3 of the UNIDROIT Principles, the court held that a claim for amending a contract would have to be submitted within a reasonable time of receipt of the refusal for alteration of another party. However, the request for renegotiation does not restrict the right of the other party to terminate the contract for non-performance.

## 9. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2011*

**Case:**<sup>647</sup> Company A from country X entered into a contract for the supply of a commodity with company B from country Y, which provided for several deliveries and a purchase price formula with fixed and variable parameters. The contract was governed by 'the substantive law of Switzerland'. A few days after, company B entered into a contract with a third company C for the onward sale of the commodity. On the date the first shipment was to be loaded, the price of the commodity collapsed and consequently the purchase price was minimal and even negative in respect of certain deliveries. Since company A did not deliver the agreed quantities, company B could not fulfil its obligations towards company C. Company B initiated arbitration proceedings against company A claiming loss of profit, damage to its reputation, reimbursement of contractual penalties paid to company C and compensation for consultancy and legal fees and the time spent in connection with attempts to remedy the situation.<sup>648</sup>

The arbitral tribunal seated in Switzerland addressed the issue of hardship. It stated that under the CISG parties are free to include in their contracts hardship clauses, which 'address an unforeseen shift in the economic equilibrium, not unforeseen impediments [factual, legal, etc]' [emphasis omitted].<sup>649</sup> After pointing out that such a distinction is not always made in commercial practice, the arbitral tribunal stated that the distinction was introduced to transnational commercial law by the UNIDROIT Principles, which may be used, according to its preamble, as an interpretation help or as a supplement to international uniform law instruments. Consequently, the arbitral tribunal applied the requirements as set out in Article 6.2.2 of the UNIDROIT Principles. After it found that these requirements were met, the tribunal addressed the effects of hardship as set out in Article 6.2.3 of the UNIDROIT Principles and found that the requirements of Article 6.2.3 were also met since the

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<sup>646</sup> Supreme Court of Lithuania, Case No K-7-306/2012, Judgment, 26 June 2012.

<sup>647</sup> ICC, Case No 16369, Final Award, 2011.

<sup>648</sup> Albert Jan van den Berg, *Yearbook Commercial Arbitration Vol XXXIX* (Kluwer 2014) 39, 170 et seq.

<sup>649</sup> *Ibid* at 201.

parties failed to reach an agreement during their negotiations. For this reason, according to Article 6.2.3(3) of the UNIDROIT Principles, it was up to the arbitral tribunal to take the adequate measure pursuant to subsection (4) of the same article. The tribunal held that it enjoys substantial discretion in this regard and decided that adaptation, rather than termination, was both ‘reasonable’ and ‘fair’.

In the context of the loss of profit claim, the tribunal applied interest at the statutory rate provided for in Swiss law, as requested by company B, starting from the time when the loss occurred. Yet, the arbitral tribunal mentioned in an aside that it saw much merit in the uniform law approach taken by some arbitral tribunals which have applied, in light of CISG’s silence on the issue of the rates of interest, the rate provided for in Article 7.4.9 of the UNIDROIT Principles.

#### 10. *The Netherlands / Arbitration / Meijer / Unilex 1534 / 2010*

**Case:**<sup>650</sup> The claimants (two oil companies in country X) and the respondent (the government of country B) entered into several agreements for the exploration and exploitation of oil in a designated area of country B. In short, the agreements held that the claimants had to provide a percentage of its oil extraction to country B for domestic use and against a price that was set by the respondent. The claimant was allowed to export the rest of the oil against market value. The relationship between the parties worsened and resulted in several court and arbitral proceedings.

One proceeding was about the effects of an earthquake. The earthquake caused a decrease in the extraction of oil. The claimants’ stance on the matter was that the contribution of oil to country B was relative to their own production and not a fixed amount. This meant that if the claimant’s own production was lower, its contribution to the respondent would be lower as well. The respondent, however, argued that it was entitled to the difference in contribution in relation to the ‘normal’ contribution as compensation for the reduced contribution after the earthquake. The tribunal agreed with the claimant on the basis of a contractual clause and made a reference to the UNIDROIT Principles. The contract contained a clause that explicitly stated that the contribution was to be a proportion of quarterly production, thereby excluding further obligations to contribute beyond the maximum amount produced in a given quarter. Moreover, the tribunal referred to and indicated that UNIDROIT Principles Articles 7.1.7, 6.2.2 and 6.2.3 (3) (b), which govern unforeseen events, are designed to distribute the effects of unforeseen events, in a just and equitable manner, between contracting parties.

#### 11. *Belgium / National Court / Meijer / Unilex 1456 / 2009*

**Case:**<sup>651</sup> A dispute arose in relation to multiple sales contracts for the purchase of steel tubes by A (buyer), a company in country X, from B (seller), a company in country Y. Since the contracts did not provide a price adjustment clause, A was affected by a sudden increase in the price of steel by about 70 per cent. The matter was taken to court, where it was held that B did not have a right to renegotiate the price.

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650 *Chevron Corporation & Texaco Petroleum Corporation v Ecuador*, ad hoc arbitration, Award, 30 March 2010.

651 *Scafom International BV v Lorraine Tubes sas*, Court of Cassation of Belgium, Case No C.07.0289.N, June 2009.

The court agreed that B would have been disadvantaged were the contract to be performed at the original agreed price, due to the sudden surge in the price of steel. However, the court noted that the CISG governed the contract, and CISG did not contain any provisions on the issue of hardship. The appellate court reversed this decision, reasoning that, in such a scenario, the general principle of good faith could be applied and, using this, the court was permitted to impose an obligation to renegotiate the contract. Thus, in spite of the applicable law not providing for remedies in the case of hardship, an exception could be made for situations that give rise to a significant imbalance in contractual obligations.

The matter reached the Supreme Court, where the appellate court's decision was upheld. The court observed that though the CISG in Article 79(1) clearly provided for force majeure events, this did not imply that it excluded the significance of hardship or the possibility of price renegotiation, as requested by B. A major alteration of the contractual equilibrium, caused by an unexpected change of circumstances, could, in some cases, be regarded as an exempting event under Article 79 (1), the court noted. Further, the court observed that, since it was the CISG that governed the contract, it was important while interpreting the provisions to keep in mind the international character and outlook of the CISG, as well as the need to promote consistency in its application, as provided by Article 7 of the CISG. In the opinion of the court, were there any inconsistencies or gaps, they would have to be addressed by taking help from the general principles underlying the CISG, and in the absence of such principles the relevant domestic law applicable. To address gaps and inconsistencies in a uniform manner, one must also consider the general principles governing the law of international commerce. The UNIDROIT Principles, for example, lay down that a party has a right to renegotiate the contract if the party invokes a change in circumstances that fundamentally disrupts the contractual equilibrium. In conclusion, B was permitted to renegotiate the contract price, and the decision of the appellate court was upheld.

## 12. *Costa Rica / National Court / Charrett / Unilex 1781 / 2006*

**Case:**<sup>652</sup> A, a company, and B, the aviation authority of country X, agreed to make repairs to an airport in country X. B decreased the hours of night-time work permissible to A. This increased A's cost of performance. A ceased performance to initiate renegotiations. B sought arbitration in aversion to A's cessation.

The tribunal granted B's claim. It used country X administrative law and Article 6.2.3 of the UNIDROIT Principles to deem hardship-based renegotiation requests insufficient to permit performance cessation. The Supreme Court of country X ruled confirming the decision of the tribunal. Contrary to A, the Supreme Court asserted that the tribunal did apply country X administrative law, not merely the UNIDROIT Principles, in reaching its decision.

## 13. *France / Arbitration / Charrett / Unilex 1062 / 2001*

**Case:**<sup>653</sup> The claimant, from country X, and the respondent, from country Y, entered into a contract for the claimant to sell and licence to the respondent the use of products derived from raw materials

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652 Judgment of Sala Primera de la Corte Suprema de Justicia, San José, Case No 05-000097-0004-AR, 23 March 2006.

653 ICC, Case No 9994, Award, December 2001.

that had been extracted from human placentae. During the period of the agreement, the conditions for the collection of human placentae changed, due to stricter government regulations in country X. In consequence, the claimant increased the price. After the price increase, the respondent terminated the contract.

The claimant initiated arbitral proceedings and argued that the termination of the contract was unlawful, since the respondent should have agreed to renegotiate the price in light of the changed circumstances. The tribunal ruled in the claimant's favour, substantiating its ruling under the law of country X, the governing law of the contract. It referred to Articles 6.2.2 and 6.2.3 of the UNIDROIT Principles, which affirm that it is a prevailing principle of international law that good faith require both parties to renegotiate and adapt the agreement should the circumstances change under which the contract was concluded, especially when a long-term contract is at stake and could lead to the ruin of one of the parties. Since the respondent made no effort to act accordingly, the tribunal ruled in favour of the claimant.

#### 14. *France / Arbitration / Charrett, Polkinghorne / Unilex 680 / 1999*

**Case:**<sup>654</sup> A and B, each a company of country X, agreed to a regulation of the right to use an original company name, wherein A could use it as a registered trademark, B, only to identify itself as a worldwide distributor and manufacturer of certain goods. A sought arbitration in accusation of B's having created confusion between its name and A's, asserting this creation was both intentional and a breach. B counterclaimed hardship.

B's counterclaim relied upon the 1989 adoption of the European Directive on Trademarks, which introduced terms more liberal than those to which A agreed. B argued for the revision or termination of the contract to the extent that this argument regarded the territory of the EU, and in this context made reference to Article 6.2 of the UNIDROIT Principles.

The tribunal rejected B's counterclaim. The tribunal did not see that, because the balance of the obligations of the parties had not been destroyed, hardship resulted merely because legislation had developed in such a way as to change the context of the contract. Although the tribunal indicated that there was a chance that B would not have entered into the agreement if the terms of the EU Directive had already been adopted, it ruled that the influence of such regulation on the balance of the obligations of the parties was not substantial. In fact, the agreement covered the territory not only of the EU, but of the world. Although the contract provided for New York law to govern the validity of the agreement, the tribunal found that the lack of relevant provisions in relation to other issues should be understood as an indication of the intention of the parties not to have such matters governed by any specific municipal law. Therefore, the tribunal applied 'the usages of international trade', 'international public policy' and the UNIDROIT Principles, an 'accurate representation, although incomplete, of the usages of international trade'.

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654 ICC, Case No 9479, Award, February 1999.

15. *Switzerland / Arbitration / Polkinghorne / Unilex 653 / 1997*

**Case:**<sup>655</sup> Company A from country X entered into two contracts with state entity B from country Y, for the sale and the installation of sophisticated military equipment. The contracts were duly performed until the advent of a revolution in country Y. The parties entered into a series of negotiations but were unable to reach an agreement.

B started arbitration proceedings against A, claiming reimbursement of payments made to A. A objected that it was B which, by not paying the remainder of the price, had breached its contractual obligations and presented a counterclaim for damages. As a consequence of the chaotic events which preceded and followed the revolution in country Y, the arbitral tribunal made express reference to Article 6.2.3 of the UNIDROIT Principles and found that each party was entitled unilaterally to request termination of the contracts or adaptation of their terms.

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<sup>655</sup> ICC, Case No 7365/FMS, 1997.

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# Chapter 7: Non-performance

## I. Article 7.1.2: Interference by the other party

### 1. *Singapore / National Court / Koh / Not Unilex / 2011*

**Case:**<sup>656</sup> A construction subcontract was entered into between a main contractor and subcontractor. Under the contract, the subcontractor was obliged to complete its works by a certain date. Three months before the completion date, both parties agreed to a three-month extension to be given to the subcontractor.

After the extended completion date had passed, the main contractor terminated the subcontract on the basis of the subcontractor's failure to proceed with its contractual obligations, and engaged other subcontractors to complete the project. The main contractor brought a claim against the subcontractor in arbitration, and among other issues, the arbitrator found that time for completion of the subcontract works was not set at large.

The main contractor appealed to the national court on three questions of law, one of which was whether, for time to be set at large, it was necessary for there to be delay in completion. In the court's consideration on this issue, reference was made to Article 7.1.2 of the UNIDROIT Principles.

## II. Article 7.1.7: Force majeure

### 1. *Russia / National Court / Petrachkov, Bekker / Not Unilex / 2017*

**Case:**<sup>657</sup> In this case the Russian claimant filed a claim for damages for injuries inflicted to the horse which was held in the stable under the services agreement with the Russian defendant. The court of the first instance denied the claims on the ground that, inter alia, the injuries were inflicted under force majeure circumstances.

The Court of Appeal cancelled the judgment of the court of the first instance and partially recovered the damages. While reasoning its ruling the Court of Appeal referred to the applicable Russian law and additionally referred to Article 7.1.7 of the UNIDROIT Principles.

The court's reasoning is explained below.

The defendant, individual entrepreneur IVA, performed services for storage of the horse in frames of its business activities which were aimed at gaining profit.

Thus, considering the provision of law, the aforementioned provisions of the storage contract and the specific circumstances of this case, the only ground for exempting the defendant's liability for the injuries inflicted to the item would be the force majeure circumstances, which, however, is not applicable to the present case of inflicting harm to the horse's eye.

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<sup>656</sup> *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* (2011) SGHC 162.

<sup>657</sup> Sverdlovsk District Court, Case No 33-17761/2017, Appeal, 18 October 2017.

By virtue of Article 7.1.7 of the UNIDROIT Principles, having the status of an intergovernmental organisation, the provisions of paragraph 3 of Article 401 of the Civil Code of the Russian Federation, the legal qualification of a certain circumstance as a force majeure event is possible in case the following essential requirements are met: emergency and unavoidability.

Emergency means exclusivity, something that is going beyond the ordinary conduct, certain extraordinary life events, something which does relate to common risks of living and which cannot be taken into account under any circumstances. Any event of life cannot be qualified as a force majeure, as force majeure is an extraordinary event which has objective, not subjective, basis.

Thus, force majeure events are understood as extraordinary and unavoidable circumstances, events, which come from outside and which do not depend on subjective factors: floods, natural disasters, earthquakes, hurricanes, avalanches, other natural disasters, as well as military actions and epidemics.

Considering that the defendant was aware of the particularities of behaviour of the animal (combing the head with the straw bedding), the injury inflicted to the claimant's horse does not indicate the presence of force majeure circumstances, but rather indicates defendant's failure to take all reasonable measures to prevent the occurrence of harm. This is indicated by the testimony of witness 4, who confirmed that in the stable, where the horse *Hendrik* was kept, there were blinkers worn on the horse's head specifically to prevent eye injuries, but they were applied only after the animal's eye was injured.

## 2. *Russia / National Court / Petrachkov, Bekker / Not Unilex / 2016*

**Case:**<sup>658</sup> A Russian company, the claimant, filed a claim for collection of the damages. The claims were based on the storage agreement. In accordance with the storage agreement the claimant transferred certain equipment to the defendant for storage. In the defendant's warehouse the defendant there was a fire which destroyed the equipment. The court accepted the claims and partially collected damages from the defendant in favour of the claimant.

The court's reasoning is explained below.

In accordance with the legal position of the Supreme Arbitrazh Court of the Russian Federation, contained in the Resolution of the Presidium dated 21 June 2012 N 3352/12 in case N A40-25926/2011-13-230, the legal qualification of a circumstance as a force majeure event is possible in case the following essential requirements are met: emergency and unavoidability.

Emergency means exclusivity, something that is going beyond the ordinary conduct, certain extraordinary life events, something which does relate to common risks of living and which cannot be taken into account under any circumstances. Any event of life cannot be qualified as a force majeure, as force majeure is an extraordinary event which has objective, not subjective, basis. The qualification of circumstances as a hardship (force majeure) is also widely recognised in the international practice.

According to Article 7.1.7 UNIDROIT Principles, having the status of an intergovernmental organisation, the circumstances of force majeure, in the case of which the party is exempted from liability for non-performance of obligations, are called an obstacle 'beyond reasonable control of a

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658 Ninth Arbitrazh Appeal Court, Case No A40-61219/15, Resolution 09AP-55092/2015-GK, 09AP-57756/2015-GK, 26 January 2016.

person', since it could not reasonably be expected to take this obstacle into account when concluding a contract or to avoid or overcome this obstacle or its consequences.

Such circumstances are extraordinary and unavoidable under the given circumstances.

Thus, force majeure events are understood as extraordinary and unavoidable circumstances, events, which come from outside and which do not depend on subjective factors: floods, natural disasters, earthquakes, hurricanes, avalanches, other natural disasters, as well as military actions and epidemics.

At the same time, the respondent did not present evidence that the fire occurred on 24 November 2014 in the warehouse located at Moscow, ul. Kotlyakovskaya, 6, p. 1, on the territory of JSC 'Experimental Plant No 1', as a result of which the disputed goods were destroyed, was due to natural phenomena of a spontaneous nature and has signs of emergency and objective unavoidability.

### **III. Article 7.2.1: Performance of monetary obligation**

#### **1. *Russia / Arbitration / Petrachkov, Bekker / Not Unilex / 2010***

**Case:**<sup>659</sup> A claimant, an Uzbekistani company, filed a lawsuit against a defendant, a Russian company, for collection of advance payment for goods, which were not delivered.

The court's reasoning is explained below.

On the issue of the law applicable to the relations between the parties under the contract, the ICAC found that according to Article 28 of the Law of the Russian Federation 'On International Commercial Arbitration' and paragraph 1 of article 26 of the ICAC Rules, the dispute shall be resolved in accordance with such rules of law as the parties have chosen as applicable to the merits of the dispute.

Since the Russian Federation and the Republic of Uzbekistan are parties to the CISG, the ICAC considered the provisions of the CISG to be applicable to the relations between the parties.

According to paragraph 2 of Article 7 of the CISG 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 applicable law. The ICAC ruled that provision of the Russian civil law, in particular, the Civil Code of the Russian Federation is to be applicable to the relations between the parties as a subsidiary statute.

Relying on paragraph 3 of Article 28 of the Law of the Russian Federation 'On International Commercial Arbitration' and paragraph 1 of Article 26 of the arbitration rules, the sole arbitrator considered it expedient to apply the UNIDROIT Principles when considering a dispute.

Based on the foregoing, the sole arbitrator decided to follow the CISG, the Civil Code of the Russian Federation and the UNIDROIT Principles when considering the dispute.

As follows from the materials of the case, the parties concluded the contract, according to which the defendant undertook an obligation to transfer the products into the ownership of

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<sup>659</sup> ICAC, Case No 224/2009, Award, 30 June 2010.

the claimant in the agreed assortment, and the claimant undertook an obligation to pay for the products on an advance basis.

Before proceeding to the merits of the case as submitted by the claimant, the sole arbitrator found it necessary to determine the legal nature of the contract and concluded that it was a contract for the supply of goods subject to the provisions of paragraph 3 of chapter 30 of Part Two of the Civil Code of the Russian Federation; and, in the unregulated parts, general provisions applicable to contract for the sale of goods as such.

Paragraph 1 of Articles 486, 487 and 516 of the Civil Code of the Russian Federation grant the buyer with the right to pre-pay the goods in the manner as provided for in the contract.

In accordance with Article 466 of the Civil Code of the Russian Federation the buyer has the right to demand the return of the advance payment, if the seller in breach of the terms of the contract provides less quantity of goods than it was paid for. Article 7.2.1 of the UNIDROIT Principles also reflects a widely recognised rule that it is always possible to demand due amounts under a contractual obligation and, if this demand is not met, to recourse to available remedies in the court.

The sole arbitrator qualified the defendant's actions as a material breach of the contract in the sense of Article 25 of the CISG, since the claimant was largely deprived of what he was entitled to rely on the contract, that is, he received less goods than he paid for.

Since the fact of breach of the contract by the defendant is confirmed by the case materials, the sole arbitrator concluded that the defendant's failure to fulfil the obligation to supply the products was proved by the claimant, and recognised the claimant's claim is reasonable and subject to satisfaction in full.

## **IV. Article 7.2.2: Performance of non-monetary obligation**

### **1. *France / Arbitration / Sierra / Not Unilex / 2016***

**Case:**<sup>660</sup> Company A, of country X and company B, of Country Y, entered into a JVA by which they agreed to create two joint companies (companies C and D), in which company B would provide the technology and company A the commercial know-how in order to produce and commercialise certain products in country X. The parties agreed that the JVA would be subject to the UNIDROIT Principles, supplemented if necessary by the laws of country X.

The JVA foresaw that if both parties failed to pass a resolution in two shareholders or board of directors meetings of company C or D, with no less than 15 days between each other, a deadlock provision would be triggered. Whenever a deadlock situation was triggered, according to the JVA, each party was entitled to start a process for the transfer of shares, where the other party was obliged to participate in good faith. In case any party failed to do so, legal arbitration proceedings would be available.

Company A claimed that there was a deadlock because there had been two board of directors meetings where the board had been unable to reach an agreement and pass resolutions on different

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<sup>660</sup> ICC, Case No 18795/CA/ASM (C-19077/CA).



topics. Company B argued that the deadlock provision was not triggered. It claimed that failure to pass resolutions at two board of directors needed to be on exactly the same topics for the deadlock provision to be triggered.

The arbitral tribunal found that there was indeed a deadlock. The arbitral tribunal determined that under Article 4.1 of the UNIDROIT Principles, in case the intention of the parties is not 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’. Thus, the arbitral tribunal held that a reasonable person would be more concerned by the impossibility to decide two different unrelated issues at two consecutive meetings than the repeated impossibility to decide the same issue. According to the arbitral tribunal, such hypothesis may reflect a symptom of the inability of the partners to work together, whatever the matter at stake, while the other hypothesis may only reflect the difficulty to deal with a specific issue.

On the issue of the transfer of shares process, the arbitral tribunal held that the parties had not activated the process to transfer of companies C and D’s shares.

Company A claimed specific performance under Article 7.2.2 of the UNIDROIT Principles seeking the transfer of companies C and D’s shares. On the other hand, company B contended that the arbitral tribunal did not have the power to order the transfer of shares. The arbitral tribunal found that there had been no breach to the deadlock provisions for the transfer of shares because the process for the transfer of shares had never been activated by any of the parties.

The arbitral tribunal held that it could not order company B to transfer any shares. Moreover, it ruled that the parties were entitled to activate the process for the transfer of shares provided for under the JVA, with both parties being obliged to participate therein in good faith, in light of Article 1.7 of the UNIDROIT Principles.

## 2. *France / Arbitration / Rojas Elgueta / Unilex 1177 / 2006*

**Case:**<sup>661</sup> The claimant, the lessee of an aircraft, sold that aircraft to the respondent with the permission of the lessor, a financial institution who owned the aircraft. However, it took the claimant longer than expected to arrange the deregistration of the aircraft in its country of origin, a necessary step for exporting an aircraft. The respondent, in reaction to the delay, decided to buy the aircraft directly from the owner. In response to this conduct, the claimant initiated arbitral proceedings claiming the lost profits from the original contract. The contract’s arbitration clause stated Swiss law as the applicable law for the adjudication of this case.

The sole arbitrator awarded damages in favour of the claimant. He found that it was impossible for the claimant to perform the contract due to the respondent’s actions. However, referring to comment 3(a) of Article 7.2.2 of the UNIDROIT Principles and Swiss law, the arbitrator found that impossibility does not nullify a contract. Since the contract between the claimant and the respondent was not nullified due to the impossibility to perform and that the failure to perform was caused by the actions of the respondent, the arbitrator awarded the claimant damages due to a breach of contract by the respondent.

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661 ICC, Award, 9 October 2006.

## V. Article 7.3.1: Right to terminate the contract

### 1. *Spain / National Court / Doria / Not Unilex / 2017*

**Case:**<sup>662</sup> A Spanish individual filed a claim against two Spanish insurance companies for compensation, holding the companies jointly liable for the damages caused to an elder relative who was institutionalised in a residence and died as consequence of injuries suffered from the breach of the duties of care and supervision of the residence.

The Court of Appeal's ruling overruled the previous ruling of the judge of first instance and declared the joint and several responsibilities of the insurance companies due to the fundamental non-performance of the contractual obligations of the residence which were the essence of the contract. In its ruling the Court of Appeal referred, among other decisions of the Supreme Court, also to Article 7.3.1 (2) (b) of the UNIDROIT Principles.

### 2. *Spain / National Court / Popova / Unilex 1935 / 2015*

**Case:**<sup>663</sup> Company A entered into a contract with company B, for A to transfer to B 18 real estate properties, in exchange for the construction of a housing project on ten other properties. The first four houses were to be built within three years. The parties agreed that if company B did not meet this deadline, a penalty would apply for every six months of delay.

After the first three years, company B had not built any of the houses. Company A sought to terminate the contract, based on B's failure to deliver within the time stipulated by the parties. It also claimed for damages based on the penalty agreed. B argued that timely performance was not an essential condition of the contract that permitted termination.

The Supreme Court held that not having built any of the houses within the time agreed by the parties was a fundamental non-performance giving rise to the right to terminate. From the terms of the contract, it could be concluded that the specific three-year time period was of the essence for the parties. In reaching its decision, the court expressly referred to Article 7.3.1 of the UNIDROIT Principles.

### 3. *Poland / National Court / Wardynski, Przygoda / Not Unilex / 2014*

**Case:**<sup>664</sup> The parties were in dispute over, among other issues, whether a failure to submit a certificate was an incidental non-performance or a fundamental non-performance allowing the other party to withdraw from the contract. The court found that such failure did not warrant a withdrawal from the contract.

The court stated that legal scholars take the stance that a withdrawal from a contract is allowed only if there is a delay in the performance of a fundamental contractual obligation. In this context, the court referred to Article 7.3 of UNIDROIT Principles, according to which a party may terminate a

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<sup>662</sup> Court of Appeal of Balears, Ruling 139/2017, 5 May 2017.

<sup>663</sup> *Maria Antonieta y otros v Victorino*, Supreme Court of Spain, Case No 333/2015, 15 June 2015.

<sup>664</sup> Supreme Court of Poland, Case No I CSK 392/13, Judgment, 24 June 2014.

contract where the failure of another party to perform an obligation under the contract amounts to a fundamental non-performance. However, the court did not discuss the rule in detail

#### 4. *Spain / National Court / Popova / Not Unilex / 2013*

**Case:**<sup>665</sup> Company A concluded a contract with company B, for B to perform certain consulting services in the real estate sector, including representing company A before certain boards, developing real estate properties, advertising real estate projects designed by A, and assisting A in buying and selling properties. Company A would pay a fixed rate of US\$100 monthly and a commission of 2.5 per cent on each sale B concludes on behalf of A.

After 18 months, B had only attended a few boards, had missed others and had ordered one person to look for potential buyers of one specific property. Company B also never reported on its activities. A terminated the contract for non-performance, and B sued for wrongful termination.

The Supreme Court, affirming the Court of Appeal, held that A's termination was justified because B's performance was insufficient in light of A's interest in the contract. Recognising the role that the UNIDROIT Principles have had in shaping national law on this point, the court held that only a fundamental non-performance gives rise to grounds for termination. It further held that a failure to perform will be fundamental when the interest of the creditor, objectively derived from the contract, is not fulfilled. B's performance was not sufficient in the circumstances, including in regard to what company A might reasonably expect and what it had paid in exchange.

#### 5. *Spain / National Court / Doria / Not Unilex / 2013*

**Case:**<sup>666</sup> A Spanish individual claimed, as buyer, against a real estate developer company, as seller, for termination of a sale and purchase agreement of a property for breach of the fundamental obligations of the latter to deliver the property and grant the public deed of transfer within the terms agreed.

Both the judge of first instance and the Court of Appeal ruled that the seller of a property which was under construction was not finalised and ready to be occupied within the term agreed, being the seller in breach of its obligations under the agreement, which were considered fundamental and essential, thus declaring the contract terminated and the right of the buyer to be compensated. The Court of Appeal in its reasoning refers, among other principles in Spanish law and jurisprudence, to those contained in article 7.3.1 (2) (b) of the UNIDROIT Principles and in the Convention of Vienna of 1980 of International Sales of Goods.

#### 6. *Spain / National Court / Doria / Not Unilex / 2013*

**Case:**<sup>667</sup> Company A supplied to company B a robotised automated system. The system was later modified, extended and assembled by company A following the request of Company B. Shortly after the system was installed, company B notified company A of termination for breach of contract

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<sup>665</sup> *Lunagar Promoción y Gestión SL v Urbanizadora Castellana SA*, Case No 638/2013, 18 November 2013.

<sup>666</sup> Court of Appeal of Barcelona (Spain), Ruling 289/2013, 13 May 2013.

<sup>667</sup> Supreme Court of Spain, Ruling 266/2013 (First Chamber), 3 May 2013.

and offered to return the system to the supplier given that the system did not comply with the specifications of the contract.

Company A filed a claim against Company B for payment of amounts due under the agreement. Company B as defendant counterclaimed filing for the resolution of the agreement for breach of the claimant's obligations. The Court of Appeal ruled that company B was entitled to terminate the agreement and to be reimbursed with the amounts paid.

The Supreme Court confirmed the ruling of the Court of Appeal based on the breach of fundamental or essential obligations of a party to an agreement. The ruling, in addition to Spanish jurisprudence and the Civil Code, makes reference specifically to the modern codes of contractual obligations which are based on the line of thought of English law which may be summarised as the right of a party to terminate an agreement in case of non-performance of the other party may be considered as an essential breach, as in Article 7.3.1 of the UNIDROIT Principles.

## **7. Spain / National Court / Doria / Not Unilex / 2012**

**Case:**<sup>668</sup> Two Spanish individuals claim, as buyers, against a real estate developer company, as seller, for termination of a sale and purchase agreement of a property for breach of the latter's obligations.

Both the judge of first instance and the Court of Appeal ruled that the seller of a property which was under construction and finalised within the term agreed, in spite of the delay in obtaining the necessary licences for occupation of the property which was not attributable to the seller, was actively and timely complying with its obligations under the agreement. And, considering that there was not a specific date considered as essential for granting the public deed of transfer of the property, should not be held in breach of fundamental or essential contractual obligations. The Court of Appeal in its reasoning refers, among other principles in Spanish law and jurisprudence, to those contained in Article 7.3.1(2)(b) of the UNIDROIT Principles, in this case to conclude that there was no fundamental breach.

## **8. Spain / National Court / Popova / Unilex 1682 / 2012**

**Case:**<sup>669</sup> Company A sells B a number of real estate properties, in exchange for which B would construct a building on one of the properties and transfer it to A. The contract provided that, the building had to be constructed within six years, in a condition to obtain a regulatory permit to use the building for residential purposes. The parties agreed that if the building was not constructed within that period, company A could terminate the contract.

Permitting was delayed and B could not deliver the building by the time agreed, but it would be in a position to do so soon thereafter. A sued to terminate the contract, arguing that the parties had expressly agreed that if the deadline was not met, the contract could be terminated.

Invoking the UNIDROIT Principles as well as the Principles of European Contract Law, the Court of Appeal held that B's failure to perform was not a fundamental breach giving rise to the right to

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<sup>668</sup> Court of Appeal of Las Palmas (Spain), Ruling 581/2012, 19 December 2012.

<sup>669</sup> *Eulogio v Bahía Planning SL*, Case No 92/2012, 7 March 2012.

terminate. B's performance did not fall short of the legitimate expectations A could objectively have from the contract and its economic purpose, the non-performance was not intentional or reckless and there was no reason to believe that B would fail to perform in the future. Indeed, the relevant permits were subsequently obtained.

## 9. *Switzerland / Arbitration / Voser, Ninković / Unilex 1513 / 2009*

**Case:**<sup>670</sup> Company A and company B are both engaged in international trade and active in the chemicals sector. Company A entered into an agreement with company B for the supply over a period of time of a certain chemical product necessary for the production of company B's end product. According to the agreement, the price was to be determined annually on the basis of certain data to be provided by company B. The agreement also provided for the right of termination '[...] if either party is in material breach of the agreement, which breach remains uncured following 30 days written notice from the non-breaching party [...]'.<sup>671</sup> In addition, the agreement contained a choice of law clause stating '[t]his agreement shall be construed and interpreted in accordance with the laws of Switzerland as applied between domestic parties provided, however, that the express agreements, understandings and provisions contained herein shall always prevail'.<sup>672</sup>

After some years of regular performance, company A terminated the agreement on the grounds that company B had committed a material breach by failing to pay two invoices in full and to provide the necessary data for determining the price for the following year. Company B initiated arbitration proceedings against company A.

As the agreement did not specify what the parties considered to be a 'material breach' and the very concept of 'material breach' is unknown to the Swiss legal system, the arbitral tribunal seated in Switzerland had to interpret this term. Swiss law provides that (partially) unclear contracts shall be interpreted in accordance with the parties' mutual intent at the time the contract was concluded. If the parties' intent cannot be established, the wording and context of the contract (or its clauses) have to be understood in the way a reasonable third party acting in good faith would have understood it. As the arbitral tribunal could not establish the parties' mutual intent and both parties were active in international trade, it, however acknowledged that the parties by their choice of law clause had implicitly excluded the application of the CISG, resorted to Article 25 of the CISG and Article 7.3.1 of the UNIDROIT Principles as sources of common understanding in international trade to interpret the concept of 'material breach'. On this basis the arbitral tribunal found that company B's non-performance did not amount to a 'material breach' in the sense of the agreement and that company A therefore was not entitled to terminate the agreement.

The Swiss Supreme Court, upon appeal against the award, stated that by interpreting the concept of 'material breach' in accordance with both Article 25 of the CISG and Article 7.3.1 of the UNIDROIT Principles, the arbitral tribunal did not apply foreign laws excluded by the parties, but rather interpreted an unclear contractual provision in accordance with the principles of Swiss law.

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670 Supreme Court of Switzerland, Case No 4A\_240/2009, Decision, 16 December 2009.

671 *Ibid.* Fact Section A.

672 *Ibid.*

## 10. *Spain / National Court / Doria / Not Unilex / 2007*

**Case:**<sup>673</sup> Various individuals purchased an apartment, a parking space and a storage room in the same building from a real estate developer company. The storage room proved not to be apt for its use due to the existence of damp.

The judge of first instance and the Court of Appeal ruled in favour of the buyers granting them the right to compensation. The Supreme Court also ruled in their favour. The interest of the ruling is that the Supreme Court declares that the storage room could not be considered as an independent object of the contract but as an annex to the parking space, thus not making it possible to terminate the contract for fundamental breach and, therefore, limiting only the claim to compensation for the works to be performed in the room to enable its use due to the seller's non-performance of its obligation under the agreement.

In the ruling the court refers to Spanish jurisprudence and to Article 7.3.1 (2) (b) of the UNIDROIT Principles.

## 11. *Spain / National Court / Doria / Not Unilex / 2002*

**Case:**<sup>674</sup> Two Spanish companies entered into an agreement for the sale of building rights on a piece of land owned by the seller. According to the contract the buyer was to pay part of the price at the time of the conclusion of the contract and the remainder once the required authorisations by the municipality were granted.

When the buyer failed to pay the remainder, notwithstanding that the authorisations had been granted, the seller brought an action requesting termination of the contract for breach or alternatively the payment of the remainder. The buyer objected that the seller had not transferred all the building rights required under the contract so that there was no longer an outstanding price to be paid.

While the court of first instance decided in favour of the buyer, the Court of Appeal overturned the verdict and decided in favour of the seller. The court however rejected the seller's request for termination and ordered the buyer to pay the remainder. Indeed, according to the court, the buyer's refusal to pay the remainder did not amount to a fundamental breach necessary for termination and in this context it referred, among others, to the ruling of the Supreme Court 1092/2008 (First Chamber) of 3 December 2008, which referred to Article 7.3.1 of the UNIDROIT Principles as well as to Articles 8:101 and 8:103 of the Principles of European Contract Law and to Article 49(1) of the Vienna Convention of International Sales of Goods, to conclude that a fundamental breach of contract is a breach which deprives the aggrieved party of what it was entitled to expect under the contract.

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<sup>673</sup> Supreme Court of Spain, Ruling 812/2007 (First Chamber), 9 July 2007.

<sup>674</sup> Supreme Court of Spain, Ruling 2919/2002 (First Chamber), 3 December 2002.



**Case:**<sup>675</sup> The worldwide organisation A is a network of member firms and is divided in two business units, A1 and A2. The cooperative entity B acts as the administrative organ of A. Every member firm and its practice partners enter into an agreement with entity B pursuant to which the member firm and/or its practice partners agree to adhere to the professional standards and principles coordinated by entity B. The relevant arbitration clause in the agreement stated that ‘[t]he arbitrator shall decide in accordance with the terms of this agreement and of the articles and bylaws of [entity B]. In interpreting the provisions of this agreement, the arbitrator shall not be bound to apply the substantive law of any jurisdiction but shall be guided by the policies and considerations set forth in the preamble of this agreement and the articles and bylaws of [entity B], taking into account general principles of equity [...]’.<sup>676</sup>

As the organisation A developed through the years, various difficulties began to strain the relationship between the business units A1 and A2. The member firm of the business unit A1 initiated arbitration proceedings against the member firms of the business unit A2 as well as entity B and asserted that both have breached their obligations under the agreement. Allegedly, A2 member firms unduly interfered with A1’s own business practices and entity B failed to coordinate the activities of member firms of the two business units and to implement guidelines to ensure compatibility among them.

The arbitral tribunal seated in Switzerland held that ‘[t]he UNIDROIT Principles are a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those “principes directeurs” that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice’.

The arbitral tribunal came to the conclusion that the members of the business unit A2 did not breach its obligations under the agreement. For this reason, it concluded that A1 member firms cannot claim any harm from the alleged breach and are not entitled to any compensation and referred in that regard to Article 7.4.2 of the UNIDROIT Principles. On the other hand, the arbitral award held that entity B was in breach of its material obligations under the agreement, which amounted to a fundamental non-performance, and applied in that regard the criteria set out in Article 7.3.1(2) of the UNIDROIT Principles. It further held that such a fundamental non-performance, in accordance with Articles 7.3.1(1) and 7.3.5(1) of the UNIDROIT Principles, justified the termination of the agreement and release of A1 member firms from all their obligations towards entity B and A2 member firms under the agreement for the future.

With respect to the request for restitution of the transfer payments already made to A2 member firms, the arbitral tribunal made a reference to Article 7.3.6(1) of the UNIDROIT Principles 1994 (ie, now Article 7.3.6) and noted that upon termination of the contract either party may claim restitution of whatever it has supplied provided that such party concurrently makes restitution of whatever it has received. However, since A1 member firms were unable to return the benefits they had received under the agreement, the arbitral tribunal finally found that they were not entitled to the restitution of the transfer payments.

<sup>675</sup> ICC, Case No 9797, Final Award, 28 July 2000.

<sup>676</sup> ASA Bulletin (2000) 18(3), 518.



## VI. Article 7.3.3: Anticipatory non-performance

### 1. *United Kingdom / Galizzi / Not Unilex / date unavailable*

**Experience of author with a negotiation on a no-names basis:**<sup>677</sup> Company A, of Portugal, entered into a shipbuilding contract for the construction of a floating production storage and offloading (FPSO) vessel with company B, of South Korea. This contract was governed by English law.

The construction of a FPSO is clearly a material and complex project, where builder and buyer assume long-term obligations to each other and bear significant commercial risks. The shipbuilding contract is a non-maritime contract, because it is insufficiently related to any rights and duties pertaining to sea commerce and/or navigation.

In this case, parties had only agreed on a fixed delivery date, without including any milestone dates in the contract. The performance by the delivery date was fundamental for company A, which had signed material contracts with clients in order to use the FPSO.

One year before the contractual delivery date, it was clear that company B could not complete the construction of the vessel by that same date and thus guarantee the correct performance of the contract. Being the contract governed by English law, company A could not terminate the contract and had to wait for the actual delivery date in order to send a notice of termination.

If the contract had been governed by the UNIDROIT Principles, company A would have had the right to send a notice of termination on the basis of Article 7.3.3 for anticipatory non-performance, a solution which appears perfectly reasonable and in line with the current needs of the shipbuilding market.

## VII. Article 7.3.5: Effects of termination in general

### 1. *Switzerland / Arbitration / Voser, Ninković / Unilex 668 / 2000*

**Case:**<sup>678</sup> The worldwide organisation A is a network of member firms and is divided in two business units, A1 and A2. The cooperative entity B acts as the administrative organ of A. Every member firm and its practice partners enter into an agreement with entity B pursuant to which the member firm and/or its practice partners agree to adhere to the professional standards and principles coordinated by entity B. The relevant arbitration clause in the agreement stated that ‘[t]he arbitrator shall decide in accordance with the terms of this agreement and of the articles and bylaws of [entity B]. In interpreting the provisions of this Agreement, the arbitrator shall not be bound to apply the substantive law of any jurisdiction but shall be guided by the policies and considerations set forth in the preamble of this agreement and the articles and bylaws of [entity B], taking into account general principles of equity.’

As organisation A developed through the years, various difficulties began to strain the relationship between the business units A1 and A2. The member firm of the business unit A1 initiated arbitration

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<sup>677</sup> Case illustration based on writer’s experience of circumstances where the UNIDROIT Principles could be applied as the governing law of the contract.

<sup>678</sup> ICC, Case No 9797, Final Award, 28 July 2000.

proceedings against the member firms of the business unit A2 as well as entity B and asserted that both have breached their obligations under the agreement. Allegedly, A2 member firms unduly interfered with A1's own business practices and entity B failed to coordinate the activities of member firms of the two business units and to implement guidelines to ensure compatibility among them.

The arbitral tribunal seated in Switzerland held that '[t]he UNIDROIT Principles are a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those "principes directeurs" that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice'.

The arbitral tribunal came to the conclusion that the members of the business unit A2 did not breach its obligations under the agreement. For this reason, it concluded that A1 member firms cannot claim any harm from the alleged breach and are not entitled to any compensation and referred in that regard to Article 7.4.2 of the UNIDROIT Principles. On the other hand, the arbitral tribunal held that entity B was in breach of its material obligations under the agreement, which amounted to a fundamental non-performance, and applied in that regard the criteria set out in Article 7.3.1(2) of the UNIDROIT Principles. It further held that such a fundamental non-performance, in accordance with Articles 7.3.1(1) and 7.3.5(1) of the UNIDROIT Principles, justified the termination of the agreement and release of A1 member firms from all their obligations towards entity B and A2 member firms under the agreement for the future.

With respect to the request for restitution of the transfer payments already made to A2 member firms, the arbitral tribunal made a reference to Article 7.3.6(1) of the UNIDROIT Principles 1994 (ie, now Article 7.3.6) and noted that upon termination of the contract either party may claim restitution of whatever it has supplied provided that such party concurrently makes restitution of whatever it has received. However, since A1 member firms were unable to return the benefits they had received under the agreement, the arbitral tribunal finally found that they were not entitled to the restitution of the transfer payments.

## 2. *Italy / Arbitration / Koh / Unilex 622 / 1996*

**Case:**<sup>679</sup> Company A from country X entered into a joint venture with company B from country Y. Mr Z became the export director of company A by a consultancy and brokerage contract concluded between company A and company B. The contract was entered into for two years and was tacitly renewable for the same period.

The contract was renewed twice, but prior to the third renewal, company A and Mr Z negotiated an exclusive agency contract. The agency contract was concluded for a period of three years and was to be tacitly renewed unless notice of non-renewal was given six months before expiry. Clause 18 of the agency contract also stipulated that '...In the case of termination by one of the parties, all the conditions of this contract shall be terminated as of the date of the notice, with the following exceptions: a) the agent shall leave all advertising and sales materials supplied by the principal at the principal's disposal on the agent's premises; b) the principal shall pay to the agent all commission

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679 *Company X v Company Y*, Final Award, CAM Case No 1795, 1 December 1996.

fees for orders received, independent of when the orders have been accepted or confirmed or when delivery takes place or the invoices are issued by the principal’.

Company A later terminated the agency contract with Mr Z. Company A later confirmed termination by a letter to company B.

With regard to the effect of termination, the tribunal made reference to Article 7.3.5 of the UNIDROIT Principles, highlighting the parties’ intentions to the contract that all conditions be terminated as of the date of notice, with the exceptions as stipulated above.

## **VIII. Article 7.3.6: Restitution with respect to contracts to be performed at one time**

### **1. *Italy / National Court / Martinetti / Not Unilex / 2017***

**Case:**<sup>680</sup> Ms A sued Dr B, a dentist, in order to obtain the termination of the contract, the refund of the payments remitted and compensation for material and non material damages suffered because of the professional misconduct by Dr B.

The court found that Dr B did not prove that the breach of contract was determined by the impossibility of the performance due to a cause non-chargeable on her. Nevertheless, the court did not consider it a grave breach and therefore rejected the claim on the termination of the contract. Likewise, the court rejected the claim for the refund of the payments remitted to Dr B, on the same grounds provided in the case previously analysed. Indeed, the judge quoted the relevant paragraph of that case, also referring to Article 7.3.6 of the UNIDROIT Principles for the above mentioned reasons.

### **2. *Italy / National Court / Martinetti / Not Unilex / 2004***

**Case:**<sup>681</sup> Mr A sued Dr B, a dentist, to obtain compensation for material (future medical expenses and refund of the payments) and non material damages suffered because of the professional misconduct of Dr B.

The court found the dental treatments performed by the dentist inadequate and decides, therefore, that Mr A is entitled to obtain compensation for non-material damages and for the future medical expenses that he will have to bear. Nevertheless, the court did not grant Mr A the refund of the payments remitted to Dr B. Indeed, the ‘secondary’ obligations were conditional on each other meaning that each party shall return what was received to the extent that the counterparty is able to fulfil its obligation. Therefore, if one of the performances cannot be returned because of its ontological nature (eg, a dental treatment), also the payment remitted by the other party cannot be returned unless it is found to be reasonable to assign a monetary value to the performance.

On this matter, the judgment quotes Article 7.3.6 of the UNIDROIT Principles that states: ‘On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of

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<sup>680</sup> Tribunale of Milano, Case No 1850/2017.

<sup>681</sup> Tribunale of Roma, Case No 197/2004.

whatever it has received under the contract. If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.’ The judge considered that such article extends to secondary obligations the rule according to which if a party’s performance becomes partially or completely impossible, the other party is accordingly free.

### 3. *Switzerland / Arbitration / Voser, Ninković / Unilex 668 / 2000*

**Case:**<sup>682</sup> The worldwide organisation A is a network of member firms and is divided in two business units, A1 and A2. The cooperative entity B acts as the administrative organ of A. Every member firm and its practice partners enter into an agreement with entity B pursuant to which the member firm and/or its practice partners agree to adhere to the professional standards and principles coordinated by entity B. The relevant arbitration clause in the agreement stated that ‘[t]he arbitrator shall decide in accordance with the terms of this agreement and of the articles and bylaws of [entity B]. In interpreting the provisions of this agreement, the arbitrator shall not be bound to apply the substantive law of any jurisdiction but shall be guided by the policies and considerations set forth in the preamble of this agreement and the articles and bylaws of [entity B], taking into account general principles of equity’.

As organisation A developed through the years, various difficulties began to strain the relationship between the business units A1 and A2. The member firm of the business unit A1 initiated arbitration proceedings against the member firms of the business unit A2 as well as entity B and asserted that both had breached their obligations under the agreement. Allegedly, A2 member firms unduly interfered with A1’s own business practices and entity B failed to coordinate the activities of member firms of the two business units and to implement guidelines to ensure compatibility among them.

The arbitral tribunal seated in Switzerland held that ‘[t]he UNIDROIT Principles are a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those “principes directeurs” that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice’.

The arbitral tribunal came to the conclusion that the members of the business unit A2 did not breach their obligations under the agreement. For this reason, it concluded that A1 member firms cannot claim any harm from the alleged breach and are not entitled to any compensation and referred in that regard to Article 7.4.2 of the UNIDROIT Principles. On the other hand, the arbitral tribunal held that entity B was in breach of its material obligations under the agreement, which amounted to a fundamental non-performance, and applied in that regard the criteria set out in Article 7.3.1(2) of the UNIDROIT Principles. It further held that such a fundamental non-performance, in accordance with Articles 7.3.1(1) and 7.3.5(1) of the UNIDROIT Principles, justified the termination of the agreement and release of A1 member firms from all their obligations towards entity B and A2 member firms under the agreement for the future.

With respect to the request for restitution of the transfer payments already made to A2 member firms, the arbitral tribunal made a reference to Article 7.3.6(1) of the UNIDROIT Principles 1994 (ie, now Article 7.3.6) and noted that on termination of the contract either party may claim restitution

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682 ICC, Case No 9797, Final Award, 28 July 2000.

of whatever it has supplied provided that such party concurrently makes restitution of whatever it has received. However, since A1 member firms were unable to return the benefits they had received under the agreement, the arbitral tribunal finally found that they were not entitled to the restitution of the transfer payments.

## **IX. Article 7.3.7: Restitution with respect to long-term contracts**

### **1. *Russia / Arbitration / Koh / Unilex 1733 / 2012***

**Case:**<sup>683</sup> The claimant, a company from country X, who was the buyer, entered into a purchase agreement with the respondent, a company from country Y, who was the seller, for technical equipment. The respondent alleged that the claimant had failed to pay for the goods in full and refused to supply a portion of the goods. The claimant countered that they had paid in full for the goods and initiated arbitral proceedings.

The tribunal found that the claimant had paid the price for the goods and that the respondent had no legal grounds to suspend its contractual obligations unilaterally. The tribunal found that the claimant was entitled to suspend the unperformed part of the contract, as the delivered parts were divisible from the undelivered parts. In making this decision the tribunal relied not only on the contracts for the International Sale of Goods, but also on Article 7.3.7(1) of the UNIDROIT Principles. The provisions state that if the performance of the contract is of a continuing nature and is divisible, restitution can only be demanded for the period after termination has taken effect. Thus, the tribunal found that the claimant was entitled to recover the price it had already paid to the respondent for the goods the respondent had not delivered.

## **X. Article 7.4.1: Right to damages**

### **1. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2012***

**Case:**<sup>684</sup> Company A and company B entered into a supply and joint venture agreement. In doing so, company A entrusted company B with the exclusive distribution of its products in the area defined in the agreement and company B undertook to acquire certain products exclusively from company A.

In the years that followed, multiple disagreements emerged between the parties. This ultimately led to company A terminating the supply and JVA and company B initiating arbitration proceedings claiming, among other things, damages from company A because the latter had failed to comply with its contractual obligation to take product liability insurance during the term of the contract and had therefore not paid any premiums.

In its award, the arbitral tribunal seated in Switzerland made reference to Article 7.4.1 of the UNIDROIT Principles (which states that any breach of a contractual obligation gives the other party a right to damages) and Article 7.4.2 of the UNIDROIT Principles (which states that for the other party

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<sup>683</sup> ICAC, Case No 111/2011, Award, 3 February 2012.

<sup>684</sup> Supreme Court of Switzerland, Case No 4A\_360/2011, Decision, 31 January 2012.

to have a right to damages it must actually have suffered damages and that there must be a causal link between the breach of the contractual obligation and those damages).

Company A appealed the award before the Swiss Supreme Court on the ground that the non-observance of its post-hearing brief by the arbitral tribunal constituted, *inter alia*, a violation of its right to be heard. The Supreme Court found that this indeed violated company A's right to be heard and annulled the award. Since it was only confronted with the question of the consequences of the non-observance, the Supreme Court did not address in its decision the arbitral tribunal's reference to the UNIDROIT Principles.

## **XI. Article 7.4.2: Full compensation**

### **1. *France / Arbitration / Sierra / Not Unilex / 2016***

**Case:**<sup>685</sup> Company A, of country X and company B, of country Y, entered into JVA by which they agreed to create two joint companies (companies C and D), in which company B would provide the technology and company A the commercial know-how in order to produce and commercialise certain products in country X. The parties agreed that the JVA would be subject to the UNIDROIT Principles, supplemented if necessary by the laws of country X.

After several years, company B filed a claim against company A, with the ICC. Company B claimed that company A incurred in several breaches, which caused two types of damages as a result of the compound effect of the breaches: (1) yearly losses of earnings before interest, taxes, depreciation, and amortization (EBITDA) (profitability) in the joint venture; and (2) deterioration in the value of the joint venture as an ongoing business. Hence, company B filed a global claim against company A.

The arbitral tribunal held that a global claim does not necessarily fail for lack of causal link between the breaches and the alleged harm. Under the tribunal's award, 'the existence of the necessary causal link requires the evidence that the overall effect of the established breach has caused the harm for which compensation is sought. Otherwise, the harm cannot be found to be the result of the non-performance as required by article 7.4.2 of the UNIDROIT Principles'. Furthermore, the tribunal held that even if company A only breached certain obligations, if those specific breaches were found to be dominant cause of damages, the global claim could prevail.

The tribunal held that company A did incur in certain breaches. However, it said breaches did not play a dominant role in causing the damages argued by company B, and therefore were not the dominant cause of company B's alleged damages.

### **2. *Spain / National Court / Doria / Not Unilex / 2014***

**Case:**<sup>686</sup> A Spanish individual claims, as buyer, against a real estate developer company, as seller, for termination of a sale and purchase agreement of a property for breach of the latter, and compensation for moral damages. The property was sold as free from liens and encumbrances and was, therefore, not delivered to the buyer. The Court of Appeal's ruling, by reference to Article 7.4.2

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<sup>685</sup> ICC, Case No 18795/CA/ASM (C-19077/CA).

<sup>686</sup> Court of Appeal of Granada (Spain), Ruling 196/2014, 21 July 2014.



of the UNIDROIT Principles, among other, declares the valid termination of the sale and the buyer's right to compensation not only for all amounts paid but also for moral damages due to the wilful misconduct of the seller and the anxiety disorder caused to the buyer, confirming the ruling handed down by the judge of first instance.

### 3. *Spain / National Court / Doria / Not Unilex / 2013*

**Case:**<sup>687</sup> A Spanish trade union claimed against a Spanish bank based on breach of fundamental rights and public freedom as a result of the bank not granting an employee the credit of working hours to be used for union representation purposes.

The interest of this ruling of the Fourth Chamber of the Spanish Supreme Court (the chamber which deals with social and employment or labour-related matters) is that, when determining the right to compensation for moral damages it refers to the more open criteria of the Supreme Court and, specifically to the application of such compensation to breach of contracts and not only to torts as provided for in the UNIDROIT Principles (although not mentioned specifically, in Article 7.4.2), as stated in the First Chamber of the Supreme Court Ruling 366/2010 of 15 June 15 June 2010 mentioned below (Compiled Summaries case XI, 7 under article 7.4.2 of the UNIDROIT Principles).

### 4. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2012*

**Case:**<sup>688</sup> Company A and company B entered into a supply and joint venture agreement. In doing so, company A entrusted company B with the exclusive distribution of its products in the area defined in the agreement and company B undertook to acquire certain products exclusively from company A.

In the years that followed, multiple disagreements emerged between the parties. This ultimately led to company A terminating the supply and joint venture agreement and company B initiating arbitration proceedings claiming, among other things, damages from company A because the latter had failed to comply with its contractual obligation to take product liability insurance during the term of the contract and had therefore not paid any premiums.

In its award, the arbitral tribunal seated in Switzerland made reference to Article 7.4.1 of the UNIDROIT Principles (which states that any breach of a contractual obligation gives the other party a right to damages) and Article 7.4.2 of the UNIDROIT Principles (which states that for the other party to have a right to damages it must actually have suffered damages and that there must be a causal link between the breach of the contractual obligation and those damages).

Company A appealed the award before the Swiss Supreme Court on the ground that the non-observance of its post-hearing brief by the arbitral tribunal constituted, *inter alia*, a violation of its right to be heard. The Supreme Court found that this indeed violated company A's right to be heard and annulled the award. Since it was only confronted with the question of the consequences of the non-observance, the Supreme Court did not address in its decision that the arbitral tribunal's reference to the UNIDROIT Principles.

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687 Supreme Court of Spain, Ruling 279/2013 (Fourth Chamber), 2 February 2013.

688 Supreme Court of Switzerland, Case No 4A\_360/2011, Decision, 31 January 2012.



## 5. *Spain / National Court / Doria / Not Unilex / 2011*

**Case:**<sup>689</sup> Two Spanish individuals claimed against a travel agency for damages and moral damages suffered for breach of the obligations of the agency as intermediary in the sale of airplane tickets for the Madrid to Sydney journey, for the lack of confirmation of the Bangkok to Sydney in business class, which determined that they had to travel in economy class and which also obliged them to confirm in Sydney the return flight in business.

This ruling of the Court of Appeal, based on the prior ruling of the Spanish Supreme Court 366/2010 of 15 June, which refers to Article 7.4.2 of the UNIDROIT Principles, overrules the previous decision of the judge of first instance and declares the right to compensation for moral damages in the case at hand.

## 6. *Poland / National Court / Wardynski, Przygoda / Not Unilex / 2010*

**Case:**<sup>690</sup> The claimants sought compensation from the organiser of their holiday for the non-pecuniary damage they suffered due to the improper performance of the travel contract (so-called ‘wasted holiday claim’).

The Supreme Court discussed whether the relevant Polish statute allowed the award of such damages. It ruled that it did. In its reasoning, the court made reference to UNIDROIT Principles indicating that pursuant to their Article 7.4.2, the aggrieved party was entitled to full compensation for harm suffered as a result of the non-performance. The court explained that such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm. Such harm may be non-pecuniary and could include emotional distress or physical suffering, among other matters.

## 7. *Spain / National Court / Doria / Not Unilex / 2010*

**Case:**<sup>691</sup> In January 2002, a Spanish individual purchased from four other individuals all the quotas of the Spanish company Fast English SL, a franchisee of Open Master Spain SA. The price was paid part in cash and the rest by the assuming debt from a loan granted to the target company by the sellers. The sellers did not disclose to the buyer that since 2000 the franchisor was in a difficult situation. In February 2002, the franchisor’s critical situation was made public and on May 2002 the latter finally filed for bankruptcy proceedings.

The buyer started legal proceedings against the four sellers of the quotas claiming for indemnification, including the payment not only of the purchase price but also for the amounts invested in the franchisee company and moral and physical damages suffered during the course of the closure of the franchisee company, which resulted in psychological consequences and impairment in functioning.

The Spanish Supreme Court, considering the existence of wilful misconduct of the sellers which was already declared in the ruling of the court in first instance, granted the moral damages suffered

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689 Court of Appeal of Navarra (Spain), Ruling 283/2011, 16 December 2011.

690 Supreme Court of Poland, Case No III CZP 79/10, Resolution, 19 November 2010.

691 Supreme Court of Spain, Ruling 366/2010 (First Chamber), 15 June 2010.

by the claimant which were denied in the judgment of the Court of Appeal. The decision of the Supreme Court is based not only on Article 1107 of the Spanish Civil Code ('[...] In the event of wilful misconduct the debtor shall be liable for all damages which are known to have arisen from the failure to perform the obligation') but with express mention to the inclusion of moral damages (also in breach of contracts) in the compensation, referring also in its reasoning to such effect to Article 7.4.2 of the UNIDROIT Principles.

## 8. *Switzerland / Arbitration / Moses / Unilex 1061 / 2001*

**Case:**<sup>692</sup> Company A is in the business of manufacturing and supplying industrial equipment. Company A contracted with company B for the delivery of industrial equipment at company B's location. The agreement between company A and company B detailed the time and place of delivery for the manufacturing equipment. The agreement further emphasised that the equipment needed to be delivered at the specified time because time was of the essence.

Company A never delivered the equipment leading to company B's failure in operating its business. Company A was fully aware of the importance of the industrial equipment to company B's business. The tribunal decided, reasoning in part on Article 7.4.2 of the UNIDROIT Principles, that company B was entitled to full compensation based on company A's failure to meet contractual requirements.

## 9. *Switzerland / Arbitration / Voser, Ninković / Unilex 668 / 2000*

**Case:**<sup>693</sup> The worldwide organisation A is a network of member firms and is divided in two business units, A1 and A2. The cooperative entity B acts as the administrative body of A. Every member firm and its practice partners enter into an agreement with entity B pursuant to which the member firm and/or its practice partners agree to adhere to the professional standards and principles coordinated by entity B. The relevant arbitration clause in the agreement stated that '[t]he arbitrator shall decide in accordance with the terms of this agreement and of the articles and bylaws of [entity B]. In interpreting the provisions of this agreement, the arbitrator shall not be bound to apply the substantive law of any jurisdiction but shall be guided by the policies and considerations set forth in the preamble of this agreement and the articles and bylaws of [entity B], taking into account general principles of equity'.

As organisation A developed over the years, various difficulties began to strain the relationship between the business units A1 and A2. The member firm of the business unit A1 initiated arbitration proceedings against the member firms of the business unit A2 as well as entity B and asserted that both have breached their obligations under the agreement. Allegedly, A2 member firms unduly interfered with A1's own business practices and entity B failed to coordinate the activities of member firms of the two business units and to implement guidelines to ensure compatibility among them.

The arbitral tribunal seated in Switzerland held that '[t]he UNIDROIT Principles are a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those "principes directeurs" that have enjoyed universal acceptance and,

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<sup>692</sup> ICC, Case No 9950 Award, June 2001.

<sup>693</sup> ICC, Case No 9797, Final Award, 28 July 2000.

moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice’.

The arbitral tribunal came to the conclusion that the members of the business unit A2 did not breach its obligations under the agreement. For this reason, it concluded that A1 member firms cannot claim any harm from the alleged breach and are not entitled to any compensation and referred in that regard to Article 7.4.2 of the UNIDROIT Principles. On the other hand, the tribunal held that entity B was in breach of its material obligations under the agreement, which amounted to a fundamental non-performance, and applied in that regard the criteria set out in Article 7.3.1(2) of the UNIDROIT Principles. It further held that such a fundamental non-performance, in accordance with Articles 7.3.1(1) and 7.3.5(1) of the UNIDROIT Principles, justified the termination of the agreement and release of A1 member firms from all their obligations towards entity B and A2 member firms under the agreement for the future.

With respect to the request for restitution of the transfer payments already made to A2 member firms, the arbitral tribunal made a reference to Article 7.3.6(1) of the UNIDROIT Principles 1994 (ie, now Article 7.3.6) and noted that on termination of the contract either party may claim restitution of whatever it has supplied provided that such party concurrently makes restitution of whatever it has received. However, since A1 member firms were unable to return the benefits they had received under the agreement, the arbitral tribunal finally found that they were not entitled to the restitution of the transfer payments.

## 10. Italy / Arbitration / Rojas Elgueta / Unilex 622 / 1996

**Case:**<sup>694</sup> A dispute arose when A, the principal, terminated a commercial agency contract with B, the agent, due to B’s failure to perform. B claimed that the termination was unlawful and instituted arbitration proceedings to recover pecuniary loss and damages caused by emotional distress from the termination.

The arbitral tribunal applied Article 7.4.2 of the UNIDROIT Principles and clarified that a company is entitled to claim pecuniary losses. However, compensation for non-material harm, such as emotional distress, is only awarded when concerning natural persons (individuals). This is demonstrated by the fact that compensation for non-material harm is only awarded in cases that concern types of harm that can only happen to a natural person, such as of ‘loss of certain acts of life’ or of ‘aesthetic prejudice’ or of ‘health’, ‘aesthetic’ or ‘biological’ damage. Given that the agent is a company and not a natural person, the tribunal found that it could not be awarded compensation on grounds of emotional suffering or distress.

## XII. Article 7.4.3: Certainty of harm

### 1. Mexico / Arbitration / Rojas Elgueta / Unilex 1149 / 2006

**Case:**<sup>695</sup> B, a distributor from country Y, struck a one-year exclusive distribution agreement with A, a grower from country X. A agreed to supply a specific amount of squash and cucumbers exclusively to

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<sup>694</sup> Camera Arbitrale Nazionale ed Internazionale di Milano, Case No A-1795/51, Award, 1 December 1996.

<sup>695</sup> Centro de Arbitraje de México (CAM), Award, 30 November 2006.

B for distribution on country Y's market against a commission. B instituted arbitral proceedings after A failed to deliver the specified goods and violated the exclusivity agreement. B sought damages for the undelivered goods and the contractual penalty for breaching the exclusivity clause.

In the opinion of the arbitral tribunal, B was able to demonstrate, with a high degree of certainty, the amount, foreseeability, and connection of the harm suffered due to A's failure to perform. However, the contract did not contain any specifics that could help determine a precise amount and B failed to substantiate an amount for the penalty. Since the amount of the penalty could not be established with a sufficient degree of certainty, the tribunal determined it on a discretionary basis according to Article 7.4.3(3) of the UNIDROIT Principles.

## 2. *France / Arbitration / Moses / Unilex 658 / 1997*

**Case:**<sup>696</sup> Company A is a business manufacturing televisions. Company A engages company B in a contract for company B to supply company A with a hardware component for company A's televisions. Company A wishes to sell the new televisions it will produce after company B supplies the necessary component. Company B is fully aware of company A's intentions.

Company B never performs its contract with company A and meanwhile another company enters the market and sells the televisions that company A intended to sell. The dispute between A and B goes to arbitration.

Although company A could still have obtained the component from a third source and damages were possibly not fully calculable, the tribunal – relying in part on Article 7.4.3 of the UNIDROIT Principles – decided that the damages were still reasonably certain to ascertain. The tribunal further reasoned that company A was entitled to damages since company B's lack of performance caused company A a loss of opportunity to realise a profit in the market.

## 3. *Italy / Arbitration / Rojas Elgueta / Unilex 654 / 1996*

**Case:**<sup>697</sup> A, the main contractor and B, the subcontractor, entered into a contract for the supply, installation, and maintenance of electrical works. Despite completion of work by B, A withheld sums due and refused to release the performance bonds which had been issued. B, therefore, requested the release of those bonds and claimed damages. A counterclaimed damages which arose from the delayed completion of work, alleging that the 20-month delay was due to several failures to perform by B that amounted to gross mistakes.

According to the tribunal, the subcontractor's performance amounted to a 'gross mistake' under the generally accepted definition given by the UNIDROIT Principles, since its conduct violated fundamental rules of the article and it repeatedly and continuously failed to perform, in a timely manner, important parts of its obligation. The tribunal therefore found that A was entitled to obtain compensation for the damages it suffered as a result of B's failures.

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696 ICC, Paris 8264, Award, April 1997.

697 ICC, Rome 5835, Award, June 1996.

Nonetheless, the tribunal clarified that the damages claimed by A arose from A's manpower disruption caused by B's delay, hence falling outside the categories of damages which can be established in an arithmetically satisfactory manner.

The law of the contract did not provide for the factors to be taken into consideration by the court when assessing the amount of damages in case they cannot be numerically established. Therefore, the tribunal, in accordance with Article 7.4.3(3) of the UNIDROIT Principles, determined the damages on a discretionary basis.

### **XIII. Article 7.4.4: Foreseeability of harm**

#### **1. Colombia / Arbitration / Rojas Elgueta / Unilex 700 / 2000**

**Case:**<sup>698</sup> Company A, following a public tender, concluded an agreement with B pursuant to which A was to sell electrical energy to B so that the latter could ensure the public supply of electricity in a part of country X. The agreement, however, remained unperformed and A initiated arbitration proceedings seeking damages for B's illegitimate breach of the contract.

The arbitral tribunal clarified that, for compensation to be awarded, the loss suffered needs to be not only direct but also foreseeable, being included in the definition of 'foreseeable losses', according to Article 7.4.4 of the UNIDROIT Principles, all those which may fairly and reasonably be considered either arising naturally from the breach itself, according to the usual course of things, or that have been within the contemplation of the party as associated with its breach.

Following this reasoning, the tribunal held that it was clear to B that the essential objective of A, in taking part in the public tender and in entering into the contract, was to obtain a return on its investment, and hence B was, in any case, able to foresee the consequences of its breach.

### **XIV. Article 7.4.5: Proof of harm in case of replacement transaction**

#### **1. Russia / Arbitration / Petrachkov, Bekker / Unilex 623 / 1997**

**Case:**<sup>699</sup> The claimant, a Russian company, filed a lawsuit against a defendant, a Hong Kong company, for collection of an advance payment for the goods, which were not delivered, and incurred interests. The defendant alleged that due to the fact that the claimant did not perform its payment obligations in full, the defendant had to make replacement transactions with two contractors and the price which the defendant had to pay to two contractors was higher than the advance payment under the contract with the claimant. The arbitral tribunal accepted the position of the defendant.

The court's reasoning is explained below.

As the parties in the contract did not agree on the law applicable to the case, during the arbitration proceedings the parties agreed to resolve the dispute in accordance with the UNIDROIT Principles;

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<sup>698</sup> ICC, Case No 10346, Award, Barranquilla, 2000.

<sup>699</sup> ICAC, Case No 116/1996, Award, 20 January 1997.

in accordance with the article 1.4 of the UNIDROIT Principles they are subject to application as the law governing the contract.

The plaintiff did not fulfil his obligations for the advance payment of goods within the terms established by the contract and in the additional terms provided by the defendant, which in accordance with Article 7.3.1 of the UNIDROIT Principles granted the defendant with the right to terminate the contract and, in order to reduce the damage, make a replacement transactions for the sale of goods, which were not paid for by the plaintiff, with other buyers under the terms of the contract. As a result of termination of the contract and making two replacement transactions by the respondent, both disputing parties suffered damages: the plaintiff – in the amount of the advanced payments, and the defendant – in the amount representing the difference between the contract price and the price of the replacement transactions. The damage suffered by both parties is proved. However, the plaintiff's claim to return to him an advance payments is not justified, while the plaintiff's reference to Article 7.3.6 of the UNIDROIT Principles cannot be taken into account, because the right of the defendant to receive compensation for damage is provided for in Article 7.4.5 of the UNIDROIT Principles.

Taking into account that the claim for compensation of damages suffered by the defendant is not formalised as a counterclaim, but rather presented in the form of statement of defence against the plaintiff's claims and, as it follows from the materials, the damage suffered by the defendant exceeded the damages suffered by the plaintiff, the ICAC does not find grounds for satisfaction of the claim.

## **XV. Article 7.4.6: Proof of harm by current price**

### **1. *China / Arbitration / Moses, Rojas Elgueta / Unilex 1441 / 2004***

**Case:**<sup>700</sup> B, a trading company, entered into a contract with A, a steel importer, for the supply of rolled steel sheets. Shortly before the agreed time of delivery, B informed A that it would not be in a position to fulfil its contractual obligations since it had to deliver the goods to another customer under a contract it had previously concluded with the latter. Consequently, A commenced arbitral proceedings requesting compensation for the losses suffered as a result of B's failure to perform.

In the view of the tribunal, whenever a replacement transaction is not possible, compensation has to be calculated with regard to the price current at the time of termination of the contract, which, in light of Article 76 of the CISG and Article 7.4.6 of the UNIDROIT Principles, corresponds to the time of avoidance or to the time, in the words of the tribunal, 'when the repudiation of it by one of the parties is accepted by the other party', because until such time the contract might well not be avoided.

### **2. *France / Arbitration / Rojas Elgueta / Unilex 655 / 1996***

**Case:**<sup>701</sup> A and B entered into a contract for the supply of a given quantity of rice. Even though all the required formalities had been carried out, B failed to provide the goods as agreed. A, therefore, commenced arbitral proceedings seeking damages.

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<sup>700</sup> China International Economic and Trade Arbitration Commission, Case No 0291-1, Award, September 2004.

<sup>701</sup> ICC, Case No 8502, Award, Paris, 1996.



The arbitral tribunal found that since B failed to comply with its obligations under the contract and its failure was not legally justified, A was entitled to compensation. In calculating the amount of the compensation the tribunal clarified, referring both to Article 76 of the CISG and Article 7.4.6 of the UNIDROIT Principles, that, when a replacement transaction is not possible, the damaged is entitled to recover the difference between the ‘contract price’ (the price determined by the contractual provisions agreed by the parties, which include the initial contract and all the subsequent amendments) and the relevant ‘market price’ (the price charged at the place where the contract should have been performed or the place that appears reasonable to take as a reference) at the time the contract was terminated.

## **XVI. Article 7.4.7: Harm due in part to aggrieved party**

### **1. *Switzerland / Arbitration / Moses / Unilex 1179 / 2007***

**Case:**<sup>702</sup> Person A entered into an agreement with person B. A and B are both scientists and engaged with each other to undertake a joint venture to produce a new pharmaceutical drug. The agreement detailed the various responsibilities each party owed to one another and was otherwise void of any fraud or inequitable terms.

After the agreement’s execution, disagreement arose between the parties. Person A accused person B of not fulfilling its obligations in obtaining the necessary licensing requirements to market, distribute, and patent the new drug. Meanwhile, before and during the dispute, person A neglected to provide person B with the required information for person B to fulfil their obligations under the agreement.

Person B’s actions, however, showed that they were unnecessarily withholding performance of certain contractual obligations that were within their powers to control. In light of this, the tribunal reasoned, under Article 7.4.7 of the UNIDROIT Principles, that person B should be required to pay damages to person A for those damages that could be attributed to person B’s failure to perform. With respect to the damages that person B sought – but was responsible in causing – the arbitral tribunal decided that they were not entitled to an award of those damages.

### **2. *Russia / Arbitration / Rojas Elgueta, Petrachkov, Bekker / Unilex 1041 / 2003***

**Case:**<sup>703</sup> Company B purchased components of ‘high sensitivity’ from company A, for incorporation into a final product. Company B discovered that the products company A delivered were not as specified in the contract. The products were defective and did not possess the specified characteristics for incorporation into its final products. Company B commenced arbitral proceedings claiming damages due to non-conformity. Company A did not contend that the goods were not defective. Instead, company A argued that company B did not thoroughly inspect the goods before they were delivered or notify company A of the non-conformity in a timely manner and was therefore not entitled to damages.

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702 World Intellectual Property Organization Arbitration and Mediation Center (Geneva), Award, 25 January 2007.

703 ICAC, Case No 97/2002, Award, 6 June 2003.



According to the tribunal, notwithstanding the ‘high sensitivity’ of the goods delivered, the parties did not set out the procedure and methods of inspection of said goods in the contract. Nor did the contract contain any reference to the technical documentation required by standards set by the international organisations.

The tribunal found that, even if company B was a professional participant in the market of such goods and was well aware of the requirements set for finished products in which the purchased goods were used, yet company B did not use due care either when making the contract or when performing it and acted with negligence. Therefore, the tribunal reasoned, partly under Article 7.4.7 of the UNIDROIT Principles, that B had also contributed to the harm and that the parties were to be considered jointly liable.

### 3. *France / Arbitration / Rojas Elgueta / Unilex 964 / 2003*

**Case:**<sup>704</sup> Company B contracted with company A, a manufacturer, for the sale of goods to be delivered directly to company B’s customers. Some customers of company B refused to pay for the goods delivered by company A due to non-conformity. Company B contacted company A, urging it to contact company B’s customers and find a solution for the non-conforming goods. Company A did no such thing. Company A requested company B to pay for the delivered goods and the cost of the raw materials used for manufacturing. Company B refused to make the payments, and company A responded by initiating arbitral proceedings.

With respect to the request for payment of the goods already delivered, the tribunal held that, despite the alleged defects of the goods, Company B’s customers were able to use the goods for other purposes and eventually paid company B the full price. Thus, B’s refusal was not justified, and A was entitled to obtain payment.

With respect to the request for payment of the raw materials, the tribunal invoked Article 7.4.7 of the UNIDROIT Principles. The tribunal found that company A and company B’s lack of cooperation in solving the claims made by B’s customers had significantly contributed to the harm. Thus, that uncooperative behaviour prevented each of them from requesting damages related to the cost of the raw materials.

### 4. *Russia / Arbitration / Rojas Elgueta / Unilex 670 / 1997*

**Case:**<sup>705</sup> The seller and the buyer entered into a contract for the sale of goods, which required the buyer to make a payment in advance. However, the seller was not able to deliver the promised goods in time due to a delay in the clearance of the goods in customs. As a consequence, the buyer initiated arbitral proceedings for payment of interest on the amount it had paid in advance.

According to the tribunal, the delay at customs was partially caused by the actions of the buyer. The buyer, in fact, had not provided the seller with the documentation required for customs clearance in a timely manner. Therefore, the tribunal only awarded part of the interest asked by the buyer. In doing so, the tribunal referred to the UNIDROIT Principles, Article 7.4.7, which states whenever the harm suffered by the aggrieved party is in part due to an act or an omission of that same party, that party has to bear concurrent liability.

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704 ICC, Case No 12111, Award, 3 October 2003.

705 ICAC, Case No 225/1996, Award, 2 September 1997.

## **XVII. Article 7.4.8: Mitigation of harm**

### **1. *Spain / National Court / Doria / Not Unilex / 2015***

**Case:**<sup>706</sup> From 2000–2003, company A expanded its distribution of energy into another market in Spain by entering into supply agreements with a number of customers in the new market. Once it had concluded all the works of the infrastructure and installations and obtained the necessary licences, company A requested company B to use of its distribution network to deliver the service to its customers, based on the regulations in force given that company B was the owner of the only existing network in the area. Company B denied access to company A, in spite of the resolutions of the National Energy Commission (and the later rulings of the administrative courts) acknowledging company A's right to do so. In order to not to incur penalties with its customers, the latter decided to provide the service by using diesel generator equipment rented from third parties, which implied a considerable over cost in respect of the access to company B's network. Company B offered to company A to render the services to the latter's customers through its network but using the infrastructure and installations constructed by company A, which was rejected by this company.

In 2003, company B sold its network to another company, which finally granted company A access to the network.

In 2010, company A filed a claim before the Spanish courts against company B for compensation of the over cost incurred in delivering the service to its customers. Company B opposed the claim alleging, among other grounds, the fact that the attitude of company A did not mitigate the harm, as the provisional solution offered by company B would have been less costly than the one company A adopted. The Spanish Supreme Court ruled that the amount claimed by the latter (which was a matter of dispute in the previous instances) should be paid by company B, rejecting the arguments of this company on the lack of mitigation, as it would have been illegitimate to prevent company A from servicing its customers and that the solution of renting diesel generators was reasonable. The Supreme Court in its ruling referred also to the obligation of the damaged party to mitigate the harm as contemplated in Article 17 of the Spanish Insure Contract Act, Article 77 of the Convention of Vienna of International Sale of Goods, Article 7.4.8 of the UNIDROIT Principles and Article 88 of the Uniform Law for the International Sales of Goods.

### **2. *France / Arbitration / Rojas Elgueta / Unilex 1661 / 2006***

**Case:**<sup>707</sup> A, the seller, entered into a sales contract with B, the buyer, for certain goods to be delivered to the port of country X. However, with the goods in transit, B sold them to a third company, C. Upon delivery of the goods, C received two conflicting bills of lading for the same shipment, a clean bill and a bill mentioning defects as per an independent surveyor's report. A dispute then arose between the parties in relation to the quality and conformity of the goods. Following the dispute the parties signed a settlement agreement, upon B's proposal.

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<sup>706</sup> Supreme Court of Spain, Ruling 123/2015 (First Chamber), 4 March, 2015.

<sup>707</sup> ICC, Case No 13009, Award, 2006.

After the settlement, A instituted arbitral proceedings claiming that it had been forced to settle due to economic duress. A claimed, among other things, that B had failed to mitigate its losses entitling A to damages.

Indeed, before commencing arbitration proceedings, A had initiated civil and criminal court proceedings against B and C, in which B had endorsed C's position. In light of these facts, the arbitral tribunal rejected all the claims made by A. The tribunal observed that, according to Article 7.4.8 of the UNIDROIT Principles, B had indeed exercised its duty to mitigate losses by endorsing C's position. It is common judicial practice that a defendant (B in the case at hand) joins its contractor (C in the case at hand) in court proceedings.

### 3. *France / Arbitration / Rojas Elgueta / Unilex 691 / 1999*

**Case:**<sup>708</sup> A dispute arose when A, the seller, delivered and installed certain defective machinery to B, the buyer. Upon notification of the problem, A made efforts to mitigate, however, B without exploring other options, halted payments to A. B also began using the defective machinery which produced defective final goods. These defective final goods were sold to customers who ended up filing cases against B for damages from the non-conformity of the final goods.

An arbitration proceeding was instituted wherein both parties A and B, accused the other of breach of contract. B also claimed consequential damages from the non-conformity of the final goods as a result of the malfunctioning of the machinery.

The tribunal referred to Article 7.4.8 of the UNIDROIT Principles and found that B could not be granted any recovery of losses due to A's alleged breach. This is because B did not take any reasonable steps to mitigate its damage, as was demonstrated by the fact that, even after the discovery of the defects, it continued using the machinery. B did not take any serious measures to repair those defects or entertain A's offer to accommodate matters over the defective machinery.

### 4. *Argentina / National Court / Moses / Unilex 1631 / 2001*

**Case:**<sup>709</sup> Party A engaged party B to do certain irrigation work on party A's property. Party A, a landowner with agricultural land, was relying on party B's irrigation work to conduct its farming business. The agreement detailed the responsibilities and the timeline by which party B was to complete its work.

Party B negligently installed a small part of the irrigation system which caused a section of party A's crops to be destroyed. However, a good portion of the crops in that section could have reasonably been saved had party A exercised reasonable care and irrigated those crops manually.

In this action, the court, referring to Article 7.4.8 of the UNIDROIT Principles, held that party A was not entitled to recover those damages that it could have reasonably avoided because a party has a duty to mitigate losses.

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708 ICC, Case No 9594, Award, March 1999.

709 *Nadal Nicolau, Carlos A v Departamento General de Irrigación*, Suprema Corte de Justicia de la Provincia de Mendoza, Judgment, 18 September 2001.

## 5. France / Arbitration / Rojas Elgueta / Unilex 659 / 1997

**Case:**<sup>710</sup> A, the seller of certain food products, stopped delivering goods to B, the buyer, and subsequently terminated an agreement with B, as B was unable to make the payments by the agreed upon deadlines. B instituted arbitral proceedings against A claiming that delays in payment originated from the dismissal of its general manager who had set up a competing commercial relationship with A.

According to the arbitrator, the sudden, unexpected interruption of deliveries from A to B caused B harm by forcing it to adapt its manufacturing to handle the lack of deliveries from A. The arbitrator noted, however, that B neither provided proof that these difficulties lasted for a long period of time nor specified what efforts were made during these adaptations.

In the absence of proof as to the efforts and attempts made by B during the alleged year of inactivity, the arbitrator, applying Article 7.4.8 of the UNIDROIT Principles, considered that B's commercial inactivity was at least partially due to B's own actions, and that B had not taken reasonable steps to reduce the harm it suffered.

## XVIII. Article 7.4.9: Interest for failure to pay money

### 1. Russia / Arbitration / Petrachkov, Bekker / Not Unilex / 2013

**Case:**<sup>711</sup> A claimant, a Japanese company, filed a lawsuit with the ICAC against a defendant, a Russian company, for collection of an advance payment for the goods, which were delayed in delivery, contractual penalties and interests. The defendant objected, inter alia, against penalties and interests.

The court's reasoning is explained below.

On the question of applicable law, the ICAC stated that this issue is resolved by the parties in the contractual provision containing the arbitration clause. In both versions the parties have chosen the law of the Russian Federation as the applicable law.

Since the subject of the contract was the supply of goods by the Russian company to the Japanese company, the ICAC found that the relations of the parties to the contract, in terms of subject matter and involving parties, were covered by the CISG, to which the Russia is a party.

The ICAC stated that in the hearing the defendant acknowledged the claimant's right to claim interests, but at the same time defendant requested to reduce the amount of interests on the basis of Article 333 of the Civil Code of the Russian Federation.

The tribunal considered such a petition of the defendant was satisfied on the following grounds.

First, the regulation of the collection of annual interests accrued on monetary obligations in Article 78 of the CISG and in Article 395 of the Civil Code of the Russian Federation has significant differences. The CISG provides for recovery of damages above the amount of interest, and not in part, exceeding the amount of interests, as it is specified in the Civil Code. The generally accepted

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<sup>710</sup> ICC, Case No 8817, Award, December 1997.

<sup>711</sup> ICAC, Case No 218/2012, Award, 1 July 2013.

approach in international commercial practice, reflected in Article 7.4.9(1) of the UNIDROIT Principles, is that a debtor who failed to pay a sum of money shall pay interest, regardless of whether he is released from responsibility for failure to perform a payment.

Considering the above and relying on clause 1 of Article 84 of the CISG and paragraph 1 of Article 395 of the Civil Code of the Russian Federation, the ICAC considered that the claimant's claim to recover interest from the defendant was reasonable and justifiable.

## 2. *Switzerland / Arbitration / Voser, Ninković / Not Unilex / 2011*

**Case:**<sup>712</sup> Company A from country X entered into a contract for the supply of a commodity with company B from country Y, which provided for several deliveries and a purchase price formula with fixed and variable parameters. The contract was governed by 'the substantive law of Switzerland'. A few days later, company B entered into a contract with a third company, C for the onward sale of the commodity. On the date the first shipment was to be loaded, the price of the commodity collapsed and consequently the purchase price was minimal and even negative in respect of certain deliveries. Since company A did not deliver the agreed quantities, company B could not fulfil its obligations towards company C. Company B initiated arbitration proceedings against company A claiming loss of profit, damage to its reputation, reimbursement of contractual penalties paid to company C and compensation for consultancy and legal fees and the time spent in connection with attempts to remedy the situation.<sup>713</sup>

The arbitral tribunal seated in Switzerland addressed the issue of hardship. It stated that under the CISG parties are free to include in their contracts hardship clauses, which 'address an unforeseen shift in the economic equilibrium, not unforeseen [factual, legal, etc] impediments' [emphasis omitted].<sup>714</sup> After pointing out that such a distinction is not always made in commercial practice, the arbitral tribunal stated that the distinction was introduced to transnational commercial law by the UNIDROIT Principles, which may be used, according to its preamble, as an interpretation help or as a supplement to international uniform law instruments. Consequently, the tribunal applied the requirements as set out in Article 6.2.2 of the UNIDROIT Principles. After it found that these requirements were met, the arbitral tribunal addressed the effects of hardship as set out in Article 6.2.3 of the UNIDROIT Principles and found that the requirements of Article 6.2.3 were met as well since the parties failed to reach an agreement during their negotiations. For this reason, according to Article 6.2.3(3) of the UNIDROIT Principles, it was up to the arbitral tribunal to take the adequate measure pursuant to subsection (4) of the same article. The tribunal held that it enjoys substantial discretion in this regard and decided that adaptation, rather than termination, was both 'reasonable' and 'fair'.

In the context of the loss of profit claim, the tribunal applied interest at the statutory rate provided for in Swiss law, as requested by company B, starting from the time when the loss occurred. Yet, the arbitral tribunal mentioned in an aside that it saw much merit in the uniform law approach taken by some arbitral tribunals which have applied, in light of CISG's silence on the issue of interest rates, the rate provided for in Article 7.4.9 of the UNIDROIT Principles.

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712 ICC, Case No 16369, Final Award, 2011.

713 Albert Jan van den Berg, *Yearbook Commercial Arbitration Vol XXXIX* (Kluwer 2014) 39, 170 et seq.

714 *Ibid* at 201.

### 3. *Serbia / Arbitration / Rojas Elgueta / Unilex 1442 / 2008*

**Case:**<sup>715</sup> Company A entered into a contract with company B for the purchase of white crystal sugar from country X's 2002 harvest. The contract required company B to provide a national certificate of origin, known as an 'EUR 1', for the sugar. The certificate is issued by the customs administration of country X and gives the sugar deliveries favoured treatment without import duties. A dispute arose when company B was unable to acquire the certificate for the last quarter of the sugar deliveries. As a consequence, company A paid import duties plus VAT at the border to import the sugar.

The arbitral tribunal found that company B was in breach of its contractual obligations by failing to deliver a portion of the sugar order with a certificate of origin. The tribunal awarded company A compensation for payment of the import duties plus interest. The tribunal based its calculation of interest on Article 9:508 of the Principles of European Contract Law, Article 7.4.9 of the UNIDROIT Principles and a Statistical Report of the European Central Bank from December 2007, which highlighted changes in the interest rate, EURIBOR, for the relevant period.

### 4. *Poland / National Court / Wardynski, Przygoda / Not Unilex / 2008*

**Case:**<sup>716</sup> Company A, a Germany entity, and company B, a Polish entity, were in dispute regarding an international sales of goods contract. A was seeking damages for breach of contract, together with interest. The Supreme Court had to decide which rate of interest applied. It ruled that this had to be determined according to the *lex contractii* stipulated by the conflict of laws rules for the seat of the court.

The justification of the judgment showed that B tried to rely on UNIDROIT principles (although the specific provision was not mentioned) to justify its position on the level of interest.

The court ruled that private codifications, such as the UNIDROIT Principles or the of European contract law, may not be used, even as a secondary source of law, that they are external to CISG, and that they are not relevant for a state court which must rule based on the law. Had the court applied the applicable Articles 7.4.9 and 7.4.10 of the UNIDROIT Principles, it would have assessed the rate of applicable interest differently.

### 5. *Russia / Arbitration / Rojas Elgueta / Unilex 1475 / 2008*

**Case:**<sup>717</sup> A dispute arose when a buyer, A, of certain goods received only a portion of their order, with some goods being defective, from a seller, B, after making the entire payment in advance as per the terms of the contract. A requested a portion of the total price to be reimbursed by B along with the payment of the contractual stipulated penalty for partial delivery. After B refused, A instituted arbitral proceedings asking for the reimbursement of the price, the contractual penalty, and an interest payment for the delay in payment. However, B countered that its failure to perform was excused by an exempting event.

The tribunal ruled that B faced an exempting event and was excused from paying the contractual stipulated penalty. However, the tribunal ruled that B did have to make the interest payment. This

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715 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Case No T-9/07, Award, 23 January 2008.

716 Poland Supreme Court, 9 October 2008, Case No V CSK 63/08. Published in OSNC 2009/10/143.

717 ICAC, Case No 13/2007, Award, 13 May 2008.



conclusion was based on the generally accepted international commercial practice of interest being due even if the delay in payment is the consequence of force majeure. Article 7.4.9 of the UNIDROIT Principles supports the tribunal's view.

## 6. *Russia / Arbitration / Petrachkov, Bekker / Unilex 1077 / 2004*

**Case:**<sup>718</sup> A claimant, a Russian company, filed a lawsuit with the ICAC against a defendant, an Indian company, for collection of indebtedness for the goods, which were not delivered, and incurred interest. The arbitral tribunal ruled in favour of the claimant.

The court's reasoning is explained below.

With regard to the amount of interests, the ICAC stated that in the 1980 CISG (Article 78) the interest rate and the procedure for calculating them were not expressly determined. In Article 395 of the Civil Code of the Russian Federation stipulates that the amount of interest shall be determined as the current interest rate at the place of location of the creditor in the amount of the banking interest rate on the day of fulfilment of the monetary obligation. In case of recovering of debt in court, a court may satisfy the creditor's claim based on the banking interest rate on the day of the submission of claim or on the date of the judgment. The claimant's representatives insisted on applying of the interest rate on the day of filing the claim, on 5 July 2002, the arbitral tribunal found it possible to satisfy such request.

Since there is no interest rate in Indian rupees in Russia, that is, at the location of the creditor (the claimant), the arbitral tribunal took into account the international practice applied in similar cases, reflected in Article 7.4.9(2) of the UNIDROIT Principles (1994), according to which '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, or where no such rate exists at that place, then the same rate in the state of the currency of payment'.

Considering this, the arbitral tribunal applied the interest rate as established by the Reserve Bank of India as used for short-term lendings to prime borrowers, according to the publications of the Reserve Bank of India as of date of filing the claim – 12.8 per cent per annum (2001 Report of the Reserve Bank of India for 2001–2002, official website of the Reserve Bank of India, [www.rbi.org.in](http://www.rbi.org.in)).

Based on the foregoing, the ICAC concluded that the defendant is obliged to pay interest to the claimant.

## 7. *France / Arbitration / Rojas Elgueta / Unilex 1068 / 2001*

**Case:**<sup>719</sup> Company A, a manufacturer, contracted companies B and C to promote A's products and assist in the collection of payments from A's customers. It came to A's attention that B and C had withheld part of the amount due to A. In response, A initiated arbitral proceedings against B and C, claiming the withheld amounts and accrued interest.

The arbitral tribunal awarded A the amounts due and the accrued interest. The tribunal based its calculation of interest on Article 1282 of the Italian Civil Code, and Article 7.4.9 of the UNIDROIT

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<sup>718</sup> ICAC, Case No 100/2002, Award, 19 May 2004.

<sup>719</sup> ICC, Case No 11051, Award, July 2001.

Principles, which states that ‘[i]f a party does not pay a sum of money when it falls due, the aggrieved party is entitled to interest upon that sum from the time when payment is due [...]’. In this case, the time when payment is due was from when the amounts were paid by A’s customers to B and C.

#### 8. *Switzerland / Arbitration / Voser, Ninković / Unilex 665 / 1998*

**Case:**<sup>720</sup> Company A entered into an agreement with company B for the provision of certain services to help company B win and perform a construction contract. The agreement contained a choice of law clause in favour of Swiss domestic law. Company B paid 40 per cent of the commissions, but afterwards refused to pay the balance to company A, based on allegations of bribery. Company A initiated arbitration proceedings to recover the outstanding commission, plus damages and interest.

The arbitral tribunal seated in Switzerland dismissed the allegations of corruption and ordered company B to pay the commission plus interest. In particular, in order to confirm that the claim for interest was part of the general claim for damages, the arbitral tribunal cited the author Klaus Peter Berger, according to whom ‘[f]rom a functional perspective, the interest claim in article 78 CISG, just as the one in article 7.4.9 of the Principles, and any statutory interest claim constitutes the minimum lump sum compensation for damages in areas where the creditor need not prove the actual damages incurred. It is a long-standing practice of international arbitrators, as well as of the Iran-US Claims Tribunal, to consider the interest claim as part of the general claim for damages’.<sup>721</sup>

The arbitral tribunal held that nothing in the agreement suggested that the parties intended to exclude the right to payment of interest in the event of default, and awarded company A the interest rate of five per cent provided for under Swiss law. In reaching this conclusion, it pointed out that such an exclusion of interest would have been difficult to reconcile with ‘[...] the usages of international trade which are echoed by, among others, the [CISG] or again the UNIDROIT Principles [...]’.

#### 9. *Switzerland / Arbitration / Voser, Ninković / Unilex 637 / 1995*

**Case:**<sup>722</sup> In order to perform a contract with a third party, company A from country X entered into a contract with company B from country Y for the supply of chemical fertilizer. Company B in turn applied to the supplier company C from country Z in order to obtain part of the fertilizer. Company A sent company C the packaging (bags) to be used for delivery of the fertilizer, which were manufactured by company A under company B’s instructions. As the bags did not conform to the technical rules of country Z’s chemical industry, company C could not use them and, consequently, the fertilizer were not delivered within the contractual time limit.

Company A asked company B in writing when the goods would be delivered and expressly stated that, in the absence of a clear commitment by company B, it would avoid the contract with respect to the part of the fertilizer not yet delivered. Because of company B’s generic reply, company A had to make a substitute purchase at a higher price to be able to perform under the contract with the third party. Company A commenced arbitration proceedings demanding damages, including the cost of the bags

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<sup>720</sup> ICC, Case No 9333, Final Award, October 1998.

<sup>721</sup> ICC International Court of Arbitration Bulletin (1999) 10(2), 102 et seq.

<sup>722</sup> ICC, Case No 8128, Final Award, 1995.

it had supplied to company C as well as the loss deriving from the substitute purchase. It also asked for interest at the London International Bank Offered Rate (LIBOR) plus two per cent.

The arbitral tribunal seated in Switzerland decided that company A was entitled to recover damages, including both the costs for the bags as well as the substitute purchase. Since CISG does not determine the rate of interest, the arbitral tribunal applied the average bank shortterm lending rate to prime borrowers, as provided for in Article 7.4.9 of the UNIDROIT Principles and Article 4.507 of the Principles of European Contract Law, which must be considered applicable because they constitute general principles on which CISG is based. As the rate required by company A corresponded to the bank short-term lending rate to prime borrowers, the arbitral tribunal awarded interests at the required rate.

#### **10. *Austria / Arbitration / Rojas Elgueta / Unilex 635 / 1994***

**Case:**<sup>723</sup> The seller, A, sold rolled metal sheets through a contract to the buyer, B. After receiving the first two deliveries, B sold the metal to C who then sold the sheets to a manufacturer, D. Upon arrival, D found the metal to be defective and would not accept the rest of the shipment. Prior to instituting arbitral proceedings, B sent notice to A seeking damages for the defective products. However, A claimed this notice was untimely and refused to pay damages. After A's refusal, B instituted arbitral proceedings seeking the requested damages and the accrued interest.

The tribunal ruled in favour of B and awarded damages. To decide on the payment of interest the tribunal referred to Article 7.4.9 of the UNIDROIT Principles. The article states that, in the event of failure by the debtor to pay a monetary debt, the creditor – who, as a business person, must be expected to resort to bank credit as a result of the delay in payment – should be entitled to interest at the rate commonly practiced in the creditor's country and with respect to that country's currency. The tribunal awarded interest based on the average prime rate in B's country and with respect to B's country's currency of payment.

### **XIX. Article 7.4.10: Interest on damages**

#### **1. *France / Arbitration / Rojas Elgueta / Unilex 1060 / 2001***

**Case:**<sup>724</sup> A entered into a contract with B and C for the delivery of certain goods. The contract provided for an advance payment from A which the latter promptly made. B and C, on the contrary, delivered goods not in conformity with the characteristic specified in the contract. A, therefore, sued companies B and C for damages related to their failure to perform, asking also for interest to be calculated, alternatively, from the time of the breach of the contract, or from the time of the advance payment originally made, or from the termination of the contract, or, lastly, from the date of A's request for reimbursement.

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<sup>723</sup> Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Wien, Case No SCH-4318, 15 June 1994.

<sup>724</sup> ICC, Case No 9771, Award, January 2001.

The tribunal held that, according to Article 7.4.10 of the UNIDROIT Principles, A was only entitled to obtain interest from the time of the breach of the contract, and that, in any case, A was not even able to offer any reason on why interest should have been calculated from a different starting point.

## **XX. Article 7.4.13: Agreed payment for non-performance**

### **1. *United Kingdom / National Court / Cowan / Not Unilex / 2015***

**Case:**<sup>725</sup> The court was determining appeals in two separate cases but which raised similar issues of law in relation to the English law ‘rule against penalties’ for breach of contract.

In the first case, A agreed to sell to B a controlling share in the holding company of a large advertising and marketing group. Under the agreement, in the event of breach of certain restrictive covenants, A would not be entitled to receive the final instalments of the sale price, and could be obliged to sell his remaining shares to B at a price that excluded the value of the goodwill of the business. A breached the restrictive covenants but argued that the two clauses were unenforceable penalties under English law.

In the second appeal, the case concerned A, who operated a private car park at which notices were displayed stating that failure to comply with a two-hour parking time limit would ‘result in a parking charge of £85’. B over-stayed for an hour beyond the two-hour limit, and argued that the £85 charge was an unenforceable penalty under English law.

Prior to the UK Supreme Court’s ruling in this case, the long-established principle in English law was that clauses would be held as unenforceable penalties where they imposed an obligation to pay a sum which was not a ‘reasonable pre-estimate’ at the time the contract was entered into of the loss that the other party would suffer in the event of breach of the obligation in question.

The UK Supreme Court criticised that pre-existing statement of the rule against penalties, and took the opportunity to restate the principle and its basis. In doing so, the court made several references to the UNIDROIT Principles, Article 7.4.13 (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 as ‘soft law’ by the court, 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”’.

In respect of English law, the court distinguished between primary and secondary obligations: the former being the primary obligations to be performed, the latter being obligations that are conditional on the performance or non-performance of the former – for example, an obligation to pay a sum of money in the event of a breach of a primary obligation. The rule against penalties in English law only applies to the latter, not to the former.

In relation to secondary obligations, they would be unenforceable penalties where: ‘...the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary

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<sup>725</sup> *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* (2015) UKSC 67.

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.

In considering a contractual provision against these tests, the court held that the legitimate interests of the innocent party could include wider concepts such as deterring the other party from breaching the contract, and thus could extend to amounts greater than 'pre-estimates of loss' viewed in purely compensatory terms.

## 2. *Poland / National Court / Wardynski, Przygoda / Unilex 1054 / 2003*

**Case:**<sup>726</sup> Party A and party B agree that in the event of non-performance or improper performance of the contract, party A will be entitled to contractual damages. A disagreement arose as to whether party B was obliged to pay contractual damages even if it was demonstrated that party A did not suffer any damage as a result of non-performance or improper performance of the contract by party B.

The Supreme Court discussed Polish case law and legal regulations in the legal systems of France, Germany and Switzerland, which it considered to have legal systems similar to that of Poland. The Court ruled that the debtor is obliged to pay the contractual penalty, even if he shows that the creditor did not suffer any damage. The Supreme Court made reference to the UNIDROIT Principles by pointing out that its resolution is in line with the Article 7.4.13 of the UNIDROIT Principles of 1994. According to the latter, if a contract specifies that the party that fails to perform the contract must pay the other party a certain amount in the event of non-performance, then the other party is entitled to claim this amount, regardless of the actual damage suffered. Unless otherwise stipulated, that amount might be reduced to a reasonable amount when it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances. The Supreme Court also pointed out that a similar regulation is included in Article 9.509 of the Principles of European Contract Law of 1998. Thus, the UNIDROIT Principles were referred to as one of the international bodies of legal rules supporting a view on a particular legal provision advocated by the Supreme Court. The principles were not used as an applicable law, but as a body of rules on which the Supreme Court drew and which it used to reinforce its reasoning process.

## 3. *Russia / Arbitration / Rojas Elgueta / Unilex 1196 / 2003*

**Case:**<sup>727</sup> This dispute arose from delayed payments from B, the buyer, to A, the seller. A and B's contract contained a clause providing a penalty of 0.5 per cent of the price of goods for every day payment was delayed.

When this dispute was initially brought before an arbitral tribunal, B was ordered to pay A 42 per cent of the original price of the goods as a penalty. A, however, did not receive this payment for two-and-a-half years. A instituted arbitral proceedings again against B, seeking an additional penalty for the delay in B complying with the first award. B acknowledged the payment was late, but argued that the new penalty amount that A was seeking was excessive and needed to be decreased.

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<sup>726</sup> Supreme Court of Poland, Case No III CZP 61/03, 6 November 2003.

<sup>727</sup> ICAC, Case No 134/2002, Award, 4 April 2003.

The tribunal noted that the penalty claimed by A came up to about 487 per cent of the original contract price. In the tribunal invoked Article 7.4.13 of the UNIDROIT Principles along with the general principles proportionality and conformability in deciding that A's requested penalty was excessive and needed to be reduced.

#### **4. *Russia / Arbitration / Petrachkov, Bekker, Rojas Elgueta / Unilex 673 / 2001***

**Case:**<sup>728</sup> A claimant, an English company, filed a lawsuit against a defendant, a Russian company, for collection of a purchase price of goods as delivered to the defendant, incurred penalties and annual interests. The arbitral tribunal ruled that only principal debt and annual interest shall be collected from the defendant.

The court's reasoning is explained below.

Regarding the claims of the plaintiff on the payment of penalties and interests, the ICAC arbitral tribunal found that the defendant had committed a breach entitling the claimant to demand them in accordance with the terms of the contract. However, considering this issue the arbitral tribunal took into account a number of circumstances. First, the contract of the parties provides for two negative consequences to the buyer for one breach of contract (delay in payment). Second, the plaintiff's claim for payment of annual interest is based on the Article 78 of the CISG, and their amount corresponds to the LIBOR rate for short-term foreign currency loans in US dollars, which is the average rate applied by the leading banks in the UK (which is the location of the creditor). Third, according to Article 333 of the Civil Code of the Russian Federation, if the penalty is clearly disproportionate to the consequences of a breach of an obligation, the Court is entitled to reduce the penalty. The same rule is established in Article 7.4.13(2) the UNIDROIT Principles, according to which regardless of any agreements the sum for non-performance may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances. Fourth, Resolution No 13/14 of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitrazh Court of the Russian Federation 'On the Application of the Provisions of the Civil Code of the Russian Federation on the Interest for the Use of Monetary Funds' (No 6) dated 8 October 1998 (clause 6) states that in cases where the creditor has the right claim the penalty and the interest due to failure to fulfil a monetary obligation, the creditor is generally entitled to apply only one of these remedies.

In view of the foregoing, the arbitral tribunal concluded that only the annual interests specified in the contract in the amount calculated in the statement of claim is to be awarded to the plaintiff.

#### **5. Finland / Arbitration / Taivalkoski / Unilex 645 / 1998**

**Case:**<sup>729</sup> The dispute in this case arose between the shareholders of company X and of company Y. Company X and company Y concluded an agreement that granted company Y the option of purchasing 51 per cent of company X's shares for a fixed price during a specified time period. The details of the agreement entailed that company X (the grantor of the option) be bound to pay a penalty corresponding

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<sup>728</sup> ICAC, Case No 88/2000, Award, 25 January 2001.

<sup>729</sup> Ad hoc Arbitration case, Helsinki, 28 January 1998.



to the purchase price of the shares should company X breach the agreement. Company X breached, and company Y instituted arbitral proceedings seeking payment of the penalty by company X.

The tribunal found that company X had indeed breached some of its obligations under the contract. However, the tribunal found that the amount company X had to pay was excessively high given that company X's breaches differed from its main obligation to sell the shares. The tribunal awarded only part of the requested penalty. It justified the mitigation of the penalty on the basis of Article 36 of the Nordic Contract Law, and Article 7.4.13(2) of the UNIDROIT Principles, which states that '[...] the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances'.

## 6. *Russia / Arbitration / Petrachkov, Bekker, Rojas Elgueta / Unilex 669 / 1997*

**Case:**<sup>730</sup> A claimant, an English company, filed a lawsuit against a defendant, a Russian company, for collection of a purchase price of goods as delivered to the defendant, incurred penalties and annual interests. The arbitral ruled that only principal debt and annual interest shall be collected from the defendant.

The court's reasoning is explained below.

According to paragraph 2, Article 9 of 1980 CISG unless otherwise agreed, the parties are considered to have impliedly made applicable to their contract or its formation a use of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 7.4.13(2) of the UNIDROIT Principles states that the sum for non-performance may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.

In such situation, the arbitral tribunal considered it reasonable and fair to take into account the defendant's request for a reduction of the sum payable for the delay in payment as claimed by the plaintiff.

## 7. *Russia / Arbitration / Rojas Elgueta / Unilex 669 / 1997*

**Case:**<sup>731</sup> The dispute arose from a sales contract between A and B containing a penalty of 0.5 per cent of the purchase price per day in the case of a delay in payment by the buyer. When the buyer failed to pay on time, the seller claimed the penalty according to the agreement and the buyer refused as it thought the penalty was excessive.

The arbitral tribunal applied Article 7.4.13(2) of the UNIDROIT Principles in deciding this case. This article enables a tribunal to reduce a penalty when the penalty is 'grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.' The tribunal found that the penalty indeed was excessive and reduced it.

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<sup>730</sup> ICAC, Case No 229/1996, Award, 5 June 1997.

<sup>731</sup> *Ibid.*

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\* These cases do not refer to the UNIDROIT Principles.

# Chapter 8: Set-off

## I. Article 8: Set-off

### *Introduction*

Because the Working Group was unable to identify any cases that refer to chapter 8 (Set-off), the group instead studied English cases on set-off. These cases are of interest because of the many similarities to the UNIDROIT Principles. These summaries have been marked with an asterisk because they do not refer to the UNIDROIT Principles.

Set-off is a concept familiar to English law and there are similarities between the positions under English law and the UNIDROIT Principles. Indeed, it would seem that similar conclusions would be reached in the example cases had the fact set been analysed under English law or under the UNIDROIT Principles.

Set-off under English law has some differences to set-off under the UNIDROIT Principles. By way of example, English law allows for indirect obligations to be set-off against one another, taking advantage of the wider commercial context of a transaction where subsidiaries and other affiliates of the primary obligor are involved.<sup>732</sup> By contrast, the UNIDROIT Principles only allow set-off when two parties directly owe each other an obligation. Therefore, setting off obligations of affiliates and subsidiaries would not appear to be possible under the UNIDROIT Principles.

There are, however, many similarities between the two regimes both in terms of allowing for the exclusion of rights of set-off, even if English law requires a greater level of explicitness in excluding the right<sup>733</sup> than the UNIDROIT Principles, where it can be impliedly excluded (see Article 1.5), and in requiring ascertainment of the obligations owed by each party and some form of link between such obligations.<sup>734</sup> Further similarities arise in that both regimes treat liabilities as being extinguished when set-off occurs.

There is large body of English case law dealing with the right of set-off in insolvency situations. Whereas English case law continues to apply to the right to exercise set-off within the insolvency context, the UNIDROIT Principles do not deal with the impact of insolvency proceedings on such right, which is left to be determined by the applicable law.

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<sup>732</sup> *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp (No.1)* (2000) C L C 878.

<sup>733</sup> *BOC Group Plc v Centeon Llc and Centeon Bio-Services Inc* (1999) 1 All ER (Comm) 970; *Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* (1990) 2 QB 514; *Coca-Cola Financial Corp v Finsat International Ltd* (1998) QB 43; *ABN AMRO Bank NV v Totisa Holdings SA* (2017) EWHC 3260 (Comm).

<sup>734</sup> *Geldof Metaalconstructie NV v Simon Carves Ltd* (2010) EWHC 1023 (Ch); *Secret Hotels2 Ltd v EA Traveller Ltd* (2010) EWHC 1023 (Ch).

## II. Article 8.1: Conditions of set-off

### 1. *United Kingdom / Court / Gibb / Not Unilex / 2001 \**

**Case:**<sup>735</sup> Company A sold the entire issued share capital of company B to company C. The purchase price was £30m, £20m of which was paid on completion. Payment of the final £10m was due to be paid in four further instalments. Company C received immediate enjoyment of the benefits of the contract.

The deadline for the first instalment passed without payment. Company C's solicitors sent a letter to company A's solicitors stating that payment was being withheld for the time being, as payment under a separate contract between company C and a third party was under contention, allegedly as a result of action taken by company A.

After 14 days had passed, company A issued proceedings for payment of the full £10m. Company C contended that it was entitled to set off this claim due to company A's alleged breach of three warranties under the share purchase agreement (SPA).

However, the SPA stated that no counterclaim could be brought unless notice in writing was given 'not later than the second anniversary of completion'. The Court of Appeal drew attention to the fact that the letter sent to company A's solicitors did not mention a counterclaim against company A, the right of set-off, or indeed any contention that the first instalment was not payable. As valid notice of a counterclaim had not been provided, the Court of Appeal ruled that the right of set-off was not available and company A was therefore entitled to repayment of the entire £10m.

### 2. *United Kingdom / Court / Gibb / Not Unilex / 2010 \**

**Case:**<sup>736</sup> Company A brought a claim against company B for overdue payment under a contract for supply of pressure vessels (supply contract). Company B argued that it was entitled to use the right of set-off in light of its counterclaim against company A under a contract for installation of storage tanks (installation contract). The court examined whether company B was entitled to set off its counterclaim under the doctrine of equitable set-off. The court found that the correct test consisted of two elements:

- formal element – there must be a close connection between the claim and the counterclaim; and
- functional element – it would be unjust to enforce one claim without taking the counterclaim into account.

The court acknowledged the difficulty in applying this test in cases involving two separate contracts, but allowed the appeal in these circumstances. The court ruled that a close connection between the claim and the counterclaim existed due to the fact that company A had insisted on payment of the supply contract as a pre-condition of returning to work on the installation contract. This close connection meant that it was manifestly unjust to enforce one claim without taking the other into account.

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<sup>735</sup> *Fortman Holdings Ltd v Modem Holdings Ltd* (2001) EWCA Civ 1235.

<sup>736</sup> *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667.

3. *United Kingdom / Court / Gibb / Not Unilex / 2010 \**

**Case:**<sup>737</sup> The court found the right of set-off to be available in situations in which the claim and counterclaim involve the same issues and are sufficiently connected.

4. *United Kingdom / Court / Gibb / Not Unilex / 1798 \**

**Case:**<sup>738</sup> Where mutual subsisting demands exist at the time at which the action is brought, the statutes of set-off will enable the defendant to set off their debt against the claim of the plaintiff.

5. *United Kingdom / Court / Gibb / Not Unilex / 1879 \**

**Case:**<sup>739</sup> The court found that a bank may only invoke banker's set-off in situations in which the two relevant accounts are current or running accounts. The balance on account must be payable on demand or at relatively short notice.

6. *United Kingdom / Court / Gibb / Not Unilex / 1993 \**

**Case:**<sup>740</sup> Director A (acting as director of company B) guaranteed the repayment of advances made by bank C to company B. The court found that director A could, upon the insolvency of company B, rely on the right of set-off under rule 4.90 of the Insolvency Rules 1986 to reduce the debt owed to bank C by company B by the amount standing to his credit in his own personal account with bank C. The court held that rule 4.90 operates to bring about a set-off in situations in which there are mutual dealings resulting in cross-claims which arise before commencement of winding-up.

7. *United Kingdom / Court / Gibb / Not Unilex / 1972 \**

**Case:**<sup>741</sup> Company A held an overdrawn account with bank B. Company A and bank B agreed to freeze the overdrawn account and open a second account. This second account would be kept in credit, and would be used for the business purposes of company A.

Shortly afterwards, the creditors of company A passed a resolution approving the voluntary winding up of the company. Bank B argued that it was entitled to use the money in the second account to set off the debt within the first account. The Court of Appeal held that the mandatory rules of insolvency set-off are triggered as soon as a company enters bankruptcy. The rules of insolvency set-off cannot be varied by contract, and are superior to any contractual rights of set-off. As such, bank B was able to exercise the right of set-off to reclaim a portion of the funds owed to it by company A. The court noted that, although these rules could not be varied by contract, the parties could agree between them not to claim should the other party become insolvent.

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737 *Secret Hotels2 Ltd v EA Traveller Ltd* (2010) EWHC 1023 (Ch).

738 *Lechmere, Esq v Hawkins, Gent* [1798] 170 ER 477.

739 *Re Willis, Percival & Co ex parte Morier* [1879] 12 Ch D 491.

740 *MS Fashions Ltd v Bank of Credit and Commerce International SA* [1993] Ch 425.

741 *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785.

## 8. *United Kingdom / Court / Gibb / Not Unilex / 2016 \**

**Case:**<sup>742</sup> Company A, acting through its liquidators, brought a claim against director B for a sum owed in relation to a share subscription. Director B brought a counterclaim for an alleged debt owed to him by company A.

The court held that an individual could not exercise the right of set-off in relation to monies owed by him for a subscription of shares in the context of liquidation. The court ruled that director B must first pay the subscription moneys owed to company A before issuing a claim for the sum allegedly owed to him.

## 9. *United Kingdom / Court / Gibb / Not Unilex / 2000 \**

**Case:**<sup>743</sup> Company A was indebted to company B under a contract containing an ambiguous clause relating to set-off. Company A argued that it could set-off this debt against debts owed by affiliates of company B to affiliates of company A under separate contracts. Company B was granted summary judgment at first hearing, on the basis that the wording of the set-off clause did not permit set-off of this kind unless there had been a double default by both the contracting party and their affiliates.

The Court of Appeal affirmed the obligation of the court to interpret an ambiguous clause in such a way so as to reflect its commercial purpose. In doing so, the court must determine the meaning that the clause would convey to a reasonable businessperson, rather than the meaning of the actual words used. The Court of Appeal found that a reasonable businessperson would have adopted a wider interpretation of the set-off clause, and therefore allowed the appeal in this case.

# III. Article 8.2: Foreign currency set-off

## 1. *United Kingdom / Court / Gibb / Not Unilex / 2010 \**

**Case:**<sup>744</sup> Claimant A was awarded £438,569 in damages as compensation for the infringement of a trademark by defendant B. The court assessed the debt owed by claimant A to defendant B as €594,696. Both parties agreed that each debt should be set off against the other; however, they disagreed over the date on which the currency conversion should take place. This was important as the rate of exchange had altered significantly over the relevant period. At the date of the infringement, the exchange rate was approximately £1:€1.45, while at the time of the judgment it was approximately £1:€1.20. If the currency was to be converted at the rate prevailing at the date of judgment, the damages received by claimant A would amount to €26,283, which was significantly less than the debt owed to defendant B.

Defendant B argued that the currency rate at the date of judgment should be used, relying on a number of Admiralty cases as precedents for this course of action. Defendant B submitted that the total amount of each liability, including interest at a rate appropriate to the relevant currency, should be calculated as at the date on which judgment was given. The lesser sum should be converted into

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<sup>742</sup> *Oakdene Homes plc (In Liquidation) v Turpin* [2016] (Unreported).

<sup>743</sup> *Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp (No 1)* (2000) C.L.C. 878.

<sup>744</sup> *Gary Fearn v Anglo-Dutch Paint & Co* (2010) EWHC 2366 (Ch).



the currency of the greater sum at the exchange rate prevailing on the date of judgment and then deducted from the greater sum, thereby providing the final balance.

The High Court ruled in defendant B's favour, finding there to be no 'justification for back-dating the set-off to any earlier date than the earliest date at which a set-off would have been possible, that is when the existence and amount of the two liabilities was finally determined by judgment or agreement'.

The High Court noted that this approach may mean that, due to currency fluctuation, the amount owed to defendant B exceeds that owed to claimant A. It could be argued that it is manifestly unfair that claimant A should pay a higher quantity of damages merely as a result of the time taken to resolve the issue. To combat this apparent defect in the law, the High Court advised that the movement in the exchange rate could result in a corresponding increase in the amount of claimant A's claim if it could be argued that claimant A would have used the profits of which he was deprived by the trademark infringement to pay off the debt owed to defendant B. However, there was no suggestion here that claimant A would have used the money owed by defendant B for this purpose.

## 2. *United Kingdom / Court / Gibb / Not Unilex / 2016 \**

**Case:**<sup>745</sup> under the Insolvency Rules 1986, debts owed in foreign currencies are required to be converted into sterling at the exchange rate prevailing at the date on which the company enters administration. There were substantial currency fluctuations between the date on which company A went into administration and the date on which its creditors were paid, meaning that many foreign currency creditors received less than they would have done if they had received payment in sterling. These foreign currency creditors sought to recover this shortfall as a non-provable debt.

The court held that the Insolvency Rules 1986 do not contain any provisions which enable creditors to bring a currency conversion claim.

## IV. Article 8.3: Set-off by notice; and Article 8.4: Content of notice

### 1. *United Kingdom / Court / Gibb / Not Unilex / 2017 \**

**Case:**<sup>746</sup> The claimants and the defendants entered into a SPA pursuant to which the defendants acquired the entire issued share capital of company A. At the time of the sale, the claimants were guarantors under a facility agreement provided to company A (the guarantee). Under the terms of the SPA, the claimants agreed to continue as guarantors in return for an indemnity from the defendants.

In the years that followed the sale, the business of company A failed. The claimants paid the shortfall due under the guarantee, before seeking reimbursement from the defendants. The defendants lodged a defence and counterclaim arising from alleged breaches of contractual warranties and misrepresentations. The claimants applied to strike out the defence and the counterclaim, citing the defendants' failure to notify them of any claim within two years of the sale, as required under the SPA.

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<sup>745</sup> *Lehman Brothers International (Europe) (In Administration), Re* (2016) EWHC 2131 (Ch).

<sup>746</sup> *Philip v Cook* (2017) EWHC 3023 (QB).

The High Court found that the words ‘the sellers are not liable for a claim [for breach of warranty] unless’ in the SPA operated to extinguish the underlying claim altogether. As such, the failure of the defendants to notify the claimants of a warranty breach meant that they could not bring a counterclaim for breach of warranty or rely on that breach to allow equitable set-off. The High Court placed emphasis on the fact that this clause required the claimants to simply notify the defendants within this period, rather than issue a full claim. The High Court also emphasised the fact that both sides had instructed solicitors so must be deemed to have fully comprehended the implications of the SPA.

## V. Article 8.5: Effect of set-off

### 1. *United Kingdom / Court / Gibb / Not Unilex / 2014 \**

**Case:**<sup>747</sup> Company A brought a claim against company B for monies due under a sale agreement. Company B brought a counterclaim by way of set-off for breach of warranty. The court found that the correct approach in determining the amount of damages payable was to assess the difference between the actual value of the business, and the estimated value had the warranties been factually correct.

## VI. Additional Article 8.6: No set-off

### 1. *United Kingdom / Court / Gibb / Not Unilex / 1999 \**

**Case:**<sup>748</sup> Company A brought a claim against company B for overdue payment under a SPA. Company B brought a crossclaim against company A for the following claims: (1) breach of agreement; (2) breach of indemnity; and (3) misrepresentation. Company A agreed that these claims would usually give rise to the right of set-off, but argued that that right had been expressly precluded by a clause in the SPA which stated that payment ‘shall be absolute and unconditional and shall not be affected by... any other matter whatsoever’.

The Court of Appeal ruled that the right of set-off had not been excluded. The Court of Appeal noted that, in order to correctly interpret a contract, it must determine the meaning which would be conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract. As such, sufficiently clear wording is required to exclude the right of set-off. The court noted the lack of express language (‘deduction’, ‘withholding’ or ‘payment in full’) in the relevant clause which would operate to exclude this right.

In addition, the language of the wider SPA suggested that the parties had intended that the full purchase price should not be affected by any potential crossclaims. The Court of Appeal placed emphasis on the fact that legal advice had been sought in the negotiation of the SPA, meaning that both parties should be deemed to have been aware of their legal rights.

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<sup>747</sup> *Bir Holdings Ltd v Mehta* (2014) EWHC 3903 (Ch).

<sup>748</sup> *BOC Group Plc v Centeon LLC and Centeon Bio-Services Inc* (1999) 1 All E R (Comm) 970.

## 2. *United Kingdom / Court / Gibb / Not Unilex / 1990 \**

**Case:**<sup>749</sup> Bank A provided facilities to company B to finance the purchase of oil. The facilities were made available on the basis of an undertaking provided by company B to repay the instalments in full without any right of set-off.

Bank A filed for summary judgment after company B suffered a number of losses. Company B filed a counterclaim for US\$10m payable under a standby letter of credit, and argued that it could set off this sum against the facilities owed to bank A.

The court found that it was possible to contract out of the right of set-off, and that bank A could therefore rely on the undertakings provided by company B that all amounts due would be paid in full. As such, the right of set-off was successfully precluded under this agreement.

## 3. *United Kingdom / Court / Gibb / Not Unilex / 1998 \**

**Case:**<sup>750</sup> Company A argued that a clause under a loan agreement waiving the right of set-off was not enforceable as, under the Insolvent Debtors Relief Act 1729, a debtor could not be prevented from setting off a mutual debt with a lender. Company A also argued that the waiver of a right of set-off was contrary to public policy.

The court held that the right of set-off could be excluded through agreement, and that such exclusion was not contrary to public policy. The court found that Company A had no arguable counterclaim and that, even if it did, the clause excluding set-off would function to prevent it from exercising this right.

## 4. *United Kingdom / Court / Gibb / Not Unilex / 2017 \**

**Case:**<sup>751</sup> The court found that the presence of a no set-off clause in the facility agreement indicated the existence of an agreement between the parties that any counterclaim should be pursued as a separate matter. The court placed great emphasis on this clause as reflective of the commercial intention of the parties. The High Court also noted the equality in bargaining strength between these two commercial parties.

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749 *Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* (1990) 2 Q B 514.

750 *Coca-Cola Financial Corp v Finsat International Ltd* (1998) Q B 43.

751 *ABN AMRO Bank NV v Totisa Holdings SA* (2017) EWHC 3260 (Comm).

## Compiled summaries of selected cases

### Chapter 9: Assignment of rights, transfers of obligations, assignment of contracts

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# Chapter 9: Assignment of rights, transfers of obligations, assignment of contracts

## I. Article 9.1.13: Defences and right of set-off

### 1. *Poland / National Court / Wardynski, Przygoda / Not Unilex / 2007*

**Case:**<sup>752</sup> Party A and party B are parties to a sale of goods contract. Party A and party C are parties to a factoring agreement. A fails to deliver the goods ordered by B but issues an invoice. B disputes the invoice and defaults on its payment. Within the scope of the factoring contract A (assignor) assigns to C (assignee) its right to payment due from party B in line with the disputed invoice. After the assignment, A corrects the invoice concerning the payment due from B. According to the corrected invoice, B's liability to A now equals zero. C requests payment from party B notwithstanding the latter's defence (correction of the invoice) against the assignor.

The court stated that under the UNIDROIT Convention on international factoring, an agreement (here 'correction of the invoice') between the factor and the debtor is ineffective for the assignee if this agreement was made without the assignee's consent and after the debtor was informed of the assignment. The court mentioned that the same follows from the UNIDROIT Principles (2004), although it did not indicate a specific principle. The court also pointed out that a similar solution is found in the Principles of European Contract Law (Articles 11.204 and 11.308). However, the court stated that in the circumstances of the case, on the basis of Polish law, the assigned liability might have retroactively expired in the light of failure to deliver the order. In such case, the assignment contract would be invalid. On these grounds, the Supreme Court returned the case to the Court of Appeal.

## II. Article 9.2.1: Modes of transfer

### 1. *Russia / Arbitration / Petrachkov, Bekker / Unilex 1476 / 2008*

**Case:**<sup>753</sup> A claimant, a Russian company, filed a lawsuit against a defendant, a Swiss company, for collection of purchase price under delivered goods and contractual penalties. The contract was concluded with the Italian branch of the defendant. However, in the course of performance of the contract, the Swiss company made several payments of goods as delivered by the claimant. The arbitral tribunal qualified such actions represent transferring of payment obligations from the initial contractor to the company, which actually performed the payments.

The court's reasoning is explained below.

The claimant and the branch of the defendant located in Italy entered into a contract, according to which the seller undertook the obligation to supply to the buyer the goods produced by him on

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<sup>752</sup> Poland Supreme Court, 3 October 2007, Case No IV CSK 160/07. Published in OSNC 2008/12/141.

<sup>753</sup> ICAC, Case No 14/2008, Award, 19 December 2008.

the FCA terms (Incoterms 2000) in quantities, prices and within the time periods specified in the specifications and annexes to the contract.

The ICAC found that although the buyer in the person of Italian company was obliged to make payment of the goods as a signatory of the contract and the amendments to it, payments to the plaintiff under the contract were carried out by the company located in Switzerland.

Evaluating the relations established between the parties, the ICAC considers that in this case there was a transfer of contractual obligations relating to the payment of the goods from the company located in Italy (the buyer) to the company located in Switzerland, which the claimant had agreed. This is in particular confirmed by the claimant's acceptance of payments made by the Swiss company (defendant), correspondence between the parties, as well as the by the claim brought by the claimant against it and by the demand for recovery of the debt under the contract.

This method of transferring obligations, which is widely used in international trade practices, is reflected in the UNIDROIT Principles. According to Article 9.2.1 'Modes of transfer', an obligation to pay money or render other performance may be transferred from one person (the 'original obligor') to another person (the 'new obligor') either: (1) by an agreement between the original obligor and the new obligor subject to Article 9.2.3; or (2) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.

Having considered the above, the ICAC considers that the Swiss company (the new debtor), to which the obligation of the buyer (the original debtor) under the contract to pay for the delivered goods was transferred, is the proper despondent and that the sum recoverable from the said company (defendant) in favour of the claimant is subject to satisfaction.



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# Chapter 10: Limitation periods

## Introduction

Because the Working Group was only able to identify a handful of cases that refer to chapter 10 (Limitation periods), the group studied English cases dealing with limitation periods. The summaries for these UK cases have been marked with an asterisk because they do not refer to the UNIDROIT Principles.

At the end of this chapter, the Working Group has included a discussion about the similarities and differences between the approach taken by the UK courts and the UNIDROIT Principles.

## I. Article 10.2: Limitation periods

### 1. *France / Arbitration / Sierra / Not Unilex / 2016*

**Case:**<sup>754</sup> Company A, of country X and company B, of country Y, entered into a JVA by which they agreed to create two joint companies (companies C and D), in which company B would provide the technology and company A the commercial know-how in order to produce and commercialise certain products in country X. The parties agreed that the JVA would be subject to the UNIDROIT Principles, supplemented if necessary by the laws of country X.

Company A filed a claim against company B, with the ICC, arguing certain contractual breaches of company B, regarding different obligations to supply equipment according with the standards set out in the JVA. Company B responded arguing that said claims were time-barred under the general limitation period of three years of Article 10.2.1 of the UNIDROIT Principles.

Company A further contested the time limitation provided under Article 10.2.1 of the UNIDROIT Principles, arguing that even though the UNIDROIT Principles were the governing law of the JVA, they were not relevant to this case, since country X's mandatory rules, providing for a ten-year statute of limitations, were applicable.

Furthermore, company A argued that if the UNIDROIT Principles were applicable, the time limitation would be of ten years as provided by Article 10.2.2, which provides that the limitation starts to run when the right can be exercised, regardless of the obligee's actual or constructive knowledge as in Article 10.2.1.

The arbitral tribunal held that the parties submitted their contract to the UNIDROIT Principles and its statute of limitations should apply. Furthermore, the tribunal ruled that company A did not demonstrate that country X's rules on time limitation were mandatory rules and that company A did not offer a justification nor evidence providing that the parties cannot depart from such rules. On the other hand, the tribunal held that the alleged non-performance by company B was fully identifiable and identified by company A more than three years before the controversy started. Hence, the tribunal confirmed the three-year statute of limitations.

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<sup>754</sup> ICC Case No 18795/CA/ASM (C-19077/CA).

## 2. *The Netherlands / National Court / Meijer / Unilex 1924 / 2015*

**Case:**<sup>755</sup> The claimant, a company, and the respondent, the government of a country, entered into nine related contracts for the supply of anti-missile systems. Pursuant to the end of an internal conflict within the country, the respondent terminated the contract. The claimant initiated arbitral proceedings claiming damage. The respondent on the other hand claimed restitution of the advance payments it had made.

The contracts did not contain a choice of law provision but did contain references to ‘natural justice’ and ‘laws of natural justice’ or ‘rules of natural justice’.

Arbitral proceedings were initiated by the claimant and several awards were rendered by the tribunal. In its first partial award the tribunal found that the UNIDROIT Principles were applicable. It stated that ‘[...] the contracts are governed by, and should be interpreted in accordance with, the UNIDROIT Principles with respect to all matters falling within the scope of such Principles and that for all other matters, by such other general legal rules and principles applicable to international contractual obligations enjoying wide international consensus which would be found relevant for deciding controverted issues falling under the present arbitration’.

In another partial award, the tribunal dealt with the issue of whether the claims of the claimant were time-barred. This is an issue that was not dealt with in the UNIDROIT Principles at the time. However, the tribunal found that it might be a general principal of law that a claim is time-barred if it is pursued with unreasonable delay. This duty stems from the duty of parties to act in accordance with good faith and fair dealing, also affirmed in Article 1.7 of the UNIDROIT Principles. However, the tribunal found that the passing of 11 years did not prevent the claimant from pursuing its claim, and the claim was not made with unreasonable delay.

The claimant pursued a setting-aside action and made arguments for the annulment of all four partial final awards issued by the tribunal. The claimant argued that the UNIDROIT Principles, namely articles 10.2.2 and 10.9, as they were written in 2004 and which contained a chapter on limitation periods, contradicted the tribunal’s conclusion that the respondent’s claims were not time-barred. The respondent, in opposition, asserted that such retroactive application of the UNIDROIT Principles was not to be permitted and that the 2004 edition of the principles had not yet achieved general consensus.

The claimant’s arguments did not prevail, and the District Court confirmed all four partial final awards, a decision upheld by both the Court of Appeal and the Supreme Court. The Supreme Court ruled that the tribunal’s decision, being on the merits, could not be reviewed in setting aside proceedings before the courts. It also held that the fact that the tribunal’s decision regarding the application of the UNIDROIT Principles was at least partly procedural in nature did not affect the court’s finding in this respect.

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<sup>755</sup> *BAE Systems PLC, UK v Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran*, Supreme Court of the Netherlands, May 2015.

### 3. *Spain / National Court / Meijer / Unilex 1907 / 2015*

**Case:**<sup>756</sup> This dispute concerned a sale of goods contract between A, the buyer (in country X) and B, the seller (in country Y). A brought proceedings against B seeking the termination of the contract for non-performance. Alternatively, A sought the specific performance of the contract (ie, the delivery of goods). A brought its action based on the CISG, while B counter-argued that such application by A was time-barred due to the limitation period for the delivery of the goods.

The first instance court ruled in favour of B. In the appellate proceedings, the court upheld this decision. During the proceedings, however, A changed its stance and stated that the CISG was not applicable to the present case as the contract was not an international sales contract since it was concluded in country X, where B had its own sales offices, and the consideration was paid with a cheque from that country. This argument was rejected by the appellate court which upheld the application of the CISG owing to the fact that the parties had their seats in two different countries, both of which were also contracting states to the CISG.

However, as there was no mention of a limitation period in the CISG, the court indicated that it had to refer to Article 10.2 of the UNIDROIT Principles and held that the action brought by A was indeed time-barred.

### 4. *France / Arbitration / Meijer / Unilex 1662 / date unavailable*

**Case:**<sup>757</sup> A joint venture (X) and a state (Y) entered into a production sharing agreement (PSA) to explore and develop the geological resources of a specific area. The PSA was concluded for 20 years and provided for the law of Y to be the applicable law. However, the arbitral tribunal was also authorised to take into account ‘principles of law common to [the country of X and to country Y] and, in the absence of such common principles, [...] principles of law normally recognised by civilised nations in general, including those which have been applied by international tribunals.’

Shortly before the expiry of the PSA, the parties concluded and signed an agreement providing for the contract’s extension for five years. After the signing of the extension agreement, Y assured X that the extension had been granted, based on which X started a new exploration programme. However, X was soon evicted from the area as Y’s parliament actually refused to ratify the extension.

X commenced arbitral proceedings before the ICC, arguing that the PSA had been validly extended and sought damages for the breach of said extension. The tribunal, in finding that it was entitled to rely on the UNIDROIT Principles, indicated that such principles ‘offer reasonable solutions to respond to the needs of the modern economy in light of the experience of some of the major legal systems.’

One of the counterclaims submitted by Y in the arbitration related to X’s alleged failure to withhold and pay certain taxes. While referring to country Y’s law, which was the law governing the contract, the tribunal held that such a counterclaim was time-barred as a period of five years had passed. The tribunal noted that it did not apply the three-year limitation period as laid down in the UNIDROIT

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<sup>756</sup> *Castellana Inmuebles y Locales SA v Brunello Cucinelli SPA*, Audiencia Provincial Madrid, Case No 66/2015, February 2015.

<sup>757</sup> ICC, Case No 14108, undated.

Principles since the applicable law already provided for a specific time limit, finding that the UNIDROIT Principles could not be applied when the agreed-upon applicable law already contained specific provisions in this respect. However, the tribunal did refer to Article 10.2 of the UNIDROIT Principles while deciding at what exact moment the limitation period started to run since that was not clearly provided for in the laws of country Y.

## 5. *United Kingdom / Court / Gibb / Not Unilex / 2007 \**

**Case:**<sup>758</sup> Council A appealed against a ruling that the respondent B had brought a claim for personal injury within the limitation period. B had delivered the claim form to the county court on the day before the limitation period was due to expire, along with a request that the claim be issued. However, the county court did not issue the claim until four days later.

The court examined the difference between bringing and issuing a claim, and found that a claim is brought on the day on which the court receives the claim form. It is the responsibility of the claimant to bring the claim form to court within the limitation period; however, it is outside the control of the claimant to influence the date on which the court issues the form. As such, a claim is brought when the claimant's request for the issue of a claim form is delivered to the correct court office during opening hours, and B had therefore brought the claim within the statutory limitation period.

## II. **Article 10.3: Modification of limitation periods by the parties**

### 1. *United Kingdom / Court / Gibb / Not Unilex / 2007 \**

**Case:**<sup>759</sup> A and B entered into an agreement stating that no proceedings could be brought later than six years from practical completion (which occurred on 25 November 1998). B instigated arbitration just within the six-year limitation period. A argued that the claim was statute-barred, as the Limitation Act 1980 provides that claims must be brought within six years of the actual breach (which occurred before practical completion).

The Court of Appeal found that the inclusion of a provision which contractually lengthens the statutory limitation period does not operate to preclude a party from utilising the statutory limitation defence. Rather, it operates as a parallel contractual limitation on the ability of the other party to bring a claim. As such, express wording excluding the right to rely on the statutory limitation defence is required to provide that proceedings may be brought under an agreement if they would otherwise be statute barred under the Limitation Act 1980. Such wording was missing in this context (however, it is present in our standard precedent in Compiled Summaries Case II, 2 under Article 10.3 of the UNIDROIT Principles).

### 2. *United Kingdom / Court / Gibb / Not Unilex / 2012 \**

**Case:**<sup>760</sup> A contractual limitation clause containing a one-year limitation period was upheld as valid by the Court of Appeal. The court acknowledged the brevity of this limitation period, but confirmed that this was acceptable when viewed in conjunction with the allocated time period of eight weeks for the entire project.

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<sup>758</sup> *Barnes v St Helens Metropolitan Borough Council* (2007) 1 WLR 879.

<sup>759</sup> *Ford Architects Partnership v Cheltenham Ladies College* (2007) PNLR 18.

<sup>760</sup> *Inframatrix Investments Ltd v Dean Construction Ltd* (2012) 28 Const L.J. 438.



### 3. *United Kingdom / Court / Gibb / Not Unilex / 2003 \**

**Case:**<sup>761</sup> Company A appealed against a ruling that the time bar of nine months in the standard trading conditions of association B failed to satisfy the requirement for reasonableness under the Unfair Contract Terms Act 1977. The Court of Appeal allowed the appeal, emphasising the fact that both parties were commercial entities with equal bargaining power. The court also ruled that it was reasonable to expect company A to have been aware of this limitation period, and that compliance with said limitation period was reasonably practicable within the allocated timeframe.

### 4. *United Kingdom / Court / Gibb / Not Unilex / 2017 \**

**Case:**<sup>762</sup> Company A sought an order striking out part of a claim brought against them by company B arguing that it was time-barred. Company B had engaged company A to manage a construction project, but terminated company A's appointment in 2012 and sent a letter of claim.

On 5 November 2015, the parties entered into the first of three standstill agreements, the third of which expired on 30 November 2016. Company B issued proceedings seeking damages on 1 December 2016. Company A argued that three of these claims should be struck out on the basis that they were statute-barred. Company A argued that the causes of action in respect of the first three claims had accrued before mid-2010, and company B had issued the proceedings more than six years later, and therefore outside the statutory limitation period.

The court refused the application to strike out the claims, stating that company B had been correct in not issuing the claims on or before 30 November 2016. The court examined the wording of the standstill agreements, and found that these stated that the parties could not issue proceedings while the standstill agreements were effective. If company B had issued proceedings on or before 30 November 2016, then they would have been in breach of these very same agreements.

The court examined the nature and function of standstill agreements, and found that in this case the standstill agreements operated to suspend time rather than extend it. This meant that the parties' position on 30 November 2016 was the same as that when they signed the first standstill agreement (ie, they still had three weeks left to issue the claims). The court examined the wording used in the standstill agreements, and found that while the word 'suspend' was used multiple times in the operative provisions of the document, the word 'extend' was not used anywhere aside from the recitals. This is an important distinction, as if the document had operated to extend the time period then this would have expired on the date on which the standstill agreement expired (ie, 30 November 2016), meaning that the claims were in fact time-barred on 1 December 2016 when they were issued.

The court noted that, in general, it may be easier to issue a claim and then seek a stay rather than enter into multiple standstill agreements.

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<sup>761</sup> *Granville Oil & Chemicals Ltd v Davis Turner & Co* (2003) 2 CLC 418.

<sup>762</sup> *Russell v Stone* (2017) EWHC 1555 (TCC).

## 5. *United Kingdom / Court / Gibb / Not Unilex / 2006 \**

**Case:**<sup>763</sup> The appellants subscribed for shares in company A, which was owned by C and D. Shortly afterwards, company A entered into creditors' voluntary liquidation and was wound up. C and D had entered into a number of warranties as part of the sale of the shares. On 24 November 2003, the appellants' solicitors wrote to each of C and D giving notice of their intention to make a claim for breach of warranty.

C and D denied that they were in breach of warranty, and alleged that the claim was time-barred under the subscription agreement as they had not been notified adequately within the required three-year period.

The initial judge found that the letters to C and D did not constitute adequate notice of a claim, and that the appellants' claims were therefore deemed to have been waived. However, the Court of Appeal allowed the appeal, ruling that the letters sent to C and D from the appellants' solicitors gave notice of the intention to make a claim, and any reasonable recipient would have understood this letter to be notification of an existing claim for breach of warranty as a result of alleged inaccuracies in the management accounts. The wording of the subscription agreement did not require details of the claim to be provided within the limitation period along with the notice. Even if details of the claim were required, the Court of Appeal found that correspondence discussing the breach of warranty sufficiently supplemented the notice so as to ensure that any reasonable recipient would have understood that this was a notification of claim.

## III. **Article 10.4: New limitation period by acknowledgement**

### 1. *United Kingdom / Court / Gibb / Not Unilex / 2010 \**

**Case:**<sup>764</sup> A had borrowed money from B to purchase a property. When A failed to make any repayments, B sold the property and set off the proceeds against the outstanding debt. A eventually began to make small monthly repayments, and B brought a claim to recover the rest of the debt. The recorder held that, although the claim had been brought outside of the statutory 12-year period under section 20 of the Limitation Act 1980, the monthly repayments (which had occurred within the 12-year period) had served to restart the limitation period from the first repayment. As such, the claim was within the statutory limitation period.

The Court of Appeal upheld this decision, emphasising the fact that there was only one outstanding debt between the parties and so the monthly repayments could only be in relation to that debt (rather than another).

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<sup>763</sup> *Forrest v Glasser* (2006) EWCA Civ 1086.

<sup>764</sup> *John Howard Ashcroft v Bradford & Bingley plc* (2010) EWCA Civ 223.

## IV. Article 10.5: Suspension by judicial proceedings

### 1. *The Netherlands / Arbitration / Meijer / Unilex 1967 / 2014*

**Case:**<sup>765</sup> This dispute arose in relation to a new law passed by the government of country X, which stated that all private companies in the health insurance sector were required to reinvest their profits back into the healthcare system and were prevented from paying dividends to their shareholders. This legislative change took place after a two-year period of liberalisation in the health insurance sector and following a change of government in country X. A, a foreign company which owned a 51 per cent shareholding in a health insurance company in country X, commenced arbitration proceedings against country X and claimed that the new law had wiped out the value of its investment in said health insurance company in that country.

A year after the commencement of the arbitration, A also brought court proceedings against country X before X's own courts. The basis of this action, the subject matter, and the amount claimed as damages were the same as the ones which had been submitted to arbitration. During the court proceedings, country X argued that the institution of a case before the courts by A constituted a waiver of the right to arbitrate. A made a reference to an alleged conservatory purpose as a justification for beginning the court proceedings. However, country X argued that, based on Article 10.6(1) of the UNIDROIT Principles, this justification held no water as the claim was not in danger of being prescribed.

The arbitral tribunal then, in a (second) award on jurisdiction, affirmed that A's conduct amounted to a waiver of the right to arbitrate. The tribunal noted that the only method of dispute resolution agreed to by the parties was arbitration. Thus, A's actions before the courts of country X were in excess of what was required to protect its position while the arbitration proceedings were still pending. Thus, the arbitral tribunal ruled that it lacked jurisdiction. The arbitral tribunal did not make a reference to the UNIDROIT Principles.

### 2. *United Kingdom / Court / Gibb / Not Unilex / 2014 \**

**Case:**<sup>766</sup> The High Court examined the correct interpretation of a contractual provision which required legal proceedings for a breach of warranty under the SPA to be 'served' within a specific time period. Company A argued that the deemed service provisions of the Civil Procedure Rules CPR 6.14 should be applied as the SPA referred to company B 'validly issuing and serving legal process'. However, the court held that, in the absence of any express wording stating otherwise, the word 'serving' should be given a non-legal interpretation (ie, the business meaning of being delivered and received). The court also held, obiter, that if the CPR were to be imported into the SPA, the relevant provision in this situation would be CPR 7.5 (which is concerned with when the claim form is despatched) rather than CPR 6.14 (which is concerned with the date of deemed service).

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<sup>765</sup> *European American Investment Bank AG (EURAM) v Slovak Republic*, PCA Case No 2010-17, June 2014.

<sup>766</sup> *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* (2014) EWHC 2178 (QB).

3. *United Kingdom / Court / Gibb / Not Unilex / 2015 \**

**Case:**<sup>767</sup> The court disagreed with the ruling above [2. *United Kingdom / Court / Gibb / Not Unilex / 2014*], and held that the words ‘served’ within a contract did in fact mean service within the context of the Civil Procedure Rules.

4. *United Kingdom / Court / Gibb / Not Unilex / 2017 \**

**Case:**<sup>768</sup> The court disagreed with the rulings in both cases above [2. *United Kingdom / Court / Gibb / Not Unilex / 2014* and 3. *United Kingdom / Court / Gibb / Not Unilex / 2015*]. The court held that service of the claim form occurs on the date on which it is deemed to have occurred under Civil Procedure Rules CPR 6.14, and not the date on which it is despatched under CPR 7.5.

5. *United Kingdom / Court / Gibb / Not Unilex / 2015 \**

**Case:**<sup>769</sup> Company A argued that the discovery of a fact which had been deliberately concealed by company B and others extended the limitation period under section 31(1)(b) of the Limitation Act 1980. The court dismissed this argument, stating that company A had submitted a detailed claim for which the concealed facts were not essential. The court held that the trigger for the initiation of the limitation period is not necessarily the discovery of every fact potentially relevant to the claim, and therefore the discovery of these facts did not justify an extension of the limitation period.

## V. **Article 10.8: Suspension in case of force majeure, death or incapacity**

1. *United Kingdom / Court / Gibb / Not Unilex / 1992 \**

**Case:**<sup>770</sup> The court found that a limitation period ceases to run when a company enters compulsory liquidation.

2. *United Kingdom / Court / Gibb / Not Unilex / 2010 \**

**Case:**<sup>771</sup> The court found that an administrator was required to obtain the consent of the shareholders of a company before accepting any statute-barred claims from creditors. The administrator submitted that these statute-barred claims should be accepted as there had been no objection from the shareholders of the company. The court ruled that a failure to submit a negative response did not constitute an agreement to the admission to proof of statute-barred claims.

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767 *T & L Sugars Ltd v Tate & Lyle Industries Ltd* (2015) EWHC 2696 (Comm).

768 *Brightside Group Ltd and others v RSM UK Audit LLP and another* (2017) EWHC 6 (Comm).

769 *Arcadia Group Brands Ltd and others v Visa Inc and others* (2015) EWCA Civ 883.

770 *Re Cases of Tuf's Well Ltd* (1992) Ch 179.

771 *Re Leyland Printing Company Ltd and Leyprint Ltd* (2010) EWHC 2015 (Ch).

### 3. *United Kingdom / Court / Gibb / Not Unilex / 2011 \**

**Case:**<sup>772</sup> The applicant liquidators brought a claim against three directors of a company (a husband, wife and son) seeking an order that they pay a sum in respect of the loans made by the company to two of them shortly before the company entered into voluntary liquidation.

The proceedings were brought outside of the usual statutory limitation period of six years for breach of fiduciary duty. However, the court found that this claim was in fact a claim to recover trust property where it had been obtained in breach of trust, for which there is no applicable limitation period. As such, the two directors who had received the loans were unable to rely on the limitation defence.

## VI. Article 10.9: Effects of expiration of limitation period

### 1. *The Netherlands / Arbitration / Meijer / Unilex 1640 / 2010*

**Case:**<sup>773</sup> The government of Country X, via a contract, had agreed to reimburse B, an international organisation, for its expenses regarding the rent B had to pay for its office space in country X. In turn, B entered into a lease agreement with A, a real estate company in country X, where it leased out a building to be used as the organisation's headquarters. A dispute arose when A demanded the full payment of the rent amount under the lease agreement. However, B argued that only 80 per cent of the amount was due since that was the amount provided to B under the contract between B and country X, due to the fact that such amount was considered by country X to be a fair amount for the rent. A commenced arbitration proceedings under the lease agreement.

According to its choice of law clause, the lease agreement was to be applied and interpreted in light of the terms of the contract between B and country X and the 'the recognised principles of international commercial law' (to the exclusion of country X's law).

While the tribunal relied mostly on the lease agreement, it stated that 'the UNIDROIT Principles may indeed be regarded as indicative of recognised principles in the field of international commercial law.' It should be noted that, during the submissions, references were made to the UNIDROIT Principles by both parties. The tribunal also specifically referred to Article 10.9 of the UNIDROIT Principles with regard to the argument by A that B was time-barred from making a counterclaim, since three years, the time limit under the UNIDROIT Principles, had already passed. In this respect, the tribunal found that: (1) time-barred rights do not cease to exist; (2) for the expiry of the limitation period to have effect, it must be asserted; and (3) a time-barred right may still be relied upon as a defence.

### 2. *United Kingdom / Court / Gibb / Not Unilex / 2004 \**

**Case:**<sup>774</sup> When considering whether to extend the time limit for service of a claim, the court must give special consideration to whether such an extension would deprive a defendant of a limitation defence.

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<sup>772</sup> *Brown and another v Button and others* (2011) EWHC 1034 (Ch).

<sup>773</sup> *Polis Fondi Immobiliari di Banche Popolare SGRpA v International Fund for Agricultural Development (IFAD)*, PCA Case No PCA-45863, December 2010.

<sup>774</sup> *Hashtroodi v Hancock* (2004) 1 WLR 3206.

### 3. *United Kingdom / Court / Gibb / Not Unilex / 2011 \**

**Case:**<sup>775</sup> The Court of Appeal determined that, when considering whether an extension of time for serving the claim form under Civil Procedure Rules CPR 7.6(2) should be granted, the primary consideration for the court was whether the defendant would be deprived of a limitation defence. The court held that a valid reason for extension must directly impact on the limitation aspect of the situation. For example, if the service was delayed because the claimant was unaware of the breach until towards the expiration of the limitation period. Here, the claimants' decision to delay service of the claim form so that they could ensure that they had monies in place to finance the proceedings was rejected as an invalid reason.

### 4. *United Kingdom / Court / Gibb / Not Unilex / 2013 \**

**Case:**<sup>776</sup> The claimant was unable to provide any exceptional circumstances to justify an extension of time where he had failed to serve the claim form in time. The court held that a more suitable approach would have been to serve the claim form within four months and then apply for an extension of time to serve the particulars of claim. The court emphasised the importance of determining whether the claim would be time-barred by the time it was reissued, arguing that a defendant should not generally be deprived of the limitation defence.

### 5. *United Kingdom / Court / Gibb / Not Unilex / 2011 \**

**Case:**<sup>777</sup> A had issued claim forms against B just before the expiry of the three-year limitation period, but the claim had not been issued in time. B had accepted responsibility for the failure to issue the claim. When A attempted to issue a second claim, it was struck out as abuse of process. The question for the court was whether a claim which had been issued towards the end of the limitation period and struck out for not being issued in time could then be reissued in a second action commencing after the expiry of that limitation period.

The court emphasised the importance of ensuring that courts strictly regulate the time periods granted for service, and acknowledged the public interest inherent in this. However, a negligent failure to serve a claim form in time does not constitute abuse of process. The Court of Appeal ruled that the appeal should not be allowed.

### *English law perspectives*

The case summaries in this area reflect English cases that consider limitation periods as included within chapter 10 of the UNIDROIT Principles. However, the decisions that have been identified under English law have been made without reference to the UNIDROIT Principles. The cases are therefore intended to assist the reader with how the English courts consider the concept of limitation periods in areas that the UNIDROIT Principles cover.

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<sup>775</sup> *Bayat Telephone Systems International Inc v Lord Michael Cecil* (2011) EWCA Civ 523.

<sup>776</sup> *Malcom-Green v And So To Bed* (2013) EWHC 4016 (IPEC).

<sup>777</sup> *Aktas v Adepta* (2011) QB 894.



The approaches to limitation periods taken under English law and the UNIDROIT Principles differ. Although there is some common ground, this seems to simply reflect the fact that legal systems typically contain a concept of a limitation period as a way of encouraging claims to be brought swiftly and providing for a cut-off when the defendant party is able to close its files. Indeed, there is such a difference between the two regimes that it would seem unlikely that a similar result would have been reached if the facts set out in these English law case summaries were considered under the UNIDROIT Principles.

The two major differences between the regimes are in the length of the limitation periods and the use of a two-stage process under the UNIDROIT Principles, compared to the single-stage approach under the Limitation Act 1980.

The time limits under both regimes are fundamentally different with the UNIDROIT Principles adopting a three years from actual/constructive knowledge of the breach of obligation limit coupled with an absolute stop of ten years from when the ability to exercise the right arose. English law generally takes the position that an appropriate limitation period is six years from when the loss occurs. In addition, the court has discretion within the statute to extend certain limitation periods (including where there is fraud) where it is felt that public policy demands greater flexibility.

The other key difference between the regimes is on the ability of two parties to set shorter or longer limitation periods than standard. While the UNIDROIT Principles allow for some flexibility in the parties to a contract, there are absolute limits on the modification of the limitation periods that cannot be contracted out of; in fact, the maximum and minimum lengths of the period are some of the few mandatory provision within the UNIDROIT Principles. By comparison, under English law any limitation period can be contracted out of although this is subject to the terms of the reasonableness test under the Unfair Contract Terms Act and case law that requires an explicit contracting out of the statutory limits. In several cases, a short limitation period has been held to be valid under English law, but it would seem that such a provision would have breached Article 10.3 of the UNIDROIT Principles.

The difference in approach is also illustrated by the exceptions that can allow for additional extensions of the period regardless of whether the limitation period is still running. One key example is in the case of fraud, where under the Limitation Act if a defendant deliberately conceals a relevant fact then a limitation period does not begin to run until the fact has been discovered. By comparison under the UNIDROIT Principles, while the general limitation will not run until the claimant has actual or constructive knowledge of the fact, the concealment of the fact will not appear to affect the maximum ten-year period from running.

However, there are some similarities in the approach to limitation periods between English law and the UNIDROIT Principles. In both systems the expiry of the limitation period does not automatically bring an end to the rights of the claimant: expiry must be asserted as a defence at which point it is absolute. Additionally, once judicial proceedings have been started, the running of the limitation period is frozen and under both systems the running of the limitation period can be frozen or started again by the agreement of the parties.

# Annex 1: UNIDROIT Principles of International Commercial Contracts 2016

Reproduced by kind permission of the International Institute for the Unification of Private Law (UNIDROIT). Readers are reminded that the complete text of the UNIDROIT Principles of International Commercial Contracts 2016 is composed of both black-letter rules and accompanying comments.

The full text of the 2016 edition is obtainable in book form (ISBN 978-88-86449-37-3) directly from UNIDROIT and is also available on the UNIDROIT website at [www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016](http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016). For select case law and bibliography relating to the Principles, see [www.unilex.info](http://www.unilex.info).

## 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.<sup>778</sup>(\*)

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.

## Chapter 1 – General Provisions

### ARTICLE 1.1

#### *(Freedom of contract)*

The parties are free to enter into a contract and to determine its content.

### ARTICLE 1.2

#### *(No form required)*

Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.

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<sup>778</sup> (\*) Parties wishing to provide that their agreement be governed by the Principles might use one of the *Model Clauses for the use of the UNIDROIT Principles of International Commercial Contracts* (see [www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses](http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses) accessed 13 November 2019).

### ARTICLE 1.3

#### *(Binding character of contract)*

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.

### ARTICLE 1.4

#### *(Mandatory rules)*

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.

### ARTICLE 1.5

#### *(Exclusion or modification by the parties)*

The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.

### ARTICLE 1.6

#### *(Interpretation and supplementation of the Principles)*

(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

### ARTICLE 1.7

#### *(Good faith and fair dealing)*

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

### ARTICLE 1.8

#### *(Inconsistent behaviour)*

A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

## ARTICLE 1.9

### *(Usages and practices)*

- (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
- (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

## ARTICLE 1.10

### *(Notice)*

- (1) Where notice is required it may be given by any means appropriate to the circumstances.
- (2) A notice is effective when it reaches the person to whom it is given.
- (3) For the purpose of paragraph (2) a notice ‘reaches’ a person when given to that person orally or delivered at that person’s place of business or mailing address.
- (4) For the purpose of this Article ‘notice’ includes a declaration, demand, request or any other communication of intention.

## ARTICLE 1.11

### *(Definitions)*

In these Principles

- ‘court’ includes an arbitral tribunal;

where a party has more than one place of business the relevant ‘place of business’ is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

- ‘long-term contract’ refers to a contract which is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties;

- ‘obligor’ refers to the party who is to perform an obligation and ‘obligee’ refers to the party who is entitled to performance of that obligation;

- ‘writing’ means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

## ARTICLE 1.12

### *(Computation of time set by parties)*

(1) Official holidays or non-business days occurring during a period set by parties for an act to be performed are included in calculating the period.

(2) However, if the last day of the period is an official holiday or a non-business day at the place of business of the party to perform the act, the period is extended until the first business day which follows, unless the circumstances indicate otherwise.

(3) The relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise.

## **Chapter 2 – Formation and Authority of Agents**

### **SECTION 1: FORMATION**

#### ARTICLE 2.1.1

##### *(Manner of formation)*

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

#### ARTICLE 2.1.2

##### *(Definition of offer)*

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

#### ARTICLE 2.1.3

##### *(Withdrawal of offer)*

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

#### ARTICLE 2.1.4

##### *(Revocation of offer)*

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.

(2) However, an offer cannot be revoked

- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
- (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

#### ARTICLE 2.1.5

##### *(Rejection of offer)*

An offer is terminated when a rejection reaches the offeror.

#### ARTICLE 2.1.6

##### *(Mode of acceptance)*

- (1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
- (2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.
- (3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.

#### ARTICLE 2.1.7

##### *(Time of acceptance)*

An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

#### ARTICLE 2.1.8

##### *(Acceptance within a fixed period of time)*

A period of acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch unless the circumstances indicate otherwise.

#### ARTICLE 2.1.9

##### *(Late acceptance. Delay in transmission)*

- (1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect.
- (2) If a communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time,

the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

#### ARTICLE 2.1.10

##### *(Withdrawal of acceptance)*

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

#### ARTICLE 2.1.11

##### *(Modified acceptance)*

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

#### ARTICLE 2.1.12

##### *(Writings in confirmation)*

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.

#### ARTICLE 2.1.13

##### *(Conclusion of contract dependent on agreement on specific matters or in a particular form)*

Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form.

#### ARTICLE 2.1.14

##### *(Contract with terms deliberately left open)*

(1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by one of the parties or by a third person does not prevent a contract from coming into existence.



(2) The existence of the contract is not affected by the fact that subsequently

- (a) the parties reach no agreement on the term;
- (b) the party who is to determine the term does not do so; or
- (c) the third person does not determine the term,

provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

#### ARTICLE 2.1.15

##### *(Negotiations in bad faith)*

- (1) A party is free to negotiate and is not liable for failure to reach an agreement.
- (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
- (3) It 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.

#### ARTICLE 2.1.16

##### *(Duty of confidentiality)*

Where 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. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

#### ARTICLE 2.1.17

##### *(Merger clauses)*

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

#### ARTICLE 2.1.18

##### *(Modification in a particular form)*

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.

#### ARTICLE 2.1.19

##### *(Contracting under standard terms)*

(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20–2.1.22.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

#### ARTICLE 2.1.20

##### *(Surprising terms)*

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

#### ARTICLE 2.1.21

##### *(Conflict between standard terms and non-standard terms)*

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

#### ARTICLE 2.1.22

##### *(Battle of forms)*

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

### **SECTION 2: AUTHORITY OF AGENTS**

#### ARTICLE 2.2.1

##### *(Scope of the Section)*

(1) This Section governs the authority of a person ('the agent') to affect the legal relations of another person ('the principal') by or with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal.

(2) It governs only the relations between the principal or the agent on the one hand, and the third party on the other.

(3) It does not govern an agent's authority conferred by law or the authority of an agent appointed by a public or judicial authority.

#### ARTICLE 2.2.2

##### *(Establishment and scope of the authority of the agent)*

- (1) The principal's grant of authority to an agent may be express or implied.
- (2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

#### ARTICLE 2.2.3

##### *(Agency disclosed)*

- (1) Where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly affect the legal relations between the principal and the third party and no legal relation is created between the agent and the third party.
- (2) However, the acts of the agent shall affect only the relations between the agent and the third party, where the agent with the consent of the principal undertakes to become the party to the contract.

#### ARTICLE 2.2.4

##### *(Agency undisclosed)*

- (1) Where an agent acts within the scope of its authority and the third party neither knew nor ought to have known that the agent was acting as an agent, the acts of the agent shall affect only the relations between the agent and the third party.
- (2) However, where such an agent, when contracting with the third party on behalf of a business, represents itself to be the owner of that business, the third party, upon discovery of the real owner of the business, may exercise also against the latter the rights it has against the agent.

#### ARTICLE 2.2.5

##### *(Agent acting without or exceeding its authority)*

- (1) Where an agent acts without authority or exceeds its authority, its acts do not affect the legal relations between the principal and the third party.
- (2) However, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

#### ARTICLE 2.2.6

##### *(Liability of agent acting without or exceeding its authority)*

(1) An agent that acts without authority or exceeds its authority is, failing ratification by the principal, liable for damages that will place the third party in the same position as if the agent had acted with authority and not exceeded its authority.

(2) However, the agent is not liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.

#### ARTICLE 2.2.7

##### *(Conflict of interests)*

(1) If a contract concluded by an agent involves the agent in a conflict of interests with the principal of which the third party knew or ought to have known, the principal may avoid the contract. The right to avoid is subject to Articles 3.2.9 and 3.2.11 to 3.2.15.

(2) However, the principal may not avoid the contract

(a) if the principal had consented to, or knew or ought to have known of, the agent's involvement in the conflict of interests; or

(b) if the agent had disclosed the conflict of interests to the principal and the latter had not objected within a reasonable time.

#### ARTICLE 2.2.8

##### *(Sub-agency)*

An agent has implied authority to appoint a sub-agent to perform acts which it is not reasonable to expect the agent to perform itself. The rules of this Section apply to the sub-agency.

#### ARTICLE 2.2.9

##### *(Ratification)*

(1) An act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period of time it can no longer do so.

(3) If, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, it may, at any time before ratification, by notice to the principal indicate its refusal to become bound by a ratification.

#### ARTICLE 2.2.10

##### *(Termination of authority)*

- (1) Termination of authority is not effective in relation to the third party unless the third party knew or ought to have known of it.
- (2) Notwithstanding the termination of its authority, an agent remains authorised to perform the acts that are necessary to prevent harm to the principal's interests.

## Chapter 3 – Validity

### SECTION 1: GENERAL PROVISIONS

#### ARTICLE 3.1.1

##### *(Matters not covered)*

This Chapter does not deal with lack of capacity.

#### ARTICLE 3.1.2

##### *(Validity of mere agreement)*

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

#### ARTICLE 3.1.3

##### *(Initial impossibility)*

- (1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.
- (2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

#### ARTICLE 3.1.4

##### *(Mandatory character of the provisions)*

The provisions on fraud, threat, gross disparity and illegality contained in this Chapter are mandatory.

## SECTION 2: GROUNDS FOR AVOIDANCE

### ARTICLE 3.2.1

#### *(Definition of mistake)*

Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

### ARTICLE 3.2.2

#### *(Relevant mistake)*

(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

### ARTICLE 3.2.3

#### *(Error in expression or transmission)*

An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated.

### ARTICLE 3.2.4

#### *(Remedies for non-performance)*

A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance.

#### ARTICLE 3.2.5

##### *(Fraud)*

A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.

#### ARTICLE 3.2.6

##### *(Threat)*

A party may avoid the contract when it has been led to conclude the contract by the other party's unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract.

#### ARTICLE 3.2.7

##### *(Gross disparity)*

(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature and purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. Article 3.2.10(2) applies accordingly.

#### ARTICLE 3.2.8

##### *(Third persons)*

(1) Where fraud, threat, gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if the behaviour or knowledge had been that of the party itself.



(2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance reasonably acted in reliance on the contract.

#### ARTICLE 3.2.9

##### *(Confirmation)*

If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded.

#### ARTICLE 3.2.10

##### *(Loss of right to avoid)*

(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance.

(2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective.

#### ARTICLE 3.2.11

##### *(Notice of avoidance)*

The right of a party to avoid the contract is exercised by notice to the other party.

#### ARTICLE 3.2.12

##### *(Time limits)*

(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

(2) Where an individual term of the contract may be avoided by a party under Article 3.2.7, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

#### ARTICLE 3.2.13

##### *(Partial avoidance)*

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

#### ARTICLE 3.2.14

##### *(Retroactive effect of avoidance)*

Avoidance takes effect retroactively.

#### ARTICLE 3.2.15

##### *(Restitution)*

(1) On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that the party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.

#### ARTICLE 3.2.16

##### *(Damages)*

Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

#### ARTICLE 3.2.17

##### *(Unilateral declarations)*

The provisions of this Chapter apply with appropriate adaptations to any communication of intention addressed by one party to the other.

### **SECTION 3: ILLEGALITY**

#### ARTICLE 3.3.1

##### *(Contracts infringing mandatory rules)*

(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin, applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.

(3) In determining what is reasonable regard is to be had in particular to:

- (a) the purpose of the rule which has been infringed;
- (b) the category of persons for whose protection the rule exists;
- (c) any sanction that may be imposed under the rule infringed;
- (d) the seriousness of the infringement;
- (e) whether one or both parties knew or ought to have known of the infringement;
- (f) whether the performance of the contract necessitates the infringement; and
- (g) the parties' reasonable expectations.

#### ARTICLE 3.3.2

##### *(Restitution)*

(1) Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances.

(2) In determining what is reasonable, regard is to be had, with the appropriate adaptations, to the criteria referred to in Article 3.3.1(3).

(3) If restitution is granted, the rules set out in Article 3.2.15 apply with appropriate adaptations.

## Chapter 4 – Interpretation

#### ARTICLE 4.1

##### *(Intention of the parties)*

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

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

#### ARTICLE 4.2

##### *(Interpretation of statements and other conduct)*

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

#### ARTICLE 4.3

##### *(Relevant circumstances)*

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

- (a) preliminary negotiations between the parties;
- (b) practices which the parties have established between themselves;
- (c) the conduct of the parties subsequent to the conclusion of the contract;
- (d) the nature and purpose of the contract;
- (e) the meaning commonly given to terms and expressions in the trade concerned;
- (f) usages.

#### ARTICLE 4.4

##### *(Reference to contract or statement as a whole)*

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

#### ARTICLE 4.5

##### *(All terms to be given effect)*

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

#### ARTICLE 4.6

##### *(Contra proferentem rule)*

If contract terms supplied by one party are unclear, an interpretation against that party is preferred.

#### ARTICLE 4.7

##### *(Linguistic discrepancies)*

Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.

## ARTICLE 4.8

*(Supplying an omitted term)*

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what is an appropriate term regard shall be had, among other factors, to

- (a) the intention of the parties;
- (b) the nature and purpose of the contract;
- (c) good faith and fair dealing;
- (d) reasonableness.

## Chapter 5 – Content and Third Party Rights

### SECTION 1: CONTENT

#### ARTICLE 5.1.1

*(Express and implied obligations)*

The contractual obligations of the parties may be express or implied.

#### ARTICLE 5.1.2

*(Implied obligations)*

Implied obligations stem from

- (a) the nature and purpose of the contract;
- (b) practices established between the parties and usages;
- (c) good faith and fair dealing;
- (d) reasonableness.

#### ARTICLE 5.1.3

*(Co-operation between the parties)*

Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

#### ARTICLE 5.1.4

*(Duty to achieve a specific result.*

*Duty of best efforts)*

- (1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.
- (2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

#### ARTICLE 5.1.5

*(Determination of kind of duty involved)*

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to

- (a) the way in which the obligation is expressed in the contract;
- (b) the contractual price and other terms of the contract;
- (c) the degree of risk normally involved in achieving the expected result;
- (d) the ability of the other party to influence the performance of the obligation.

#### ARTICLE 5.1.6

*(Determination of quality of performance)*

Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.

#### ARTICLE 5.1.7

*(Price determination)*

- (1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.
- (2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.

(3) Where the price is to be fixed by one party or a third person, and that party or third person does not do so, the price shall be a reasonable price.

(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

#### ARTICLE 5.1.8

*(Termination of a contract for an indefinite period)*

A contract for an indefinite period may be terminated by either party by giving notice a reasonable time in advance. As to the effects of termination in general, and as to restitution, the provisions in Articles 7.3.5 and 7.3.7 apply.

#### ARTICLE 5.1.9

*(Release by agreement)*

(1) An obligee may release its right by agreement with the obligor.

(2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it.

### SECTION 2: THIRD PARTY RIGHTS

#### ARTICLE 5.2.1

*(Contracts in favour of third parties)*

(1) The parties (the ‘promisor’ and the ‘promisee’) may confer by express or implied agreement a right on a third party (the ‘beneficiary’).

(2) The existence and content of the beneficiary’s right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

#### ARTICLE 5.2.2

*(Third party identifiable)*

The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.

#### ARTICLE 5.2.3

*(Exclusion and limitation clauses)*

The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.



#### ARTICLE 5.2.4

##### *(Defences)*

The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee.

#### ARTICLE 5.2.5

##### *(Revocation)*

The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.

#### ARTICLE 5.2.6

##### *(Renunciation)*

The beneficiary may renounce a right conferred on it.

### **SECTION 3: CONDITIONS**

#### ARTICLE 5.3.1

##### *(Types of condition)*

A contract or a contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

#### ARTICLE 5.3.2

##### *(Effect of conditions)*

Unless the parties otherwise agree:

- (a) the relevant contract or contractual obligation takes effect upon fulfilment of a suspensive condition;
- (b) the relevant contract or contractual obligation comes to an end upon fulfilment of a resolutive condition.

#### ARTICLE 5.3.3

##### *(Interference with conditions)*

- (1) If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition.
- (2) If fulfilment of a condition is brought about by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the fulfilment of the condition.

#### ARTICLE 5.3.4

##### *(Duty to preserve rights)*

Pending fulfilment of a condition, a party may not, contrary to the duty to act in accordance with good faith and fair dealing, act so as to prejudice the other party's rights in case of fulfilment of the condition.

#### ARTICLE 5.3.5

##### *(Restitution in case of fulfilment of a resolutive condition)*

(1) On fulfilment of a resolutive condition, the rules on restitution set out in Articles 7.3.6 and 7.3.7 apply with appropriate adaptations.

(2) If the parties have agreed that the resolutive condition is to operate retroactively, the rules on restitution set out in Article 3.2.15 apply with appropriate adaptations.

## Chapter 6 – Performance

### SECTION 1: PERFORMANCE IN GENERAL

#### ARTICLE 6.1.1

##### *(Time of performance)*

A party must perform its obligations:

- (a) if a time is fixed by or determinable from the contract, at that time;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time;
- (c) in any other case, within a reasonable time after the conclusion of the contract.

#### ARTICLE 6.1.2

##### *(Performance at one time or in instalments)*

In cases under Article 6.1.1(b) or (c), a party must perform its obligations at one time if that performance can be rendered at one time and the circumstances do not indicate otherwise.

#### ARTICLE 6.1.3

##### *(Partial performance)*

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

(2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor without prejudice to any other remedy.

#### ARTICLE 6.1.4

##### *(Order of performance)*

(1) To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.

(2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

#### ARTICLE 6.1.5

##### *(Earlier performance)*

(1) The obligee may reject an earlier performance unless it has no legitimate interest in so doing.

(2) Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party's obligations.

(3) Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy.

#### ARTICLE 6.1.6

##### *(Place of performance)*

(1) If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform:

- (a) a monetary obligation, at the obligee's place of business;
- (b) any other obligation, at its own place of business.

(2) A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract.

#### ARTICLE 6.1.7

##### *(Payment by cheque or other instrument)*

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

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

#### ARTICLE 6.1.8

##### *(Payment by funds transfer)*

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

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

#### ARTICLE 6.1.9

##### *(Currency of payment)*

(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless

(a) that currency is not freely convertible; or

(b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

#### ARTICLE 6.1.10

##### *(Currency not expressed)*

Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.

#### ARTICLE 6.1.11

##### *(Costs of performance)*

Each party shall bear the costs of performance of its obligations.

#### ARTICLE 6.1.12

##### *(Imputation of payments)*

(1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied. However, the payment discharges first any expenses, then interest due and finally the principal.

(2) If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.

(3) In the absence of imputation under paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria in the order indicated:

- (a) an obligation which is due or which is the first to fall due;
- (b) the obligation for which the obligee has least security;
- (c) the obligation which is the most burdensome for the obligor;
- (d) the obligation which has arisen first.

If none of the preceding criteria applies, payment is imputed to all the obligations proportionally.

#### ARTICLE 6.1.13

##### *(Imputation of non-monetary obligations)*

Article 6.1.12 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

#### ARTICLE 6.1.14

##### *(Application for public permission)*

Where the law of a State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise

- (a) if only one party has its place of business in that State, that party shall take the measures necessary to obtain the permission;
- (b) in any other case the party whose performance requires permission shall take the necessary measures.

#### ARTICLE 6.1.15

##### *(Procedure in applying for permission)*

(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay and shall bear any expenses incurred.

(2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay.

#### ARTICLE 6.1.16

*(Permission neither granted nor refused)*

(1) If, notwithstanding the fact that the party responsible has taken all measures required, permission is neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.

(2) Where the permission affects some terms only, paragraph (1) does not apply if, having regard to the circumstances, it is reasonable to uphold the remaining contract even if the permission is refused.

#### ARTICLE 6.1.17

*(Permission refused)*

(1) The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of some terms only, only such terms are void if, having regard to the circumstances, it is reasonable to uphold the remaining contract.

(2) Where the refusal of a permission renders the performance of the contract impossible in whole or in part, the rules on non-performance apply.

### SECTION 2: HARDSHIP

#### ARTICLE 6.2.1

*(Contract to be observed)*

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

#### ARTICLE 6.2.2

*(Definition of hardship)*

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.

### ARTICLE 6.2.3

#### *(Effects of hardship)*

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium.

## Chapter 7 – Non-performance

### SECTION 1: NON-PERFORMANCE IN GENERAL

#### ARTICLE 7.1.1

##### *(Non-performance defined)*

Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

#### ARTICLE 7.1.2

##### *(Interference by the other party)*

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk.

#### ARTICLE 7.1.3

##### *(Withholding performance)*

(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.

(2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.



#### ARTICLE 7.1.4

##### *(Cure by non-performing party)*

(1) The non-performing party may, at its own expense, cure any non-performance, provided that

(a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;

(b) cure is appropriate in the circumstances;

(c) the aggrieved party has no legitimate interest in refusing cure; and

(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

#### ARTICLE 7.1.5

##### *(Additional period for performance)*

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.

(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.

(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.

#### ARTICLE 7.1.6

##### *(Exemption clauses)*

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

#### ARTICLE 7.1.7

##### *(Force majeure)*

- (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
- (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
- (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

### **SECTION 2: RIGHT TO PERFORMANCE**

#### ARTICLE 7.2.1

##### *(Performance of monetary obligation)*

Where a party who is obliged to pay money does not do so, the other party may require payment.

#### ARTICLE 7.2.2

##### *(Performance of non-monetary obligation)*

Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

- (a) performance is impossible in law or in fact;
- (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;
- (c) the party entitled to performance may reasonably obtain performance from another source;
- (d) performance is of an exclusively personal character; or

(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

#### ARTICLE 7.2.3

##### *(Repair and replacement of defective performance)*

The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.

#### ARTICLE 7.2.4

##### *(Judicial penalty)*

(1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order.

(2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages.

#### ARTICLE 7.2.5

##### *(Change of remedy)*

(1) An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy.

(2) Where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy.

### **SECTION 3: TERMINATION**

#### ARTICLE 7.3.1

##### *(Right to terminate the contract)*

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

- (c) the non-performance is intentional or reckless;
  - (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
  - (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.
- (3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired.

#### ARTICLE 7.3.2

##### *(Notice of termination)*

- (1) The right of a party to terminate the contract is exercised by notice to the other party.
- (2) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance.

#### ARTICLE 7.3.3

##### *(Anticipatory non-performance)*

Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.

#### ARTICLE 7.3.4

##### *(Adequate assurance of due performance)*

A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.

#### ARTICLE 7.3.5

##### *(Effects of termination in general)*

- (1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.
- (2) Termination does not preclude a claim for damages for non-performance.
- (3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

#### ARTICLE 7.3.6

*(Restitution with respect to contracts to be performed at one time)*

(1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.

#### ARTICLE 7.3.7

*(Restitution with respect to long-term contracts)*

(1) On termination of a long-term contract restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible.

(2) As far as restitution has to be made, the provisions of Article 7.3.6 apply.

### SECTION 4: DAMAGES

#### ARTICLE 7.4.1

*(Right to damages)*

Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.

#### ARTICLE 7.4.2

*(Full compensation)*

(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

(2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

#### ARTICLE 7.4.3

##### *(Certainty of harm)*

- (1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.
- (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.
- (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

#### ARTICLE 7.4.4

##### *(Foreseeability of harm)*

The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.

#### ARTICLE 7.4.5

##### *(Proof of harm in case of replacement transaction)*

Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.

#### ARTICLE 7.4.6

##### *(Proof of harm by current price)*

- (1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.
- (2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.

#### ARTICLE 7.4.7

##### *(Harm due in part to aggrieved party)*

Where the harm is due in part to an act or omission of the aggrieved party or to another event for which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

#### ARTICLE 7.4.8

##### *(Mitigation of harm)*

(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.

(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.

#### ARTICLE 7.4.9

##### *(Interest for failure to pay money)*

(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.

(2) 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, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

#### ARTICLE 7.4.10

##### *(Interest on damages)*

Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.

#### ARTICLE 7.4.11

##### *(Manner of monetary redress)*

(1) Damages are to be paid in a lump sum. However, they may be payable in instalments where the nature of the harm makes this appropriate.

(2) Damages to be paid in instalments may be indexed.

#### ARTICLE 7.4.12

##### *(Currency in which to assess damages)*

Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.



#### ARTICLE 7.4.13

##### *(Agreed payment for non-performance)*

(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.

(2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.

## Chapter 8 – Set-off

#### ARTICLE 8.1

##### *(Conditions of set-off)*

(1) Where two parties owe each other money or other performances of the same kind, either of them ('the first party') may set off its obligation against that of its obligee ('the other party') if at the time of set-off,

- (a) the first party is entitled to perform its obligation;
- (b) the other party's obligation is ascertained as to its existence and amount and performance is due.

(2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.

#### ARTICLE 8.2

##### *(Foreign currency set-off)*

Where the obligations are to pay money in different currencies, the right of set-off may be exercised, provided that both currencies are freely convertible and the parties have not agreed that the first party shall pay only in a specified currency.

#### ARTICLE 8.3

##### *(Set-off by notice)*

The right of set-off is exercised by notice to the other party.

#### ARTICLE 8.4

##### *(Content of notice)*

(1) The notice must specify the obligations to which it relates.

(2) If the notice does not specify the obligation against which set-off is exercised, the other party may, within a reasonable time, declare to the first party the obligation to which set-off relates. If no such declaration is made, the set-off will relate to all the obligations proportionally.

#### ARTICLE 8.5

##### *(Effect of set-off)*

(1) Set-off discharges the obligations.

(2) If obligations differ in amount, set-off discharges the obligations up to the amount of the lesser obligation.

(3) Set-off takes effect as from the time of notice.

## **Chapter 9 – Assignment of Rights, Transfer of Obligations, Assignment of Contracts**

### **SECTION 1: ASSIGNMENT OF RIGHTS**

#### ARTICLE 9.1.1

##### *(Definitions)*

‘Assignment of a right’ means the transfer by agreement from one person (the ‘assignor’) to another person (the ‘assignee’), including transfer by way of security, of the assignor’s right to payment of a monetary sum or other performance from a third person (‘the obligor’).

#### ARTICLE 9.1.2

##### *(Exclusions)*

This Section does not apply to transfers made under the special rules governing the transfers:

- (a) of instruments such as negotiable instruments, documents of title or financial instruments, or
- (b) of rights in the course of transferring a business.

#### ARTICLE 9.1.3

##### *(Assignability of non-monetary rights)*

A right to non-monetary performance may be assigned only if the assignment does not render the obligation significantly more burdensome.

#### ARTICLE 9.1.4

##### *(Partial assignment)*

- (1) A right to the payment of a monetary sum may be assigned partially.
- (2) A right to other performance may be assigned partially only if it is divisible, and the assignment does not render the obligation significantly more burdensome.

#### ARTICLE 9.1.5

##### *(Future rights)*

A future right is deemed to be transferred at the time of the agreement, provided the right, when it comes into existence, can be identified as the right to which the assignment relates.

#### ARTICLE 9.1.6

##### *(Rights assigned without individual specification)*

A number of rights may be assigned without individual specification, provided such rights can be identified as rights to which the assignment relates at the time of the assignment or when they come into existence.

#### ARTICLE 9.1.7

##### *(Agreement between assignor and assignee sufficient)*

- (1) A right is assigned by mere agreement between the assignor and the assignee, without notice to the obligor.
- (2) The consent of the obligor is not required unless the obligation in the circumstances is of an essentially personal character.

#### ARTICLE 9.1.8

##### *(Obligor's additional costs)*

The obligor has a right to be compensated by the assignor or the assignee for any additional costs caused by the assignment.

#### ARTICLE 9.1.9

##### *(Non-assignment clauses)*

- (1) The assignment of a right to the payment of a monetary sum is effective notwithstanding an agreement between the assignor and the obligor limiting or prohibiting such an assignment. However, the assignor may be liable to the obligor for breach of contract.

(2) The assignment of a right to other performance is ineffective if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment. Nevertheless, the assignment is effective if the assignee, at the time of the assignment, neither knew nor ought to have known of the agreement. The assignor may then be liable to the obligor for breach of contract.

#### ARTICLE 9.1.10

##### *(Notice to the obligor)*

(1) Until the obligor receives a notice of the assignment from either the assignor or the assignee, it is discharged by paying the assignor.

(2) After the obligor receives such a notice, it is discharged only by paying the assignee.

#### ARTICLE 9.1.11

##### *(Successive assignments)*

If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.

#### ARTICLE 9.1.12

##### *(Adequate proof of assignment)*

(1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.

(2) Until adequate proof is provided, the obligor may withhold payment.

(3) Unless adequate proof is provided, notice is not effective.

(4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

#### ARTICLE 9.1.13

##### *(Defences and rights of set-off)*

(1) The obligor may assert against the assignee all defences that the obligor could assert against the assignor.

(2) The obligor may exercise against the assignee any right of set-off available to the obligor against the assignor up to the time notice of assignment was received.

#### ARTICLE 9.1.14

##### *(Rights related to the right assigned)*

The assignment of a right transfers to the assignee:

- (a) all the assignor's rights to payment or other performance under the contract in respect of the right assigned, and
- (b) all rights securing performance of the right assigned.

#### ARTICLE 9.1.15

##### *(Undertakings of the assignor)*

The assignor undertakes towards the assignee, except as otherwise disclosed to the assignee, that:

- (a) the assigned right exists at the time of the assignment, unless the right is a future right;
- (b) the assignor is entitled to assign the right;
- (c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party;
- (d) the obligor does not have any defences;
- (e) neither the obligor nor the assignor has given notice of set-off concerning the assigned right and will not give any such notice;
- (f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.

### **SECTION 2: TRANSFER OF OBLIGATIONS**

#### ARTICLE 9.2.1

##### *(Modes of transfer)*

An obligation to pay money or render other performance may be transferred from one person (the 'original obligor') to another person (the 'new obligor') either

- (a) by an agreement between the original obligor and the new obligor subject to Article 9.2.3, or
- (b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.

#### ARTICLE 9.2.2

##### *(Exclusion)*

This Section does not apply to transfers of obligations made under the special rules governing transfers of obligations in the course of transferring a business.

### ARTICLE 9.2.3

#### *(Requirement of obligee's consent to transfer)*

The transfer of an obligation by an agreement between the original obligor and the new obligor requires the consent of the obligee.

### ARTICLE 9.2.4

#### *(Advance consent of obligee)*

- (1) The obligee may give its consent in advance.
- (2) If the obligee has given its consent in advance, the transfer of the obligation becomes effective when a notice of the transfer is given to the obligee or when the obligee acknowledges it.

### ARTICLE 9.2.5

#### *(Discharge of original obligor)*

- (1) The obligee may discharge the original obligor.
- (2) The obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly.
- (3) Otherwise the original obligor and the new obligor are jointly and severally liable.

### ARTICLE 9.2.6

#### *(Third party performance)*

- (1) Without the obligee's consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation in the circumstances has an essentially personal character.
- (2) The obligee retains its claim against the obligor.

### ARTICLE 9.2.7

#### *(Defences and rights of set-off)*

- (1) The new obligor may assert against the obligee all defences which the original obligor could assert against the obligee.
- (2) The new obligor may not exercise against the obligee any right of set-off available to the original obligor against the obligee.

## ARTICLE 9.2.8

### *(Rights related to the obligation transferred)*

- (1) The obligee may assert against the new obligor all its rights to payment or other performance under the contract in respect of the obligation transferred.
- (2) If the original obligor is discharged under Article 9.2.5(1), a security granted by any person other than the new obligor for the performance of the obligation is discharged, unless that other person agrees that it should continue to be available to the obligee.
- (3) Discharge of the original obligor also extends to any security of the original obligor given to the obligee for the performance of the obligation, unless the security is over an asset which is transferred as part of a transaction between the original obligor and the new obligor.

## SECTION 3: ASSIGNMENT OF CONTRACTS

### ARTICLE 9.3.1

#### *(Definitions)*

‘Assignment of a contract’ means the transfer by agreement from one person (the ‘assignor’) to another person (the ‘assignee’) of the assignor’s rights and obligations arising out of a contract with another person (the ‘other party’).

### ARTICLE 9.3.2

#### *(Exclusion)*

This Section does not apply to the assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business.

### ARTICLE 9.3.3

#### *(Requirement of consent of the other party)*

The assignment of a contract requires the consent of the other party.

### ARTICLE 9.3.4

#### *(Advance consent of the other party)*

- (1) The other party may give its consent in advance.
- (2) If the other party has given its consent in advance, the assignment of the contract becomes effective when a notice of the assignment is given to the other party or when the other party acknowledges it.



#### ARTICLE 9.3.5

##### *(Discharge of the assignor)*

- (1) The other party may discharge the assignor.
- (2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly.
- (3) Otherwise the assignor and the assignee are jointly and severally liable.

#### ARTICLE 9.3.6

##### *(Defences and rights of set-off)*

- (1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.13 applies accordingly.
- (2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.7 applies accordingly.

#### ARTICLE 9.3.7

##### *(Rights transferred with the contract)*

- (1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.14 applies accordingly.
- (2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.8 applies accordingly.

## Chapter 10 — Limitation Periods

#### ARTICLE 10.1

##### *(Scope of the Chapter)*

- (1) The exercise of rights governed by the Principles is barred by the expiration of a period of time, referred to as ‘limitation period’, according to the rules of this Chapter.
- (2) This Chapter does not govern the time within which one party is required under the Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or to perform any act other than the institution of legal proceedings.

#### ARTICLE 10.2

##### *(Limitation periods)*

- (1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee’s right can be exercised.

(2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised.

#### ARTICLE 10.3

*(Modification of limitation periods by the parties)*

(1) The parties may modify the limitation periods.

(2) However they may not

(a) shorten the general limitation period to less than one year;

(b) shorten the maximum limitation period to less than four years;

(c) extend the maximum limitation period to more than fifteen years.

#### ARTICLE 10.4

*(New limitation period by acknowledgement)*

(1) Where the obligor before the expiration of the general limitation period acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgement.

(2) The maximum limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Article 10.2(1).

#### ARTICLE 10.5

*(Suspension by judicial proceedings)*

(1) The running of the limitation period is suspended

(a) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor;

(b) in the case of the obligor's insolvency when the obligee has asserted its rights in the insolvency proceedings; or

(c) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings.

(2) Suspension lasts until a final decision has been issued or until the proceedings have been otherwise terminated.

## ARTICLE 10.6

### *(Suspension by arbitral proceedings)*

(1) The running of the limitation period is suspended when the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor. In the absence of regulations for arbitral proceedings or provisions determining the exact date of the commencement of arbitral proceedings, the proceedings are deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor.

(2) Suspension lasts until a binding decision has been issued or until the proceedings have been otherwise terminated.

## ARTICLE 10.7

### *(Alternative dispute resolution)*

The provisions of Articles 10.5 and 10.6 apply with appropriate modifications to other proceedings whereby the parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute.

## ARTICLE 10.8

### *(Suspension in case of force majeure, death or incapacity)*

(1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, from causing a limitation period to cease to run under the preceding Articles, the general limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.

(2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor has inherited the respective party's position. The additional one-year period under paragraph (1) applies accordingly.

## ARTICLE 10.9

### *(Effects of expiration of limitation period)*

(1) The expiration of the limitation period does not extinguish the right.

(2) For the expiration of the limitation period to have effect, the obligor must assert it as a defence.

(3) A right may still be relied on as a defence even though the expiration of the limitation period for that right has been asserted.

#### ARTICLE 10.10

##### *(Right of set-off)*

The obligee may exercise the right of set-off until the obligor has asserted the expiration of the limitation period.

#### ARTICLE 10.11

##### *(Restitution)*

Where there has been performance in order to discharge an obligation, there is no right of restitution merely because the limitation period has expired.

## Chapter 11 – Plurality of Obligors and of Obligees

### SECTION 1: PLURALITY OF OBLIGORS

#### ARTICLE 11.1.1

##### *(Definitions)*

When several obligors are bound by the same obligation towards an obligee:

- (a) the obligations are joint and several when each obligor is bound for the whole obligation;
- (b) the obligations are separate when each obligor is bound only for its share.

#### ARTICLE 11.1.2

##### *(Presumption of joint and several obligations)*

When several obligors are bound by the same obligation towards an obligee, they are presumed to be jointly and severally bound, unless the circumstances indicate otherwise.

#### ARTICLE 11.1.3

##### *(Obligee's rights against joint and several obligors)*

When obligors are jointly and severally bound, the obligee may require performance from any one of them, until full performance has been received.

#### ARTICLE 11.1.4

##### *(Availability of defences and rights of set-off)*

A joint and several obligor against whom a claim is made by the obligee may assert all the defences and rights of set-off that are personal to it or that are common to all the co-obligors, but may not assert defences or rights of set-off that are personal to one or several of the other co-obligors.

#### ARTICLE 11.1.5

##### *(Effect of performance or set-off)*

Performance or set-off by a joint and several obligor or set-off by the obligee against one joint and several obligor discharges the other obligors in relation to the obligee to the extent of the performance or set-off.

#### ARTICLE 11.1.6

##### *(Effect of release or settlement)*

(1) Release of one joint and several obligor, or settlement with one joint and several obligor, discharges all the other obligors for the share of the released or settling obligor, unless the circumstances indicate otherwise.

(2) When the other obligors are discharged for the share of the released obligor, they no longer have a contributory claim against the released obligor under Article 11.1.10.

#### ARTICLE 11.1.7

##### *(Effect of expiration or suspension of limitation period)*

(1) Expiration of the limitation period of the obligee's rights against one joint and several obligor does not affect:

- (a) the obligations to the obligee of the other joint and several obligors; or
- (b) the rights of recourse between the joint and several obligors under Article 11.1.10.

(2) If the obligee initiates proceedings under Articles 10.5, 10.6 or 10.7 against one joint and several obligor, the running of the limitation period is also suspended against the other joint and several obligors.

#### ARTICLE 11.1.8

##### *(Effect of judgment)*

(1) A decision by a court as to the liability to the obligee of one joint and several obligor does not affect:

- (a) the obligations to the obligee of the other joint and several obligors; or
- (b) the rights of recourse between the joint and several obligors under Article 11.1.10.

(2) However, the other joint and several obligors may rely on such a decision, except if it was based on grounds personal to the obligor concerned. In such a case, the rights of recourse between the joint and several obligors under Article 11.1.10 are affected accordingly.

#### ARTICLE 11.1.9

##### *(Apportionment among joint and several obligors)*

As among themselves, joint and several obligors are bound in equal shares, unless the circumstances indicate otherwise.

#### ARTICLE 11.1.10

##### *(Extent of contributory claim)*

A joint and several obligor who has performed more than its share may claim the excess from any of the other obligors to the extent of each obligor's unperformed share.

#### ARTICLE 11.1.11

##### *(Rights of the obligee)*

(1) A joint and several obligor to whom Article 11.1.10 applies may also exercise the rights of the obligee, including all rights securing their performance, to recover the excess from all or any of the other obligors to the extent of each obligor's unperformed share.

(2) An obligee who has not received full performance retains its rights against the co-obligors to the extent of the unperformed part, with precedence over co-obligors exercising contributory claims.

#### ARTICLE 11.1.12

##### *(Defences in contributory claims)*

A joint and several obligor against whom a claim is made by the co-obligor who has performed the obligation:

- (a) may raise any common defences and rights of set-off that were available to be asserted by the co-obligor against the obligee ;
- (b) may assert defences which are personal to itself ;
- (c) may not assert defences and rights of set-off which are personal to one or several of the other co-obligors.

#### ARTICLE 11.1.13

##### *(Inability to recover)*

If a joint and several obligor who has performed more than that obligor's share is unable, despite all reasonable efforts, to recover contribution from another joint and several obligor, the share of the others, including the one who has performed, is increased proportionally.

## SECTION 2: PLURALITY OF OBLIGEES

### ARTICLE 11.2.1

#### *(Definitions)*

When several obligees can claim performance of the same obligation from an obligor:

- (a) the claims are separate when each obligee can only claim its share;
- (b) the claims are joint and several when each obligee can claim the whole performance;
- (c) the claims are joint when all obligees have to claim performance together.

### ARTICLE 11.2.2

#### *(Effects of joint and several claims)*

Full performance of an obligation in favour of one of the joint and several obligees discharges the obligor towards the other obligees.

### ARTICLE 11.2.3

#### *(Availability of defences against joint and several obligees)*

- (1) The obligor may assert against any of the joint and several obligees all the defences and rights of set-off that are personal to its relationship to that obligee or that it can assert against all the co-obligees, but may not assert defences and rights of set-off that are personal to its relationship to one or several of the other co-obligees.
- (2) The provisions of Articles 11.1.5, 11.1.6, 11.1.7 and 11.1.8 apply, with appropriate adaptations, to joint and several claims.

### ARTICLE 11.2.4

#### *(Allocation between joint and several obligees)*

- (1) As among themselves, joint and several obligees are entitled to equal shares, unless the circumstances indicate otherwise.
- (2) An obligee who has received more than its share must transfer the excess to the other obligees to the extent of their respective shares.



# Annex 2: Model Clauses for Use of UNIDROIT Principles of International Commercial Contracts

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## INTRODUCTION

1. The UNIDROIT Principles of International Commercial Contracts (hereinafter ‘the UNIDROIT Principles’), first published in 1994, with a second edition in 2004, a third in 2010 and now in their fourth (2016) edition (hereinafter ‘UNIDROIT Principles 2016’), represent a non-binding codification or “restatement” of the general part of international contract law. Welcomed from their first appearance as “a significant step towards the globalisation of legal thinking”, over the years they have been well received not only by academics but also in practice, as demonstrated by the numerous court decisions and arbitral awards rendered worldwide that refer in one way or another to the UNIDROIT Principles.<sup>779(\*)</sup>
2. There is, however, a clear perception that the potentialities of the UNIDROIT Principles in transnational contract and dispute resolution practice have not yet been fully realised. This is due to a large extent to the fact that the UNIDROIT Principles are still not sufficiently well-known among the international business and legal communities so that much remains to be done to bring them to the attention of all their potential users worldwide. While this is true of all international uniform law instruments, with respect to the UNIDROIT Principles there is an additional factor to be taken into consideration. Unlike binding instruments, such as, e.g., the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter ‘the CISG’), which are applicable whenever the contract at hand falls within their scope and the parties have not excluded their application, the UNIDROIT Principles, being a ‘soft law’ instrument, offer a greater range of possibilities of which parties are not always fully aware. Hence the idea of preparing Model Clauses that parties may wish to adopt in order to indicate more precisely in what way they wish the UNIDROIT Principles to be used during the performance of the contract or when a dispute arises.
3. The Model Clauses suggested below are primarily based on the use of the UNIDROIT Principles in transnational contract and dispute resolution practice, i.e. they reflect the different ways in which the UNIDROIT Principles are actually being referred to by parties or applied by judges and arbitrators.
4. The Model Clauses are divided into four categories according to whether their purpose is
  - (i) to choose the UNIDROIT Principles as the rules of law governing the contract (see Model Clauses No. 1, *infra* p. 4 et seq.),

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779 <sup>(\*)</sup> For an up-to-date collection of court decisions and arbitral awards (at least in the form of abstracts) referring in one way or another to the UNIDROIT Principles see the database UNILEX ([www.unilex.info](http://www.unilex.info)).

(ii) to incorporate the UNIDROIT Principles as terms of the contract (see Model Clause No. 2, *infra* p. 14 et seq.),

(iii) to refer to the UNIDROIT Principles to interpret and supplement the CISG when the latter is chosen by the parties (see Model Clauses No. 3, *infra* p. 16 et seq.), or

(iv) to refer to the UNIDROIT Principles to interpret and supplement the applicable domestic law, including any international uniform law instrument incorporated into that law (see Model Clauses No. 4, *infra* p. 20 et seq.).

5. In deciding which of the four categories of Model Clauses to choose parties should be aware of the advantages and disadvantages of each (see e.g. Model Clauses No. 1 General remarks section 4, *infra* pp. 5-6; Model Clause No. 2 Comment section 1 and section 5, *infra* p. 14 and p. 15; Model Clauses No. 3 General remarks section 4, *infra* p. 17; Model Clauses No. 4 Comment section 3, *infra* p. 21).

6. Where appropriate, for each Model Clause two versions are proposed, one for inclusion in the contract (“pre-dispute use”) and one for use after a dispute has arisen (“post-dispute use”).

7. The Model Clauses are deliberately drafted in a concise manner, leaving it to the Comments to indicate possible modifications or additions parties may wish to make.

8. The Model Clauses refer to the UNIDROIT Principles 2016, but parties are free to choose the previous editions of 1994, 2004 and 2010 (which, however, cover fewer topics). If the parties refer to the UNIDROIT Principles without specifying the edition, it should be presumed that the reference is to the current edition.

## IMPORTANT

**Parties should be aware that the purpose of the Model Clauses is merely to allow them to indicate more precisely the way they wish the UNIDROIT Principles to be used during the performance of the contract or when a dispute arises. Therefore, even if parties decide not to use these Model Clauses, judges and arbitrators may still apply the UNIDROIT Principles according to the circumstances of the case as they have been doing so far.**

## 1. MODEL CLAUSES CHOOSING THE UNIDROIT PRINCIPLES AS THE RULES OF LAW GOVERNING THE CONTRACT

### *General remarks*

1. There are several reasons for which parties – be they powerful ‘global players’ or small or medium businesses – may wish to choose the UNIDROIT Principles as the rules of law governing their contract or, in case of a dispute, as the rules of law applicable to the substance of the dispute. Except where one of the parties is in a position to persuade the other to accept its own domestic law, parties are usually reluctant to agree on the application of the domestic law of the other. The choice of a ‘neutral’ law, i.e. the law of a third country, to avoid choosing the domestic law of either party presents obvious inconveniences, since such ‘neutral’ law is foreign to both parties and to know its content may require time consuming and expensive consultation with lawyers of the country of the law chosen. The UNIDROIT Principles are a useful alternative to the choice of both the domestic law of one of the parties and the law of a third country. The UNIDROIT Principles provide a balanced

set of rules covering virtually all the most important topics of general contract law, such as formation, interpretation, validity including illegality, performance, non-performance and remedies, assignment, set-off, plurality of obligors and of obligees, as well as the authority of agents and limitation periods. Moreover, and even more important, the UNIDROIT Principles, prepared by a group of experts representing all the major legal systems of the world and available in virtually all the major international languages, are 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.

2. Parties wishing to choose the UNIDROIT Principles as the rules of law governing their contract or as the rules of law applicable to the substance of the dispute, may

(i) choose the UNIDROIT Principles without any reference to other legal sources (see Model Clauses No. 1.1 (a) and (b), *infra* p. 6 et seq. and p. 8) or

(ii) choose the UNIDROIT Principles supplemented by a particular domestic law (see Model Clauses No. 1.2 (a) and (b), *infra* p. 9 and p. 10), or

(iii) choose the UNIDROIT Principles supplemented by ‘generally accepted principles of international commercial law’ (see Model Clauses No. 1.3 (a) and (b), *infra* p. 11 et seq. and p. 12 et seq.).

3. In all these cases the parties may refer to the UNIDROIT Principles either in their entirety or with the exception of individual provisions thereof which they do not consider appropriate for the kind of transaction/dispute involved.

4. Parties choosing the UNIDROIT Principles as the rules of law governing their contract or the rules of law applicable to the substance of the dispute are well advised to combine such a choice-of-law clause with an arbitration agreement. Domestic courts are bound by the rules of private international law of the forum, which traditionally and still predominantly limit the parties’ freedom of choice to domestic laws, so that a purported choice of non-state rules such as the UNIDROIT Principles will be considered not as a choice of law but, rather, as an agreement to incorporate them into the contract.<sup>780(\*\*)</sup> The consequence of this treatment of non-state rules is that they bind the parties only to the extent that they do not conflict with the rules of the applicable domestic law from which the parties may not vary by agreement (for some examples of such ‘ordinary’ mandatory rules of the applicable domestic law see Model Clause No. 2, Comment section 5, *infra* p. 15). In the context of international commercial arbitration, however, parties are nowadays generally permitted to choose ‘soft law’ instruments such as the UNIDROIT Principles as the ‘rules of law’ on which the arbitrators are to base their decisions.<sup>781(\*\*\*)</sup> Consequently, in arbitration, the UNIDROIT Principles apply within their scope to the exclusion of any particular national law, subject only to the application of those rules of domestic law which are mandatory irrespective of which law governs the contract; and since such ‘overriding’ mandatory rules are for the most part of public law nature (e.g. prohibition of corruption; exchange control regulations; anti-trust rules; environmental protection rules; etc.), their application along with the UNIDROIT Principles normally will not give rise to any true conflict.

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780 <sup>(\*\*)</sup> But see now Article 3 of the *Draft Hague Principles on the Choice of Law in International Contracts* and attached Comments.

781 <sup>(\*\*\*)</sup> See Article 28(1) of the 1985 *UNCITRAL Model Law on International Commercial Arbitration*.

5. Parties may refer to the UNIDROIT Principles also where they agree that the arbitral tribunal shall decide *ex equo et bono* or as *amiable compositeur*. However, in such a case the arbitral tribunal will apply the UNIDROIT Principles as the rules of law governing the substance of the dispute only to the extent that their strict application does not lead to an inequitable result in the dispute at hand.

6. Parties may refer to the UNIDROIT Principles even in the context of conciliation. However, in such a case the conciliator will merely use the UNIDROIT Principles as guidance when formulating the terms of a possible settlement agreement for submission to the parties for approval.

## 1.1 MODEL CLAUSES CHOOSING ONLY THE UNIDROIT PRINCIPLES

### (a) *Model Clause for inclusion in the contract*

*"This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts (2016)."*

#### COMMENT

1. This Model Clause may be used by parties wishing to choose the UNIDROIT Principles as the rules of law governing their contract without any reference to other legal sources (see UNIDROIT Principles 2016, Preamble section 2).

2. As to the different effects which such a choice may have on the application of the UNIDROIT Principles depending on as to whether it will be invoked in court proceedings or in arbitration proceedings, see Model Clauses No. 1, General Remarks, section 4, *supra* pp. 5-6.

3. If parties choose only the UNIDROIT Principles as the rules of law governing their contract, the question arises as to how to deal with issues not covered by the UNIDROIT Principles. Indeed, comprehensive as the UNIDROIT Principles are, there are still issues which fall within their scope but are not expressly settled by them (e.g. specific cases of negotiations in bad faith (see Comment 2 to Article 2.1.15 UNIDROIT Principles 2016); the extent of the duty of co-operation (see Comment to Article 5.1.3 UNIDROIT Principles 2016); specific duties to preserve the other party's rights pending fulfillment of a condition (see Article 5.3.4 UNIDROIT Principles 2016); etc.). Moreover other issues are outside the scope of the UNIDROIT Principles (e.g. lack of capacity (see Article 3.1.1 UNIDROIT Principles 2016); the internal relationship between principal and agent (see Article 2.2.1(2) UNIDROIT Principles 2016); the authority of organs, officers or partners of a corporation (see Article 2.2.1(3) UNIDROIT Principles 2016); etc.), as are issues relating to specific types of contracts (e.g. with respect to sales contracts, the buyer's duty to examine the goods and to give notice thereof to the seller; special remedies for defects of the goods; the passing of the risk; etc.). Issues within the scope of the UNIDROIT Principles but not expressly settled by them may be settled, as far as possible, in accordance with the basic ideas underlying the UNIDROIT Principles (see Article 1.6 UNIDROIT Principles 2016). By contrast, issues outside the scope of the UNIDROIT Principles and, therefore, not covered by them at all will of necessity be governed by other legal sources. Unless the contract provides a reference to the sources to be used (as in Model Clauses 1.2 and 1.3 *infra* p. 9 *et seq.* and p. 11 *et seq.*), they will be determined in accordance with relevant rules of private international law. Inasmuch as those rules vary somewhat from State to State and are not always predictable in their application, the absence of such a reference may result

in some uncertainty as to the source of rules that will apply to matters outside the scope of the UNIDROIT Principles.

*(b) Model Clause for use after a dispute has arisen*

*“This dispute shall be decided in accordance with the UNIDROIT Principles of International Commercial Contracts (2016).”*

COMMENT

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, the UNIDROIT Principles as the rules of law applicable to the substance of the dispute without any reference to other legal sources.
2. Depending on the applicable rules of procedure parties may do so by a separate agreement, before or after the commencement of the court or arbitration proceedings.
3. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, section 4, *supra* pp. 5-6.
4. As to the question of how to deal with the case where the disputed issues are not covered by the UNIDROIT Principles, see Model Clause No. 1.1 (a), Comment, section 3, *supra* pp. 7-8.

## **1.2 MODEL CLAUSES CHOOSING THE UNIDROIT PRINCIPLES SUPPLEMENTED BY A PARTICULAR DOMESTIC LAW**

*(a) Model Clause for inclusion in the contract*

*‘This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts (2016) and, with respect to issues not covered by such Principles, by the law of [State X].’*

COMMENT

1. This Model Clause may be used when the parties, in view of the fact that the UNIDROIT Principles do not cover all issues that may arise in relation to their contract, wish to choose the UNIDROIT Principles as the rules of law governing their contract together with a particular domestic law to which to resort to fill possible gaps in the UNIDROIT Principles. In so doing, the parties will avoid the possibility present in Model Clause No. 1.1 (a) that, if a dispute arises concerning issues outside the scope of the UNIDROIT Principles, these issues will be decided on the basis of the law determined by the adjudicating body in accordance with the relevant rules of private international law (see Model Clause No. 1.1 (a), Comment, section 3, *supra* pp. 7-8).
2. When choosing the domestic law, parties should bear in mind that in the case of a multi-unit State (e.g. the United States of America; Canada; Australia; etc.) they should specify the particular jurisdiction to which they intend to refer (e.g. the law of the State of New York; the law of the Province of Quebec, etc.).

3. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, section 4, *supra* pp. 5-6.

*(b) Model Clause for use after a dispute has arisen*

*'This dispute shall be decided in accordance with the UNIDROIT Principles of International Commercial Contracts (2016) and, with respect to issues not covered by the Principles, by the law of [State X].'*

COMMENT

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, the UNIDROIT Principles as the rules of law applicable to the substance of the dispute together with a particular domestic law to fill possible gaps in the UNIDROIT Principles. In so doing, the parties will avoid the possibility present in Model Clause No. 1.1 (b) that, if the dispute relates to issues outside the scope of the UNIDROIT Principles, these issues will be decided on the basis of the law determined by the adjudicating body in accordance with the relevant rules of private international law (see Model Clause No. 1.1 (a), Comment, section 3, *supra* pp. 7-8).

2. Depending on the applicable rules of procedure, parties may do so by a separate agreement either before or after the commencement of the court or arbitration proceedings.

3. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, section 4, *supra* pp. 5-6.

### **1.3 MODEL CLAUSES CHOOSING THE UNIDROIT PRINCIPLES SUPPLEMENTED BY GENERALLY ACCEPTED PRINCIPLES OF INTERNATIONAL COMMERCIAL LAW**

*(a) Model Clause for inclusion in the contract*

*'This contract shall be governed by the UNIDROIT Principles of international Commercial Contracts (2016) and, with respect to issues not covered by such Principles, by generally accepted principles of international commercial law.'*

COMMENT

1. This Model Clause may be used when the parties, in view of the fact that the UNIDROIT Principles do not cover all issues that may arise in relation to their contract, wish to choose the UNIDROIT Principles as the rules of law governing their contract together with generally accepted principles of international commercial law to which to resort to fill possible gaps in the UNIDROIT Principles. In so doing, the parties will avoid the possibility present in Model Clause No. 1.1 (a) that, if a dispute arises concerning issues outside the scope of the UNIDROIT Principles, these



issues will be decided on the basis of the law determined by the adjudicating body in accordance with the relevant rules of private international law (see Model Clause No. 1.1 (a), Comment, section 3, supra pp. 7-8).

2. Instead of referring to ‘generally accepted principles of international commercial law’, parties may use other formulations such as ‘general principles of law’, ‘generally accepted principles of international contract law’, the *lex mercatoria*, international customs and usages, or the like: all such formulations have one and the same purpose, i.e., to indicate the parties’ determination to have possible gaps in the UNIDROIT Principles filled in accordance with transnational principles and rules and not by resort to a particular domestic law.

3. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, section 4, supra pp. 5-6.

*(b) Model Clause for use after a dispute has arisen*

*‘This dispute shall be decided in accordance with the Unidroit Principles of International Commercial Contracts (2016) and, with respect to issues not covered by such Principles, by generally accepted principles of international commercial law.’*

COMMENT

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, the UNIDROIT Principles as the rules of law applicable to the substance of the dispute together with generally accepted principles of international commercial law to which to resort to fill possible gaps in the UNIDROIT Principles. In so doing, the parties will avoid the possibility present in Model Clause No. 1.1 (b) that, if the dispute relates to issues outside the scope of the UNIDROIT Principles, these issues will be decided on the basis of the law determined by the adjudicating body in accordance with the relevant rules of private international law (see Model Clause No. 1.1 (a), Comment, section 3, supra pp. 7-8).

2. Instead of referring to ‘generally accepted principles of international commercial law’, parties may use other formulations such as ‘general principles of law’, ‘generally accepted principles of international contract law’, the *lex mercatoria*, international customs and usages, or the like: all such formulations have one and the same purpose, i.e., to indicate the parties’ determination to have possible gaps in the UNIDROIT Principles filled in accordance with transnational principles and rules and not by resorting to a particular domestic law.

3. Depending on the applicable rules of procedure parties may do so by a separate agreement, before or after the commencement of the court or arbitration proceedings.

4. As to the different effects this Model Clause may have on the application of the UNIDROIT Principles, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, section 4, supra pp. 5-6.



## 2. MODEL CLAUSE INCORPORATING THE UNIDROIT PRINCIPLES AS TERMS OF THE CONTRACT

*'The UNIDROIT Principles of International Commercial Contracts (2016) are incorporated in this contract to the extent that they are not inconsistent with the other terms of the contract.'*

### COMMENT

1. This Model Clause may be used when the parties, instead of choosing the UNIDROIT Principles as the rules of law governing their contract, wish to incorporate the UNIDROIT Principles in their contract. One of the reasons for opting for this approach may be that – as is generally the case in court proceedings – according to the relevant rules of private international law parties cannot choose a 'soft law' instrument such as the UNIDROIT Principles as the rules of law governing their contract (see Model Clauses No. 1, General Remarks, section 4, supra pp. 5-6).
2. Parties may incorporate in their contract the UNIDROIT Principles in their entirety, or only specific chapters or sections thereof, and in so doing they may either merely refer to them or reproduce the relevant texts. This Model Clause incorporates the UNIDROIT Principles in their entirety and does so by reference to them.
3. By stating that the UNIDROIT Principles are incorporated to the extent that they are not inconsistent with the other terms of the contract, the Model Clause makes it clear that in case of a conflict between the UNIDROIT Principles and the other terms of the contract, the latter prevail. In order to avoid any uncertainty in this respect the parties may wish to list all the documents forming part of their contract and establish their priority.
4. Parties incorporating the UNIDROIT Principles in their contract may also indicate the domestic law governing the contract. Absent an express choice by the parties, the domestic law governing the contract will be determined by the adjudicating body according to the relevant rules of private international law.
5. As terms of the contract, the UNIDROIT Principles will prevail over the non-mandatory or 'default' rules of the applicable domestic law but not over the mandatory rules, i.e. the rules from which parties cannot vary by agreement. It is true that in the field of general contract law mandatory rules are rather rare; however, domestic mandatory rules that prevail over conflicting rules of the UNIDROIT Principles may exist, if at all, inter alia with respect to special requirements as to form, contracting on the basis of standard terms, illegality, public permission requirements, contract adaptation in case of hardship, exemption clauses, penalty clauses and limitation periods.

### **3. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) WHEN THE LATTER IS CHOSEN BY THE PARTIES**

#### *General remarks*

1. It is nowadays widely recognised that international uniform law instruments, even after their incorporation in the various domestic laws, remain an autonomous body of law which should be interpreted and supplemented according to autonomous and internationally uniform principles and rules, and that recourse to domestic law should be only a last resort. In the past, such autonomous principles and rules had to be found each time by the judges and arbitrators themselves. The UNIDROIT Principles could considerably facilitate their task in this respect (see UNIDROIT Principles 2016, Preamble, section 5).
2. The use of the UNIDROIT Principles as a means of interpreting and supplementing uniform law instruments is particularly relevant with respect to the CISG. Notwithstanding the different scope of application of the two instruments – international commercial contracts in general in the case of the former, international sales contracts in the case of the latter – the instruments deal with many of the same issues concerning contract formation, interpretation, performance, non-performance and remedies. Since the provisions contained in the UNIDROIT Principles are more comprehensive and in general more detailed, they may in many cases provide a solution for ambiguities or gaps in the CISG.
3. Article 7 of the CISG states that ‘[i]n the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application [...]’ (paragraph 1) and 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 and, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law’ (paragraph 2).
4. Parties wishing to ensure that, if the CISG governs their contract, it will be interpreted and supplemented by the UNIDROIT Principles should expressly stipulate this in their contract or in a separate agreement. However, in so doing the parties should be aware that the effects of their reference to the UNIDROIT Principles as a means of interpreting and supplementing the CISG differ considerably depending on whether CISG applies (i) as a result of a choice by the parties (even though the CISG would not otherwise govern as a matter of domestic law) or (ii) as a matter of the domestic law governing the contract (see Model Clause No. 3 (a) Comment section 2, *infra* p. 18 and Model Clause No. 4 (a) Comment section 3, *infra* p. 21).

#### *(a) Model Clause for inclusion in the contract*

*‘This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) interpreted and supplemented by the Unidroit Principles of International Commercial Contracts (2016).’*

1. This Model Clause may be used when parties choose the CISG to govern their contract, even though the objective requirements for the application of the CISG are not met, and wish the CISG to be interpreted and supplemented by the UNIDROIT Principles. As to the role of the UNIDROIT Principles as a means of interpreting and supplementing the CISG where the CISG applies as integral part of the domestic law governing the contract, see Model Clause No. 4 (a), Comment section 3, *infra* p. 21).

2. By using this Model Clause, the parties achieve a twofold result: first, their contract will be governed by the CISG and not by the otherwise applicable domestic law which has not incorporated the CISG; second, since the CISG will apply not as a matter of binding domestic law but, rather, only as a ‘soft law’ instrument chosen by the parties to govern their contract, the UNIDROIT Principles may be used to interpret and supplement the CISG not only with respect to issues covered by the CISG but not expressly settled by it (cf. Article 7(2) CISG), but also with respect to other issues of general contract law which are outside the scope of the CISG but may become relevant also in the context of sales contracts (such as contracting on the basis of standard terms, authority of agents, defects of consent, illegality, conditions, set-off, assignment of rights, limitation periods, etc.).

3. As to the different effects this Model Clause may have on the application of the CISG and of the UNIDROIT Principles as a means of interpreting and supplementing the CISG, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, section 4, *supra* pp. 5-6.

*(b) Model Clause for use after a dispute has arisen*

*“This dispute shall be decided in accordance with the United Nations Convention on Contracts for the International Sale of Goods (CISG) interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2016).”*

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, the CISG as the rules of law applicable to the substance of the dispute, even though the objective requirements for the application of the CISG are not met, and to refer to the UNIDROIT Principles as a means of interpreting and supplementing the CISG.

2. Depending on the applicable rules of procedure parties may do so by a separate agreement either before or after the commencement of the court or arbitration proceedings.

3. As to the different effects this Model Clause may have on the application of the CISG and of the UNIDROIT Principles as a means of interpreting and supplementing the CISG, depending on whether the parties invoke it before a domestic court or an arbitral tribunal, see Model Clauses No. 1, General Remarks, section 4, *supra* pp. 5-6.

## 4. MODEL CLAUSES REFERRING TO THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING THE APPLICABLE DOMESTIC LAW

### *General remarks*

The UNIDROIT Principles may play – and, in fact, increasingly do play – an important role in the interpretation and supplementation of the domestic law governing the contract or applicable to the substance of the dispute (see UNIDROIT Principles 2016, Preamble, section 6). This is the case in particular when the domestic law in question is that of a country with a less developed legal system. Yet even highly developed legal systems do not always provide a clear-cut solution to specific issues arising out of international commercial contracts, either because opinions are sharply divided or because the issue at stake has so far not been addressed at all. In both cases, a clause referring to the UNIDROIT Principles may be used to ensure an interpretation and supplementation of the applicable domestic law in accordance with the internationally accepted principles and rules set forth in the UNIDROIT Principles.

### *(a) Model Clause for inclusion in the contract*

*‘This contract shall be governed by the law of [State X] interpreted and supplemented by the Unidroit Principles of International Commercial Contracts (2016).’*

### COMMENT

1. This Model Clause may be used by parties who choose a particular domestic law as the law governing their contract and wish that law to be interpreted and supplemented by the UNIDROIT Principles. In so doing, the parties ensure that the domestic law that is designated will be interpreted and supplemented in accordance with internationally accepted principles and rules as laid down in the UNIDROIT Principles.
2. Parties may wish to refer to the UNIDROIT Principles as a means of interpreting and supplementing the applicable domestic law not only when the domestic law in question is that of a country with a less developed legal system but also when it is a highly developed legal system. Even highly developed legal systems do not always provide a clear-cut solution to specific issues arising out of international commercial contracts, so that a solution has to be found on a case to case basis. By referring to the UNIDROIT Principles to interpret and supplement the applicable domestic law, parties will in both cases achieve greater predictability and thereby reduce transactional and litigation costs.
3. This Model Clause has also the effect that international uniform law instruments incorporated in the domestic law governing the contract are, to the extent needed, to be interpreted and supplemented in accordance with the UNIDROIT Principles. In particular, as far as the CISG is concerned, it should be noted that Article 7 lays down the criteria for an autonomous interpretation of the Convention, and that the “general principles on which [the Convention] is based” referred to in Article 7(2) are as such not identical with the UNIDROIT Principles. By using this Model Clause the parties would impliedly derogate from Article 7(2) CISG by indicating that gaps in the

Convention are to be filled in conformity with the UNIDROIT Principles and as a last resource with reference to the applicable domestic law. However, contrary to the effects of Model Clauses No. 3, under this Model Clause the UNIDROIT Principles would act as gap-filler only with respect to issues governed by the CISG but not expressly settled in it, whereas issues outside the scope of the CISG would be governed by the applicable domestic law.

*(b) Model Clause for use after a dispute has arisen*

*"This dispute shall be decided in accordance with the law of [State X] interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts (2016)."*

COMMENT

1. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, a particular domestic law as the law applicable to the substance of the dispute and to refer to the UNIDROIT Principles as a means of interpreting and supplementing the domestic law in question.

2. Depending on the applicable rules of procedure, parties may do so by a separate agreement either before or after commencement of the court or arbitration proceedings.

3. The effects of this Model Clause on the application of the UNIDROIT Principles as a means of interpreting and supplementing the domestic law chosen as the law governing the contract are basically the same regardless as to whether the parties invoke it before a domestic court or an arbitral tribunal. It is true that domestic courts consider the interpretation and gap-filling of the applicable domestic law in principle to be their prerogative. However, at least with respect to issues covered by party autonomy, not only arbitral tribunals but also domestic courts will normally follow the indications made by both of the parties as to how they wish to have ambiguities in the applicable law resolved or gaps filled, and to this effect it is irrelevant whether such indications are made by the parties in their pleadings with respect to specific issues under dispute or by a reference to the UNIDROIT Principles with respect to all issues that may become relevant.















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