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Perspectives in Practice of the UNIDROIT Principles 2016

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

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**. 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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