UNIDROIT International Summer School 2022
UNIDROIT Principles of International Commercial Contracts: Model Clauses
Professor Don Wallace, Rome, Tuesday, July 5, 2022

Syllabus

I The Principles' Preamble(Purpose of the Principles)'s second paragraph: "They shall be applied when the parties have agreed that their contract be governed by them."

Some background further to Professor Bonell's syllabus:

*Inter alia the Principles inform the academy, serve as a restatement of the law, and as a source and inspiration for national legislators. A contemporary example may be their use to deal with the impact of covid and measures to deal with it and force majeure and hardship. Note of the UNIDROIT Secretariat on the UPICC and the Covid-19 Health Crisis. www.unidroit.org/

But the further harmonization of law and practice by actual use of the Principles will be their greatest accomplishment. In contrast to other initiatives to unify law, the use of the Principles constitutes a 'bottom-up' effort, whose effect may be more profound and lasting. See Coelken, Foreword, Perspectives in Practice of the UNIDROIT Principles 2016: Views of the IBA Working Group on the Practice of the UNIDROIT Principles 2016(International law Institute (ILI), Washington, DC 2019)["Perspectives"]

*Freedom of contract, of party autonomy with respect to all matters and aspects of contracts and contracting, is increasingly ascendant around the world. Stewart and Bowker, Ristau's International Judicial Assistance: A Practitioner's Guide to International Civil and Commercial Litigation, p 107 et seq (2nd ed.,ILI and OUP 2021) Article 1.1 of the Principles reflects this fact.

Thus the parties are increasingly free to select a law governing the interpretation of the substance of a contract(procedural issues will be governed by the lex fori, the law of the country of the court), even though that law's country has few if any contacts with the contract. One of the beauties of the Principles is that by definition it is international or non-national, and hence immune from needing contacts in the first place. It might be worth noting that the rules of conflicts of law/private international law applied in default of party choice, have also changed. No longer will the interpretation of the substance of a contract be limited to the lex locus contractus, i.e. the site of the contract's making, as new conflicts rules have emerged. Stewart and Bowker, ibid, p 137 et seq.

*The Principles have been translated into more than 20 languages and are freely available in 12 from the UNIDROITwebsite, www.unidroit.org

*A possibly obvious point about the exercise of freedom of contract to select the Principles: the Principles which are said to be balanced with respect to the interests of the parties, which embody and build on the best of civil and common law systems, are attractive to the parties in their not having to research and choose between the respective national law systems of the parties(the substance of which may not always favor the interests of the national of that system).

And the Principles displace both the substance of national law, the 'internal' law of the country, and also its conflicts of law. And the clauses are models, which may be varied, and may be selected in whole or in part(i.e. exclude particular principles).

II Model Clauses for the Use by Parties of the UNIDROIT Principles of International Commercial Contracts(2013, p 6), clause 1.1(a),

"This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts(2010)."

*Given the background in I, why indeed would not parties to all contracts include this clause in their contracts? A principal answer is that not all courts(and the judges in our audiences may wish to comment) yet accept freedom of contract and party autonomy with respect to the matter of a choice of law clause. See Preamble, comment 4(a). In large part this is because the 'conflicts of law'(private international law rules) laws and rules of most jurisdictions limit such choice to "law", i.e. hard law, not soft law like the Principles. Article 3 of the Hague Conference Principles on Choice of Law in International Commercial Contracts seeks to change this.

*An obvious point: the Principles, whether made applicable by clause 1.1(a), or otherwise as noted below, are always subject to the mandatory laws, and public policy/ordre publique if different, of the relevant jurisdiction.

*An editorial observation: note that these instruments are continuously being revised, and a reference in one may be to an edition of an earlier date than the one current. Attention therefore needs to be paid to making correct and current references, or in the alternative to the relevant jurisprudence governing the consequences of incorrect references.

III Arbitration

A practical step is for the parties to combine clause 1.1(a), with a choice of forum clause, which again party autonomy generally permits, and specifically an arbitration agreement. Op cit comment 4(a). If arbitration under the UNCITRAL Rules(2013) is chosen, Rule 35(1) provides the parties may specify the governing law, absent which the arbitrators may. Compare ICSID Convention Article 42(1).

IV Compromis

*Clauses 1.1(b), 1.2(b), 1.3(b), 3(b) and 4(b) contemplate the parties, having failed to include a clause like 1.1(a) in their contracts ab initio, can later agree(comromis is just an agreement, addressed to a court or arbitrators) with respect to a dispute, that the Principles to the extent specified in each of those clauses, shall apply to its resolution. It is beyond the scope of this discussion, whether arbitrators or judges are bound to accept the compromis.

V Incorporation by reference

Clause 2 provides that the Principles shall be incorporated by reference into the contract, to the extent not inconsistent with the other terms of the contract.
In my view, this is a second best, if that. Some courts, rejecting Clause 1.1(a) on the grounds already seen that only hard "law" and not soft law may be selected by the parties, nonetheless treat the reference as one of 'incorporation' [cases]. I say second best, because this is inevitably clumsy: the wording of the Principles is general and legislative, not particular and oriented to the facts of the deal or contract, and will probably not sit well with the rest of the contract. Therefore to voluntarily and explicitly select it, is both second best and inelegant. If apprehending a court's negative reaction to clause 1.1(a) per se, better to select clause 1.1(a) in conjunction with an arbitration agreement.

VI Clause 1.2(a) and Clause 4(a) provide for the application of a combination of national law and the Principles: in the former national law supplements the Principles, and in the latter the Principles supplement the national law.
In arbitration I see no particular difficulty. In courts, I leave it to the judges in our audiences to comment.

VII Clauses 1.3 (a) and (b): the Principles as supplemented by "generally accepted principles of international commercial law". I must say that if were a judge I might find this puzzling, possibly even vexing.
The comments to the Preamble, speaking of "general principles of law", 'lex mercatoria"(shades of the Hanseatic League) and the like' refer to the 'extreme vagueness" of such concepts. The well-defined Principles are offered in their place, indeed that is the prime raison d'etre for their existence. Now come the suggestion that gaps in the principles be filled by them. If I were a judge resistant to the Principles, these Clauses would not assuage me.

VIII Clauses 3(a) and (b), for use with the Convention on Contracts for the International Sale of Goods(CISG).

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To increase familiarity with the Principles: participate in the Vis Competition; more international commercial law courses in law school curricula; generational and geographic disparities.