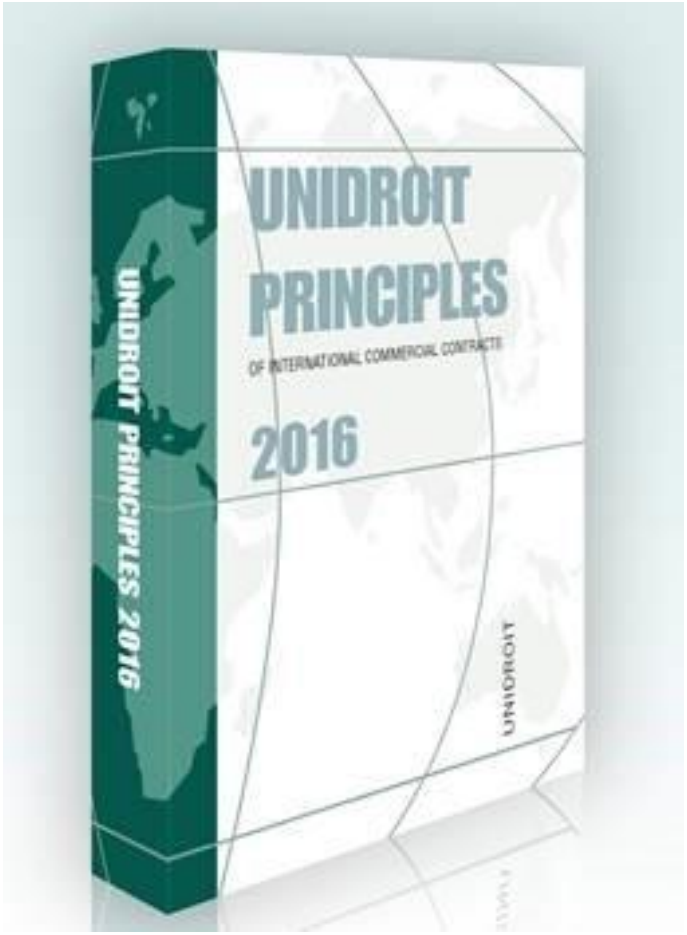
UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

UNIDROIT
and the UNIDROIT Principles of International Commercial Contracts (UPICC)

Prof Anna Veneziano
Deputy Secretary-General, UNIDROIT
Professor of Comparative Law
University of Teramo, Italy

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé



Black-letter rules and comments available on-line at:

https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016

UPICC available in several additional languages, including French, Arabic, Chinese, Spanish…

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

A practical example: the case…

- Series of contracts between an English company and a government agency of a Middle Eastern country for the supply of equipment;
- some of the contract referred to settlement of future disputes "according to laws and rules of natural justice"

WHY?

- neither party is strong enough to impose its own domestic law
- parties cannot agree on the choice of the domestic law of a third country
- domestic law often not well suited to settle disputes regarding international contracts

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

…and the solution

DECISION OF THE ARBITRAL TRIBUNAL REGARDING THE APPLICABLE LAW:

- **arbitral tribunal held that parties intended to exclude the application of any domestic law and to have their contracts governed by "general principles and rules which, though not enshrined in any specific national legal system, are specially adapted to the needs of international transactions and enjoy wide international consensus";**
- **the arbitral tribunal concluded that such "general rules and principles enjoying wide international consensus […] are primarily reflected by the UNIDROIT Principles".**

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

A second practical example: the case…

- Two Spanish companies entered into a framework agreement, according to which the parties would every year conclude a contract for the sale of the grape crop of the respective year.
- After several years of regular performance of the framework agreement, the buyer failed to pay the price for one consignment, prompting the seller to terminate the contract for breach by the buyer in accordance with Article 1124 of the Spanish Civil Code. and to no longer perform its obligations under the contract.
- The buyer brought an action against the seller claiming that on its part there was no breach of the contract but merely a delay in performance which was not a sufficient ground for termination, and that therefore it was the seller which in refusing to perform any longer was responsible for breach of contract.

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

…and the solution

- **The Spanish Supreme Court stated that only a fundamental breach by one of the parties entitled the other to terminate the contract.**
- **Since Article 1124 of the Spanish Civil Code referred generically to breach with no further qualification, it was up to the Courts to define the notion of fundamental breach.**
- **Referring, inter alia, to Article 7.3.1 of the UNIDROIT Principles and to Article 49(1) CISG, the Court held that a fundamental beach of contract which gives rise to the right to termination is a breach which "deprives the aggrieved party of what it was entitled to expect under the contract".**
- **In the case at hand the Court considered the buyer's failure to pay the price to be a fundamental breach and decided in favour of the seller.**

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

UNIDROIT Principles: Origin and Development

- The UNIDROIT Principles of International Commercial Contracts were first published in 1994
- Following their worldwide success, two subsequent enlarged editions were prepared: 2004 and 2010
- In 2016 edition adapting the text to the application to long-term contracts was published
- They are based on extensive comparative law studies carried out over many decades:
  - Starting 1928: Work on international commercial sales contracts (leading to the 1980 UN Convention on Contracts for the International Sale of Goods - CISG)
  - 1971: Study Group (David-Schmitthoff-Popescu)
  - 1980 onwards: Working Group to draft UPICC led by Prof. Michael Joachim Bonell
- Were prepared by a group of eminent experts in the field of international contract law representing all major legal systems and/or geo-political regions of the world, with extensive consultations with practitioners
- They were approved by UNIDROIT's governing organs and endorsed by UNCITRAL
- They are translated in all major world languages

Why "Principles" of International commercial Contracts?

. **Limits to harmonisation of the law of international business transactions worldwide by legislative means (like CISG)**

. **Non-binding "Principles" vs hard treaties:**

Less effective?

- **Non binding rules applied because of their persuasive value**
- **Application left to decision of parties / adjudicators**

More effective?

- **No need of a diplomatic conference, no need to be ratified by States**
- **Well suited to party autonomy**
- **More easily adapted to changing conditions in international trade**

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

Content of the UNIDROIT Principles

- **The UNIDROIT Principles 2016 consist of a Preamble and 211 Articles (accompanied by Comments and Illustrations)**

- **They cover the most important areas of contract law and the law of obligations**
  - **(formation (including pre-contractual phase), interpretation, validity, illegality, performance, non-performance and remedies, excuses for non-performance and hardship, agency, third party rights, set-off, assignment of claims and transfer of obligations, limitation periods, restitution)**
  - **Special rules and comments regarding long-term contracts**

– **contain solutions generally accepted by various legal systems and/or most suited to the special needs of international trade and modern contract negotiations**

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

Ways to use the UNIDROIT Principles

- **The UNIDROIT Principles may be used (and have been used in practice) for a number of purposes:**
- **Tool of party autonomy**
  - **guidelines for drafting international contracts**
  - **chosen by parties as the law governing their contract/ as content of their contract**
  - **guideline to reach settlement agreements**
- **Tool for adjudicators**
  - **by arbitral tribunals as the law governing the contract**
    - **When parties referred to "lex mercatoria"**
    - **When parties did not choose any applicable law and it was clear they meant to exclude the application of domestic law**
  - **both by domestic courts and arbitral tribunals:**
    - **to interpret international uniform law**
    - **to interpret domestic law**
- **Model by national and international legislators**
- **"Background law" (reference in projects regarding specific contracts")**
- **Teaching materials**

WWW.UNILEX.INFO

UNILEX (an on-line data base accessible free of charge) presently reports around 560 decisions rendered worldwide and referring in one way or another to the UPICC

230 arbitral awards

Numbers of arbitral awards actually higher since arbitral awards often remain unpublished (e.g., ICC cases published only until 2008)

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

UNIDROIT Principles as a model for contract negotiation and settlement agreements

Award of the ICSDIC Court of arbitration

- Dispute between a US State national and the Government of another country
- The Parties agreed on **a settlement agreement** which was recorded as an award, and which contained "principles of interpretation and implementation of the agreement"
- Provisions correspond almost literally to 15 provisions contained in the UNIDROIT Principles

Decisions applying the UNIDROIT Contract Principles as the law governing the contract because so requested by the parties

(***source: www.unilex.info***)

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

Award of the Arbitration Court of the Lausanne Chamber of Commerce and Industry:

- **Contract between a Turkish company and a company incorporated in the West Indies concerning highly sophisticated equipment;**
- **contract contained two conflicting choice of law clauses: one in favour of English law, the other in favour of Swiss law;**
- **the arbitral tribunal suggested to the parties to agree on the application of the UNIDROIT Principles;**
- **the parties agreed also in view of the fact that with respect to the disputed issues the solutions provided by the UNIDROIT Principles were found basically to correspond to both English and Swiss law;**
- **the arbitral tribunal applied Arts. 1.7 on good faith, 2.1.16 on the duty of confidentiality, 4.6 on the contra proferentem rule, and 7.4.1, 7.4.2 and 7.4.4 on damages.**

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

ICC Rules of Arbitration – 2021

Art. 21: (1) The parties shall be free to agree upon the **rules of law** to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the **rules of law which it determines to be appropriate.**

UNCITRAL Model law on arbitration (2006)

Art. 28: (1) 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.

[Art. 35 **UNCITRAL arbitration rules:** same text]

Rome I Regulation (REGULATION (EC) No 593/2008)

Art. 3: 1. A contract shall be governed **by the law** chosen by the parties (…)

Recitals:

(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention

(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

Hague Principles on the Choice of Law in International Commercial Contracts (HCCH Principles - 2015)

Article 2 -Freedom of choice

1. A contract is governed by the law chosen by the parties.
2. The parties may choose -
    a) the law applicable to the whole contract or to only part of it; and
    b) different laws for different parts of the contract

(…)

Article 3 -Rules of law

The law chosen by the parties may be **rules of law** that are generally accepted on an international, supranational or regional level as a **neutral** and balanced set of rules, **unless the law of the forum provides otherwise**

Commentary expressly refers to the UNIDROIT Principles as a typical example of the rules of law under Art. 3 HCCH Principles

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

Decisions applying the UNIDROIT Contract Principles as rules of law (in the absence of parties' express choice)

Cour d'appel de Paris - 25-02-2020 (source: unilex database)

Seller, an Indian company, entered into a contract with Buyer, a Romanian company, for the sale of stainless steel tubes, which were intended to be incorporated into heat exchangers manufactured by the Buyer and supplied to a third party.

The confirmation of the order which Buyer sent to Seller by e-mail included the following clause: "Arbitration: Court of Arbitration of Paris". When a dispute arose between the parties regarding a series of defects detected in the goods, the Buyer commenced arbitration proceedings before the ICC International Court of Arbitration.

Since the parties disagreed on the law applicable to the dispute, the Arbitral Tribunal decided to apply the UNIDROIT Principles on the basis of Art. 21.1 of the ICC Arbitration Rules ("rules of law which [the arbitral tribunal] determines to be appropriate"). The Tribunal then ruled by majority that the Seller was in breach of its obligations under the contract and under the UNIDROIT Principles and ordered him to pay compensation to the Buyer in the amount of one million euros.

The Seller filed an appeal for the annulment of the award claiming, among others, the arbitrators' violation of the limits of their mandate for having applied the UNIDROIT Principles in order to solve the dispute, instead of Indian law, thus rendering an award on an equitable basis and not according to law.

The Court of Appeal rejected Seller's arguments and confirmed the arbitral award.

The Appellate Court found that the parties had never agreed to apply Indian law to their dispute and that the arbitrators, by applying the UNIDROIT Principles, did not decide ex aequo et bono but according to rules of law. The arbitrators' decision was also confirmed on the merits.

Decisions applying the UNIDROIT Principles to interpret or supplement the otherwise applicable domestic law

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

Federal Court of Australia, 30 June 1997, No. 558 (Hughes Aircraft Systems International v Airservices Australia) (source: unilex database)

- **The dispute concerned a bidding procedure, which had arisen between a Californian company and an Australian governmental agency after the latter awarded the contract to another bidder;**
- **according to the claimant, the defendant had failed to conduct the tender evaluation fairly and in a manner that would have ensured equal opportunity to both bidders;**
- **in considering whether such a duty was implied by law in pre-award contract contexts, the Federal Court of Australia, after stating that Australian judicial and scholarly opinion differed sharply on this matter, concluded in the affirmative;**
- **in support of its ruling, the Court stated that a general duty of good faith and fair dealing was not only recognised in a number of foreign jurisdictions but had also been propounded as a fundamental principle to be honoured in international commercial contracts and expressly referred to Art. 1.7 of the UNIDROIT Principles.**

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

Cour d'appel – Province of Quebec – District of Montréal

A Canadian company and a US company concluded a contract for the construction of a hydroelectric plant in Grand-Mere, Quebec.

During the execution of the work, which lasted four years, the US company faced a number of problems (unavailability of the site areas, cleaning the foundations deeper than expected, etc.), which had significantly increased the costs for the realization of the project. In particular, the work had cost the US company $ 76 million more than the initially estimated value ($ 111 million).

The US company, therefore, sued the Canadian company, claiming compensation for 60 million dollars, as the additional costs were to be attributed to the behaviour of the latter.

The Court of First Instance ordered the Canadian company to compensate the US company over $ 27 million, considering that the first had seriously breached its duty of cooperation which weighed on the contractor as well as on the client. The Court therefore held that the bad faith of the Canadian company in the execution of the contract was so widespread as to be defined "institutional bad faith."

The Canadian company appealed the decision, arguing that its legal representatives had not acted with malice.

The Court of Appeal, however, upheld the decision of first instance, stating that, under the law of Quebec, it was not necessary to act with malice in order to violate the duty of good faith. In particular, the Court held that the Canadian company's conduct was inconsistent with the reasonable expectations of the US company.

In this regard, the Court referred to the prohibition of inconsistent behaviour contained in Art. 1.8 of the UNIDROIT Principles, adding that the principle of good faith enshrined in the Civil Code of Quebec was taken up by the UNIDROIT Principles.

Common core or better rule approach? The example of 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.

Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

Model Clauses for the practical application of the UNIDROIT Principles

"***Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice***"

https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses

- **To enhance awareness of the usefulness of the UPICC**
- **To be used both in the phase of the drafting and in the phase of dispute resolution**
- **Various ways to apply the UPICC and to combine them with domestic law**

UNIDROIT
International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

Contractual guidance instruments based on the UPICC as general contract law:

- **UNIDROIT work on contracts for agricultural production and land investment contracts:**
  - **UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (2015)**
  - **ALIC Legal Guide (Agricultural Land Investment Contracts) (2020)**
- **PRICL: Principles of Reinsurance Contracts**
- ***Work programme 2023-2025*: Instrument on Investment Contracts**

THANK YOU FOR YOUR ATTENTION!

For more information:
http://www.unidroit.org
info@unidroit.org