Assessment of the Effectiveness of the UNIDROIT Principles as Governing Law in Litigation: Case-Based Observation

ZHANG Sihui* JI Wenhua**

Introduction

The UNIDROIT Principles of International Commercial Contracts (hereinafter the UNIDROIT Principles) are a significant legal framework for governing international commercial transactions. However, the utilization of the UNIDROIT Principles as governing law in litigation remains a topic of considerable debate. This research employs a case study approach to assess its acceptance and, further, the realization of the second and third purposes of the UNIDROIT Principles in courts. The case analyses show that only a few domestic courts have acknowledged the choice of the UNIDROIT Principles as the governing law, either directly or indirectly. However, recent legislative advancements suggest a gradual increase in their acceptance. This evidence highlights the importance of expanding the reach and influence of the UNIDROIT Principles and other soft law instruments through strategic partnerships with States and esteemed international organizations such as UNCITRAL.

Doctrinal Interpretations and Legal Frameworks

The UNIDROIT Principles, as articulated in its preamble, 'shall be applied' when expressly chosen by parties; and 'may be applied' when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. This signifies that the UNIDROIT Principles could potentially function as the governing law of their contracts, regardless of whether parties have explicitly selected these principles or opted for a broader legal framework. Nonetheless, this determination is subject to nuanced considerations within judicial contexts. Traditionally, it is generally accepted that the principle of party autonomy in the choice of law has been confined to domestic legal systems. From a strict positivist standpoint, courts have typically adhered to conflict-of-laws rules, limiting the application of 'law' to national rules.[1] Thus, the UNIDROIT Principles Model Clause explains that '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 rules of law with national law.'[2]

In recent years, however, it has become an increasingly common reality that, within the domain of cross-border commercial transactions, in which situation parties – be they powerful 'global players' or small or medium businesses – are unable or unwilling to accept a particular domestic law as the applicable law rooted in concerns over legal

---

* LLM candidate, School of Law, University of International Business and Economics (UIBE), China.
** Professor, School of Law, University of International Business and Economics (UIBE), China.

[1] David Oser, *The UNIDROIT Principles of International Commercial Contracts: A Governing Law?* (Martinus Nijhoff 2008), p. 71.

[2] UNIDROIT Principles Model Clause No. 1 General remarks, Comment 4, p. 5.

familiarity and enforceability,[3] and prefer neutral third-country law, ‘general principles of law’, the ‘*lex mercatoria*’, or the like. Therefore, despite the traditional limit mentioned before, the realization of the purpose of the UNIDROIT Principles necessitates empirical examination within practical contexts. Therefore, it becomes imperative to ascertain whether courts persist in positivist doctrines or exhibit flexibility in applying non-state norms.

Practical Applications and Judicial Precedents

With respect to case analyses, while there is still a lack of accurate empirical data on the use of the UNIDROIT Principles as applicable law in international commercial disputes, resources such as UNILEX, as an intelligent database of international case law and bibliography on the UNIDROIT Principles,[4] provide valuable if still incomplete insights. Of the 16 court cases on the UNIDROIT Principles as the governing law in the UNILEX database,[5] the courts in 3 disputes have acknowledged the parties’ explicit selection of these principles as the law governing their contracts;[6] in 6 disputes, the courts upheld the validity of the UNIDROIT Principles as a rule of law governing the substance of the dispute in the absence of an express choice by the parties, but using the expression ‘general principles of law’ or the ‘*lex mercatoria*’.[7] These diverse judicial precedents underscore the pragmatic adaptability of the UNIDROIT Principles to varying legal contexts and contractual arrangements.

Concerning express choice, for example, in 2004, the Swiss Court of Handelsgericht St. Gallen gave an affirmative judgment stating that the parties have the right to choose supranational rules of law governing their contract as long as the rules in question are transnational and sufficiently coherent and balanced in their content, as in the case of the UNIDROIT Principles;[8] and in 2005 the Federal Supreme Court of Switzerland, Bundesgericht, reaffirmed the content of the judgment of 2004 by stating that, according to the prevailing opinion among legal scholars in Switzerland, the UNIDROIT Principles represent ‘a set of general principles and rules developed by independent scholars, which are comparable to domestic legal systems in terms of internal balance, comprehensiveness, and universal recognition.’[9] Concerning implicit choice, for example, in 2014 the Civil Chamber of the Venezuelan Supreme Court

---

[3] Michael Joachim Bonell, ‘The law governing international commercial contracts and the actual role of the UNIDROIT Principles’ [2018] 23 Uniform Law Review 15, 24.

[4] UNILEX – About UNILEX, <www.unilex.info/main/about> accessed 31 March 2024.

[5] In February 2018, the UNILEX database grouped the four cases in which the courts refused to consider the election to apply the UNIDROIT Principles as the incorporation of its provisions into the contract from Article 2.1.1 ‘Principles applicable if expressly chosen by the parties’ into the catalog under Article 2.2 ‘As terms incorporated into the contract’.

[6] A70-1319/2011, <www.unilex.info/principles/case/2077> accessed 31 March 2024; HG.2003.10, <www.unilex.info/principles/case/1123> accessed 31 March 2024; 4C.1/2005 /ast, <www.unilex.info/principles/case/1124> accessed 31 March 2024; [2007] EWHC 2981 (Ch), <www.unilex.info/principles/case/1633> accessed 31 March 2024.

[7] 17/22943, <www.unilex.info/principles/case/2245> accessed 31 March 2024; 324781 / HA ZA 08 - 3870 and 372066 / HA ZA 10 – 2649, <www.unilex.info/principles/case/1592> accessed 31 March 2024; 200.095.535-01, <www.unilex.info/principles/case/1925> accessed 31 March 2024; 14/00945, <www.unilex.info/principles/case/1924> accessed 31 March 2024; 98-1165-B, <www.unilex.info/principles/case/652> accessed 31 March 2024; Decision No. 0738, <www.unilex.info/principles/case/1867> accessed 31 March 2024.

[8] Abstract and full text, <www.unilex.info/principles/case/1123> accessed 31 March 2024.

[9] Abstract and full text, <www.unilex.info/principles/case/1124> accessed 31 March 2024.

decided that, in the absence of a choice by the parties of the law governing the contract, an international contract is governed by the law with which it is most directly connected, and that in determining this law, not only are all the objective and subjective elements of the contract to be taken into account (place of performance, nationality, domicile, etc.) but also 'the general principles of international commercial law recognized by international organizations', such as the UNIDROIT Principles.[10] Although not included in UNILEX Article 2.1.2,[11] in 2017 the Court of Appeal of Rio Grande do Sul in Brazil confirmed the possibility of referring to the *lex mercatoria*, i.e. the UNIDROIT Principles of the parties' contractual choice as the law governing the contract, and reasoned that 'in what concerns the UNIDROIT Principles, there is no obstacle in applying it to the merits of the dispute as well. [...] because the content of the UNIDROIT Principles reveals, in a large scale, the content of the so-called "new *lex mercatoria*". [...] Finally, because the use of the UNIDROIT Principles [...] reaffirms a flexible, non-positivist approach to the controversy, as disputes in the field of international commercial law require'.[12]

Taken all relevant cases together, it is evident that the UNIDROIT Principles are subject to nuanced interpretation and application. On the one hand, in the event of an express choice by the parties, the preamble provides that the UNIDROIT Principles 'shall' apply. However, the wording 'shall' just means an expectation rather than an absolute mandate, implying that it ought to be applied but does not necessarily serve as the law governing the contract to the exclusion of the application of a particular domestic law. In other words, such self-qualification as the applicable law is not sufficient to make it automatically the rule of law governing their contract but must be considered in the context of the actual situation. On the other hand, it is provided that the UNIDROIT Principles 'may' apply general principles of law or the *lex mercatoria* or the like when the parties choose to do so, which indicates that judges retain discretion in determining the applicable law, thereby leaving the discretion of choice of law in the hands of the judges. As a codification of some international commercial practices and general principles of law, the clearer and more systematic rules than other vague principles make it more feasible and operable for judges, and therefore, such choice of law provides a certain degree of possibility for the application of the UNIDROIT Principles. In any case, the UNIDROIT Principles also increase the efficiency of the courts in resolving international commercial disputes.

The above court practices have significantly contributed to the broader acceptance of the UNIDROIT Principles at the national level. It has been applied across approximately 25 jurisdictions globally, and national courts, reaffirming the principle of party autonomy in private international law.[13] Such developments underscore the enduring relevance of party autonomy in private international law, highlighting the increasing recognition of non-state rules in transnational contractual governance. As

---

[10] Abstract and full text, <www.unilex.info/principles/case/1867> accessed 31 March 2024.

[11] Selected Cases by Artcile & Issues, 2.1.2 Principles as expression of the 'lex mercatoria' referred to in the contract, <www.unilex.info/principles/cases/article/102/issue/1220#issue_1220> accessed 31 March 2024.

[12] Abstract and full text, <www.unilex.info/principles/case/2035> accessed 31 March 2024.

[13] Eckart Brödermann, *Principles of International Commercial Contracts: An Article-By-Article Commentary* (2nd edn, Kluwer Law International 2023), para 29.

clarified in the UNIDROIT Principles 2016, they 'represent a system of principles and rules of contract law that are common to exist national legal systems or best adapted to the special requirements of international commercial transactions, there might be good reasons for the parties to choose them expressly as the rules of law governing their contract.'[14] Indeed, the UNIDROIT Principles qualify, as a whole, not only as a set of rules but also as an embodiment of general principles of law relating to international commercial contract law.[15]

Legislative Developments and Future Prospects

Despite the less prevailing acceptance of the UNIDROIT Principles within domestic courts than arbitral tribunals, recent legislative developments indicate a gradual departure from strict positivist approaches towards a more liberal and transnational outlook.[16] In particular, in the last few years, to promote the adoption of a more flexible approach to conflict of laws and respect the adoption and refinement of the principle of party autonomy, the Hague Conference on Private International Law has adopted Principles on the Choice of Law in International Commercial Contracts (the Hague Principles) in 2015, which underscore this shift, signaling a growing recognition of non-state rules in contractual governance.[17] As a result, the Paraguayan 'Sobre el derecho aplicable a los contratos internacionales' entered into force in the same year, specifying that parties to an international contract may not only choose a particular domestic law as the governing law of their contract but may also invoke non-state rules of law.[18] By affirming the principle of party autonomy and recognizing the validity of non-state rules, these legislative developments create an enabling environment for the acceptance of the UNIDROIT Principles in litigation. Similarly, countries like Australia and the United States are considering amendments to their domestic laws to align with the latest developments in private international law, including the adoption of the Hague Principles.[19] These legislative initiatives not only bolster the status of the UNIDROIT Principles as a viable governing law option but also contribute to the harmonization of legal frameworks across jurisdictions, fostering greater efficiency and consistency in international commercial transactions.

According to Article 3 of the Hague Principles, 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.[20] Its commentary states that the UNIDROIT Principles is an example of 'rules of law' that satisfy this criterion 'generally accepted on an

---

[14] UNIDROIT Principles of International Commercial Contracts 2016, Comment 4(a) of Preamble, p. 2.

[15] Brödermann (n 13) 1.

[16] Bonell (n 3) 25.

[17] The Hague Conference on Private International Law Permanent Bureau, *Principles on Choice of Law in International Commercial Contracts* (2015), Commentary I.4, p. 23 (the Hague Principles).

[18] Marta Requejo, 'Paraguay Adopts New Law on International Contracts'(2015), <https://conflictoflaws.net/2015/paraguay-adopts-new-law-on-international-contracts/> accessed 31 March 2024; Law No 5393 on the law applicable to international contracts, <www.hcch.net/en/publications-and-studies/details4/?pid=6300&dtid=41> accessed 31 March 2024.

[19] Brooke Marshall, 'The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law' [2018] 66 The American Journal of Comparative Law 175, 179.

[20] the Hague Principles, Article 3, p. 18.

international level'.[21] In 2022, The French Cour de cassation (Chambre commerciale) rejected the appellant's request, holding that, according to Article 3(1) of the Rome Convention, general principles applicable to international contracts, such as those developed by the UNIDROIT Principles, do not constitute a choice of law available to the parties within the meaning of that provision. Interestingly, however, the UNILEX commentary then notes that 'the Court did not even consider Article 3 of the Hague Principles on Choice of Law in International Commercial Contracts, according to which "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", nor has it acknowledged that the Rome Convention on the law applicable to contractual obligations has long since been replaced by the Regulation (EC) No 593/2008 (Rome I)'.[22] As can be seen, the application of the Hague Principles will also boost the acceptance of the UNIDROIT Principles in domestic courts. It should be noted, however, that challenges persist in harmonizing the application of soft law instruments within domestic legal frameworks. The Hague Principles and the UNIDROIT Principles are both soft law rules of private international law, which are quite different in nature, origin, content, and structure. Therefore, the advent of the Hague Principles may introduce normative ambiguities and unintended consequences in the application of the UNIDROIT Principles, necessitating careful consideration and coordination between international and domestic legal regimes.[23]

In conclusion, the UNIDROIT Principles is a complete set of non-state legal rules for international commercial activities, which are specific and comprehensive, including basically all aspects in the field of contract law, with specific and clear provisions and strong practicality. While its role of the governing law in litigation remains less prevalent compared to arbitration, it is still supported by several countries, with evolving legal landscapes and a growing emphasis on party autonomy, the recognition of the UNIDROIT Principles within domestic courts is expected to increase gradually. To facilitate this transition, UNIDROIT should prioritize collaboration with domestic legal systems and enhance the applicability of soft law instruments through synergistic efforts with organizations like UNCITRAL.

Conclusion

The practical application of the UNIDROIT Principles remains somewhat insufficient due to traditional and still prevailing views of conflict-of-laws rules. However, emerging legislative developments have shown increasing recognition and acceptance of the UNIDROIT Principles within judicial contexts globally. By enhancing coordination with domestic legislation and international organizations, the UNIDROIT Principles are expected to have a more significant impact on the development of international commercial law. As legal systems continue to evolve and global commerce becomes more complex, the UNIDROIT Principles remain a beacon of

---

[21] the Hague Principles, Commentary 3.6, p. 41.
[22] Abstract and full text, <www.unilex.info/principles/case/2073> accessed 31 March 2024.
[23] Marshall (n 19) 215.

flexibility, pragmatism, and transnational cooperation in contractual governance.