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Reference


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The Significance of the UNIDROIT Principles for International Contract Practice

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1. From a contract law perspective, the third edition of the UNIDROIT Principles of International Commercial Contracts\(^1\) is good news. Published in 2010, they set forth general rules for international commercial contracts releasing the parties from the contingencies of domestic laws. Described as "soft law"\(^2\), their objective 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"\(^3\). The significance of the Principles for international contract practice can be envisaged in more than one way. An empirical study on the use of the Principles in practice would seem to be an interesting (quantitative) approach\(^4\). However, to conduct such a survey would be an impossible task since inquiries would have to be made into the contractual practice covering international commercial contracts passed worldwide. What legal research often resorts to – on a smaller scale – is to look into (arbitral and judicial) court decisions applying or referring to a given body of rules. This is exactly what the present paper will do with a view on the substance of the Principles as applied by decisions giving them reasonable consideration.

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\(^1\) Hereafter: the Principles or UPICC.


2. Though scholarly writings might seem less relevant to assess the significance of the Principles in practice, one should consider the tremendous number of seminars, colloquia and writings devoted to the Principles around the world, some of which precisely tried to assess the use of the Principles. Among those one should mention: a special issue of the Uniform Law Review in 2011; the Commentary edited by Stefan Vogenauer and Jan Keinheiterksamp in 2009 (1319 pages); the Reports of the Colloquium of the Swiss Institute of Comparative Law published in 2007; a significant volume published in 2005 by the father of the Principles, Michael Joachim Bonell (second edition of the volume first published in 1994). Those legal writings also have their influence on international contract practice and will therefore be taken into consideration.

3. Considering the Preamble, the uses of the Principles are manifold. This paper will first examine the possible significance of the UNIDROIT Principles for international contract practice on the basis of the Preamble, and then will go on to examine the actual use which is made of the Principles in practice.

I. – Possible significance of the UNIDROIT Principles in practice

4. The Preamble of the Principles lists six scenarios among which three may have a direct significance for contractual practice: application of the Principles by agreement of the parties, or as general principles of law, or in the absence of any choice by the parties. The significance of the Principles applied to solve a dispute may be qualified as direct when they contribute to the shaping of the relationship between the parties (A.). In the three subsequent scenarios envisaged by the Preamble, the Principles serve either as an instrument to interpret or supplement international uniform law instruments on the one hand, domestic laws on the other,

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5 This special issue published in ULR Vol. XVI 2011-3, pp. 508-734, contains papers on the four new groups of provisions (illegality, conditions, plurality of obligors and of obligees and unwinding of failed contracts), five contributions on regional experiences (Germany, Brazil, Russia, UK and Japan) and the last one on statistics.


or as a model for legislators; the significance of the Principles for international contractual practice is an indirect one (B.).

A. - Direct significance

5. The application of the Principles by agreement implies that the parties are allowed to subject the contract to non-state rules such as the UNIDROIT Principles. The debate is most lively and well known: while in the context of international commercial arbitration the parties are generally allowed to choose non-state rules as the “rule of law” on which the arbitrators will base their decision⁸, in front of domestic courts the parties are traditionally limited to state rules⁹. If a soft law instrument such as the UNIDROIT Principles is not a possible “law” governing the contract, the choice of the UNIDROIT Principles will be considered as an agreement to incorporate them into the contract, which only sets aside non-mandatory domestic rules.

6. Without entering into this private international law debate¹⁰, I would like to examine a Swiss decision¹¹ mentioned by the Unilex database¹² with regard to the choice of the UNIDROIT Principles in a dispute submitted to the Swiss state courts. In this decision, the Swiss Federal Court seems to deny the applicability of the UNIDROIT Principles as a possible applicable “law” in a dispute about a contract for the transfer of a football

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⁹ UNIDROIT Principles Model Clause No. 1, General remarks, Comment 4, p. 5. See also, CR LDIP/CL-BONO, Art. 116 § 20 f.

¹⁰ The dominant view today seems to be that non-state rules cannot be chosen by the parties as the “law” applicable to the contract: the 2003 proposal to the contrary submitted by the European Commission was eventually rejected, and Art. 3(1) of the Rome I Regulation now provides only for State laws [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)]; for an opposite view, see Art. 3 of the Draft Hague Principles on Choice of Law in International Contracts, available at: http://www.hcch.net/upload/wop/princ_com.pdf. On the UNIDROIT Principles as the law applicable to the contract, see M. J. BONELL, 2005, p. 186 f. (application by domestic courts), p. 192 f. (application by arbitral tribunals); G. P. ROMANO, 2007, p. 35 f., argues that the practical difference between the application of the UPICC as the rules governing the contract and as the law applicable to the substance of the dispute may be largely overstated.


¹² http://www.unilex.info/case.cfm?id=1124.
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player between a Swiss and a Greek company through a FIFA-Agent\textsuperscript{13}. This contract contained a forum selection clause in favour of the Swiss courts and the following choice of law clause: “This agreement is governed by FIFA Rules and Swiss law”.

7. Action for breach of contract was brought four years after the conclusion of the contract in front of a Swiss court (Handelsgericht St. Gallen). The court, in a bold decision\textsuperscript{14}, applied the FIFA Regulations and rejected the claim on the ground that it had not been made within the limitation period of two years provided by the FIFA Rules. Since the corresponding mandatory limitation period under Swiss law is longer (ten years), the question arose as to whether the parties’ reference to the FIFA Rules constituted a valid choice of the applicable law\textsuperscript{15} with the consequence that the FIFA limitation rule (two years) would prevail over Swiss law (ten years). Admittedly, said the Court, opinions in Switzerland are divided as to whether the parties are entitled to choose anational or supranational rules as the law governing their contract before domestic courts under Article 116(1) SPILA. The Court followed those legal authors who accept such a choice provided that the rules in question offer sufficient certainty because they are transnational in character, coherent enough and balanced as to their content. According to the Court, the UNIDROIT Principles met these requirements. As the FIFA Rules were comparable to the UNIDROIT Principles, said the Court, they could likewise be chosen as the law governing the contract. The Handelsgericht thus rejected the claim which had not been made within the two-year limitation period of the FIFA Rules.

8. The Swiss Federal Court reversed the lower court’s decision. It considered that “autonomous rules of private organisations do not have the status of rules of law, even if they are very detailed and comprehensive as are the SIA-Rules\textsuperscript{16} or the FIS-Rules\textsuperscript{17}”. Such rules are not “law”

\textsuperscript{13} Fédération Internationale de Football Association, FIFA.

\textsuperscript{14} Handelsgericht St. Gallen, 12.11.2004, http://www.unilex.info/case.cfm?id=1123. It is interesting to note that this decision is accessible through Unilex but not through the Swiss database containing decisions from all Swiss cantons https://www.swisslex.ch/.

\textsuperscript{15} Comp. Art. 116(1) SPILA (“The contract is subject to the law [Recht, droit, diritto] chosen by the parties”) and Art. 187(1) SPILA (“The arbitral tribunal shall decide the dispute according to the law [Recht, règles de droit, diritto] chosen by the parties or, in the absence of such choice, according to the law having the closest connection with the dispute”). On the difference of the wording in the three Swiss national languages of Art. 187(1) SPILA: F. L. SPADA, p. 121, n. 30.

\textsuperscript{16} SIA, Société des ingénieurs et architectes, International federation of consulting engineers

\textsuperscript{17} SFC 132 III 285 c. 1.3, J.T. 2008 I 329; FIS, Fédération internationale de ski, International Ski Federation.
("Recht") and can only be chosen as substantive rules ("materiellrechtliche Verweisung") applicable to the contract. This reasoning might lead to the impression that the UNIDROIT Principles may not be chosen if a dispute is submitted to Swiss courts or even to arbitration in Switzerland according to Articles 116(1) or 187(1) SPIL. While the first edition of the (Basle) Commentary\textsuperscript{18}, on which the \textit{Handelsgericht}'s decision was based, admitted the choice of the UNIDROIT Principles, the later editions now consider that the Swiss Supreme Court's negative ruling generally applies to all non-state bodies of rules\textsuperscript{19}.

9. Three observations should be made on this case. First, the Swiss Federal Court rightly refused to rely on the FIFA Rules as the law governing the contract. As a private organization, the FIFA, albeit international, offers no guarantee comparable to the guarantee attached to laws enacted by a state in terms of autonomy and comprehensiveness, predictability and accessibility\textsuperscript{20}. Though the regulations are accessible on the FIFA website under "Law and Regulations", they are neither clearly organised nor do they indicate which are in force; the predictability and accessibility criteria are not met. Furthermore, those rules are specifically designed to "provide the basic laws for world football"\textsuperscript{21} and therefore they lack comprehensiveness in the legal sense. Though its goals may be truly elevated (see Article 2-4 of the Statutes\textsuperscript{22}), the FIFA is a private organization. The Rules emanating from it could therefore rather be compared with the SIA or FIDIC regulations (Société des Ingénieurs et Architectes – FIDIC, International Federation of Consulting Engineers). All three institutions are private bodies whose rules are adapted to their particular trade, be it football or construction contracts; those rules lack autonomy and comprehensiveness. As a result the FIFA Rules clearly do not qualify as "law".

10. Secondly, whereas the FIFA is a private body (an international association registered in Switzerland), the International Institute for the Unification of Private Law (UNIDROIT)\textsuperscript{23} is an international Institute established in 1940 on the basis of a multilateral agreement, the

\textsuperscript{18} BASKIP-AMSTUTZ / VOGT / WANG, 1\textsuperscript{st} ed., Art. 116, § 21.
\textsuperscript{20} F. LA SPADA, p. 121, lists those elements as characteristics of a "law".
\textsuperscript{21} FIFA website: http://www.fifa.com/aboutfifa/organisation/statutes.html.
\textsuperscript{22} FIFA website: http://www.fifa.com/aboutfifa/organisation/mission.html.
\textsuperscript{23} UNIDROIT website: http://www.unidroit.org/about-unidroit/institutional-documents/statute.
UNIDROIT Statute (Statut organique) which holds it responsible to the participating Governments (Article 2 of the Statute). As an intergovernmental organisation, the Institute counts 63 Member States from the five continents and representing various legal, economic and political systems as well as different cultural backgrounds. As of 1990\(^24\), its well organised website allows following the steps of the discussions held by the different Working Groups which led to the adoption by the Governing Council of the three editions of the Principles of International Commercial Contracts in 1994, 2004 and 2010.

11. Thirdly, it is important to stress that the Swiss Federal Court’s decision mentioned the UNIDROIT Principles as an obiter dictum only, in order to disprove the Handelgericht’s comparison between the FIFA rules and the UNIDROIT Principles. The question at stake was not the applicability of the UNIDROIT Principles, but the possibility to submit the dispute to the FIFA Rules, which was refused, and rightly so. One should by no means infer from this decision that the Swiss Supreme Court would necessarily refuse the parties’ choice in favour of the UNIDROIT Principles in front of Swiss domestic Courts (on the basis of Article 116 SPILA).

12. In international arbitration however, the situation is more straightforward since, traditionally, the choice in favour of the Principles (general principles of law or lex mercatoria) is admitted\(^25\). According to the Comment of the new UNIDROIT Model Clauses, the parties are therefore well advised to combine a choice-of-law clause in favour of the Principles with an arbitration clause\(^26\). Whether in front of state courts or of arbitral tribunals, the Principles gain direct significance through the agreement of the parties. Such choice is an interesting one in the context of international contracts because it rules out the idiosyncrasies of domestic contract laws which may lead to misunderstandings and complications in contract drafting. The next section will deal with this issue.

**B. - Indirect significance**

13. Even if a given international contract does not call for the application of the Principles, they may play an important role in practice, be it an indirect one. Apart from their gap-filling function mentioned in the

\(^{24}\) See the Summary records of the meetings as of the 19 to 23 November 1990 meeting: http://www.unidroit.org/work-in-progress-studies/studies/contracts-in-general/1363-study-l-principles-of-international-commercial-contracts.

\(^{25}\) See above, note 8.

\(^{26}\) UNIDROIT Principles Model Clause No. 1, General remarks, Comment 4, p. 5.
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Preamble (§ 5 and 6), they may also serve as a model for national legislators and actually have done so in many instances; R. Michaels considers this to be the broadest success of the Principles. It should be stressed that the model function of the Principles for contract drafting is even more significant. Though not listed in the Preamble, this function is mentioned in the Comment:

"[T]he Principles may also serve as a guide for drafting contracts. In particular the Principles facilitate the identification of the issues to be addressed in the contract and provide a neutral legal terminology equally understandable by all the parties involved."

14. The Principles are the result of a major comparative law effort dating back as long as 1971 when René David, Clive M. Schmitthoff and Tudor Popescu, representing the legal systems existing at the time (civil law, common law, socialist system) started inquiring about the feasibility of an international restatement of general principles of contract law. The first Working Group was constituted in 1980 and was composed of experts in the field of contract and international trade law. The adopted methodology has shown its merits. Each Working Group appointed Rapporteurs responsible for the drafts which were discussed among the members and submitted to experts from all jurisdictions. The first task of the Rapporteurs was to identify the issues to be addressed and the existing solutions. All major legal systems and regions were taken into consideration. Whenever diverging solutions were found, the successive Groups had to look for a consensus aiming at the best solutions ensuring fairness in international commercial relations. They avoided using concepts and a terminology drawn from any specific legal system. They were also careful to draft principles which would be simple and clear enough not to give rise to divergent understandings in the different parts of the world. As a result, the Principles together with the comments and their numerous examples form a comprehensive body of rules which are likely to be understood by lawyers of all jurisdictions. Since their third edition in 2010, they amount to a general part which addresses the most important contract law problems and is similar to the general part of the continental civil codes.

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27 UNIDROIT Commentary-Michaels, Preamble I, §§ 129-140.
30 A good example can be found in the discussions on "illegality" which led to Art. 3.3.1-3.3.2 UNIDROIT in combination with Art. 1.4 UNIDROIT: see M. J. Bonell, 2011, p. 521 f.
15. The Working Groups deliberately avoided the peculiarities of a given legal system and tried to solve the problems addressed through domestic rules, as will be shown in the following four examples. Firstly, to start with the basics, a contract is concluded by the mere agreement of the parties according to Article 3.1.2 UPICC, without any further requirement like cause of the French circle or consideration known in the common law systems. The problems addressed by those concepts are taken care of by the provisions on mistake, gross disparity or illegality.1

16. Secondly, the issue of change of circumstances altering the equilibrium of the contract33 which still is the subject of international debate, was addressed already in the first edition of the Principles (1994). The term “hardship” was chosen on the ground that it was well-known to business men, in spite of the fact that it had a very specific meaning in certain legal systems and did not translate well into French34 (and therefore was not translated)35. As Article 6.2.2 UPICC contains a definition of hardship, and Article 6.2.3 UPICC specifies the consequences of a situation of hardship, the divergent domestic law concepts remain irrelevant.

17. The third example is the distinction between obligation de moyens and obligation de résultat particularly developed by French contract law. Does this domestic, in a way over-emphasized, distinction have any meaning beyond the French border? Articles 5.1.4 and 5.1.5 UPICC Principles offer an efficient comparative law tool to deal with those two main types of obligations. They first provide a definition of each type of obligation and, then, specify a list of factors that allow 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”36. The French version of the Principles confirms that obligation de moyens corresponds to a duty of best efforts, and obligation de résultat to a duty to achieve a specific result. More than a translation, the UNIDROIT Principles offer the

32 Art. 3.1.2 UPICC 2010 Comments 1 and 2; M. J. Bonell, 2005, p. 113 f; see also, C. Chappuis, 2008, p. 253 f; unconvinced: B. Mercadal, p. 490 f.
33 Art. 6.2.1-6.2.3 UPICC 2010.
36 Art. 5.1.5 UPICC (stress added); in French: “Pour déterminer si l’obligation est de moyens ou de résultat, on prend en considération, notamment [...]”. See, C. Chappuis, 2002, p. 284 ff.
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necessary legal setting for understanding the different domestic perspectives on the content of the obligations, which in turn is obviously an important step for the determination of non-performance of an obligation by a party.

18. The last example will deal with conditions. The word “condition(s)” may be understood in more than one way in French and in English; the same holds true of the word “term(s)” which was left aside. Terminology was a recurrent subject of discussion during the meetings and found a welcome clarification in the black letter rules and the Comments: what is meant here is not condition as a major term of the contract, but as a clause making the contract or an obligation dependent on the occurrence or non-occurrence of a future and uncertain event. Another controversial topic was whether an obligation entirely dependent on the will of the obligor (condition potestative) should be null and void, as it is under French law. The members of the Working Group agreed that this should be left to the agreement of the parties and ultimately was a question of interpretation of the contract. The preparatory work also took share/asset purchase agreements into consideration. These contracts, developed by commercial practice, heavily rely on various “conditions” even though the legal consequences thereof remain often unclear. The Comments address this issue with an explanation of the concept of “closing” and an illustration which identifies in a clause under the heading “Conditions precedent” a mixture of obligations and suspensive conditions.

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37 Art. 5.3.1-5.3.5 UPICC.

38 Terms and conditions, conditions générales, Allgemeine Geschäftsbedingungen: Art. 5.3.1 UPICC, Comments 1 and 2.


40 Art. 5.3.1 UPICC, Comments 2 and 3.

41 Art. 5.3.1 UPICC, Comment 1.


43 Art. 5.3.1 UPICC, Comment 4.

44 H. Peter and S. Venturi, Contrat de cession d’entreprise, §§ 0.12, 3.1 ff.

45 Art. 5.3.1 UPICC, Comment 5, Illustration 9: “The obligation of the Lead Manager at the closing date to subscribe for the shares is subject to the realisation of the following conditions precedent on or prior to the closing date: a. Accuracy of representations and warranties; b. Performance of undertakings: the Issuer has performed all of those of its obligations hereunder to be performed on or before the closing date; c. Admittance to trading on stock exchange; d. Delivery of any and all closing documents: the Lead Manager
19. The above examples\textsuperscript{46} demonstrate how domestic peculiarities – and the misunderstandings attached thereto – can be avoided in international commercial dealings. The careful definitions and the multilingual character of the Principles make the concepts they use clear even if the legal background of the parties is different. Although the working languages are English and French, the Principles are translated into the other official languages of UNIDROIT, namely German, Italian and Spanish; the black letter rules also exist in Arabic, Chinese, Greek, Hungarian, Japanese, Portuguese, Russian and Ukrainian. The formulation of the Principles aims at simplicity – a necessity considering the need to translate them into various languages. The Principles therefore are a wonderful tool in the hands of international contract drafters helping them in the process of negotiating an agreement, a tool which is yet enhanced by the information to be found on the database \textit{Unilex}\textsuperscript{47}.

20. The model function of the Principles has recently gained in importance since UNCITRAL unanimously endorsed the third edition of the UNIDROIT Principles in 2012, and recommended their use as appropriate for the purposes set out in the Preamble\textsuperscript{48}. Another crucial endorsement to note is that of the International Chamber of Commerce (ICC). The applicable law clauses of many of the ICC Model Contracts provide that the questions relating to these contracts but not settled by them, will be governed, \textit{inter alia}, by the UNIDROIT Principles\textsuperscript{49}.

21. Though the indirect significance of the UNIDROIT Principles might seem, at first glance, less important in practice, this role should not be minimized as will be seen further on.

\begin{footnotes}
\footnote{If any one of the above conditions has not been satisfied at the time it should have been satisfied pursuant to this Section, the obligations of the Lead Manager may be terminated by the Lead Manager\textsuperscript{46}.}
\footnote{Many other examples could, of course, be given since every provision of the Principles shows the various approaches of domestic laws.}
\footnote{See below, \S 24 f.}
\end{footnotes}
II. – Actual significance of the UNIDROIT Principles in practice

22. A word has to be said, first, on how to assess the actual significance of the UNIDROIT Principles in international contractual practice (A.). Two interesting cases where the Principles were actually applied to solve a dispute will then be examined (B.). A few examples of the other actual use of the Principles will close this second section (C.).

A. – Methods of assessment

23. The vast possibilities offered by the UNIDROIT Principles to the actors of the international commerce have been shown. It remains to be found out if the Principles have really been adopted in practice, either directly or indirectly. As stated earlier, a general survey of worldwide practice is impossible to carry out, even though various attempts have been made, which were, to some extent or other, too restricted to be significant on a broad level. The present paper therefore will use the filter of court cases and arbitral awards. The method is arguably an imperfect one for two reasons among many: first only a limited number of contracts find their way to courts (state or arbitral) and, second, arbitral awards are far from being systematically published.

24. However, the UNILEX database – an obvious research tool – shows interesting results: 174 arbitral awards and 167 court decisions can be found in January 2014, as opposed to 74 arbitral awards and 22 court decisions in June 2005. The increase in court decisions (22 to 167), as compared to arbitral awards (74 to 174), is somewhat surprising when one considers the traditional belief that the UNIDROIT Principles are especially relevant in the context of arbitration. Other databases were


52 Ibid.

used to double-check the results obtained through UNILEX. It appeared that the cases were generally reported on UNILEX, which means that this database records fairly all decisions throughout the world which refer to, rely on, or apply the Principles. Resorting to the UNILEX database may not be entirely appropriate, but for lack of any better method, it will be adopted in order to identify interesting decisions and draw some conclusions on the use of the UNIDROIT Principles in practice. Before doing so, a word must be said on the UNILEX database so as to have an idea of its intrinsic worth.

25. As it can be seen from its website, UNILEX “is an ‘intelligent’ database of international case law and bibliography on the UNIDROIT Principles of International Commercial Contracts (and on the United Nations Convention on Contracts for the International Sale of Goods, CISG)”, which “contains detailed abstracts of the most important cases decided under both instruments by courts and arbitral tribunals worldwide”, and provides access “to the decisions and arbitral awards by: date; country or arbitral tribunal; article number of the instrument; specific issues listed under each article.”, and “to the bibliography by: author; article number of the instrument; area.” The editors, under the direction of M. J. BONELL, are in charge of the information contained in the UNILEX database, which is “based on a research project started in 1992 by the Centre for Comparative and Foreign Law Studies – a joint venture of the Italian National Research Council, the University of Rome I “La Sapienza”, and the International Institute for the Unification of Private Law (UNIDROIT).” In more than twenty years, this academically run database has offered valuable information on the CISG as well as on the UNIDROIT Principles.

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54 Swisslex, the database for Swiss law, interestingly enough does not give access to the decision of the Handelsgericht discussed above (n. 14), which can be found on Unilex.
55 See the warning on http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311, addressed to the users who “are reminded that since most of the decisions relating to the UNIDROIT Principles are arbitral awards which are not published, the total number of decisions referring in one way or another to the UNIDROIT Principles is considerably greater than the figures indicated in this database”.
B. – Two interesting examples

26. The discussion will focus on two examples with a view on the substance of the Principles. Those specific cases have been identified with the help of UNILEX and chosen because the tribunal truly goes into the application of the UNIDROIT Principles to the dispute and justifies its reasoning rather extensively in both cases. The aim is to check if the Principles allow a satisfying reasoning taking into account all relevant circumstances to come to a fair solution.


27. The new Civil Code of Lithuania of 18 July 2000 (CCL) is one of the recent codifications which was influenced by the UPICC rules on contract formation, quality of performance and contract price. Article 6.204 CCL, in particular, draws on the UPICC rules on hardship (Article 6.2.1-6.2.3 UPICC). The Supreme Court of Lithuania made an interesting application of this provision in a decision of 19 May 2003 which can be found in translation on Unilex. A Lithuanian company (the Seller) entered...
into a contract for the sale of its shares with a Lithuanian individual (the Buyer). The Buyer made a down payment of 20% of the total price but refused to pay the balance. When the Seller sued the Buyer for the payment of the outstanding sum, the Buyer relied on the hardship provision on the ground that the value of the shares was considerably diminished because, in the meantime, the company had become insolvent. While the Buyer was successful in the courts of first and second instance, the Supreme Court decided in favour of the Seller and ordered the payment of the balance.

28. The contract seemed to have excluded any obligation of the Seller as to the value of the shares. This observation by the Court based on a provision of the contract is in line with the international practice of share purchase agreements. Such agreements generally contain extensive - and highly standardized clauses on the representations and warranties of the seller (and the buyer) which aim at allocating the risk between the parties. If the drop in the shares’ value falls outside the scope of comparable provisions, this loss of value occurs at the Buyer’s risk. This is precisely a hypothetical for which Article 6.2.2(d) UPICC excludes the hardship provision when, as in the present case, the risk of the event was assumed by the disadvantaged party.

29. Such result is not surprising given the fact that the provisions on hardship are carefully drafted as a narrow exception to the binding character of the contract. Pacta sunt servanda is and remains the fundamental principle stated in Article 6.2.1 UPICC. It is noteworthy that

Consult" and the value of the shares during the period of the validity of the contract, i.e. until the performance of the contract. However, it was found in the case that circumstances on which the respondent based the counterclaim asking for the termination of the contract occurred after the period for the performance of the contract elapsed. It follows that the respondent breached the contract by failing to pay the amount the purchased goods in timely manner (Article 176(1) of the Civil Code of 1964). It was noticed above that this conclusion was reached by the court of first instance. The judge of the court of first instance correctly argued that Article 260 of the Civil Code of 1964 shall be applied to the claim of the plaintiff pursuant to which the seller can require the buyer to purchase the good and pay the price if the buyer breached the contract by refusing to pay the price agreed in the contract. Since the court of first instance erroneously applied Article 177 of the Civil Code of 1964 and court of appeals failed to correct the mistakes of the application of substantial norms, both decisions of lower courts shall be annulled to the extent the plaintiffs claim was rejected” (stress added).

64 H. Peter and S. Venturi, Contrat de cession d’entreprise, § 05.
65 Ibid., § 4.1 f.
66 Art. 6.2.1 UPICC Comments 1 and 2. UPICC Commentary-McKendrick, Introduction to Art. 6.2.1, § 4.
the provisions on hardship are sometimes feared for creating unwelcome uncertainty\textsuperscript{67}. The perceived uncertainty is a reason often put forward by practitioners for not choosing the UNIDROIT Principles, but two arguments can be raised against this reluctance.

30. First, the parties may exclude the application of specific provisions or derogate from or vary the effect of any provision of the UNIDROIT Principles which are mainly default rules (Article 1.5 UPICC). Only few mandatory provisions are to be found in the UNIDROIT Principles\textsuperscript{68}. The parties therefore are free to exclude most of the provisions, in particular the provisions on hardship. A good example can be found in the ICC Model Contract for the Turnkey Supply of an Industrial Plant. Article 36 of the Model Contract suggests the following alternatives on the issue of applicable law:

\begin{quote}
Unless otherwise agreed, any questions relating to this Contract which are not expressly or impliedly settled by the provisions contained in this Contract shall be governed in the following order:

(a) by the principles of law generally recognised in international trade as applicable to international turnkey contracts,

(b) by the United Nations Convention on the International Sale of Goods (CISG),

(c) by the relevant trade usages, and

(d) by the Unidroit Principles of International Commercial Contracts, with the exclusion of the clauses 6.2.1-6.2.3, with the exclusion of national laws.
\end{quote}

31. The language of this clause clearly excludes the possible consequences of a hardship situation, namely renegotiation, termination or adaption of the contract. The Turnkey Contract thus sticks to the basic principle of the binding character of the contract without allowing for any exception. This is a reasonable solution for a contract setting out rules on force majeure as does Article 33 of the Turnkey Contract\textsuperscript{69}. This clause contains a set of rules on the definition of force majeure, the failure to perform by a third party, the consequences of force majeure, temporary force majeure, and the listing of the considered impediments. Given the comprehensive ruling on the issues regarding future events potentially disrupting

\textsuperscript{67} UPICC Commentary-McKENDRICK, Introduction to Section 6.2, § 10.

\textsuperscript{68} Art. 1.5 UPICC, Comment 3.

\textsuperscript{69} Art. 33 of the Turnkey Contract is inspired by art. 79 CISG, but more precise and complete, and must be read in conjunction with Art. 7 (and Annex 5) on the time schedule and its alterations.
performance, the Turnkey Contract rightly excludes the provisions on hardship. The assumption of the risk by each party is distributed by the contract. This leaves no room for the exceptional circumstances underlying Articles 6.2.2 and 6.2.3 UPICC. As a result, it should be stressed that the UNIDROIT Principles stand perfectly without the feared provisions whenever they are not compatible with a specific contract since they can be struck out.

32. The second reason against the traditional reluctance towards the hardship provisions is to be found in the comments and illustrations which account for a large part of each edition of the Principles. While the black letter rules only take up 32 pages, with the added comments the number of pages amounts to 400. Those comments and illustrations, as carefully drafted as the black letter rules, help to understand how each provision is to be applied in a given situation. They are, in turn, further explained by the cases recorded on Unilex even if the full text of the decisions is not always available. They all point into the same direction: only in the truly exceptional circumstances leading to a fundamental alteration of equilibrium of the contract will the affected party prevail with its argument of hardship. Thus, the feared uncertainty triggered by the hardship provisions is lifted. This decision shows that if the provisions on hardship are often relied upon by the party seeking for exemption, in most cases, however, the remedies provided for hardship will not apply.

2. Arbitral Award 30 November 2006, Centro de Arbitraje de México (CAM)

33. A Mexican grower and a U.S distributor entered into a one year exclusive agreement according to which the grower undertook to produce specific quantities of squash and cucumbers and to provide them to the distributor on an exclusive basis, while the distributor had to distribute the goods on the Californian market against a commission. The contract contained an arbitration clause submitting any potential disputes to the UNIDROIT Principles. The U.S distributor brought an action before the Centro de Arbitraje de México against the Mexican grower arguing that the latter had breached the contract by not providing the goods referred to in the contract and by violating the exclusivity clause. The U.S distributor asked for termination of the contract as well

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70 Available at: http://www.unilex.info/case.cfm?pid=2&id=1149&do=case; UPICC Commentary-McKendrick, Introduction to Art. 6.2.2, § 15.
as damages for the harm suffered as a result of the grower's failure to provide the goods; it also asked for payment of the penalty stipulated in the contract in case of violation of the exclusivity clause. The grower objected that its failure to deliver the goods was due to the destruction of the crops by a series of extraordinarily heavy rainstorms and flooding caused by the meteorological phenomenon known as "El Niño", and amounted to hardship.

34. Interestingly, the arbitral tribunal confirmed the validity of the parties' choice in favour of the UNIDROIT Principles because, according to the Mexican Commercial Code, the dispute was to be decided pursuant to the "rules of law" chosen by the parties. Adopting what it considered as the modern trend\(^71\), the tribunal applied the UNIDROIT Principles 2004 as the normas de derecho chosen by the parties (who had omitted the indication of the edition). As far as the research has shown, no other case was as thoroughly decided in accordance with the UNIDROIT Principles as this Mexican case. The Tribunal held that: 1) the distribution agreement had been validly concluded by the mere agreement of the parties\(^72\) notwithstanding the absence of any formalization or registration, 2) the failure by the Mexican grower to deliver the squash and cucumber amounted to a fundamental non-performance\(^73\), because 3) it was intentional and deprived substantially the other party of its expectations\(^74\), 4) the distributor was entitled to terminate the contract by notice\(^75\). On the Mexican grower's objection that its failure to deliver the goods was due to "El Niño", the tribunal held that: 5) such meteorological event was foreseeable by a grower with longstanding experience\(^76\), 6) the destruction of the crops was not a case of hardship because the grower typically assumed the meteorological risk\(^77\), 7) the distributor was entitled to full compensation\(^78\), 8) had proven certainty and foreseeability of the harm suffered and its direct connection with the grower's failure to deliver\(^79\), and finally 9) the grower was to pay the agreed sum for non-performance\(^80\). Here again the hardship argument failed because the risk of the meteorological

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\(^{71}\) See Arbitral Award CAM (n. 70) at § 4 f.

\(^{72}\) Art. 3.2 UPICC 2004, 3.1.2 UPICC 2010.

\(^{73}\) Art. 7.1.1 and 7.3.1(1) UPICC 2004/2010.

\(^{74}\) Art. 7.3.1(2) UPICC 2004/2010.

\(^{75}\) Art. 7.3.2 UPICC 2004/2010.

\(^{76}\) No force majeure, Art. 7.1.7(3) UPICC 2004/2010.

\(^{77}\) Art. 6.2.2(d) UPICC 2004/2010.

\(^{78}\) Art. 7.4.2 UPICC 2004/2010.

\(^{79}\) Art. 7.4.2(1), 7.4.3 and 7.4.4 UPICC 2004/2010.

\(^{80}\) Art. 7.4.13 UPICC 2004/2010.
event was assumed by the grower. The arbitral tribunal based its entire decision on the UNIDROIT Principles.

35. Particularly interesting is the arbitral tribunal's holding on the claim for payment of the agreed sum for non-performance in conformity with Article 7.4.13 UPICC. Under this provision, the highly controversial distinction between a valid liquidated damages clause and a possibly null and void penalty clause is not an issue. The contract provided that, in case of a violation of the exclusivity clause, the grower had to pay a penalty. The arbitral tribunal awarded the payment of this penalty. It had to determine the precise amount due, because the clause did not fix a determined sum but a percentage (25%) of the transactions breaching the exclusivity clause. It did so on a discretionary basis, pursuant to Article 7.4.3(2) UPICC. The arbitral tribunal thus held in favour of the distributor except as far as his claim for compensation for loss of reputation was concerned. Though Article 7.4.2(2) UPICC allows compensation of non-pecuniary harm, the distributor failed to establish the existence and the amount of such harm in the present case.

36. Both cases show a straightforward reasoning leading to satisfying results based on the provisions of the UNIDROIT Principles. Specially conceived for international commercial contracts, those provisions allow weighing the interests of the parties without having to cope with unwelcome surprises originating from domestic rules.

C. – Further actual significance

37. Apart from the cases where the Principles are directly applicable, their significance can be observed otherwise on three aspects. First observation: in their function as a model for legislators, the UNIDROIT Principles have inspired several recent contract law reforms such as the Lithuanian and the Ukrainian. In 2010, the High Court of the latter country held that the 1994 edition of the UPICC would be officially considered as one of the documents that enshrines the trade customs applied in Ukraine.

81 UPICC Commentary-McKENDRICK, Art. 7.4.13, §§ 2 and 15; C. CHAPPUIS, 2011, p. 83 f.
82 See above, n. 27.
83 High Court of Ukraine, Arcada PP v. Hobotovske enterprise Krahmaloprodukt, 30 November 2010, referring to an Explanatory note of the High Commercial Court of Ukraine of 7 April 2008 (available at: http://www.unilex.info/case.cfm?id=1700): "Please note that the 1994 edition of the Principles of International Commercial contracts is officially considered as one of the documents that enshrines the trade customs applied in Ukraine.
This decision lends an indisputable authority to the Principles in both countries.

38. As to Lithuanian contract law, an interesting arbitral decision should be mentioned (Svenska Petroleum)\textsuperscript{84}. In a dispute about a Joint Venture Agreement (JVA) for oil exploitation in Lithuania between a Swedish petroleum company and a previously state-owned Lithuanian petroleum company, arbitration was commenced by the first company against the second one and the Government of Lithuania. The JVA contained clauses on settlement of disputes as well as governing law and sovereign immunity, which were in need of interpretation\textsuperscript{85}. In the course of the enforcement and recognition of the award in England, the High Court had to decide whether the Government of Lithuania had agreed to arbitration (as a "Founder") and whether it had waived its rights to sovereign immunity. The High Court referred to the relevant rules of contract interpretation contained in Articles 6.193 to 6.195 of the Lithuanian Civil Code, which repeat Articles 4.1 to 4.6 of the UNIDROIT Principles. Examining the parties' pre-contractual negotiations, including previous drafts of the agreement, the High Court held that the drafters had inappropriately used the term "founder", that the State of Lithuania was bound by the arbitration agreement, and that it had waived its sovereign immunity. The appeal was dismissed\textsuperscript{86}.

39. The High Court had to deal with the difficult issue of the relation between the language of the contract and the real intentions of the parties\textsuperscript{87}. Acknowledging the difference between English law and Lithuanian law on the principles of construction of a contract, the High Court held


\textsuperscript{85} The two conflicting clauses read as follows: "Disputes between the Founders concerning the performance or interpretation of this Agreement are settled through negotiations between the Founders" (Art. 9.1 JVA), and "GOVERNMENT and EPG hereby irrevocably waives [sic] all rights to sovereign immunity" (Art. 35.1 JVA).


\textsuperscript{87} Svenska Petroleum (High Court) 2005: - § 81: "Article 6.193 of the Civil Code, "Rules of the Interpretation of Contracts", and the Commentary thereon, (which I have already set out in full above) make it clear that the process of interpretation of a contract under Lithuanian law is significantly different from the approach that is applied under English law.
that the interpretation had to ascertain what the parties actually intended "regardless of the literal meaning of the words they used".\(^{88}\) Considering the evidence relating to the parties' pre-contractual negotiations and construing the contradictory clauses in the context of the entire agreement, the High Court applied the Lithuanian standards which follow Articles 4.3(a) and 4.4 UPICC. It set aside the solution to this problem adopted by English law which would require a claim for rectification of the written document.\(^{90}\) This decision, which is in line with the UNIDROIT Principles, is to be welcomed as avoiding domestic specificities and favouring legal certainty in international commerce.

40. Second observation: the use of the UNIDROIT Principles as course material in law schools has been rightly put forward.\(^{91}\) Such experiences

\(^{88}\) Svenska Petroleum (High Court) 2005, § 82.

\(^{89}\) See, n. 85.

\(^{90}\) Svenska Petroleum (High Court) 2005, § 89; Svenska Petroleum (Court of Appeal) 2006, § 71.

\(^{91}\) M. J. Bonell, 2005, p. 260 f.
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were made at the Faculty of Law of Geneva within the context of various classes, such as a class on international commercial contracts, on the international sale of goods or on comparative methodology for students coming from different jurisdictions. In such cases, the Principles serve as a common ground for studying international instruments. The Principles have also been used for seminars (e.g. on the new trends of contract law). They are introduced as of the first year often as a simple expression of principles developed under Swiss law. Experience has shown that the Principles provide an excellent teaching tool allowing students from different backgrounds to follow the lectures.

41. Third observation: legal opinions on disputes about interpretation, validity, consent and other issues can be reinforced by a reference to the UNIDROIT Principles even if the contract is submitted to Swiss law. Furthermore, the Principles and Comments offer interesting perspectives on issues less known or developed under domestic laws as for example clauses like “merger clauses” (art. 2.1.17 UPICC), at least as far as Swiss law is concerned. In such cases, the Principles allow taking into consideration the international and commercial nature of the contract.

Conclusion

42. After this tour d'horizon, the actual significance of the UNIDROIT Principles in international contractual practice is, admittedly, difficult to measure even though their possible significance is nearly limitless. S. Vogenauer\(^\text{92}\) says:

"On the occasion of the publication of the second edition of the PICC in 2004, the Governing Council of UNIDROIT boldly asserted that the 'success in practice' of the UNIDROIT Principles over the last ten years has surpassed the most optimistic expectations'.\(^\text{93}\) This assessment is open to debate. Its validity very much depends on whether the observer tends to see the glass half full, rather than half empty”.

\(^{92}\) UPICC Commentary-VOGENAUER, Introduction, § 37.

43. With S. Vogenaüer, we agree that such a success assessment very much depends on the observer's personal views. Written by an observer used to looking at half full glasses rather than half empty ones, this paper argues that the UNIDROIT Principles are indeed a success in practice. This contention is based first on the way the Principles have been drafted throughout the three editions (and the model clauses), with a special focus on solutions tested by way of comparative law tools and with a view on commercial fairness and soundness. Thus, the parties to an international commercial contract can be confident that the UNIDROIT Principles provide solutions avoiding domestic peculiarities which may have surprising consequences for one or even both parties. This would be a good reason to submit the contract to the UNIDROIT Principles.

44. Secondly, the actual application of the Principles can be followed through the UNILEX database which gives access to decisions worldwide and allows an international discussion. In this regard, it matters little whether the Principles are the law applicable to the contract or find only an indirect application. In those cases, the scientific exchange and discussion of decisions constitutes an important means of achieving an international understanding of the most important contractual issues. Any person interested in taking part in this exchange, either for a scientific, educational or practical purpose, can do so through the UNILEX database which gives an easy and free of charge access to the international body of decisions applying, or referring to, the UNIDROIT Principles.

45. All things considered, one of the greatest advantages of the UNIDROIT Principles is to relieve international commerce of the burden of domestic rules sometimes ill fitted for transnational relationships. If only for this reason, the actual significance of the UNIDROIT Principles is bound to rise steadily in the context of a globalized economy.

94 A special tribute should be paid to the generous Sponsors of UNILEX: http://www.unilex.info/dynasite.cfm?dsmid=13087.
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