The UNIDROIT Principles for International Commercial Contracts and the New Dutch Civil Code

Arthur Hartkamp

INTRODUCTION

Recently, I had the opportunity to draw the attention to the UNIDROIT Principles for International Commercial Contracts and to the Principles of European Contract Law. I discussed the nature and the possible functions of the Principles and presented a brief survey of their contents.\(^1\) The UNIDROIT Principles have been published in the American Journal of Comparative Law\(^2\), together with some articles by member of the Working Group that has drafted them.\(^3\)

In this article I will consider the Principles from the viewpoint of a Dutch observer and compare them with the general contract rules contained in the Dutch Civil Code of 1992. Due to restrictions of space I must refrain from extensive quoting of articles and from drawing comparisons with other legal systems. I intend to return to the subject in other publications, inter alia in order to investigate the relation between the Principles and the Vienna Sales Convention of 1980 (CISG).

Because of the international character of the subject and since contract law (both Dutch and international) is increasingly taught in Dutch university courses to foreign students\(^4\), I venture to submit my article in English, although this is not customary in a Dutch book honouring a Dutch professor of private law. However, I am certain that Chris Brunner, with his keen interest for comparative law\(^5\), will not be disconcerted by this modernism.

I. GENERAL PROVISIONS

1.1 When comparing the Principles to a set of national rules, it must be borne in mind that the scope of the Principles is restricted to international commercial contracts (Article 1.1), whereas the rules of a national Code normally apply to all contracts, both national and international, and irrespective of their civil or commercial character. The latter is especially true for the Dutch Code, which has abandoned the difference between civil law and commercial law. However, this does not exclude the possibility of articles referring to only one type of contract, such as Articles 6:233, 234 and 7:6, which relate to consumer transactions.
1.2 The Chapter on General Provisions contains, apart from rules on the application of the Principles which will be passed over in silence here, some very important operative rules.

The parties are free to enter into a contract and to determine its content (Article 1.3). The same principle applies in Dutch law; it is not expressly laid down in the Civil Code, but an implicit reference may be found in Article 2:248, paragraph 1.

A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided under these Principles (Article 1.4). Here the same remark as to Dutch law may be made. The same is true for the rule that the parties may exclude the application of the Principles or derogate from or vary the effect of any of its provisions, except as otherwise provided in the Principles (Article 1.6).

1.3 Each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty (Article 1.8). The draft-comments enumerate a number of applications throughout the Principles and note that good faith and fair dealing may be considered 'to be one of the fundamental ideas underlying the Principles.' The applications include the process of negotiation and of formation of contracts (e.g. Articles 2.3, 2.14 and 2.15), validity (e.g. Article 3.5 and 3.10), interpretation and the rules on performance and non-performance.

I take this to mean that, in principle, the function of good faith in the Principles is identical to that of 'reasonableness and equity' in Dutch law so that good faith may lead to a restriction or an extension of the rights or duties of a party as compared to the content of these rights and duties according to the literal text of the agreement or of the Principles. Of course, this does not imply that a Court or arbitrator in a case governed by the Principles will arrive at the same application of the concept of good faith as would a national court within a national context. Particularly in light of the qualification 'in international trade' national solutions will only be considered relevant to the extent that they reflect internationally accepted standards. This point is stressed in a more general way by Article 1.7, which states that in the interpretation of the Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.

1.4 The principle that notices, including declarations, are not subject to any particular requirement as to form as well as the so called 'receipt principle' (a notice is effective when it reaches the person to whom it is given) correspond to the rules in Article 3:37.

II. FORMATION

2.1 Chapter II on formation comprises 19 articles. Of these, Articles 1 - 10 deal with the traditional process of concluding a contract through the mechanism of offer and acceptance. They fully conform to Dutch law: either to the provisions of Articles 3:37 and 6:217 ff or, where a corresponding specific rule is absent, to what may be deduced from general principles of Dutch contract law. This is, I submit, also true for Articles 2.11 (writings in confirmation), 2.12 (contract dependent on agreement on specific matters or in specific form) and 2.13 (contract with terms deliberately left open), for which no equivalent articles in the Dutch Code can be found.

2.2 Articles 2.14, and 2.15 are devoted to the negotiation process, a subject new to uniform law.

Article 2.14. states that a party is free to negotiate and is not liable for failure to reach an agreement. However, a party who has negotiated or broken off negotiations in bad faith is liable for the losses caused to the other Party. The article goes on to offer an example of bad faith: It is bad faith, in particular, for a Party to enter into or continue negotiations intending not to make an agreement with the other Party. The article corresponds to Dutch case law, subject to the rule that liability is restricted to losses caused to the other Party. The Dutch Supreme Court has not ruled out the possibility that the other Party is entitled to compensation of its expectation loss; this may be so either if it had reasonable grounds to believe that a contract would be concluded or on account of 'other circumstances' (which have so far not been specified by the court). According to Article 2.15 a duty of confidentiality may arise in a situation where it would be contrary to good faith to disclose information obtained during negotiations. If appropriate, the remedy for breach of the duty may include

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compensation based on the benefit received by the Party in breach. Dutch law would lead to the same result on the basis of the provisions on tort (especially the general clause of Article 6:162) in conjunction with Article 6:104, allowing the court to measure the injured party's loss by the amount of profit gained by the party in breach.

2.3 The remaining articles (2.16 - 2.19) deal with general conditions (defined in Article 2.16 paragraph 2, comp. Article 6:231 sub a) and make some exceptions to the general rules on formation.

Article 2.17 (battle of forms) adopts the 'knock-out doctrine': subject to clear statements to the contrary by either of the parties, the contract is concluded on the basis of those standard terms which are common in substance. The article differs from the 'first shot doctrine' of Article 6:225 Paragraph 3, which is internationally isolated.\textsuperscript{10}

According to Article 2.19 surprising provisions are not effective. The Dutch solution is different: acceptance of the general conditions as a whole will normally include the surprising term, but its surprising character will be weighed in the balance and enhance the risk of the term being declared unreasonably onerous by the court (Articles 6:232, 233).

Finally, the rule of interpretation contained in Article 2:19 (if there is a conflict between a standard term and a term which is not a Standard term the latter prevails) also applies in Dutch law, despite the absence of rules on interpretation of contract clauses in the new Civil Code.\textsuperscript{11}

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III. VALIDITY

3.1 Chapter III deals with grounds of invalidity of contracts and, by way of analogy, of unilateral declarations (Article 3.21). However, it is not concerned with lack of capacity, lack of authority and immorality or illegality (Article 3.20), nor with grounds of invalidity derived from public law.\textsuperscript{12}

In its first two articles the chapter begins by setting forth the principle of consensualism and the lack of other requirements such as consideration and cause. This corresponds with Dutch law, but the rules of Article 3.1 paragraphs 2 and 3 (entire agreement clauses and written modification clauses) are unknown to Dutch law.

3.2 The regulation of the so called defects of consent (Articles 3.3 - 3.9) to a large extent corresponds with Dutch law. An exception is Article 3.4 paragraph 1 sub b, stating that a party may avoid a contract for mistake (apart from the three cases mentioned in litt. a) if 'the other party has not at the time of avoidance acted in reliance on the contract'. Dutch law generally protects a party who has concluded a contract reasonably believing the other party to assent (Articles 3:33, 35), without requiring the first party to act in reliance on the contract.\textsuperscript{13}

Another exception is Article 3.6, which denies the mistaken party the right to rely on his mistake when it disposes of a remedy for non-performance. In Dutch law concurrence of actions normally is considered to be allowed, a view which sometimes finds support in an explicit provision such as Article 7:22 on the sale of goods.

Finally, avoidance on the ground of 'gross disparity' requires an unjustified and 'excessive' advantage, whereas Article 3:44 paragraph 4 on abuse of circumstances and Dutch case law do not.

3.3 One more provision relates to the grounds for invalidity: according to Article 3.10 initial impossibility does not affect the validity of the contract. The other articles are concerned with effects of invalidity, such as confirmation, adaptation of contract in the Gases of mistake and gross disparity, avoidance by notice, time Limits for avoidance, partial avoidance, retroactive effect of avoidance and damages. All these rules can be found in Dutch law, subject to some minor details which need not be dealt with here.\textsuperscript{14}

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IV. INTERPRETATION

4.1 Article 4.1 states that a contract shall be interpreted according to the parties' common Intention if such an intention can be established, and, if not, that it shall be interpreted according to the meaning which reasonable persons of the same kind as the parties would give to it in the same circumstances. The same principle applies to the interpretation of statements and other conduct of one of the parties (Article 4.2). The Dutch Civil Code does not contain rules labelled
'Interpretation rules', but the same principles may be derived from, on the one hand, Articles 3:33 and 35 dealing with the formation of contract (mentioned in section 3.2, supra), and, on the other hand, the principle of good faith stated in Article 6:248. In fact, a well known decision of the Supreme Court of 1981 condemned a mere literal interpretation and ruled that the content of contractual rights and obligations must be determined according to the sense which the parties, in the circumstances, reasonably could attach to the contractual stipulations and according to the parties’ reasonable mutual expectations.

4.2 Neither does the Code contain interpretation rules of a more concrete character such as those spelled out in Articles 4.4 - 4.8, but a Dutch court would not find any difficulty in applying those rules.16

V. CONTENT

5.1 The chapter contains some rather theoretical or pedagogical provisions (Articles 5.1 - 5.5) on a) the concept of express and implied obligations and b) the difference between duties to achieve a specific result and duties of best efforts. As far as b is concerned, the text aptly stresses that a contract and even one obligation may comprise duties of both kinds. All this accords with Dutch law, albeit that the classification of 'content of contract' as the subject of a specific chapter is not familiar to civil law codes.

5.2 More important are the rules on the determination of quality of performance and, especially, that on price determination (Articles 5.6 and 5.7). Article 5.7 purports to eliminate, as much as possible, the risk of a contract being declared Void on account of the lack of price determination, by referring to alternative objective factors or to a reasonable price. This principle corresponds to Dutch statutory provisions inter alia in the law of sale, deposit and mandate (Articles 7:4, 405 and 601).

VI. PERFORMANCE

6.1 The first section of Chapter VI contains a number of rather technical rules on the time and place of performance, which need not be discussed in detail. As Fontaine has indicated, in several instances the rules try to combine both the civil law and common law approaches, which has led to some overlap and, as he fears, may cause difficulties of interpretation.17 I do not consider the Problem to be very grave. It is true that Articles 6.1.3 (performance at one time or in instalments) and 6.1.5 (order of performance) do not appear in civilian codes and that their respective relation to Articles 6.1.4 (partial performance) and 6.1.6 (earlier performance) at first glance may not be entirely clear. But this will be explained in the comments and I do not think that the provisions run contrary to what for example a Dutch court normally would decide on the basis of Articles 6:28 ff. of the Civil Code.

6.2 Furthermore there are rules on the payment of monetary obligations, a subject to which the Dutch Code devotes a separate section18 which has inspired the drafters of the Principles. However, there are some differences, for example relating to the arduous question of when a debtor making payment by transferring a sum of money to a financial Institution is discharged. Whereas Article 6:114 Paragraph 2 opts for the time when the account of the creditor is credited, Article 6.1.8 Paragraph 2 states that the debtor is discharged when the transfer to the creditor's financial Institution becomes effective.

6.3 Articles 6.1.14 - 6.1.18 relate to public permission requirements affecting the validity of the contract. The articles set forth which party shall take the measures necessary to obtain the permission and spell out the consequences of either the permission being not granted or refused (termination or invalidity of the contract). In the Dutch Civil Code these matters are not dealt with at length, but they are nevertheless touched upon by Articles 3:40, 41 (nullity and partial nullity, compare 6.1.18, Paragraph 1, second sentence) and 3:57 (rights of interested third Parties).

6.4 The second section of the chapter contains rules on hardship ('imprévision', changed circumstances), defined as the occurrence of events which fundamentally alters the equilibrium of the contract whether because the cost of a party's Performance has increased or because the value of the performance a party receives has diminished. If the further requirements of Article 6.2.2 sub a-d are met, the disadvantaged party is entitled to request renegotiation. Upon failure to reach agreement either Party may resort to the court19; the court then may,
if reasonable, terminate the contract at a date and on terms to be fixed or adapt the contract with a view to restoring its equilibrium.

The regulation, which is new in uniform law\textsuperscript{20}, follows the example of \textit{inter alia} Article 6:258, but its main criterion is geared to (international) commercial contracts. One slight problem, in my mind, lies in the fact that the articles on hardship not only apply when the events occur after the conclusion of the contract, but also when they merely become known to the disadvantaged party after that time, thus causing an overlap with Article 3.4 on mistake.

\section*{VII. NON-PERFORMANCE}

7.1 Chapter VII is the final and most extensive chapter of the Principles: it numbers some 30 articles distributed over four sections (General Provisions, Right to Performance, Termination, Damages and Exemption Clauses). However, for all its length it may be treated fairly briefly here, since in its general features as well as in most details it corresponds to Dutch law.

7.2 In the Principles the key concept is 'non performance', which is defined as 'failure by a party to perform any of its obligations under the contract, including defective performance or late performance' (Article 7.1.1). It is immaterial whether the non-performance is excused or not; and it is also immaterial whether the cause of the non-performance existed already at the time of conclusion of the contract or whether it arose afterwards. This does not mean, of course, that all possible non-performances will give rise to all possible remedies. For example, the right to terminate a contract does not exist if the non-performance is of minor importance (Article 7.3.1); damages may not be claimed where the non-performance is excused (Article 7.4.1); and where a non-performance is caused by the obligee he is not allowed to rely on it (Article 7.1.2).\textsuperscript{21}

All this conforms to Dutch law (Articles 6:74 ff. and 265 ff.), as do most of the other rules of this section, notably Articles 7.1.3 (right to withhold performance, comp. 6:262) and 7.1.4 (cure by non-performing party, comp. 6:86). The rule on force majeure (Article 7.1.6) amounts to what normally in a commercial context would be deduced from Article 6:75.

7.3 For a Dutch lawyer Article 7.1.5 presents more difficulties. According to paragraphs 1 and 2 the aggrieved party may by notice to the other party allow an additional period of time for performance. During this period the aggrieved party may withhold performance of his own reciprocal obligations and may claim damages but he may not resort to any other remedy. The Dutch Code does not contain a corresponding rule, but the same result will follow from the rule on good faith. It must be stressed that the rule does not coincide with Articles 6:181 ff and 6:265, which lay down that where performance is still possible the creditor's right to damages and to termination depend on the debtor's default; unless the contract sets a term for performance, default is brought about by sending the debtor a written warning allowing him a reasonable time for performance. In the system of the Principles such a notice is not required: there is a non-performance as soon as the debtor does not duly perform his obligations within the time limits set by Article 6.1.1. Consequently, the rule in Article 7.1.5 is concerned with a 'Nachfrist', that is to say a notice allowing an additional period of time after a non-performance in the sense of Article 7.1.1 has come into being.

The article continues by stating (paragraph 3) that if in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, he may terminate the contract at the end of that period. This rule, too, as such is unknown to Dutch law, because in Dutch law the right to termination is not restricted to fundamental non-performance; see section 7.5 below.

7.4. Section 2 adopts the principle of \textit{specific performance} not only for monetary obligations but also in cases of non-monetary obligations (comp. Article 3:296). The principle is subject to some qualifications which, while purporting to accomodate the reluctance felt in common law systems with reference to this principle, frequently in civil law systems, too, would hamper its enforcement. Article 7.2.4. allows the court, when ordering a defaulting party to perform, to direct that the party shall pay a penalty if it does not comply with the order - thereby introducing the 'astreinte' or 'dwangsom' which plays such an important role in Dutch civil proceedings (including summary proceedings).

7.5 Section 3 grants the aggrieved party the \textit{right to terminate the contract}, to be exercised by notice to the other party. Dutch law leaves the creditor the choice to exercise his right by notice or by demanding a Court decision (Article 6:267).

Article 7.3.1 requires the failure to perform to constitute a fundamental non-performance; conversely; Article 6:265 grants
the right to terminate generally (‘Every failure . . .’ gives the right to terminate), but excludes it where the failure is of minor importance. The difference might rather relate to the burden of proof than to substance. As was mentioned in section 7.3 *supra*, the mechanism of Article 7.1.5 paragraph 3 allows the creditor to transform a non-substantial non-performance into a fundamental one by allowing the debtor an additional time for performance. In Dutch law, such a reasonable time for performance often must be set in order to bring about default in the first place, and may afterwards be set for the same purpose as in the Principles.

The other provisions (on anticipatory non-Performance, effects of termination in general and restitution) concur with Dutch law, which, however, furnishes more details (Articles 6:80, 262 ff, 271 ff).

7.6 In the Dutch Code the right to damages is regulated - not in the sections on non-performance, but - in a separate section (Articles 6: 95 - 110) relating to all legal obligations to repair damages, which means in practice relating both to non-performance of contractual obligations and to liability in tort. Due to this peculiarity most provisions are formulated in a loose and generalized manner and may well be applied differently according to the type of liability at hand. Taking this into account, I submit that most provisions of section 7.4 would lead to the same results as would the application of the Dutch Code.

An exception is Article 7.4.4, which restricts liability to losses which the defaulting party foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance. Article 6:98 does not compel a court to adopt this restriction which might be inappropriate in a case where for example the breach is committed in bad faith at a time when the defaulting party knows that the loss resulting from the breach will exceed what could be foreseen at the time of the conclusion of the contract. Another difference concerns the rate of interest upon a sum of money which is not paid on time: Articles 7.4.10 and 6:119.

7.7 The section closes with two important provisions. Exemption clauses may not be invoked if it would be grossly unfair to do so. In Dutch law the same results from Article 6:248 paragraph 2 and, in case of general conditions, from Article 6:233 sub a. And Article 7.4.14 acknowledges the validity of penal clauses (not limited to the common law concept of liquidated damages), but the specified sum may be reduced if grossly excessive. The same rule is laid down in Article 6:94 paragraph 1 of the Dutch Code.

CONCLUDING REMARKS

Our survey has shown that the Unidroit Principles to a considerable extent tally with Dutch law as laid down in the new Dutch Civil Code. This is true for the general policies underlying the Principles (see sections 1.1 - 1.4) as well as for most aspects of the substantive rules on formation and validity, interpretation, performance and non-performance. I must add, however, that the comparison has not been complete in the sense that by following the order of the Principles, I have not been able to point to important rules of Dutch law which lack a counterpart in the Principles, such as the power of the court to reduce an obligation to repair damage (Article 6:109).

Of course, the merits of a document of uniform law can not be measured by the extent to which it coincides with the national legal system of the beholder and such has not been the purpose of this study. Nonetheless, it is a comforting thought for a Dutch lawyer that the new Civil Code, which is based on much comparative reflection, largely complies with the latest authoritative proposals on international contract law.

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1 Principles of Contract Law, in Hartkamp et al. (ed.), Towards a European Civil Code (1994), in print. To put it very briefly, the UNIDROIT Principles are a set of some 120 articles, covering the general part of contract law. In this stage, they are not meant to become binding law, but they may inspire national legislators; they may provide guidance to Courts when interpreting existing uniform law and to arbitrators when deciding disputes over international commercial contracts; and they will stimulate, together with the European Principles, the discussion on a uniform contract law for Europe.

2 AJCL XL (1992), p. 703 ff. In July 1993, UNIDROIT has issued a working paper (Study L Doc. 40, Rev. II) which contains some minor modifications, mainly relating to the Order of the rules. However, as these are not relevant to the purpose of this article I will refer to the principles as published in the AJCL. At the time I am writing (September 1993), the

4 For instance, the Faculty of Law at the University of Utrecht will offer a course on European Contract Law from Autumn 1993.

5 I need only refer here to the editorial formula of the 'Monografieën Nieuw B.W.', which I have had the pleasure of co-editing with him for over thirteen years.


7 Comp. on supplementing obligations also Arts. 4.7, 5.2 sub c, 5.3 and 5.7.

8 Arts. 2.1; 2.3 para. 2 sub b; 2.5 para. 1, in fine, and para. 3; 2.7.


11 See Asser-Hartkamp II, op. cit. (N. 9), nr. 287 sub f.

12 See Drobnig (N. 3) and infra section 6.3.

13 This prevailing view has been challenged eloquently by Nieskens-Ishphording, Het fait accompli in het vermogensrecht (1991).

14 As to damages (in Art. 3.18 restricted to the reliance measure) I would point out, however, that some legal authors in The Netherlands advocate a more severe liability for the party causing a mistake. According to this view (influenced by developments in the law of precontractual liability, See section 2.2 supra), that party's liability should not per se be restricted to faulty behaviour nor to the other party's reliance interest. See the discussion in Asser-Hartkamp, op. cit. (N. 9) nr. 487.


16 Compare the 'guidelines' proposed in Asser-Hartkamp, op. cit. (N. 9) nr. 287.

17 Fontaine (N. 3) p. 650 ff.

18 Art. 6:III ff.; compare also Art. 6:46.

19 Which includes an arbitral tribunal (Art. 1.11).

20 See Maskow (N. 3) at p. 658.

21 The Article not only contemplates the case where the non-performance was caused by the obligee's act or omission, but also the case where the non-performance was caused by another event as to which the obligee bears the risk. In the Dutch Code the same rules follow from Arts. 6:58, 75 and 266.

22 Under CISG this possibility is restricted to non-delivery as opposed to other instances of non-performance such as defective delivery: See Art. 49 para. 1 sub b.

23 Compare also Tallon (N. 3) at p. 679. Under the rule of Art. 7.4.4, which corresponds with Art. 74 CISG (but not with Art. 89 ULIS), the problem can only be resolved if the debtor's fraud can be considered as a tort.

24 The remarks of Fontaine and Tallon (N. 3) as well as Bonell (AJCL op. cit., p. 622) and Farnsworth (ib. p. 700) bear witness to the inspiration drawn by the UNIDROIT Study Group from the Dutch Civil Code. The same observation in relation to the Principles of European Contract Law has recently been made by Ole Lando, Is codification needed in Europe? Principles of European Contract Law and the relationship to Dutch law, European Review of Private Law, Vol. 1 (1993), p. 157 - 170, at p. 158.

**Referring Principles:**

- IV.5.3 - Interpretation in favor of effectiveness of contract
- IV.5.4 - Interpretation against the party that supplied the term
- VIII.1 - Definition