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Content:

The UNIDROIT Principles of International Commercial Contracts (hereafter UNIDROIT Principles) address themselves equally to both judicial courts and to commercial arbitration tribunals. Indeed, Article 1.10 (Definitions) states: “In these Principles “court” includes an arbitral tribunal”. However, as it is also stressed in the Preamble to the Principles, international commercial arbitration appears to be particularly important for the UNIDROIT Principles. Something which is equally important is the fact that these Principles can also be relevant to international commercial arbitration.

Part I will examine the relevance of arbitration to the UNIDROIT Principles; Part II will focus on the relevance of the Principles to arbitration.

I. RELEVANCE OF INTERNATIONAL COMMERCIAL ARBITRATION TO THE UNIDROIT PRINCIPLES

1. Arbitration is said to elevate the UNIDROIT Principles to a national law

The UNIDROIT Principles set forth general rules for international commercial contracts. However, as long as disputes over contracts are settled by a national court instead of by an international arbitration tribunal, the UNIDROIT Principles can only play a complementary role besides the national contract law. Indeed, for national courts a contract has to be governed by a national legal system. Consequently, in the eyes of national courts, parties who agree that the Principles will govern their contract can merely “incorporate” these principles into their contract which otherwise remains governed by national law.
The UNIDROIT Principles do not have to play this secondary role when contract disputes must be submitted to international commercial arbitration. In the event that the arbitrators are allowed to decide as *amicable compositeurs*, i.e. *ex aequo et bono*, they do not have to apply a specific national law and can thus use the UNIDROIT Principles as an autonomous standard. However, it also has become widely accepted that even international commercial arbitrators who are not *amicable compositeurs* do not have to apply a specific national legal system but may apply anational rules (such as general principles of law or the *lex mercatoria*). In that event they may consider the UNIDROIT Principles to be part of these anational rules. Besides, the drafters of the UNIDROIT Principles have claimed that the Principles are indeed part of the general principles of law or the *lex mercatoria*.

Three critical observations.

Firstly, the UNIDROIT Principles not only refer to national law for issues of capacity and form but they yield to all relevant mandatory rules of domestic law. The anational ambitions of the UNIDROIT Principles are difficult to reconcile with these many references to domestic law.

Secondly, it is not up to the Principles to advance themselves as general principles of law or as *lex mercatoria*. As general principles of law the UNIDROIT text will only be accepted when the legal community and not merely the some twenty drafters of the UNIDROIT text, no matter how skilled and reputed these lawyers may be, has recognized that the UNIDROIT document states principles which underlie most legal systems and are generally accepted. In fact some UNIDROIT rules are certainly too specific to be perceived as such. The UNIDROIT standards will only be part of the *lex mercatoria* if they are recognized as such by the business community and its arbitrators. Since the UNIDROIT Principles have just been launched, it is too early to assess this possibility.

Thirdly, it is as yet uncertain what the UNIDROIT Principles may contribute to the general principles of law or to the *lex mercatoria*. For the UNIDROIT drafters, the Principles are useful because they give the extremely vague concepts from the general principles of law and the *lex mercatoria* a well defined content. Many Principles, however, remain rather vague and where other Principles become more specific it may be questioned whether they still reflect the widely accepted standards from the general principles of law or from the *lex mercatoria*.

**II. THE UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL ARBITRATORS ARE APT TO APPLY**

UNIDROIT proposes principles - not rules - of international contract law.

The distinction between "principles" and "rules" is well established in legal theory. Roscoe Pound and Geny explored these notions on both sides of the Atlantic in the twenties. Nowadays the difference between "principles" and "rules" is still essential for many legal philosophers, such as e.g. Dworkin.

Legal principles are as good as statement of a law as are legal rules. It has been said that legal principles differ from legal rules by being more general. In fact, however, legal principles have different degrees of generality and some may be quite specific. A more essential difference between principles and rules is that principles offer fundamental standards which may be in conflict when applied to a specific case, while rules apply in an all-or-nothing fashion. Moreover, principles have to be balanced against each other whereby some principles will receive more weight than others. Furthermore, principles are subject to continuous debate on their justification and scope. A rule, on the other hand, if it applies, fully determines the situation. Rules do not have to be weighed against one another. They are strictly adhered to without question.

The business community is not governed by a "rulebook" but rather by principles. Parties to an international contract submit themselves to the legal principles of international trade and, at the same time, reserve the right to adapt these principles to the case at stake. In this sense, their adherence to the UNIDROIT Principles of International Contract Law appears to be a most natural choice. But principles imply that a third party exists to determine the respective scope of the various relevant standards and balance them against each other when the parties cannot come to an agreement on these points. For the UNIDROIT Principles this third party should preferably not be a state court, but an arbitration tribunal,
which is much more closely in touch with the international Business community and its values and interests. Thus, arbitrators will be the natural authority for the interpretation and application of the UNIDROIT Principles.

III. ARBITRATION GIVES CONTENT TO THE UNIDROIT PRINCIPLES

The UNIDROIT Principles of International Commercial Contracts refer to many "notions" and "standards", which have no specific meaning but whose content depends on the context in which they are applied. Chaim Perelman would name these notions "notions à contenu variable en droit". Many of these "notions" have already been the subject matter of numerous arbitration proceedings an international commercial contracts. Arbitral awards thus may give body to the notions of the UNIDROIT Principles. However, Information about awards is often difficult to obtain. Awards are generally not published. Moreover they "display a multitude of approaches which ... do not provide the firm band of settled case law". Nevertheless, awards still may "offer useful guidance". Indeed, the similarity in the facts, the familiarity of the arbitrators with the business community and the quality of the arbitration panels make many awards an authoritative precedent in interpreting the UNIDROIT Principles.

There are many "notions à contenu variable" in the UNIDROIT Principles. If parties, judges or arbitrators have no point of reference for these notions, they risk giving the Principles a rather subjective and occasional meaning. Application of the Principles would then result in much uncertainty in spite of the uniformity which the Principles aim at. However, the Principles reflect arbitration practice. Their "notions à contenu variable" receive a more specific meaning through arbitration awards. With a vast arbitration practice as reference, the Principles become a more stable standard. A few examples will illustrate how notions from the UNIDROIT Principles receive a more specific meaning from international arbitration practice.

1. Usages

Under Article 1.8, international trade usages that are widely known and regularly observed in the particular trade bind the contracting parties. Under Article 4.3 these usages are relevant in interpreting the contract.

The best sources of knowledge about such international trade usages and practices are the international arbitration awards which settle disputes from the specific trade. Such awards may come from arbitration institutions of trade associations, such as GAFTA (Grain and Feed Trade Association), which have a truly international Field of Operation, or from arbitrators whose expertise and familiarity with international trade is internationally recognized.

It is less certain if usages, formulated by domestic arbitration Panels or by institutions which generally settle domestic disputes and only occasionally a dispute with a foreign party, reflect international usages to the same extent. However, domestic institutions and arbitration panels can give insight into local usages, on for example commodity markets or ports, which are relevant to the modalities of Performance.

2. Good faith and fair dealing

Article 1.7 enounces a fundamental idea, which also underlies many other Principles, namely that "Parties are under a general obligation to act in good faith and fair dealing in international trade". By looking to international trade for good faith and fairness, the drafters made it clear that international trade standards may be different than domestic standards. In other words, fairness and good faith on the domestic level is not necessarily fairness and good faith in international trade. Domestic standards only become international standards if they are shared by other countries and/or if they are applicable in international transactions. The drafters even recognized that good faith and fairness may be different from one trade sector to another as standards and business practices may vary substantially between different trades.

Many awards, which give judgments on the question of whether parties have acted fairly and in good faith in a multitude of situations and in variety of trades, can be of guidance in interpreting these concepts.

3. Reasonableness
Some twenty UNIDROIT Principles refer to the standard of "reasonableness", the textbook example of a "notion à contenu variable". Many past awards have indicated what arbitrators have considered to be reasonable in certain circumstances. In fact, a "reasonable" solution is what most awards end up with. The arbitrators' views may be used as guidelines in applying the reasonableness standard of the UNIDROIT Principles.

4. Hardship

How arbitral awards can give a more specific meaning to the UNIDROIT Principles may be illustrated with the UNIDROIT rules on hardship (Section 6 - Articles 6.2.1, 6.2.2 and 6.2.3).

(a) Pacta sunt servanda?

As already stated, principles may be conflicting and have then to be weighed against one another. In a case of hardship, two contradictory UNIDROIT Principles surely have to be balanced. One UNIDROIT Principle maintains the sanctity of contract in spite of hardship: "Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligation..." (Article 6.2.1). However, alter this Statement of principle, the UNIDROIT text opens all sorts of possibilities for remedies because of hardship: indeed, Article 6.2.1 has consecrated the sanctity of contract "... subject to the following provisions on hardship". Accordingly, the UNIDROIT Principles stick less to a strict "pacta sunt servanda" than other international texts which also claim to reflect international business practice (such as the Vienna Convention on International Sales of Goods which does not provide a remedy for "economic hardship"). The proceeding Articles on hardship contain a few criteria to determine when hardship will indeed affect the contract terms and to what remedy it may lead. These criteria, however, remain rather general. The official Comment which seeks to clarify these criteria, moreover, remains vague. Arbitration practice gives a more specific content to these criteria.

(b) Disruption of Balance

Under the UNIDROIT Principles parties are no longer bound by the terms of the contract as such "where the occurrence of events alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished" (Article 6.2.2). Arbitral practice is relevant in illustrating the different elements of this rule:

- Article 6.2.2 starts from the presupposition that there is an "equilibrium" in the contract. This notion of "equilibrium" between the performances has also been fundamental in many awards. As it has been stated in an ICC award from 1975:

- The original balance between the contractual performances can be fundamentally disturbed when the cost of a party's performance has increased. The Comments specify that this may, for example, occur because of a dramatic rise in the price of raw materials necessary for the production of the goods or the rendering of services, or because of the introduction of new safety regulations requiring far more expensive production procedures. Arbitration awards may give examples of such situations.

Referring Principles:

- VII.6 - Duty to pay interest