

The Impact of the UNIDROIT Principles in International Dispute Resolution in Figures

Eleonora Finazzi Agrò *

The UNIDROIT Principles of International Commercial Contracts, first published in 1994 and now in their third edition,¹ continue to arouse considerable interest in academic circles,² while opinions as to their actual use in practice are rather divided. However, the empirical data on which both sides – those who maintain that the success of the UNIDROIT Principles is going far beyond initial expectations and those who, on the contrary, consider the role of the UNIDROIT Principles in practice to be rather modest – base their argument are not always up to date and often partial.

The statistical data presented here are based on a more extensive study carried out by the author of this paper of all the decisions referring in one way or another to the UNIDROIT Principles reported in the UNILEX data base,³ with a view to analysing the real impact of those decisions on the outcome of the relevant dispute.⁴

* PhD, University of Rome “La Sapienza” (Italy); Partner, *Studio Valensise*; e.finaziagro@studiovalensise.it.

¹ Cf. UNIDROIT Principles of International Commercial Contracts 2010 (hereinafter “UNIDROIT Principles 2010”).

² For a comprehensive bibliography, see the UNILEX database at <<http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13622>>.

³ See at <<http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13617>>.

⁴ Cf. E. FINAZZI AGRÒ, “The Impact of the UNIDROIT Principles in International Dispute Resolution: An Empirical Analysis”, *Uniform Commercial Code Law Journal* (2011) (to be published).

As of 31 August 2011, the total number of decisions collected in UNILEX was 266, 107 of which were decisions by domestic courts and 159 were arbitral awards. Of those decisions, only 230 have been taken into consideration, the remainder being of no direct interest for the present purpose either because the reference to the UNIDROIT Principles was made only by the parties in their statements of claim or defence and/or because the adjudicating body decided not to refer to the UNIDROIT Principles.

Following the structure of the above-mentioned study, the statistical data reproduced here have been divided into four main categories referring to:

- decisions (totalling 61, of which 55 arbitral awards and 6 court decisions) in which the UNIDROIT Principles were applied as the rules of law governing the substance of the dispute because
 - they were expressly chosen by the parties, or
 - they were applied by the arbitral tribunal *ex officio*,
 - when the contract generically referred to the “general principles of law”, the *lex mercatoria*, and the like,
 - in the absence of a valid choice-of-law clause, or
 - in arbitrations *ex aequo et bono*;
- decisions (totalling 58, of which 33 arbitral awards and 25 court decisions) in which the UNIDROIT Principles were cited to demonstrate that the solution provided by the applicable domestic law was in conformity with current internationally accepted standards and rules;
- decisions (totalling 76, of which 27 arbitral awards and 49 court decisions) in which the UNIDROIT Principles were referred to as a means of interpreting and supplementing the applicable domestic law;
- decisions (totalling 35, of which 24 arbitral awards and 11 court decisions) in which the UNIDROIT Principles were referred to as a means of interpreting and supplementing international uniform law instruments.

Admittedly, seventeen years after the publication of the first edition of the UNIDROIT Principles, these figures may appear not too impressive. However, it is a fact that most decisions referring in one way or another to the UNIDROIT Principles are arbitral awards, most of which remain unpublished: suffice it to mention that the latest survey of the relevant ICC Awards was published by the ICC International Court of Arbitration, by far the most important international arbitration institution, in 2005 and that it refers to only 10 awards

rendered in the years 2001 and 2002,⁵ whereas the total number of ICC Awards referring to the UNIDROIT Principles rendered in the years 2002-2004 alone was 54.⁶

Yet the picture that emerges from the statistical data is at any rate remarkable. First, the number of arbitral tribunals and domestic courts which have used the UNIDROIT Principles is considerable, as is their location, spread all over the world. Second, also the fact that the parties involved in the respective disputes were situated in so many different countries may be seen as confirmation that the UNIDROIT Principles are increasingly known worldwide. Finally, the substantive scope of application of the UNIDROIT Principles, though centring mainly on sales contracts, also covers a great variety of other important international commercial contracts, especially service contracts, distribution contracts and licensing contracts. As to the provisions of the UNIDROIT Principles most frequently invoked, those on the general principle of good faith, interpretation, hardship and force majeure, termination for non-performance and damages clearly predominate, while others such as those on agency, set-off, assignment and limitation periods seem to play a very limited role, if any. One of the reasons for this may be that these topics were only included for the first time in the 2004 edition of the Principles, and this is of course even more true with respect to the provisions on restitution in case of failed contracts, illegality, conditions and plurality of obligors and obligees, which were only added in the recently published 2010 edition.

⁵ See ICC International Court of Arbitration Bulletin, vol. 16, No. 1 (Spring 2005), 73 et seq.

⁶ Cf. E. JOLIVET, "L'harmonisation du droit OHADA des contrats: l'influence des Principes d'UNIDROIT en matière de pratique contractuelle et d'arbitrage", *Unif. L. Rev. / Rev. dr. unif.* (2008), 127 et seq.

Statistics

I. – UNIDROIT PRINCIPLES APPLIED AS THE LAW GOVERNING THE SUBSTANCE OF THE DISPUTE

Total number of decisions: 55 Arbitral awards; 6 Court decisions

A. LEGAL BASIS FOR DECISION

1. UNIDROIT Principles expressly chosen by the parties

- | | |
|---|---------------------------------------|
| 1.1 Sole legal basis for the decision | 8 Arbitral awards; 2 Court decisions* |
| 1.2. In conjunction with other sources of law | 7 Arbitral awards; 1 Court decision** |

2. UNIDROIT Principles applied *ex officio* by the arbitral tribunals

- | | |
|--|--|
| 2.1. Reference to no further specified principles and rules of supra-national or transnational character | 16 Arbitral awards; 2 Court decisions*** |
| 2.2. Absence of any choice of law or choice-of-law clause manifestly invalid | 21 Arbitral awards; 1 Court decision**** |
| 2.3. Arbitrations <i>ex aequo et bono</i> | 3 Arbitral awards |

* Decision of the Swiss court *Handelsgericht St. Gallen* of 12 November 2004 admitting, as *obiter dictum*, that in disputes before domestic courts the parties are entitled to choose a-national or supranational rules of law, such as the UNIDROIT Principles, as the law governing their contract; decision of the Swiss Supreme Court of 20 December 2005 admitting, as *obiter dictum*, that in disputes before domestic courts the parties are entitled to choose a-national or supranational rules of law, such as the UNIDROIT Principles, as the law governing their contract.

** Decision of the Xiamen Intermediate People's Court of 2006 (exact date unknown) confirming the validity of a choice-of-laws clause referring to CISG and, for issues not covered by CISG, to the UNIDROIT Principles.

*** Decision of the United States District Court, S.D. California, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.* (7 December 1998), confirming ICC Award No. 7365 of 5 May 1997, since the reference by Arbitral Tribunal to the UNIDROIT Principles as a source of general principles of law and trade usages without express authorisation by the parties does not violate Art. V(1)(c) of the 1958 New York Convention; decision of the Dutch court, *Rechtbank 's-Gravenhage* of 11 May 2011 confirming two ICC Awards (No. 7110 of June 1995 and April 1998).

**** Decision of the Supreme Court of the Netherlands of 24 April 2009 confirming an unknown arbitral award.

B. ADJUDICATING BODIES

Arbitral Tribunals		Domestic Courts	
ICC International Court of Arbitration	30	United States District Court, S.D. California	1
International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation	7	Handelsgericht St. Gallen	1
Arbitration Institute of the Stock- holm Chamber of Commerce	2	Schweizerisches Bundesgericht	1
Arbitration Court of the Lausanne Chamber of Commerce and Industry	2	Xiamen Intermediate People's Court	1
ICSID	1	Supreme Court of the Netherlands	1
London Court of Arbitration	1	Rechtbank 's-Gravenhage	1
Permanent Court of Arbitration	1		
National and International Arbitration Chamber of Milan	1		
Arbitration Center of Mexico	1		
Arbitral Tribunal of the City of Panama	1		
Tribunal of International Commer- cial Arbitration at the Ukrainian Chamber of Commerce and Trade	1		
<i>Ad hoc</i> Arbitrations	7		
Total	55	Total	6

C. TYPE OF CONTRACT

Sale/Supply of goods contracts	20	Joint venture agreement	1
Service contracts	4	Marketing agreement	1
Distribution contracts	4	Settlement agreement	1
Licensing agreement	1	Technology cooperation agreement	1
Loan agreement	3	Lease contract	1
Guarantee contract	1	Transfer of football player	1
Development agreement	1	Advertisement contract	1
Memorandum of Understanding	1	Type of contract unknown	13
Agency contract	1		
Consulting contract	1		
Transportation contract	1		
Interfirm agreements	1	Total	59

D. NATIONALITY OF THE PARTIES			
United States	10	Belarus	1
Russia	9	Hungary	1
England (UK)	6	Argentina	1
China	4	Chile	1
Italy	3	Panama	1
France	3	Puerto Rico	1
Netherlands	3	Mexico	1
Switzerland	3	Moldova	1
Iran	2	Algeria	1
UN Organisation	2	Poland	1
Spain	2	Costa Rica	1
Ukraine	2	Romania	1
Sweden	1	Andersen Worldwide Organ- isation	1
Turkmenistan	1	No further specified inter- national organisations	2
Canada	1	No further specified parties from Middle East	6
Belgium	1	No further specified parties from Europe	5
Germany	1	No further specified parties from Asia	1
Turkey	1	No further specified parties from Africa	1
British West Indies	1	No further specified parties from Latin America	1
Vietnam	1	Nationality unknown	25
Japan	1		
Bermuda	1		
Greece	1		
Slovenia	1		
Rwanda	1		
Gibraltar	1		
	1		
		Total	117

E. PROVISIONS OF THE UNIDROIT PRINCIPLES APPLIED

Chapter 1 (<i>General Provisions</i>)	Arts. 1.1, 1.3, 1.6, 1.7, 1.8, 1.9, 1.10, 1.12
Chapter 2, Section 1 (<i>Formation</i>)	Arts. 2.1.1, 2.1.2, 2.1.3, 2.1.6, 2.1.11, 2.1.13, 2.1.16, 2.1.17
Chapter 3, Section 1 (<i>General Provisions</i>)	Art. 3.1.2
Chapter 3, Section 2 (<i>Grounds for avoidance</i>)	Arts. 3.2.2, 3.2.5, 3.2.7, 3.2.9, 3.2.10, 3.2.11, 3.2.12
Chapter 4 (<i>Interpretation</i>)	Arts. 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.8
Chapter 5, Section 1 (<i>Content</i>)	Arts. 5.1.1, 5.1.2, 5.1.3, 5.1.4, 5.1.8
Chapter 6, Section 1 (<i>Performance in general</i>)	Arts. 6.1.4, 6.1.15, 6.1.16
Chapter 6, Section 2 (<i>Hardship</i>)	Arts. 6.2.1, 6.2.2, 6.2.3
Chapter 7, Section 1 (<i>Non-performance in general</i>)	Arts. 7.1.1, 7.1.7
Chapter 7, Section 2 (<i>Right to performance</i>)	Art. 7.2.5
Chapter 7, Section 3 (<i>Termination</i>)	Arts. 7.3.1, 7.3.2, 7.3.3, 7.3.5, 7.3.6, 7.3.7
Chapter 7, Section 4 (<i>Damages</i>)	Arts. 7.4.1, 7.4.2, 7.4.3, 7.4.4, 7.4.5, 7.4.6, 7.4.7, 7.4.8, 7.4.9, 7.4.10, 7.4.12, 7.4.13
Chapter 9, Section 2 (<i>Transfer of obligations</i>)	Art. 9.2.5

II. – REFERENCE TO THE UNIDROIT PRINCIPLES TO CONFIRM THAT THE SOLUTION PROVIDED BY THE APPLICABLE DOMESTIC LAW IS IN CONFORMITY WITH INTERNATIONAL STANDARDS

Total number of decisions: 25 Court decisions; 33 Arbitral Awards

A. ADJUDICATING BODIES

Domestic Courts		Arbitral Tribunals	
Supreme Court of Lithuania	4	ICC International Court of Arbitration	19
2 nd Arbitrazh Appellate Court (Russia)	3	<i>Ad hoc</i> Arbitrations	3
Tribunal Supremo (Spain)	2	International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation	3
Federal Court of Australia	2	Internationales Schiedsgericht der Wirtschaftskammer Österreich	2
13 th Arbitrazh Appellate Court (Russia)	2	National and International Arbitration Chamber of Milan	2
Federal Arbitrazh Court of the Volgo-Vyatsky District (Russia)	2	World Intellectual Property Organization Arbitration and Mediation Center (Geneva)	1
Cour d'appel de Grenoble (France)	1	Zürich Chamber of Commerce Arbitral Court of the Economic Chamber and the Agrarian Chamber of the Czech Republic	1
Henan Luoyang Jianxi District People's Court (China) *	1	Câmara FGV de Conciliação e Arbitragem (São Paulo, Brazil)	1
Shenzhen Intermediate People's Court & Guangdong High People's Court (China)*	1		
Shaoguan Intermediate People's Court (China)	1		
Supreme Court of the Netherlands **	1		
High Court of Justice (Queen's Bench Division)	1		
			→

* Opinion of one of the judges.

** Reference to the UNIDROIT Principles in the Advocate General's conclusions, confirmed by the Court.

Domestic Courts		Arbitral Tribunals	
Superior Court, Province of Quebec, District of Montreal (Canada)	1		
Supreme Court of Sweden	1		
Bundesgericht (Switzerland)	1		
High Court of Delhi (India)	1		
Supreme Court of New South Wales	1		
Supreme Court of Western Australia, Court of Appeal	1		
Total	25	Total	33

B. DOMESTIC LAWS CONCERNED

Russian law	7	English law	1
Swiss law	5	Greek law	1
Italian law	5	Czech law	1
Lithuanian law	5	Egyptian law	1
Australian common law	4	Portuguese law	1
French law	3	Romanian law	1
Brazilian law	3	English common law (Netherlands Antilles)	1
Chinese law	3	Quebec law	1
Spanish law	2	Lebanese law	1
Polish law	2	Swedish law	1
Austrian law	2	Indian common law	1
Dutch law	1	Unknown law	3
Ivory Coast law	1		
Uruguayan law	1		
		Total	58

C. PROVISIONS OF THE UNIDROIT PRINCIPLES CONCERNED

Chapter 1 (<i>General Provisions</i>)	Arts. 1.1, 1.2, 1.3, 1.7, 1.8, 1.9
Chapter 2, Section 1 (<i>Formation</i>)	Arts. 2.1.1, 2.1.6, 2.1.11, 2.1.12, 2.1.13, 2.1.14, 2.1.15, 2.1.17, 2.1.18, 2.1.19, 2.1.21
Chapter 3, Section 2 (<i>Ground for avoidance</i>)	Arts. 3.2.1, 3.2.2, 3.2.5, 3.2.6
Chapter 4 (<i>Interpretation</i>)	Arts. 4.1, 4.2, 4.3, 4.6, 4.8
Chapter 5, Section 1 (<i>Content</i>)	Arts. 5.1.2, 5.1.3, 5.1.7
Chapter 6, Section 1 (<i>Performance in general</i>)	Arts. 6.1.7, 6.1.13
Chapter 6, Section 2 (<i>Hardship</i>)	Arts. 6.2.1, 6.2.2, 6.2.3
Chapter 7, Section 1 (<i>Non-performance in general</i>)	Art. 7.1.7
Chapter 7, Section 4 (<i>Damages</i>)	Arts. 7.4.1, 7.4.2, 7.4.3, 7.4.5, 7.4.7, 7.4.8, 7.4.9, 7.4.12
Chapter 9, Section 1 (<i>Assignment of rights</i>)	Arts. 9.1.10, 9.1.13
Chapter 9, Section 2 (<i>Transfer of obligations</i>)	Arts. 9.2.1, 9.2.5

III. – UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING DOMESTIC LAW

Total number of decisions: 49 Court decisions; 27 Arbitral Awards

A. ADJUDICATING BODIES

Domestic Courts

Tribunal Supremo (Spain)	6	4 th Arbitrazh Appellate Court (Russia)	1
Supreme Court of New South Wales	4	Tribunale di Roma (Italy)	1
Federal Court of Australia	4	Tribunale di Bergamo (Italy)	1
Supreme Court of Netherlands *	4	Tribunale di Catania (Italy)	1
Court of Appeal (Civil Division) (UK)	3	Cámara Nacional de Apelaciones en lo Comercial (Argentina)	1
Court of Appeal of New Zealand	2	Audiencia Provincial de Lleida (Spain)	1
Audiencia Provincial de Madrid	2	Audiencia Provincial de Tarragona (Spain)	1
Court of Appeal of Buenos Aires	2	Audiencia Provincial de Càdiz (Spain)	1
Beijing Haidian District People's Court (China)**	2	Audiencia Provincial de Valencia (Spain)	1
Cour d'appel de Paris (France)	1	High Court of Australia	1
Rechtbank Zwolle (Netherlands)	1	Supreme Court of Poland	1
Guangzhou Baiyun District People's Court (China) **	1	Bundesgericht (Switzerland)	1
Shenzhen Intermediate People's Court & Guangdong High People's Court **	1	High Court of Dehli (India)	1
High Court of Justice, Queen's Bench Division, Commercial Court (UK)	1	Constitutional Court (Colombia)	1
Highest Arbitrazh Court (Russia)	1	Total	49

* In two decisions reference to the UNIDROIT Principles in the Advocate General's conclusions, confirmed by the Court.

** Opinion of one of the judges.

Arbitral Tribunals

ICC International Court of Arbitration	11	Schiedsgericht Berlin	1
<i>Ad hoc</i> Arbitrations	5	China International Economic and Trade Arbitration Commission	1
International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation	3	Camera arbitrale nazionale ed internazionale di Milano	1
Arbitration Centre of the Costa Rican Chamber of Commerce	2	Arbitration Court of the Hungarian Chamber of Commerce and Industry	1
International Centre for Settlement of Investment Disputes (ICSID)	2		
		Total	27

B. DOMESTIC LAWS CONCERNED

Spanish law	11	Kuwaiti law	1
Australian common law	9	Law of the State of New York	1
Russian law	6	Polish law	1
Chinese law	5	Lithuanian law	1
English common law	5	Hungarian law	1
French law	4	Mexican law	1
Italian law	3	Ecuadorian law	1
Argentinean law	3	Congolese law	1
Swiss law	3	Indian common law	1
New Zealand common law	3	Law of the German Democratic Republic	1
Dutch law	3	Nordic Contract Law	1
Columbian law	2	Law of a State formerly belonging to the Soviet Union	1
German law	2	Unknown law	1
Turkish law	2		
Costa Rican law	2		
		Total	76

C. PROVISIONS OF THE UNIDROIT PRINCIPLES CONCERNED

Preamble	Comment 1
Chapter 1 (<i>General Provisions</i>)	Arts. 1.1, 1.2, 1.3, 1.4, 1.7, 1.8, 1.9
Chapter 2, Section 1 (<i>Formation</i>)	Arts. 2.1.1, 2.1.2, 2.1.14, 2.1.15, 2.1.18, 2.1.20, 2.1.21, 2.1.22
Chapter 3, Section 1 (<i>General Provisions</i>)	Art. 3.1.3
Chapter 3, Section 2 (<i>Grounds for avoidance</i>)	Art. 3.2.8
Chapter 4 (<i>Interpretation</i>)	Arts. 4.1, 4.2, 4.3, 4.4, 4.5, 4.7, 4.8
Chapter 5, Section 1 (<i>Content</i>)	Arts. 5.1.2, 5.1.3, 5.1.4, 5.1.8
Chapter 6, Section 1 (<i>Performance in general</i>)	Arts. 6.1.4, 6.1.9
Chapter 6, Section 2 (<i>Hardship</i>)	Arts. 6.2.1, 6.2.2, 6.2.3
Chapter 7, Section 1 (<i>Non-performance in general</i>)	Arts. 7.1.1, 7.1.2, 7.1.4, 7.1.5, 7.1.6, 7.1.7
Chapter 7, Section 2 (<i>Right to performance</i>)	Art. 7.2.2
Chapter 7, Section 3 (<i>Termination</i>)	Arts. 7.3.1, 7.3.3, 7.3.6 *
Chapter 7, Section 4 (<i>Damages</i>)	Arts. 7.4.3, 7.4.4, 7.4.7, 7.4.8, 7.4.9, 7.4.13

* In the decision of the Tribunale of Bergamo of 19 April 2006, the Court referred to Art. 7.3.6(2) [Art. 7.3.7(1) of the UNIDROIT Principles 2010] dealing with restitution in case of termination of the contract, whereas the dispute at hand concerned a case of an illegal contract [matter now covered by Arts. 3.3.1-3.3.2 of the UNIDROIT Principles 2010].

IV. – UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING INTERNATIONAL UNIFORM LAW INSTRUMENTS

Total number of decisions: 11 Court decisions; 24 Arbitral awards

A. ADJUDICATING BODIES

Domestic Courts		Arbitral Tribunals	
Supreme Economic Court of the Republic of Belarus	2	ICC International Court of Arbitration	9
Court of Justice of the European Communities *	1	International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation	8
Court of Cassation of Belgium	1	Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien	2
Corte di Cassazione (Italy)	1	International Court of Arbitration of the Chamber of Commerce and Industry of the Republic of Belarus	2
Supreme Court of Venezuela	1	China International Economic and Trade Arbitration Commission	1
Cour d'appel de Grenoble (France)	1	Netherlands Arbitration Institute	1
Tribunale di Padova (Sez. Este) (Italy)	1	Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce	1
Economic Court of the Commonwealth of Independent States (CIS)	1		
Hof 's-Hertogenbosch (Netherlands)	1		
Commercial Court of Brest Region	1		
Total	11	Total	24

* Reference to the UNIDROIT Principles in the Advocate General's conclusions, confirmed by the Court.

B. INTERNATIONAL INSTRUMENTS CONCERNED

United Nations Convention on Contracts for the International Sale of Goods (CISG)	30
Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters / EC Reg. 44/2001	2
Uniform Laws on the International Sale of Goods (ULIS) and on the Formation of Contracts for the International Sale of Goods (ULFC)	1
Inter-American Convention on Commercial Arbitration	1
Economic Agreement between Member States of the Commonwealth of Independent States (CIS)	1
Total	35

C. PROVISIONS OF THE UNIDROIT PRINCIPLES CONCERNED

Preamble	Comment 1
Chapter 1 (<i>General Provisions</i>)	Art. 1.3
Chapter 2, Section 1 (<i>Formation</i>)	Arts. 2.1.15, 2.1.17, 2.1.18, 2.1.19, 2.1.20
Chapter 4 (<i>Interpretation</i>)	Arts. 4.3, 4.5
Chapter 6, Section 1 (<i>Performance in general</i>)	Arts. 6.1.6, 6.1.9
Chapter 7, Section 1 (<i>Non-performance in general</i>)	Art. 7.1.3
Chapter 7, Section 2 (<i>Right to performance</i>)	Art. 7.2.1, 7.2.2
Chapter 7, Section 4 (<i>Damages</i>)	Arts. 7.4.1, 7.4.2, 7.4.4, 7.4.6, 7.4.7, 7.4.9, 7.4.13

