Reference to the UNIDROIT Principles in International Commercial Arbitration Practice in the Russian Federation

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The UNIDROIT Principles of International Commercial Contracts (hereinafter: the UNIDROIT Principles) have become quite familiar to the Russian legal and business communities since the full text of both the 1994 and 2004 editions, with comments and illustrations, was translated into Russian shortly after its publication in the official languages. Over the years, the UNIDROIT Principles have frequently been used by Russian business people in negotiating international commercial contracts and they have also often been used as an authoritative source of information about the rules of modern commercial practice in the legal orders of countries with a developed market economy.

Also, the UNIDROIT Principles have repeatedly been used as a source of reference in legislative work aimed at the further development of the Russian law on contracts, primarily the rules contained in the Russian Civil Code. This is because in recent years, a great many publications have appeared in the Russian legal literature dealing with the UNIDROIT Principles as the subject-matter of scientific research. The academic analysis has tended to concentrate both on the significance of the UNIDROIT Principles as a source of rules of law reflecting the modern lex mercatoria and on the substantive contents of the rules themselves in the context of comparative law studies.

This broad use of the UNIDROIT Principles in Russian commercial practice where it relates to foreign trade transactions could also explain why the application of the UNIDROIT Principles has become quite evident lately in settling international commercial disputes through arbitration in Russia. References to the application of the UNIDROIT Principles are not infrequently found in the awards rendered by the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry.

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The significance of arbitration practice referred to above follows from the fact that ICAC is today the major international commercial arbitration institution in the territory of the former Soviet Union. It deals with the overwhelming majority of international commercial disputes in this area owing to its excellent international standing as an arbitration institution.

This development has been substantially supported by objective factors relating to the existing legal regulation with regard to international arbitration proceedings in the Russian Federation. The Russian Law on International Commercial Arbitration, adopted in 1993, was not only based on the UNICITRAL Model Law on International Commercial Arbitration of 1985 (hereinafter: the Model Law), but indeed was drafted very close to the model.

Article 28(1) of the Model Law provides that “[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute”. This provision was literally reproduced in Article 28(1) of the Russian Law on International Commercial Arbitration. The idea behind this Model Law rule is that the formulation employed must be understood as authorising the arbitral tribunal to give effect to the agreement of the parties relating to the applicable rules of law, not only when these rules represent a national legal system but also in cases where the parties have referred to legal texts of international origin such as international conventions that have not yet come into force, or informal international codifications.

It should also be noted that the ICAC Rules reflect the same approach. The parties to international commercial contracts that have opted to settle their disputes by ICAC arbitration can opt for a flexible solution with regard to the applicable law, e.g., choosing the UNIDROIT Principles as the applicable rules of law, in order to avoid the difficulties inherent in agreeing on a given national law as the applicable law. If the parties provide in the contract that the tribunal should apply particular rules of law of international origin chosen by the parties as lex contractus, a more balanced and transparent situation as to the contractual parties’ material rights and duties would arise than, e.g., if the applicable material law were left to be determined by choice-of-law rules which the arbitral tribunal would consider applicable.

The author is aware that there have been many international commercial contracts made by Russian businesses with their foreign partners that include references to the UNIDROIT Principles as the applicable rules of law. Indeed,
this practice continues to develop and will undoubtedly continue to do so in the future. The fact that there have not so far been any arbitration cases in ICAC practice in which the UNIDROIT Principles were to be applied on the basis of the agreement of the parties fixed in their contract may be explained by the fact that any differences that might have arisen between those parties in their actual commercial relations were successfully settled because they relied on the UNIDROIT Principles in the first place rather than on a given national law.

As indicated in the Preamble, the UNIDROIT Principles may be used in different ways. The most frequent situation in which ICAC arbitral tribunals referred to the UNIDROIT Principles were those cases where it was found to be appropriate to take advantage of the UNIDROIT Principles to interpret and supplement either international uniform law instruments or national law, in particular Russian civil legislation. As regards the application of international uniform law instruments, such cases concerned mainly disputes involving the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG).

As to arbitral tribunals operating under ICAC Rules taking advantage of the relevant provisions in the UNIDROIT Principles to supplement Russian national civil law or interpret relevant provisions of the Russian Civil Code, there are special reasons for this practice, owing to the following circumstances.

The Russian Civil Code adopted in the mid-1990s introduced a private law approach into the national legal system in respect of contractual relations. In the Soviet past, Russian civil law took no account of the market economy in dealing with obligations arising from the contract. Moreover, the new Civil Code introduced quite general rules representing the basics of private law on contracts, including regulations relating to commercial transactions. On top of that, the Russian business and legal communities were as yet inexperienced in the art of operating in a private law environment that was needed for the development of market relations. There were no trade usages or established commercial practices geared to market conditions. Nowadays, the Russian business and legal communities are quite well-versed in the substance of the rules relating to contractual relations contained in the Civil Code as the rules of dispositive character and the specificity of their application in regulating commercial contracts in modern international practice.
1. Application of the UNIDROIT Principles in ICAC arbitration

The actual practice of applying the UNIDROIT Principles in arbitration under ICAC arbitration rules may be illustrated by some concrete examples. It should be stressed from the outset, however, that ICAC arbitral tribunals have quite often used the UNIDROIT Principles as the authoritative source of fundamental principles of modern commercial relations and in particular, of the principle of good faith and fair dealing. The value of this practice in the Russian legal system stems from the fact that Russian civil law still does not formally recognise the general character of this principle, although Russian courts now increasingly refer to it in their judgments. It would not be an overstatement to say that the change of attitude in the business and legal communities as to the vital significance of this principle as part of the legal order has been prompted also by the application of the UNIDROIT Principles in international arbitration.

- In one case, an arbitral tribunal included in its award the statement that it was persuaded that the principle of good faith and fair dealing, interpreted in international economic relations as a fundamental principle of a mandatory nature (items 1-3 of the Comments to Article 1.7 of the UNIDROIT Principles) should be extended to cover the parties’ conduct throughout their contractual relationship, starting from negotiations to conclude the contract and ending with steps regarding the settlement of disagreements arising in the fulfilment of the contract, i.e., at the pre-arbitral stage.1

- In another case, the tribunal decided to apply the UNIDROIT Principles on the ground that this document, adopted by an authoritative intergovernmental Organisation, reflected the most common approaches of the majority of national legal systems to the regulation of particular problems arising in international commercial transactions. The tribunal also stated that the UNIDROIT Principles were broadly applied in international commercial practice and widely used by the international business community as a background for settling their disputes. Article 1.7 of the UNIDROIT Principles, which provides that each party must act in accordance with good faith and fair dealing in international trade, was appraised by the tribunal as an imperative and fundamental rule of the UNIDROIT Principles.2

- Accepting the UNIDROIT Principles as the source of rules for the settlement of international commercial disputes in another case relating to the performance of the contract, the tribunal characterised the UNIDROIT

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1 Case No. 18/2007 (Award of 8 February 2008).
2 Case No. 100/2008 (Award of 30 October 2009).
Principles as the recommended legal regulator containing the general rules on the performance of contractual obligations of an international character. The UNIDROIT Principles were recognised by the tribunal in one case as *lex mercatoria* in order to justify their subsidiary application to Russian civil law.


One example of the application of the UNIDROIT Principles to supplement the CISG is given in the following extract from an ICAC award in a dispute between a Russian and a Canadian contract party.

- In this case, the tribunal stated that the claims for recovery of the penalty for partial delivery and for payment of interest for delay in the repayment of money had resulted from two different breaches on the part of the Respondent. The contract provided for the right to demand payment of the appropriate sum with regard to each of these breaches. In order to be released from payment of the penalty for the partial delivery of the goods, the Respondent had to prove the circumstances exempting it from liability (in accordance with the contract and Article 79 CISG); the interest for delay in the repayment of money had to be paid irrespectively of whether a party was exempt from liability for the non-payment. The tribunal pointed out that such was the generally accepted understanding in international commercial practice as reflected in both the 1994 and 2004 editions of the UNIDROIT Principles (Article 7.4.9 – “Interest for failure to pay money”). The tribunal stated that the UNIDROIT Principles, together with the Official Comments to them, had been elaborated by the International Institute for the Unification of Private Law (UNIDROIT) and that both Russian and Canadian specialists had taken part in that work. The Comment on Article 7.4.9 expressly stated that even if the delay in payment was the consequence of force majeure, interest would still be due.

- In another case, an Estonian buyer claimed compensation from a Kazakh seller for damage resulting from partial performance of the contract for the sale of goods, *i.e.*, the delivery of a smaller amount of goods than provided for in the contract. Since the buyer had paid the full price of the goods in advance, it claimed back the sum corresponding to the amount of

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3 Case No. 64/2008 (Award of 9 April 2009).
4 Case No. 148/2008 (Award of 2 June 2009).
non-delivered goods from the seller. The tribunal, stating that both parties had their place of business in a State Party to the CISG, applied the CISG rules to the case. Finally deciding in favour of the claimant, the tribunal referred to Article 81 CISG, stating that this provision expressed the universally accepted approach to deal with situations such as that which had arisen between the parties in the dispute. In addition, the tribunal indicated in its award that this approach was also confirmed by Articles 7.2.1, 7.2.2 and 1.3 of the UNIDROIT Principles.6

- In an award relating to a dispute between a German and a Russian contract party, the arbitral tribunal gave detailed explanations in support of its application of the UNIDROIT Principles. In this case, a German buyer made a contract with a Russian factory for the delivery of a certain amount of metal products. Delivery of the goods was to take place by end-2002. The buyer had sent the seller several orders for the delivery of the goods in accordance with the contract. The seller performed only a small part of the orders. In December 2005, the buyer initiated arbitration proceedings against the seller, claiming specific performance of the contract in relation to the goods that had been ordered by the buyer in 2002 and had never been delivered by the seller.

Since the Federal Republic of Germany and the Russian Federation were both States Party to the CISG, the tribunal applied the CISG to the dispute. In assessing the legal grounds for the buyer’s claim for specific performance of the contract, the tribunal concluded that the CISG did not include provisions stipulating conditions for the application of the buyer’s remedy for specific performance. The tribunal came to the same conclusion with regard to the subsidiarily applicable Russian law. Under these circumstances, the tribunal found that application of the UNIDROIT Principles would be justified. The tribunal stated that the UNIDROIT Principles had been treated both in international commercial practice and in ICAC arbitration practice as a supplementary source of rules of law reflecting contemporary international experience and creating the possibility to achieve well-grounded and justifiable settlement of disputes. In refusing the buyer’s claim for specific performance, the tribunal referred to Article 7.2.2 of the UNIDROIT Principles, in particular to the rule that such a claim should be brought by the party within a reasonable time after it had, or ought to have become aware of the non-performance.7

6 Case No. 23/2006 (Award of 1 February 2007).
7 Case No. 147/2005 (Award of 30 January 2007).
• In yet a further case, a Russian buyer (Claimant) claimed from an Indian seller (Respondent) payment of damages for non-delivery of the goods. As one of the items of such damages the Claimant indicated the interest relating to the price of the goods paid in advance in Indian currency. The law applicable to the contract was the CISG. The dispute between the parties turned on the rate of interest payable, a circumstance not addressed by the CISG. The arbitration court found that the law applicable for that purpose was Russian law, namely, Article 395 of the Civil Code which provided that the rate of interest should be determined on the basis of the accounting rate of the bank interest in force on the day of performance of the monetary obligation at the place where the creditor was located – in the case at hand, this was the Russian Federation. The arbitral tribunal decided to apply the practice adopted for such cases in international trade which was reflected in the UNIDROIT Principles. Article 7.4.9(2) of the UNIDROIT Principles stipulates that the rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. The arbitration court duly applied the corresponding rate of interest used by the Reserve Bank of India.8

• A Claimant from the Russian Federation asked the arbitration court to order a German Respondent to pay a sum of money as a penalty for delay in payment of a consignment of goods, calculating this sum on the basis of the price of the goods. In relation to this breach of an international sales contract, the Respondent had earlier been ordered by an arbitral award to pay the Claimant a penalty. Following this first arbitral award, the Respondent had paid a penalty of only 42% of the price of the goods. Since the Respondent had failed to pay the full penalty in a timely manner, the Claimant asked the arbitration court to order the Respondent to pay the full penalty. However, the delay in payment having been much longer than the period of time taken into account when the penalty had been calculated in the first award, the Claimant calculated that at the time when the second claim was brought, the penalty should amount to as much as 487% of the price of the goods.

The Respondent, among other arguments for non-payment of the penalty indicated in the earlier arbitral award, argued that the penalty in the sum asked by the Claimant in the present arbitration proceedings was manifestly excessive in relation to the actual consequences of the breach of the contract and asked the arbitration court to reduce it correspondingly.

8 Arbitral Award of 19 May 2004 in Case No. 100/2002.
Deciding this question in favour of the Respondent on the basis of subsidiarily applicable Russian law (Article 333 of the Civil Code), which gave the court authority to reduce a contractually agreed sum of money to be paid in case of breach of a contractual obligation, the arbitral tribunal also referred to Article 7.4.13 of the UNIDROIT Principles, stating that the UNIDROIT Principles represented a restatement of rules universally accepted in international trade as reflecting the approaches of the main legal systems to the legal regulation of such contracts, and provided for the same solution of this problem. Thus, the decision to reduce the penalty in this case would be just and well-grounded.9

3. Application of the UNIDROIT Principles in supplementing national law

The following examples highlight the application of the UNIDROIT Principles to supplement Russian civil law with regard to contract interpretation, a legal point that has been playing an important role in Russian court practice since the recent inclusion of the relevant rules in the Russian Civil Code.

• A German buyer claimed from a Russian seller the recovery of the principal debt for undelivered goods, interest for delay in the repayment of the principal debt and lost profits. The dispute arose in connection with the seller’s breach of its obligations under a sales contract between the parties. The Claimant argued that the contract had been amended by agreement of the parties, whereas the Respondent insisted that there had been no such alteration of the contract. To resolve the dispute, the arbitral tribunal was asked to decide whether the contract had or had not been altered.

According to the applicable Russian law, a written contract can only be altered in writing. The Respondent invoked the absence of a written agreement between the parties to alter the contract. The contract itself provided that any appendices, addenda and alterations to it were valid and constituted an integral part of the contract only if made in writing and executed by both parties and if said appendices, addenda and alterations, communicated by means of electronic interchange, including facsimile messages, were considered as originals. It followed from those contract provisions that alterations to the contract need not be made in one single document but could be made by means of an exchange of documents, including electronic ones.

In accordance with the applicable rules of the Russian Civil Code, the arbitral tribunal, in interpreting the contract, had to consider the literal meaning of the contract provisions; if that interpretation did not allow the content of the contract to be ascertained, the arbitral tribunal was required to identify the true common intention of the parties, taking into account negotiations and correspondence prior to the contract, the practice established in the parties’ mutual relations, commercial customs, and the subsequent conduct of the parties. In addition, the arbitral tribunal took into account international trade usages as provided in Articles 2.1.1, 4.1, 4.2, 4.3 of the UNIDROIT Principles (2004 edition). Pursuant to these provisions, a contract may be concluded by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement; the agreement is to be interpreted according to the common intention of the parties.

Relying on these provisions, the arbitral tribunal concluded that the parties, after making the contract, had altered its terms relating to the quantity of goods and the terms of payment and established in their mutual relations the practice according to which the goods were to be delivered not at one time for the total quantity contracted for, but in several consignments pursuant to the Claimant’s orders, whereas the terms of payment were to be determined by the parties separately in respect of each consignment. The relevant agreements of the parties on the alterations to the contract were reached by exchange of documents which, in accordance with the aforementioned provisions of the Russian legislation, is considered as the offer of one party and its acceptance by the other party.\(^\text{10}\)

- Another case concerned the claim brought by a company situated in the British Virgin Islands, which concluded a contract with a Russian company for the delivery of oil products within a certain period of time. Russian law was agreed as the applicable material law. The dispute related to the difference in the price of the goods delivered under the contract, resulting from different estimations made by each party with regard to particular delivery lots. The parties disagreed as to the imputation of performance of the contract in relation to the goods delivered under separate orders at different prices. The tribunal referred to the Comments to Article 6.1.13 of the UNIDROIT Principles in support of its interpretation of Article 522 of the Russian Civil Code providing for the rules applicable in case of imputation of performance of similar obligations. In particular, the tribunal referred to the

\(^{10}\) Case No. 83/2008 (Award of 22 December 2008).
conditions which must be complied with when rules of imputation of performance of non-monetary obligations had to apply.11

In dealing with the claim for specific performance of the contractor’s obligation to deliver the full set of technical documentation the tribunal, having found no specific regulation in the applicable Russian civil law addressing the situation, decided to apply Article 7.2.2 of the UNIDROIT Principles (“Performance of a non-monetary obligation”) to confirm the Claimant’s right and ordered the Respondent to hand over the necessary documentation to the Claimant.12

4. Application of the UNIDROIT Principles at the tribunal’s initiative

A recent case in ICAC practice involved the arbitral tribunal applying, at its own initiative, the UNIDROIT Principles in the absence of any clause relating to the choice of applicable material law, and rendering an award with reference to a particular rule of the UNIDROIT Principles. In this case the Claimant, a Russian seller, and an Italian buyer entered into a sales contract. However, the payments to the seller were made by the Respondent, a Swiss company bearing the same corporate name as the buyer. Correspondence relating to fulfilment of the contract on behalf of the buyer was carried on by its CEO, who sent facsimile messages from the buyer’s and the Respondent’s offices. The Respondent’s messages evidenced that although this company did not consider the claim against it to be justified, it acknowledged that it was indebted to the Claimant for the delivered goods.

The tribunal, after having due regard to relations between the parties, concluded that in this case, there had been a transfer of the obligation to pay under the contract for the goods from the buyer to the Respondent and the seller had given its consent to the transfer of the debt. In particular, it was confirmed by the Respondent’s payments for the goods, which were accepted by the Claimant by way of correspondence between the parties, by the Claimant’s pre-arbitration demands to the Respondent and by the claim for recovery of the debt.

The tribunal determined that the relationship between the parties was subject to the CISG in that they had initially concluded the contract for the sale of goods and had their places of business in States Party to the CISG. The tribunal stated that it could not identify any rules or general principles in the

11 Case No. 91/2006 (Award of 27 March 2007).
12 Case No. 64/2009 (Award of 9 April 2009).
CISG that addressed the problem that had arisen between the parties. Under those circumstances, the tribunal stated that the method of transfer of obligations used by the parties in dispute was widely used in international commercial practice and was reflected in the UNIDROIT Principles, a document of private law unification which offered a set of generally accepted rules in international trade. Thus, under Article 9.2.1 of the UNIDROIT Principles (“Modes of transfer”), an obligation to pay money or render other performance may be transferred from one person (the original obligor) to another person (the new obligor): (a) by an agreement between the original obligor and the new obligor with due regard to Article 9.2.3 (subject to the obligee’s consent); or (b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.13

Obviously, this overview of ICAC practice relating to the application of the UNIDROIT Principles would not be complete without mentioning that there have also been cases where the tribunal has refused to apply the UNIDROIT Principles. Usually, the main reason not to apply the UNIDROIT Principles as applicable rules of law has been the objection to such application by one of the parties, while the other party insisted on their application. One such cases involved a Russian seller’s claim for lost profit in connection with a breach of contract for the sale of goods by a Hungarian buyer. Russian law was agreed as the governing law of the contract.

In its arguments, the Respondent made reference to the application by the arbitration court of the UNIDROIT Principles in resolving this dispute, relying on the fact that they were to be applied as a recognised international standard and were gaining further importance as an international trade usage. The Claimant objected to such application. The arbitration court concluded that the UNIDROIT Principles were not applicable in this case since the contract did not provide for their application to the contractual rights and duties and the Claimant expressly disagreed to their application in its written submission in the dispute at hand.14

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13 Case No. 14/2008 (Award of 19 December 2008).
14 Case No. 174/2003 (Arbitral Award of 12 November 2004).