International commercial contracts: a case study

In re Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative (ICC Award No. 9797/CK/AER/ACS of 28 July 2000)

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Fact pattern

- A truly global dispute: 44 claimants operating in 37 countries and 93 respondents operating in 57 countries
- In 1989 the member firms of Andersen Worldwide Organization ('AWO') were divided in two separate Business Units:
  1) Arthur Andersen Business Unit ('AABU') for audit/attest, tax and other financial services
  2) Andersen Consulting Business Unit ('ACBU') for strategic and other consulting services
- Each individual member firm entered into an agreement with Andersen Worldwide Société Coopérative ('AWSC'), the administrative organ of AWO
- AWSC was in charge of coordinating the individual member firms' activities

Fact pattern

- Soon after this restructuring, the relationship between the two Business Units began to deteriorate
- The AABU member firms developed their own consulting practices
- The ACBU member firms complained that such behavior constituted undue interference with their own professional practices
- After many attempts to better define the respective business activities so to avoid overlapping practices,
  - the ACBU member firms filed in 1997 a request for arbitration before the ICC International Court of Arbitration
  - Against both the AABU member firms and AWSC

Fact pattern

- The claimants argued that the respondents had breached their obligations under the agreements with AWSC. In particular:

1) The AABU member firms for having developed their consulting practices
2) AWSC for having failed to coordinate adequately the activities of the member firms of the two Business Units

- The relief sought by the claimants:

1) Termination of the agreements with AWSC
2) Payment of damages by the respondents

The choice of the UNIDROIT Principles

- The relevant arbitration clause in the agreements stated that:

«[t]he arbitrator shall decide in accordance with the terms of this Agreement and of the Articles and Bylaws of [AWSC]. In interpreting the provisions of this Agreement, *the arbitrator shall not be bound to apply the substantive law of any jurisdiction* but shall be guided by the policies and considerations set forth in the Preamble of this Agreement and the Articles and Bylaws of [AWSC], *taking into account general principles of equity*»

- Article 17(1) (current Article 21(1)) of the ICC Rules:

«1) The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. *In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate*»

The choice of the UNIDROIT Principles

- According to the arbitrator:

1) The appropriate “rules of law” are “the general principles of law and the general principles of equity commonly accepted by the legal systems of most countries”

2) The UNIDROIT Principles are a reliable source of international commercial law for they contain, in essence, a restatement of those principles that have enjoyed universal acceptance

- Questions:
  - 1) Do you agree with the arbitrator’s analysis?
  - 2) Could have the parties expressly chosen the UNIDROIT Principles as the rules of law governing the agreements?

The choice of the UNIDROIT Principles

- Parties wishing to choose the UNIDROIT Principles as the rules of law governing their contract or as the rules of law applicable to the substance of the dispute, may:

1) Choose the UNIDROIT Principles without any reference to other legal sources [see Model Clauses No. 1.1 (a) and (b)] or

2) Choose the UNIDROIT Principles supplemented by a particular domestic law [see Model Clauses No. 1.2 (a) and (b)] or

3) Choose the UNIDROIT Principles supplemented by "generally accepted principles of international commercial law" [see Model Clauses No. 1.3 (a) and (b)]

The UNIDROIT Principles applied (A)

- *Article 1.7 (Good Faith and Fair Dealing)*

1) *Each party must act in accordance with good faith and fair dealing in international trade.*
2) *The parties may not exclude or limit this duty.*

- The arbitrator found that, notwithstanding the agreements were silent on these points, AABU member firms committed acts:

"contrary to the member firms' *implicit obligation* … to pursue their professional practice in accordance with the *principle of good faith and fair dealing* inherent to international contracts"

- Questions:
    1) Do you agree with the arbitrator's analysis?
    2) Could have the arbitrator applied a different UNIDROIT Principle?

The UNIDROIT Principles applied (A)

- *Article 4.8 (Supplying an omitted term)*

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what is an appropriate term regard shall be had, among other factors, to

(a) the intention of the parties;

(b) the nature and purpose of the contract;

(c) good faith and fair dealing;

(d) reasonableness.

The UNIDROIT Principles applied (A)

- *Article 5.1.2 (Implied obligations)*

Implied obligations stem from

(a) the nature and purpose of the contract;

(b) practices established between the parties and usages;

(c) good faith and fair dealing;

(d) reasonableness.

The UNIDROIT Principles applied (A)

- *Article 5.1.3 (Co-operation between the parties)*

Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

The UNIDROIT Principles applied (B)

- *Article 5.1.4 (Duty to achieve a specific result. Duty of best efforts)*

1) *To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.*

2) *To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.*

- The arbitrator found that a careful reading of both the agreements and the bylaws of AWSC clearly showed that AWSC was under an obligation to coordinate the business activities of the two Business Units (by defining their scope and practices)
- According to the arbitrator, AWSC's obligations involved a duty of best efforts and AWSC breached this duty by failing to take any action when the relationships between the two Business Units deteriorated
- Questions:

1) Do you agree with the arbitrator's analysis?

The UNIDROIT Principles applied (C)

- *Article 7.3.1 (Right to terminate the contract)*

1) *A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.*

2) *In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether*

(a) *the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;*

(b) *strict compliance with the obligation which has not been performed is of essence under the contract;*

(c) *the non-performance is intentional or reckless;*

The UNIDROIT Principles applied (C)

- *Article 7.3.1 (Right to terminate the contract)*

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;

(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

(3) […].

The UNIDROIT Principles applied (C)

- The arbitrator found that AWSC's breach was *fundamental* given that:

(a) The failure to coordinate deprived the claimants of the cooperation they were entitled to expect under the agreements;

(b) Its obligation to coordinate was of the essence;

(c) …

(d) Claimants had reasons to believe that they could not rely on AWSC's future performance

(e) Being AWSC a mere instrumentality for the purpose of coordinating, it could not possibly suffer any harm from the termination

- The arbitrator did not address letter (c) of Article 7.3.2
- Questions:

1) Do you agree with the arbitrator's analysis?

The UNIDROIT Principles applied (D)

- *Article 6.2.3 (Effects of Hardship)*

1) *In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.*
2) *The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.*
3) *Upon failure to reach agreement within a reasonable time either party may resort to the court.*
4) *If the court finds hardship it may, if reasonable,*

(a) *terminate the contract at a date and on terms to be fixed, or*

(b) *adapt the contract with a view to restoring its equilibrium.*

The UNIDROIT Principles applied (D)

- The respondents requested that the claimants be prohibited from using the “Andersen” name
- The arbitrator found that Arthur Andersen & Co., founder of AWO, had a legal title to the “Andersen” name and that it would be unfair to allow the claimants to keep the name built by individual that preceded the current AWSC’s partners
- However, the arbitrator decided that the claimants would be enjoined from using the name not as of the date of the award but at a later date (six months later)
- Notwithstanding the agreements provided that upon termination a member firm was no longer entitled to use the “Andersen” name, the arbitrator, invoking Article 6.2.3(4) of the UNIDROIT Principles, decided to adapt the terms of the agreements
- Questions:

    1) Do you agree with the arbitrator’s analysis?