The UNIDROIT Principles of International Commercial Contracts: Potential for greater impact in the MENA region

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Today’s Discussion

• Review the **applications** of the UNIDROIT Principles of International Commercial Contracts – the UPICC

• Examine **data on the use** of the UPICC in MENA

• Discuss possible **reasons** for lower use of the UPICC across MENA

• Analyze the **permissibility** of applying the UPICC in MENA

• Consider the **potential** for increasing use of the UPICC in MENA
PREAMBLE
(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.
They shall be applied when the parties have agreed that their contract be governed by them. (*)
They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like.
They may be applied when the parties have not chosen any law to govern their contract.
They may be used to interpret or supplement international uniform law instruments.
They may be used to interpret or supplement domestic law.
They may serve as a model for national and international legislators.

(الغرض من هذه المبادئ)

تضمن المبادئ التالية قواعد عامة خاصة بالعقود التجارية الدولية، تطبق عندما يتفق الأطراف على إخضاع عقدهم لها.
ويمكن تطبيقها عندما لا يتفق الأطراف على إخضاع عقدهم للمبادئ العامة للقانون أو قانون التجارة أو ما شابه ذلك.
ويمكن استخدامها في تفسير أو تكملة وثائق أخرى للقانون الدولي الموحد.
ويمكن استخدامها في تفسير أو تكملة القانون الوطني.
ويمكن أن تكون باعتبارها قانوناً نموذجياً للمشرين الوطنيين والدوليين.
The UPICC can support a range of applications

1. Choice of Law
   - As directly indicated by the parties...
     E.g. 16 cases in national courts that used UPICC for choice of law*
   - ... and/or later selected by courts or arbitral tribunals
     E.g. 96 cases in arbitral courts that used UPICC for choice of law*

2. Interpretation and understanding of Governing Law
   - Interpret international uniform law, domestic law
     E.g. 322 cases used the UPICC to interpret other laws*
   - Inform legal education via moot courts, curricula
     E.g. more than 50 university syllabi; INS and VIS moot courts

3. Drafting Guide
   - Support international and national legislators
     E.g. OHADA; national laws in China, Estonia, the Netherlands, Spain, Paraguay
   - Draft commercial contracts between private parties
     E.g. Adoption of Model Clauses

*Data from UNILEX as of December 2017.
The UPICC can serve as governing law to a contract...

- Parties may wish to choose the UPICC as the law governing their contract because they:
  - Provide a **comprehensive set** of rules that govern the most important areas of contract law
  - Offer a **clear and non-technical** terminology, which may be more accessible than foreign law
  - Supply a **neutral instrument** where the parties cannot agree to, or do not wish to use, the domestic law of a third country

Article 3
Rules of law

The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

3.6 Another source of “rules of law” that would satisfy this first criterion may come from non-binding instruments formulated by established international bodies. One example is UNIDROIT, an inter-governmental organisation responsible solely to its Member States, which operates on the basis of consensus. The UNIDROIT Principles are an example of “rules of law” that are “generally accepted on an international level”. Moreover, the UNIDROIT Principles expressly provide that parties may designate them to govern their contract and suggest choice of law clauses to that end (see the footnote to the UNIDROIT Principles’ Preamble and the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts).
...or applied in the absence of an express choice

National courts and arbitral tribunals have applied the UNIDROIT Principles as the law governing the contract because:

– The court or tribunal considered the UNIDROIT Principles as an expression of “general principles of law” or “lex mercatoria”

– The court or tribunal considered the UNIDROIT Principles to be more appropriate than any domestic law
International Centre for the Settlement of Disputes (ICSID) Award of 23 July 2008:

A U.S. company and Congolese companies submitted a request for arbitration to the ICSID, invoking the violation by the Government of the DR Congo of the 1984 Treaty between the U.S. and the DR Congo on the mutual promotion and protection of investments.

In deciding the merits of the case, the Arbitral Tribunal referred on a number of occasions to individual provisions of the UNIDROIT Principles to corroborate solutions found under Congolese law.

(see abstract of ICSID Award of 23 July 2008 in UNILEX at http://www.unilex.info/case.cfm?id=1349)
As a model used by legislators...

• China
• Denmark
• Estonia
• Lithuania
• Netherlands
• Russia
• Spain
• OHADA
ARTICLE 1.5
(Exclusion or modification by the parties)

The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.
The UPICCC Model Clauses

• Approved in 2013
• Contain a set of Model Clauses together with Commentary
• Can be used for both contract drafting and dispute resolution
• Based on the use of the UPICCC in transnational contract and dispute resolution practice: they illustrate various ways to use the UPICCC and/or to combine them with domestic law
• Available in English, French and Spanish
Case law: UNILEX data through January 2023

<table>
<thead>
<tr>
<th>Region</th>
<th>UPICC Cases Before National Courts and Arbitral Tribunals</th>
<th>UPICC Cases by Applicable Law</th>
<th>UPICC Cases by Party to Suit</th>
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<tr>
<td>Sub-Saharan Africa</td>
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<td>South Asia</td>
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<td>Middle East &amp; North Africa</td>
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<tr>
<td>Europe &amp; Central Asia</td>
<td>403</td>
<td>282</td>
<td>589</td>
</tr>
</tbody>
</table>

Data on UNILEX cases from 1994 to November 2022, as of March 2023.
Regions as designated by the World Bank.
European countries apply the UPICC regularly

**UPICC Cases Before National Courts and Arbitral Tribunals**

Of 526 cases in national courts and arbitral tribunals citing the UPICC:

- 403 cases were in national courts in Europe & Central Asia

**UPICC Cases by Applicable Law**

Of 392 countries whose laws were invoked in decisions citing the UPICC:

- 282 countries used the UPICC to interpret the laws of Europe & Central Asian countries

**UPICC Cases by Party to Suit**

Of 871 total parties to decisions citing the UPICC:

- 589 parties were citizens of Europe & Central Asia countries

Data on cases from 1994 to November 2022, as of March 2023. These countries include all designated by the World Bank in Europe & Central Asia.
MENA countries use the UPICC very infrequently

UPICC Cases Before National Courts and Arbitral Tribunals

Of 526 cases in national courts and arbitral tribunals citing the UPICC:
- 3 cases were in national courts in MENA

UPICC Cases by Applicable Law

Of 392 countries whose laws were invoked in decisions citing the UPICC:
- 8 countries used the UPICC to interpret laws of MENA countries

UPICC Cases by Party to Suit

Of 871 total parties to decisions citing the UPICC:
- 36 parties were citizens of MENA countries

Data on cases from 1994 to November 2022, as of March 2023.
"MENA” countries include all designated by the World Bank in the Middle East & North Africa.
The UPICC have been used as a model by regulators

Qatar Financial Centre (QFC) Contract Regulation, 2005

- Established in 2005 within a Special Economic Zone
- Based **QFC Contract Regulation** on the UPICC, subject to interpretation via common law judgements and English statutes

**QFC Article 11 - Usage and practices**

“(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage is excluded by the contract or would be unreasonable.”

**UPICC Article 1.9 - Usages and practices**

“(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.”
Why is the UPICC used less across the MENA?

Involvement of MENA practitioners and representatives

- Less MENA representation across UNIDROIT initiatives

MENA countries comprise 11% of UNIDROIT membership, against 12% of the world’s nations (European UNIDROIT membership comprises 52%, against 34%) ➤ UNIDROIT MS accounted for 240 (81%) of the 322 cases brought before domestic courts that cited the UPICC

- Less involvement in the design and implementation of the UPICC when compared to most other regions

- Less presence of UPICC in academic settings across MENA

Of 50 universities covering the UPICC soon after publication, only 1 MENA
Why is the UPICC used less across the MENA? (cont’d)

Involvement of MENA practitioners and scholars

Linguistic availability; less support for translations by MENA stakeholders

2016 edition of UPICC + 2013 Model Clauses not available in the Arabic language (2004 + 2010 editions available in Arabic)

Lack of case law and scholarship in Arabic language
Why is the UPICC used less across MENA? (cont’d)

Possible other causes, for further research

- Less use of arbitration (the most common UPICC application) in MENA
  - Arbitrators preferred MENA tribunals only 6.3% of the time, per ICC data (2021)

- Potential preference for national law in resource extraction contracts given impact on national GDP
  - UPICC cases in “extractive” industries were 1/2 as common as those in “services”, 1/3 as “manufacturing”
Why is the UPICC used less across MENA? (cont’d)

Possible other causes, for further research

- Questions around whether the UPICC aligns with Sharia law principles and MENA civil and commercial codes
- Commonly discussed issues: remedies (including interest) and choice of law
- Higher ranking of Islamic Sharia than UPICC (as a reflection of global ‘custom’ or ‘customary practice’) in the hierarchy of sources of law to supplement gaps in MENA legislation
- Potentially less opportunities for UPICC application to supplement domestic law
**Permissibility of applying the UPICC in MENA courts**

- By national courts, the UPICC are principally used
  1. to interpret and supplement the law (392 of 551 cases in UNILEX),
  2. to serve as part of the *lex mercatoria*, or
  3. *as the applicable law*.

- Application of UPICC as the applicable law is dependent on:
  1. the extent to which countries’ domestic law recognises **party autonomy** with regard to choice of non-state rules as the applicable law, and
  2. the Principles’ **compatibility** with national legal rules, depending on the particular country
     - E.g. Art. 28 Omani Civil Transactions Law (2013) allows the application of foreign legal provisions only so far as they are consistent with the Islamic Sharia)
Party autonomy regarding choice of Law

• In most MENA countries, party autonomy is explicitly applied as the primary rule when considering choice of law in a transaction containing a foreign element

• Only in a few MENA countries, the law explicitly refers to international trade law and practices including its customs as an eligible source of law

• Only a few countries have case law assessing non-state law as an acceptable choice (in other countries this remains under debate)
  - E.g. Tunisia; Qatar
Substantive conformity of the UPICC with MENA domestic legislation

- Legal systems of most MENA countries are either Sharia-based or contain Sharia elements.

- **General compatibility** between UPICC and MENA domestic laws of contracts and commercial rules, which codify many of the same fundamental principles:

- **Potential incompatibilities**, under debate:
  1. UPICC Art 7.4.9 on interest vs Sharia prohibition on interest (*riba*).
  2. UPICC Art 5.3.1 on types of condition and Art 9.1.5 on future rights vs Sharia prohibitions on uncertainty (*gharar*) and speculation (*maysir*).
  3. UPICC Art 7.4.2(1) and 7.4.3(2) for payment of damages for lost profits vs Sharia prohibitions on uncertainty (*gharar*) and interest (*riba*).
Potential for increasing use of the UPICC in MENA

Potential advantages of more frequent application

- Promoting fair and harmonised contract practices, as well as stability of the significant and accelerating international trade relations through unified rules which help clarify the rights and obligations of parties to international commercial contracts.

- Facilitating the resolution of cross-border legal conflicts.

- Providing a model and reference for legal harmonisation in the region and beyond, which could be of special value in MENA given the relative lack of regional legal harmonisation. Notable harmonisation efforts to date, yet with little practical application:
  - 1996 Model Arab Civil Law of the Arab League
  - GCC harmonisation initiatives

- Providing a model and reference for the modernisation of legislations.
Broader availability of Arabic language texts

Eliminates existing language barriers, as well as boosting awareness of, and familiarity with, the UPICC

E.g.: UNIDROIT/UNCITRAL/HCCH Legal Guide to Uniform Instruments in the Area of International Commercial Contracts (2020), available in Arabic

Provides a tool to strengthen awareness of the UPICC and promote progressive harmonisation of international commercial contract law
Potential for increasing use of the UPICC in MENA (cont’d)

Possible strategies to raise awareness of the UPICC

Institutional collaboration between UNIDROIT and MENA universities, bar associations, and other professional associations; encourage incorporation of the UPICC in MENA syllabi and moot courts

Promotion activities to raise awareness about the adaptability of the UPICC to any MENA jurisdiction’s legal context, taking account of potential compatibility requirements with Sharia principles

Involves involvement of MENA practitioners and scholars in the implementation of the UPICC; increases awareness and knowledge of the UPICC across the region

Eliminates doubts as to the UPICC’s incompatibility with Sharia principles
Potential for increasing use of the UPICC in MENA (cont’d)

Potential drivers for more frequent application

Recent developments fostering a more arbitration-friendly environment in parts of MENA (e.g., reforms of arbitration legislation in Qatar, Dubai, Egypt)

Flexibility regarding UPICC application in arbitration increases opportunities for UPICC use
Conclusions

- UPICC have helped shape international commercial contracts, dispute settlements, national legal reforms, and legal education for almost 30 years
- Compared to their use worldwide, the UPICC are invoked rarely in MENA courts
- UPICC use is largely permissible under MENA domestic legislation, and significant and accelerating international trade involvement provides opportunities for them to be applied productively
- Possible reasons for lower use might be overcome to facilitate the application of the UPICC:
  - Lower use of arbitration ➤ recent trend promoting the use of arbitration in MENA can facilitate UPICC use
  - Potential incompatibilities between MENA domestic legislation and the UPICC ➤ UPICC can be adapted to prevailing legal tradition
  - Lower institutional representation of MENA in the UPICC’s implementation, low representation of UNIDROIT across MENA academic settings, and language-related obstacles ➤ greater partnership between UNIDROIT and MENA practitioners and academia to facilitate the UPICC’s future impact in the region
Questions, comments?

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