Chapter 1 : The Unidroit Principles of International Commercial Contracts

RESPECTING THE RULES OF LAW: THE UNIDROIT PRINCIPLES IN NATIONAL COURTS AND INTERNATIONAL ARBITRATION () 14 VJ - provisions which balance the rights and obligations of both parties to the contract.

International legislation vs "restatement" Without a doubt, the United Nations Convention on Contracts for the International Sale of Goods CISG represents a landmark in the process of international unification of law. Unanimously adopted in by a diplomatic Conference held in Vienna with the participation of representatives from 62 States and 8 international organizations, it has in the meantime been ratified by 48 countries from the five continents, including almost all the major trading nations. The importance of CISG is further demonstrated by the fact that the number of decisions rendered by both State courts and arbitral tribunals in its application is rapidly increasing. The fact that from the beginning it was taken for granted that the envisaged uniform rules were to be prepared in the form of a binding instrument should not come as a surprise. In those days legal positivism and the identification of law with State-made law were the dominant credo. As a consequence any attempt at unifying the law likewise could only take the form of uniform legislation agreed upon by States at an international level and which they subsequently had to introduce into their domestic legal systems. After work was suspended during the war two further revised versions followed in and , and in the meantime an additional draft uniform law dealing with the formation of international sales contracts was prepared. However, despite several decades of intensive efforts invested in their preparation, it appeared from the outset that the two Conventions would meet with little success: There was now even a further reason to insist on the legislative option. The unification process was no longer confined to a relatively small number of States with a rather homogeneous economic and social structure, but for the first time also involved the socialist countries of Eastern Europe and the newly independent nations in the so-called Third World. A common feature of most of these countries was a strictly centralised and planned economy. If they wanted to participate in international commerce, they had to provide special rules for their foreign trade relationships by granting their economic organizations basically the same freedom of contract enjoyed by their competitors from countries with market economies. Such a special legal regime could only be established through legislation, whether enacted unilaterally or -- as in the case of international sales contracts -- agreed at the international level. Due to the differences in legal tradition and at times, even more significantly, in the social and economic structures prevalent in the States participating in the negotiations, some issues had to be excluded at the outset from the scope of the envisaged instrument, while with respect to a number of other items the conflicting views could only be overcome by compromise solutions leaving matters more or less undecided. As a result, CISG presents significant gaps and several rather vague and ambiguous provisions. Thus, some categories of sale -- among which are also transactions of considerable importance in international trade practice, such as sales of shares and other securities, of negotiable instruments and money, of ships and aircraft -- are expressly excluded from its scope. CISG itself expressly mentions the validity of the contract, the effect of the contract on the property in the goods [5] and the liability of the seller for death or personal injury caused by the goods to the buyer or any other person. Of the provisions laying down not too convincing compromise solutions between conflicting views some openly refer the definite answer to the applicable domestic law, [7] while others use the technique of a main rule immediately followed by an equally broad exception thereby leaving the question open as to which of the two alternatives will ultimately prevail in each single case; [8] others still hide the lack of any real consensus by an extremely vague and ambiguous language. In other words, if it had not been for the world-wide adoption of an international uniform sales law like CISG, any attempt at formulating rules for international commercial contracts in general would have been unthinkable. At the same time, it was precisely because the negotiations leading up to CISG had so amply demonstrated that this Convention was the maximum that could be achieved at the legislative level, which caused UNIDROIT to abandon the idea of a binding instrument and instead to take another road for its own

project. In other words, the objective was no longer to unify domestic law by means of special legislation, but merely to "restate" existing international contract law. Contents compared a CISG: To the extent that the two instruments address the same issues, the rules laid down in the UNIDROIT Principles are normally taken either literally or at least in substance from the corresponding provisions of CISG; cases where the former depart from the latter are exceptional. As a result, it was possible for them to address a number of matters which are either completely excluded or not sufficiently regulated by CISG. Thus, in the chapter on formation, new provisions were included on the manner in which a contract may be concluded, [27] on writings in confirmation, [28] on the case where the parties make the conclusion of their contract dependent upon reaching an agreement on specific matters or in a specific form, [29] on contracts with terms deliberately left open, [30] on negotiations in bad faith, [31] on the duty of confidentiality, [32] on merger clauses, [33] on contracting on the basis of standard terms, [34] on surprising provisions in standard terms, [35] on the conflict between standard terms and individually negotiated terms [36] and on the battle of forms. Another reason for the addition of new provisions was that the scope of the UNIDROIT Principles is not limited to sales contracts but also encompasses other kinds of transactions, above all service contracts. Examples of provisions so conceived as to take into account the special problems connected with these other types of contract are those on the duty of co-operation between the parties, [57] on the distinction between a duty to achieve a specific result and the duty of best efforts and the criteria for determining the kind of duty involved in a given case, [58] on the determination of the quality of performance, [59] on the order of performance, [60] on putting an end to a contract for an indefinite period, and on the right to require performance not only of monetary, but also of non-monetary obligations. Terms of co-existence As to the relationship between the UNIDROIT Principles and the other uniform law instruments, it has been observed that "[the Principles] do not compete or claim to displace the other harmonizing projects, but instead fit well with them as part of the multi-layered approach. The use of the restatement form avoids confrontation between the Principles and other parts of the multi-layer approach; it enables them to supplement each other. Yet even in respect of sales contracts, the two texts are not necessarily incompatible and indeed can even usefully support one another. To begin with, notwithstanding the worldwide acceptance of CISG it might still occur that a sales contract is entered into between two parties not situated in Contracting States, thereby escaping the scope of application of CISG. In such cases there could be room for applying the UNIDROIT Principles as an alternative set of internationally uniform rules, either because of an express choice to this effect by the parties themselves or because a reference in the contract to "general principles of law" or the "lex mercatoria" or the like as the governing law is considered to be equivalent to a reference to the UNIDROIT Principles. It is true that according to Art. In such cases, they will prefer the safety of domestic law rather than venture into the application of something as novel as the UNIDROIT Principles, whatever their intrinsic merits. The view has been expressed that such reference is tantamount to a tacit exclusion of CISG as a whole, just as occurs, for example, if the parties choose the law of a non-Contracting State or refer to principles and rules typical of the non-unified domestic law of any State, whether or not a party to CISG. According to paragraph 1 of Art. For example, the criteria laid down in Art. Indeed, in addition to the general criterion laid down in Art. According to paragraph 2 of Art. One of the general principles on which CISG is based is that of reasonableness. The same may be said of the rule contained in Art. CISG expressly settles neither the question of the time from which the right to interest accrues or of the rate of interest to be applied, nor that of the currency in which to assess damages. Likewise, CISG does not expressly settle the question of where the seller has to refund the price if and to the extent that it was not due. The gap may be filled in by Art. Indeed, as will be discussed in more detail below, [76] both provisions are expressions of the general duty to act in good faith as laid down in Art. To this effect, they may include a clause in the contract which might read as follows: This may be the case, for instance, with the rules on contracting on the basis of standard terms [84] or on public permission requirements. The situation is different if the parties agree to submit their disputes arising from the contract to arbitration. Arbitrators are not necessarily bound to base their decision on a particular domestic law. Yet the application,

along with the UNIDROIT Principles, of the mandatory rules in question will as a rule not give rise to any true conflict, given their different subject-matter. The latest version of the UNILEX data base available both on diskette and as a loose-leaf service contains court decisions from 15 countries and some 32 arbitral awards: Bonell et al eds. There were those who, in view of the existence of a vast amount of contract clauses and practices developed by the interested business circles themselves in order to regulate their trade relationships in a satisfactory and, possibly, exhaustive manner, argued that any intervention by State legislators would run the risk of remaining a dead letter cf. Yet such objections were not shared by the promoters of the unification project. To quote the same Ernst Rabel cf. In the first instance, under the present system of commercial clauses, there are, and always will be, gaps. The Principles seek to accommodate their interest more directly by protecting parties against the application of unreasonable usages. Comment 5 to Art. See in this sense, e. Since only the party who sends the notice can take the necessary precautions, it therefore makes sense to place the risk of loss on that party. According to Comment 2 to Art. An important factor to be taken into account in this respect is whether the additional or different terms are commonly used in the trade sector concerned and therefore do not come as a surprise to the offeror. On this point, A. At first sight this approach, which in substance corresponds to the position generally taken by the civil law systems for a comparative survey, see G. Treitel, Remedies for Breach of Contract. A Comparative Account, Oxford , p. In most respects it formulated a reasonable compromise between the common law and the civil law approaches to specific performance. Alpa, La protezione della parte debole di origine internazionale con particolare riguardo al diritto uniforme , in M. For a critical analysis of this chapter, see D. Bernardini, Hardship e force majeure, in M. For a critical analysis of these latter provisions, see D. On the different views expressed in this respect both in the course of the preparation of the article in question and after its final approval, see, also for further references, J. Honnold, Uniform Law for International Sales 2nd ed. For the same solution as laid down in Art. Only in the absence of such general principles does the same article permit as a last resort reference to the domestic law applicable by virtue of the rules of private international law. This appears to have been overlooked by U. In this sense see also J. Ferrari, La vendita internazionale. For the first three arbitral awards which have made express reference to Art. See, also for further references, M. In the sense that under the Convention even substantial supervening changes in economic circumstances do not amount to an exempting event see, among others, D. Even those who maintain that the general definition of "impediment" in Art. Bonell, La prima decisione italiana in tema di Convenzione di Vienna sulla vendita internazionale, in Giurisprudenza Italiana, , 1, c. General Conditions May For more on this point, see infra Ch.

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It follows that reference to the UNIDROIT Principles as the law governing the contract cannot be construed as indicating the parties' intention to exclude CISG in its entirety; the sole consequence of such reference is that, within the limits of party autonomy according to Art. 6 CISG, the UNIDROIT Principles will prevail over any conflicting.

There is, however, a clear perception that the potentialities of the UNIDROIT Principles in transnational contract and dispute resolution practice have not yet been fully realised. This is due to a large extent to the fact that the UNIDROIT Principles are still not sufficiently well-known among the international business and legal communities so that much remains to be done to bring them to the attention of all their potential users worldwide. Unlike binding instruments, such as, e. Hence the idea of preparing Model Clauses that parties may wish to adopt in order to indicate more precisely in what way they wish the UNIDROIT Principles to be used during the performance of the contract or when a dispute arises. In deciding which of the four categories of Model Clauses to choose parties should be aware of the advantages and disadvantages of each see e. The Model Clauses are deliberately drafted in a concise manner, leaving it to the Comments to indicate possible modifications or additions parties may wish to make. Therefore, even if parties decide not to use these Model Clauses, judges and arbitrators may still apply the UNIDROIT Principles according to the circumstances of the case as they have been doing so far. Except where one of the parties is in a position to persuade the other to accept its own domestic law, parties are usually reluctant to agree on the application of the domestic law of the other. The UNIDROIT Principles provide a balanced set of rules covering virtually all the most important topics of general contract law, such as formation, interpretation, validity including illegality, performance, non-performance and remedies, assignment, set-off, plurality of obligors and of obligees, as well as the authority of agents and limitation periods. Moreover, and even more important, the UNIDROIT Principles, prepared by a group of experts representing all the major legal systems of the world and available in virtually all the major international languages, are designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied. Parties choosing the UNIDROIT Principles as the rules of law governing their contract or the rules of law applicable to the substance of the dispute are well advised to combine such a choice-of-law clause with an arbitration agreement. However, in such a case the arbitral tribunal will apply the UNIDROIT Principles as the rules of law governing the substance of the dispute only to the extent that their strict application does not lead to an inequitable result in the dispute at hand. However, in such a case the conciliator will merely use the UNIDROIT Principles as guidance when formulating the terms of a possible settlement agreement for submission to the parties for approval. As to the different effects which such a choice may have on the application of the UNIDROIT Principles depending on as to whether it will be invoked in court proceedings or in arbitration proceedings, see Model Clauses No. Unless the contract provides a reference to the sources to be used as in Model Clauses 1. Inasmuch as those rules vary somewhat from State to State and are not always predictable in their application, the absence of such a reference may result in some uncertainty as to the source of rules that will apply to matters outside the scope of the UNIDROIT Principles. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, the UNIDROIT Principles as the rules of law applicable to the substance of the dispute without any reference to other legal sources. Depending on the applicable rules of procedure parties may do so by a separate agreement, before or after the commencement of the court or arbitration proceedings. In so doing, the parties will avoid the possibility present in Model Clause No. When choosing the domestic law, parties should bear in mind that in the case of a multi-unit State e. Depending on the applicable rules of procedure, parties may do so by a separate agreement either before or after the commencement of the court or arbitration proceedings. Parties may incorporate in their contract the UNIDROIT Principles in their entirety, or only specific chapters or sections thereof, and in so doing they may either merely refer to them or reproduce the relevant texts. In order

to avoid any uncertainty in this respect the parties may wish to list all the documents forming part of their contract and establish their priority. Absent an express choice by the parties, the domestic law governing the contract will be determined by the adjudicating body according to the relevant rules of private international law. It is true that in the field of general contract law mandatory rules are rather rare; however, domestic mandatory rules that prevail over conflicting rules of the UNIDROIT Principles may exist, if at all, inter alia with respect to special requirements as to form, contracting on the basis of standard terms, illegality, public permission requirements, contract adaptation in case of hardship, exemption clauses, penalty clauses and limitation periods. It is nowadays widely recognised that international uniform law instruments, even after their incorporation in the various domestic laws, remain an autonomous body of law which should be interpreted and supplemented according to autonomous and internationally uniform principles and rules, and that recourse to domestic law should be only a last resort. In the past, such autonomous principles and rules had to be found each time by the judges and arbitrators themselves. Notwithstanding the different scope of application of the two instruments â€" international commercial contracts in general in the case of the former, international sales contracts in the case of the latter â€" the instruments deal with many of the same issues concerning contract formation, interpretation, performance, non-performance and remedies. However, in so doing the parties should be aware that the effects of their reference to the UNIDROIT Principles as a means of interpreting and supplementing the CISG differ considerably depending on whether CISG applies i as a result of a choice by the parties even though the CISG would not otherwise govern as a matter of domestic law or ii as a matter of the domestic law governing the contract see Model Clause No. By using this Model Clause, the parties achieve a twofold result: Article 7 2 CISG , but also with respect to other issues of general contract law which are outside the scope of the CISG but may become relevant also in the context of sales contracts such as contracting on the basis of standard terms, authority of agents, defects of consent, illegality, conditions, set-off, assignment of rights, limitation periods, etc. Depending on the applicable rules of procedure parties may do so by a separate agreement either before or after the commencement of the court or arbitration proceedings. This is the case in particular when the domestic law in question is that of a country with a less developed legal system. Yet even highly developed legal systems do not always provide a clear-cut solution to specific issues arising out of international commercial contracts, either because opinions are sharply divided or because the issue at stake has so far not been addressed at all. In so doing, the parties ensure that the domestic law that is designated will be interpreted and supplemented in accordance with internationally accepted principles and rules as laid down in the UNIDROIT Principles. Parties may wish to refer to the UNIDROIT Principles as a means of interpreting and supplementing the applicable domestic law not only when the domestic law in question is that of a country with a less developed legal system but also when it is a highly developed legal system. Even highly developed legal systems do not always provide a clear-cut solution to specific issues arising out of international commercial contracts, so that a solution has to be found on a case to case basis. By referring to the UNIDROIT Principles to interpret and supplement the applicable domestic law, parties will in both cases achieve greater predictability and thereby reduce transactional and litigation costs. This Model Clause has also the effect that international uniform law instruments incorporated in the domestic law governing the contract are, to the extent needed, to be interpreted and supplemented in accordance with the UNIDROIT Principles. However, contrary to the effects of Model Clauses No. This Model Clause may be used by parties wishing to choose, after a dispute relating to their contract has arisen, a particular domestic law as the law applicable to the substance of the dispute and to refer to the UNIDROIT Principles as a means of interpreting and supplementing the domestic law in question. Depending on the applicable rules of procedure, parties may do so by a separate agreement either before or after commencement of the court or arbitration proceedings. The effects of this Model Clause on the application of the UNIDROIT Principles as a means of interpreting and supplementing the domestic law chosen as the law governing the contract are basically the same regardless as to whether the parties invoke it before a domestic court or an arbitral tribunal. It is true that domestic courts consider the interpretation and gap-filling of the applicable domestic law in principle to be

their prerogative. However, at least with respect to issues covered by party autonomy, not only arbitral tribunals but also domestic courts will normally follow the indications made by both of the parties as to how they wish to have ambiguities in the applicable law resolved or gaps filled, and to this effect it is irrelevant whether such indications are made by the parties in their pleadings with respect to specific issues under dispute or by a reference to the UNIDROIT Principles with respect to all issues that may become relevant.

Chapter 3 : UNIDROIT - UPICC Model Clauses

The UNIDROIT Principles of International Commercial Contracts (hereinafter "the UNIDROIT Principles"), first published in , with a second edition in and now in their third () edition (hereinafter "UNIDROIT Principles "), represent a non-binding codification or "restatement" of the general part of international.

They are conceived in the same spirit as the UN Sales Convention and provide an harmonious fit in certain key areas. In its Preamble, the PICC claim to be applied to interpret and supplement the other international uniform law instruments. Despite the fact that any international instrument can draw the limits of its scope, be it legally binding or not, it can be considered as a guide to the adjudicator confronting with a case. More importantly, the drafters of the PICC have benefited from the learning and the experience of the CISG, thus, have aimed for producing a more elaborate text, which fixes the problems and fills the gaps of the CISG. The soft law nature of the PICC makes it inherently a more flexible and innovative text in terms of its solutions offered to the problems that are left to be unsolved in the CISG, as it required a consensus in a diplomatic conference. It is not without controversy, but seems well established in the case law. Then, it would not be unwise to state that the PICC should be applied in so far as it they restate the existing principles. Moreover, it is suggested that The PICC can serve as the principles also in their model function, where an adjudicator is seeking for the best interpretation of an unclear provision. Furthermore, in the absence of principles underlying the CISG the adjudicator must resort to a domestic law, which leads to undermine the uniformity. In the case law, art. The similar gap- filling function is valid for the fundamental breach stated in the art. Also payment by cheque and by funds transfer, and liability for negotiation and for breaking off negotiations in bad faith and the duty of confidentiality are example of the issues to be interpreted according to the PICC in practice. Especially the hardship provisions of the PICC 6. However, the Preamble cannot be conclusive, at least in the context of litigation. Under traditional conflict rules the PICC cannot be selected as lex contractus since they do not constitute a self-standing legal system. Therefore, they can merely be incorporated into the contracts as contract terms and subject to the applicable law determined by the conflict rules. The Inter-American Convention art. The outcome is unclear, while Briggs8 defends that there is no room for the PICC, Juenger, Boele-Woelki9 and Bonell 10 claim that at least when the parties expressly choose it can be applied. It is also possible in the American UCC In Arbitration Unlike state courts, arbitral tribunals do not have a lex fori in the sense of substantive laws apply by virtue of the place of the tribunal. However it determines the lex arbitri, thus, the rules regarding the determination of the law applicable to the merits. The question of whether an arbitral tribunal can apply the PICC as the lex contractus does not depend on the self-declaration of the PICC, but the lex arbitri governing the arbitration. Traditionally, national conflict rules used to be applied by arbitral tribunals. However, today they can directly determine the applicable law. There are two difficulties in applying the PICC as law applicable. First, they do not constitute a comprehensive fully-fledged codification, there are some subjects uncovered. The parties cannot derogate from the otherwise applicable law in the areas not covered by the PICC. Also the PICC have more general rules, rather than specific rules as in the domestic laws. It may be argued that there are also gaps in national laws, so it is not a problem unique to the PICC. Second, the domestic mandatory rules will apply irrespective of the choice, and if the PICC is 8 Good et al. There may be mainly four references to the PICC. In this case there is no discussion and the tribunal must honor this choice. Second, the parties may decide to apply the general principles of law, lex mercatoria, usages or the like. As an expression of general principles of law there is not much discussion, however applying them as part of the lex mercatoria requires an objective element. Also the restatements do not merely restate but also create, innovate or finds the best solution, so only to the extent that they restate they can be said to be part of the lex mercatoria. Nevertheless there are three pragmatic reasons to apply the PICC as part of the lex mercatoria. First, this would give effect to the will of the parties. Second, the tendency to avoid strict localization of the contracts within a single national legal system, and instead to have

recourse to vague principles and rules of transnational law has been criticized. But the PICC as a well-defined set of rules can reduce this uncertainty. Another way would be the absence of choice of law. In some cases arbitrators construed the absence of choice as a decision to exclude the domestic law of both parties, eg. However, an omission of choice must not be readily interpreted as negative choice, there may be some other considerations. Arbitrators have varying degrees of discretion in determining the law applicable in this case. It is generally suggested that as the PICC is a neutral international instrument, it should be applied in the absence of a choice of law. Finally, when the parties have chosen a domestic law, but the relevant rules cannot be established or the relevant rules are do not fit the context of international commercial transaction. In such a case the PICC can only be applied as the last resort and as a complementary but not as the lex contractus. While the freedom of arbitral tribunal is as discussed above, the enforceability of awards given may constitute another set of limitation. On this point, it would be enough to state that reliance on the PICC in the absence of a choice is not a ground for annulment or denial of enforcement per se, but an express choice by the parties of a national law must not disregarded. Conclusion 13 Good et al. This role of the Principles seems the most useful in the context of the CISG, regarding their overlapping scope and drafting history.

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Chapter 4 : Principles of International Commercial Contracts, - UNIDROIT

The Unidroit Principles are a restatement of the law applicable to international commercial contracts that have been developed on the basis of an innovative comparison of the leading contract laws.

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Chapter 5 : International Commercial Contracts - GlobaLex

UNIDROIT Principles 2 ARTICLE (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.

Chapter 6 : UNILEX on UNIDROIT Principles

Arbitral Award International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation 23/, (Arts , and Unidroit Principles), www.

Chapter 7 : UNIDROIT - News and events

The PICC and the CISG One of the most significant usages of the UNIDROIT Principles of International Commercial Contracts (PICC) is interpretation and supplementation of the other international commercial instruments, in particular the Vienna Sales Convention (CISG).