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Why is it Risk Minimising and Cost Efficient to Choose the UNIDROIT Principles of International Commercial Contracts 2016 when Negotiating an International Contract ? *

- for Primerus Colleagues, Inhouse-Counsels and Clients –

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*Disclaimer: This article is meant to **contribute to a discussion**. It does not replace legal advice. It is neither an academic nor comprehensive contribution, but rather an **expression of opinion** based on 30 active years of experience from different perspectives in the changing world of international contract drafting and arbitration.*

Key "Take-Aways" for the Reader

This article addresses those who are **novices** to the UNIDROIT Principles of International Commercial Contracts (**"UNIDROIT Principles"**) **or sceptics** to using a different legal regime than (i) their home law or (ii), if they cannot impose their home law, to using something else than a 'neutral' state law such as English or Swiss national law.

This article will argue that, with the UNIDROIT Principles, **a comprehensive new tool for cross-border contract drafting has emerged** between 1994 (when its 1st edition was released after ten years of preparation) and 2017 when the **4th edition 2016** was released by a decision of the Council of the **inter-governmental organisation** called "UNIDROIT" to which 67 nations from all geopolitical areas of the world are members. They cover all major aspects of contracts just as any national law. This also includes general questions such as assignment of claims or contracts, plurality of obligees or obligors or even issues of prescription (which is a subject of substantive law and not of procedure under many dispute resolution regimes). The UNIDROIT Principles are particularly helpful when it comes to negotiating an **international contract** relating to parties from civil and common law jurisdictions. As transnational set of rules, they provide a **transnational bridge between common and civil law**. During my writing of an article-by-article commentary of the UNIDROIT Principles published in 2018, I discovered some 50 compromises between common and civil law. The UNIDROIT Principles are the **best tool** whenever the in-house-counsel or external counsel do not succeed or wish to abstain from pressing for the application of the home state law of the company for tactical reasons.

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Dear Primerus Colleagues, Inhouse-Counsels and Clients,

It is not always possible or tactically wise to insist on the contract law of the company's home jurisdiction. Certainly, it is the law which you and your company are best organized to handle. Yet, if you do not have the market power to bring home both the 'choice of law' and the 'dispute resolution clause', go for the latter! Determining the minds making the decisions, should the contractual relationship run sour, through a 'dispute resolution clause' is more important than the determination of the substantive law! It is the arbitration law or the private international law applicable by the chosen *forum* which decides about your freedom of choosing the substantive rules of law. In short: **The dispute resolution clause trumps the choice of law clause!**

As a result, if you can bring home only one, you need a Plan B, i.e. rules of law which you can master without a large investment of your own time and/or costs for external counsel. Save the money for external counsel for strategy, negotiating and drafting (and the search for any applicable mandatory law). Do not waste it on research of a background law (such as the national law of your contract partner or a so-called neutral law). Any national law has its limitations and may be different from its apparent wording if you are unfamiliar with it. **The devil lies in the details!**

It is at this point of reflection that the UNIDROIT Principles of International Commercial Contracts 2016 (**"UNIDROIT Principles"**) step in. They provide a tool functioning as background law regardless of the nationality of your own law, because the principles are **global and neutral**.

At this point I will offer some background **(1.-5.)** and practical hints **(6.)** before I describe how the UNIDROIT Principles match both with a choice of court **(7.)** and an arbitration clause **(8.)** and then offer a conclusion **(9.)**.

1. What are the UNIDROIT Principles?

Released by the Council of the inter-governmental organisation of UNIDROIT (63 member states) in 2017 in their 4th edition 2016, the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles") provide an ingenious tool for cross-border contract drafting and dispute resolution on neutral ground. The **United Nations Commission on International Trade Law** ("UNCITRAL") has **endorsed** the UNIDROIT Principles twice, in 2004 and 2007, to "commend" their use "as appropriate, for their intended purposes".

Developed through approximately 35 years of international legal research and discussions (since the establishment of the first Working Group in 1983 at UNIDROIT in Rome), the UNIDROIT Principles have been described as a "restatement" of international contract law (*Bonell*). Most of the 211 principles constitute a **compromise between different approaches** to a given contractual topic, while others reflect a universal understanding or an emerging general principle of law (e.g. Arts. 1.7, 4.1 and 5.1.7). On other occasions, the international Working Group, composed of experts from all major legal systems and geopolitical systems of the world, decided on one or the other solution providing in sum a balanced middle ground between the common and the civil law approach (only Section 11.2 on plurality of obligees is

content to merely offer a choice for the applicable default rule because the Working Group could not agree on any "better law" approach or compromise). Sometimes the UNIDROIT Principles have proposed a new approach particularly appropriate for cross-border business (e.g. Section 6.2 on *hardhsip*). The UNIDROIT Principles also address **typical international questions** (e.g. a rule on foreign currency set-off, Art. 8.2; or a rule on time zones, Art. 1.12) for which there is no equivalent in most domestic laws.

With this background, the UNIDROIT Principles are an important instrument for all international practitioners, although the Principles themselves are not part of many law school curriculums, at least not at any advanced level.

2. Key messages

The UNIDROIT Principles are based on the principle that each contract party is **responsible for its own scope of work** and its own sphere. The party can be excused by *force majeure* (Art. 7.1.7) or by contractual agreement, which is typically contained in a limitation of liability or another exemption clause (Art. 7.1.6).

Otherwise, the UNIDROIT Principles are based on a one digit number of **underlying concepts** such as freedom of contract/party autonomy, bindingness of contracts (*pacta sunt servanda*), openness to usages, upholding the contract if possible (*favor contractus*), the observance of good faith and fair dealing and avoidance of 'unfairness' which shall guide the settlement of issues "within the scope of these Principles but not expressly settled by them" (Art. 1.6 (2)).

3. Risk Management and Cost Reducing Effect

The mere number of **211** UNIDROIT Principles on international commercial contracts underscores that there are many issues where contract partners from different jurisdictions are likely to have a **different understanding**. Such different understanding entails risks of future disputes (e.g., in a contract negotiation, who would normally consider that civil and common law lawyers have just opposing pre-concepts of who can bring forward a claim in case of a plurality of obligees?).

By providing **default solutions** for these issues, the UNIDROIT Principles **reduce risk**. For points which you find important to resolve otherwise, party autonomy grants the freedom to regulate them differently in the contract. If there is no time or budget to negotiate an individual solution, you have the certainty with the UNIDROIT Principles, that you have at least a **balanced and neutral solution** negotiated among experts from different jurisdictions. You can rely on a compromise without investing costs for individual solutions and concentrate on those issues which are most important for your company (Example: Who would think about foreign currency set-off in ordinary circumstances?).

Moreover, your default rule package of the UNIDROIT Principles functions in combination with contract partners from any jurisdiction in the world. One solution fits all situations which is more cost effective as compared to separate research of national contract laws for each new contract project.

Furthermore, the same team of lawyers handling your normal matters can also handle these matters. You do not need foreign counsel to follow up on details of contractual issues.

4. How do the UNIDROIT Principles function in practice?

The UNIDROIT Principles, created for cross-border B2B contracts, are **smooth to work with**. I have been using them close to 15 years on a regular basis in a multitude of contexts: **(i)** for common law clients and for civil law clients; **(ii)** for my own law firm's client contracts when we are instructed by foreign clients or by an international organisation (*why should they bother with German law?*), for contracts with international cooperation partners from other jurisdictions; **(iii)** or for small and mid-size clients and for large clients listed on the German DAX stock market. For example, when offering sub-contracts for a large construction project to a variety of potential sub-contractors from different jurisdictions, the client offered them a choice between German law from its home jurisdiction and the choice of the UNIDROIT Principles. **(iv)** I have chosen the UNIDROIT Principles as the applicable contractual regimes, with or without adaptations. I have used them as a check-list. I have implemented individual rules, e.g. on hardship, as templates. **(v)** I have also used the UNIDROIT Principles as an arbitrator for the interpretation of a clause choosing the general principles of law, or as counsel arguing before arbitration tribunals and even before German national courts (demonstrating that a certain interpretation of German domestic law would best fit the international spirit of a given contract).

5. 15 Languages

The UNIDROIT Principles 2010 exist in 15 languages and can be used with the exception of long term contracts where the 2016 edition had brought about changes. Thus, if you negotiate with a client who speaks a different language than yourself, each party can read the provisions in their own language even if the drafting takes place in English. The pre-existing versions can become extremely helpful in understanding each other and to avoiding misunderstandings.

Note: **(i)** If you are a native English speaker it is difficult to assess the risk of misunderstanding in negotiations with a contracting partner who uses English as a foreign language for convenience. **(ii)** If you are not a native English speaker, the risk is high that you may overestimate your skills of mastering English. I personally am admitted in both New York and Germany, while I am originally a French lawyer. With each year of additional experience I know better what I do not know, starting with the language

6. Where do I find information about the UNIDROIT Principles?

Most information is available on the internet. You can find the different language versions, as well as "Official Comments" of the 2016 version with illustrations in English and French. You find court and arbitration decisions using the UNIDROIT Principles from around the globe at www.unilex.info. If you google UNIDROIT Model Clauses'(or insert your search at 'ecosia.com'which uses Bing and plants trees with the income), you will find UNIDROIT clauses with official comments. Further, you can find the 'Official Comments' of the UNIDROIT Principles in the Internet by searching for "UNIDROIT Principles Official Comments".

An **article-by-article commentary** provides a useful tool in working with the UNIDROIT Principles and navigating through the myriad of options which they offer to the drafting of contracts, advising businesses and resolving disputes (once there is a dispute governed by the UNIDROIT Principles). Based on my personal work experience with the UNIDROIT Principles (as well as my experience in participating in the discussions of the Working Group of UNIDROIT for several years, as an official observer), I decided to write exactly such an article-by-article commentary (Eckart Brödermann, UNIDROIT Principles of International Commercial Contracts, an article-by-article commentary, published by Wolters Kluwer in 2018, 531 pages). For each rule, I concentrated on its background, summarized its practical requirements, defined its limits and strived to present options to its application, as appropriate under the given circumstances. Over a period of two years, this made me realise the brilliance of the UNIDROIT Principles and the coherence of the many bridges built between different approaches to so many contractual subjects, many of them so sophisticated that there is usually no budget to spend time on them during the average cross-border contract negotiation.

The article-by-article commentary is a format which has a long standing tradition in civil law. It functions well also for the interpretation of written soft law. From a business perspective, the use of the UNIDROIT Principles can save time and money in many situations. The commentary is aimed at providing a convenient tool to navigate through the UNIDROIT system.

7. Combination of the UNIDROIT Principles with a choice of court clause

The UNIDROIT Principles can be combined with a choice of court clause. This is even the case if the law in the jurisdiction of the court requires the application of a domestic law of a state (this is the case in the member states of the European Union where, the Preamble of the applicable so-called "Rome Regulation" explicitly permits to "incorporate" rules of law). The domestic law will step in only if the application of the UNIDROIT Principles would entail a violation of mandatory domestic law which is excluded *per se* as pursuant to Art. 1.4 of the UNIDROIT Principles, "*[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.*"[i] Most otherwise applicable domestic laws would thereby respect the choice of the UNIDROIT Principles as an expression of party autonomy.

8. Combination of the UNIDROIT Principles with an arbitration clause

The UNIDROIT Principles can most easily and most efficiently be used in combination with an arbitration clause. Pursuant to many arbitration laws, "*[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*" (emphasis added; the quote stems from the UNCITRAL Model Law on International Arbitration which has been integrated into many domestic arbitration laws such as the arbitration law of Florida).

If the choice of the UNIDROIT Principles is combined with an arbitration clause, there is no danger of any legal discussion about the "soft" law character of the principles. The same is true when parties of an arbitration agreement decide to apply the UNIDROIT Principles later during the arbitration, (I have experienced this twice in my professional practice as an

international lawyer; once upon the proposal of the Chairman of a Swiss arbitration in 2001, and again in 2017 upon proposal of the respondent in a CEAC arbitration, in order to avoid research and proof of otherwise applicable Chinese law to European arbitrators).

The main advantage of combining the UNIDROIT Principles with an arbitration clause is yet another effect: According to the Official Comments, in such situation the range of mandatory laws which are applicable in addition to the contractual regime is more restricted. While a state court will have to apply all domestically applicable mandatory laws, an arbitration tribunal will apply only those arbitration laws which are of an *international* vocation.

9. Conclusion

In sum, in many situations the UNIDROIT Principles can help and it is important to know about them as a back-up tool. In my mind, the UNIDROIT Principles constitute *the* future of international contract drafting. Thanks to their international and comparative background, they match with *any* national law (and can therefore operate as a plan B in combination with any national law).

Let me close with a quote from a US in-house counsel (Bill Turner) who was one of the test readers of my manuscript in 2017. He was intrigued by my idea of such a commentary and read it over two long distance flights to Hong Kong. He wrote me an email stating:

> *"I am amazed at the progress and status of this framework. I am impressed and motivated in its adoption certainly in the deals I can influence."*

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by **Eckart Brödermann,** Managing partner of **Brödermann Jahn**, the German member of the **Primerus Society of Independent Law Firms** based in **Hamburg, Germany (www.German-law.com)**, with an M&A, corporate and construction law background and field experience in >20 industries. Professor at the University of Hamburg (teaching international contracts and international arbitration); Fellow of the Chartered Institute of Arbitrators (London), trained in Paris (License, Maître en droit), Harvard (LL.M.) and Hamburg (Dr. iur.), admitted in New York and Hamburg, a Bar Certified Specialist of International Economic Law in Hamburg, Germany; working both as **Arbitrator and Counsel**. Eckart is author or co-author of numerous publications on private international law, comparative law, contracts and arbitration. Most recently, Eckart published a practice oriented **article-by-article commentary** of the UNIDROIT Principles (Eckart Brödermann, UNIDROIT Principles of International Commercial Contracts, an article-by-article commentary, published by Wolters Kluwer in 2018, 529 pages). Eckart has set as arbitrator under many regimes including ICC, CIETAC (China), DIS (Germany), SEC (Sweden).

Bibliographical Note: ***(i)*** *This article is based on a contribution to the WoltersKluwer arbitration blog which was released on 25 March 2018: http://arbitrationblog.kluwerarbitration.com/2018/03/25/future-cross-border-contracts-combination-arbitration-clauses-unidroit-principles-international-commercial-contracts-provide-practice-proven-bridge-common-civil/* ***(ii)*** *For more details see the article-by-article-commentary Eckart Brödermann, UNIDROIT Principles of International Commercial Contracts, an article-by-article commentary, published by Wolters Kluwer in 2018, 531 pages.*