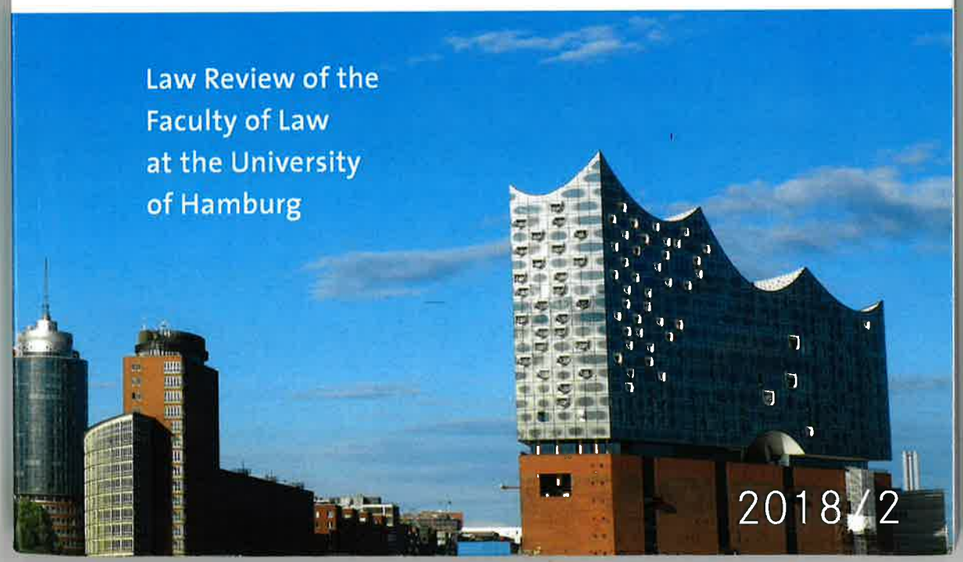
HAMBURG LAW REVIEW

Towards Use of the UNIDROIT Principles 2016 in Practice – a Bridge between Common and Civil Law



Hamburg Law Review

Towards Use of the UNIDROIT Principles 2016 in Practice – a Bridge between Common and Civil Law

Law Review of the
Faculty of Law
at the University of Hamburg

2018/2

The UNIDROIT Principles of International Commercial Contracts 2016: A High-Level Analysis for the United States' Commercial Practitioner

Roger E. Barton*

Practitioners in the United States may be unfamiliar with the UNIDROIT Principles of International Commercial Contracts (the "UNIDROIT Principles"), as indeed I was until my good friend Professor Eckart Brödermann of Hamburg, Germany commended them to my attention. They are an amalgam of common and civil law that come together in 211 articles to provide a balanced set of general rules to govern the interpretation and enforcement of international contracts. The UNIDROT Principles have undergone four revisions since they were first published in 1994. In 2007 and again in 2012 the United Nations Commission of International Trade Law (UNCITRAL) endorsed the UNIDROIT Principles to "commend" their use "as appropriate for their intended purposes" which includes their choice as the applicable regime for contracts.

Parties to international commercial agreements may find it advantageous to choose the UNIDROIT Principles as the applicable legal regime to govern their agreements where diverse jurisdictions would otherwise create obligations or curtail rights under an agreement that are unfamiliar or undesirable to the parties. As one would expect, no United States court has ruled substantively on the merits of any specific UNIDROIT Principles; however, US courts have held that arbitration provisions calling for disputes to be resolved under the UNIDROIT Principles or awards rendered pursuant to the UNIDROIT Principles are enforceable absent the normal

* Roger E. Barton, Esq. is the Managing Partner of Barton LLP in New York City

exceptions. Therefore, it may be advisable for US counsel to incorporate the UNIDROIT Principles into an international agreement. To illustrate this point, I have outlined below a few of the leading concepts that will be familiar and important to US parties, but which may not exist if the governing law of a foreign jurisdiction is designated instead of the UNITDROIT Principles.

Good Faith and Fair Dealing as Mandatory Core UNIDROIT Principles pursuant to Articles 1.5 and 1.6(2)

The bedrock US concept of the obligation of good faith and fair dealing as an inherent term contained in every contractual relationship is not present in a number of foreign jurisdictions. For example, the United Kingdom does not recognize such an obligation, and until only recently have courts in parts of Canada adopted what they characterize as "the general organizing principle" of the duty of honest performance, which while similar to the US concept of good faith and fair dealing, is not the same.

Under the UNIDROIT Principles, as in US Common Law, the principle of good faith and fair dealing relates to all phases of a contractual relationship starting with negotiations, Article 2.1.15(2), and continues with 82 references to "reasonableness" as well as other specific references. See also Art. 1.8 which brings the concept of detrimental reliance\estoppel into the UNIDROIT Principles.

Formation of an Agreement – Article 2.1.1 A contract may be concluded by the acceptance of an offer or by conduct of the parties that is sufficient to show an agreement.

Often a contractual provision may be vague or uncertain. In litigation parties will attempt to construe contractual provisions to support their interpretation of the obligations under the contract. Under US Common Law, courts will assess the conduct of the parties as evidence to assist in determining how to interpret and enforce vague contractual provisions. The same is true under the UNIDROIT Principles. Note, however, that acceptance by silence as provided by the UNIDROIT principles is not always

the case under US Common Law. A more prolonged course of conduct is generally required.

Merger Clauses – Article 2.1.17 provides that a contract in writing that contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

Just as with the concept of interpreting provisions of a contract by course of conduct, courts in the US under Common Law will look to prior communications between the parties to interpret contractual provisions if they are contested by the parties.

It is important to note in this context that the UNIDROIT Principles focus on not **contradicting or supplementing** the contents of the contract and thus, as in US Common Law, they respect and protect the integrity of the written contract. The UNIDROIT Principles, like common law, merely allow for prior writings or statements (parole evidence) to interpret the contract's meaning.

Modification in Particular Form – Article 2.1.18 A contract in writing that contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.

Article 2.2.18 reflects the US Common Law principles of:

- detrimental reliance
- equitable estoppel
- good faith\fair dealing

Article 3 – Validity

Grounds for Avoidance

The UNIDROIT Principles have similar concepts for avoidance that are found in the US Common Law. For example: fraud, threat, gross disparity (which is meant to equate to the common law concept of "undue influence" however common law does not go as far as UNIDROIT in terms of giving relief if a party takes unfair economic advantage), and illegality.

Article 3.2.5 – Fraud A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.
Fraudulent conduct is defined essentially by the same five elements as it is under US Common Law:

1. a material misstatement or omission,
2. made with knowledge or recklessness disregard for the truth,
3. with the intent to deceive the other party,
4. which is relied upon by other party, resulting in
5. damages (actual loss) linked to the misstatement or omission

Fraud is evaluated under UNIDROIT at the same points in the contractual process as under US Common Law:

- Fraudulent inducement (to enter the contract)
- Fraudulent misrepresentation (within the contract)
- Fraudulent performance (under the contract)

The election of remedies under the UNIDROIT Principles applies to all avoidance claims, and again mirrors US Common Law:

- Rescission
- Money damages

Article 4 Interpretation

Article 4.1 Intention of the Parties Under the UNIDROIT Principles, a contract shall be interpreted according to the common intention of the parties. If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

US Common Law principles (discussed above) are found in this UNIDROIT Principle which looks to the intention of the parties, their course of conduct and parole evidence.

Importantly, reasonableness is a significant concept under UNIDROIT. As under US Common Law, every contract provision must be interpreted so as to give it reasonable meaning within the context of the overall agreement. Parties often confront this concept in the face of arguments centering on "plain meaning" or "objective meaning" of contract language. This is particularly important in terms of cross-border relationships where strict interpretations of specific words and terms can differ due to language or culture. It is therefore useful to put these words and terms into context and follow a reasonable interpretation that is consistent with the overall intention of the parties to provide reasonable meaning to the contract.

Article 7 Non-Performance
Overall UNIDROIT follows the US Common Law approach to a plurality of remedies including:

- specific performance
- money damages
- Termination rights
    - prior breach excusing subsequent performance
    - frustration of purpose\performance
    - anticipatory breach
- right to cure.

As one can see from the brief analysis of the sections above, UNIDROIT and the US Common Law are more often than not in harmony with one another. Accordingly, it behooves US practitioners to study these principles and to consider drafting international contracts where UNIDROIT is the primary choice of law to govern the agreement.

The UNIDROIT Principles 2016: A Contemporary English Law Perspective

Rina See* and Dharshini Prasad**

I. Introduction

Twenty-five years ago, the first release of the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles" or "Principles") was published in 1994. The UNIDROIT Principles were the result of over two decades of work by independent legal experts from all major legal systems, aiming to produce a "balanced set of rules 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."[1] In this vein, UNIDROIT deliberately avoided seeking endorsements from its member state governments, but aimed for the Principles to be an independent, commercial, non-binding international restatement of general principles of contract law, akin to the US Restatements.[2] And, in the nature of a restatement, rather than simply aiming to reproduce the law, the UNIDROIT Principles "embody what are perceived to be the best solutions, even if still not yet generally adopted."[3]

Reflecting this aim, the Preamble declares that the purpose of the UNIDROIT Principles is to set out general rules for international commercial contracts. Further, the Preamble

* Counsel, Wilmer Cutler Pickering Hale and Dorr LLP.
** Senior Associate, Wilmer Cutler Pickering Hale and Dorr LLP.

1 UNIDROIT Principles 2016 ("UNIDROIT Principles"), Introduction to the 1994 Edition, pp. xxvii-xxix. See also *E. Brödermann*, UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary (2018), pp. 5-6.

2 UNIDROIT Principles, Introduction to the 1994 Edition, p. xxix.

3 UNIDROIT Principles, Introduction to the 1994 Edition, p. xxix. See also *R. Goode*, "International Restatements of Contract and English Contract Law" (1997) 2 Unif. L. Rev 231, 234 ("…the task of those engaged in the work of harmonisation, whether it takes the form of a convention, a set of uniform rules to be incorporated by contract, a model law or a scholarly restatement, is to find the best solutions to typical problems, and thus to improve the law, not merely to reproduce it.").