UNIDROIT
International Institute for the Unification of Private Law

PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Rome 1994

国际统一私法协会
国际商事合同通则
对外贸易经济合作部条约法律司　编译

出版·发行/法律出版社
经销/新华书店
印刷/北京宏伟胶印厂
排版/泰能照排中心
开本/850×1168 毫米 1/32　**印张**/16.875　**字数**/442 千

版本/1996 年 8 月第 1 版　　1996 年 8 月第 1 次印刷
印数/0,001－6,000

社址/北京市广外六里桥北里甲 1 号八一厂干休所(100073)
电话/63266796　63266781

书号:ISBN 7－5036－1834－5/D・1521
定价:33.00 元

FOREWORD

It is with the utmost pleasure that the International Institute for the Unification of Private Law (UNIDROIT) announces the completion of the drawing up of the UNIDROIT Principles of International Commercial Contracts. This achievement represents the outcome of many years of intensive research and deliberations involving the participation of a large number of eminent lawyers from all five continents of the world.

Tribute must first be paid to the members of the Working Group primarily entrusted with the preparation of the UNIDROIT Principles and, among them, especially to the Rapporteurs for the different chapters. Without their personal commitment and unstinting efforts, so ably coordinated throughout by Michael Joachim Bonell, this ambitious project could not have been brought to its successful conclusion.

We must also express gratitude for the most valuable input given by the numerous practising lawyers, judges, civil servants and academics from widely differing legal cultures and professional backgrounds, who became involved in the project at various stages of the drafting process and whose constructive criticism was of the greatest assistance.

In this moment of great satisfaction for the Institute we cannot but evoke the memory of Mario Matteucci, who for so many years served UNIDROIT as Secretary-General and then as President and whose belief in the Principles as a vital contribution to the process of international unification of law was a source of constant inspiration to us all.

Malcolm Evans
Secretary-General

Riccardo Monaco
President

INTRODUCTION

Efforts towards the international unification of law have hitherto essentially taken the form of binding instruments, such as supranational legislation or international conventions, or of model laws. Since these instruments often risk remaining little more than a dead letter and tend to be rather fragmentary in character, calls are increasingly being made for recourse to non-legislative means of unification or harmonisation of law.

Some of those calls are for the further development of what is termed "international commercial custom", for example through model clauses and contracts formulated by the interested business circles on the basis of current trade practices and relating to specific types of transactions or particular aspects thereof.

Others go even further and advocate the elaboration of an international restatement of general principles of contract law.

UNIDROIT's initiative for the elaboration of "Principles of International Commercial Contracts" goes in that direction.

It was as long ago as 1971 that the Governing Council decided to include this subject in the Work Programme of the Institute. A small Steering Committee, composed of Professors René David, Clive M. Schmitthoff and Tudor Popescu, representing the civil law, the common law and the socialist systems, was set up with the task of conducting preliminary inquiries into the feasibility of such a project.

It was not until 1980, however, that a special Working Group was constituted for the purpose of preparing the various draft chapters of the Principles. The Group, which included representatives of all the major legal systems of the world, was composed of leading experts in the field of contract law and international trade law. Most of them were academics, some high ranking judges or civil servants, who all sat in a personal capacity.

The Group appointed from among its members Rapporteurs for the different chapters of the Principles, who were entrusted with the task of submitting successive drafts together with Comments. These were then discussed by the Group and circulated to a wide range of experts, including UNIDROIT's extensive network of correspondents. In

addition, the Governing Council offered its advice on the policy to be followed, especially in those cases where the Group had found it difficult to reach a consensus. The necessary editorial work was entrusted to an Editorial Committee, assisted by the Secretariat.

For the most part the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. Since however the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.

The objective of the UNIDROIT Principles is to establish 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. This goal is reflected both in their formal presentation and in the general policy underlying them.

As to their formal presentation, the UNIDROIT Principles deliberately seek to avoid the use of terminology peculiar to any given legal system. The international character of the Principles is also stressed by the fact that the comments accompanying each single provision systematically refrain from referring to national laws in order to explain the origin and rationale of the solution retained. Only where the rule has been taken over more or less literally from the world wide accepted United Nations Convention on Contracts for the International Sale of Goods (CISG) is explicit reference made to its source.

With regard to substance, the UNIDROIT Principles are sufficiently flexible to take account of the constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practice. At the same time they attempt to ensure fairness in international commercial relations by expressly stating the general duty of the parties to act in accordance with good faith and fair dealing and, in a number of specific instances, imposing standards of reasonable behaviour.

Naturally, to the extent that the UNIDROIT Principles address issues also covered by CISG, they follow the solutions found in that Convention, with such adaptations as were considered appropriate to reflect the particular nature and scope of the Principles(*).

(*) See especially Arts. 1.8, 1.9, 2.2, in conjunction with 5.7 and 7.2.2.

Introduction

In offering the UNIDROIT Principles to the international legal and business communities, the Governing Council is fully conscious of the fact that the Principles, which do not involve the endorsement of Governments, are not a binding instrument and that in consequence their acceptance will depend upon their persuasive authority. There are a number of significant ways in which the UNIDROIT Principles may find practical application, the most important of which are amply explained in the Preamble.

The Governing Council is confident that those to whom the UNIDROIT Principles are addressed will appreciate their intrinsic merits and derive full advantage from their use.

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Rome, May 1994

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MEMBERS OF THE WORKING GROUP

Michael Joachim BONELL — Professor of Law, University of Rome I "La Sapienza"; *Chairman of the Working Group; Rapporteur on Chapter 1 (including the Preamble), Chapter 2 and Chapter 4*

Patrick BRAZIL — Attorney, Canberra; former Secretary, Attorney-General's Department; former member of the UNIDROIT Governing Council

Paul-André CREPEAU — Director, Centre de recherche en droit privé et comparé du Québec; Professor of Law, McGill University, Montreal

Samuel K. DATE-BAH — Professor of Law, University of Accra; Special Adviser (Legal), Commonwealth Secretariat, London

Adolfo DI MAJO — Professor of Law, University of Rome I "La Sapienza"

Ulrich DROBNIG — Director, Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg; *Rapporteur on Chapter 7, Section 2 and Co-Rapporteur on Chapter 3*

E. Allan FARNSWORTH — Professor of Law, Columbia University in the City of New York School of Law; Member of the UNIDROIT Governing Council; *Chairman of the Editorial Committee*

Marcel FONTAINE — Professor of Law, Centre de droit des Obligations, Université Catholique de Louvain, Louvain-la-Neuve; *Rapporteur on Chapter 5 and on Chapter 6, Section 1 (excluding Articles 6.1.14 to 6.1.17)*

Michael P. FURMSTON — Professor of Law, University of Bristol; *Rapporteur on Chapter 7, Section 1 (excluding Articles 7.1.4 and 7.1.6)*

Alejandro GARRO — Lecturer at the Columbia University in the City of New York School of Law; former Attorney, Buenos Aires

Arthur S. HARTKAMP — Advocate-General at the Supreme Court of the Netherlands, The Hague; Professor of Law, Utrecht University; member of the UNIDROIT Governing Council

Hisakazu HIROSE — Professor of Law, University of Tokyo, Komaba

HUANG Danhan — Professor of Law, University of International Business and Economics; former Deputy Director of the Department of Treaties and Law at the Ministry of Foreign Economic Relations and Trade of the People's Republic of China, Beijing

Alexander S. KOMAROV — President of the Court of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry; Head of Law Department, All-Russian Academy of Foreign Trade, Moscow

Ole LANDO — Professor of Law, Institute of European Market Law, Copenhagen School of Economics and Business Administration; *Rapporteur on Chapter 7, Section 3, Co-Rapporteur on Chapter 3*

Dietrich MASKOW — Attorney, Berlin; Former Director, Institut für ausländisches Recht und Rechtsvergleichung der DDR; *Rapporteur on Articles 6.1.14 to 6.1.17 and on Chapter 6, Section 2*

Denis TALLON — Professor of Law; Former Director, Institut de droit comparé de Paris, Université de droit, d'économie et de sciences sociales (Paris 2); *Rapporteur on Article 7.1.6 and on Chapter 7, Section 4*

Secretary to the Working Group was Lena PETERS of the UNIDROIT Secretariat

Initially the Working Group also included C. Massimo Bianca (University of Rome I "La Sapienza"); Jerzy Rajski (University of Warsaw; Co-Rapporteur on the preliminary drafts of Chapters 5 and 6); Tony Wade (The Asser Institute at The Hague); Wang Zhenpu (Deputy Director of the Department of Treaties and Law at the Ministry of Foreign Economic Relations and Trade of the People's Republic of China).

OTHER PARTICIPANTS IN THE PROJECT

The following also participated in one capacity or another in the project: José M. Abascal Zamora (Panamerican University of Mexico City); Enrique Aimone Gibson (Catholic University of Valparaíso); Joseph 'Bayo Ajala (former Solicitor-General of the Federation of Nigeria and Director-General Federal Ministry of Justice); Bernard Audit (University of Paris II Panthéon-Assas); Luiz O. Baptista (President of the Bar Association of São Paolo); Jorge Barrera Graf (Universidad Nacional Autónoma de México); Henry T. Bennett (former Deputy Secretary of the Attorney-General's Department, Canberra); Eric E. Bergsten (Pace University; former Secretary to the United Nations Commission on International Trade Law); George Berlioz (Attorney in Paris); Piero Bernardini (Attorney in Rome; former Head of the Legal Office of the Ente Nazionale Idrocarburi (ENI)); Richard Buxbaum (University of California at Berkeley); Franz Bydlinski (University of Vienna); Amelia Boss (Temple University); Andrzej Calus (Warsaw School of Economics); John W. Carter (University of Sydney); James Richard Crawford (University of Cambridge); Ronald C.C. Cuming (University of Saskatchewan); Giorgio De Nova (University of Milan); Louis Del Duca (Dickinson School of Law); Arturo Diaz Bravo (Attorney in Mexico City); Aubrey L. Diamond (University of London); Alfred Duchek (Generalanwalt at the Austrian Federal Ministry of Justice); Fritz Enderlein (Attorney in Berlin; former Director of the Institut für ausländisches Recht und Rechtsvergleichung in Potsdam-Babelsberg); John Goldring (University of Wollongong); James Gordley (University of California at Berkeley); Anita Hill (University of Oklahoma); Fernando Hinestrosa (University of Bogotà); Kurt Grönfors (University of Gothenburg); Lars Hjerner (University of Stockholm); Richard Hyland (Rutgers University at Camden), *Rapporteur on Article 7.1.4*; Rafael Illescas Ortiz (University Carlos III of Madrid); Philippe Kahn (Director of the Centre de recherche sur le droit des marchés et des investissements internationaux, Dijon); Koh Kheng-Lian (University of Singapore); Lodvik Kopac (Attorney in Prague; former Deputy Director at the Federal Ministry of Foreign Trade of the CSSR); Ernest Krings (Advocate-General at the Supreme Court of Belgium); Pierre Lalive (University of Geneva); Hans Leser (University of Marburg); Berardino Libonati (University of Rome I

"La Sapienza"); Giovanni Longo (Secretary-General of the Supreme Court of Italy); Kéba Mbaye (former Vice-President of the International Court of Justice); Luis Moisset de Espanés (University of Còrdova); José C. Moreira Alves (former President of the Supreme Court of Brazil); Barry Nicholas (University of Oxford); Tinuade Oyekunle (Attorney in Lagos; former Director International and Comparative Law Division, Nigerian Federal Ministry of Justice); Grace Orleans (Acting Solicitor-General, Ghana); Alfred E. von Overbeck (University of Fribourg); Luiz G. Paes de Barros Leães (University of São Paolo); Gonzalo Parra Aranguren (University of Caracas); Michel Pelichet (Deputy Secretary-General of the Hague Conference on Private International Law); Pietro Perlingieri (University of Naples); Allan Philip (President of the Comité Maritime International); László Réczei (Professor of Law, University of Budapest; former Ambassador); Pietro Rescigno (University of Rome I "La Sapienza"); Julio C. Rivera (University of Buenos Aires); Walter Rolland (University of Halle; former Ministerialdirektor at the Federal Ministry of Justice); Eero Routamo (University of Helsinki); Arthur Rosett (University of California Los Angeles); Rodolfo Sacco (University of Turin); Claude Samson (University of Laval); Benito Sansò (University of Caracas); David Sassoon (Attorney in Tel Aviv); Peter Schlechtriem (University of Freiburg); Kurt Siehr (University of Zurich); José Luis Siqueiros (Professor of Law; Attorney in Mexico City); Sir Thomas Smith (University of Edinburgh); T. Bradbrooke Smith (former Assistant Deputy Attorney General at the Department of Justice, Ottawa); Kazuaki Sono (Hokkaido University of Sapporo; former Secretary, United Nations Commission on International Trade Law; former Legal Consultant of the World Bank); Jean-Georges Sauveplanne (University of Utrecht); Nagendra Singh (former President of the International Court of Justice); Sandro Schipani (University of Rome II "Tor Vergata"); Giuseppe Sperduti (University of Rome I "La Sapienza"); Sompong Sucharitkul (former Ambassador and former Thai member of the International Law Commission); Guido Tedeschi (Hebrew University, Jerusalem); Evelio Verdera y Tuells (University of Madrid "La Complutense"); Michael Will (University of Geneva); Hernany Veytia Palomino (Panamerican University of Mexico City); Jelena Vilus (University of Belgrade); Peter Winship (Southern Methodist University, Dallas).

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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 provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislators.

COMMENT

The Principles set forth general rules which are basically conceived for "international commercial contracts".

1. "International" contracts

The international character of a contract may be defined in a great variety of ways. The solutions adopted in both national and international legislation range from a reference to the place of business or habitual residence of the parties in different countries to the adoption of more general criteria such as the contract having "significant connections with more than one State", "involving a choice between the laws of different States", or "affecting the interests of international trade".

The Principles do not expressly lay down any of these criteria. The assumption, however, is that the concept of "international" contracts should be given the broadest possible interpretation, so as ultimately to exclude only those situations where no international element at allis involved, i.e. where all the relevant elements of the contract in question are connected with one country only.

2. "Commercial" contracts

The restriction to "commercial" contracts is in no way intended to take over the distinction traditionally made in some legal systems between "civil" and "commercial" parties and/or transactions, i.e. to make the application of the Principles dependent on whether the parties have the formal status of "merchants" (*commerçants*, *Kaufleute*) and/or the transaction is commercial in nature. The idea is rather that of excluding from the scope of the Principles so-called "consumer transactions" which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, i.e. a party who enters into the contract otherwise than in the course of its trade or profession.

The criteria adopted at both national and international level also vary with respect to the distinction between consumer and non-consumer contracts. The Principles do not provide any express definition, but the assumption is that the concept of "commercial" contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as investment and/or concession agreements, contracts for professional services, etc.

3. The Principles and domestic contracts between private persons

Notwithstanding the fact that the Principles are conceived for international commercial contracts, there is nothing to prevent private persons from agreeing to apply the Principles to a purely domestic contract. Any such agreement would however be subject to the mandatory rules of the domestic law governing the contract.