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The Future for Cross-Border Contracts: In combination with Arbitration Clauses, the UNIDROIT Principles of International Commercial Contracts provide a Practice-Proven Bridge between Common and Civil Law

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Released 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. This is particularly so if the choice is combined with an arbitration clause, because, 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). Thus, 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).

Even if the choice of the UNIDROIT Principles is combined with a choice of court clause and that court would require the application of the domestic law of a state, the choice of the UNIDROIT Principles is useful to bridging the gap between common and civil 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."* Most otherwise applicable domestic laws would thereby respect the choice of the UNIDROIT Principles as an expression of party autonomy.

Developed through approximately 35 years of international legal research and discussions (since the establishment of the first Working Group in 1983 at the inter-governmental organisation 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, has decided for 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 offering 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.

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

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 civil law clients and for common law clients; **(ii)** for my own law firm's client contracts when we are instructed by foreign clients or by an international organisation, or for contracts with international cooperation partners from other jurisdictions; **(iii)** 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 offers 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 interpreting a clause choosing the general principles of law, or as counsel arguing before arbitration tribunals and even before German national courts (in order to demonstrate that a certain interpretation of German domestic law would best fit the international spirit of a given contract).

As with many legal topics, the devil lies in the details. For example, in case of non-performance, the UNIDROIT Principles provide a number of pragmatic options to both the obligor and the obligee (as defined in Art. 1.11) to cope with the situations, *see* e.g. Art. 7.1.4 for the non-performing obligor or Arts. 7.2.1-7.2.5 for the obligee.

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. 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, 529 pages). For each rule, I have 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.

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