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Exclusive Application of UNIDROIT Principles to Cure the Parties' Disagreement on the Lex Contractus: a View from France

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The Paris Court of Appeal recently upheld an ICC award where the arbitral tribunal exclusively applied the UNIDROIT Principles of International Commercial Contracts ('the Principles') as *lex contractus* failing any agreement on the applicable law between the parties.

This recent development deserves further analysis as it confirms French courts' favourable attitude towards the application of the Principles in international arbitration and illustrates good arbitral practice where the contract is silent as to the applicable law.

Evolution of the UNIDROIT Principles' Scope of Application

In the 1994 initial version, the Principles limited their application to circumstances where (i) the parties had directly chosen them as *lex contractus* (Preamble, para. 2), (ii) the parties had indirectly chosen them in broadly referring to the *lex mercatoria* or general principles of law (para. 3), (iii) the applicable law did not provide for a relevant answer (para. 4), or (iv) it was necessary to interpret an international uniform instrument (para. 5).

A decade later, the Principles' ambitious drafters rewrote paragraph 4 of the Preamble and extended their application where the parties had not chosen any law to govern their contract, be it by silence or disagreement (Preamble of the 2004 Principles, para. 4). The Preamble remained unchanged in the 2010 and 2016 Principles.

Arbitral and French Judicial Practice on UNIDROIT Principles

Most of ICC cases referring to the Principles have used them as a means of interpreting and supplementing national law (*e.g.* ICC cases 15956, 16314, 19272) or international uniform instruments, such as the CISG (*e.g.* ICC cases 14633, 16369) and the 1964 Hague Convention (ICC case 8547).

Where the contracting parties have not agreed on the applicable law and the arbitration is Paris-

seated, ICC arbitral tribunals enjoy great freedom to determine the *lex contractus*, in accordance with Art. 1511 of the French Code of Civil Procedure ('CCP') and ICC Rule 21(1).

No established practice emerged as to how to justify the application of the Principles where the parties remained silent or disagreed. Arbitrators have used different criteria including *e.g.* the lack of satisfactory connecting factors (ICC cases 13012, 15089), the international nature of the contract (ICC case 9875), or the contract's reference to the INCOTERMS (ICC case 8502). In some instances, Tribunals have inferred a negative choice excluding national rules from the parties' rejection of each other's national law and their choice to resort to arbitration in order to apply the Principles. This is particularly the case with State contracts (*e.g.* for supply of goods or construction in ICC cases 7110, 7375, 10385), although not exclusively (ICC case 15089). The Principles have also been applied when the contract had been concluded under "*economic duress*" (ICC case 13009), and even *ex officio* without any justification (ICC case 12698).

Under French judicial practice, the Principles' applicability is narrowed as French courts rely on their own conflict-of-law rules. In cases unrelated to arbitration, courts have very rarely relied on the Principles as a means of interpretation of international instruments, be it suggested by a party (Reims Court of Appeal, 6 September 2012, no. 11/02698; Court of Cassation, 17 February 2015, no. 12-29.550) or not (Grenoble Court of Appeal, 24 January 1996, *Harpert Robinson*; 23 October 1996, *GAEC v Teso Ten Elsen*). In setting-aside proceedings, the Paris Court of Appeal held that an arbitral tribunal applying the Principles to supplement the national law chosen by the parties does not violate its mandate within the meaning of Art. 1520(3) of the CCP (5 March 1998, *Forasol v. CISTM*).

A Recent View: ICC Case 20731(2017)

In a recent award in ICC Case 20731(2017), the Principles were applied under the Preamble's most challenging hypothesis of application (para. 4) to cure the contract's silence and the parties' failure to agree on the applicable law during the proceedings.

In this case, a dispute arose between an Indian company -supplier- and a Romanian company -buyer- (together, 'the Parties') in relation to an agreement for the supply of stainless-steel tubes. Only providing for "*Arbitrage: cour d'arbitrage de Paris*", the very succinct arbitration agreement did not provide for any choice of law.

From the outset of the proceedings, the tribunal invited the Parties, in a first procedural order, to "*examine*" the law applicable to the dispute, including transnational rules of law. Each party claimed that its own domestic law was applicable to the contract but both agreed on the use of the so-called direct method. Relying on this agreement and its freedom to determine the applicable law, the tribunal decided in a third procedural order that the Principles would apply to the dispute.

Interestingly, the tribunal did not ground its choice on the Parties' negative choice excluding national rules but rather explicitly relied on (i) its empowerment to determine the "*most appropriate*" applicable law, (ii) the "*largely international*" nature of the contract as well as (iii) the parties' agreement for the determination of the applicable law in accordance with the *voie directe* method. This reasoning offers a convincing rationale as it safeguards the parties' autonomy and favors a neutral solution that consolidates the award's legitimacy.

A Valid Award Under Art. 1520(3) of the CCP

Under the scrutiny of the Paris Court of Appeal, the award was fully upheld on 25 February 2020 (n°17/18001).

The Court dismissed the supplier's claim that the arbitral tribunal, by applying the Principles, had "*ruled without complying with the mandate conferred upon it*" as per Art. 1520(3) of the CCP. It tersely considered that the Parties "*failed to agree on the application of Indian law to the dispute and the arbitrators did not rule in equity but in law, applying the 2010 UNIDROIT Principles*".

Under French law, absent any choice of law, the determination of the applicable law is entirely left to the arbitral tribunal, which must decide the dispute "*in accordance with the rules of law it considers appropriate*" (Art. 1511 of the CCP). Arbitrators are free to use the method of their choice and their determination and implementation of the *lex contractus* are not reviewed by the annulment judge in order to avoid re-examination of the merits of the dispute (Court of Cassation, 22 October 1991, no. 89-21.528; Paris Court of Appeal, 24 November 2005, *BVBA v. Cat et Co*).

Accordingly, the application of the Principles in accordance with paragraph 4 of the Preamble is not a ground to set-aside an award. A party dissatisfied with the *lex contractus* applied by the arbitral tribunal may only be successful before French courts if it demonstrates that the arbitrators did not apply the rules of law chosen by the parties. This certainly explains the supplier's claim that the tribunal should have applied Indian law, allegedly "*the law chosen by the parties*", in order to comply with its mandate. In such circumstances, it sufficed for the Court to note the Parties' uncontroversial disagreement on the applicable law in order to dismiss the supplier's request.

The Court thus limited its analysis to the determination of a disagreement between the Parties on the *lex contractus*. To this purpose, the Court relied its analysis on the procedural steps taken by the tribunal. Since it had already decided in a procedural order that the Principles were applicable to the dispute failing any agreement on the applicable law, the Court simply observed that the award was "*in compliance with this decision*". By requesting from the Parties specific submissions on the applicable law as soon as the proceedings started, the arbitral tribunal crystallised their disagreement on this issue and thus secured the validity of its award.

Conclusion: The UNIDROIT Principles, a Valid Set of "*rules of law*"

Although predictable, the upholding of the award on this ground is of interest in two respects:

(i) First, the Paris Court confirms that an arbitral tribunal may validly make exclusive application of the Principles in the event the contract is silent and the parties subsequently fail to reach an agreement on the applicable law.

Such a ruling complies with the wording of both ICC Rule 21(1) and Art. 1511 of the CCP, which broadly refer to "*the rules of law*" available to arbitrators, rather than merely "*law*", as in *e.g.* Art. 46 of the UK Arbitration Act, Art. 1051(2) of the German ZPO or Art. 28 the UNCITRAL Model Law. This textual difference has been interpreted as possibly denying arbitrators in these jurisdictions the right to apply non-national rules of law, as the word "*law*" would exclusively refer

to national legislative provisions. The Court's ruling is also fully consistent with its previous case-law, according to which an arbitral tribunal does not exceed its mandate by applying the *lex mercatoria* absent any choice-of-law agreement (Paris Court of Appeal, 13 July 1989, no. 88-18887, *Valenciana v. Primary Coal*).

This decision makes clear that the Principles, just like the *lex mercatoria*, qualify as "*rules of law*" within the meaning of Art. 1511 of the CCP, available to arbitrators under French law absent any choice-of-law agreement between the parties.

(ii) Second, in line with this finding, the Court also confirms that an arbitral tribunal applying the Principles does not rule in equity. Under French law, an award may be set aside when the arbitral tribunal ruled as *amiable compositeur* without any empowerment to do so, in breach of Art. 1512 of the CCP. The Court thus makes a clear distinction between the application of the Principles, which are a particular set of legal rules ("*a system of principles and rules of contract law which are common to existing national legal systems or best adapted to the special requirements of international commercial transactions*" as per Art. 4(a) of the Preamble's official commentary) and the concept of *amiable composition*, in full consistency with the Court of Cassation's previous ruling that an arbitral tribunal applying the *lex mercatoria* does not rule in equity (Court of Cassation, 22 October 1991, no. 89-21.528).

This shining example of application of the Principles under paragraph 4 of the Preamble contributes to their diffusion and constitutes a perfectly good arbitral practice where the contractual framework to an international commercial dispute is silent as to the applicable law, the only limit to the Principles' exclusive application being their non-exhaustive character.

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