

# Kluwer Arbitration Blog

## The Multiple Roles of the UNIDROIT Principles of International Commercial Contracts in Arbitration

Eckart Brödermann (Brödermann Jahn) · Wednesday, September 13th, 2023

The **International Institute for the Unification of Private Law** (“UNIDROIT”), itself set up in 1926 as an off-spin of the League of Nations, has compiled and developed since 1970 a soft law tool, i.e. the **UNIDROIT Principles of International Commercial Contracts** (“UNIDROIT Principles”). Three decades since their first release in 1994, the UNIDROIT Principles have played multiple roles in international arbitration. This article gives a high-level review of the principles, including the need for soft law tools (1.), the importance of such substantive soft law tools (2.), and the impressive line of arbitral awards that have referenced the UNIDROIT Principles (3.). In the author’s view, it behooves well to arbitration practitioners to be familiar with the UNIDROIT Principles, and several national committees of the ICC have indeed started doing so (4.).

### 1. Soft Law Tools Promote Efficiency in Arbitration

The arbitration sector has always been proud to be innovative, practice-driven, and sophisticated, servicing the needs of clients who want their disputes to be resolved confidentially, in a competent, time- and cost-efficient manner. Over the years, two approaches on how to most efficiently manage international commercial arbitration have evolved. One strives to help parties settle their differences at the right moment during the arbitration. This approach is known by many names such as Arb-Med, Med-Arb-Med or, even within an arbitration, as facilitating settlement during a first or second hearing. The other strategy involves only listening to the arguments and evidence to effectuate justice, similar to a court of law but in a confidential setting and with adequate speed, including in the form of emergency arbitration if so requested. According to this analysis, an efficient and fair process itself promotes settlement.

Regardless of the chosen style of arbitration, the arbitrators need (soft law) tools which can increase efficiency, reduce risks and costs and contribute to the rendering of justice. Obvious examples on the procedural level include the ‘relevant and material’ test for admitting discovery, if any, under both (i) the soft law in the **IBA Rules on Taking Evidence** or the similar **CIETAC Guidelines on Evidence** or (ii) under the Arbitration Rules of the International Center for Dispute Resolution of the American Arbitration Association. Another procedural device is the **IPBA Guidelines on Privilege and Attorney Secrecy**, released in Kobe, Japan, in November 2019. They strengthen the rights of in-house counsels (at least as compared to jurisprudence of the European Court of Justice) and generally level the playing field in a procedural area of law where

common and civil law regimes are otherwise clashing. The IBA is about to start a similar venture, as flagged at the 2022 IBA in Miami.

## 2. Arbitration Is More Than Mere Procedure

Arbitration exists to settle substantive disputes. Many national arbitration laws expect arbitrators to do justice (which, in the author's view, remains essential even if it is not part of the triangle of cost, quality and time, whereby the emphasis on any two of these goals will have an impact on the third goal). Thanks to the impressive success of the **1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards**, arbitration awards are often even more efficient than any national judgement due to their international enforceability.

To live up to this ambition, arbitrators need tools to resolve the substance of a contractual dispute in a way that is both efficient and perceived to be fair. This often presents itself in the international context in determining the choice of law to apply. This arises not just when the parties have failed to identify a choice of law principle. It is not uncommon for the choice of law clauses in a complex contract to be inconsistent or the chosen domestic law may be old and does not provide a solution for the international commercial contract question at hand. Sometimes, the parties may have agreed on "international commercial law" or the like without realizing how little that helps the arbitrators.

In such situations, it can be extremely helpful – and is arguably state of the art – to know about the substantive soft law tool offered by the UNIDROIT Principles. In 220 postulates, the UNIDROIT Principles cover all relevant general subjects of the life of a contract with the specificity and certainty as required from an English law perspective and in a way which passes the good faith and fair dealing test of civil law trained or US lawyers. The UNIDROIT Principles are sometimes called an "international UCC". It was the UCC which introduced, in a general way, the good faith and fair dealing requirement to cross-border US trade; thereby evidencing that common law can well live also with good faith and fair dealing as long as the requirements of certainty are met as best possible under the circumstances which differ.

The UNIDROIT Principles are compatible with all national laws. While they offer detailed international compromises on the issues they cover – i.e., a broader range than the specific sales-oriented focus of the **UN Convention on Contracts for the International Sale of Goods** (the "CISG") –, they accept the priority of the choice of the parties. Parties are free to adapt the rules (see e.g. [articles 1.1, 1.2, 1.5](#)). For example, during the BREXIT transition and during COVID, one of the authors has often used the hardship provisions of the UNIDROIT Principles as a starting point and then discussed with the parties the desired legal consequences of a fundamental disruption of the equilibrium of a contract, e.g., a commitment to negotiate or, as a last resort as *offered* by the UNIDROIT Principles, to resort to arbitration (under the UNIDROIT Principles, article 1.11, the word 'court' includes an arbitral tribunal). In addition to respecting party autonomy, the UNIDROIT Principles also require parties to observe applicable mandatory law, be it of national, supranational or international origin. Within these parameters, the UNIDROIT Principles offer default principles and rules which can become extremely helpful in the context of an international arbitration.

## 3. An Impressive Line of Arbitral Awards

In the last three decades, an **impressive line of arbitral awards** has applied the UNIDROIT Principles as general principles of law, either on a stand-alone basis or to supplement international instruments or domestic law. This latter approach is further supported by hundreds of national court decisions. As noted in a new chapter “Annex to Preamble – UNIDROIT Principles as General Principles of International Commercial Contract Law” of the recently published **second edition of the author’s article-by-article commentary of the UNIDROIT Principles**, “*this includes awards of different origin including ICC awards, UN related awards, ICSID awards and awards rendered in ad hoc arbitrations or under other arbitration regimes (e.g., Stockholm Chamber of Commerce, CIETAC).*” Out of the extremely long string of examples, it may suffice for the purpose of this contribution to highlight three of them.

1. **ICC**: Since 1995, international arbitral tribunals have used the UNIDROIT Principles as an expression of general principles of contract law. A strong example, sometimes also cited in later arbitrations, is ICC award No. 7110 in an English-Iranian dispute with detailed reasonings which are helpful even in 21<sup>st</sup> century current arbitrations. A series of further ICC and other awards have taken similar views.
2. **LCIA**: In a 1995 arbitration under the rules of the London Court of International Arbitration, the tribunal had to resolve a dispute under a contract between a US party and a Middle Eastern state. Under the contract, the tribunal had to apply “anglo-saxon principles of law”. Having no further clarification of this term, the arbitral tribunal referred to the UNIDROIT Principles.
3. **Ad hoc**: In a recent state related *ad hoc* arbitration *Nurhima Kiram Fornan et al. v Malaysia*, a Spanish arbitrator issued in 2020 an award under the UNIDROIT Principles after finding

*“that he should apply general principles of international law to the merits of the dispute and, specifically, the Principles of International Commercial Contracts endorsed by the International Institute for the Unification of Private Law, amended in 2016, to wit, the UNIDROIT Principles.”*

Most, if not all, arbitration laws and rules around the globe also contain a provision on the application of “rules of law.” This includes, *inter alia*, all arbitration laws which are based on article 28 of the **UNCITRAL Model Law**. Thus, there exists a basis to apply the UNIDROIT Principles as a soft law instrument. In modern cross-border practice, it is state of the art to combine an arbitration clause with a choice of the UNIDROIT Principles as either the sole applicable law or as the supplement. This method is currently being explored and discussed under the rubric Simplified Global Contracting. Absent such choice of the UNIDROIT Principles, they can be introduced by the parties or the arbitrators in multiple ways, as evidenced by the above examples, either directly or to supplement otherwise applicable international instruments (like the CISG) or national laws. It may be sensible to address these issues already at the first case management conference or in a procedural order.

#### 4. Concluding Remarks

The UNIDROIT Principles can thus play a role in international arbitration both if chosen by the parties before or during the arbitration and as a supplement to domestic or treaty law. They have become a standard which modern arbitrators ought to know. Under the coordination of **ICC**

**Germany**, several national arbitration committees of the ICC have started in May 2023 to jointly explore these issues and welcome any other ICC national committee to join.

*For further information, see Brödermann, [UNIDROIT Principles of International Commercial Contracts, An article-by-article commentary \(Wolters Kluwer\)](#), 2nd edition 2023, in particular the 'Introduction' and the chapter 'Annex to Preamble – UNIDROIT Principles as General Principles of International Commercial Contract Law'. See further Garro / Moreno Rodríguez, [Use of the UNIDROIT Principles to Interpret and Supplement Domestic Contract Law \(Springer\)](#), 2021.*

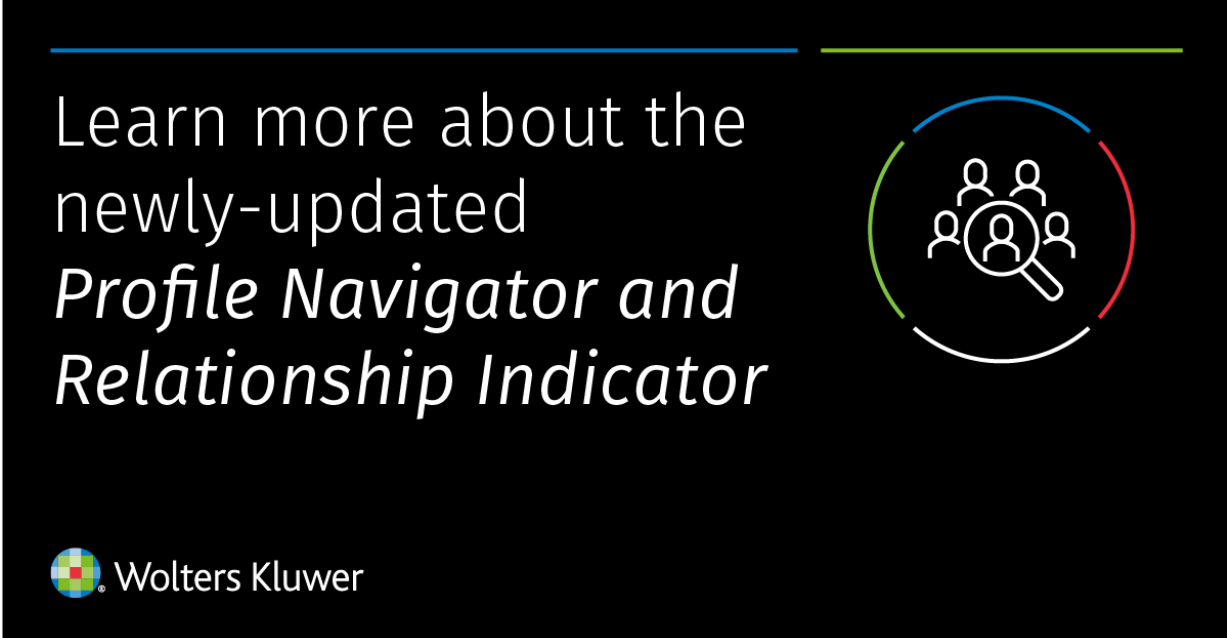
---

To make sure you do not miss out on regular updates from the *Kluwer Arbitration Blog*, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).


### **Profile Navigator and Relationship Indicator**

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



Learn more about the newly-updated *Profile Navigator and Relationship Indicator*

 Wolters Kluwer

This entry was posted on Wednesday, September 13th, 2023 at 8:48 am and is filed under [Soft Law Instruments](#), [UNIDROIT Principles of International Commercial Contracts](#), [Uniformity](#). You can follow any responses to this entry through the [Comments \(RSS\) feed](#). You can leave a response, or [trackback](#) from your own site.

