

Secretariat Note on Correction and Interpretation of Awards

ICC Arbitration News

Composition of the ICC International Court of Arbitration
ICC International Arbitration Commission Projects
International Court of Arbitration Web Site
Secretariat Appointments

1992 Practical Guide on Terms of Reference Revised

Arbitration, Telecommunications and Electronic Commerce

Unidroit Principles of International Commercial Contracts
in ICC Arbitration

Introduction and Preliminary Assessment
Extracts from ICC Awards referring to the Unidroit Principles
Bibliography

By Fabrizio
Marrella* &
Fabien Gélinas**

* *Doctor of laws (La Sorbonne, Bologna); Diploma, Haque Academy of International Law; Lecturer, University of Paris III-La Sorbonne Nouvelle.*

** *General Counsel, ICC International Court of Arbitration.*

The Unidroit Principles of International Commercial Contracts in ICC Arbitration

Introduction and Preliminary Assessment

The amount of scholarly attention given to the Unidroit Principles of International Commercial Contracts of 1994 is arguably second only to that given to *lex mercatoria*. Lord Mustill's wise words on the latter,¹ marking a debate of twenty-five years, could soon apply to the former, unless there is a downturn in the ratio of academic works to awards. Hence the idea of a survey of ICC Awards based on the Unidroit Principles, with particular attention to the unpublished ones. This should provide an opportunity of assessing the quality of the Principles as reflected in their adoption by the business community and arbitrators over a limited period of time (May 1994 - December 1998).

The Unidroit Principles were referred to in Awards made in at least twenty-three cases submitted to the ICC International Court of Arbitration up until the end of 1998. Excerpts from certain of these Awards have already been published in various reviews.² Excerpts from all hitherto unpublished Awards are published in this issue of the *ICC International Court of Arbitration Bulletin*.

This report introduces the various kinds of applications of the Unidroit Principles in ICC 'case law', together with references indicating where the Awards listed have been published. A detailed bibliography relating to the Unidroit Principles is appended.

The Unidroit Principles are intended to be applied in a great variety of contexts, as mentioned in the Preamble thereto.³ As far as arbitration is concerned, three categories of applications are particularly useful.

Firstly, they may be applied as the proper law of an international contract, by virtue of an express choice of the parties, or where such choice may be construed by the arbitrators as being implicit.

Secondly, notwithstanding a choice of municipal law by the parties, the Principles may be applied whenever it proves difficult to determine specific rules in the applicable national law. A broad interpretation has been made of this practice, in keeping with a modern comparative law approach. Accordingly, the Principles have been used to fill gaps in internal laws so as to give an international interpretation to national rules.⁴

Thirdly, the Principles may be used to interpret or supplement other international instruments of uniform law, notably the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG).

This categorization is reflected in actual practice, as shown in the following table summarizing applications of the Unidroit Principles in ICC arbitration.

¹ . . . the reported awards do not in all cases seem to sustain the wealth of commentary based upon them' (Lord Mustill, 'The New Law *Mercatoria*, The First Twenty-five Years', in *Liber Amicorum for The Rt. Hon. Lord Wilberforce*, Oxford, Clarendon Press, 1987, pp. 149-183, at p. 177).

² *The Uniform Law Review* reports periodically on the status of the publication of awards, academic writings and judicial decisions related to the Unidroit Principles.

³ 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.

⁴ M.J. Bonell, *An International Restatement of Contract Law* (2nd ed., 1997) at p. 340; E. Marrella, 'La nuova *Lex Mercatoria*', in *Trattato di diritto commerciale e di diritto pubblico dell'economia diretto da Francesco Galgano*, CEDAM, Padova, 2000 (forthcoming).

Applications of the Unidroit Principles

ICC Reference	Where Published	Type of Application
1 5835 Final Award Language: English Year: 1996	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 33-39.	As means of interpreting applicable domestic law.
2 7110 Partial Awards Language: English Years: 1995, 1998, 1999	References in works listed in bibliography (<i>infra</i> , pp. 110-119), e.g. Berger, Bonell, De Ly, Lalive. <i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 39-57. ⁵	As the proper law of the contract.
3 7375 Partial Award Language: English Year: 1996	<i>Mealey's International Arbitration Report</i> , vol. 11, no. 12 (December 1996), pp. A1-A69.	As the proper law of the contract.
4 8128 Final Award Language: German Year: 1995	<i>Journal du droit international</i> , 1996, pp. 1025-28 (French translation), commentary D. Hascher.	Application of Unidroit Principles and Principles of European Contract Law by renvoi from Art. 7(2) CISG.
5 8223 Final Award Language: French Year: 1998	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 58-60.	As means of interpreting applicable domestic law.
6 8240 Final Award Language: English Year: 1995	References in works listed in bibliography (<i>infra</i> , pp. 110-119), e.g. Berger, Bonell, Lalive. <i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 60-62.	As means of interpreting applicable domestic law.
7 8261 Final Award Language: English Year: 1996	<i>Uniform Law Review</i> , 1999, p. 171.	As the proper law of the contract.
8 8264 Final Award Language: French Year: 1997	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 62-65.	As means of interpreting applicable domestic law.
9 8331 Final Award Language: English Year: 1996	<i>Journal du droit international</i> , 1998, pp. 1041-44 (French translation), commentary Y.Derains. <i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 65-68.	As the proper law of the contract.

⁵ Caveat: *Uniform Law Review*, 1997, p. 812, referring incorrectly to Award "700", contains a summary of the choice-of-law issue dealt with in the first partial Award.

	ICC Reference	Where Published	Type of Application
10	8486 Final Award Language: German Year: 1996	References in works listed in bibliography (<i>infra</i> , pp. 110-119), e.g. Berger, Bonell, Laive. <i>Journal du droit international</i> , 1998, pp. 1047-49 (French translation), commentary Y. Derains. <i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 69-71.	As means of interpreting applicable domestic law.
11	8501 Final Award Language: English Year: 1996	See No. 12.	As the proper law of the contract.
12	8502 Final Award Language: English Year: 1996	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 72-74.	As the proper law of the contract.
13	8503 Final Award Language: English Year: 1996	See No. 12.	As the proper law of the contract.
14	8769 Final Award Language: English Year: 1996	<i>ICC International Court of Arbitration Bulletin</i> , this issue, p. 75.	As means of interpreting/ supplementing international uniform law instruments (CISG).
15	8817 Final Award Language: Spanish Year: 1997	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 75-78.	As means of interpreting/ supplementing international uniform law instruments (CISG).
16	8873 Final Award Language: French Year: 1997	<i>Journal du droit international</i> , 1998, pp. 1017-24, commentary D. Hascher. <i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 78-81.	Express choice of national legal system with exclusion of Unidroit Principles.
17	8874 Final Award Language: English Year: 1996	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 82-83.	As the proper law of the contract.
18	8908 Final Award Language: Italian Year: 1998	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 83-87.	As means of interpreting applicable domestic law.

	ICC Reference	Where Published	Type of Application
19	9029 Final Award Language: Italian Year: 1998	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 88-96.	Exclusion of Unidroit Principles.
20	9117 Final Award Language: English Year: 1998	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 96-101.	As a means of interpreting applicable domestic law.
21	9333 Final Award Language: French Year: 1998	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 102-104.	As means of interpreting applicable domestic law.
22	9419 Final Award Language: Italian Year: 1998	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 104-106.	Exclusion of Unidroit Principles.
23	9593 Final Award Language: English Year: 1998	<i>ICC International Court of Arbitration Bulletin</i> , this issue, pp. 107-109.	As means of interpreting applicable domestic law.

I. Unidroit Principles as the proper law of an international contract

The Unidroit Principles have been used as *lex contractus* in eight of the twenty-three ICC cases.

Insofar as they are the outcome of comparative law workshops held at Unidroit over a thirty-year period, the Principles are looked upon as representing a system of rules of contract law common to the world's main legal systems. This facilitates their application as the proper law of a contract.

A further point worth noting in relation to this category of cases is that the application of the Principles here stems from arbitration at law. Although the least controversial basis upon which the Principles could be applied would be express reference thereto coupled with an arbitration agreement allowing arbitrators to decide a dispute *ex aequo et bono* or as *amiables compositeurs*, this has not been the case in any of the ICC Awards. Most of the Awards fall within arbitration at law, where the proper ground has been construed by reference to the rules of law applicable by the arbitrators pursuant to the former Article 13, now Article 17, of the ICC Rules of Arbitration.

Award 7110 is of particular interest for the complexity of the issues discussed and the legal reasoning leading to the application of the Principles. Referring to Article 13(3) of the 1988 ICC Rules, the Arbitral Tribunal first examines the issue of the choice of law.

Finding no express choice, it assesses such absence of choice in the light of the specific case at issue and comes to the conclusion that all that can be assumed as far as the parties' intentions are concerned is that each party wished to exclude the application of the national law of the other party.

The Arbitral Tribunal infers an implied choice of law on the basis of the wording of the contracts, where reference is made to principles of 'natural justice'. This is interpreted by a majority of the Tribunal as meaning that the parties intended applying general legal rules and principles befitting the contracts but not deriving from a specific municipal legal system. The Tribunal goes on to find that the Unidroit Principles are a leading reflection of such general legal rules and principles applicable to contractual obligations, commanding a broad international consensus and relevant to the contracts at issue. It therefore holds that the contracts shall be governed by, and interpreted in accordance with, the Unidroit Principles with respect to all matters falling within the scope of such Principles, and, for any other matters, by such other general legal rules and principles as are applicable to international contractual obligations and over which there is a broad international consensus. This approach is deemed compatible with the laws of the United Kingdom and the Netherlands.

Award 7375 follows the same pattern. Here too the Tribunal finds that the absence of a choice of law provision in the contract should be interpreted as each party's implied intent to avoid the other party's national law, or any other third national law in general, given the Claimant's sovereign status and the absence of any significant connection with a third municipal law. The contract is therefore denationalized, and the general principles of law and the Unidroit Principles are applied insofar as they may be considered to reflect generally accepted principles and rules.

II. Unidroit Principles as a means of supplementing and interpreting applicable domestic law

The Unidroit Principles have been used as a means of supplementing or interpreting domestic law in nine of the twenty-three cases.

According to the comments accompanying the 'black letter rules' in the Unidroit publication of 1994, use of the Principles to interpret applicable internal law is justified whenever the relevant rule of the applicable law is difficult to establish and a solution can be found in the Principles.

In actual practice the effect of such use in certain instances has been to denationalize national law. In almost all the cases concerned, the Unidroit Principles were found to be a useful tool for testing domestic law against a transnational standard. This indeed points to the interesting and characteristic use of the Unidroit Principles for comparative purposes in this category of applications. Such use consists in comparing the results obtained from applying the proper law of the contract with those that would be obtained were the Arbitral Tribunal to apply the Unidroit Principles. By revealing convergent solutions, such use allows arbitrators deciding disputes of an international nature to affirm, if such be the case, that the solution reached by applying national law is consistent with generally accepted principles of international contracts. This could be called the 'international test' of domestic law, which has become highly relevant to arbitrators in view of the internationalization of contracts and adjudicative procedure.

The potential problem with such use of the Unidroit Principles, however, is that it may conceivably offer an excuse for a lack of reasoning in the choice of a domestic law. Arbitrators may thus be tempted to use more or less openly a *lex cognita* approach, that is, to apply the rules they know best, with the justification that the solution would have been the same had the Unidroit Principles been applied. The risk is that, instead of representing a step forward in the evolution of international business law, the Unidroit Principles might be used to mask what is in fact a poorly reasoned selection and a strict application of domestic law to an international transaction. This risk does not appear to have materialized.

III. Unidroit Principles as a means of supplementing and interpreting international conventions

The Unidroit Principles have been used as a means of supplementing the United Nations Convention on Contracts for the International Sale of Goods (CISG) in three of the twenty-three cases.

Even after being incorporated into the various national legal systems, uniform law does not lose its special nature as a body of law developed independently at international level. There is a need for an 'emergency' comparative tool like the Principles, capable of offering solutions where there are gaps in uniform law and where the various national legal systems are unable to provide satisfactory answers.

In all cases such use proves to be in keeping with the original purpose of the Unidroit Principles as stated in the Preamble thereto. In Award 8128, the Unidroit Principles were applied jointly with the Principles of European Contract Law, while in Award 8769 they were used to determine the proper rate of interest for quantifying damages.⁶

IV. Exclusion of the Unidroit Principles

In three cases, application of the Unidroit Principles was considered and excluded.

In Award 8873, the arbitrators were faced with an arbitration clause providing for the application of Spanish law as *lex contractus*, with an express exclusion of any other legal system. The arbitrators produced a thorough analysis of possibilities of applying the Principles, but found there to be no legal grounds for such application. They further concluded that the Unidroit rules on hardship did not represent international trade usages.

The solution contained in Award 9419 echoes the debate on the validity of the Unidroit Principles in terms which are familiar to *lex mercatoria* experts. The arbitrator sides with legal opinion which dismisses *lex mercatoria*. Accordingly, he considers that neither *lex mercatoria* nor the Unidroit Principles are applicable and opts for a traditional application of conflict of law rules in order to localize the contract in a domestic legal system.

In Award 9029, lastly, the arbitrators faced a choice of law clause in favour of Italian law as the applicable law. One of the parties asked for the Unidroit Principles or *lex mercatoria* to be applied on the basis of the new Article 834 of the Italian Code of Civil

⁶ Article 7:419 of the Unidroit Principles provides as follows:

(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.

(2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place, the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

Procedure in which reference is made to trade usages. The arbitrators rejected such a broad interpretation in favour of a strict interpretation of the applicable domestic law. Nonetheless, they then went on to show that, had they applied Unidroit Principles or *lex mercatoria*, substantially the same solution would have been reached as by applying the chosen domestic law.

Conclusion

The first four years of reference to the Unidroit Principles in ICC arbitral practice show them to have been widely accepted. Cases are evenly split between the use of the Principles as the proper law of a contract and their application as a means of supplementing or interpreting municipal law. They are used somewhat less as a means of filling gaps in international conventions, such use being thus far limited to the CISG.

The Principles may well represent a stepping stone to international commercial law in the coming millennium. They involve a new method of unifying international commercial law which may be referred to as the 'scientific' unification of law. This differs from traditional techniques of legal unification, such as 'hard law' unification by way of international conventions. The Principles are taken up by arbitrators in their legal reasoning not *ratione imperii*, but *imperto rationis*. In this respect, they differ also from the third kind of legal unification, namely the 'spontaneous' method, which results from the codification of usages, as in the Incoterms and the UCP 500, on the basis of constant observation of business practices. This requirement is hardly met by the Principles, which, as observed in Award 8873, are 'only' intended to be a world restatement of international contract law. As such, they offer general principles of contract law as a framework for solving any international dispute.

Extracts from ICC Awards

Referring to the

Unidroit Principles of International Commercial Contracts

Interim and Final Awards in Case 5835

Dates:

December 1989, June 1996

Language:

English

Claimant:

Kuwaiti company

Respondent:

Italian company

Place of arbitration:

Rome, Italy

Awards rendered in English or French, ICC's official languages, are printed in their original language. Those rendered in another language have been translated here into English. The extracts from each Award are preceded by a summary of the case in question.

In the extracts published here, details which are not indispensable for the intelligibility of the Award may have been expunged from the original text.

Where the names of parties appeared in the original texts, these have been replaced in English by the terms 'Claimant' and 'Respondent' in keeping with the terminology used in the current version of the ICC Rules of Arbitration, and in French by the expressions 'partie demanderesse' and 'partie défenderesse'.

In connection with a construction contract ('Main Contract') entered into by Respondent and X, Respondent subcontracted to Claimant the supply, installation and maintenance of electrical works (by virtue of an 'Agreement'). Claimant argues that Respondent wrongfully withheld sums due and refused to release performance bonds which had been issued, despite completion of the works and the fact that Respondent had itself received payment under the Main Contract. Claimant seeks damages and release of the performance bonds. Respondent argues that Claimant's arbitration request is inadmissible and that its claims are time-barred or estopped, and makes a counterclaim for damages. In an initial interim Award, the Arbitral Tribunal determines the law applicable to the merits of the dispute, rejects Respondent's defence regarding inadmissibility and partly approves/partially rejects its defence of time-bar and estoppel. In a second interim Award, the Arbitral Tribunal rejects Respondent's application for interim protection orders. In a third interim Award, the Arbitral Tribunal rejects certain of Claimant's claims, considers others to be without object and accepts others in principle, leaving the amount to be determined later. Respondent's counterclaim is admitted, due to Claimant's liability, the amount of the damages being left to be determined in the final Award.

In the majority final Award, the Arbitral Tribunal examines the various claims submitted by each party. In so doing, it applies Kuwaiti civil law, which it compares with the Unidroit Principles (Art. 7.1.6 (to determine whether conduct may be deemed to be 'gross mistake'), Art. 7.4.7 (reduction of damages according to parties' conduct), Art. 7.4.3 (3) (assessment of damages by court)). It awards Claimant payment for extra works and compensation for damage to electrical works. It grants Respondent compensation for office and site overheads, additional labour costs and for a certain proportion of its financial charges. The awards made to each party are set off against each other, leaving a balance in Respondent's favour. Arbitration costs are split between Claimant and Respondent in accordance with the success of their respective claims (90% borne by Claimant, 10% by Respondent).

Initial Interim Award

Law applicable to the merits:

“Claimant contends that the issues of the entire dispute should be governed by Kuwaiti law, either as the law explicitly chosen by the Parties (art. 38 of the Agreement, art. 80 of the Main Contract) or, in the alternative, as the proper law of the contract in application of all the relevant criteria of Kuwaiti and other rules of conflict of laws.

Respondent submits that the Parties made a “negative choice”, i.e. each Party intended to avoid the other Party’s (Kuwaiti or Italian) national law and the law of a third country was likewise excluded. Respondent explains this submission by referring mainly to Clause 38 of the Agreement where the Parties . . . chose to limit the applicability of Kuwaiti law to one Party (the Claimant) and to its performance of the Agreed Works in Kuwait . . . Respondent concludes from this interpretation that the Parties have chosen, as the law applicable to the merits, that part of the Kuwaiti and Italian legislation which was common to them at the time the Agreement was entered into.

The Arbitral Tribunal holds that the Parties have neither explicitly nor tacitly agreed on the substantive law.

The choice of Kuwaiti law in the Main Contract (clause 80) between X and Respondent may not be understood to apply to the contractual relationship between the Parties as well; if the Parties had intended to refer to the applicable law clause in the Main Contract, they would have done so in the same way as they did in the first version of clause 20 of the Agreement (“ . . . in accordance with the settlement of dispute clause in the Main Contract . . .”).

By Clause 38 of the Agreement, Claimant (not both Parties) undertook to abide “by the regulations and customs in Kuwait” and to “follow the rules of Kuwait and Kuwaiti law” . . . [The Parties] chose a wording the scope of which is obviously restricted to Claimant’s and its staff’s activities when performing the Agreement By choosing such a restricted wording in Clause 38, the Parties did obviously not deal with the much wider question as to which law shall be applicable to their Agreement in general (validity, interpretation; each Party’s rights and duties; statute of limitation, etc.)

In the absence of any clear indication by the Parties as to the applicable law, the Arbitral Tribunal shall apply the law designated as the proper law by the rule of conflict which it deems appropriate (Art. 13(3) of the ICC Rules).

The Arbitral Tribunal does not deem it necessary in this case to designate a national private international law in view of the fact that all rules of conflict which may be found in legislations which have some connection with this case, indicate to Kuwaiti law as the proper law of the Agreement:

The Agreement has been signed in Kuwait. It is both Parties’ understanding that the place where a contract has been concluded is an important or even the decisive criterion in their respective national (Kuwaiti and Italian) laws. It may be added that the place of arbitration is in Italy which is an additional justification to take into consideration the Italian private international law in accordance with opinions expressed formerly in the doctrine . . .

The most characteristic elements of performance of the contract . . . are obviously the services rendered, the work done and the goods supplied by the Kuwaiti party. The place of residence of the party which has to carry out the characteristic performance of the contract at issue is the decisive criterion in Swiss private international law, which law is

connected with this Arbitration in view of the fact that the proceedings are governed, *inter alia*, by the Swiss Intercantonal Concordat on Arbitration . . . This connection exists even if the applicability of Swiss law should be understood to be limited to procedural points only.

When looking directly to the substantive law with the closest connection, the Kuwaiti law must again be the conclusion. With the exception of the nationality and the residence of Respondent (Italy) the Agreement and its performance do not have any link whatsoever with other countries than Kuwait where the entire Agreement was discussed, concluded and performed. The price had also been agreed and paid in Kuwaiti currency.

However, in accordance with a well-established practice in international commercial arbitration, the arbitrators shall take account also of the principles generally applicable in international commerce . . . This proviso is particularly justified in view of the fact that the Parties refrained from choosing explicitly Kuwaiti law as the law on the merits . . .

The Arbitral Tribunal concludes that Kuwaiti law and, to the extent necessary, principles generally applicable in international commerce are applicable to the merits of the dispute.'

Final Award

Arbitration clause:

'Should any dispute occur that requires arbitration proceedings this will be referred to the International Chamber of Commerce in Paris and will be carried out in accordance with their regulations for such disputes.

All meetings connected with any arbitration proceedings will be held in Italy and will be under the auspices of Swiss law.

The conclusion of the above arbitration proceedings will be final and binding on both parties and under no circumstances will any dispute be taken to a legal court.'

Rules applicable to proceedings:

'Pursuant to Sect. 6.1 of the Terms of Reference, the proceedings were governed, subject to the mandatory provisions of the law at the place of arbitration, i.e. of Italian law, by the ICC Rules of Arbitration 1975 (ICC Rules) and, as to what is not covered by the ICC Rules, by the Swiss Intercantonal Concordat on Arbitration, dated March 27/August 27, 1969 ("Concordat"), and where both those rules are silent, by such further rules as the Arbitral Tribunal may determine from time to time. Some further rules were adopted within the Terms of Reference.

On January 1, 1989, the Swiss Federal Act on Private International Law (PIL Act) which contains a chapter (Arts. 176-194) on international arbitration, became effective. This new law became immediately applicable, starting January 1, 1989, [to] international arbitration proceedings pending on that date, even in cases where the underlying arbitration agreement referred explicitly to the Swiss Concordat (which remains applicable to domestic arbitration) ([cf.] Art. 176 PIL Act and Swiss Federal Court in BGE 115 II 97, 102, 288 and 390). The Arbitral Tribunal ruled (Sect. 5.2 of the Third Interim Award) that the Parties' reference to Swiss law encompasses the provisions regarding the timely application of amendments to the law and that consequently the Parties' reference to the Swiss Concordat has to be construed, as from January 1, 1989, as a reference to chapter 12 of the PIL Act.'

With respect to Respondent's counterclaim for damages to cover harm resulting from delayed completion of the works:

Claimant pointed out . . . that the damages to be awarded to Respondent for Claimant's delay have already been assessed (in the sense of Article 300 Sect. 1 of the Kuwaiti Civil Law no. 67) by the Parties in Clause 34, Part II of the Subcontract which provides that: "In case the Second Party [Claimant] fails to execute and complete the Agreed Works during the agreed period, he undertakes to pay to the First Party [Respondent] a penalty equal to . . . In Claimant's submission, Respondent should not be awarded damages in excess of said amount for the reason that Claimant did not commit "fraud or grave mistake". In this context, Claimant refers to Article 304 of the Civil Law no. 67 which provides that: "Where the damage exceeds the amount of the agreed upon damages, the creditor shall not be entitled to claim more than that amount unless he proves that the debtor had committed fraud or grave mistake." . . .

Even if Art. 304 of the Civil Law were applicable, Respondent's claim for damages would not be confined to . . . since – contrary to Claimant's submission – Respondent alleged and established that Claimant's delay is the result of Claimant's gross mistakes . . .

Respondent made the relevant allegations both explicitly and implicitly:

- a) Respondent explicitly alleged that Claimant's delays were due to its "flagrant disregard to his obligation" . . ., "gross error", "fundamental misunderstanding of their contractual obligations", "extensive delays", "potential disaster", "over 600 delayed electrical activities", "duty was breached grossly and continuously" . . .
- b) Moreover, Respondent's allegation that Claimant delayed the completion of the Agreed Works by 44 months (as compared to the contractual period of 24 months) and that Claimant's delay is attributable to Claimant's mistakes, represents the implied allegation that Claimant's mistakes were gross mistakes.

The Tribunal holds that Respondent's allegations as to Claimant's gross mistakes are supported by the evidence:

- a) A contractor's performance amounts to "gross mistake" if his conduct grossly violates a fundamental rule of the art or if he repeatedly or continuously fails to perform in a timely manner important parts of his obligations. The intent to harm the contractual party does not constitute a prerequisite of a *culpa grave* claim for contractual negligence. A party's conduct is grossly negligent if it shows an elementary failure of attention for the consequences of one's action and if it leads to a performance substantially different from what the other party reasonably expected (cf. Final Award in ICC case no. 6320 of 1992, *ICCA Yearbook* XX-1995, pp. 62ss, p. 87; Unidroit Principles, Article 7.1.6). "Gross mistake" under Kuwaiti law is not different from this generally accepted definition. If it were, Claimant would have submitted relevant authority in response to Respondent's allegations . . . Had a narrower definition of "gross mistake" been established under Kuwaiti law, the Tribunal would have had to follow "principles generally applicable in international commerce" (Interim Award I), i.e. the definition recorded hereinabove.
- b) It results from the Third Interim Award . . . that Claimant's failures were extremely numerous and related to such important activities as the preparation of shop drawings and as-built drawings, the site supervision and co-ordination of the works and the dealing with the earthing problem.
- c) The Neutral Expert . . . expressed his surprise at the fact that the delay reached the extremely disproportionate period of 44 months . . .

- d) Subject to differentiations which shall have to be made when examining the various items of Respondent's Counterclaim, in a global approach dealing with Claimant's preliminary defence, the Arbitral Tribunal concludes that Claimant's failures in the timely performance of the Agreement amounts to "grave mistake" in the sense of Article 304 of the Civil Law no. 67.

Accordingly, Claimant's defence relating to the penalty clause must be rejected.

With respect to the attribution of responsibility for delay:

In its Third Interim Award, the Arbitral Tribunal had decided that Claimant is responsible for the delay of the Project and shall be liable, in principle, for the damages suffered by Respondent. The Arbitral Tribunal reserved the determination of the extent of Claimant's liability and the amount of damages resulting therefrom to the present Final Award.

In this context . . . the Expert was asked, *inter alia*, to determine the extent of the delay for which Claimant is responsible, taking into account all relevant circumstances, in particular Claimant's failures referred to in the Third Interim Award as well as other subcontractors' delays and Respondent's own conduct. The Expert's Terms of Reference specified on the one hand that the findings of the Arbitral Tribunal as expressed in its Third Interim Award were binding on the Expert and on the other hand that he shall draw his own conclusions within the limits of such findings.

The Expert proceeded to determine the allocation of the responsibility for delay on the basis of two different global approaches . . . His choice to follow global approaches is motivated by the lack of adequate evidence supporting a detailed allocation of delay to one or the other Party . . .

In a first global approach, the Expert listed the main causes of the delay (those suggested by the Parties, and those found by the Expert) and allocated certain percentages of weight to them in a kind of "critical path" . . .

In a second global approach, the Expert based his assessment of the development of the works mainly on the monthly payment certificates. He found that twelve months of the total 44 months was Respondent's own responsibility whereas Claimant bears the responsibility for a total of 32 months (72%) . . .

The wording of Article 300 Sect. 1 of the Kuwaiti Civil Law no. 67 ("Compensation shall be estimated by the court . . .") indicates that apart from the debtor's failure other factors which may have contributed to the extent of the damages, will have to be taken into consideration when the quantity of damage claims is to be assessed. This is particularly true with respect to the creditor's conduct as a contributing factor. This generally accepted principle may be summarized as follows: "Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties" (Unidroit Principles of International Commercial Contracts, Rome 1994, Article 7.4.7). Applying these principles to the instant case and considering the conduct of each of the Parties as described in the Tribunal's Interim Award III and in the Expert's Report, the Tribunal concludes that the amount of damages to be awarded to Respondent shall normally be reduced by one quarter.

With respect to Respondent's additional labour costs:

Respondent submits that it suffered additional labour costs . . . as a result of the disruptive effects of Claimant's delay and of the additional years of duration. . . .

Claimant contends that Respondent did not sustain any damage and that its Counterclaim is in any event inflated . . .

The Expert rejected Respondent's calculation for various reasons, among others for the reason that Claimant should not be burdened with the consequences of an over- or underestimate of the labour costs laid down in the Main Contract . . . The Expert found that the factual allegations submitted by Respondent did not allow him to satisfactorily assess the loss suffered by Respondent in its manpower productivity . . .

After the Parties and the Tribunal had discussed this "non-liquid"-result with the Expert . . . the Expert was asked to deliver an amendment to his report "in which he shall evaluate Respondent's claim for manpower disruption . . . in the Amendment, the Expert is not bound to necessarily state a precisely reasoned calculation of his assessment . . . but may make an estimate based on his professional experience relating to normal consequences of manpower disruption crises" . . .

The Tribunal holds that a contractor's manpower disruption caused by a subcontractor's delay falls into the category of damages which may normally not be established, in a claim for damages, in an arithmetically satisfactory manner. Manpower disruption belongs to the category of damages not ascertainable by calculation, which must be determined by the Tribunal, taking into account the ordinary chain of events. This approach is in accordance with Art. 300 Sect. 1 of the Kuwaiti Civil Law no. 67 of 1980, which provides that compensation, shall be "estimated" by the Court. It is also in accordance with generally accepted principles in international commerce (cf. e.g. Unidroit Principles of International Commercial Contracts, Rome 1994, Article 7.4.3 Subs. 3: "Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.").

The Tribunal holds that the importance of the delay (44 months) as compared with the contractual completion time (Interim Award III) sufficiently establishes that Respondent suffered additional labour costs as a result of such delay. As to the quantification of the additional labour costs, the Tribunal is particularly convinced by the Expert's method D . . .

Accordingly, the Tribunal decides to award Respondent damages in the amount of . . . for its manpower disruption costs.

With respect to Respondent's financial charges and interest:

. . . Respondent claims interest on payments made to its Kuwaiti site, interest on its further claims and, originally, compensation for its rate of exchange losses . . .

It is undisputed that Respondent had borrowed funds during the entire period for which it is claiming interest, that its interest rate averaged 13% per annum and that it had claimed damages and interest from Claimant as early as . . .

Claimant addressed the present issue only in its Post Hearing Brief . . . and only with respect to the restrictions applicable, under Kuwaiti law, on interest rates. It indicated that the interest rate may not exceed 7% according to Art. 110 and 111 of the Kuwaiti Commercial Code (law no. 68/1980).

Respondent replied . . . as follows: "Whether this may apply to interest due on in [sic] Kuwait, this cannot apply to interests paid in . . . under the local official banking rate (which averages 13%). In any event Claimant has provided no evidence that such a rate would exceed any rates announced by the Kuwaiti Central Bank."

The Tribunal holds that Kuwaiti law restricts the rate of interest only with respect to contractual rates and to the interest rate applicable when the payment of money the amount of which is known to the debtor, is delayed (cf. Art. 110 and 111 of the Kuwaiti Commercial Code no. 69), but not however to interest aimed at compensating the aggrieved party for the fact that the damages awarded shall only be paid some time after the damage occurred and that the creditor may have incurred financial charges in order to survive the period during which he was awaiting compensation of his damages . . . Kuwaiti law provides that the compensation shall include "the damage suffered by the creditor . . . provided that this is a natural result of non-fulfilment of the obligation or delay thereof" (Art. 300 Sect. 2 of the Civil Law no. 67/1980). The Tribunal holds that the said financial charges may qualify, according to the circumstances of the case, as a "natural result" of a debtor's delay in paying damages owed to his contractual partner. Particularly, if the basis of the debtor's liability is "grave mistake" . . . the normally applicable limits on interest rates are no longer applicable (Art. 300 Sect. 3 and Art. 304 Civil Law *per analogiam*).

This understanding of Kuwaiti law is in accordance with internationally accepted principles which otherwise would become applicable pursuant to the Tribunal's First Interim Award. Reference may again be made to the Unidroit Principles of 1994, which provide in Art. 7.4.9 (3) that the aggrieved party is entitled to additional damages if the non-payment caused it a greater harm than covered by the normally applicable interest rate.'

Partial Awards in Case 7110

Dates: June 1995, April 1998, February 1999
Original: English
Claimant: State party (State X)
Respondent: Private contractor (United Kingdom)
Place of arbitration: The Hague, Netherlands

The parties entered into a number of contracts covering the sale, supply, modification, maintenance and operation of equipment, and support services relating thereto. The contracts were terminated following events in State X and disputes arose in connection with the amounts claimed by the parties from each other. An initial partial Award was issued with respect to the governing law. A majority of the Arbitral Tribunal found that the contracts should be governed by and interpreted in accordance with the Unidroit Principles. There followed a second partial Award dealing with substantive issues, in which reference is made to Articles 1.7, 2.18, 2.4, 2.14, 7.1.3, 7.4.8 and Chapter 4 of the Unidroit Principles, and subsequently a third partial Award, in which further decisions were delivered with respect to certain of these issues.

With respect to the applicable law (first partial Award):

'This partial award, made in The Hague, The Netherlands, with the affirmative vote of the majority of the Tribunal's members . . . decides in a final way on the law applicable to all the contracts subject to these arbitral proceedings.

The Contracts respectively provide for the resolution of disputes which may arise thereout, as follows:

Contract (i): ICC arbitration in The Hague, The Netherlands . . .
 Contract (ii): amicable resolution by the parties . . .
 Contract (iii): disputes to be finally settled "according to natural justice" by ICC arbitration in Paris, France . . .
 Contract (iv): disputes to be finally settled "according to natural justice" by ICC arbitration in Paris, France . . .
 Contract (v): disputes to be finally settled "according to natural justice" by ICC arbitration in Paris, France . . .
 Contract (vi): disputes not amicably resolved to be finally settled "according to the laws of natural justice" by arbitration . . . no site indicated for the arbitration;
 Contract (vii): disputes not amicably resolved shall be settled "in accordance with natural justice" by arbitration . . . no site indicated for the arbitration;
 Contract (viii): disputes not amicably resolved shall be finally settled by arbitration in [State X] . . .
 Contract (ix): disputes not amicably resolved shall be settled by arbitration in [State X] as provided in Clause 16 and [Annexe] V, articles 4 and 15 of the latter respectively indicating that (a) when the rules "governing the proceedings" contained in the said [Annexe] are "silent", proceedings shall be governed by . . . any rules which the parties (or, failing them, the Arbitrator(s)) may settle in accordance with the rules of natural justice"; and (b) "in all matters not expressly provided" in the rules set forth in the said [Annexe] "the Arbitrator(s) shall act in the spirit of these Rules (the ones provided in the [Annexe]) and natural justice and shall make every effort to make sure that the award is enforceable at law".

The parties have agreed to submit all disputes arising from the Contracts to arbitration under the ICC Arbitration Rules (the "ICC Rules") before the same arbitral tribunal sitting at The Hague, The Netherlands. To that extent, then, the clauses in the Contracts have been superseded.

[Claimant's position with respect to the applicable law:]

. . . Claimant first adduced in its request for arbitration . . . that (i) there was no "explicit" choice of law in the Contracts; and (ii) the Contracts having been signed in [State X], the laws of [State X] should apply since the rule *lex loci contractus* is "a long-standing rule in international sales and purchases".

. . . Claimant further clarified its position by pointing out, with respect to Contract (v), that (1) the parties did not "expressly" agree on the applicable law; and (2) references to "natural justice" are too vague since there is no agreement among international jurists on its content and it does not offer to the arbitral tribunal sufficiently precise rules to decide the disputes being the subject-matter of this arbitration and would in any case express the parties' will as to the "approach" to be observed by the arbitral tribunal in the course of the proceedings. Claimant insists that the parties wished to have the dispute resolved according to a "law", which law should be [the law of State X] since the Contracts were signed in [State X]; [State X] was the place of contractual performance and this Contract was a part of a large project [for purposes relating purely to State X]. In this submission, Claimant extended the above reasoning only to Contracts (iii), (iv), (v), (vi) and (ix).

[Subsequently, taking all the Contracts as a whole,] Claimant contends that the Contracts should be first scrutinized for determining, according to Art. 13(3) of the ICC Rules, if there is any indication in the Contracts permitting to establish the parties' will as to the substantive law governing them . . . Claimant isolates four common features to all Contracts which, in Claimant's views, should lead to conclude that the Contracts are governed by general principles of law . . . Against the backdrop of such four considerations, Claimant contends that the following circumstances reflect or indicate the

implied intention of the parties to subject the Contracts to general principles of law as proper law: (a) the inter-governmental elements of the transactions between the parties and the fact that the Contracts “are accompanied by the exercise of exclusive powers of the state as sovereign and holder of the public power” . . . (b) the expression “natural justice”, found in many of the Contracts would not have the narrow sense ascribed to it under English law referring to certain standards of procedural fairness which would be redundant because such standards are already reflected in the ICC Rules; and (c) the negotiation history of the Contracts would prove that it was the intention of both parties not to accept the law of the country of the other as governing law and that the parties did not select the application to the Contracts of the laws of a third state.

. . . In a nutshell, Claimant’s position is that in absence of an explicit or implied choice of law by the parties, the rule of conflict the most appropriate for determining the applicable law pursuant to Art. 13(3) of the ICC Rules would be either (i) general principles of private international law or (ii) [the] private international law [of State X]. In the first case, general private international law principles would lead to the application of general principles of law as proper law of at least 7 of the Contracts, whereas in the second case the Contracts would be governed by [the law of State X]. Claimant argues that the Contracts are “state contracts” or “state-to-state” contracts of international character, and that according to the practice of international arbitral tribunals, general principles of law are the proper law of such contracts. It also refers to different authorities favouring the application of general principles of law or *lex mercatoria* to state contracts and international contracts. Claimant rejects Respondent’s arguments that the applicable law to the Contracts should be determined on the basis of the characteristic performance rule, since it would not be a part of the general principles of private international law. Claimant also rejects the application of the European Convention on the Law applicable to International Obligations of 1980, since [State X] is not a party and [the Convention] was ratified by and became effective for the U.K. after the Contracts were made.

Subsidiarily, Claimant contends that the Contracts would be governed by [the law of State X] because [State X] is a party to all of them, all Contracts were made in [State X], and some of them were to be performed in [State X]. Claimant submits that since the Contracts were made in [State X], Article 968 of the Civil Code of [State X], providing that contracts are subject to the laws of the place where made, would govern. Claimant contends that such solution would not be contrary to English conflict-of-laws rules, which would give preference to the presumed will of the parties, nor [to] the closest connection test existing in England before its ratification of the European Convention or as contemplated in the latter’s Art. 4, all of which would lead to the application of [the law of State X]. Claimant also argues that Dutch private international law does not apply since The Netherlands was not envisaged as arbitration site when the Contracts were made and the application of Dutch conflict-of-laws rules would be artificial. . . .

[Respondent’s position with respect to the applicable law:]

. . . Respondent contends instead that “the proper law of the Contracts is English law or, alternatively, that the tribunal should apply general principles of law”.

. . . Respondent contends that according to Art. 13(3) of the ICC Rules . . . the arbitral tribunal should resort to the *voie indirecte*, that is, selecting the conflict-of-laws rule it would deem appropriate, for determining the substantive law(s) applicable to the Contracts. In that connection, Respondent’s opinion is that no national rule of conflict (particularly [of State X] or British) should apply exclusively or in tandem, either because the principle and semblance of impartiality would be compromised or because the cumulative application of English and [State X’s] conflict-of-laws would lead to conflicting results with respect to at least six of the Contracts.

Respondent further argues that if the choice is to be made between the English and [State X's] conflict-of-laws rule, the first would be preferable because (1) the place of formation of the contract (the connecting factor determining the proper law according to Art. 968 of the Civil Code [of State X]) is arbitrary and responds only to the convenience of the parties; (2) the English rule (as it was when the Contracts were made) is more consistent with comparative private international law, including modern international conventions; and (3) [State X's] conflict-of-laws rule is widely criticized and has never been applied by [State X's] Courts. Respondent is of the view that the conflict-of-laws rules of the site of the arbitration (The Netherlands), though consistent with general principles of private international law, should not apply in view of conflicting authorities on the application by arbitral tribunals of the private international law of the country where they sit and the fact that The Hague was chosen as the site of the arbitration after the Contracts were made and was not selected by the parties or originally contemplated by them when contracting.

If choice is not to be made between the English and [State X's] conflict-of-laws rules, Respondent contends that general principles of private international law regarding contracts for the international supply of goods or services should apply. In Respondent's view, such principles would be (1) the Contracts are governed by the law of the jurisdiction with which each Contract separately considered is most closely connected; and (2) the proper law is that of the place of habitual residence or central administration of the party whose performance is characteristic to each Contract. By applying any or both of such principles Respondent contends that except for Contract (ix) (which could be governed by [the law of State X]) all Contracts are governed by English law. Respondent also argues that the result would be the same if either Dutch or English conflict-of-laws rules were found applicable.

... Respondent argues that the expressions "natural justice", "the laws of natural justice" and the "rules of natural justice" have all the same meaning and just refer to principles of procedural fairness and do not have any bearing on the law applicable to the substance of the Contracts. In Respondent's view, the only substantive meaning which may be attributed to such expressions - which are not present, Respondent emphasizes, in Contracts (i), (ii) and (viii) - is that they refer to principles of equity or morality, which may not be reconciled with the fact that the Tribunal is called to decide by application of the law and not in equity. In any case, Respondent indicates that such principles are deprived of any specific identity or are not sufficiently detailed to permit the resolution of a commercial dispute, circumstances which would negatively affect the enforceability of an award in these proceedings at least in England. Respondent indicates its agreement with Claimant's position, as perceived by Respondent, that general principles of conflict-of-laws would be the appropriate conflict-of-laws rule for determining the law applicable to the Contracts and that according to such general principles the closest connection test would be such general conflicts rule, but disagrees that such test may lead to the application of general principles of law as the substantive law, or that the characteristic performance test is not a part of generally accepted principles of conflict-of-laws. After contesting other aspects of Claimant's arguments, Respondent concludes that it would not be compatible with the expectations of the parties at the moment of contracting to see "such ill-defined principles" become the substantive law applicable to the Contracts. Respondent makes a special point in denying that the place of arbitration (as originally set forth in some of the Contracts before the parties decided to have consolidated arbitration in The Hague under the ICC Arbitration Rules) is a relevant element for determining the jurisdiction showing the closest connection with a contractual transaction, or that arbitration clauses in Contracts (viii) and (ix) render [the law of State X] applicable. Respondent reiterates its position that all Contracts are governed by English law except Contract (ix), which probably would be governed by [the law of State X].

[Arbitral Tribunal's consideration of an express or implied choice of law by the parties.]

... In the view of this Tribunal, Art. 13(3) of the ICC Arbitration Rules should be interpreted as contemplating both the express and the implied or presumed choice by the parties of the law governing the Contracts. Such interpretation is consistent with the interpretation of similar texts created on the basis of a broad international consensus ...

In consequence, in absence of express choice-of-law stipulations in the Contracts, this Tribunal shall proceed to determine whether the parties have made an implicit choice of the law or laws governing the Contracts. To that end, the Tribunal will consider the Contracts not in isolation, but as interrelated expressions of a long-term relationship between the parties spanning more than ten years. Such an approach is also consistent with (1) express statements of the parties in that regard ... (2) statements of the parties in that sense in the course of the hearing which took place in The Hague, The Netherlands, on ... (3) the unified approach adopted by the parties to deal with the resolution of disputes arising out of the Contracts; and (4) a certain degree of functional interrelatedness of the Contracts ...

It is also the view of this Tribunal that indications of the parties as to the applicable law referred to in Art. 13(3) of the ICC Rules should be construed ... on the basis of an objective test revealing what would have been the reasonable intention and expectations of the parties regarding the applicable law as evidenced by all the circumstances surrounding the negotiation of the Contracts, as well as by contractual terms likely to evidence the applicable law, i.e. a "contextual" approach ...

In that respect, the question of the applicable law was clearly an important issue in the course of the negotiation of the Contracts, which deserved careful consideration by each party in its efforts to advance the application of its respective national law. Matters closely interrelated, such as the neutrality of the applicable law and of the dispute resolution mechanism, were at the foreground of the parties' concerns and discussions and it is obvious that the way in which they were finally taken care of was at the centre of the carefully negotiated compromises inducing the parties to enter into the Contracts.

Central to the considerations of each party in the course of contractual negotiations was its clear resolve not to accept the application of its counterpart's national law to the Contracts ...

Six out of nine of the Contracts contain the expressions "natural justice", "rules of natural justice" or "laws of natural justice" in association with the resolution of disputes through commercial arbitration. In five of those Contracts ... the syntactic insertion of the expression "natural justice" is redolent of the drafting a practitioner would use to refer to the law governing the substance of the relevant transaction ... [T]he incorporation or exclusion of such terms was brought to bear in connection with discussions between the parties regarding the substantive law which would govern the Contracts and the dispute resolution process regarding controversies which might arise under the Contracts.

It is clear then that the presence of the expressions "natural justice", "laws of natural justice" and "rules of natural justice", which were undoubtedly the subject of careful consideration and negotiation, may not be ignored for assessing if and to which extent the parties have indicated the laws or principles governing the Contracts. However, to elucidate their meaning it would be inappropriate to have recourse, in bootstrap fashion, exclusively to the legal notions of one of the national juristic systems the application of which is at stake. The fact that the Contracts are drafted in English is not decisive, since the English language has become an international tool for expressing the terms and conditions of sophisticated transactions, even between parties none of which is a national

of an English-speaking country or entering into transactions wholly unconnected with any such country. Resorting to English when it comes to exteriorizing in black and white the substance of a deal does not necessarily imply espousing the technical meaning that a specific common law jurisdiction would ascribe to the terms utilized, particularly when English is also the language spoken in other common law jurisdictions to which the expression "natural justice" is unknown or is deprived of the meaning ascribed to it under English law (for instance, such expression, and also expressions such as "rules of natural justice" or "laws of natural justice", are deprived of any technical meaning in the USA, are not currently used in such jurisdiction and may not be even found in Black's Law Dictionary (5th edition, 1979)). Such expressions are then ambiguous, particularly when found in international contracts not expressly submitted to the laws of England, and more specifically with respect to the non-English party not originating the contractual drafts being negotiated and whose legal system is not a common law one.

The determination of the procedural or substantive connotations of the expression "natural justice" and the like shall have an impact on the law or laws applicable to the Contracts and is a part of the choice-of-law process having as its purpose the determination of such law or laws. On the other hand, five of the six Contracts in which "natural justice" or similar expressions are found were from their inception submitted by the parties to international commercial arbitration. The sixth Contract (Contract (ix)) was submitted ... to a type of highly delocalized and self-contained form of commercial arbitration comparable to international commercial arbitration, a trait further confirmed by the later conduct of the parties as they submitted Contract (ix) together with the others to a unified form of international commercial arbitration. Therefore, it is appropriate, on the basis of the terms of the Contracts and all surrounding circumstances, to establish the meaning and scope of "natural justice" and similar expressions from the autonomous perspective of both private international law and international commercial arbitration.

It is a general principle of interpretation widely accepted by national legal systems and by the practice of international arbitral tribunals, including ICC arbitral tribunals, that in case of doubt or ambiguity, contractual provisions, terms or clauses should be interpreted against the drafting party (*contra proferentem*) ... On the other hand, the meaning to be ascribed to expressions contained in international transactions *ab initio* submitted to international commercial arbitration should be consistent with the nature and expected role of the dispute-resolution method chosen by the parties and the concomitant impact of such choice not only on procedural aspects but also on the law governing the merits. Finally, it is also a generally accepted practice by international arbitral tribunals, predicated upon elementary notions of coherence and rationality, to assume that the same words or expressions shall have the same meaning throughout the documents containing them ...

This Tribunal finds that, without unduly extending the scope of such principle, it also applies to situations such as the one faced by this Tribunal, in which the same or similar expressions are repeated in different contracts between the same parties showing some noticeable functional interrelation, which, in addition, are to be considered as a whole for the purpose of determining the applicable law to the merits.

Common to such expressions found in six out of nine Contracts ... is, precisely, the word "justice", which undoubtedly is the predominant element to be taken into account for assessing their meaning and scope. In international commercial arbitration, though it is imaginable that the term "justice" may be utilized only in the sense of procedural justice, i.e. due process and fair trial, it is commonly understood as referring to arbitral justice in a more comprehensive sense, including not only arbitral procedural fairness but also the type of solution regarding the merits – not necessarily the same that would be obtained from national courts – that should be expected by the parties by the very fact of having

chosen international commercial arbitration for resolving their contractual disputes. Thus, it is not infrequently stated that often the parties resort to arbitration in order to have access to a "justice" other than that which would be obtained by applying a "national law", particularly when, on account of the discrete circumstances of the case, a national law would not be adapted to the solution of the dispute at stake . . . An obvious confirmation that notions of justice in international commercial arbitration are not merely procedural but are also substantive is that the majority of national statutes dealing with international arbitration, international conventions regarding arbitration not just concerned with the recognition and enforcement of arbitral agreements and awards, and international arbitration rules contain procedural provisions and choice-of-law provisions, i.e. provisions pointing to choice-of-law solutions only becoming relevant because the dispute has been submitted to international commercial arbitration and which may well differ from those that would have been otherwise obtained had the decision of the case been left to municipal courts and their private international law systems.

This Tribunal, being confronted, in view of the mandate of the parties, with a choice-of-law exercise for determining the proper law of the Contracts, also has to consider the meaning of justice in the field of conflicts-of-laws. According to one of the classic English private international law texts, the notion of justice has a clearly substantive, and not merely procedural, meaning and, indeed, justice in its substantive sense would constitute the cornerstone of the discipline, since the "dominant motivating principle" of a private international law system like the English system is "the desire to do justice in cases involving a foreign element". More specifically "so far as English law is concerned, the principle is a priori in the statutory sense, in the terms of the oath that every judge must take before he enters on his judicial functions; and secondly, justice appears in the results as well as in the premise. The judge's decision, which itself establishes or applies a rule, converts the postulate of justice into reality". It is clear also that justice is not understood merely as a "conflicts justice" premised upon a blind, mechanical and "neutral" designation of the applicable law through an aseptic conflicts rule which operates on the basis of the geographical localization of the transaction, but is concerned with the results as to fairness derived from the application of this or that substantive rule to the disputed issue at stake (R.H. Graveson, *Conflict of Laws. Private International Law*, Sweet & Maxwell, 7th ed., 7-8 (1974)).

Such substantive essence of private international law justice is further illustrated through references to different English court decisions or authorities . . . Balance and convenience regarding the resolution of disputes as to their substance have been widely held as a part of natural justice and of the principle of reasonableness inherent to such notion . . . The trend favouring choice-of-law processes not indifferent to ensuring the application of substantive laws or norms ensuring the "best" solution for the specific case in view of considerations of fairness, substantive justice, the reasonable expectations of the parties and the fact that the applicable rule being advanced is the best adapted to the circumstances of the case is far from being limited to isolated national private international law systems . . .

There is, then, a clear correspondence between, on one hand, the mandate of international arbitrators of making a fair and just decision adapted to the particular controversy at stake without being tied to precedent or abstract concerns and, as it happens in this case, without the parties' contractual stipulations directing the arbitrators to apply any specific national rule or legal system, and, on the other hand, choice-of-law methodologies aimed at reaching fair and just results by applying the substantive legal rules and principles which are better adapted to the circumstances of the case . . . From the standpoint of conflict-of-laws principles in international commercial arbitration, the notion of justice goes beyond procedural fairness and plays an important role in the determination of the applicable substantive law.

Particularly when associated with international commercial arbitration, choice-of-law justice is premised on the idea that multi-state cases are imperfectly governed by the laws of a single national jurisdiction, since by their very nature, they constitute a "social and economic unit" for which, in view of the fact that they overlap national frontiers, there is no equivalent comprehensive tailor-made "legal unit", sufficiently adapted to the circumstances of the multi-state case and the expectations of the parties, that would provide a fair and just substantive solution for it . . . Choice-of-law methodologies advancing the application of that type of multi-state substantive rules are then the best adapted to resolve international commercial cases on the basis of the substantive justice and fairness expectations of the parties and the circumstances of the case . . .

In respect of transactions like the Contracts, in which (i) there is no express choice-of-law stipulation designating the law of any of the parties or of a third country and where neutrality regarding the applicable law was a paramount concern denoted by the parties' rejection of each other's law and the absence of any explicit or implicit reference to the laws of a third country; and (ii) the parties have buttressed neutrality as to the applicable law by agreeing to submit their contractual disputes to international commercial arbitration, albeit without empowering the Tribunal to act *ex aequo et bono* or as *amiable compositeur*, it can only be concluded that no national law was judged adequate or adapted to govern such transactions without the risk of disturbing the balance of neutrality between the parties. In consequence, when the parties negotiated and finally entered into the Contracts they only left room for the application of general legal rules and principles adequate enough to govern the Contracts but not originated in a specific municipal legal system. Such balance of neutrality, which includes neutrality of the applicable substantive law, is an essential part of the substantive justice expected by the parties in connection with the Contracts. Such "negative" choice by the parties commands as much respect as any express choice-of-law would have commanded, had the parties inserted choice-of-law stipulations in the Contracts; therefore, in order not to disrupt the parties' common understanding in that regard, this Tribunal must refrain from the choice of any national law as proper law. Through references to "natural justice" and the like, the parties indicated their intention that their Contracts be governed by substantive rules not belonging to any discrete national legal system and appropriately responding to their concerns about neutrality in the applicable law.

Though the parties excluded the application of any national law to the Contracts, it does not follow that they failed to imply the application of any other substantive rules or principles and thus left the decision regarding the designation of the proper law of the Contracts to the happenstance of choice-of-law methodologies [over] which they had no control, particularly as to their neutrality for determining the applicable law. In this regard, the statement that "... wholly neutral principles of conflict-of-laws are an illusion" (A. Lowenfeld, "Lex Mercatoria: an arbitrator's view", in *Lex Mercatoria and Arbitration* (Carbonneau Ed.) Transnational Juris Publications, Inc. 37, 45 (1990)) is certainly pertinent and acquires special significance.

Such interpretation is particularly appropriate if the only alternative left in absence of express or implied choice-of-law stipulations would be resorting to supposedly choice-of-law neutral and dispassionate criteria, such as a talismanic notion of the localization of the characteristic obligation or an amorphous grouping of contacts or the closest connection noticeable in some national legal systems, which would, by the rule-of-thumb and without taking into account the parties' concerns and expectations as to substantive justice, including neutrality as to the applicable law, impose the law of one of the parties or of a third state which would or might defeat the parties' intentions.

... five out of nine Contracts contained international arbitration clauses providing for panels not to be integrated with nationals from the country of any of the parties. The other Contracts, though not expressly submitted to international institutional arbitration, both on account of the introduction of expressions such as natural justice or laws or rules of natural justice in connection with the dispute resolution process (as indicated before, such terms have both "procedural" and "substantive" connotations) and the omission of any designation of a national *lex arbitri* or procedural law, referred to a form of commercial arbitration highly delocalized irrespective of the seat of the arbitral tribunal. ... [T]he parties' latter conduct, i.e. their decision to globally submit disputes arising out of the Contracts to international arbitration under the ICC Rules, is clear evidence and confirmation that the parties favoured the delocalization of the dispute resolution system in connection with all the Contracts in consonance with their strong concerns regarding the neutrality of the substantive and procedural legal framework related to their long-term relationship embodied in the Contracts.

Such considerations acquire particular relevance when the transactions at stake, in addition to being commercial and international, are also coloured – as in the instant case – by a certain degree of state or public involvement on both sides. The Tribunal finds that it has not been presented with conclusive evidence showing that the Contracts may be considered state-to-state contracts since it has not been proved that Respondent is organically linked to the British state, vested with any of its functions or otherwise assimilated to the British state so as to acquire a position significantly different from that of a private party. Nevertheless, the Contracts, though commercial in nature, have a state party and have been negotiated, executed, and the obligations of the parties insert themselves, in a context in which state interests and policies are intimately concerned on both sides. ... The Contracts then squarely belong to the category of international commercial contracts (which for the purposes of this award will be hereinafter referred to as "state contracts") being the subject of a resolution of the Institute of International Law on "Arbitration between States, State Enterprises, or State Entities, and Foreign Enterprises" adopted on September 12, 1989 in the course of the Institute's Santiago de Compostela session. Such Resolution was intended to serve as guidance to international commercial arbitrators for, among other matters, determining the laws, rules and principles applicable to the substance of this type of transaction. ...

State contracts show a certain number of paradigmatic characteristics which this Tribunal finds of relevance in connection with the Contracts. Among those, the following are pertinent: (i) the state party should not be allowed to resort to its law-creating powers not in the general interest but to improve its legal position or to exonerate itself from contractual liability. ... (ii) the parties may expressly or implicitly de-localize state contracts to remove them from national legal systems and submit them to transnational legal rules. ... (iii) the applicable law should respect the principle that the substantive "contractual equilibrium" between the parties as agreed at the moment of contracting is not disrupted. ... (iv) detachment of the arbitral process and of the arbitral *lex fori* at large (including arbitral choice-of-law methodologies for determining the law applicable to the merits) from the laws of the seat of the arbitration. ... (v) agreeing on international commercial arbitration in connection with state contracts has an impact on the substantive law applicable to the substance of the dispute.

In this latter respect it is pertinent to point out that the parties and the arbitrators enjoy larger autonomy for de-localizing the contract and determining the applicable laws or rules when disputes arising out of a state contract are submitted to international arbitration than otherwise, and, thus, that choosing international commercial arbitration has de-localizing effects as to the applicable law: this may be established, for example, when comparing

(i) the Preamble and provisions of the Resolution adopted by the Institute of International Law in its Athens sessions on the Proper Law of the Contract in Agreements between a State and a Foreign Private Person, dealing in general with issues regarding the law applicable to a state contract in principle not necessarily submitted to international commercial arbitration . . . with (ii) the Santiago de Compostela Resolution mentioned above, in particular its Arts. 4 and 6, which exclusively concern the law applicable to state contracts by international commercial arbitrators. The detachment of the choice-of-law methodology and the substantive applicable law identifiable through it from national legal systems in order to preserve the contracted-for equilibrium between the state and the private parties is then a common feature of state contract arbitration to be taken into account when interpreting such contracts and their surrounding circumstances for determining the governing law.

In the present case, such equilibrium was an integral part of the substantive and dispute resolution justice framework the parties had in mind when entering into the state contracts binding on them. Therefore, references to "natural justice" and "laws" or "rules" of "natural justice" found in the majority of the Contracts should be consistently and uniformly interpreted as referring not only to procedural justice but to the special type of substantive justice the parties had in mind, based on the neutrality of the applicable law to the merits and of the means of dispute resolution mechanisms selected by the parties to effectuate substantive neutrality, this latter aspect further confirmed by the ulterior comprehensive submission by the parties of their disputes arising out of the Contracts to ICC international arbitration.

The choice of international or de-localized arbitration to resolve any potential disputes, which is explicit from their very inception in most of the Contracts but was later extended to all of them, should then be understood as an additional element to further support and maintain such substantive justice balance. Such choice plays a "localizing" role in the case of international and commercial state contracts not having an express choice-of-law stipulation, since it denotes the exclusion of choice-of-law criteria normally applicable by national courts, which would lead to the exclusive application of national laws, and therefore points by exclusion to a *tertium genus* or general principles of law which may be only defined in the negative as such rules and principles not exclusively belonging to a single national legal system . . . Being international and commercial state contracts, reference in the Contracts to natural justice or the like, together with the absence of reference to any national law, can then be only reasonably construed as pointing to the application of such substantive legal rules and principles adapted to the Contracts and the facts and circumstances surrounding them, which, by not belonging to any discrete national legal system, satisfy the parties' concerns as to the neutrality of the applicable proper law. Substantive rules and principles fulfilling such requirements may only be general legal rules and principles regarding international contractual obligations and enjoying wide international consensus.

. . . the Tribunal concludes that the reasonable intention of the parties regarding the substantive law applicable to the Contracts was to have all of them governed by general legal rules and principles in matter of international contractual obligations such as those arising out of the Contracts, which, though not necessarily enshrined in any specific national legal system, are specially adapted to the needs of international transactions like the Contracts and enjoy wide international consensus.

In addition, this Tribunal estimates that its mandate . . . requires that, to the extent possible at this stage, some precisions be given as to the substance of such legal rules and principles. It should be noted that both Claimant and Defendant, at different stages of their successive argumentations, have expressed their concern either about the vagueness

of general principles of law or the possibility (at least with respect to English courts) that an award rendered on the basis of such principles might not be enforceable before national courts.

Taking into account such circumstances, the discussions held in such connection with the parties . . . and also the requirement that arbitrators " . . . should do no less than is required to exercise their authority completely . . ." (Institute of International Law, Santiago de Compostela Resolution cited above, art. 1, 63-II *International Law Institute Yearbook* 326 (1990)), this Tribunal finds that general legal rules and principles enjoying wide international consensus, applicable to international contractual obligations and relevant to the Contracts, are primarily reflected by the Principles of International Commercial Contracts adopted by Unidroit (the "Unidroit Principles") in 1994 . . . In consequence, without prejudice to taking into account the provisions of the Contracts and relevant trade usages, this Tribunal finds that the Contracts are governed by, and shall be interpreted in accordance [with], the Unidroit Principles with respect to all matters falling within the scope of such Principles, and for all other matters, by such other general legal rules and principles applicable to international contractual obligations enjoying wide international consensus, which would be found relevant for deciding controverted issues falling under the present arbitration.

The reasons why this Tribunal considers the Unidroit Principles to be the central component of the general rules and principles regarding international contractual obligations and enjoying wide international consensus, which constitute the proper law of the Contracts, are manifold: (1) the Unidroit Principles are a restatement of international legal principles applicable to international commercial contracts made by a distinguished group of international experts coming from all prevailing legal systems of the world, without the intervention of states or governments, both circumstances redounding to the high quality and neutrality of the product and its ability to reflect the present stage of consensus on international legal rules and principles governing international contractual obligations in the world, primarily on the basis of their fairness and appropriateness for international commercial transactions falling within their purview; (2) at the same time, the Unidroit Principles are largely inspired [by] an international uniform-law text already enjoying wide international recognition and generally considered as reflecting international trade usages and practices in the field of the international sales of goods, which has already been ratified by almost 40 countries, namely, the 1980 Vienna Convention on the International Sale of Goods; (3) the Unidroit Principles are specially adapted to the Contracts being the subject of this arbitration, since they cover both the international sale of goods and supply of services; (4) the Unidroit Principles (see their Preamble) have been specifically conceived to apply to international contracts in instances in which, as it is the case in these proceedings, it has been found that the parties have agreed that their transactions shall be governed by general legal rules and principles; and (5) rather than vague principles or general guidelines, the Unidroit Principles are mostly constituted by clearly enunciated and specific rules coherently organized in a systematic way . . .

The precisions given by this Tribunal in preceding paragraph . . . should suffice to dispel any concerns as to the enforceability of an award made in these proceedings on the basis of the general legal rules and principles applicable to international obligations on account of the vagueness or lack of precision of such principles. . . . [L]earned opinions . . . indicate that the present trend in England points towards the admissibility and enforceability in that jurisdiction of arbitral awards based on *lex mercatoria* or general principles of law, particularly when the award has not been rendered in England or is not subject to English law and the laws of the national jurisdiction in which the award is made do not render invalid an award made on such terms . . .

[Arbitral Tribunal's consideration of the applicable law in the absence of an express or implied choice by the parties:]

The above conclusions would not have been different had the Tribunal not found that the parties made an implicit choice of the applicable law to the Contracts. First and foremost, it should be noted that it is commonly accepted in comparative private international law that there is no clear delimitation between the tests to determine the implicit choice-of-law made by the parties with respect to the substance of contractual obligations and those to be observed in absence of choice and in fact the boundaries between such tests are often blurred The same objective circumstances, such as, in this case, the intention of the parties not to submit the Contracts to each other's laws or to the laws of a third country and yet their will to have their disputes decided according to legal rules and not *ex æquo et bono*, the nature of the relationship between the parties (state contracts) and their concerns regarding the neutrality as to the applicable law as revealed, for instance, by contractual negotiations, the insertion of terms such as "natural justice" or "laws of natural justice" or "rules of natural justice" and the submission of all disputes to international commercial arbitration also militate in favour of concluding that the general legal rules and principles regarding international contractual obligations enjoying a broad international consensus would have been found to be the law governing the Contracts even in absence of an implied contractual stipulation to that end.

Such conclusion would have been reached by the Tribunal by resorting either to the *voie directe* or the *voie indirecte*

. . . the determination of the applicable law is an exercise which may not remain indifferent to the substantive outcome of the choice-of-law process. If projected to the field of international commercial arbitration and the interpretation of the relevant part of Art. 13(3) of the ICC Arbitration Rules, the necessary conclusion is that the very distinction between *voie indirecte* and *voie directe* becomes blurred and on the verge of fading away, since both would pursue the same ends through essentially the same means, namely, the application of the "better law", i.e. the substantive rules, laws and principles best adapted to a just and fair decision of the dispute on the basis of the circumstances of the case and the parties' expectations by directly taking into account, for so doing, the contents of the substantive rules and principles to be applied. . . . [W]ith respect to the Contracts such "better law" is found in the general rules and principles regarding international contractual obligations enjoying wide international consensus. Since such rules and principles are deemed to become directly applicable, in absence of a choice-of-law, to transactions characterized as commercial and international state contracts, their application may be also explained in terms of the *voie indirecte*, because such characterization is precisely a conflicts rule, though differing from traditional ones in that its operation does not depend on the geographical localization of a connecting factor

. . . Art. 13(3) of the ICC Arbitration Rules does not impose on the arbitrators the obligation to follow generally accepted conflict-of-laws rules or, for that matter, any specific national or anational conflict-of-laws rules In these proceedings, it has been sufficiently and convincingly argued that the cumulative method, i.e. the application of the conflict-of-laws systems of the national jurisdictions of the parties to the dispute would not have been useful because the private international laws of England and [State X] would have led to incompatible, rather than coincident, solutions as to choice-of-law in connection with most of the Contracts. On the other hand, in view of the diversity of private international law systems in the world, a comparative law research would fail in identifying generally accepted private international law principles enjoying wide international consensus for determining the applicable law to international contracts in absence of express or implied parties' choice

It might be adduced, however, that when it comes to determining the substance of such general rules and principles applicable in absence of an implied stipulation by the parties, the application of the Unidroit Principles is not possible, since the Preamble to the Principles indicates that they may be applied “when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* and the like”. The original draft version of the Unidroit Principles, which was not finally approved by the Unidroit Council in this respect, provided (Art. 1.2 (b)) that such principles also apply “when the parties have not chosen any law to govern their contract” . . . This provision was excluded from the text of the Unidroit Principles as finally approved and is not a part of their Preamble because the Unidroit Council felt, in absence of a choice by the parties, that it would be conducive to pre-empting the application of the domestic law of the national legal system rendered applicable by private international law rules . . .

Nevertheless, on the basis of at least two grounds, this Tribunal would not have been thereby prevented from referring to the Unidroit Principles as a part of the law applicable to the Contracts in absence of an express or implicit choice-of-law stipulation: (i) . . . the Contracts are governed, as a result of a preliminary findings, by general rules and principles regarding international contractual obligations enjoying wide international consensus, i.e. they are not governed by any discrete domestic or national law. In consequence, in the present case, no clash between any discrete municipal law and the Unidroit Principles is possible; and (ii) the application of the Unidroit Principles does not depend on their self-given criteria of application, but on the powers vested with this Tribunal under Art. 13(3) of the ICC Arbitration Rules, which are not limited to the *voie indirecte* and authorize it to directly determine the applicable law it deems more appropriate to govern the merits, i.e., in this case, the general legal rules and principles regarding international contractual obligations enjoying wide international consensus, including, without limitation, the Unidroit Principles as an adequate restatement and expression of such general legal rules and principles. The application of the Principles in case of absence of choice then rests upon Art. 13(3) of the ICC Arbitration Rules and the mandate conferred on this Tribunal to find and determine the law applicable to the Contracts.

. . . This Tribunal then concludes by a majority . . . that, without prejudice to taking into account the provisions of the Contracts and relevant trade usages, the Contracts shall be governed by, and interpreted according to, the general legal rules and principles regarding international contractual obligations enjoying a wide international consensus, including the Unidroit Principles, with respect to all such matters falling under the scope of such principles.

Dissenting Arbitrator:

. . . a reluctance for psychological or political reasons on the part of each negotiating party to be seen expressly to agree to apply the law of the other negotiating party is not the same as a determination by the parties that in no case shall the law of either of them apply. A *fortiori* it is not a determination by them of the law that is to be applied to the merits of the dispute. . . .

Thus in my view the attitude attributed to the negotiating parties was not tantamount to an agreement excluding the application of the laws of either of them. It was simply a reflection of the unwillingness of each negotiator to be seen expressly to concede that the law of the other would or might apply. That is a very different thing, entirely compatible with recognition on both sides that, failing agreement, the dispute would need to be resolved by applying the “accepted legal rules for deciding the law which would need to be applied if . . . a dispute needed to be formally resolved”. The “accepted legal rules for deciding the law which would need to be applied” are the rules of conflict of laws. . . .

A determination of the law not to be applied . . . is not a determination of the law which is to be applied. For the latter, the parties must positively pick their winner, not merely limit the field of choice.

Perhaps to pre-empt such objections, it was next argued (in the alternative) on behalf of Claimant that the wording of the Contracts did indeed point to a positive determination, or choice, by the parties. They had, it was contended, determined that the law to be applied to the merits of the dispute was to be the "general principles of law". It is my understanding that this contention derives from an inference, said to be reasonable, drawn from the reference in some of the Contracts to "natural justice", coupled perhaps with the fact that Claimant is a sovereign State entity. . . .

A "determination" must presumably determine something. It must, however informally expressed, indicate with reasonable certainty what has been determined. In the present case I can find nothing equivalent to a pronouncement that the law applicable to the merits shall be "general principles of law" (a pronouncement itself not conspicuous either for precision or for predictability of its consequences) . . . such references as can be found to "natural justice" do not in my opinion attempt to determine anything about the law applicable to the merits, let alone dictate that "general principles" of law are to be so applicable. . . . The researches of counsel have produced no instance of any case where a contract calling for disputes to be settled by arbitration in accordance with natural justice was held thereby to be defining the substantive law applicable to the merits of the dispute, as opposed to the decision-making procedures to be adopted.

That some of the Contracts here do contain a reference to "natural justice" seems to me to indicate only a desire on the part of the framers of those Contracts to stress that all arbitral procedures adopted, and all steps taken by the arbitral tribunal or any of its members, must be consistent with the rules of natural justice – understandable enough, since otherwise there is a real risk that any award would be vulnerable to attack in many countries as being unenforceable, in the same way as would a foreign judgement arrived at after a similarly defective process. A requirement that the arbitrators are to . . . proceed in accordance with natural justice may be said to be rather more specific than the provision in Article 26 of the ICC Rules that the arbitrators are to make every effort to make sure that their award will be enforceable in law. In Contract 9 the phrase is expressly referable to "the rules governing the proceedings"; it is agreed that those rules may include (if certain identified procedural rules are silent) rules "which arbitrator(s) may settle in accordance with the rules of natural justice". This cannot, in my view, suffice to allow the arbitrator(s) to "settle" provisions of substantive law – i.e. effectively to write into the Contract provisions of law which will govern the substantive bargain of the parties.

Moreover, the opening sentences of Article 13(3) of the ICC Rules, and of Article 1054(2) of the Netherlands Code, contemplate a determination, or choice, by the parties of the rules of law to be applied to the merits of the dispute – i.e. the "proper" law. Now, it may be possible for the parties effectively to provide in express terms in their contract that it is to be governed by "Unidroit Principles" or by "general principles of law". A court or an arbitrator would in that type of case doubtless strive to do their best to interpret, and give effect to, such language. But that is not the question here. The parties said nothing about "general principles of law", still less about which of the countless principles of law to be found in the world's legal systems (principles often irreconcilable with each other) were to be selected. They said nothing about "Unidroit Principles". Indeed, the Unidroit Council itself declined to provide that the Unidroit Principles should apply where contracting parties had not chosen any law to govern their contract, since to have done so "would be conducive to pre-empting the application of the domestic law of the national legal system rendered applicable by private international law rules" . . .

In my view, the first sentences of Article 13(3) of the ICC Rules and Article 1054(2) of the Netherlands Code are applicable only if the parties themselves designate the rules of law to be applied by the arbitrator to the merits of the dispute. The parties do not do that – (a) by designating rules to be applied by the arbitrators, not to the merits of the dispute, but to the dispute-resolving procedures prescribed or adopted by them; or (b) by inserting, in a number of these formal Contracts framed in English, a reference to “natural justice” – a legal expression which in its ordinary usage is employed with reference to rules designed to ensure the fair trial of the merits, as opposed to rules of substantive law designed to be applied in deciding which of the disputants has the better case on the merits; or (c) by leaving it to the arbitrators to apply to the merits of future disputes any principles of law that the arbitrators may deem appropriate.

Hence I have not been able to accept the arguments on behalf of Claimant that the parties here have themselves determined, either “negatively” or “positively”, the rules of law to be applied to the merits of the dispute. The parties never did “determine the law to be applied by the arbitrators to the merits”. At best, if Claimant is right, they purported to leave that determination to the arbitrators charged with resolving future disputes, if any. The failure of the parties to make a determination would seem to me to bring into play the second sentence of Article 13(3), requiring the arbitrators to proceed by way of deciding upon a rule of conflict that they deem appropriate, being a rule of conflict which in turn designates the proper law (the provisions of which are to apply to the merits).

I therefore come to the second sentences of Article 13(3) of the ICC Rules and Article 1054(2) of the Netherlands Code. The parties having *ex hypothesi* failed to determine the proper law for themselves, the arbitrators must make the selection in accordance (directly or indirectly) with what they consider to be “appropriate”. The second sentence of Article 1054(2), viewed in isolation, arguably might be said to permit “direct” selection of the substantive law, rather than “indirect” selection via the selection of an appropriate rule of conflict. Prima facie it seems to me to be doubtful if that sentence, even viewed in isolation, would permit the arbitrators to deem appropriate, as applicable to the substance of the dispute, unspecified “general principles of law”. Moreover here the second sentence of Article 1054(2) is not to be viewed in isolation. On the contrary, Section VI, paragraph 2 of the Terms of Reference provides that the rules governing the procedure are to be the ICC Rules, and that only where the latter are silent will the Articles of the Netherlands Code apply.

... Applying Article 13(3) of the ICC Rules, the arbitrators must apply to the merits of the dispute the law designated as the proper law by the rule of conflict of laws which they deem appropriate. Among numerous threshold questions here is whether they may “deem appropriate” a rule of conflict (if such there be) which does not itself designate any particular system of proper law, but merely leaves the arbitrators free to pick, as needs arises, from differing legal systems or sources, a selection of whatever rules of proper law they may deem appropriate.

I do not think that the latter would satisfy the provisions in question. Article 13(3) seems to me to direct the arbitrators to arrive at the proper law via a rule of conflict which itself designates that proper law. The role of the rule of conflict is to designate the substantive proper law. The arbitrators are to select the rule of conflict, and the rule of conflict so selected is in turn to designate the substantive proper law. The second sentence of Article 13(3) basically tells the arbitrators that they are not obliged to apply the rules of conflict of e.g. the forum or seat of arbitration, if they consider other rules of conflict to be more appropriate. But a so-called rule of conflict that purports to prescribe merely that the arbitrators may or shall hereafter designate principles of substantive proper law to be applied postulates that the substantive proper law remains undesignated by that rule of

conflict itself. Such a “rule” is not in truth a rule of conflict at all. To say that the arbitrators may deem appropriate a “rule” that would merely refer back to the arbitrators themselves the designation of the proper law is a circular way of saying that the “rule” does not designate any proper law. As well as multiplying the uncertainties of the outcome, this seems to me to be contrary to the underlying concept. Article 13(3) by its nature is a provision which will apply to the countless international bargains subject to the ICC Rules in which the parties themselves (whether purely commercial entities or sovereign States) have made no specific determination as to the law to be applied to the merits. My own surmise is that most would expect their arbitral tribunals to do their best to apply “the generally accepted legal rules for deciding the law which would need to be applied” That would result in the selection of a particular system of law as the proper law, the classic role of any system of conflict of laws. Article 13(3) seems to me to be designed for such parties. More adventuresome parties who prefer something more sophisticated cannot reasonably complain if they are required to specify expressly what they have in mind.

For the above reasons I conclude: (a) that the parties here never themselves determined the law to be applied to the “merits of the dispute”; (b) in particular, that they at no time purported to determine that such law was to consist of “general principles of law”; that if they had purported to do the latter that would not have been a determination qualifying as such under the first sentence of Article 13(3) of the ICC Rules, which calls for a determination by the parties of the proper law which is to be applied to the merits by the arbitrators, and not merely for an indication by the parties that if a dispute arises, the arbitrators are left free to choose any rules or proper law that they may think appropriate; (c) that accordingly the first sentence of Article 13(3) is not satisfied here; that nevertheless, by reason of the foregoing and the second sentence of Article 13(3), the arbitrators here have a wide discretion to select, from any existing rules of conflict designed to identify a proper law, the rule of conflict which they consider to be the most appropriate; and (f) that having done so, they should thereafter proceed to apply to the merits of the dispute the system of proper law identified by that rule of conflict. . . .

But what conflict rule is “appropriate” here? . . . I take the view that the present Contracts . . . are all most closely connected with England Under conflict rules familiar in numerous legal systems, including those of English law and of The Netherlands (the agreed seat of this arbitration) a permissible approach would be to seek the law which had the “closest connexion” with the Contracts. That appears to me to point to English law. The widely favoured “principle of characteristic performance”, which today has the endorsement of an impressive number of countries, including again England and The Netherlands, would point strongly in the same direction. . . .

Accordingly, I would have held, in the case of Contracts Nos. 1-8 inclusive, that the law to be applied to the merits of the dispute was the law of England, being the law designated as the proper law by the rules of conflict of, *inter alia*, the Netherlands and England, which rules I would deem more “appropriate” than any other in the present case. I would not have been disposed to contest, however, that in relation to Contract No. 9 (having regard to the obligations of the parties performable by [State X] thereunder), the proper law could be held to be that of [State X], as being the system designated as the proper law by the rules of conflict above mentioned calling for the ascertainment of the law with which the relevant Contract might be said to have the closest relation.

With respect to Respondent's defence that Claimant's claims are time-barred (second partial Award):

Claimant first argued that Respondent is “estopped from raising a limitation defence by its own conduct”

The argument is based, *inter alia*, on the principle *venire contra factum non concedit* and on Articles 1.7 (principle of good faith), 2.18 (no-oral modification clause) and 2.4 (reliance theory) of the Unidroit Principles. . . .

The Tribunal considers that Respondent is not estopped from raising a time-bar defence. . . . The defence based on limitation/unreasonable delay is therefore admissible.

It is Respondent's position that the question of limitation ought to be resolved by application of the *lex causae*. Claimant concurs with this position.

Respondent argued that the Unidroit Principles are the *lex causae*, that these Principles are silent as to any applicable period of limitation and that, therefore, there was a need for the Tribunal to "fill a gap" in the Principles.

According to Respondent, the gap should be filled by resorting to the domestic laws that are most relevant in this arbitration, i.e. English law and [the law of State X], possible Dutch law and French law or, alternatively, to domestic laws in general. . . .

Respondent invoked the 1974 New York Convention on the International Sale of Goods (Article 8) under which the limitation period is four years, Article 23 providing that the "overall limitation for bringing legal proceedings" is ten years.

. . . Respondent submitted a comparative analysis of the limitation period under 119 domestic laws with respect to contractual disputes under international commercial sales contracts, contending that such analysis demonstrates that the great majority of the legal systems reviewed had limitation periods between three and ten years. Ten years would be, Respondent argued, an appropriate limitation period in the present case under the circumstances. . . .

Claimant's position is that domestic laws are irrelevant for the determination of the limitation issue.

In Claimant's submission, reference has to be made to general principles of law, including Unidroit Principles, as held by the Tribunal in Partial Award No. 1. . . .

According to Claimant, there is no general principle of law which sets a specific time limit for bringing an action, and, failing any such time limit, the only general principle of law applying to the issue under review is the principle that claims must be pursued without unreasonable delay. . . .

As to the 1974 New York Convention, Claimant denied that it constitutes the expression of a widely recognized and accepted principle, pointing out that neither the United Kingdom nor [State X] has signed the Convention. . . .

The Tribunal notes that there is no provision in any of the Contracts dealing with limitation periods. . . .

The Tribunal has not found that a fixed limitation period results from trade usages in contracts for the sale and supply of goods or services.

It is common ground that the Unidroit Principles do not deal with limitation periods and, therefore, the Tribunal has to determine whether there are general legal rules enjoying a wide international consensus that contain the principle that an action is time-barred after a fixed period of time has lapsed.

The Tribunal does not consider that the 1974 New York Convention. . . incorporates any such widely recognized principle.

It is the Tribunal's view that the solution to the question does not have to be derived from the domestic laws, and that a comparative approach such as the one suggested by Respondent does not reveal a generally accepted principle as to the length of an extinctive limitation period.

... the Tribunal rejects Respondent's defence that Claimant's claims are time-barred on the basis of any fixed limitation period.

... Alternatively to the limitation defence, Respondent argued that if the *lex causae* includes no rules prescribing a fixed limitation period (or if the applicable limitation period exceeds 11 years and 10 months), then, as a matter of general principle, the Tribunal should still reject Claimant's claims, the initiation of which has been unreasonably delayed by Claimant.

Reference is made by Defendant to Article 1.7(1) of the Unidroit Principles, according to which: "each party must act in accordance with good faith and fair dealing in international trade"....

Claimant's position is that, under the circumstances of the present case, the delay in bringing suit has not been "unreasonable".

... the Tribunal has concluded that it was not unreasonable for Claimant, in all the circumstances, not to launch arbitration proceedings so long as there seemed to be a prospect of arriving at an agreement on the terms of a settlement. Making due allowance for the fact that the internal political upheavals consequent upon [events in State X] were not conducive to speedy decision making, the Tribunal considers that the claims which Claimant pursues in this arbitration are not time-barred for unreasonable delay and that they are therefore admissible.

With respect to payment for and retention of substitute equipment (second partial Award):

'The Contract... contains no provision dealing with the situation... Consequently, the solution has to be found in generally accepted legal principles enjoying a wide recognition (Partial Award No. 1), including Unidroit Principles.

It is a principle of law widely accepted that if a buyer does not perform its obligations as to payment of the balance of the price when due, the seller may, in the absence of an express contractual provision to the contrary, suspend performance of its obligation to arrange for shipment and/or delivery. The civil law concept of *exceptio non adimpleti contractus* corresponds to the principle laid down in the Unidroit Principles 7.1.3....

The Tribunal is of the opinion that Respondent was entitled to retain... until it received full payment therefor.'

With respect to Respondent's disposal of such equipment following storage for a lengthy period (second partial Award):

'This conduct, the Tribunal finds, is entirely consistent with the generally accepted principle of the mitigation of harm, as expressed in Article 7.4.8 of the Unidroit Principles.'

Dissenting opinion by a member of the Arbitral Tribunal:

'I fail to understand the Majority's reasoning in invoking Article 7.4.8 of the Unidroit Principles. I see nothing in that Article which could possibly be construed to entitle one party to dispose of property of the other party without its consent.... This article does

certainly entitle the aggrieved party to recover from the other party reasonable expenses incurred in its attempt to preserve the goods and reduce the harm. It does not give a right to the aggrieved party to go beyond it and sell or otherwise dispose of such goods.'

With respect to whether or not a termination clause was binding upon Claimant (second partial Award):

Claimant argues that 'the termination clause . . . has to be interpreted in accordance with the principles set out in Chapter 4 of the Unidroit Principles and, in the instant case, as the clause is deficient, terms have to be supplied (or implied) in the termination clause . . .

The Tribunal does not find that the record supports Claimant's argument that the [documents] contained "manifest errors" or that they were "grossly unreasonable", nor does it find Claimant's reliance on the Unidroit Principles to be of assistance, if only because in the Tribunal's judgment Claimant has adduced no evidence to establish that the [documents] are erroneous or unreasonable.

The Tribunal does not consider that [the clause] is unclear and requires interpretation.'

With respect to shipment of goods (second partial Award):

'Once goods had been accepted, Respondent had the obligation to arrange transport and shipment to [State X]. However, at the time of termination . . . Claimant was in default of paying monies due . . . Consequently, Respondent was entitled, under the general principle of the *exceptio non adimpleti contractus*, which has been adopted under Article 7.1.3 of Unidroit, to withhold performance of its obligation to dispatch the goods and, thus, to retain the Accepted Goods and the Returned Goods.'

With respect to use by Respondent of goods returned or accepted by Claimant (second partial Award):

'The Tribunal finds that Respondent's conduct under the circumstances was entirely consistent with the generally accepted principle of the mitigation of harm, as expressed in Article 7.4.8 of the Unidroit Principles.'

Cf. dissenting opinion quoted above.

With respect to the validity of a levy provided for in a side letter (second partial Award):

'The Tribunal finds that, in the Side Letter of . . . , the Parties had agreed on the principle of a licence and of a levy, and on the amount of such levy, i.e. the essential terms of a licence . . . The circumstance that the Parties have left certain contractual terms to be agreed upon . . . does not prevent the agreement from coming into existence (see Unidroit Principles, Article 2.14).'

Interim and Final Awards in Case 8223

Dates: October 1995, April 1998
Language: French
Claimant: Distributor of high-technology products (USA)
Respondent: Manufacturer of high-technology products (France)
Place of arbitration: Paris, France

The parties entered into a distribution agreement whereby Respondent granted Claimant the exclusive right to distribute certain high-technology products in North America. Claimant was to pay annual royalties as consideration, including a guaranteed minimum amount. The distributor made no sales during the first year, but paid Respondent the guaranteed minimum amount as per the agreement. Having achieved conformity with their intended use and withheld payment of the guaranteed minimum amount, Respondent accordingly gave notice of the termination of the agreement, attributing blame entirely to Claimant. It demanded that the royalties be paid, plus damages to cover lost earnings and Claimant's failure to abide by its undertaking not to compete. Claimant in turn filed an arbitration request in which it sought to have the agreement declared void on the ground of a mistake as to an essential aspect of the product.

Between the date on which the agreement was made and that on which Respondent gave notice of its termination, Claimant had been taken over by another company (X) belonging to the same group as itself. As a result of such take-over, the agreement had been transferred to company X. The Arbitrator considers this transfer to be effective with respect to Respondent, which had acknowledged same by seeing its contractual relations continue with company X. In support of his analysis, the Arbitrator refers to Article 2.19 of the *Unidroit Principles*. Hence, Claimant no longer has any rights or obligations arising out of the agreement. The Arbitrator rules out any possibility of transferee's having mandated Claimant to act in the arbitration. As Claimant therefore has no entitlement to act, its petition is dismissed. The Arbitrator also dismisses the counterclaim on the ground that it is directed against a party which is no longer contractually liable for either the royalties or the alleged failure to abide by the undertaking not to compete. The costs of the arbitration are split between the two parties, one third to be borne by Claimant and two thirds by Respondent.

Interim Award

With respect to the applicable law:

Le droit matériel applicable, tant aux termes [...] du Contrat que [...] de l'Acte de Mission, est celui de la France.

Mais puisque la partie défenderesse allègue que la Requête afin d'Arbitrage n'est pas recevable et que sa demande de mesures conservatoires est fondée, il convient dès lors de rechercher la loi en vertu de laquelle le Tribunal peut statuer sachant, d'une part, que ces dernières questions relèvent du droit applicable à la procédure et, d'autre part, que le droit qui régit cette procédure ne se confond pas avec celui qui est applicable au fond du litige.

[...] l'Acte de Mission dispose à ce propos que : « Les règles applicables à la procédure sont celles édictées par le Règlement de Conciliation et d'Arbitrage de la Cour Internationale

d'Arbitrage en vigueur au 1er janvier 1988 telles que modifiées, y compris par le nouvel appendice III en vigueur depuis le 1er janvier 1993. Dans le cas où lesdites règles ne seraient pas suffisamment claires ou passeraient sous silence une question soulevée durant la mission du Tribunal, les règles procédurales seront celles établies par les Parties en accord avec le Tribunal ou à défaut, par le Tribunal en se référant au Code de procédure civile français, dans ses dispositions visant l'arbitrage international. »

Le Règlement d'arbitrage de la C.C.I. ne permettant pas de déterminer directement un ensemble de règles applicable à la procédure, c'est à bon escient que les Parties ont exprimé leur accord pour que le Tribunal fasse application des dispositions du Nouveau Code de Procédure Civile français visant l'arbitrage international, soit les articles 1492 à 1497. Du reste, une partie importante des sources du droit international de l'arbitrage consacre l'application de la loi du for à la procédure [...]

Les Parties se sont en conséquence référées dans leurs Mémoires à l'application des règles de procédure contenues dans le Nouveau Code de Procédure Civile français.'

Final Award

With respect to the admissibility of the Request for Arbitration.

'Par une Sentence Intérimaire [...] reprenant les étapes antérieures de la procédure, le Tribunal arbitral, après avoir constaté que la partie demanderesse continuait d'avoir une existence légale même si elle pouvait être qualifiée de « coquille vide », la déclarait recevable en sa demande d'arbitrage. Toutefois, le Tribunal précisait qu'en statuant ainsi, il ne se prononçait pas sur la titularité des droits invoqués par la partie demanderesse, sa décision quant à la recevabilité de l'action intentée par la partie demanderesse restant étrangère au bien-fondé de ses réclamations. De même, le Tribunal renvoyait à la sentence finale sa décision quant aux conséquences, si elle était vérifiée, de la cession du Contrat à X.'

With respect to the effect of the transfer of the agreement.

'La partie demanderesse reconnaît que le Contrat [...] a fait l'objet d'une cession en faveur de X qui en a ainsi repris à son propre compte l'exécution et les difficultés y afférentes. Le formulaire 10-K déposé [...] auprès de la Securities and Exchange Commission par [...], dont dépendaient la partie demanderesse et X, précise expressément, qu'outre le transfert de contrôle de la partie demanderesse à X suite à l'acquisition par celle-ci d'un intérêt de 100%, une cession du Contrat en faveur de X s'était également opérée. [...]

En tout état de cause, il est constant que la partie demanderesse était devenue une « coquille vide » [...]

Force est de constater qu'une cession a de fait eu lieu, que la partie défenderesse ne s'y est jamais opposée mais qu'au contraire, toute la correspondance, y compris la lettre [...] mettant fin à l'exclusivité des droits de la partie demanderesse au titre du Contrat et la lettre [...] confirmant la résiliation du Contrat [...] s'est faite avec X ou d'autres sociétés du Groupe [...]. Il y a bien eu quelques factures et relevés adressés par la partie défenderesse à la partie demanderesse mais il y en a eu tout autant à X. Non seulement la partie défenderesse n'a soulevé aucune objection à la cession, mais il n'est pas contestable que dans son esprit le Contrat se poursuivait entre elle-même et X [...]

Dans les circonstances de l'affaire, le Tribunal en conclura qu'il y a eu cession effective du Contrat [...] par la partie demanderesse en faveur de X et que cette cession est devenue

opposable à la partie défenderesse en dépit des termes de l'article 21 du Contrat assujettissant toute cession de droits en découlant par l'une ou l'autre partie à l'accord préalable écrit de l'autre.

L'analyse du Tribunal à cet égard se trouve confortée par l'article 2.19 des Principes Unidroit Applicables en matière de Contrats Commerciaux qui traite des effets relatifs des clauses dites standards. En effet, une clause d'incessibilité est souvent rédigée à l'avance ; même si elle est souscrite au même titre que toutes les autres clauses du contrat, elle ne fait, sauf indication contraire, l'objet ni de discussions, ni de négociation comme pour les clauses considérées comme essentielles et reflétant la véritable convention des parties.

Par conséquent, à compter du [...], le Contrat est sorti du patrimoine de la partie demanderesse pour passer dans celui de X. En transférant le Contrat à X, la partie demanderesse s'est dépouillée du droit de s'en prévaloir à l'encontre de la partie défenderesse. La partie demanderesse ne saurait en effet tout à la fois céder le Contrat et continuer de l'invoquer. Il s'agit ici d'une application du principe d'opposabilité des conventions qui se traduit par une extension de leurs effets obligatoires à l'égard de certains tiers, en l'occurrence la partie défenderesse. La pleine efficacité des contrats s'en trouve ainsi assurée ; si tel n'était pas le cas, la cession intervenue ne produirait pas tous ses effets entre les parties et la partie demanderesse pourrait encore revendiquer le bénéfice du Contrat à l'encontre de son cocontractant d'origine.

Le Contrat ne lui appartenant plus à compter du [...], la partie demanderesse ne peut se prévaloir de droits qui en découleraient, ceux-ci relevant désormais exclusivement de X en sa qualité de cessionnaire. Celle-ci n'a cependant pas jugé utile en définitive de les faire valoir, comme bénéficiaire, à compter de cette date, de la convention d'arbitrage insérée dans le Contrat, en dirigeant une demande en arbitrage distincte à l'encontre de la partie défenderesse.

[...] X avait cependant offert [...] d'intervenir volontairement dans la présente procédure. La partie défenderesse l'ayant refusé, la présente procédure n'a pu que continuer, en raison de la nature consensuelle de l'arbitrage, qu'entre la partie demanderesse et la partie défenderesse, les seules parties dans la présente affaire.

Final Award in Case 8240

Date: July 1995
Language: English
Claimants: Swiss and Singaporean distributors
Respondents: Belgian suppliers
Place of arbitration: Brussels, Belgium

Pursuant to a distribution agreement, Respondents granted Claimant 1 an exclusive right to distribute certain of Respondent's products in the markets of Singapore, Malaysia, the Philippines and Thailand. The contract was terminated by an agreement signed by Respondents and Claimant 2 acting on its own and Claimant 1's behalf. The termination agreement expressly refers to the main agreement with respect to disputes regarding its interpretation or validity. A dispute arose in connection with the interpretation of Article 1 of the termination agreement providing for repurchase of Claimants' inventory

by Respondents on the basis of Respondents' invoiced prices stated in Belgian francs. The parties agree to the price being paid in Singaporean dollars, converted from Belgian francs, but disagree on the exchange rate to be used. Claimants argue for the application of the exchange rate in force when the inventory was initially purchased and Respondents for that in force at the date of the termination. The sole Arbitrator holds that the exchange rate for the conversion of the Singaporean dollars into Belgian francs is the rate at the date when the payment was due under the termination agreement. In so doing, he refers to the principle of nominalism, upheld by Swiss case law and scholarly opinion and by the Unidroit Principles (Article 6.1.9(3)). Since this corresponds to what Respondents had already paid, Claimants' request for application of the rate at the date the inventory was initially purchased is rejected. Arbitration costs are to be borne by Claimants.

With respect to the applicable law and principles of contractual interpretation:

The determination of the exchange rate to be applied to Claimant's claim under Art. 1 of the Termination Agreement requires interpretation of said stipulation under the applicable law.

The parties have agreed that the choice of law clause contained in Art. 36 of the Distribution Agreement and referring to the laws of Switzerland as the governing law of their contract shall also be applicable to the Termination Agreement. This agreement constitutes a valid choice of law clause and, according to the wording of Art. 36 of the Distribution Agreement, also applies to the interpretation of the contracts.

Under Swiss law, contract interpretation is governed by Art. 1 and 18 of the Swiss Code of Obligations (*Obligationenrecht*) in connection with Art. 1, Sec. 2 of the Swiss Civil Code (*Zivilgesetzbuch*). These provisions require the Arbitrator to look first for corresponding intentions of the parties as expressed in the contractual stipulations (Swiss Federal Tribunal BGE 105 II 16; 111 II 457; Guhl, *Das Schweizerische Obligationenrecht*, 8th ed. 1991, at 97). If no such natural consensus can be discerned, the Arbitrator has to look for the parties' implied or normative consensus. Towards this end the Arbitrator has to discern what reasonable parties acting in good faith must have expressed as their common intentions at the moment of conclusion of the contract . . . The principle of good faith thus establishes a "presumption of reasonableness" to be followed by the Arbitrator in his task of construing the contractual provision in dispute. Starting from the wording of the contractual stipulation this objective interpretation has to take into account not only the conduct of the parties before and after the conclusion of the contract but also the purpose of the contract and of previous contracts concluded between the same parties and the economic context in which it was concluded . . .

With respect to the exchange rate agreed upon by the parties:

In answering this question one has to focus again on Art. 1(c) of the Termination Agreement. It must be determined whether this provision can be considered to contain an implied currency clause, fixing the date of conversion to the date of the individual purchase of each item of inventory. Since such a will is not expressed on the face of said provision, one has to apply the principles of objective interpretation as outlined . . . above.

Every attempt that tries to give Art. 1(c) of the Termination Agreement such a broad meaning has to take into account the principle of nominalism. This principle provides that absent a specific provision in the agreement of the parties each debtor has to pay a monetary debt at its nominal value. Therefore, without any special agreement, each party

carries the risk of currency depreciation. The principle of nominalism is a general principle of transnational law. It is laid down not only in Swiss court decisions and doctrinal writings . . . but also in Art. 6.1.9(3) of the Unidroit Principles of International Commercial Contracts, allowing the obligor to make payment of a money debt expressed in a currency other than that of the place for payment in the currency of that place "at the rate of exchange prevailing there when payment is due" (Unidroit (ed.), Principles of International Commercial Contracts, 1994, at 127). As a consequence of this general principle of law, international arbitral tribunals are very reluctant to intervene into a contract because of inflation and currency depreciation in the absence of a specific currency depreciation clause . . .

This principle sets high standards for the Claimant who, according to the general principles of *actori incumbit probatio*, carries the burden of proof for a specific currency clause contained in the agreement of the parties. The Tribunal is not convinced that Art. 1(c) of the Termination Agreement contains such a currency clause. . . .

Final Award in Case 8264

Date: April 1997
Language: French
Claimant: Civil engineering equipment manufacturer (USA)
Respondent: State-owned industrial development corporation (Algeria)
Place of arbitration: Paris, France

The parties entered into an agreement relating to the design, production, start-up and initial management of industrial facilities by Claimant. Annexed to the agreement was a contract providing for the transfer by Claimant to Respondent of the industrial property, rights and know-how required for or useful to the design, manufacture, development, use, sale and upkeep of the factory equipment and products covered by the agreement, together with all improvements and changes thereto. Respondent agreed to pay not only a fixed fee, but also a proportional fee for each machine manufactured. Claimant accuses Respondent of stopping payment of the proportional fees without justification and of furnishing incomplete dispatch reports initially and of then sending no reports at all. Respondent considers it was justified in stopping payment of the fees due to Claimant's failure to provide it with the improvements likely to be of relevance to production. Accordingly it seeks compensation for the harm thereby caused to it. The Arbitral Tribunal considers Respondent to have fulfilled its duty to forward the dispatch reports and to provide information on the changes made by it to the licensed products. There is no question, however, that payment of the proportional fees is still outstanding. The Arbitral Tribunal begins by determining the amount of such proportional fees and then considers Respondent's counterclaim based on Claimant's alleged breach of contract, especially its duty to provide the improvements and changes relating to the design, manufacture, use and upkeep of the products and equipment covered by the contract. The Arbitral Tribunal considers that, since this duty is limited to improvements to the products and equipment covered by the contract, Claimant was not in breach of its contractual obligations strictly speaking. It therefore dismisses the plea of non-performance raised by Respondent, but admits that Claimant fell seriously short in its

general duty to provide information, leading to a loss of opportunity for Respondent, for which awards should be made in accordance with Article 7.4.3.(2) of the Unidroit Principles. The Arbitral Tribunal estimates the harm caused at one tenth of the sum claimed and orders this to be offset against the fees due by Respondent to Claimant. It decides not to order payment of interest on overdue amounts, as Claimant's omissions were largely to account for the lack of payment. The Arbitral Tribunal does not consider there to have been any abuse of procedure by the parties, but rather that the arbitration was necessary in order to assess their respective liability; it thus orders arbitration costs to be borne equally by both parties.

With respect to the law applicable to the merits:

'[...] il convient de rappeler les dispositions de l'acte de mission en ce qui concerne le droit applicable au fond du litige [...]

« En se référant à l'article [...] de la convention, le tribunal arbitral tiendra compte :

- a) des lois applicables en Algérie, qui régissent cette convention, ainsi que l'exécution des accords qui en sont la suite ou la conséquence,
- b) des prévisions raisonnables des parties à la lumière des objectifs, des motifs et des buts de la convention, et
- c) des principes généraux du droit et des usages du commerce international. »

With respect to Claimant's failings:

'Il est donc certain que l'attitude de la partie demanderesse, depuis [...], a manqué de transparence et de sincérité quant à la mise en œuvre concrète de ses obligations à ce titre. Celles-ci impliquaient une information claire, constante et gratuite sur l'évolution des techniques relatives aux pièces et produits contractuels.

'[...] la partie défenderesse a constamment excipé de l'inexécution par la partie demanderesse de son obligation de communiquer les perfectionnements pour justifier son propre droit de retenir le paiement des redevances proportionnelles correspondantes. [...]

Il est certain que, dans les contrats synallagmatiques, les prestations promises par chaque partie doivent être exécutées simultanément, et que, si l'une réclame ce qui lui est dû sans payer ou faire ce qu'elle doit, l'autre peut refuser d'exécuter sa propre prestation en lui opposant l'*exceptio non adimpleti contractus*. Cette voie de justice privée conduit donc à la suspension de l'exécution de la prestation de celui qui l'invoque, mais la pression ainsi exercée laisse subsister le contrat, du moins aussi longtemps qu'il n'est pas résolu. Consacrée en droit algérien dans l'article 200 du Code civil, elle est connue dans la plupart des systèmes juridiques, elle peut être considérée comme un principe général du droit des contrats internationaux.

Si une application stricte de ce principe à la présente espèce n'est pas fondée, cela ne signifie pas que la partie défenderesse n'ait pu surseoir, en raison du comportement de la partie demanderesse, au paiement des redevances proportionnelles qu'elle lui devait, et qu'elle lui doit encore. [...]

D'une part, en effet, les conditions et les effets de l'exception d'inexécution ne sauraient jouer ici dans toute leur rigueur. D'abord et surtout [...] parce qu'il n'a pu être établi clairement que la partie demanderesse avait effectivement manqué à son obligation de

communiquer les perfectionnements et améliorations qu'elle aurait réalisés sur les produits et pièces contractuels. Ensuite parce que, même si cette défaillance avait été prouvée, elle n'aurait pu justifier à elle seule le jeu de l'exception d'inexécution. Cette réplique, en effet, doit être proportionnée au mal que son auteur entend faire cesser. Or, malgré l'importance que présentait pour la partie défenderesse la communication des perfectionnements éventuellement réalisés par la partie demanderesse, la véritable contrepartie des redevances proportionnelles était constituée par la licence de fabrication concédée sur les produits contractuels, et cette contrepartie a subsisté jusqu'à l'expiration du contrat de licence. Cette exigence d'équilibre entre la prestation refusée et celle dont on entend sanctionner l'inexécution est elle aussi très généralement admise, en conséquence du principe général de bonne foi dont l'exception d'inexécution assure le respect dans les contrats synallagmatiques.

Mais d'autre part, il est incontestable que la partie demanderesse a gravement manqué à ses obligations générales d'information à l'égard de son licencié. Si elle n'avait pas de perfectionnement à lui communiquer, elle devait clairement et sincèrement le lui dire, et lui expliquer tout aussi clairement pourquoi. Le contrat de licence l'obligeait à un comportement actif, allant au-delà de simples propositions commerciales. Ce manque de transparence est contraire, lui aussi, au principe général selon lequel les obligations contractuelles doivent être exécutées de bonne foi, principe particulièrement exigeant dans un contrat international de coopération industrielle ayant pour objet la réalisation effective d'un transfert de technologie sur une longue durée. [...]

C'est la raison pour laquelle le Tribunal arbitral tout en rejetant l'exception d'inexécution soulevée par la partie défenderesse en ce qu'elle était fondée sur la violation de l'article 5.1 du contrat de licence, juge cependant que la partie demanderesse a manqué à ses obligations générales d'information et de conseil découlant implicitement mais nécessairement du contrat de licence, et aux engagements particuliers auxquels elle a consenti [...]

En conséquence, tout en réaffirmant – ce que d'ailleurs la partie défenderesse n'a jamais contesté – que les redevances proportionnelles sont dues jusqu'à l'expiration du contrat de licence [...], le Tribunal arbitral juge que les intérêts de retard réclamés à leur propos par la partie demanderesse ne sont pas dus avant le prononcé de la présente sentence [...]

Le Tribunal arbitral est conscient des difficultés rencontrées par la partie défenderesse pour établir précisément un préjudice consécutif à un défaut d'information en matière technologique. Il lui paraît néanmoins injustifié de confier à un expert une mission aussi générale, en déchargeant la demanderesse reconventionnelle de la charge de la preuve qui lui incombe. Il est préférable que le Tribunal arbitral se prononce lui-même, à partir de tous les éléments dont il dispose au terme d'une instruction aussi complète que possible. [...]

La passivité et les réticences de la partie demanderesse ont à tout le moins empêché la partie défenderesse d'intégrer dans ses plannings soit l'existence, soit l'absence de perfectionnements, et l'ont sans doute privée des informations qui lui étaient nécessaires pour faire évoluer ses produits, les adapter au marché et aux besoins de l'exportation.

En d'autres termes, en raison de l'attitude de la partie demanderesse, la partie défenderesse a perdu une chance de rentabiliser convenablement des installations industrielles fort onéreuses. Certes, l'échec actuel de la partie défenderesse, qui se traduit par l'arrêt presque complet de la fabrication des compresseurs et compacteurs visés par le contrat de licence, est dû à des causes diverses, mais le comportement de la partie demanderesse a sûrement contribué, dans une certaine mesure, à ce fiasco industriel.

En droit du commerce international, « la perte d'une chance peut être réparée dans la mesure de la probabilité de sa réalisation ». Ainsi s'expriment les Principes d'Unidroit relatifs aux contrats du commerce international (article 7.4.3, al. 2), qui consacrent, comme on le sait, des règles très largement admises à travers le monde dans les systèmes juridiques et la pratique des contrats internationaux.

Plus spécialement, le Tribunal arbitral estime que dans un contrat de transfert technologique, et spécialement lors de l'exécution d'un contrat de licence, les réticences de la partie détentrice de l'expérience et du savoir-faire qu'elle cède contre rémunération engendrent naturellement - ou en tous cas avec un très fort degré de probabilité - une insuffisance ou un retard dans l'acquisition de la maîtrise industrielle recherchée par son licencié.

De l'avis du Tribunal arbitral, il en a été ainsi dans la présente espèce et c'est cette perte de chance qu'il convient donc de réparer. [...]

Final Award in Case 8331

Date: December 1996
Language: English
Claimant: Swedish manufacturer
Respondent: Iranian company
Place of arbitration: Paris, France

The parties entered into an agreement called Memorandum of Understanding (MOU) relating to the sale by Claimant to Respondent of trucks and spare parts and the organization of after-sales service and future co-operation. Respondent called the performance guarantee owing to alleged failure by Claimant to fulfil its contractual obligations. Claimant requests repayment of the performance guarantee plus interest, arguing that it had correctly performed all its obligations under the agreement and that the performance guarantee had expired. The Arbitral Tribunal examines (i) the legal status of the agreement and whether it has binding force on the parties, (ii) whether Claimant was in breach of any of its contractual obligations and, if so, whether damages are due, (iii) whether Respondent was legally justified in calling the performance guarantee, and (iv) whether reimbursement of the performance guarantee is justified. In so doing, it applies the Unidroit Principles where appropriate and necessary (Articles 2.13, 4.1, 4.5, 5.1, 5.2, 5.4, 7.4.3 and 7.4.9).

Choice of law:

'The parties have agreed that the Arbitral Tribunal shall apply the relevant agreements between the parties and, to the extent that the Arbitral Tribunal finds it necessary and appropriate, the Unidroit Principles of International Commercial Contracts of May 1994 shall be applied by the Arbitral Tribunal.'

Claimant's pleas:

'The MOU is not a binding Contract but has the character of a letter of intent in which the parties agree to consider to carry out some projects. This is demonstrated by the use of

words in the MOU in which the parties would only "consider" the different projects concerning the sale of trucks, the after-sale services and the assembly of trucks. Claimant does not deny that the parties have concluded an agreement, called MOU, that the parties are bound to negotiate in order to try to come to a final agreement on the different projects of the MOU, but asserts definitely that the MOU does not bind the parties to execute the same projects . . .

Respondent's pleas:

'Respondent considers the MOU to be its basic agreement with Claimant regarding a vast project for the assembly and the manufacturing of Claimant trucks . . . The sale Contract was the first part of the MOU to be executed. The MOU was providing for the setting up of a joint venture . . . for the marketing of Claimant products, the organization of after-sales service activities . . . and for the strengthening of Claimant's position in the Middle East. . . . Claimant failed to execute its part of the deal by not forming the joint venture agreed on in the MOU. Claimant was in breach of its contractual obligations regarding the conformity of the trucks . . . The assortment rate of the spare parts was also not in conformity with the international norms. Claimant also failed to meet its obligations with respect to training of the Respondent's engineers and technicians. . . .

Article 2.13 of Unidroit general provisions confirms that the MOU was a binding agreement between the parties and what has been left are secondary little matters to be clarified by the parties in further discussions. The binding character of the MOU should be found in the two parties' common intention (Art. 4.1 of Unidroit). Such intention was clearly expressed in the various parts of the MOU. As an example, the confidentiality provided for in paragraph 6 of the MOU was binding on them and according to Article 5.1 of Unidroit Claimant's contractual obligations need not be expressly mentioned.

The implied obligations of Claimant in the MOU according to Article 5.2 of Unidroit derive from the nature of the Agreement, the good faith and fair dealing and reasonableness.

In that respect, Claimant has not respected the principle of good faith in dealing with its obligations. . . .

With respect to the legal status of the MOU and its force on the parties:

'Whereas the Claimant contends that the Memorandum of Understanding (MOU) . . . has no legally binding effect between them and that specific contracts detailing the terms on which the parties will agree are necessary to have the provisions of the MOU becoming final and legal obligations between the parties.

Whereas the Respondent considers on the contrary that the MOU is by itself legally binding between the parties and that several parts of it have not been fulfilled by the Claimant.

Whereas the Arbitral Tribunal, in order to set forth the rules according to which it will examine the contentions of the parties regarding the various items of the MOU and their effects on the relations between the parties has examined the text of the MOU in light of Article 4.5 of Unidroit "Principles of International Commercial Contracts" together with the comments thereon published by the International Institute for the Unification of Private Law, "Unidroit-Rome".

Whereas the MOU contains two kinds of provisions, the first of which defines specific conditions and terms that are the result of the parties' agreement and consequently are to be considered as final obligations between them unless they are amended by subsequent

contracts approved by the parties; the second one being a general description of the parties' intention to enter into certain agreements.

Whereas the real issue to be determined with regard to the legal status of the MOU is to establish what is the legal effect of the above-mentioned general description of the parties' intention if and when such intention has not been translated into specific contractual obligations.

Whereas the Arbitral Tribunal considers that when the parties agree upon general issues to be implemented by them at a later stage they cannot be released from their obligations to use their best efforts to ensure that such general issues become specific terms of contracts to be executed by the parties.

The Arbitral Tribunal having considered paragraph 2 of Article 5.4 of Unidroit "Principles of International Commercial Contracts" rules that the general description of the parties' intentions to reach agreements on certain issues contained in the MOU obligates the parties to exert their best efforts in order to have such intentions become defined terms of Contracts legally binding for each of them.

With respect to breach by Claimant of its contractual obligations vis-à-vis Respondent:

... Whereas the question at issue is merely to determine whether the Claimant has acted in bad faith by attaching to the MOU the Appendix 1 the contents of which were not exactly what item C of the MOU, in its second part, stated they are; or whether Claimant has considered, in good faith, that the differences between the trucks were not significant and that the trucks were adapted in accordance with Respondent's needs as clearly mentioned in Annex 1 to the Contract ...

Whereas the Arbitral Tribunal, in light of the facts and documents submitted to it, considers that there is no conclusive proof that the Claimant has acted in bad faith in order to deceive the Respondent on the technical specifications of the trucks ...

The Arbitral Tribunal rules that the Claimant did not breach its contractual obligation related to the technical specifications of the trucks delivered to the Respondent.

The second breach invoked by the Respondent is that the assortment of the spare parts did not conform to the Contract. ... The Arbitral Tribunal rules that the Claimant did not breach its specific contractual obligation related to the assortment of the spare parts delivered by it to the Respondent.

The third breach invoked by the Respondent is the failure of the Claimant to fulfill its obligations related to after-sales services and to the training of Respondent's technicians. ... Whereas the second point to be determined is whether the Claimant was under the obligation to form a Joint Venture. ... with the Respondent to take care of the after-sales services. Whereas paragraphs 7 and 8 of the Addendum show that the parties to the Contract ... have confirmed their intention, previously formulated in the MOU, to form ... by making it a part of their Contractual obligations and even to speed up the procedures to that end. Whereas the Claimant by refusing to take any appropriate actions to that effect has breached its obligation in respect of forming ...

Whereas the fourth breach invoked by the Respondent relates to the pre-delivery inspection that it alleged was not made by the Claimant in ... Whereas the trucks were delivered FOB in Sweden and duly inspected by ... in execution of clause 8 of the Contract ... the Arbitral Tribunal rules that the Claimant did not breach its contractual obligations regarding the inspection of the trucks.

Whereas the fifth breach invoked by the Respondent relates to the refusal by the Claimant to cooperate with the Respondent and to study the possibilities for future assembly of Claimant's vehicles in Iran. . . . Whereas a party to an agreement that has freely chosen its counterpart for the business envisaged by both of them may not after the conclusion of said agreement invoke as a justification of the non-fulfilment of its obligation to exert its best efforts to have the business materialized that it has made a wrong choice in selecting the other party which, according to it, may not constitute a real counterpart. The Arbitral Tribunal rules that the Claimant has breached its obligation to make its best efforts with the view to proceeding with the establishment of the assembly of Claimant vehicles in Iran in cooperation with the Respondent.'

With respect to the calling of the performance guarantee:

'Whereas, in light of the facts and pleas submitted to it, the Arbitral Tribunal cannot rule that the Performance Guarantee was called by the Respondent after its expiry date. Whereas the Respondent sustains that the performance guarantee was to cover the good execution of the Claimant's obligation under the MOU, the Contract . . . and the Addendum, while the Claimant submits that the Performance Guarantee is limited to its obligations set forth in the Contract . . . Whereas the Arbitral Tribunal has considered . . . above that the Claimant has breached its obligation to make its best efforts in respect of forming . . . , the Respondent is to be considered legally justified in calling the Performance Guarantee, being payable on demand.'

With respect to the legal consequences of the breach and payment of damages:

'Whereas the Claimant has been in breach of its obligations to exert its best efforts in respect of forming . . . and establishing with the Respondent the assembly of Claimant vehicles in Iran. Whereas the damages suffered by the Respondent in that respect may not be accurately determined due to the fact that they relate to assumptions on what would have been the benefit for the Respondent . . . The Arbitral Tribunal, after due consideration of Articles 7.4.3 and 7.4.9 of Unidroit Principles of International Commercial Contracts, rules that the Claimant should compensate the Respondent for the loss of the chance to enjoy the probable benefits of the two aborted projects mentioned above by bearing an amount of . . . US Dollars to be deducted from the Performance Guarantee amount of . . . US Dollars already cashed by the Respondent. The balance to be reimbursed by the Respondent to the Claimant, in Sweden, amounts to . . . US Dollars together with accrued simple interest at a rate which - due to the absence of any prime rate in dollars in Sweden - shall be the prime rate in dollars prevailing in the United States on [date of payment of performance guarantee] and as subsequently modified from time to time until the effective date of payment.'

With respect to the repayment of the performance guarantee and interest:

'The Arbitral Tribunal, in light of its answers to the issues . . . above, rules that the Claimant is justified in requesting the reimbursement of part of the Performance Guarantee amount and therefore orders Respondent to pay to Claimant . . . US dollars together with accrued simple interest, on the principal sum, at the USD prime rate prevailing on [date of payment of performance guarantee] and as subsequently modified from time to time until the date of payment.'

Final Award in Case 8486

Date: September 1996
Language: German
Claimant: Seller (Netherlands)
Respondent: Buyer (Turkey)
Place of arbitration: Zurich, Switzerland

Respondent ordered a sugar-cube production plant from Claimant. Following Respondent's default on the contractual terms of payment and the failure to find a solution, Claimant terminated the sales contract and claimed compensation and interest from Respondent. In so doing, it pointed out the attempts it had made to mitigate damage by selling that part of the facilities which had not been specially designed to meet Respondent's particular needs. Respondent argues its inability to finance the order due to unforeseen economic changes in the Turkish sugar-cube market, currency divergence and a rise in the costs of energy, carboard packaging and labour, preventing it from obtaining a bank loan. It requests repayment of its advance. In the final Award, the sole Arbitrator firstly finds the contract to be valid, as the financing thereof by Respondent was not a condition precedent for its validity. The Arbitrator decides Dutch law is applicable, but also stresses that the national rules of law should be applied in the light of international contractual law, especially the Unidroit Principles. He considers that the events mentioned by Respondent do not release it from its obligation to pay, as the cancellation of contracts due to the occurrence of unforeseen events should be admitted only in rare cases. He decides that the events mentioned by Respondent are part of the economic risks borne by the latter. As the cancellation of the contract is thus valid, Respondent is accordingly entitled to compensation and interest. The costs of the arbitration are not split in accordance with the parties' respective success rates. General principles of international arbitration law call for arbitral tribunals to take account of the parties' attitudes during the proceedings as well as the outcome of such proceedings. As Respondent had not paid any advance and had not signed the Terms of Reference or taken part in the hearings, it should bear the arbitration costs in full.

With respect to Respondent's obligation to pay and the events referred to with a view to its release therefrom:

The circumstances put forward by Respondent do not entitle the Arbitral Tribunal to release Respondent from its obligation to pay pursuant to Art. 6:258 of the Dutch Civil Code (*Burgerlijk Wetboek*, BW) on the ground of the occurrence of unforeseen circumstances ("onvoorziene omstandigheden"). It is true that the provisions of the Dutch Civil Code as the law governing the producer are applicable to the contract in accordance with Art. 13, para. 3, sentence 1 of the ICC Rules of Arbitration taken in conjunction with Section 28.2 of the General Terms of Business. This also follows from Art. 13, para. 3, sentence 2 of the ICC Rules of Arbitration taken in conjunction with Article 187, paragraph 1, 2nd alternative of the Swiss Private International Law Act (PILA). The Swiss PILA, according to Article 176, paragraph 1 thereof, is applicable to the present arbitration, as Zurich (Switzerland) was fixed by ICC as the place of arbitration and both parties have their registered offices outside Switzerland. Claimant, in its capacity as producer of the sugar-cube production plant, has effected the characteristic performance in respect of the contract; as a result, the dispute is most closely connected with its law . . .

The provision of Art. 6:258 also applies, even though in Section 25 of the General Terms of Business the parties agreed on special regulations covering "grounds for release". Indeed,

according to Art. 6:250 of the BW, the parties may not derogate from this provision by mutual agreement, which means that the rule is mandatory . . .

The requirements of the provision are not met in the present case, however, the premise being that this provision should only be applied with much prudence. This is firstly because it is a special rule giving general authorization to consider specific contractual provisions as inapplicable in the given circumstances according to standards of fairness and reasonableness ("redelijkheid en billijkheid"), pursuant to Art. 6:248, para. 2 taken in conjunction with Art. 3:12 of the Dutch Civil Code . . . As it is, this general provision is applied only with much prudence in internal legal practice within the Netherlands . . . The prime decisive factor here, according to Art. 3:12 of the BW, is the "legal conviction valid in the Netherlands". In the case of application of the provision in an international context, this is replaced by the legal convictions valid in international contract law. The decisive characteristic here, however, is the principle of *pacta sunt servanda*, as expressed to some extent in Article 1.3 of the Unidroit Principles of International Commercial Contracts . . . These legal convictions are also to be taken into consideration when applying national law to international matters . . . The necessity and admissibility of interpreting national law in the light of the Unidroit Principles has also been specifically advocated for Dutch law . . .

It is the intention of the Dutch legislator that such prudence in applying the law should also exist in the application of the special rule in Art. 6:258 . . . Such prudence is again in keeping with international contractual and arbitral practice. It should also be considered in the context of national Dutch law . . . Accordingly, termination of a contract on the grounds of the occurrence of unforeseeable circumstances ("hardship", "*clausula rebus sic stantibus*") should be admitted only in extreme and rare cases . . . The underlying principle in international trade is rather that the parties themselves assume the corresponding risks of performing and fulfilling the contract unless the risks are expressly otherwise distributed in the contract itself . . . Moreover, Art. 6.2.1 of the Unidroit Principles states specifically that the mere fact that performance of a contract entails greater economic difficulties for one of the parties is not sufficient justification for accepting a case of hardship . . . The ICC principles on force majeure and hardship also provide that a party cannot invoke hardship in performance simply because the contract turns out to be unprofitable for it . . . Accordingly, a Dutch arbitral tribunal found that a dramatic fall in prices and currency divergency alone do not constitute unforeseeable circumstances and therefore do not justify termination of the contract. It was the opinion of the arbitral tribunal that these circumstances fell rather within the area of risk of the party concerned . . . In view of these uncertain circumstances on the Turkish market, known to Respondent, it cannot be countenanced that Respondent now wished to shift the associated economic risks to Claimant . . .

With respect Claimant's ending of the contract:

'Claimant, for its part, however, . . . put effective end to the contract with Respondent. The question remains open as to whether Claimant, through the document from its legal counsel dated . . . , effectively cancelled the contract by way of avoidance (*«vermitigend»*) in accordance with Art. 3:39 of the BW, or by way of termination (*«ontbindend»*) in accordance with Art. 6:267, para. 1 of the BW. The parties in fact effectively excluded these provisions of the applicable Dutch law in the *General Conditions for the Supply and Erection of Plant and Machinery for Import and Export* of the United Nations Economic Commission for Europe (No. 188 A) appended to the order confirmation. According to these Supply Conditions, Claimant is entitled to terminate the contract and claim damages.

The General Supply Conditions were validly included in the contract between the parties. To this end, Art. 6:234, para. 1(1) of the BW taken in conjunction with Art. 6:233(b) of the

BW requires that the user provide the other party with the conditions "before or at the time of concluding the contract", so that the other party has "a fair possibility of acquainting itself" with the content of such conditions. The order confirmation of . . . which was initialed and signed by both parties and hence represents the actual text of the contract, contains both in the preamble and the concluding section an express reference to the General Supply Conditions, which were moreover appended to the contract.

According to Art. 10.2 of the Supply Conditions, Claimant could, in the event of the late taking of delivery, summon Respondent to take delivery within a fitting period of time; once this period had expired, it could renounce the contract simply by giving written notification. The Claimant has satisfied these requirements. . . .

With respect to the arbitration costs:

According to Art. 20 of the ICC Rules of Arbitration, the Arbitral Tribunal is required, in addition to deciding on the merits of the case, to rule on the costs of the arbitration and decide which of the parties should pay the costs. According to general principles, the costs of the proceedings are borne by the unsuccessful party in the arbitration . . . In the present case, Respondent is unsuccessful in its counterclaim, while Claimant is only partially successful in its claim. Moreover, it is liable towards Respondent for costs in connection with the partial withdrawal of its claim announced during the proceedings However, the arbitration costs are to be borne in full by Respondent. Indeed, according to general principles of international arbitration law, the Arbitral Tribunal, in its decision on costs, should take account not only of the outcome of the proceedings but also of the conduct of the parties during the proceedings . . . Parties to international arbitration have a special duty, in good faith, to help the proceedings to progress and to refrain from any delaying tactics . . . Respondent's conduct during the entire proceedings in no way meets these requirements. Respondent paid none of the advances on costs required for the arbitration. Moreover, it not only delayed in submitting its counterclaim, namely until after the first draft of the Terms of Reference had been drawn up, refused to sign the Terms of Reference amended in accordance with its wishes, despite being fully advised by the Arbitral Tribunal as to the significance and legal consequences, and failed to take part in the hearing despite being given sufficient notice, but also, by instructing legal counsel at the last minute, i.e. after the hearing was over and shortly before the expiry of the final deadline for reacting to the report of the hearing, followed by the abandonment of the brief just a few days later, contributed considerably to delaying and confusing proceedings. This was moreover exacerbated by the fact that the same legal counsel resumed the brief on the same day, without the arbitrator being informed.

For the above-mentioned reasons, Respondent shall reimburse Claimant for the advance on costs amounting to . . . paid by the latter in respect of these proceedings.

According to Article 20, para. 2 of the ICC Rules of Arbitration, the requirement to pay costs incumbent on Respondent also covers the "normal legal costs incurred by the parties" The "normal" nature of the legal costs is determined according to general principles underlying arbitration cost law. The deciding factor here is whether the asserted legal costs are objectively necessary and fitting, given the factual and legal complexity of the case including the anticipated time it would take. The Arbitral Tribunal has some leeway in making its decision . . . In view of the legal questions raised by the proceedings and having regard to the course of the proceedings described above, the Arbitral Tribunal finds the legal costs asserted by Claimant necessary and fitting, and therefore also "normal" within the meaning of Art. 20, para. 2 of the ICC Rules of Arbitration. They are consequently to be borne in full by Respondent.

The ICC Awards in cases 8501, 8502 and 8503 concern disputes arising in connection with contracts all relating to the supply of the same commodity under similar circumstances. The same Arbitral Tribunal decided all three cases, and all three Awards follow a common pattern with respect to legal issues and arguments. For these reasons, only one of the Awards will be presented here, as representative of all three.

Final Award in Case 8502

Date: November 1996
Language: English
Claimant: French and Dutch buyers
Respondent: Vietnamese exporter
Place of arbitration: Paris, France

*Claimants and Respondent entered into a contract for the supply of a given quantity of rice of a given quality during a given period of time. Claimants allege that Respondent failed to supply the rice despite all required formalities having been carried out. Respondent is accused of seeking to delay performance, of alleging difficulties arising from government action and flooding in the country of exportation, and of attempting to renegotiate the agreed prices. The sales contract contains an arbitration clause referring to the ICC Rules of Arbitration. Respondent refuses to take part in arbitration proceedings. The arbitration therefore continues on an ex parte basis pursuant to Article 15(2) of the 1988 ICC Rules of Arbitration. The Arbitral Tribunal decides to apply to the contract trade usages and generally accepted principles of international trade, as reflected in the 1980 Vienna Convention on the International Sale of Goods and the *Unidroit Principles* (Article 7.4.6 of which is referred to for the calculation of damages). The Arbitral Tribunal decides that Respondent was in breach of its obligations and that there was no case of force majeure preventing it from performing. Claimants are awarded damages. Three quarters of the arbitration costs are to be borne by Respondent and the remaining one quarter by Claimant; each party is to bear its own legal expenses.*

Applicable law:

The Contract concluded between the Parties, and upon which the present proceeding is based, is silent as to the law to be applied on the merits. There is, accordingly, no express choice of law clause. Similarly, having regard to the correspondence exchanged between the Parties, the Arbitral Tribunal is of the opinion that no implied choice of law can be inferred from the relationship between the Parties.

The Contract, as well as the present arbitration, involve, on the one hand, a Vietnamese seller and, on the other hand, a Dutch buyer acting through its French company. The place of arbitration is Paris, France.

This dispute has connections with several national laws, all of which may have a relevant role. Under Article 13(3) of the ICC Rules, the Arbitral Tribunal shall apply the law designated by the rule of conflict "which it deems appropriate".

The Arbitral Tribunal notes that the Respondent has not stated its position as to which law should apply. Respondent has never submitted, in the context of this arbitration or in the correspondence between the Parties, that Vietnamese law should apply. The Arbitral Tribunal is of the opinion that it is not required *ex officio* to identify potential issues that might possibly arise under Vietnamese law.

Although the Contract contains no choice of law clause, it refers to international trade usages. Article 6 of the Contract, with respect to the price to be paid by the buyer, provides that Incoterms 1990 shall apply. Similarly, Article 13 of the Contract stipulates, as regards force majeure, that the clause of UCP 500 shall apply.

It thus appears that the Parties have, to a large extent, agreed to submit their relationship to recognized trade usages such as the Incoterms or the Uniform Customs and Practice for Documentary Credits (UCP), published by the ICC. The Arbitral Tribunal considers that by referring to both the Incoterms and the UCP 500 the Parties showed their willingness to have their Contract governed by international trade usages and customs.

The application of the relevant trade usages is consistent with Article 13(5) of the ICC Rules and with the arbitral practice . . .

For the foregoing reasons, the Arbitral Tribunal finds that it shall decide the present case by applying [to] the Contract entered into between the Parties trade usages and generally accepted principles of international trade. In particular, the Arbitral Tribunal shall refer, when required by the circumstances, to the provisions of the 1980 Vienna Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) or to the Principles of International Commercial Contracts enacted by Unidroit, as evidencing admitted practices under international trade law.¹

With respect to compensation due to Claimant owing to Respondent's default:

The Arbitral Tribunal found that the Respondent failed to comply with its obligations under the Contract and that said failure was not legally justified. It now remains to calculate the amount of compensation due to the Claimants caused by the Respondent's default.

As regards the applicable law on the question of compensation, the Arbitral Tribunal, as previously mentioned, considers that the Parties have expressed their mutual intention to have their relationship governed by general principles of international trade.

The Incoterms 1990 or the UCP 500, to which reference is made in the Contract, contain no provision regarding the effect of the failure by one party to fulfil its obligations under the Contract.

The Arbitral Tribunal considers that this question should be examined in light of generally admitted principles of international trade as contained for example in international treaties. For this reason, the Arbitral Tribunal is of the opinion that the principles embodied in the Vienna Convention on the International Sale of Goods of 1980 (Vienna Sales Convention) reflect widely accepted trade usages and commercial rules. Although the Vienna Sales Convention is not as such directly applicable to the Contract (Vietnam has not ratified this Convention), the Arbitral Tribunal finds that it may refer to its provisions as the expression of usages in the world of international commerce . . .

Article 76 of the Vienna Sales Convention reads as follows:

- "(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under Article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under Article 74. (...)
- (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no

current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.”

The method of calculation of damages in the Vienna Sales Convention is analogous to that envisaged by different national laws. . . .

Finally, the Arbitral Tribunal shall refer to the work of the International Institute for the Unification of Private Law (Unidroit). Article 7.4.6 of the Unidroit Principles of International Commercial Contracts provides:

“(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.

(2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.”

Based on these applicable principles of law, the Claimants are entitled to damages calculated as the difference between the contract price and the relevant market price. The contract price is easily determined by the contractual provisions agreed upon by the Parties, which include the initial Contract and its amendment. . . .

With respect to the determination of the relevant market price, two issues must be addressed. One needs first determine the reference time at which the market price is calculated, and the place of reference. . . .

[Reference to Article 76 CISG and various national laws.]

It results from the foregoing analysis that, unless a current price is not available, damages should be calculated with reference to the market price at the place where delivery of the goods should have been made. In the present case, the goods being sold FOB Ho Chi Minh City port, the place of delivery of the goods for the purposes of this provision is Ho Chi Minh City. . . .

As regards the relevant time to refer to the local market price, the Arbitral Tribunal shall apply the general rule according to which the relevant time for specifying the current price is that of the default. . . .

With respect to interest:

The Claimants' prayer for relief asks for the application of compound interest. The Arbitral Tribunal notes that the granting of compound interest is not a universally recognized practice in international trade. Some national laws prohibit the capitalization of interest. Moreover, the Claimants have not shown any particular reason why in this case compound interest should be granted. As a consequence, the amount hereby awarded shall bear simple interest. . . .

. . . the amount awarded shall bear interest commencing . . . the date the Request for Arbitration was received by the ICC until payment.

As to the rate of interest, the Arbitral Tribunal considers that the rate of 12% per annum requested by the Claimants is not excessive and that it would have been up to the Respondent to contest this rate, which it has not done. . . .

Final Award in Case 8769

Date: December 1996
Language: English
Claimant: French company
Respondent: Austrian company
Place of arbitration: Zurich, Switzerland

The parties entered into a manufacturing contract, plus a tooling agreement relating thereto. Claimant alleges breach of contract by Respondent, referring to misleading conduct in negotiations, failure to meet technical specifications, misuse of toolings and non-registration of patent. Respondent objects and files a counterclaim to cover balance of tooling costs, unused packaging and materials, warehouse costs, settlement payment for termination of licensing agreement, additional machinery costs, outstanding invoices and lost profits. The sole Arbitrator applies French law and the Vienna Convention on Contracts for the International Sale of Goods (CISG), in accordance with the agreement reached by the parties in the arbitration clause. He rejects Claimant's demands and grants Respondent's counterclaims. In awarding interest, he refers to Article 7.4.9(2) of the Unidroit Principles relating to the rate of interest. Arbitration costs and Respondent's legal costs are to be borne by Claimant.

With respect to interest claimed by the parties:

'Claimant claims interest at the French statutory rate from . . .
 Respondent claims interest at 10.5% on . . . since . . .

Claimant is entitled to interest on the sums awarded pursuant to Art. 78 of the Vienna Convention. Art. 78 Vienna Convention does not specify a particular interest rate. The sole Arbitrator considers it appropriate to apply a commercially reasonable interest rate (see Art. 7.4.9. subs. 2 Unidroit Principles). The interest rate claimed is commercially reasonable for the award currency, Austrian schillings.

On . . ., the date from which Respondent claims interest, the Agreement had been terminated. The sums claimed were due in the sense of Art. 78 Vienna Convention.

Accordingly, interest is awarded to Respondent as claimed.'

Final Award in Case 8817

Date: December 1997
Language: Spanish
Claimant: Spanish company
Respondent: Danish company
Place of arbitration: Paris, France

Claimant objects to the termination with immediate effect of an exclusive distribution agreement relating to food products between itself and Respondent. The latter had given as the reasons for termination (i) the change that had occurred in Claimant's

*management, which in its view came within the causes of termination provided for in the agreement, and (ii) Claimant's lack of sufficient resources to pay the sums due within the agreed time-limits. According to Claimant, such reasons concealed unfair competition, as the change in question was the dismissal of the general manager, who, it alleges, had created a rival undertaking with which Respondent had established commercial relations competing with those existing between Claimant and Respondent. In determining the applicable law, the sole Arbitrator takes into account the nature of the contractual relations between the parties. He decides to apply the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention) and at the same time draws upon the *Unidroit Principles which echo them (namely, in the present case, the force of prior practices between the parties (1.8) and mitigation of harm (7.4.8))*. The Arbitrator finds that there was no justification for the termination of the agreement in such conditions and awards Claimant damages for the harm caused by the severance of the agreement and commercial relations of several years standing and by the unfair competition which it had suffered. Interest is added to the damages at the rate applicable to the currency in which the latter are calculated. Respondent is ordered to bear the entire costs of the arbitration, as Claimant had been successful in almost all its claims.*

With respect to the applicable law:

Bearing in mind, firstly, that the contractual relationship between Respondent and Claimant ended in September 1995, and that the task of the arbitrator is limited to judging a dispute, the arbitrator feels there is no need to determine the applicable law as the parties could have done at the start of their relationship.

Bearing in mind, secondly, the provisions of Article 13.3 of the ICC Rules of Conciliation and Arbitration, which invites the arbitrator to determine the law applicable to the merits of the dispute, the sole arbitrator believes that the starting point for determining the applicable law should be the claims and counterclaims made in the dispute. . . .

Analysis of the grounds for this first claim for compensation shows that the part connected with the activity of exclusive distributor represents less than one tenth of the compensation relating to Claimant's loss of profits in trading the goods manufactured by it.

This means that the quality of contract of sale prevails over that of distribution contract, if the contractual relationship is taken as a whole. Claimant's other two claims are a consequence of the cancellation . . . or connected with the circumstances of the cancellation of the contractual relationship . . .

In the presence of a contractual relationship qualified overall as one of sale, the arbitrator must, in order to resolve the dispute, determine an appropriate law, as he is invited to do by Article 13.3 of the ICC Rules of Conciliation and Arbitration. According to widespread case law in arbitration practice, one of the criteria for the appropriate nature of a rule is its presence in the legal systems of both parties. This is the case in the United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna on 11 April 1980. This Convention came into force in Denmark on 1 March 1990 and in Spain on 1 August 1991, which date is after the signature of the contract but sufficiently remote for the text to have been studied and commented on especially in Spain. . . .

Article 3.2 of said Vienna Convention calls for it to be applied in situations where, as in the present case, there is both a provision of a service and a sale, and the preponderant part of the obligations arise from the sale. The same Convention reinforces the choice of a single law, desired by both parties, for dealing with disputes.

Furthermore, the provisions of the Convention and its general principles, now contained in the Unidroit Principles of International Commercial Contracts, are perfectly suited to resolving the dispute. . . .

It should also be understood that the provisions of the contract signed in . . . shall apply as the law governing the parties.'

With respect to Claimant's inability to pay the sums due within the time-limit set by Respondent:

'The succession of events highlights the fact that Respondent attempted to change the practices and habits followed by the parties from at least March 1993. The change concerns the time-limit for payment and the requirement of a constant balance between deliveries and their payment.

According to Article 9.1 of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980, "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves". This rule was extended to all international commercial contracts by the Unidroit Principles. Principle 1.8 provides that: "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."

The arbitrator considers that such a rule is perfectly suited to resolving the dispute between Claimant and Respondent, even though the cancelled contract is a contract for exclusive distribution. Hence, in order for previous practices to be changed, the proposal made by one of the contracting parties needed to be accepted by the other party. . . .

The changes Respondent wished to make should have been negotiated and accepted. In the absence of agreement between the two parties, the arbitrator considers that the fact of maintaining the practices accepted previously – at least tacitly – by both parties does not constitute "gross negligence" on the part of Claimant.

The arbitrator does not consider the reason given for denouncing the contract, which refers to the lack of means of paying within the time-limit fixed by Respondent, to be properly founded.'

With respect to Claimant's request to be compensated for the interruption in its business resulting from its being unable to use other suppliers' products:

. . . the arbitrator considers that the sudden, unexpected interruption of deliveries to Claimant caused harm to the company. Such harm took the form of difficulties in adapting to a new situation requiring changes in manufacturing arrangements. The arbitrator notes that Claimant neither provides proof that these difficulties lasted for a year nor indicates what efforts it made and what difficulties it encountered during the stage of adapting to different conditions and products.

Respondent points out pertinently that it is a principle of international commercial law that the party suffering harm must take the necessary steps to mitigate the harm. For contracts of sale, this rule is expressed in Article 77 of the Vienna Convention in the following terms: "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated."

In general, a similar rule is set out in Article 7.4.8. of the *Unidroit Principles*, which states: "The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps."

In the absence of indications as to the efforts and attempts made by Claimant during the alleged year of inactivity, the arbitrator considers that this commercial inactivity was caused in part by Claimant's inertia.'

Final Award in Case 8873

Date: July 1997
Language: French
Claimant: French company
Respondents: Spanish companies
Place of arbitration: Madrid, Spain

*In connection with the construction of a road in Algeria, Claimant, a French company, entered into a contract with Respondent 1, a Spanish company, whose rights were assigned to Respondent 2, also a Spanish company. As Claimant fell behind schedule in performing the work, Respondent asked it to increase its resources so as to make up the lost time. Claimant's explanation of the delay was (i) a deterioration in conditions in Algeria, which, it alleges, prevented it from mobilizing the necessary personnel and (ii) extra work requested by Respondent. It suggested that the terms of their collaboration should be renegotiated, failing which it would be obliged to cease the work on grounds of force majeure. An amendment was drawn up, which made various changes to the initial contract. The work was continued but fell behind schedule. Respondent therefore claimed penalty payments for late performance and made the payment of invoices subject to Claimant's issuing a credit note covering the amount of the penalties. A deadlock ensued, with Claimant refusing to sign the credit notes and asking for all sums invoiced to be paid, and Respondent refusing to pay the invoices until it had received the credit notes. In the face of this situation, Claimant introduced its Request for Arbitration referring to force majeure to account for the delay in the performance of the work. Its claims concern outstanding invoices due for payment by Respondent and various additional costs that it had been caused to incur. Respondent made a counterclaim in order to obtain payment of the penalties for late performance and to be covered for certain additional costs it had been caused to incur. The Arbitral Tribunal begins by considering the law applicable to the merits. It refuses to apply the *Unidroit Principles* relating to hardship and the FIDIC and ENAA conditions, as sought by Claimant. It then examines the parties' various claims and sets off the sums due on the one side against those due on the other. Arbitration costs are halved between the two parties.*

With respect to the law applicable to the merits:

'La référence aux usages et aux principes généraux

L'article 26 du contrat dit que « This Contract shall be entirely governed by Spanish law, excluding any other legal system ». Considérant le choix exprès fait par les parties, il n'est

évidemment pas nécessaire de déterminer la loi nationale applicable. Le problème qui se pose est plutôt celui de savoir si, et dans quelle mesure, on devra prendre en considération également, dans le contexte de la loi nationale choisie par les parties, les usages du commerce international.

Selon l'opinion de la partie demanderesse la controverse doit être décidée non seulement sur la base des dispositions de la loi espagnole mais aussi en tenant compte des usages du commerce international et des principes généraux du droit et, en particulier, des usages existant dans les contrats internationaux de génie civil.

La partie demanderesse fait aussi valoir au soutien de cette thèse la première version du contrat soumise à la partie demanderesse selon laquelle : « In reaching a decision the arbitrators shall be guided primarily by the terms of this Contract and international practice in similar agreements. However, to the extent arbitrators decide that reference need be made to the laws of a particular jurisdiction, the laws of Spain shall be applied ».

La partie défenderesse, au contraire, souligne qu'en droit espagnol, et en particulier sous le Code civil, applicable dans le cas d'espèce (le *contrato de obras* étant un contrat de droit civil), les usages ne sont applicables que dans l'absence de réglementation de loi.

En ce qui concerne l'argument de la partie demanderesse tiré de la version précédente du contrat, son absence de fondement est évidente. D'ailleurs, la demanderesse semble avoir abandonné cet argument dans les mémoires successifs.

En ce qui concerne la question des relations entre usages et normes de loi dans le contexte de la loi nationale choisie par les parties, il est important de souligner que cette question se présente d'une façon tout à fait particulière dans le contexte de l'arbitrage international en vertu des règles spéciales réglant le rôle des usages dans l'arbitrage international. Ainsi, le Règlement de conciliation et d'arbitrage de la CCI dit expressément à l'article 13, § 5, que « ... dans tous les cas, l'arbitre tiendra compte des stipulations du contrat et des usages du commerce ». Mais, surtout, l'article VII de la Convention de Genève du 21 avril 1961 (ratifiée par la France et l'Espagne) dit expressément que : « ... les arbitres tiendront compte des stipulations du contrat et des usages du commerce ».

Ceci signifie que les arbitres ne sont pas liés aux règles strictes d'un droit national lorsqu'il s'agit de déterminer si, et dans quelle mesure, les usages du commerce peuvent s'appliquer, éventuellement en substitution de normes dispositives de la loi applicable. En particulier, la Convention de Genève a établi, par son article VII, un principe internationalement uniforme qui s'applique au lieu des normes nationales en la matière et qui reconnaît aux arbitres une marge d'appréciation plus large quand il s'agit de déterminer le rôle à attribuer aux usages. Ceci permet aux arbitres d'attribuer une place plus importante aux usages du commerce, et par conséquent aux règles coutumières établies, à niveau international, par les entreprises engagées dans le commerce international, avec la seule limite du respect des dispositions impératives de la loi applicable.

Naturellement, tout ceci ne s'applique qu'en présence d'usages véritables, c'est-à-dire d'usages largement connus et régulièrement observés dans la branche considérée : il faut par conséquent établir qu'il s'agit des règles que les personnes engagées dans le commerce international (et en particulier dans la branche en question) considèrent applicables, sans aucun besoin d'une référence expresse, parce qu'elles sont devenues obligatoires comme conséquence d'un usage répandu et continu. Il est évident que cette appréciation doit être faite avec prudence, afin d'éviter que les parties se trouvent soumises à des règles dont elles ne pouvaient pas attendre raisonnablement qu'elles soient applicables.

Le problème spécifique soulevé par le demandeur *barsbip* et droit au remboursement des surcoûts causés par la force majeure.

Les règles que la partie demanderesse prétend être applicables en tant qu'usages du commerce ou en tant que principes généraux applicables aux contrats internationaux sont essentiellement deux : d'une part le régime de la *barsbip* prévu par les « Principes Unidroit » et d'autre part la règle selon laquelle la partie qui subit un événement de force majeure a droit au remboursement par l'autre partie des surcoûts qu'elle supporte pour surmonter la situation de force majeure, règle qui résulterait des conditions contractuelles répandues à niveau international et en particulier des conditions FIDIC [...] et les conditions de l'ENAA [...]

Les Principes Unidroit en matière de *barsbip*

En ce qui concerne les « Principes des Contrats Commerciaux Internationaux » rédigés par l'Unidroit (« Principes Unidroit »), leur Préambule prévoit expressément qu'ils s'appliquent « lorsque les parties acceptent d'y soumettre leur contrat » et qu'ils « peuvent s'appliquer lorsque les parties acceptent que leur contrat soit régi par les « Principes généraux du droit », la *lex mercatoria* ou autre formule similaire ».

Etant donné que dans le contrat du [...] les parties n'ont fait aucune référence aux Principes en question et que la formulation de la clause sur la loi applicable permet d'exclure avec certitude que les parties aient voulu soumettre le contrat à la *lex mercatoria* ou aux principes généraux du droit, on ne voit pas comment les principes en question pourraient trouver application en tant que tels.

Le seul moyen pour justifier leur application serait de dire qu'il s'agit d'une « codification » d'usages existants et que les Principes Unidroit devraient être appliqués dans cette qualité d'usages « codifiés » par l'Unidroit. Pour arriver à cette conclusion il faudrait prouver que les règles invoquées par la demanderesse (et en particulier celles sur la *barsbip*, contenues dans les articles 6.2.1 et suivants) correspondent à un usage international généralement établi, auquel les personnes engagées dans le commerce international se considèrent liées sans besoin d'une stipulation expresse dans ce sens.

Or, si l'on peut admettre l'existence d'une tendance, dans certaines branches, à stipuler avec une certaine continuité des clauses de *barsbip*, il est certain que dans la pratique des affaires l'obligation de rééquilibrer le contrat (par la négociation et, le cas échéant, par l'imposition d'un tiers, comme prévu dans l'art. 6.2.3, § 4 des Principes Unidroit), qui caractérise la *barsbip*, constitue un principe tout à fait exceptionnel qui n'est accepté que dans le cadre de clauses contractuelles, qui devront déterminer en détail les situations justifiant la *barsbip* ainsi que les conséquences de celle-ci. Il est donc exclu que l'on puisse considérer les dispositions en matière de *barsbip* contenues dans les Principes Unidroit comme des usages du commerce. Il s'agit, au contraire, de règles qui ne correspondent pas, au moins à l'état actuel, à la pratique courante des affaires dans le commerce international et qui ne seront par conséquent applicables que lorsque les parties y ont fait une référence expresse, ce qui n'est pas le cas ici.

Dans ces conditions le Tribunal arbitral conclut à l'inapplicabilité, dans le cas d'espèce, des Principes Unidroit et en particulier des articles 6.2.1 et suivants en matière de *barsbip*. [...]

Les conditions FIDIC et ENAA

En ce qui concerne les conditions générales invoquées par la demanderesse, il faut souligner qu'il s'agit de contrats type, qui ne s'appliquent, en principe, que lorsque les parties ont expressément ou implicitement montré leur intention de soumettre leur

contrat aux conditions générales en question. Certes, les principes contenus dans des contrats type utilisés avec grande fréquence dans une certaine branche peuvent devenir, en vertu de leur répétition constante, des véritables usages. Toutefois pour arriver à une telle conclusion il faut prouver que le principe en question représente désormais une règle qui s'impose – sans nécessité d'accord – aux entreprises de la branche dans laquelle il est appliqué.

Or, afin que des solutions contractuelles typiques puissent devenir des usages il faut :

- qu'il s'agisse de solutions établies dans la pratique des affaires avec un degré suffisant d'uniformité pour pouvoir être appliquées directement (comme formule standard) sans besoin de négocier des éléments ultérieurs ;

- qu'il soit prouvé que les principes que l'on veut considérer comme des usages sont appliqués par les entreprises de la branche en question même dans l'absence d'une prévision expresse dans le contrat.

En ce qui concerne le premier aspect, il faut tout d'abord souligner que le principe selon lequel le maître de l'ouvrage doit prendre en charge les coûts supportés par l'entrepreneur en conséquence d'une situation de force majeure ne s'applique, dans le cadre des contrats type précités, que dans certaines situations exceptionnelles de force majeure (en particulier en cas de guerre) et suivant des procédures précises, réglementées en détail dans ces contrats type. Ainsi, dans les conditions FIDIC, la situation de guerre doit être immédiatement notifiée à l'*Engineer* qui déterminera, après consultation de l'entrepreneur et du maître de l'ouvrage, les surcoûts relatifs (art. 65.5 FIDIC) ; les conditions ENAA prévoient la notification à temps par écrit du montant des surcoûts comme condition pour engager une responsabilité du maître de l'ouvrage. En outre, les *special risks* des conditions FIDIC (art. 20.4, a-e) ne correspondent pas exactement aux *war risks* des conditions ENAA (art. 38.1).

Tout ceci montre clairement que les principes contenus dans les conditions précitées, ne sont pas encore « murs » pour se transformer en une règle uniforme et autonome capable de s'imposer comme usage : il ne s'agit pour le moment que de solutions contractuelles, inutilisables hors du contexte du contrat type dans lequel elles sont étroitement intégrées sans procéder à des mises au point au niveau contractuel. Ainsi, il serait absurde d'appliquer hors de leur contexte des solutions, comme celles citées ci-dessus, qui contiennent des mécanismes particuliers (comme le rôle de l'*Engineer* dans les conditions FIDIC ou l'obligation d'indiquer tout de suite le montant des surcoûts réclamés dans les conditions ENAA) visant à réaliser un équilibre des intérêts des parties qui ne peut pas être obtenu hors de ce contexte sans négocier une série d'éléments supplémentaires.

En ce qui concerne le second aspect, aucune preuve n'a été apportée que, en présence de clauses de force majeure classiques (comme celle contenue dans le contrat du [...]), se limitant à prévoir une exemption de responsabilité du débiteur qui n'exécute pas ses obligations, les entreprises travaillant dans la branche de la construction se considèrent liées, dans l'absence de toute clause contractuelle en ce sens, par un usage qui imposerait au maître d'ouvrage de rembourser les surcoûts supportés par l'entrepreneur comme conséquence de la force majeure.

Final Award in Case 8874

Date: December 1996
Language: English
Claimant: United Kingdom company
Respondent: Belorussian company
Place of arbitration: Paris, France

An advertising contract was signed between Claimant and Respondent, pursuant to which Claimant would produce and publish a full-page advertisement in favour of Respondent to appear in a weekly newspaper. Following a fire at its worksite, Respondent announced it was unable to fulfil the contract, having to devote its financial resources to repairing fire damage. It proposed renewing negotiations with a view to placing advertisements at a later date. Claimant agreed to revise payment schedule, following which an advertisement was published after receipt by Claimant of signed artwork. Having received no payment, Claimant resorted to ICC arbitration. A sole Arbitrator was appointed, who, in accordance with the advertising contract between the parties and the Terms of Reference (signed only by Claimant), was to act as amiable compositeur and decide the case according to the principles of equity.

Claimant requests payment of the amount initially agreed upon in the advertising contract, plus interest relating thereto and damages for non-fulfilment of the contract. Respondent argues that the fire constituted a case of force majeure preventing it from fulfilling the contract, that the artwork was signed by an unauthorized person, that the published page was not an advertisement but general information, and that, as a further case of force majeure, it was prevented from making any payment, whether in US dollars or roubles, due to the economic situation and legal provisions in Belarus.

*The sole Arbitrator examines whether exchanges between Claimant and Respondent testify to the cancellation of the contract. He finds that no demand for termination was made by Respondent and that payment was thus due to Claimant. He does not find any further harm justifying the payment of damages sought by Claimant. As regards the payment of interest, he refers to the *Unidroit Principles in fixing the appropriate rate. Defendant is ordered to pay procedural costs, due to its uncooperative attitude.**

With respect to the payment of interest:

The payment of interests, in case of delay, is contractual (art. 1.2 of the contract) and has been accepted, as such, by both parties.

The existence of such an increased amount, in the case of delays in settling payments, is above discussion: it is a cornerstone of economic and commercial relations. Therefore, the principle of Respondent having to pay not only the contractual amount of . . . but interests, based on time elapsed since the agreed initial date of payment, cannot be discussed and must be reaffirmed. . . .

The rate of interest is determined by the contract. Therefore it is considered as accepted by both parties. However, with the powers of "amiable compositeur", I wish to make the following remarks:

Respondent's situation, since the fire, is difficult and mutual understanding should lead to take it into account. They certainly have improperly dealt with the consequences of the event and they will have to fulfil their contractual engagements, which they did not formally propose to resiliate [sic]. Later, this silence to the legitimate questions raised by Claimant is surely not

acceptable in the spirit of good commercial relations. But they were – and probably still are – confronted with a major accident with important direct and secondary effects.

They warned – even if the manner was neither formal nor strictly rightful – their counterpart, which acknowledged the new situation. Respondent even showed what can be interpreted as a token of good faith in offering . . . as an indemnity.

The contractual interest rate is fixed at a level which is considerably higher than the rates which are usually put in practice in these matters, such as the US Prime Rate, recommended by the Principles of Unidroit.

In deciding a case “according to the principles of equity”, my view is that the initial contractual interest rate, if applied to the considered amount and period of time, would be disproportionate with the economic and commercial conditions of this case. I therefore substitute the US Prime Rate to the initial contractual rate of 1.4% per month, for the delayed payment owed to Claimant by Respondent.’

Final Award in Case 8908

Date: September 1998

Language: Italian

Claimant: Distributor (Liechtenstein)

Respondent: Supplier (Italy)

Place of arbitration: Milan, Italy

The dispute concerns the complex and diverse commercial relationship between two companies – a manufacturer and a distributor of pipes. Claimant is described as both an agent and a distributor. A considerable number of contractual ties were formed between the parties. Although formally and legally distinct, they are considered as constituting a single commercial relationship. A deterioration occurred in the relationship, with Respondent complaining that Claimant's debt was much bigger than the line of credit granted, and Claimant criticizing Respondent for problems of quality and delays in delivery. The parties entered into a settlement agreement which laid down a schedule for Claimant to pay its debt, in return for which Respondent would carry out certain deliveries. However, there was no improvement in the situation and arbitration proceedings were instituted, with each party requesting that the contractual relations between them be considered terminated due to the other's default. The Arbitral Tribunal's task is complicated by the fact that the contracts are varied as well as numerous. As only one of the contracts contains an arbitration clause, Respondent pleads lack of jurisdiction, but later withdraws its plea. After examining the applicable law and bearing in mind the fact that the content of the settlement agreement which the parties had reached has a decisive role to play in deciding their claims, the Arbitral Tribunal attempts to define the scope of the settlement by interpreting the overall situation in question. Reference is made to the Unidroit Principles – a text described as being normative – notably Articles 1.7, 4.1 to 4.8, and 2.11. It finds that, although both parties defaulted on their obligations, this chiefly applies to Claimant, whose obligation to comply with the deadlines set in the settlement agreement was vital and fundamental.

As neither party is entirely successful in its claims, arbitration costs are halved between the two.

With respect to the applicable law:

"The contract contains a clause, quoted at the beginning, whereby Italian law is applicable. This clause has certainly been extended to the amendment dated . . . , given the reference to the former in respect of matters otherwise unregulated. . . ."

In view of the basic unicity of the relations, mentioned earlier, it is therefore necessary, as a preliminary measure, to establish the law applicable to the contracts in respect of which the parties have not expressed their intent.

This point is covered in paragraph 11 of the Terms of Reference where it is stated that: "With regard to the substantive and procedural provisions contained in the International Chamber of Commerce Rules, it is clearly specified that: a) the applicable substantive law is Italian law . . ." Given that the parties, counsel and the arbitrators had signed such Terms, this matter can be considered as settled and beyond dispute. It is true that at that moment Respondent had raised an objection to arbitral jurisdiction over all the contracts referred to in Claimant's claims, and so, it could be objected, its acceptance of Italian law as the applicable law was limited to the definition of this procedural objection. Moreover, the subsequent waiver of this objection . . . and the statement whereby Respondent's legal representative "admits that the solution to all these issues raised by one or other of the parties in the dispute pending between Claimant and Respondent before the Arbitral Tribunal . . . is sought from the aforementioned Arbitral Tribunal in accordance with the arbitration clause contained in Article XIII (arbitration) of the Accord dated 1st October 1991, *inter partes*" . . . do not contain any reserves regarding the point of applicable law, as previously outlined in the Terms of Reference, which therefore has to be considered as granted. There is therefore precise justification for the choice of Italian law and the Arbitral Tribunal considers it appropriate to support this choice with a number of clarifications that make a distinction between supplies . . . and settlement:

- (a) for the former, it would seem appropriate to apply the Vienna Convention, and, purely for the part not regulated by this or for which the principles deriving from it or from international usages are of no assistance, the general rules of Italian law (see Article 7(2) of the Vienna Convention);
 - (b) the settlement, on the other hand, is unquestionably regulated by the general rules of Italian law.
- The supplies between Respondent/Claimant are considered as "international sales of goods" to which the Vienna Convention is applicable for the following concisely stated reasons:
- (a) according to Article 13.3 of the ICC Rules of Conciliation and Arbitration: "The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate";
 - (b) the parties have not made this choice, which has thus been deferred to the Arbitral Tribunal;
 - (c) the original contract, together with the successive amendments and additions thereto (which, despite not being a deed of sale, is considered by the parties to be the general

reference framework for their business relations), provides for the applicability of Italian law. It thus appears that Italian law is the most appropriate law and the one that offers the closest connection;

(d) according to the Rome Convention (to which Article 57 of Italian law 218/1995 on the reform of private international law refers), in the absence of any choice by the parties, the contract is governed by the law of the country in which the person effecting the characteristic performance is based (see Articles 4.1 and 4.2). According to standard indications in legislation and conventions, the characteristic performance, as a rule, is that which is not in cash, and, in a deed of sale, is that effected by the seller: see Article 117.3 of the Swiss federal statute on private international law of 18.12.1987, on which the Italian statute was modelled; Article 3.1 of the Hague Convention of 1955; Article 8 of the new Hague Convention of 1985 (not ratified). In our case, Respondent, a company with its head office in Italy, effected the characteristic performance;

(e) the applicability of Italian law makes international sales immediately subject to application of the Vienna Convention, Article 1.1(b) of which establishes that: "This Convention applies to contracts of sales of goods between parties whose places of business are in different states . . . when the rules of private international law lead to the application of the law of a Contracting State" and this is the case of Italy on the basis of law 765/1985 that ratified this Convention. Furthermore, this applicability of the Convention is also valid in relation to the explicit choice of Italian law adopted in the Terms of Reference;

(f) the supplies in question can be considered to be international sales, in the meaning of the Vienna Convention, in that the exclusion stated in Article 2 and the circumstances contained in Articles 3 and 6 are not applicable.

The fact that an ongoing distribution relationship was involved, of which individual sales/supplies were part, does not detract from the conclusions reached. It is true that commercial distribution contracts do not fall within the scope of the Vienna Convention, but this does not, however, prevent individual sales transactions which are part thereof from being subject to the Convention . . .

As already mentioned, in drawing up the settlement . . . the parties did not establish which was to be the applicable law. In the course of the arbitration, the question has not been specifically covered by the parties, but it can be said that this is dealt with in the general resolution contained in paragraph 11 of the Terms of Reference. In addition to this, in applying Article 13.3 of the ICC Rules of Arbitration, it would seem appropriate, however, to make reference to the rules of conflict pursuant to Article 4.1 of the Rome Convention on the Law Applicable to Contractual Obligations (to which Article 57 of Italian law [218]/1995 on the reforming private international law refers) and, at the same time, to Article 117.1 of the Swiss federal statute on private international law (Claimant has its operating base in . . . in Switzerland. . .) and so to the law of the country with which the settlement presents the "closest connection" or, respectively "the law of the State with which [the contract] is most closely linked". This connection cannot be provided by the additional "characteristic performance" criterion (Article 4.1 of the Rome Convention; Article 117.2 of the previously-mentioned Swiss federal statute), that does not exist in the settlement as such, just as the examples listed in Article 117.3 of the previously-mentioned Swiss federal statute are also of little help, but rather by taking into account that, as a result of the reciprocal concessions reached between the parties, the settlement has regulated the relationships - by modifying them in part - that originate from other contracts, with respect to which it is placed in a relation of connection/dependence. It is therefore the law applicable to such contracts that presents the "closest connection". Since the *inter partes* contracts subject to arbitration are

covered by Italian law through an explicit clause ... or on the basis of the rule of conflict deemed to be most appropriate, Italian law shall be extended to the settlement too.

With respect to the scope and interpretation of the settlement:

The Arbitral Tribunal is of the opinion that the search for the content of the settlement plays an essential role in finding a solution to the questions and the claims raised by the parties ...

From the literal meaning of Article 1975 of the Italian Civil Code, it results that the settlement may be of a general nature and cover "all the business affairs that may exist" between the parties and, implicitly and *a contrario*, that it may cover only certain controversial business affairs, thus allowing the disputes and controversies on other business affairs to subsist ... Given the extent of the controversies between the parties, it is a question of defining what is the specific subject of the settlement, and whether it covers the entire dispute ... or only part of it and which part.

The language that Respondent uses in its letter-contract ... is of little help in itself. It only states the re-scheduling of debts brought forward, the guarantees, Claimant's compliance with its payment obligations on the due dates as a condition for the observance by Respondent of its commercial commitments with respect to the orders confirmed ... in the same letter-contract. However, it has to be borne in mind that this letter was drafted by Respondent's commercial managers in the style that is characteristic of this corporate position, according to which, as would seem to be the general rule, only elements of a strictly commercial nature are listed, such as quantity, prices, terms of payment, place of delivery. The letter therefore needs to be supplemented with the purpose being pursued by the parties, and, on the other hand, with the starting situation and any stated or potential reciprocal objections, even if these emerge at a later date.

This method of interpretation is entirely consistent with the specific rules of Italian law (Articles 1362-1371 of the Italian Civil Code), as applied by the courts, according to which (w) recourse is made to an extra-textual interpretation when the letter-contract is incomplete and fails to execute the "common intent of the parties"; (x) among the methods taken into consideration, there is first and foremost the so-called logical interpretation, which includes the identification of the purpose of the contract; (y) although considered as being subsidiary, the assessment of past and subsequent behaviour falls within the interpreter's responsibilities when the text is unclear or incomplete; (z) an interpretation on the basis of good faith places importance, among other things, on the reciprocal trust between the parties and so on what one of the parties should have communicated to the other with a view to protecting their respective interests, and also in relation to the obligation of good faith in negotiations pursuant to Article 1337 of the Italian Civil Code. The rules relating to interpretation and good faith contained in the Unidroit Principles (in particular, Articles 1.7 and from 4.1 to 4.8), which are in all events a useful reference framework for applying and judging a contract of an international nature, also confirm what has been said.

In this light, the Arbitral Tribunal feels that the following circumstances are important:

- (a) the reciprocal objections raised by the parties prior to the settlement agreement: by Respondent: Claimant's failure to perform payment obligations and violation of commercial obligations; by Claimant: defects in goods sold, overdue deliveries and violations of commercial obligations ...
- (b) the manifest and stated scope of the settlement to define all outstanding issues with

a view to re-establishing current commercial relations which there was a desire to maintain at that time. . . .

(c) the previous behaviour of the parties: more specifically, the proposals and counter-proposals formulated gradually prior to the meeting of . . .

(d) subsequent (immediately following) behaviour, and above all the spontaneous “principle of execution” [sic] (which can also be described as a declaration of a “sign of good faith”): on the part of Claimant, through the issue of a bank guarantee and payment of the first instalment . . . ; on the part of Respondent, acceptance without reserve of the bank guarantee in which, in the description of the agreed terms of payment, no mention is made of the last instalment of interest . . .

. . . the payment schedule described in the bank guarantee does not mention the January instalment . . . and this omission was explained by Claimant . . . as consideration for waiving the claims relating to defects etc. – later consideration – pursuant to subsection (c), in respect of the waivers already made in this respect. Respondent’s acceptance without reserve of the bank guarantee, in which point 6 is omitted, and the alleged start-up of production of the ordered pipes amount to a tacit acceptance by Respondent of the modified/counter-proposed acceptance by Claimant, according to the principle derived *a contrario* from Article 1326, last paragraph, of the Italian Civil Code. Moreover, reference should be made to Article 19, (1) and (2) of the Vienna Convention with regard to the formation of international sales contracts, and Article 2.11 of the Unidroit Principles, which are both normative texts that can be considered helpful in the interpretation of all contracts of an international nature . . .

With respect to interest:

‘Given that long-term contracts are involved, the termination of relations on the ground of Claimant’s fault, as mentioned above, does not extend to relations that have already ended. With regard to payment obligations remaining unperformed, performance cannot be ordered, but rather compensation for damages . . . This compensation is calculated in proportion to the amount from the settlement remaining unpaid, to which overdue interest has been added, as provided for in Article 1219, no. 3 of the Italian Civil Code, with effect from the due date . . . and up until full payment of the balance. The Vienna Convention lays down a general rule, in Article 78, that the liability for payment of a sum is subject to interest for late payment, but it does not lay down the criteria for calculating this interest. International case law presents a wide range of possibilities in this respect, but amongst the criteria adopted in various judgements, the more appropriate appears to be that of the rates generally applied in international trade for the contractual currency . . . In concrete terms, since the contractual currency is the dollar and the parties are European, the applicable rate is the 3-month LIBOR on the dollar, increased by one percentage point, with effect from the due date not respected up until full payment has been made. However, capitalization of interest is excluded, as from Respondent’s arbitration answer, since this is not provided for in the Vienna Convention and does not appear to be in keeping with international trade usages. Revaluation is also included in the above-mentioned rate.’

Final Award in Case 9029

Date: March 1998
Language: Italian
Claimant: Italian company
Respondent: Austrian company
Place of arbitration: Rome, Italy

Claimant's search for the capital required to finance an aeronautical manufacturing and marketing project led it to take up relations with a company of which Respondent is the successor. The two parties formalized their partnership through various agreements, including a Shareholders Agreement. The dispute concerns the latter. Claimant requests the Arbitral Tribunal to pronounce the termination of the Agreement owing to breach by Respondent and to award it damages for the harm suffered. In turn, Respondent claims the Agreement was invalid or inapplicable, that it was justified in withdrawing, and that the Agreement was characterized by hardship, entitling it to damages. It bases its claims on the Unidroit Principles, notably Articles 6.2 (hardship), 3.10 (gross disparity) and 1.7, and 2.15/2 (lack of good faith), as a reflection of international trade usages. The Arbitral Tribunal rejects both the claims and the grounds upon which they are based. It decides that there is no justification for the alleged hardship and that the Agreement and the arbitration clause it contains are valid and applicable. It then considers the question of lack of good faith, raised by Claimant, and that of failure to comply with the undertaking not to compete, raised by Respondent. The Arbitral Tribunal dismisses the former and, whilst recognizing the validity of the undertaking not to compete, declares that it lacks jurisdiction to decide this request, which is not included in the Terms of Reference. It comes to the conclusion that the Agreement should not be terminated on the ground of Respondent's default and that it was unjustified for the latter to withdraw. Its finding is that the Agreement came to an end rather through mutual misunderstanding, with no retrospective effects. The parties are ordered to bear arbitration costs in equal proportions.

With respect to the applicable law:

Respondent has claimed that these proceedings are an arbitration that is international and subject to statutory rules and to institutional procedures; that the arbitration's international character is determined by the fact that both Respondent's head office and the *locus destinatae solutionis* of a considerable part of the services that are the subject of the disputed business relationship are situated abroad (Article 832 of the Code of Civil Procedure), as well as by the fact that this is an institutional arbitration governed by the Rules of Arbitration of the International Chamber of Commerce; and that the statutory nature of the arbitration is inherent in the fact that this is a legal arbitration, with application "for every purpose" of Italian law . . .

This constitutes the premise on the basis of which Respondent pleads to "recall that in accordance with Article 834 of the Code of Civil Procedure international arbitration should in all cases also take into account, as regards the relevant legal rules applicable, commercial usages"; to claim that *lex mercatoria* "is thus necessarily an integral part, even where binding rules of procedural practice apply, of substantive Italian law, under which, as indicated in the contract, the present case must be appraised and the dispute decided by the Arbitrators"; to engage the "Principles of International Commercial Contracts" drawn up by Unidroit, as an authoritative source of knowledge of international trade usages.

In its written response . . . Claimant considered inappropriate Respondent's appeal to Unidroit Principles, inasmuch as these apply only when the parties have agreed that the contract be subject to them; inasmuch as the Unidroit Principles "shall be applied when the parties have agreed that their contract be governed by them" and "they may be applied when the parties have agreed that the contract be governed by them"; inasmuch as the doctrine expounded by the author of the commentary on the preamble and the first, second and fourth chapters of the Unidroit Principles, has made it clear that the Unidroit Principles are not the subject of an international agreement and do not have binding force in themselves, but can acquire validity only by the will of the parties; that one of the fundamental principles of the Unidroit Principles is that of freedom of contract; and inasmuch as Article 11 (Freedom of Contract) stipulates that: "The parties are free to enter into a contract and to determine its content". Claimant observes that it is precisely in their exercising of contractual autonomy, a cardinal principle endorsed by Article 1322 of the Civil Code and by Article 41 of the Constitution, that the parties agreed Clause 17 of the Shareholders Agreement, the applicability of Italian law, and did not make any reference to the Unidroit Principles.'

On the question of whether or not the Shareholders Agreement is characterized by hardship:

'Respondent concluded by asking the Arbitral Tribunal to declare that the Shareholders Agreement entered into by the parties . . . causes grave hardship to the detriment of Respondent . . . Respondent has attempted to identify the hardship in the *inzumutbare Härte* of German experience, i.e. in the excessive disparity in the contract or in some of its clauses, with excessive advantage to one of the parties, to which the Unidroit Principles also refer . . . [and to show] that the disparity between the services rendered by the two parties is vast . . . Respondent therefore maintains that the services rendered by Claimant were no more than abstract "Supports", in part not corresponding to the truth and in part, on the contrary, laying burdens . . . exclusively on Respondent . . . Respondent insists that the gross disparity between the obligatory services rendered by the parties . . . has repercussions for the validity and efficacy of the partnership agreement . . .

Furthermore, Claimant, having considered inappropriate Respondent's appeal to the Unidroit Principles on the basis of the general considerations described above, has also pointed out that, in any case, Articles 3.10 and 6.2.2 of the Unidroit Principles referred to in Respondent's concluding plea do not permit a finding of the existence of the alleged grave hardship complained of, i.e. the disparity between the services in the contract, to the detriment of Respondent; that Article 3.10 of the Unidroit Principles, in particular, stipulates that there must exist two presuppositions in order for the grave hardship principle to be applicable, viz. that "there must be a serious disparity between the parties' reciprocal rights and obligations which gives an excessive advantage to one party" and that "the excessive advantage must be unjust, that is to say that one party must have taken excessive advantage of a dependency, a state of economic necessity, urgent needs or lack of foresight, ignorance, inexperience, or the other party's disablement in conducting the negotiations"; that these presuppositions are not present in this case.

The Arbitral Tribunal considers that the abnormal hardship complained of by Respondent does not exist, and that it cannot therefore accept the connected claim aimed at obtaining from the Arbitral Tribunal the finding that the Shareholders Agreement is invalid or void. And this for many concurrent reasons.

Firstly, it notes that Respondent's claim aimed at obtaining from the Arbitral Tribunal the finding that the Shareholders Agreement is invalid or void is based sometimes on the *lex mercatoria* and sometimes on the Unidroit Principles; it also notes that, notwithstanding the

textual references to "hardship", in basing its defence claim on the Unidroit Principles Respondent does not limit itself to pleading Article 6.2.2 of the Unidroit Principles, but also invokes Article 3.10, which deals not with "hardship" but with "gross disparity".

In the first place, the Arbitral Tribunal considers that the reference to *lex mercatoria* and the specific appeals to the Unidroit Principles do not constitute sufficient justification for sustaining Respondent's claim that the Shareholders Agreement should be declared invalid or void, for various reasons.

The first reason appertains to the fundamental judicial rule that the onus is on the party that has invoked the application of the *lex mercatoria* and of the Unidroit Principles to prove that the rules invoked are part of *lex mercatoria* so far as concerns assumptions that may be of legal relevance and so far as concerns the consequences of disparity between the parties to the agreement, proving the existence of interpretative and applicative trends in international commercial circles supporting the interpretation that is put forward. This Respondent has failed to do, and therefore the appeal to the Unidroit Principles as regards gross disparity and hardship is not valid: it having been made clear that the Unidroit Principles are not part of normative sources of production, and that they are designed to constitute a uniform model for regulating the negotiation of contractual relations, whatever their connection with the *lex mercatoria* and with international commercial usages in particular, and it is also clear that the Unidroit Principles are only partly valid, and in many ways are innovative. In other words, although the Unidroit Principles constitute a set of rules theoretically appropriate to prefigure the future *lex mercatoria* should they be brought into line with international commercial practice, at present there is no necessary connection between the individual Principles and the rules of the *lex mercatoria*, so that recourse to the Principles is not purely and simply the same as recourse to an actually existing international commercial usage.

The second reason, which comes into play even if one assumes that the rules on gross disparity and on hardship invoked by Respondent actually come under *lex mercatoria* and the practices of international trade in particular, consists in a widespread interpretative trend, which the Arbitral Tribunal agrees with, whereby, where the parties have expressly and precisely identified the law applicable to the relationship established between themselves and, in particular, have, as in the present case, identified it as a national law, the possibility of putting before judges rules that do not belong to the national system of rules to which the contracting parties have referred is precluded. In the light of the above-mentioned trend, it is not sufficient, in order to make applicable *lex mercatoria*, for provisions that may exist in the national legal system to which the contracting parties have referred to contain references to *lex mercatoria*: that is to say, where the parties have availed themselves of the possibility of choosing the legal system applicable to their relationship, no-one can substitute himself for these parties in the choice of applicable laws, adapting the system at his discretion. All of the above, which applies even in respect of the widespread referrals to *lex mercatoria* that can be found in French and Swiss legislative practice, has even more validity with regard to Article 834 of the Code of Civil Procedure, where the reference proves to be more tenuous. On the one hand, it should be borne in mind that Article 834 of the Code of Civil Procedure refers to "international commercial usages", while *lex mercatoria* is an expression of notoriously very wide scope and interpretation, and could even be termed imprecise and debatable; in this light, there is no merit in appealing to Article 834 of the Code of Civil Procedure as a provision legitimising the application of *lex mercatoria* as the basis for making the Shareholders Agreement void and invalid. On the other hand, it should be borne in mind that the appeal to international commercial usages contained in Article 834 of the Code of Civil Procedure must be linked with the national legal regulations to which the provision appealing to

international commercial usages belongs. If one refers to instruments that are specifically regulated by Italian law or, in any case, that produce rules that are incompatible with the regulations of Italian law, international commercial usages cannot take precedence over national law; thus Article 834 of the Code of Civil Procedure, which does not allocate any precedence to the various sources, does not grant to any international commercial usages that can be taken into account, in the interpretation of a contract, supremacy over the provisions of Italian law. Thus, international commercial usages are of strictly interpretative and integrative value, to the extent that there are gaps in national regulations that could usefully be filled by the aforesaid usages; this means that Article 834 of the Code of Civil Procedure refers to international commercial usages as a source of law, but that those practices have their place and are treated in a similar way to custom; all the more so when the parties have chosen national law as the law applicable to their relationship, it being certainly not possible, in such a case, to substitute international commercial usages for the national law chosen by the parties with regard to institutions, actions, and effects, for which the latter makes special provision. Since the presuppositions for juridical relevance and the consequences of the contractual disparity, whether at the start or that occurred after the conclusion of the contract, are specifically regulated by Italian legislation, which recognizes the remedies of rescission and cancellation of the contract because the contract has become excessively onerous, the appeal to *lex mercatoria* or to the Unidroit Principles does not permit application of the doctrine of gross disparity and of hardship in order to bring into greater focus the contractual disparity – whether original or occurring later – beyond the limits of or with effects different from the presuppositions that are relevant in law and from the actual consequences of rescission and of cancellation of the contract because it has become excessively onerous.

The third reason is found in the nature of the provisions of Italian law concerning the invalidity and nullity of contracts that are considered to come under the rules of public policy. The binding nature of these provisions, which flows directly from the obligation emphasized above, precludes the possibility that the provisions of Italian law concerning hypotheses and presuppositions of invalidity or nullity of contracts be set aside by reference to *lex mercatoria*. In a more specific sense, this constitutes a further proof of the above argumentation in that, given that the parties opted for Italian law as the law governing their contractual relationship, the rules on gross disparity and on hardship invoked by Respondent are rendered inapplicable in the present case, even if one assumed that they are part of *lex mercatoria* and, in particular, international commercial usages.

In any case, even if *lex mercatoria* and the Unidroit Principles were applicable in this case, Respondent's claim aimed at obtaining from the Arbitral Tribunal the finding that the Shareholders Agreement is invalid or void, could not, in the Arbitral Tribunal's opinion, be sustained, either with regard to the supposed gross disparity, or with regard to the supposed hardship.

As for the possibility of accepting the aforesaid claim under the heading of gross disparity, the Arbitral Tribunal considers that there are impediments even on the formal level. In the first place, the Terms of Reference refer only to hardship, and lack any reference to gross disparity; which Respondent has not, in this forum, invoked, not even requesting, still less obtaining, its inclusion as part of the Terms of Reference. On the other hand, and in the second place, while Respondent has detailed its own submissions it has again failed to refer to gross disparity.

And, even if one wished to ascribe the notion of gross disparity to the disputed issues that are the subject of this arbitration according to the principle of *forum non conveniens*, supposing a mere error on the part of Respondent and bearing in mind that Respondent's claim is aimed at asserting the

original disparity in order to make the Shareholders Agreement invalid or void, the said claim could still not be sustained, given the absence of the presuppositions.

In this regard, the Unidroit Principles specify that the consequences of the gross disparity consist in amending the contract at the demand of one party or, alternatively, in annulling the contract. In this case, there being nothing in the documents to show there was a request to amend the contract based on the original contractual disparity, which Respondent refers to for the first time at the start of the arbitration, the only consequence can be the annulment of the Shareholders Agreement, for which, however, the presuppositions to such an end required by the Unidroit Principles invoked by Respondent are lacking.

And, in fact, Article 3.10 of the Unidroit Principles asks that the following factors be taken into account when determining the "injustice" of the disparity: the fact that the advantaged party (in this case Claimant) had taken advantage of the dependent state, economic difficulties or immediate needs of the disadvantaged party (in this case Respondent), or of the ignorance, inexperience or lack of negotiating skills of the disadvantaged party (in this case Respondent). Not only has Respondent failed to prove the presuppositions alluded to but also circumstances have emerged such as to exclude them totally: not only has Respondent failed to prove that, at the time the contract was concluded, it was in a state of dependence, economic difficulty or immediate need, but it has also emerged that it was Claimant who was in economic difficulties; not only has Respondent failed to prove that, at the time the contract was concluded, it was incompetent, ignorant, inexperienced, or lacked negotiating skills, but also these conditions are excluded by Respondent's status.

It seems rather unlikely that Respondent was languishing in a state of ignorance, bearing in mind the lengthiness of the negotiations prior to the conclusion of the Shareholders Agreement . . .

On the other hand, whatever state it was in, ignorance would not be relevant to the notion of gross disparity, inasmuch as Article 3.10 of the Unidroit Principles gives relevance to the disadvantaged party's being in ignorance only if this ignorance was of circumstances that came about later or, if prior to the conclusion of the contract, of circumstances that were not known and could not have been known at that time. In the present case, because of the considerations just described, the Arbitral Tribunal holds that the extent of the contributions requested could reasonably have been foreseen by a professional operator in the aeronautical sector, by exercising the due diligence expected from a professional from the sector to which Respondent belonged. All the more so since the facts brought forward by Respondent in its own defence, following investigations carried out in the course of the arbitration, demonstrate not only and not so much that many of the facts learnt by Respondent *ex post* were objectively knowable beforehand, but above all that Respondent was negligent in its preliminary investigations at the stage of the pre-contractual negotiations, which constitutes confirmation of an attitude that cannot but assume importance as regards the application of the invoked Article 3.10 and, particularly, as regards the presupposition of the "unknowability" of such facts by a diligent professional.

. . . considering that the cited Article 3.10 attaches importance not to what was purely subjectively believed to be the case by the disadvantaged party, but rather to what was objectively knowable, the remedy of annulling the agreement due to gross disparity purely because the disadvantaged party attaches blame, both in general and in the present case, remains precluded.

Just as there are no presuppositions on which one could base annulment of the Shareholders Agreement due to gross disparity, it must also be pointed out that, under the

invoked Article 3.10, an assessment aimed at verifying the presupposition of the original disparity must take into account the nature and purpose of the contract whose annulment is sought.

As regards the purpose of the Shareholders Agreement, of prime importance is the fact that the contract was aimed, on the one hand, at regulating the contributions from each of the parties, in the common knowledge of the economic difficulties in which Claimant found itself, which is therefore connected to the common knowledge that it was on Respondent that the economic burden would fall most heavily; and at the same time that the parties' contractual positions would be brought back into balance. . . . This does not permit the hypothesis of an alleged original disparity, not only given the objective content of the economic and legal transaction taken in its entirety, but also bearing in mind that the assessment carried out *a posteriori* in the interpretation of the contract cannot replace the free demonstration of the parties' individual autonomy, the person interpreting the meaning of the contract therefore being in no position to substitute himself for the parties in the free determination of the negotiating balance, nor to invoke the aforesaid assessment to allow escape from an obligation freely assumed purely because it had become disagreeable.

As regards the nature of the Shareholders Agreement, of prime importance is the fact that the two connected contracts of which the united economic and legal joint-venture operation agreed between the parties consists are partnership contracts. This means that the services that the parties undertook to provide had the nature of contributions to a common enterprise. . . . ∴ there is no relationship of equivalence between the services that Respondent and Claimant undertook to provide under the Shareholders Agreement and, consequently, it is by no means certain, with regard to the relationship between the above-mentioned services, that the alleged original contractual disparity should even be evaluated.

As regards the possibility of accepting, under the heading of the alleged hardship, Respondent's claim aimed at obtaining a finding from the Arbitral Tribunal that the Shareholders Agreement is void or invalid, even if the Unidroit Principles invoked in this regard by Respondent came under *lex mercatoria*, and it were to be held that the latter is applicable to the present case, the Arbitral Tribunal considers that in the present case there would be no presuppositions of hardship and, therefore, no grounds for a finding of invalidity or nullity.

As regards the absence of presuppositions of hardship, it is enough here to point out that these are listed under Sections A to D of Article 6.2.2 of the Unidroit Principles, which stipulate the only concurrent and supplemental conditions that may be cited when pleading hardship; that, in particular, hardship postulates an event that took place that was the cause of the contractual disparity; that in the present case Respondent has not alleged that such an event occurred, and that this event cannot be the alleged cognizance that third parties owned the rights to make use of the project, since we are dealing here with an original fact that may be cited solely in relation to gross disparity, although even then, as we have written, it could not assume any importance in this respect; that the notion of hardship also postulates that the disadvantaged party was not contractually bound in respect of the event that occurred that was the source of the contractual disparity; that in the present case Respondent was aware – or, at any rate could have been aware, for the reasons already described – that this was an old project, and that responsibility for the technical aspects, the certification, the marketing, and any finance necessary for the joint venture would fall upon it, and that it would assume the related risk; that no unforeseen circumstances had even emerged while the contract was being concluded such as to aggravate that risk, taking into account, after all, that Respondent declared its intention of extricating itself from its obligation only two months after the Shareholders Agreement had been finalized.

As regards the absence of presuppositions for a finding of invalidity and nullity, it is worth noting that Article 6.2.3 of the Unidroit Principles specifies that the consequences of hardship are that the contract be either amended or terminated. Given that neither party has requested that the contract be amended, Respondent's application to have the Shareholders Agreement declared invalid or void *ab origine* cannot be accepted, on the basis of the same rules invoked by Respondent, which would in any case only have allowed the possibility that the contract might have been terminated because of the hardship.⁷

On the question of good faith:

... Respondent concluded by asking the Arbitral Tribunal to declare that Claimant had violated Article 1337 of the Civil Code and of the corresponding rules of the *lex mercatoria*, at least in the objective meaning of the criterion for good faith.

... In its concluding pleading, Respondent particularly emphasised *in iure* that according to commercial usages, which, in Respondent's opinion, and also according to Article 834 of the Code of Civil Procedure, the arbitrators should take into account, good faith should be evaluated not in a subjective sense, according to the equation "lack of good faith = fraud", but in an objective sense; that in the Unidroit Principles, in which good faith is mentioned repeatedly, it is always evaluated by reference not to the internal standards of various national legal systems, but to the standards of international business practice, according to which the obligation to observe it is violated not only in the case of fraud, but also in that of simple negligence, thoughtlessness, and rashness; that in contract law acting in good faith refers to a purely objective test: if a party acts in an unreasonable and inequitable way, it will not be a defence to say that he honestly believed his conduct to be reasonable and equitable; that this is the correct approach to the concept of good faith in the present judgement, too, in which the way in which Claimant conducted the pre-contractual negotiations was perhaps, but not necessarily, motivated by bad faith in the sense of conscious deceit, but could also have been caused simply by negligence, thoughtlessness, or inexperience, but that, if this were the case, there would be no grounds for not deeming it to have been objectively bad-faith behaviour; in a business relationship such as the present, which is subject to Italian law, whose legal system also includes the *lex mercatoria*.

... Claimant has contested the validity of Respondent's thesis, according to which Claimant had acted in bad faith in relation to Respondent, involving Respondent ... in a project that could objectively lead to bankruptcy.

... Claimant maintains that the general clause on good faith, as a criterion for interpreting contracts *inter partes* and as a code of behaviour in their performance, far from being violated by Claimant, has been violated by Respondent. In Claimant's view, not only was it solely Respondent which had failed to discharge its specific obligations under the Shareholders Agreement, but it had also not performed the contract in good faith.

According to Claimant, Respondent violated the general clause of good faith, above all in the pre-contractual negotiations: this on the presupposition that good faith binds the parties to joint contractual responsibility; negatively speaking, good faith carries the obligation of not intentionally encouraging misplaced trust, not speculating on the basis of misplaced trust, and not contesting reasonable trust, however engendered by the other party ...

According to Claimant, Respondent also violated the general clause on good faith in the performance of the contract: this on the presupposition that good faith carries an obligation of safeguard, which requires each of the parties to act in such a way as to protect the other's interests and, therefore, to safeguard the economic value of the contract ...

... Respondent has confirmed that for Respondent the case centres principally on Claimant's violation of the duty to behave in good faith when conducting the negotiations and drawing up the contract; has contested Claimant's thesis that Respondent had violated the general clause on good faith "following the 'misplaced' trust that Claimant, who claimed ... to have thus overcome some of the problems connected to the development, production and sale of the ...; had 'intentionally engendered'"; has confirmed that it is referring, when maintaining that Claimant "had violated the canons of good faith ... to the use of that term in the sense that it had objectively violated them, as also and in particular understood by the rules of the *lex mercatoria* (and by the Unidroit Principles, especially Articles 1.7 and 2.15/2). We do not therefore wish to accuse the other party of having acted fraudulently. Fraud there may have been, perhaps; we are not asserting that there was, in the sense of defective consent within the meaning of Article 1439 of the Civil Code, but it is from the violation of Article 1337 of the Civil Code that we derive Respondent's right to receive compensation for the damages derived therefrom"....

The Arbitral Tribunal holds that, with regard to Respondent's appeal to *lex mercatoria* in support of Claimant's alleged violation of Article 1337 of the Civil Code, the reasons already given above also apply here, and the Tribunal therefore holds that the claim is devoid of merit.

As regards Respondent's claim that Claimant has violated Article 1337 of the Italian Civil Code, that is to say, as regards the claim that Claimant violated its obligation to act in good faith under Article 1337 of the Civil Code, the Arbitral Tribunal holds that the question does not fall within its competence, bearing in mind the arbitration clause. This is on the grounds that Article 1337 of the Civil Code pertains to the course of the negotiations and to the drawing-up of the contract, and thus to facts and behaviour preceding the conclusion of the contract that are the subject of disputes not amongst those covered by the arbitration clause providing for those disputes to be referred to arbitrators. Furthermore, and in the same sense, the Arbitral Tribunal agrees with the school of thought in interpretation which, although it recognizes the far-reaching nature of pre-contractual responsibilities sanctioned by Article 1337 of the Civil Code, nevertheless leaves outside the contractual realm – and, in particular, outside the realm of disputes concerning the contract that are the subject of the arbitration clause – the facts of a claimed violation of the obligation to act in good faith at the stage of the pre-contractual negotiations, which is the complaint of Respondent.

In this regard, it should also be noted that Respondent has not asked the Arbitral Tribunal to pronounce on whether the Shareholders Agreement can be annulled on account of error or fraud on the part of Claimant connected to the violation complained of by the latter of the obligation to act in good faith during the pre-contractual negotiations. It remains the case, nevertheless, that Respondent is entitled to take the matter before the courts in order to have assessed Claimant's complained-of pre-contractual responsibility, and that the latter may consequently be ordered to pay compensation for damages should the presuppositions be accepted by that court.'

With respect to the assessment of damages:

'The President of the Arbitral Tribunal, while conscious of the difficulties involved in resolving the final issues put forward by his co-Arbitrators who, on the point of the *an debatur*, agree on the solution adopted, but do not agree on the effects and on the amount of the costs to be divided between the parties, considers that recourse must be made to formal criteria for the solution, aided – where necessary – by recourse to "equity", which is permitted by Italian law for the assessment of damages, under Article 1226 of the Civil Code.

As for the effects of the dissolution of the agreement by mutual dissent, while having a high regard for the doctrinal thesis set out by the arbitrator nominated by Respondent, the President of the Arbitral Tribunal considers it preferable to adhere to another thesis, one also subscribed to in case law, according to which the cancellation of a contract by mutual dissent, in contrast to cancellation due to breach of contract, does not, in the absence of a specific negotiated agreement, have the retroactive effect that for the latter is provided for by Article 1458, paragraph 1, of the Civil Code; thus, when a contract is terminated by mutual dissent, it does not lead to the restoration of the *status quo ante*, which must, in fact, be deemed to be implicitly excluded by the effect of the comprehensive assessment given by the parties by the act of terminating the contract. It follows that, should a contract be dissolved by mutual dissent, the parties' only obligation is to effect the usual restitutions deriving from the contract's dissolution, whilst any other residual effects (compensation for damages or reimbursement of expenses), which are the specific consequences of facts constituting breach of contract, should take place following an appropriate agreement between the contracting parties; and this in the sense that, if the parties have made no provision for apportioning the losses following the dissolution, one must have regard solely to the restitutive effects, which are not retroactive. This means that each of the parties must return to the other the amount it had contributed at the beginning of the operation.

Final Award in Case 9117

Date: March 1998
Language: English
Claimant: Russian state-owned corporation
Respondent: Canadian corporation
Place of arbitration: Zurich, Switzerland

*The parties entered into contracts for sale of goods by Claimant to Respondent, and various additions thereto. As the US import licences held for the goods were due to expire, Respondent urged for rapid shipment. Some of the goods were delivered prior to expiry of the licences and some afterwards. Respondent paid the full price of goods delivered prior to expiry of the licences and approximately one third of the price of the goods shipped thereafter. Respondent refused to make any further payments, claiming the sums withheld would be set off against damages allegedly due to it. Respondent alleges it had an exclusive right to import the goods, which Claimant had violated, and that Claimant had also defaulted on timely shipment. The Arbitral Tribunal finds no proof of Respondent's claim to exclusivity, no legally binding requirement for the deliveries to be timed so as to come within the term of the US import licences, nor any lack of good faith by Claimant in its choice of time of delivery. In so determining, it refers to Articles 2.17 (merger clause), 2.18 (written modification clause) and 4.3 (prior commercial practices) of the *Unidroit Principles*. 85% of arbitration costs are to be borne by Respondent and 15% by Claimant, reflecting the success rate of the various claims and the proportion of the proceedings devoted to each of them.*

With respect to determination of the applicable law:

Article 8 of the Contract ... contained the following provision on arbitration:

"8.1. The Parties shall use all efforts to settle all disagreements and disputes which arise in connection with or as a result of the performance of this Contract, by means of negotiations. If a disagreement or dispute cannot be resolved amicably; this disagreement or dispute shall be resolved by arbitration in accordance with section 8.2.

8.2. All disagreements, disputes or claims, arising out of or relating to this Contract shall be referred to, settled and finally resolved by the Arbitration Institute of the International Chamber of Commerce in accordance with the Rules for Reconciliation and Arbitration. The arbitral tribunal shall be composed of 3 (three) arbitrators, one be appointed by the Seller, the other by the Buyer, and the third one be appointed by the two Arbitrators.

8.3. The place of arbitration shall be Zurich, Switzerland. The decision of the arbitral tribunal shall be conclusive and binding on each of the Parties."

The Parties, however, did not provide for a choice of law clause to govern their contractual relationship.

... Claimant asserts that, in the absence of a choice of law made by the Parties, the Arbitral Tribunal should apply Article 7 of the 1961 European Convention and determine the applicable law in accordance with the rule of conflicts of law deemed appropriate. Further, Claimant refers to an, as it says, unwritten rule pursuant to which a court investigating disputes on foreign economic transactions would make use of its own national rules of conflict of laws for determining the applicable law. In Claimant's opinion, the case presented to the Arbitral Tribunal is, therefore, governed by the Swiss Federal Statute on Private International Law (PIL) ...

According to Claimant, Article 118 PIL refers to the Convention on the Law Applicable to the International Sale of Goods (The Hague Convention, of 15 June 1955). Claimant quotes Article 3 of The Hague Convention pursuant to which the sale of goods "shall be governed by the national law of the country which is the place of permanent residence of the seller at the time when he received the order [...]". Claimant derives from that provision the conclusion that Russian law should be applied

Claimant further pleads that the Russian Federation is a member state to the United Nations Convention on Contracts for the International Sale of Goods (CISG). Consequently, the CISG constitutes the main source of law governing the business transactions between Claimant and Respondent. Finally, Claimant argues that any issues not covered by the CISG should be determined in accordance with the law of the Russian Federation ...

Considering the above principles, Claimant reasons that the matter in dispute should be settled as follows:

- in accordance with the terms and conditions of the Contract ...;
- in accordance with the provisions of CISG; and
- in accordance with the Russian law on matters not covered by the CISG.

... Respondent argues that all jurisdiction areas relevant to the present dispute, i.e. that of the Russian Federation, Canada and Switzerland, are signatory States of the United Nations Convention on Contracts for International Sale of Goods (CISG). Thus, Respondent agrees with Claimant that the Contract ... is primarily governed by and to be construed in accordance with the CISG ...

Contractual issues and disputes that cannot be resolved by reference to CISG are, in Respondent's view, to be settled in conformity with the Swiss substantive law. In support of this theory, Respondent refers to the Swiss Federal Statute on Private International Law (PIL) and stresses especially the principle of the burden of establishing foreign law (Article 16 PIL). It argues that the Russian law was unclear at the time the Contract was executed, and the law as applied often deviated substantially from the law as promulgated in the published Codes. Although the Russian Federation adopted recently a modified Civil Code, a relevant jurisprudence had not as yet been developed thereunder. According to Respondent, it does not seem feasible to establish the content of the applicable Russian law . . .

Respondent further asserts that, in the event that Russian law was deemed applicable, Claimant had not fulfilled its burden of establishing the content of such Russian law in respect of the disputed issues. Thus, if the content of Russian law cannot be established, the Arbitral Tribunal should apply the substantive law of Switzerland . . .

Respondent also bases its theory of application of the substantive law of Switzerland on Article 17 PIL. Respondent notes that Article 17 PIL precludes the application of foreign law if it would produce a result that is incompatible with the Swiss public policy. The principle of public policy of any modern, international trading nation should support the orderly and good faith fulfillment of international contractual obligations pursuant to established principles of international trade and commerce and the application of readily ascertainable laws. Taking into account that argument, the readily accessible Swiss law would provide for an equitable result of the contractual disputes, based on law that is well-known and understood by all Parties . . .

For the Tribunal it is clear that, in the first instance, the contractual terms as agreed by the Parties in the framework of their contractual relationship shall be looked at and applied to determine the disputed issues. In case of ambiguity and to the extent necessary, contractual terms may have to be interpreted by the Tribunal.

In addition to the foregoing, the Tribunal has to have regard to the relevant usages of the trade, for two reasons: First, the Parties had specifically referred to the Incoterms 1990 . . . Second, trade usages are to be observed on the basis of Article 13(5) ICC Rules (which Rules had been chosen by the Parties).

Matters or issues which had not been contractually agreed among the Parties and which cannot be determined by having regard to trade usage (including the Incoterms), will have to be determined on the basis of the 1980 Vienna Sales Convention ("CISG"), as correctly pleaded by both Parties.

Regarding any further issues which might come up and which are not governed by any of the foregoing, the Tribunal will have to determine the proper law of contract according to the so-called "objective approach". For this task, the Tribunal does not have to apply the European Convention 1961 (which was particularly referred to by Claimant), but indeed the ICC Rules, as the set of rules which the Parties had specifically agreed upon and chosen to govern their arbitration. The relevant provision is Article 13.3 ICC Rules 1975/1988, which provision had been inspired by Article VII of the European Convention of 1961 . . .

Accordingly, the Tribunal, shall apply the law (or rules of law) designated as the proper law by the rule of conflict deemed "appropriate". The Tribunal thus benefits from a wide freedom when determining such "appropriate" conflict rule. In particular, the Tribunal does not have to apply any particular or national system of conflict of laws, nor the conflict of laws system at the place of arbitration. The concept to which Claimant made reference (in the sense that, under an unwritten rule, a court or tribunal should be guided by the system of private international law (conflicts of laws rules) as prevailing at the forum or place of

arbitration (I)] is, in fact, a solution which had attracted very strong and justified criticism already since the 1950s. In fact, this concept had been abandoned by the 1961 Geneva Convention (Article VII) . . . A tribunal should, accordingly, no longer be expected to apply a conflict of law system (in its entirety, such as the one prevailing at the forum), but should be free to only determine the appropriate conflict rule (which is a notion significantly different from a "system"), and such rule can form part of any national or a-national rules of private international law.

The most appropriate conflict rule, in the instant case, is to determine the preponderant connecting factor(s) to one or another legal system. In a sales transaction, such closest connecting factor will, as a rule, be established by the domicile or place of business of the seller. There is also a general consensus, prevailing in most modern legal systems, that the seller (and not the buyer) has to perform the more characteristic performance of either manufacturing or procuring the goods to be sold, whereas the buyer will typically "only" have the monetary obligation to pay (and certain ancillary duties of a lesser relevance).

The "centre of gravity", therefore, is in the instant case located in the seller's country, i.e. in the Russian Federation, irrespective of the fact that the Parties had agreed on CIF delivery terms, for delivery in Canada or the United States. Thus, the objective approach clearly leads to the conclusion that the present contractual relationship is most closely related to the seller's legal system, i.e. to the laws of the Russian Federation. These laws will, therefore, be applied by this Tribunal where necessary, i.e. where a particular issue cannot be solved by having regard to the contractual terms, or an interpretation thereof, or the relevant trade usages, and where no answer can be found in or derived from the CISG.

Obviously, the Swiss substantive laws, as the law governing at the place of arbitration, cannot claim any applicability. The mere fact that an arbitration takes place in a particular country does not constitute a sufficiently strong connecting factor. As a footnote it may be remarked that, in the past, arbitral tribunals that occasionally applied the substantive law of the forum (which frequently coincides with the law with which the arbitrators, or some of them, are most familiar) instead of a possibly less known "foreign" law . . . had been vigorously criticized, for good reasons!

Furthermore, the Tribunal might – even *ex officio* – have to take into consideration certain mandatory rules of law, such as the relevant competition laws, in particular the Russian Competition Laws enacted in 1991 and 1995, and the U.S. antitrust laws.⁷

With respect to exclusivity:

. . . Respondent maintains that . . . Claimant orally represented to Respondent the right of exclusivity from the beginning of their negotiations . . .

Respondent also maintains that the right of exclusivity was not only represented to it orally but was moreover subsequently confirmed in writing . . .

In the first instance, the relevant Contract has to be looked at. It is clear that *le contrat fait loi entre les parties*. Respecting the unambiguous contractual terms agreed upon by both parties is, beyond any doubt, the basis of any international business and trade. The notion of *pacta sunt servanda* is reflected in any national law known to the present Arbitrators and is certainly reflected in the Vienna Convention, in Russian law, as well as in Canadian, US or Swiss law. The obligation of each party to honour the contractual terms has its limits only in very exceptional circumstances, for instance where the freedom of the parties to themselves regulate the affairs is restricted through mandatory rules of law, or where an

agreement violates public policy, or in the extremely rare situations where the contractual *equilibrium* became so seriously affected that the agreement has to be considered frustrated on the basis of *clausula rebus sic stantibus* (or similar notions as laid down in national legislations of civil law and common law countries). None of these exceptional situations is relevant in the present context.

In the instant case, two provisions are of paramount importance: first, the so-called merger clause (sometimes called *integration clause*) and, second, the *written modification clause*. Both of them may be characterized as typical clauses, and there can be no doubt for any party engaged in international trade that the clauses mean, and must mean, what they say. The merger clause makes sure that only the terms as reflected in the signed agreement will form part of the contractual obligations, thus excluding any extrinsic understandings, oral explanations, assurances or representations during prior negotiations which are not as such reflected in the written contract. Thus, by agreeing to a merger clause as part of a contract, the contractual parties clearly acknowledge, confirm and warrant for the benefit of each other that any and all prior discussions, negotiations, representations will be of no legal effect, unless they are directly reflected in the signed Contract. Prior discussions could thus only be relevant for interpretation purposes; however, this is not an issue in the present case.

(Reference to Article 8 CISG) . . . it may be noted that the effects and the significance of a merger clause are also reflected in Article 2. [17] of the 1994 Unidroit Principles of International Commercial Contracts. Although this Tribunal did not determine that the Unidroit Principles shall directly be applied, it is nevertheless informative to refer to them because they are said to reflect a world-wide consensus in most of the basic matters of contract law (and certainly in the areas which are discussed in the framework of this Award). Article 2.17 of the Unidroit Principles reads as follows: "(Merger clauses). A contract in writing which 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." The comments to this Article explain that a merger clause, of course ". . . covers only prior statements or agreements between the parties and does not preclude subsequent informal agreements between them. The parties are, however, free to extend an agreed form even to future amendments; see Article 2.18". Article 2.18 of the 1994 Unidroit Principles is the Article on the written modification clause to which reference will be made in the following paragraphs.

The *written modification clause* to which the present Parties have also explicitly agreed in the framework of the Contract . . . has the same effects as the merger clause with regard to any future negotiations, promises and any other extrinsic evidence which otherwise might be adduced for supplementing, altering or contradicting the written contract. The significance of the written modification clause is explained in Article 29(2) CISG which reads as follows: "A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."

. . . In the instant case, however, it is the Tribunal's opinion that there is no room whatsoever for applying the exception clause. The present Parties have agreed to the written requirement for any kind of modifications, and there is no evidence of a conduct which could be of a nature as to do away with that specific requirement.

Again, it is useful to realize that a written modification clause is another typical element in international contracts. The comparison (with) the 1994 Unidroit Principles again seems

appropriate. Article 2.18 states the following: "(Written modification clause). A contract in writing which contains a clause requiring any modification or termination by agreement to be in writing 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 acted in reliance on that conduct." As can be seen, Article 2.18 of the 1994 Unidroit Principles is quite close to Article 29(2) CISG.

The combination of the two discussed clauses, i.e. the merger clause reflected in Article 9.5 of the Contract and the written modification clause as per Article 9.3 of the Contract, make it almost impossible that, in the instant case, Respondent could rely on any kind of verbal promises or assurances, or any kind of written references which are not at the same time also reflected in an Amendment or Supplement to the Contract.

The evidentiary proceedings conducted in the present case have corroborated the above analysis, leading to the clear conclusion that a legally binding exclusivity had not been promised by Claimant . . .

With respect to timely delivery:

"The Majority Arbitrators further considered whether under the general duty to act in good faith Claimant would have been under an obligation to accelerate the shipment . . . so as to allow a customs clearing prior to the expiry of the US import licence. For instance, parties to a contract might be or become bound by a particular course of dealing which they have established as between themselves, by virtue of their previous commercial practices and conduct, and which can fairly be regarded as a common basis of understanding for interpreting their expression and other conduct. This notion, for instance, is also reflected in Article 4.3 of the 1994 Unidroit Principles (which are not directly applicable in the instant case, but nevertheless express a *communis opinio* and consensus).

The question thus arises whether such a particular course of dealing (which might have to be considered or applied by this Tribunal) had been established between the Parties. The answer to this question is, however, negative, for three reasons. First, it is from the outset hardly conceivable that a conclusive (and in the end legally binding) commercial practice can be established overriding the terms of a straightforward sales contract; typically, such practices emerge in the framework of long-term contracts such as those in the construction industry. Second, the explicit integration clause and the written modification clause, as contained in the Contract, operate as a bar against the assumption that a certain behaviour or practice could reach the level of becoming legally binding between the Parties. Third, the contractual relationship, as it had been examined by this Tribunal, did not reveal any particular commercial practices between the Parties, and there is no evidence before the Tribunal that the Parties had established a particular conduct which could have become legally binding on them.

Final Award in Case 9333

Date: October 1998
 Language: French
 Claimant: Broker (Morocco)
 Respondent: Builder (France)
 Place of arbitration: Geneva, Switzerland

Pursuant to an agreement entered into by the parties, Claimant promised to provide certain services to help Respondent to win and perform a building contract. Claimant's consideration took the form of commission, the amount of which was set in the agreement. Two payments representing almost 40% of such amount were made into a Swiss bank account. Thereafter, no further payment was made. According to Respondent, the policy of the American group of which it had become part prohibited it from making payments in a country other than that where the agent was located or the services rendered. This policy is alleged to have been introduced in connection with the USA Foreign Corrupt Practices Act (FCPA). Respondent believes the reasons for Claimant's wishing to be paid in Switzerland were related to bribery, which it considers to be an illicit purpose making the agreement void under the Swiss Code of Obligations. Claimant institutes arbitral proceedings in order to obtain his outstanding commission, plus interest and damages. Respondent contends that no commission is due owing to the agreement being void, that Claimant had not performed the agreement, and that there is no proof of the alleged harm. The sole Arbitrator considers in turn the validity of the agreement under the applicable law, the rights and obligations arising from the agreement, the damages claimed by Claimant, and the allocation of arbitration costs. He dismisses the accusation of corruption for lack of documentary evidence and indicators pointing to such corruption. He also finds there to be no evidence of the alleged non-performance, which, moreover, he considers to be based on a misinterpretation of the texts. He orders Respondent to pay commission, plus interest in accordance with Article 78 of the United Nations Convention on Contracts for the International Sale of Goods and Article 7.4.9 of the *Unidroit Principles*. He dismisses Claimant's request for damages, but awards him compensation to cover travel expenses. As Claimant won on the main issue, Respondent is ordered to bear the entire arbitration costs, plus all of Claimant's defence expenses.

With respect to the American anti-corruption law:

"La Convention est soumise au Code suisse des obligations. Selon la défenderesse, toutefois, la loi FCPA trouve "pleinement application dans les relations contractuelles des parties" [...] La défenderesse prétend que la loi FCPA lui interdit de faire des paiements au demandeur en dehors du Maroc.

Un contrat qui est contraire non pas au droit suisse, mais à un droit étranger, n'est en principe pas illicite selon l'article 20 CO, cette disposition ne protégeant que le respect de la loi suisse. Dans des circonstances exceptionnelles, une violation d'un droit étranger peut néanmoins être considérée comme contraire aux mœurs selon l'article 20 CO si elle est irréconciliable avec les mœurs suisses [...] Tel n'est pas le cas en l'occurrence [...] Le Tribunal [...] est arrivé à la conclusion que le grief de corruption n'était pas établi par des preuves [...]

Une loi étrangère avant la qualité de loi de police pourrait éventuellement trouver application à un contrat, autrement soumis au droit suisse, par le biais de l'article 19 LDIP. Une violation d'une telle loi de police, à supposer réunies les conditions d'application de

l'article 19, pourrait entraîner l'illicéité du contrat. La question de savoir si l'article 19 LDIP s'applique à un arbitre international ainsi que les conditions d'application de cette disposition est controversée [...]. La question peut toutefois être laissée ouverte dès lors que le Tribunal arbitral est de l'avis que (i) l'application de la FCPA à titre de loi de police étrangère ne se justifie pas et que (ii), en toute hypothèse, les conditions d'applications de la FCPA ne sont pas réunies.

La présente procédure met en cause la défenderesse, filiale française de la société américaine [X], et le demandeur, un ressortissant marocain. La société américaine [X] n'est pas partie à la procédure. Il n'y a aucun rattachement avec le droit américain hormis le fait que la société française est devenue, après la conclusion de la Convention, une filiale d'une société américaine. Ce rattachement serait en tout état de cause insuffisant pour appliquer la loi FCPA à titre de l'article 19 LDIP.

Il n'est cependant pas nécessaire de chercher un rattachement, car la loi FCPA ne s'applique pas aux filiales de sociétés américaines à l'étranger [...]. En revanche, selon la loi FCPA, la société mère basée aux Etats-Unis est responsable pour les agissements des sociétés appartenant au groupe qu'elle chapeaute. C'est dans cette optique, afin de limiter le risque lié à leur propre responsabilité, que les multinationales américaines ont instauré des programmes dans toutes les sociétés du groupe qui devraient permettre d'assurer le respect de la loi FCPA [...].

On ajoutera que même si la loi FCPA était applicable à la défenderesse, ceci ne signifierait pas encore qu'un Tribunal arbitral international serait tenu de l'appliquer sans autre. Même à supposer (i) qu'il s'agit d'une loi de police et (ii) que l'arbitre admet qu'une telle loi peut être appliquée nonobstant l'élection d'une autre loi matérielle, encore faudrait-il démontrer des intérêts puissants et légitimes des Etats-Unis à l'application de cette loi. De sérieux doutes à ce sujet pourront en effet résulter du fait que la loi FCPA ne vise pas en premier lieu à protéger l'ordre public fondamental des Etats-Unis mais qu'elle a pour but de restaurer la confiance du public dans l'intégrité des entreprises américaines dont la réputation [avait] été ternie par une série de scandales retentissants [...]. Il serait donc peu approprié d'imposer sans autre la loi FCPA à des entreprises en dehors des Etats-Unis [...] la lutte contre la corruption, but certes louable, ne justifie pas nécessairement l'exportation des méthodes ou du code de conduite singulier de la loi FCPA pour atteindre ce but [...].

With respect to the duty to pay interest:

'[...] le demandeur a modifié ses conclusions tendant à l'obtention d'intérêts moratoires en ce qu'il réclame que ceux-ci soient « calculés au taux de 5% conformément aux dispositions de l'article 104 du Code suisse des obligations (et non au taux légal français) » et ceci à compter du dépôt de la Requête d'arbitrage [...].

Le demandeur a réclamé le paiement d'intérêts dans sa Requête d'arbitrage déjà. Aurait-il persisté à fonder sa demande sur le droit français, il aurait incombé au Tribunal, non pas de déclarer irrecevable la demande, mais d'appliquer le Code suisse des obligations.

On peut d'ailleurs s'interroger sur la question de savoir si les intérêts ne font pas de toute façon partie de la demande principale. Ainsi, un auteur a récemment écrit ce qui suit : « From a functional perspective, the interest claim in Art. 78 CISG, just as the one incorporated in Art. 7.4.9 of the Principles, and any statutory interest claim constitutes the minimum lump sum compensation for damages in areas where the creditor need not prove the actual damages incurred. It is a long-standing practice of international arbitrators, as well as of the Iran-U.S. Claims Tribunal, to consider the interest claim as part of the general claim for damages. » (Klaus Peter Berger, « International Arbitral Practice and the

Unidroit Principles of International Commercial Contracts », in *The American Journal of Comparative Law*, Vol. 46, 1998, p. 155 s.) [...]

Selon l'article 104 CO, auquel la Convention est soumise, tout débiteur qui est en demeure pour le paiement d'une somme d'argent doit l'intérêt moratoire de 5% par l'an. Rien dans la Convention ne permet d'admettre que les parties avaient l'intention d'exclure le droit au paiement d'intérêts en cas de demeure. Une telle exclusion aurait du reste été difficile à réconcilier avec les usages du commerce international dont se font l'écho, entre autres, la Convention des Nations Unies sur les contrats de vente internationale de marchandises (Convention de Vienne), ou encore les Principes Unidroit pour les contrats commerciaux internationaux, évoqués par l'auteur précité.

Au vu de l'article 104 CO et des conclusions du demandeur, il convient donc d'assortir toute condamnation de la défenderesse au paiement de commissions d'une condamnation au paiement d'intérêts au taux de 5% dès le dépôt de la Requête d'arbitrage [...]

Final Award in Case 9419

Date:

September 1998

Language:

Italian

Claimant:

Counterrtrade management company (Switzerland)

Respondent:

Exporter (Liechtenstein)

Place of arbitration:

Lugano, Switzerland

*An agreement was made between the parties relating to the exportation of Bulgarian goods obtained by Respondent for countertrade purposes to cover supplies to be made in Bulgaria by a company belonging to the same group as Claimant. Respondent was to be paid commission on sums credited to a bank account in payment of the Bulgarian exports. Claimant asserts that no payment had been made into the bank account, that an order had not been honoured (thereby forcing it to purchase replacement goods), and that Respondent had never repaid it interest unduly collected on payments it had made in advance. The sole Arbitrator begins with two interlocutory questions: his jurisdiction and the applicable law. He considers that the arbitration clause contained in the initial agreement between the parties may be extended to the subsequent sales contracts made pursuant to such agreement, since, in his view, the latter is a framework agreement. As far as the law applicable to the merits is concerned, he rules out *lex mercatoria* and the *Unidroit Principles* and decides that French law is applicable. This being so, he considers that the United Nations Convention on Contracts for the International Sale of Goods should be applied in the first place. As regards the merits, and in the face of a situation complicated by lack of clarity and coherence in the documents, the Arbitrator proceeds to qualify the relationship between the parties. He finds that, although the agreement did not contain any precise obligations which, if unperformed, could justify sanctions, at the performance stage Respondent had made an undertaking which it had failed to fulfil. The Arbitrator determines the sum due by Respondent as a result of such failure. Next, he dismisses the request for compensation to cover non-payment of a 'premium' and then considers whether Claimant is entitled to damages for alleged unperformed orders. Lastly, he refuses to order the refunding of interest on a payment made in advance, owing to lack of proof. The Arbitrator considers he has jurisdiction to*

fix the amount of interest due on the sums contained in the Award and refers to the average interbank rate, applying 5% to the debt in Swiss francs and 8% to that in US dollars. The arbitration costs are halved between the two parties.

With respect to the applicable law:

The arbitration clause does not specify the substantive law that the arbitrator has to apply. It is therefore up to the arbitrator to determine this, as stated, moreover, in point D10 of the Terms of Reference.

The Claimant has covered this question in its Brief and, more specifically, has argued that, in absence of any reference to a specific national law, the demands are based on the universally acknowledged principles of international commerce, allowing the arbitrator to pronounce his decision in the light of the so-called "*lex mercatoria*", a kind of codification of which can be found in the principles of international commercial contracts drawn up by Unidroit. Otherwise, in the event that reference needs to be made to a national law, French law has to be applied, given that the Agreement between X and Y has become an integral part of the Accord and the application of French law is explicitly provided in said Agreement . . .

The undersigned arbitrator is not convinced of the applicability of the so-called *lex mercatoria*. While acknowledging the authoritativeness of the school of thought that has posited the existence of such an unwritten and supranational law, based on principles and usages generally accepted by players in international commerce (the so-called *mercatores*), and although aware that there have even been awards in international commercial arbitration where explicit reference is made to *lex mercatoria*, the undersigned arbitrator sides with the other school of thought that does not believe in the existence of *lex mercatoria* and which firmly believes that the search for a law that can be applied to a contractual relationship must necessarily lead to the identification of a national law. This is all the more so since, in accordance with the provisions of Article 13.3 of the ICC Rules (consistent with the provisions of Article VII of the Geneva Convention of 1961), the arbitrator, barring any indication by the parties, is required to apply the law that is applicable on the basis of the rules of conflict that he considers to be appropriate.

Whereas, on the one hand, the parties maintain their freedom of choice regarding the legal regulation of their relationship, on the other hand, failing the expression of such choice, the power of the arbitrator is not to choose the applicable law in a direct way, but is limited to identifying the rule of conflict that he considers to be the most appropriate and on the basis of which, in an indirect way, the determination of the applicable law will be made. This means that, by proceeding in this manner (as is his precise duty), the arbitrator necessarily arrives at the designation of a specific national legal system.

Notwithstanding this, the arbitrator must in all events take account not only of the contractual stipulations, but also of trade usages (as provided for in Article 13.5 of the ICC Rules). In other words, precisely due to their general acceptance by the *mercatores* community, trade usages can be considered to be tacitly acknowledged by the parties in their contractual relationship. Such usages incorporate the contractual regulation of the relationship, though without excluding the need to identify the relevant legislative framework.

With regard to the Principles drawn up by Unidroit, it is quite true that these may be considered as a kind of codification of the *lex mercatoria*, but once again these are the results of highly commendable work of academic research and comparison, as well as the

reflection of an increasingly eager aspiration to arrive, as it were, at a globalization of legal thinking, though without attributing any binding value to such Principles. (*)

(*) The Introduction to the Principles states that: "... 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".

This means that the Unidroit Principles could certainly be used for reference by the parties involved for the voluntary regulation of their contractual relationship, in addition to helping the arbitrator in confirming the existence of particular trade usages, but they cannot constitute a normative body in themselves that can be considered as an applicable supranational law to replace a national law, at least as long as the arbitrator is required to identify the applicable law by choosing the rule of conflict that he considers most appropriate, in accordance with the provisions laid down by the international conventions and as provided for in the rules of arbitration within the scope of which he operates. (**)

(**) The Preamble to the Principles states that: "Parties who wish to adopt the Principles as the rules applicable to their contract would however be well advised to combine the reference to the Principles with an arbitration agreement."

However, it is feasible to accept the Claimant's second argument regarding the applicability of French law, the moment the parties have declared such Agreement, in which the application of French law is explicitly provided, to be an "integral part" of their Accord. It is up to the arbitrator to find out whether and to what extent the parties have an intent with regard to the applicable law, even when an explicit choice is not apparent. The arbitrator replaces the parties in the search for an applicable law only when no "indication" whatsoever has been expressed by the parties in this respect (Article 13.3 of the ICC Rules), which precisely means that it is up to the arbitrator to discover the intent of the parties, wherever possible, also by means of elements pointing to an implicit intent. In our case it is therefore possible to assume that, having incorporated the Agreement into the Accord, the parties have implicitly expressed their wish to submit their contractual relationship to the same system of law (French law) as that to which the Agreement was explicitly subject.

It has to be mentioned, however, that since most claims are based on alleged breaches of contract for the supply of goods, the arbitrator must first of all apply the United Nations Convention on Contracts for the International Sales of Goods adopted in Vienna on 11 April 1980 (hereinafter the "Vienna Convention" or "CISG"), making reference to all the conditions that, in this particular case, make it applicable on the basis of the provisions in Article 1 [of said Convention] and more precisely:

- the sale of goods, that is, the subject of the contract;
- the international nature of the relationship, given that the parties have their business centres in different countries;
- accession to the CISG by the two countries (Switzerland and Liechtenstein) where the parties are based; and (should it be necessary)
- France's accession to the CISG, given that French law is considered applicable.

Final Award in Case 9593

Date: December 1998
Original: English
Claimant: Distributor (Ivory Coast)
Respondent: Supplier (Ivory Coast)
Place of arbitration: Paris, France

*The parties entered into agreements for exclusive distribution by Claimant in Ivory Coast of motor vehicles supplied by Respondent, a joint venture of UK/Japanese origin. Problems arose in the performance thereof, such as a lack of agreement on tariffs and failure by Claimant to fulfil its payment obligations punctually. Relations between the parties deteriorated rapidly, leading Respondent to terminate the agreements, alleging a vast number of serious breaches. Claimant filed a Request for Arbitration, arguing that Respondent's termination of the agreements was unfounded and alleging Respondent's failure to perform its contractual obligations in good faith and general lack of cooperation. Respondent objects to these allegations, accusing Claimant of bad faith, hostility and an uncooperative attitude. Both Ivorian law and the usages of international trade, as reflected in the *Unidroit Principles* (Article 5.3), require good faith in the performance of contracts. In the light thereof, the Arbitral Tribunal finds the termination to have been unfair and orders Respondent to pay compensation owed Claimant. It further orders Claimant to pay to Respondent the outstanding amount owed to it. As each party had contributed to complicating the arbitration procedure, the Arbitral Tribunal decides that each shall bear half of the arbitration costs.*

With respect to the parties' good faith:

As stated in clause 1.2 of the Dealer Agreement and clause 13.1 of the Supplementary Agreement . . . , the law governing the Agreements and their interpretation is the law of the Republic of the Ivory Coast.

Thus, according to Article 13(3) of the ICC Rules, the Arbitral Tribunal must apply the laws of the Ivory Coast in order to decide the merits of this dispute.

Pursuant to Article 13(5) of the ICC Rules, the Arbitral Tribunal shall also take into account the provisions of the contract and the relevant trade usages. In doing so, the Arbitral Tribunal will pay particular attention to the specific nature of the Agreements and to the context within which they were entered into. As requested by Article 1156 of the Civil Code of the Ivory Coast, the Arbitral Tribunal will look for the real intent of the parties and not only the literal wording of the Agreements.

Article 1134 para. 3 of the Ivorian Civil Code stresses that contracts must be performed in good faith. Furthermore, Article 1135 of the same code recalls that a contract binds the parties not only according to its wording, but also to the consequences thereof resulting from equity, custom and the law. In a contractual relationship which is the extension in time of previous relations between a Japanese Group and an Ivorian Group, constitutes the result of negotiations between English, Japanese and Ivorian parties and deals with the distribution in the Ivory Coast of Japanese products, the custom to be taken into consideration by the Arbitral Tribunal within the framework of Article 1135 of the Ivorian Civil Code is to be found within the usages of international trade.

One consequence of the principle recalled by Article 1134 para. 3 of the Ivorian Civil Code, according to which contracts must be performed in good faith, is that the parties must

cooperate in good faith to reach the common goals contractually agreed upon. It is on the basis of the identical text of Article 1134 para. 3 of the French Civil Code that French courts have decided that good faith and loyalty oblige a party to a contract to facilitate the performance of its obligation by the other party. . . . Indeed, as written years ago by the French lawyer Demogue: "les contrats forment une sorte de microcosme (...) une petite société où chacun doit travailler dans un but commun, qui est la somme des buts individuels, poursuivis par chacun, absolument comme dans la société civile ou commerciale" (R. Demogue, *Traité des Obligations*, 1927, [Vol.] IV, p. 191). Such obligation to cooperate in good faith in the performance of the contract has also become a fundamental element of the usages of international trade applicable to this case through Article 1135 of the Ivorian Civil Code and Article 13(5) of the ICC Rules. Such usage was pointed out by several awards rendered under the aegis of the International Court of Arbitration of the ICC. . . .

Further to a comparative study, Unidroit came to the conclusion that the obligation to cooperate in good faith in the performance of a contract amounted to a general principle applicable to international trade. Accordingly, this principle was reflected under Article 5.3 of the Unidroit Principles of International Commercial Contracts: "Each party shall cooperate with the other party when such cooperation may reasonably be expected for the performance of that party's obligations."

In conclusion, the Arbitral Tribunal will make its decision on the validity of the termination of the Agreement on the basis of the text thereof, in the light of the law of the Ivory Coast which requires good faith in the performance of contracts, such requirement also deriving from the usages of international trade.

Clause 6.2 of the Dealer Agreement and Clause 11.2.3 of the Supplementary Agreement authorized Respondent to terminate the Agreements, *inter alia*, in case of failure by Claimant to make any payment due to it by the due date, or for "serious breach" of Claimant's obligations. . . .

According to Clause 6.2 of the Dealer Agreement, a breach of Claimant "shall be deemed serious if during the previous two years the Dealer . . . has received two or more warnings for breaches of the same obligations or three or more such warnings for any breaches".

On the basis of the evidence submitted by both parties, the Arbitral Tribunal is convinced that a number of the breaches relied upon by Respondent took place.

. . . Clause 6.2 of the Dealer Agreement does convey the conclusion that, when the parties entered into the Agreements, their real intention, to which the Arbitral Tribunal must give particular relevance pursuant to Article 1156 of the Civil Code of the Ivory Coast, was that, even if the Dealer was in breach of his contractual obligations, many breaches, even repeated, would not be considered as serious breaches allowing termination before the expiry of a period of two years.

Such a contractual approach was reasonable, as the relations between a distributor of vehicles and a dealer require a close cooperation and an adaptation period. . . .

The existence of such an adaptation period was perfectly understandable and normal since the parties had decided to create a new structure in the frame of an already existing long relationship, in which, as Respondent knew, Claimant had not scrupulously complied with its contractual obligations.

Consequently, Claimant's breaches allegedly occurring within ten months after the signature of the Agreements and presented by Respondent as "serious breaches" cannot be

so characterized under the Agreements and, thus, even if their occurrence were ascertained, they could not be a valid ground for termination of the Agreements by Respondent. . . .

Contrary to the "serious breaches" as defined by the Agreements, delays in payment by the Dealer allowed Respondent, according to the Agreement, to terminate immediately the Agreement.

However, the exercise of such a contracting right was available only if this breach of Claimant was indisputably [sic] established, if it was not caused by other breaches on the part of Respondent and if Respondent did not exercise its right abusively. . . .

It appears from the facts of the case that, by its general behaviour, Respondent did not cooperate with Claimant in a way which would have allowed Claimant to strictly comply with all of its obligations. . . .

Therefore, the Arbitral Tribunal considers that Claimant's delays as regards payments were not clearly established as Claimant's defaults, as they were caused, in part, by Respondent's behaviour. . . .

Therefore, under the above-mentioned circumstances, where there was no certainty that Claimant was in breach of its obligations of payment, where the real intent of the parties was that no termination would take place before two years of the life of the Agreements in most of the cases of breach and where Claimant's breaches were largely caused by Respondent's attitude and by the latter's breach of its duty to cooperate, the Arbitral Tribunal decides that the termination of the Agreements by Respondent was not justified and, therefore, abusive.

Bibliography

on the

Unidroit Principles of International Commercial Contracts*

- F. Addis, 'Note introduttive ai Principi Unidroit', in *Materiali e commenti sul nuovo diritto dei contratti, a cura di G. Vettori*, Padova, CEDAM, 1999, pp. 926-934.
- G. Alpa, 'Prime note di raffronto tra i principi dell'Unidroit e il sistema contrattuale italiano', in *Contratto e impresa/Europa*, 1996, p. 287 et seq.
- G. Alpa, 'I Principi dell'Unidroit, Quadro di sintesi', in *I contratti in generale. Aggiornamento 1991-1998, diretto da G. Alpa e M. Bessone, Giurisprudenza sistematica di diritto civile e commerciale, fondata da W. Bigliari*, vol. I, Torino, UTET, 1999, pp. 195-216.
- G. Alpa, 'La protezione della parte debole nei Principi dell'Unidroit', in *I contratti in generale. Aggiornamento 1991-1998, diretto da G. Alpa e M. Bessone, Giurisprudenza sistematica di diritto civile e commerciale, fondata da W. Bigliari*, vol. I, Torino, UTET, 1999, pp. 217-232.
- American Journal of Comparative Law*, 40, 1992 (includes: M. J. Bonell, 'Unification of Law by Non-Legislative Means: The Unidroit Draft Principles for International Commercial Contracts', pp. 617-633; U. Drobnig, 'Substantive Validity', pp. 635-644; E. A. Farnsworth, 'Closing Remarks', pp. 699-702; M. Fontaine, 'Content and Performance', pp. 645-655; M. P. Furmston, 'Breach of Contract', pp. 671-674; R. Hyland, 'On Setting Forth the Law of Contract: A Foreword', pp. 541-550; D. Maskow, 'Hardship and Force Majeure', pp. 657-669; A. Rosett, 'Unification, Harmonization, Restatement, Codification and Reform in International Commercial Law', pp. 683-697; D. Tallon, 'Damages, Exemption Clauses, and Penalties', pp. 675-682).
- J. Basedow, 'Die Unidroit-Prinzipien der Internationalen Handelsverträge und die Übereinkommen des einheitlichen Privatrechts – Eine theoretische Studie zur praktischen Anwendung des internationalen Transportrechts, besonders der CMR', in *Festschrift für Ulrich Drobnig zum siebenzigsten Geburtstag*, Tübingen, Mohr Siebeck, 1998, pp. 19-38.
- E.-M. Belser, 'Die Auslegung des Vertrages – Richtliche Inhaltsgestaltung zwischen Freiheit und Gerechtigkeit', in *L'européanisation du droit privé. Vers un Code civil européen?*, Editions Universitaires Fribourg, Switzerland, 1998 (*Universités de Berne. Fribourg, Genève, Lausanne et Neuchâtel. Enseignement de 3^e cycle de droit*, vol. 18), pp. 237-267.
- Béraudo, J.-P., 'Les Principes d'Unidroit relatifs au droit du commerce international', in *La Semaine juridique*, 1995, I, p. 3842.
- K. P. Berger, 'Die Unidroit-Prinzipien für Internationale Handelsverträge', in *Zeitschrift für Vergleichende Rechtswissenschaft*, 1995, pp. 217-236.
- K. P. Berger, 'Einheitliche Rechtsstrukturen durch außergesetzliche Rechtsvereinheitlichung', in *Juristen Zeitung*, 54, 1999, pp. 369-377.

- K. P. Berger, 'International Arbitral Practice and the Unidroit Principles of International Commercial Contracts', in *American Journal of Comparative Law*, 46, 1998, pp. 129-150.
- K. P. Berger, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International, 1998.
- K. J. Bonell, 'The Lex Mercatoria Doctrine and the Unidroit Principles of International Commercial Contracts', in *Law and Policy in International Business*, 28, 1997, pp. 943-990.
- K. Boele-Woelki, 'European and Unidroit Principles of Contract Law', in B. Von Hoffmann (ed.), *European Private International Law*, Nijmegen, Ars Aequi Libri, 1998, pp. 67-85.
- K. Boele-Woelki, 'Principles and Private International Law - The Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply them to International Contracts', in *Uniform Law Review*, 1996, pp. 652-678.
- K. Boele-Woelki, *Principles en IPR. Enkele beschouwingen over de toepassing van de Unidroit Principles of International Commercial Contracts en de Principles of European Contract Law op internationale overeenkomsten*, Koninklijke Vermande, 1995.
- A. Boggiano, 'La Convention interaméricaine sur la loi applicable aux contrats internationaux et les Principes d'Unidroit', in *Uniform Law Review*, 1996, pp. 219-228.
- M. J. Bonell (ed.), *A New Approach to International Commercial Contracts - The Unidroit Principles of International Commercial Contracts* (International Academy of Comparative Law, XVII International Congress of Comparative Law, Bristol, 26 July - 1 August 1998), Kluwer Law International, 1999 (includes: G. Alpa, 'Italy', pp. 175-190; J. Basedow, 'Germany', pp. 125-150; M. J. Bonell, 'General Report', pp. 1-17; P. M. Cosmovici & R. Munteanu, 'Romania', pp. 281-300; H. Dunham, 'China', pp. 65-70; F. De Ly, 'Netherlands', pp. 203-235; B. Fauvarque-Cosson, 'France', pp. 95-123; M. Fontaine, 'Belgium', pp. 55-64; M. Furnston, 'United Kingdom', pp. 379-385; C. Hultmark, 'Sweden', pp. 301-330; B. Izadi, 'Iran', pp. 151-165; J. Lookofsky, 'Denmark', pp. 71-93; G. A. Moens, L. Cohn & D. Peacock, 'Australia', pp. 19-54; L. Net, 'Vietnam', pp. 421-431; A. M. Rabello, 'Israel', pp. 167-173; A. Rosett & M. W. Gordon, 'United States', pp. 387-419; F. Sabourin, 'Quebec', pp. 237-280; H. Veytia, 'Mexico', pp. 193-201; F. Werro & E. M. Belser, 'Switzerland', pp. 331-378; R. Yamashita, 'Japan', pp. 191-2).
- M. J. Bonell, *An International Restatement of Contract Law. The Unidroit Principles of International Commercial Contracts*, 2nd enlarged edition, Transnational Publishers Inc., Ardsley, NY, 1997.
- M. J. Bonell, A "Restatement" of Principles for International Commercial Contracts: An Academic Exercise or A Practical Need?, in *International Business Law Journal*, 1988, pp. 873-888.
- M. J. Bonell, 'I Principi Unidroit dei contratti commerciali internazionali: origini, natura e finalità' (paper delivered at the international colloquium organized by the ICC Institute of International Business Law and Practice in Paris on 20 October 1994), *Diritto del commercio internazionale*, 1995, pp. 3-22.
- M. J. Bonell, 'I Principi Unidroit. Un approccio moderno al diritto dei contratti', in *Materiali e commenti sul nuovo diritto dei contratti, a cura di G. Vettori*, Padova, CEDAM, 1999, pp. 935-955.
- M. J. Bonell, 'I Principi Unidroit. Un approccio moderno al diritto dei contratti', in *Rivista di diritto civile*, 1997, pp. 231-247.

- M. J. Bonell, "Policing" the Contract against Unfairness under the Unidroit Principles for International Commercial Contracts', in *Diritto del commercio internazionale*, 1994, pp. 251-267.
- M. J. Bonell, 'The Unidroit Initiative for the Progressive Codification of International Trade Law', in *International and Comparative Law Quarterly*, 27, 1978, pp. 413-441.
- M. J. Bonell, 'The Unidroit Principles - A Modern Approach to Contract Law', in H.-L. Weyers (ed.), *Europäisches Vertragsrecht*, Nomos, Baden-Baden, 1997, pp. 9-21.
- M. J. Bonell, 'The Unidroit Principles in Practice: The Experience of the First Two Years', in *Uniform Law Review*, 1997, pp. 34-45.
- M. J. Bonell, 'The Unidroit Principles of International Commercial Contracts and CISG: Alternative or Complementary Instruments?', in *Uniform Law Review*, 1996, pp. 26-39.
- M. J. Bonell, 'The Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?', in *Uniform Law Review*, 1996, pp. 229-246.
- M. J. Bonell, 'The Unidroit Principles of International Commercial Contracts: Towards a New *Lex Mercatoria*?', in *International Business Law Journal*, 1997, pp. 145-163.
- M. J. Bonell, 'The Unidroit Principles: What Next?', in *Uniform Law Review*, 1998, pp. 275-286.
- M. J. Bonell, 'Unidroit Principles and the *Lex Mercatoria*', in *Lex Mercatoria and Arbitration*, ed. T.E. Carbonneau, Juris Publishing, Kluwer Law International, 1998, pp. 249-255.
- M. J. Bonell, 'Unidroit Principles: A Significant Recognition by a United States District Court', in *Uniform Law Review*, 1999, pp. 651-663.
- M. J. Bonell, 'Unidroit Principles of International Commercial Contracts and CISG: Alternatives or Complementary Instruments?', in *International Sales*, 24, June 1999, pp. 9-14.
- M. J. Bonell & F. Bonelli (ed.), *Contratti Commerciali Internazionali e Principi Unidroit*, Milan, Giuffrè Editore, 1997 (includes: G. Alpa, 'La protezione della parte debole di origine internazionale con particolare riguardo al diritto uniforme', pp. 225-246; P. Bernardini, '*Handship e force majeure*', pp. 193-214; M. J. Bonelli, 'I Principi Unidroit dei contratti commerciali internazionali: un approccio nuovo alla disciplina dei contratti internazionali', pp. 7-19; F. Bonelli, 'La responsabilità per danni', pp. 307-338; S. M. Carbone, 'Principi dei contratti internazionali e norme di origine internazionale con particolare riguardo al diritto uniforme', pp. 23-38; C. Castronovo, 'Inadempimento ed esatto adempimento nei Principi Unidroit', pp. 271-294; A. Di Maio, 'L'osservanza della buona fede nei Principi Unidroit sui contratti commerciali internazionali', pp. 143-160; U. Drobnič, 'Protection of the Weaker Party', pp. 215-224; E. A. Farnsworth, 'Contract Formation: Two Models Compared', pp. 171-181; G. B. Ferri, 'Il ruolo dell'autonomia delle parti e la rilevanza degli usi nei Principi dell'Unidroit', pp. 123-141; M. Fontaine, 'Les dispositions relatives au *handship* et à la force internationale i Principi ed il diritto internazionale privato' [in French], pp. 55-70; P. Kahn, 'Les Principes Unidroit comme droit applicable aux contrats internationaux', pp. 39-53; E. A. Kramer, '*Fair dealing in international trade*' et vices du consentement', pp. 161-169; P. Lalive, 'L'Arbitrage international et les Principes Unidroit', pp. 71-89; O. Lando, 'The Role of Party Autonomy and the Relevance of Usages', pp. 107-122; R. Luzzatto, 'I Principi Unidroit e l'arbitrato commerciale internazionale', pp. 91-104; P. Schlechtriem, 'Termination of Contracts

- International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 Unidroit Conventions on International Factoring and Leasing and the Unidroit Principles', pp. 217-241; E. A. Kramer, 'Contractual Validity according to the Unidroit Principles', pp. 269-288; P. Schlechtriem, 'Termination and Adjustment of Contracts', pp. 305-323; A. K. Schnyder & R. M. Straub, 'The Conclusion of a Contract in accordance with Unidroit Principles', pp. 243-268; I. Schwenzler, 'Specific Performance and Damages according to the 1994 Unidroit Principles of International Commercial Contracts', pp. 289-303; F. Vischer, 'The Relevance of the Unidroit Principles for Judges and Arbitrators in Disputes arising out of International Contracts', pp. 203-216).
- E. A. Farnsworth, 'An International Restatement: The Unidroit Principles of International Commercial Contracts', in *University of Baltimore Law Review*, 26, 1997, pp. 1-7.
- E. A. Farnsworth, 'Duties of Good Faith and Fair Dealing under the Unidroit Principles, Relevant International Conventions and National Laws', in *Tulane Journal of International and Comparative Law*, 1994, p. 45 *et seq.*
- E. A. Farnsworth, 'The American Provenance of the Unidroit Principles', in *Tulane Law Review*, 72, 1997/1998, pp. 1985-94.
- E. A. Farnsworth, 'The American Provenance of the Unidroit Principles', in *Uniform Law Review*, 1998, pp. 397-404.
- B. Fauvarque-Cosson, 'Les contrats du commerce international, une approche nouvelle : les Principes d'Unidroit relatifs aux contrats du commerce international', in *Revue internationale de droit comparé*, 1998, pp. 463-489.
- F. Ferrari, 'I "Principi per i contratti commerciali internazionali" dell'Unidroit ed il loro ambito di applicazione', in *Contratto e impresa/Europa*, 1996, p. 297 *et seq.*
- M. Fontaine, 'Les clauses exonératoires et les indemnités contractuelles dans les Principes d'Unidroit: observations critiques', in *Uniform Law Review*, 1998, pp. 405-417.
- M. Fontaine, 'Les principes pour les contrats commerciaux internationaux élaborés par Unidroit', in *Revue de droit international et de droit comparé*, 1991, pp. 23-40.
- M. Furmston, 'An English View of the Unidroit Principles of International Commercial Contracts', in *Uniform Law Review*, 1998, pp. 419-424.
- M. Furmston, 'Unidroit General Principles for International Commercial Contracts', in *Journal of Contract Law*, 10, 1996/1997, pp. 11-20.
- E. Gaillard, 'Use of General Principles of International Law in International Long-Term Contracts', in *International Business Lawyer*, 27, 1999, pp. 214-224.
- A. M. Garro, 'The Contribution of the Unidroit Principles to the Advancement of International Commercial Arbitration', in *Tulane Journal of International and Comparative Law*, 3, 1994, p. 94 *et seq.*
- A. Giardina, 'Les Principes Unidroit sur les contrats internationaux', in *Journal du droit international*, 1995, pp. 547-558.
- J. Gordley, 'An American Perspective on the Unidroit Principles', *Centro di studi e ricerche di diritto comparato e straniero. Saggi, conferenze e seminari*, no. 22, Rome, 1996.
- C. Gorritz Lopez, 'L'interpretazione del contratto nei Principi Unidroit dei contratti commerciali internazionali', in *Contratto e impresa/Europa*, 1998, pp. 467-488.

- O. E. Haazen, 'Comparative law and economics en het Europees privaatrecht als ongemengd rechtsstelsel', in *Nederlands Juristenblad*, 73, 1998, pp. 1227-33.
- A. S. Hartkamp, 'The Concept of Good Faith in the Unidroit Principles for International Commercial Contracts', in *Tulane Journal of International and Comparative Law*, 1994, p. 45 *et seq.*
- A. S. Hartkamp, 'The Unidroit Principles for International Commercial Contracts and the Principles of European Contract Law', in *European Review of Private Law*, 1994, pp. 341-357.
- A. S. Hartkamp, 'The Unidroit Principles for International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods', in Asser Institute (ed.), *Comparability and Evaluation - Essays on Comparative Law, Private International Law and International Commercial Arbitration*, Nijhoff Publishers, 1994, pp. 95-98.
- R. Hill, 'A Businessman's View of the Unidroit Principles', in *Journal of International Arbitration*, 13, 1996, pp. 163-170.
- F. Hinestroza, 'Des principes généraux du droit aux principes généraux des contrats', in *Uniform Law Review*, 1998, pp. 501-517.
- F. Hoekstra, 'The Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law: A Comparison', in *Molegrafica*, 1996, pp. 3-44.
- Institute of International Business Law and Practice (ed.), *Unidroit Principles for International Commercial Contracts. A New Lex Mercatoria?*, ICC Pub. 490/1, 1995 (includes: J. P. Beraudo, 'L'application des Principes Unidroit par les tribunaux étatiques et supranationaux', pp. 217-221; G. De Nova, 'The Unidroit Principles as a Guide for Drafting International Contracts', pp. 129-135; U. Drobnig, 'The Use of the Unidroit Principles by National and Supranational Courts', pp. 223-232; E. A. Farnsworth, 'An American View of the Principles as a Guide to Drafting Contracts', pp. 85-93; M. Fontaine, 'Les Principes Unidroit, guide de la rédaction des contrats internationaux', pp. 73-84; M. P. Furmston, 'The Unidroit Principles and International Commercial Arbitration', pp. 199-209; V. Gaymer, 'Unidroit Principles of International Commercial Contracts as a Guide for Drafting Contracts, A View from an International Commercial Lawyer', pp. 95-103; A. Giardina, 'L'application des Principes Unidroit aux contrats internationaux', pp. 143-154; A. S. Hartkamp, 'The Use of the Unidroit Principles of International Commercial Contracts by National and Supranational Courts', pp. 253-262; J. Huet, 'Conclusions', pp. 263-281; A. S. Komarov, 'Remarks about the Application of the Unidroit Principles of International Commercial Contracts in International Commercial Arbitration', pp. 155-166; P. Lalive, 'Preface', pp. 7-10; R. Moreta, 'Tendances de la jurisprudence et de la doctrine juridique italiennes en matière de *lex mercatoria*', pp. 233-241; H. Raeschke-Kessler, 'Should an Arbitrator in an International Arbitration Procedure apply the Unidroit Principles?', pp. 167-180; K. Razumov, 'Les contrats commerciaux internationaux et les nouveaux Principes Unidroit : pratique contractuelle commerciale russe', pp. 105-113; D. Tallon, 'L'application des Principes Unidroit par les tribunaux étatiques', pp. 243-251; H. Van Houette, 'The Unidroit Principles as a Guide for Drafting Contracts', pp. 115-127; H. Van Houette, 'Unidroit Principles of International Commercial Contracts and International Commercial Arbitration: Their Reciprocal Relevance', pp. 181-198).
- International Institute for the Unification of Private Law Unidroit, *Los Principios de Unidroit: ¿ Un Derecho Común de los Contratos para las Américas? / The Unidroit Principles: A Common Law of Contracts for the Americas? Actas / Proceedings - Congreso Interamericano / Inter-American Congress - Hacia un nuevo régimen para la contratación mercantil internacional: los Principios de Unidroit sobre los contratos comerciales*

- internacionales / A New Approach to International Commercial Relations: the Unidroit Principles of International Commercial Contracts* (Valencia, Venezuela, 6-9 November 1996), Rome, 1998 (includes: J. M. Abascal, 'Los Principios de Unidroit como instrumento para interpretar o suplementar textos internacionales de derecho uniforme o textos de derecho interno', pp. 211-220; L. O. Baptista, 'The Unidroit Principles – A Possible Model for the Harmonization of International Contract Law in the Context of the Regional Integration of the Americas, with special reference to MERCOSUR', pp. 119-135; J.-P. Béraudo, 'Los Principios de Unidroit como instrumento para interpretar o suplementar textos internacionales de derecho uniforme o textos de derecho interno', pp. 235-238; M. J. Bonell, 'The Unidroit Principles of International Commercial Contracts: General Presentation', pp. 21-28; L. Borjas Hernández, 'Los Principios de Unidroit: ¿ Un modelo posible con miras a la armonización del derecho de los contratos comerciales internacionales en el contexto de la integración regional en las Américas?', pp. 137-145; A. Boggiano, 'La solución de controversias: los Principios de Unidroit como normativa aplicable a los contratos comerciales internacionales por los jueces nacionales y por los árbitros', pp. 167-174; E. A. Farnsworth, 'The Unidroit Principles: A New *Lingua franca* for the Drafting of International Commercial Contracts?', pp. 193-199; L. Ferrari Bravo, 'La contribución de Unidroit al proceso de unificación del derecho privado', pp. 13-20; F. Hinestroza, 'Los Principios de Unidroit: Una nueva *lingua franca*', pp. 185-191; H. M. Holtzmann, 'Application of the Unidroit Principles of International Commercial Contracts in Arbitrations Governed by the UNCITRAL Model Law on International Commercial Arbitration', pp. 161-166; J. Illescas Ortiz, 'Los Principios de Unidroit: ¿ Una nueva *lingua franca* para la redacción de los contratos comerciales internacionales?', pp. 201-209; F. K. Jueger, 'Contract Choice of Law in the Americas', pp. 77-88; B. Kozolchyk, 'The Unidroit Principles as a Model for the Unification of the Best Contractual Practices in the Americas', pp. 93-117; D. Operitti Badán, 'El estado actual del tratamiento jurídico de los contratos comerciales internacionales en el continente americano', pp. 29-75; J. L. Siqueiros, 'Los Principios de Unidroit como normativa aplicable por los árbitros en controversias comerciales internacionales', pp. 151-159; J. S. Ziegel, 'The Unidroit Contract Principles, CISG and National Law', pp. 221-233; plus: T. M. Adrián Hernández, 'Las "ventajas desproporcionadas" en los Principios de Unidroit sobre los contratos comerciales internacionales', pp. 293-298; D. Morán Bovio, '¿ Falta un precepto en los Principios de Unidroit? Reflexión sobre los intereses como indemnización de mínimo con carácter objetivo', pp. 299-301; G. Parra-Aranguren, 'Conclusions', pp. 319-324; M. D. P. Perales Viscasillas, 'Los Principios de Unidroit como objeto y Suplementary Initiatives for the Furtherance of International Contract Law', pp. 311-316).
- S. H. Jenkins, 'Exemption for non-performance: UCC, CISG, Unidroit Principles – A Comparative Assessment', in *Tulane Law Review*, 72, 1997/1998, pp. 2015-30.
- P. Kahn, 'Les contrats internationaux de coopération scientifique et technique inter-entreprises face aux Principes d'Unidroit', in *Uniform Law Review*, 1998, pp. 519-524.
- C. Kessedjian, 'Un exercice de rénovation des sources du droit des contrats du commerce international : les Principes proposés par l'Unidroit', in *Revue critique de droit international privé*, 1995, pp. 641-670.
- A. S. Komarov, 'The Unidroit Principles of International Commercial Contracts: A Russian View', in *Uniform Law Review*, 1996, pp. 247-254.
- B. Kozolchyk, 'The Unidroit Principles as a Model for the Unification of the Best Contractual Practices in the Americas', in *American Journal of Comparative Law*, 46, 1998, pp. 151-179.
- E. A. Kramer, 'Die Gültigkeit der Verträge nach den Unidroit Principles of International Commercial Contracts', in *Zeitschrift für Europäisches Privatrecht*, 7, 1999, pp. 209-228.

- International Commercial Contracts: An Introduction to Chapter Seven: Non-Performance', pp. 175-186; J. L. Siqueiros, 'Los Principios de Unidroit y la Convención Interamericana sobre el Derecho Aplicable a los Contratos', pp. 217-228; J. F. Smith, 'Mediation and the Principles of Unidroit', pp. 237-251; L. E. Trakman, 'Performance and the Unidroit: an Evaluation of Article 6.1', pp. 95-110; J. C. Treviño Azcur, 'La formación del contrato en los Principios sobre los contratos internacionales de Unidroit', pp. 53-80; D. F. Vagts, 'Arbitration and the Unidroit Principles', pp. 265-277; H. Veytia, 'El capítulo uno de los Principios del Unidroit: "disposiciones generales"', pp. 53-52).
- H. Van Houtte, 'The Unidroit Principles of International Commercial Contracts', in *Arbitration International*, 11, 1995, pp. 373-390.
- J.C. Wichard, 'Die Anwendung der Unidroit-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte', in *Kabels Zeitschrift*, 60, 1996, pp. 269-302.
- B. Wörmann, 'Choice of Law by Arbitrators: The Applicable Conflict of Laws System', in *Arbitration International*, 14, 1998, pp. 97-113.
- G. Zmij, 'Währungsrechtliche Probleme des vertraglichen Schadenersatzes unter besonderer Berücksichtigung der Unidroit-Grundregeln der Internationalen Handelsverträge', in *Zeitschrift für Rechtsvergleichung. Int. Privatrecht und Europarecht*, 39, 1998, pp. 21-34.