



International Distribution Institute

A World-Wide Standard Franchise Agreement Governed by the Unidroit Principles ?

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Plan

Introduction

1. Unidroit and the Unidroit Principles.
2. « Soft law » as the applicable « Rules of law » ?
3. Mandatory Rules Issues
4. Advantages to choose the Principles
5. How to do it

Conclusions

1. Unidroit and the Unidroit Principles

– Unidroit

- Intergovernmental institution
- Main achievements

1. Unidroit and the Unidroit Principles

– The Unidroit Principles

- Full codification of law of contracts
 - > 30 years of elaboration
 - Main legal traditions involved
 - Specific attention to international trade
- « *Soft Law* »

2. « Soft law » as the applicable « Rules of law » ?

- Rome I

art. 3, 1°

« Whereas » # 13

- The Hague Principles

- The special case of arbitration

UNCITRAL model law, art. 28, 1°

ICSID Convention, art. 42 (1)

ICC Rules, art. 21, 1°

2. « Soft law » as the applicable « Rules of law » ?

– Rome I Regulation

- « *A contract shall be governed by the law chosen by the parties* » (art. 3, 1°)
- « *This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law ...* » (Whereas 13)

2. « Soft law »

as the applicable « Rules of law » ?

– The Hague Principles on Choice of Law

- *« The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise » (art 3).*

2. « Soft law » as the applicable « Rules of law » ?

- The special case of arbitration
 - UNCITRAL Model Law on Arbitration :
 - « *The arbitral tribunal shall decide the dispute with such rules of law as are chosen by the parties as applicable to the substance of the dispute ...* » (art. 28, 1°)

2. « Soft law »

as the applicable « Rules of law » ?

– The special case of arbitration

• ICSID Convention :

« The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties ... » (art. 42, 1°)

2. « Soft law » as the applicable « Rules of law » ?

- The special case of arbitration

• ICC Arbitration Rules :

« The parties shall be free to agree upon the rules of law to be applied by the tribunal to the merits of the dispute » (art. 21, 1°)

2. « Soft law » as the applicable « Rules of law » ?

- Preamble of the Unidroit Principles :

« These Principles ... shall be applied when the parties have agreed that their contract be governed by them ... »

2. « Soft law » as the applicable « Rules of law » ?

– Comments to the Principles

- Ordinary Tribunals
- Arbitral tribunals

3. Mandatory Rules Issues

– Major issues of the IPL law of contracts

- Mandatory rules of the applicable law
- Mandatory rules of other laws

– « *overriding mandatory provisions* »

» due to their nature and importance,
« *applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract* »

(Rome I, art. 9, 1°)

Examples

3. Mandatory Rules Issues

- Complexity of the issues
 - Different sets of rules
 - with different categories and names
 - Same with commentators
 - Problems with some translations
 - from one language to the other

3. Mandatory Rules Issues

- Art. 1.4 of the UNIROIT Principles :

« Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of international private law »

3. Mandatory Rules Issues

- Official Comments to that art. 1.4
 - Distinction made :
 - Principles « *incorporated in the contract* »
 - Principles as « *governing rules of law* »

3. Mandatory Rules Issues

Mandatory rules in arbitration

- ICC Model Franchising Contract
 - « *In any event consideration shall be given to mandatory provisions of the country where the Franchisee is established which would be applicable even if the Contract is governed by a foreign law. Any such provisions will be taken into account to the extent they embody principles which are universally recognised and provided their application appears reasonable in the context of international trade* »

3. Mandatory Rules Issues

Mandatory rules in arbitration

Another aspect :

- « ... *arbitrators' duty is to take care
the award*

will be enforceable »

(ICC Rules 2021, art. 42)

- Refusal of enforcement

- «*which would be contrary to public policy »*

(NY Convention, art.V, 2.b)

3. Mandatory Rules Issues

- Choosing the Unidroit Principles thus
 - no way to avoid applicable mandatory rules
 - but consider special case of arbitration

4. Advantages to choose the Unidroit Principles

- A « neutral » choice
- Many translations available
- Recognized high quality
- Devised to meet the specific needs of international trade
- ...

4. Advantages to choose the Unidroit Principles

- ...
- Wide international recognition
 - academic circles,
teaching and research
 - UNCTAD recommendation
 - influence on law reforms
 - case law, judicial and arbitral
 - model for contract drafting
- ...

4. Advantages to choose the Unidroit Principles

- ...
- Ample documentation available
 - literature
 - case law
- The UNILEX data bank
 - <https://www.unilex.info>
- Practical importance

4. Advantages to choose the Unidroit Principles

- Evaluation of the choice in the Programme

- contract based « *on a set of internationally accepted rules, especially made for cross-border agreements* »
- respect of applicable mandatory rules
- suggested special reference
to disclosure rules

5. How to choose the UNIDROIT Principles

– Obviously, by inserting a clause in the contract

expressing the choice of the Principles

– Several more precise ways to do it :

- See the UPICC Model Clauses

proposed by Unidroit

(<https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/>)

5. How to choose the UNIDROIT Principles

- The UPICC Model Clauses
 - Four main possibilities
 - Suggested sub-types
 - In each case, distinction :
 - » clause to include in the contract
at the conclusion stage
 - ... or to agree upon when a dispute arises

5. How to choose the UNIDROIT Principles

- The UPICC Model Clauses
 - Most simple example :

*« This contrat shall be governed by the
Unidroit Principles of International
Commercial
Contracts » (2016)*

5. How to choose the UNIDROIT Principles

- The UPICC Model Clauses

Another example :

*« This contrat shall be governed by the
Unidroit Principles of International
Commercial Contracts (2016),*

*and, with respect to the issues not covered
by the Principles, by the Law of [State
X] »*

5. How to choose the UNIDROIT Principles

- Another possible model :
 - The ICC Model Int. Franchising Contract,
art. 31
 - « *Unless otherwise agreed, any questions relating to this contract which are not expressly or implicitly settled by the provisions contained in this Contract shall be governed, in the following order :*
 - ...

5. How to choose the UNIDROIT Principles

– The ICC Model Int. Franchising Contract,
art. 31

« ...

*a) by the principles of law generally
recognized in international trade as applicable
to international franchise contracts,*

b) by the relevant trade usages and

*c) by the Unidroit Principles of
International Commercial Contracts ».*

Conclusions

« Would a standard international franchise agreement governed by the Unidroit Principles be a practical approach ? »

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- - Largely positive answer

- - Reminder of advantages,
keeping in mind

- the special character of soft law

- and the regime of

mandatory rules

- Wide choice of model clauses available

Open issues: my personal position (Fabio Bortolotti)

I will now take the liberty of adding some personal conclusions to those of Marcel Fontaine.

The main problem is how to deal with overriding mandatory rules protecting franchisees under the domestic rules of the franchisee's country. These rules differ from country to country, but there are a number of common principles

In order to overcome this problem, the model contract should deal with the issues in question in compliance with the basic domestic rules protecting franchisees against abusive practices.

Open issues: my personal position (Fabio Bortolotti)

I believe that this goal is not impossible to reach, but it would require an accurate drafting of the model, which should take into account the the need of warranting a fair protection of franchisees in order to comply with all (or most of the) principles protecting franchisees against imbalance of their rights.

I would have liked to discuss this aspect with my friend Marcel, and I hope we will soon have an occasion for this debate.



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Conclusions

THANK YOU

FOR YOUR ATTENTION !