

UNIDROIT PRINCIPLES APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS

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Abstract: *The creation of a juridical regime which, through uniformity and harmonization, should go beyond the difficulties and uncertainties impeding trade off relations is a sine qua non condition for guaranteeing and developing international commerce and economic progress. The first studies necessary for the legislative uniformity of the international commercial sale were carried out in the year 1929 by the International Institute for the Unification of Private Law (UNIDROIT) at the proposal of the German jurist Ernst Rabel.*

Key words: *international commerce, commercial sale, unification.*

1. International Commercial Relations and Juridical Instruments

UNIDROIT principles stand for modern “*ius commune*“, a species of general code of principles, applicable to all commercial contracts and especially to the contracts of international commercial sale. International commercial tradeoffs and their continuous development imply the existence of regulations such as laws, conventions, treaties, juridical instruments meant to ensure juridical security and stability to the tradesmen and respectively commercial relations. The process of elaborating uniform regulations in the field of international trade not only unfolds in the sphere of the direct relations among the States, but most often under the auspices of international organizations. The contract of international trade is the juridical instrument through which the operations are achieved, both in the sphere of the

commercial relations, and of economic and technical-scientific cooperation. The creation of a juridical regime which, through uniformity and harmonization, should go beyond difficulties and uncertainties obstructing trade-off relations is a *sine qua non condition* for guaranteeing and developing international commerce and economic progress. The first studies necessary for the legislative uniformity of the international commercial sale were carried out in the year 1929 by the International Institute for the Unification of Private Law (UNIDROIT) at the proposal of the German jurist Ernst Rabel. [6] Any business (investment) starts off with a *business plan*, on whose basis the business defining elements are settled, respectively the project feasibility, profitability and costs etc. The business plan is based on known elements, both of the state of affairs and of the state of internal and international law, at a given

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moment, and of the provisions upon their modification during the unfolding of the contracts, which concur to attain the goal pursued by the investor. But, the longer the term for achieving the goal, the lesser the possibility for the accurate achievement of the advanced provisions in the business plan. On the basis of the business plan, international commercial contracts are clinched, which are negotiated and perfected under the conditions of a contractual equilibrium settled by the parts. During the execution of the contracts, events may appear, perturbing the initial contractual equilibrium settled by the parts. Such events are appreciated by the doctrine and by jurisprudence as risks. UNIDROIT principles settle the general rules applicable to international commercial contracts and apply when the parts agreed upon the contract ruling by these principles. The principles may be applied when the parts convened that the agreement between themselves, in guise of contract, should be governed by "general principles of law", by "lex mercatoria" or other such principles. They may be applied when the parts chose no law that should govern their contract. The principles may be used for interpreting or for completing international uniform legal instruments. They may be used to interpret or to complete the internal law. Moreover, the principles may serve as model for the national and international legislators. [3]

2. Aspects regarding The International Institute for the Unification of Private Law (UNIDROIT)

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organisation based in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular

commercial law as between States and groups of States. Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 63 member States are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds.

UNIDROIT has an essentially three-tiered structure, made up of a Secretariat, a Governing Council and a General Assembly. The *Secretariat* is the executive organ of UNIDROIT responsible for the day-to-day carrying out of its Work Programme.

The *Governing Council* supervises all policy aspects of the means by which the Institute's statutory objectives are to be attained and in particular the Secretariat's carrying out of the Work Programme, the drawing up of which is its responsibility. It is made up of one *ex officio* member, the President of the Institute, and 25 elected members, typically eminent judges, practitioners, academics and civil servants.

The *General Assembly* is the ultimate decision-making organ of UNIDROIT: it votes the Institute's budget each year; it approves the Work Programme every three years; it elects the Governing Council every five years. It is made up of one representative from each member Government.

The official languages of UNIDROIT are English, French, German, Italian and Spanish; its working languages are English and French.

The working methods of this institute are:

- Preliminary stage: use of study groups - Once a subject has been entered on

UNIDROIT's Work Programme, the Secretariat, where necessary assisted by experts in the field, will draw up a *feasibility study and/or a preliminary comparative law report* designed to ascertain the desirability and feasibility of law reform.

- Intergovernmental negotiation stage - a preliminary draft instrument established by a study group will be laid before the Governing Council for approval and advice as to the most appropriate further steps to be taken.
- Publication of UNIDROIT working materials;
- Co-operation with other international organisations. UNIDROIT maintains close ties of co-operation with other international Organisations, both intergovernmental and non-governmental, which in many cases take the form of co-operation agreements concluded at inter-Secretariat level. The Hague Conference on Private International Law, UNIDROIT and UNCITRAL, the three private-law formulating agencies, are quite appropriately referred to as "the three sisters".
- Network of correspondents - UNIDROIT's ability to obtain up-to-date information on the state of the law in all the various countries is essential to the pursuit of its statutory objectives. [7]

3. UNIDROIT Principles Applicable to International Contracts [4]

The idea of elaborating international principles applicable to international contracts, without compulsorily imposing their acceptance and application, was materialized through drawing up the UNIDROIT Principles by the International Institute for the Unification of Private Law, in the year 1994.

The idea of avoiding a strict "localization" of the international commercial contracts in the framework of a single system of national law and of referring them to principles and rules of supra-national or non national character, or to a transnational law, was more criticized than accepted.

One of the most frequent objections raised in this case was that the default of a more precise definition on the nature and content of these principles/rules in the case of their application would lead to an inevitable and undesired unpredictability and even to arbitration in solving every case.

However, once with the publication of UNIDROIT principles applicable to international commercial contracts, this argument loses its force, as these principles were created with the purpose of "settling an equilibrated corpus of especially elaborated rules so as to be used throughout the world by the participants to commerce, without depending on the legal traditions and on the economic or political conditions of the countries wherein they will apply." [5]

The possibility is created thereby to considerably reduce and even eliminate the "difficulties in the attempts to nationalize the legal system of the transactions among the States". [1]

The originality of UNIDROIT principles, as well as the advantages they provide as regards their content and effective application in comparison to traditional instruments of uniform law is widely recognized.

Two main objectives of UNIDROIT were identified.

Firstly, the completion and enrichment of the materials and publications upon the law of international trade so as to help the researchers in the field and also the students to benefit from pertinent, scientific information on the phenomenon

of transnationality of the international commercial law.

Secondly, forging the measures that impose themselves for changing and adapting the legislative policies as regards legal, national, international and transnational instruments, so as to encourage and develop trade.

In this line, a decisive year in the field of contract law was the year 1994, when UNIDROIT principles were published for international commercial contracts by the Directing Council of the International Institute for the Unification of Private Law (UNIDROIT) and when, at the same time, the first part of the principles of European Contract Law was elaborated (finished and published in 1998) by the Commission for European Contract Law.

UNIDROIT principles were published in the five official variants and, as a sign of their success, they were also translated in Arabian, Bulgarian, Chinese, Hungarian, Japanese, Serbian, Slovakian and Russian. Perhaps the most important fact in emphasizing the success of these principles is that, a year after their publication, there had been already drawn up reports on the decisions of the Courts of Justice and on the arbitration sentences referring to these principles. [2]

In 1994, UNIDROIT principles solely presented a purely theoretical interest but, in time, they proved their efficiency and of our days, also due to the researches carried out by CENTRAL (Center For Transnational Law) as regards the use of transnational law in practice and in the framework of the arbitration of international commercial contracts.

References

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2. Bonell, M. J.: *Un codice internazionale del diritto dei contratti i Principi UNIDROIT dei contratti commerciali internazionali*. Milano. 1995, p. 193.
3. See *Principiile UNIDROIT aplicabile contractelor comerciale internaţionale (UNIDROIT Principles Applicable to International Commercial Contracts)*, Preamble - *Scopul Principiilor (Purpose of the Principles)* – edition from 2004.
4. *Principiile UNIDROIT aplicabile contractelor comerciale internaţionale (UNIDROIT PRINCIPLES Applicable to International Commercial Contracts)*, edition from 2004, translated and published in Romania at Minerva Publishing House, Bucharest. 2006.
5. UNIDROIT, *Principiile aplicabile contractelor comerciale internaţionale (Principles Applicable to International Commercial contracts) – introducecere (introduction)*.
6. UNIDROIT is the International Institute for the Unification of Private Law, independent inter-government organization, headquartered in Rome, set up in 1926, as auxiliary organ of the League of Nations – predecessor of the United Nations Organization, Romania being member since 1927, on the basis of the approval given by the Ministry of Justice.
7. www.unidroit.ro.