European Science and Technology

MATERIALS
OF THE II INTERNATIONAL
RESEARCH AND PRACTICE CONFERENCE
Vol. I

May 9th–10th, 2012

Wiesbaden, Germany 2012

European Science and Technology [Text] : materials of the II internationa research and practice conference, Vol. I, Wiesbaden, May 9th–10th, 2012 / publish ing office «Bildungszentrum Rodnik e. V.». – c. Wiesbaden, Germany, 2012. – 540 p.

ISBN 978-3-9811753-7-0

The collection of materials of the II international research and practice conference «European Science and Technology» is the research and practice edition which includes the scientific articles of students, graduate students, postdoctoral students, doctoral candidates, research scientists of higher education institutions of Europe, Russia, the countries of FSU and beyond, reflecting the processes and the changes occurring in the structure of present knowledge.

It is destined for teachers, graduate students, students and people who are interested in contemporary science.

Printed in Germany

Publishing office «Bildungszentrum Rodnik e. V.» Wiesbaden, Germany
Tel.: 0611 - 89 06 506
Fax.: 0611 - 89 07 105
stafinsky@reenet.de

Second edition 2012

ISBN 978-3-9811753-7-0

9 783981 175370 >

JURISPRUDENCE

THE VALUE OF THE PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (UNIDROIT) IN THE UNIFICATION OF INTERNATIONAL TRADE LAW

Balmagambetova Z.©

KazNU named after al-Farabi

Kazakhstan

Abstract

The article analyzes the legal nature and importance of the Principles of International Commercial Contracts (UNIDROIT[1] Principles) in the unification of international trade. Different points of view are expressed based on the research of opinions of scientists and experts in this field. Having examined the content of the UNIDROIT Principles in a generalized-complex form, the author formulated the appropriate conclusions and proposals. Study and application of the UNIDROIT Principles in Kazakhstan is necessary for the participants of the international trade and their practical application sometimes generates many problems.

Keywords: UNIDROIT Principles, lex mercatoria, unification, harmonization, trade customs, soft law, copyright.

International and national organizations play an important role to fili the balance of interests of different states in the regulation of private relations in international trade. First of all, their work is important to collect existing common rules (norms, customs, usages) of international trade and the creation of unified rules and regulations that participants are free to cooperate with each other in various areas of commerce when applying them. Secondly, the credibility of these organizations means that providing some mechanisms to deal with international commercial disputes, they actually contribute to the recognition, use, development, appropriate interpretation of certain practices that are recommended to use in international trade [1].

Development and adoption of uniform legal regulators in civil relations with a foreign element (private international law) is executed by the International Institute for the Unification of Private Law UNIDROIT (the name comes from the French UNIDROIT - unified law). It was established in 1926 as a subsidiary body of the League of Nations after the end of the last in 1935 was restored in 1940 in the new international legal capacity – in the status of an intergovernmental organization.

"The main objective of the UNIDROIT in the present conditions is to examine ways of harmonizing and coordinating private law of individual states or groups of states with a view to developing uniform law for the gradual adoption by the states", that is "the institution today pose a challenge to develop a unified private law in the broadest sense".

The approach designated by organization means that "the projects for unification the legislation of modern times that is being developed, however, sometimes affect the scope of public law. This is especially concerns such branches of national law, which is now sometimes difficult to distinguish between private and public law". It is also necessary to emphasize that "UNIDROIT primarily focuses on the development of uniform rules relating to the unification of substantive law. Conflict rules are subject to unification activity of the Insfitute only in between" [2].

Members of the organization are now 63 states from five continents, but none Kazakhstan nor any other Central Asian countries are not included in this organization. Russia as the successor of the former Soviet Union became a member of UNIDROIT on January 1, 1990 [3]. Over the entire period of its existence, the UNIDROIT prepared more than 70 documents in the field of unification of private international law, most of which are used today to promote international economic cooperation.

Principles of International Commercial Contracts (hereinafter UNIDROIT Prin adopted in 1994 (at present: revised in 2004) by International Institute for the Unification of P Law (UNIDROIT) "can be regarded as a landmark event in the development of private inter law" [4] and as a document that takes into account the needs of "a unified regulation of co transactions concluded in the process of international commercial traffic" [2].

A. V. Kukin at the same time draws attention to specific methods of creating the ment. "First, a special working group composed of representatives of the major legal and economic systems - widely recognized in the international legal world experts in the field of co law and international trade law. All team members were invited to work on the Principles, representatives of the states, or any organization, but in his person (individually), and they when creating document to express their own points of views and not the official position of country. Second, the goal was to reflect the foundations of drawing up and implementation of mercial contracts, which are recognized by all legal systems" [4].

A.S. Komarov, adding ably justified prior statements of previous scientist by the fact the UNIDROIT Principles "traditionally the general part of contract law", on his own notes: "the mulation of the rules included in this set, was carried out based on the analysis of doctrine and lation, including the practice of its application, and identification of the most appropriate co approaches in the different national legal systems" [2].

I.S. Zykin believes that "the states in many cases only hinder the implementation of u tion, and therefore should seek to get closer to the legal regulation at non-governmental level, andoning the purely positivist approach to the law". Such an approach, according to him, "bec the basis for the formation of the modern lex mercatoria» [5], and its striking example is the DROIT Principles.

T.V. Matveyeva, unlike previous authors said that "the preparation of such documents not provided by the Charter of UNIDROIT", but as she notes, "realizing this objective, the UNIDR eventually went out on the special form of creation of uniform rules, which combines the feature spontaneous and targeted unification" [6].

It is noteworthy that another author – S.V. Bakhin proposes to call this particular form of istence of legal provisions as subright. "Introducing a new concept of "subright", the author consi it "not as a system of law or any of its division, but as the form in which there may be legal requ ments" [7].

However, as stressed by O.E. Shcherbihina, there is no "clear definition of the legal nat of the new unified documents". Rightly noting that "while determining the legal nature of the ciples many authors consider them in the category of lex mercatoria», by the way, "it is justified take into account the strong interest in this category in the foreign legal doctrine, and little atten to domestic jurists", she personally confirms the fact that "in the scientific literature there are differ views on the legal nature of the UNIDROIT Principles and the European principles. They are posed "to be considered as lex mercatoria, general principles of law, Restatement of Law, inter tional trade practices, black letter rules, soft law, the commentary to the UN Convention on C tracts for the International Sale of Goods in 1980, etc." [8].

For example, A.V. Kukin is of the view that "the UNIDROIT Principles, on the one han may be regarded as the normal rules (customs) that do not require for their application specific r erence to them in the contract - this is due to the fact that most of the rules contained in the doc ment, on the practice are used by fair participants when conclusion of international commercial co tracts". In particular, "such general provisions contained in the UNIDROIT Principles, like the re that each party must cooperate with the other party, or that the parties must fulfill their obligatio properly, are fundamental of so-called common law, and will be applied regardless of the referenc to them" [9].

G.Y. Fedoseyeva comes from the fact that "certain provisions of the principles" "has qu specific content" and will be used only with the references to them". This, in her opinion, has be confirmed in the Preamble to the UNIDROIT Principles. Thus, she believes, that "the UNIDRO Principles, like a set of rules set forth in the Incoterms are optional and can be used by the part by reference to them in the text of a contract with the following phrases: "contract is governed b

neral principles of law", "lex mercatoria is applicable", "the legal regulation is carried out in accor-nce with trade customs and usages" and so on. [10].

In accordance with the positions Yu. Bazedov [11] and I. Lukashuk [12] the rules of UNI-ROIT Principles (as well as European principles of contract law) should be classified as "soft w". In our opinion, T.V. Matveeva adheres to position that is more correct. Therefore, it quite spe-ifically proves that the "Principles of International Commercial Contracts UNIDROIT represent an ntirely new category of legal documents, because they are neither a contract agreed between usinesses nor international convention, subject to ratification by signatory states" and thus makes lear that "UNIDROIT Principles is purely optional document". Legally, "they become binding being ied by parties to the contract. And do not immediately become "soft" and "solid", but again this is t the law, but strictly legally - rules, contract terms" [6].

A. Smityukh, principally agreeing with the T.V. Matveyeva, formulates his statement on the gal nature of the UNIDROIT Principles. They are, in his opinion, constitute "an international in-rument of non-interstate origin on problems of general contract law - on the conclusion, content, terpretation, performance and failure of international commercial contracts" [13].

However, as suggested by O.E. Shcherbinina, "all views expressed are reduced to trying to rovide considering documents in question as of any existing law" [8]. She supports S.V. Bahin, hich concludes that "during tbe development of unification process and seeking its best form a ecial mechanism to ensure a uniform regulation of international trade and economic relations has een found by empirical way" [7].

The author offering to call this new form, as already noted, as subright, argues his own po-ition by the fact that "the UNIDROIT Principles and the European Principles contain elements of reaty norms, international custom, matching rules and principles of national legislation, model con-racts and general conditions of arbitration practice". He also argues "this elements are present in ets of the analyzed contract law not in its pure form". They are carefully selected, systematized, rrected and consolidated in order to create a hollstic document" [7].

Whatever it was the UNIDROIT Principles are a very new approach to the informal, non-nventional, non-traditional unification. Given the fact that an appeal to the parties to commercial ntracts is predetermined by the will of the parties themselves, they can be regarded as the most mmon codes of principles governing international commercial contracts.

It follows that, firstly, the rules of the UNIDROIT Principles suggest to use an expression of l of interested parties, are not so self-contained, as the legal nature and are addressed directly to he participants of international transactions; and secondly, their purpose is to regulate the agree-ents of the parties, if they agree to it, "by the general principles of law", "lex mercatoria", "trade ocedures", "soft law" and other similar forms and ways. "In addition, they can be used to address n issue raised when it proves impossible to establish the relevant rule of applicable law and to in-erpret or supplement international uniform law instruments" [2].

***

Having examined the content of the UNIDROIT Principles in a generalized-complex form e can formulate the following conclusions.

1. First of all, we must pay attention to the fact that the Principles are not subject to the ssical understanding of the international legal concept of "contract", but according to him, or given similar international character of all documents, acquire a broad (comprehensive) meaning, includ-g in its system "agreements" concluded in writing in informal or formal way. However, indirectly or ectly to the Principles it should be noted that they allow for broad interpretation of "commercial ntracts", which is in contrast to public international law is based on the special agreement or inten-n of the parties of the business turnover, and therefore does not require the definition of "authori-ion" from the international law (public) order. In this case, the UNIDROIT Principles may apply not y to instruments of international sales, but also to contracts for services, investment contracts, ncession agreements, etc. "Democracy" of the rules of the Principles is shown in the fact that for recognition of any transaction as "commercial" the parties do not need official confirmation of the tus of party business relationships.

2. The basic rule of the UNIDROIT Principles is that they are applicable, if the parties of relevant agreements (contracts) have agreed to their regulation on the basis of these principles the possibility of application of reservations. Proclaiming, thus, freedom of contract and mandatory provisions of the latter, the Principles at the same time allow for the rejection of their plications, retreat from them, or change any of them, except, however, those rules, which is in mandatory. In this regard, among the latter the Principles have defined not only binding to contract on the parties concluded between them, but also: good faith and fair dealing; the duty maintain confidentiality of sensitive information transmitted; preventing excessive advantage of over the other parties to the contract; the interpretation of the contract only on the basis of a common intention of parties and clarity («contra proferentem» rule), the duty of the parties to comply with any "trade usage", "general principle", "soft law" and other similar provisions in respect of which they have agreed and practices which they have established in business relationships.

3. The UNIDROIT Principles have been prepared on the basis of broad comparative analysis of the national legislation of the states belonging to different legal and economic systems order to ensure uniform regulation of international commercial transactions. As a successful example of non-conventional (indirect) unification, they not only use the benefits and advantages of conventional method of unification, such as the Vienna Convention 1980 on Contracts for International Sale, the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1955, the European Convention on the Law Applicable to Contractual Obligations 1980, but also takes into account their weaknesses. In contrast to a similar document adopted the EU - Principles of European Contract Law, which were adopted in 1999 (I and II p.) and 2002 (III p.), the UNIDROIT Principles are of extraregional scope. This means that they can serve as a model for the relevant regional instruments that can be adopted in the Customs Union (Common Economic Space), the Asia-Pacific Economic Cooperation (APEC), and others. In our opinion, it is impossible not to appreciate the role and importance of the UNIDROIT Principles in the process of interpretation and filling gaps in existing unification acts.

4. We should also talk about the high value of the UNIDROIT Principles in the development of national legislation, such as improving the standards of the Civil Code of the Republic of Kazakhstan, the legal framework for international commercial arbitration (arbitration court). Given the repeated references to the principles in support of decisions in litigation and arbitration practice and consent of the parties to the agreement of standards that could be used also by arbitration courts of the Republic, by arbitrations ad hoc, and the Chamber of Commerce in Kazakhstan. We cannot miss in this regard the need for wider application of the Principles themselves, and their results in national research, as today in Kazakhstan there is some uncertainty in the understanding of the legal nature of the rules of that document.

We also propose the inclusion of key provisions of the Principles into the educational (training) programs of higher education institutions of law (international law) and economic profile of Kazakhstan with the status of individual disciplines or specific courses.

Finaliy, taking into account the translation of the official text of the Principles in English and in French on a number of other foreign languages (German, Dutch, Danish, Russian, and others in Kazakh language is to be done), it would be to make based on them an international standardized Glossary of terms (concepts) of international commercial (business) turnover.

Note

[1] International Institute for the Unification of Private Law // http://www.unidroit.org/

References

[1] K.A. Talzhanov. International custom as a source of private international law. Abstract of thesis. Cand. Law Sc. Kaz.GYuU. - Almaty. - 2005. - P.168.

[2] A.S. Komarov. International unification of legal regulation of foreign economic activity / / Legislation. - 1999. - № 11. - P.28-33.

[3] UNIDROIT / / http://www.unidroit.org/english/members/main.htm

[4] A.V. Kukin Principles of International Commercial Contracts UNIDROIT: key provisions, the legal nature. Abstract of thesis. Cand. Law Sc.. - M., 2004. - P.9.

.S. Zykin. Foreign trade operations: law and practice. M.: Int. relations., 1994. - P.72.
.V. Matveyeva. To a question about "soft law"" in the regulation of international private law relations / / State Law. - 2005. - № 3. - P.62 -71.
S.V. Bakhin. Subright: International codes of uniform contract law. - St. Petersburg.: Legal Center Press, 2. - P.311
U.E. Shcherbinina. Review of the work of S.V. Bakhin Subright. (a set of uniform international contract law) / / te and Law. - 2005. - № 1. - P.125-126.
A. Kukin. The ratio of the UNIDROIT Principles and the Vienna Convention on International Sale of Goods / / w and economics. - 2000. - № 4. - P.47.
G.Yu. Fedoseyeva. Private International Law: A Textbook. - M.: "Ostozhye", 1999. - P.132.
Y. Bazedov. Revival of process of law unification: European contract law and the elements / / State and w. - 2000. - № 2. - P.73.
I.I. Lukashuk. International law. The general part. Textbook. M: Publishing House of the BEK, 1996. - P.102-
A.V. Smityukh. Principles of International Commercial Contracts UNIDROIT and the lex mercatoria in the ntext of private international law. Dissertation. Cand. Law Sc. National Law Academy of Odessa. - O., 2004. - 9.

RECHTSREGELUNG DER ORGANSPENDE IN DEUTSCHLAND

Grebennikova K.V.©

Süd-Russische Staatliche Universität für Wirtschaft und Service

Russische Föderation

Die Zusammenfassung

rt im Artikel um die deutschen Tranaplantationsgesetz und Rechtsregelung der Organspende. inzelne Aspekte sowle Zulassigkeit der Organspende und das geltende Modell der Organ- e werdem betrachtet. Als Schluss werden die Daten über die Spenderanzahi analizlert und mit nderen Ländern vergleicht.

chlusswörter: Transplantationsgesetz, Organspende, Modell, Zustimmungslösung.

Die Zulässigkeit der Organspende wird in Deutschland durch das Gesetz über die Spende, hme und Übertragung von Gewebe und Organen (Transplantationsgesetz - TPG) vom 1997 geregelt. Der Anwendungsbereich des Gesetzes erfasst die Entnahme und Spende von chlichen Gewebe und Organen für die Transplantationszwecke (§ 1 Abs. 1). Blut und Blutbe- ile sowie Blutprodukte sind aus dem Anwendungsbereich des Gesetzes ausgenommen (§ 1 2) [1].

In Deutschland gilt die erweiterte Zustimmungslösung. Dies ist in §§ 3 und 4 bestimmt. § 3 dass die Entnahme von Organen und Gewebe zulässig ist, „wenn der Spender in die Entnah- gewilligt hatte" [1]. Das Zustimmungsrecht der Angehörigen ist in § 4 Abs. 1 verankert: „Ist dem nächsten Angehörigen eine soiche Erklärung nicht bekannt, so ist die Entnahme unter voraussetzungen [...] nur zulässig, wenn ein Arzt den nächsten Angehörigen über eine in Frage ende Organ- oder Gewebeentnahme unterrichtet und dieser ihr zugestimmt hat" [1]. Die Vor- zungen der Entnahme legt § 3 Abs. 1, Abs. 2 fest:

1. Der potentielier Spender muss zu Lebzeiten oder seine Angehörigen müssen nach sei- Tod der Entnahme zugestimmt haben [2, 1998, S.69]. Eine aktuelle Frage in Deutschland ist,

Scientific edition

European Science and Technology

MATERIALS
OF THE II INTERNATIONAL
RESEARCH AND PRACTICE CONFERENCE
Vol. I

May 9th-10th, 2012

Passed for printing 01.06.2012. Appearance 07.08.2012.
Format 170x24/8. Typeface Ariai.
Conventional printed sheets 33,5. Circulation 200 copies. Order 148.

Publishing office «Bildungszentrum Rodnik e. V.» Wiesbaden, Germany

The publisher «Strategic Studies Institute».