

UNIDROIT Principles and the European Principles: are they similar or are they two parallel models?

Erjon Marku¹ Alketa Marku²

- 1 Ph.D. candidate at the Institute of European Studies, University of Tirana/Albania e mail:markuerjon@gmail.com
2. Department of Administrative and Political Science, Albanian University, Blv.Zogu I Tirana/Albania, mail: a.marku@albanianuniversity.edu.al

Abstract

In the field of international trade, contracts and contractual relations constitute the most significant phenomenon: the translation into contractual form of international trade transactions - from the simplest to the most complex, which is a fact of life experience in this field.

It can be argued that the contractual instrument represents the engine of prosperity and international economic cooperation.

A fundamental contribution to the process of international unification of contract law has been provided at the level of doctrine, by the most recent "Principles of commercial contracts" drawn up and adopted by Unidroit.

Also, in the early eighties a committee appointed at the request of the European Community began to develop the 'Principles of European Contract Law' and bonds. European Principles, completed in 2003, were published in their original English version in three successive volumes. The Principles of European Contract Law formed - from the beginning - the enlargement of the entire European Union, and were objectively due to the subjects and operators, to those who were called the Maastricht Treaty European citizens.

Since their publication, one encounters controversy on the co-existence of these two instruments apparently very similar.

This study will try to put some light on the differences and similarities between their.

Key words: Principles Europeans, Contract Law, Principles Unidroit

1. The establishment of Unidroit Principles and European Principles

a) *Unidroit Principles*

In international trade sector, contracts and contractual relations, so-called international constitute an element quite relevant: the use of a contractual form of an international trade activity - from the simplest to the most complex ones - is a necessity in this sector.¹ It can be said that the contractual instrument is the engine of the development and economic cooperation².

An important contribution to the process of unification of the international law of contracts is given, in doctrinal level, from the "commercial contracts Principles " created by UNIDROIT.

UNIDROIT with residence in Rome, is an independent intergovernmental organization, created in 1926 consisting of 59 States. Its main target is to "study the tools for harmonizing and coordinating the private law between states ..." and for this purpose it does not only "edits draft laws or conventions with the aim to determine a uniform right ", but also "undertakes studies of compared private law"³.

In 1971 the UNIDROIT Governing Council decided to include in work program of the Institute what in the original version of solution in French was determined as " *essai d'unification portant sur la partie générale des contrats (en vue d'une Codification progressive du droit des obligations 'ex contractu')*"⁴.

Therefore a pilot committee, consisting of professors René David, Clive M. Schmitthoff Tudor Popescu, representatives of civil law systems and common law, and socialist countries at that time, was charged with preliminary work on the feasibility of the project.

In the first report, in 1974, the committee underlined the importance of the project and determined in general lines the structure of how this project would be realized, which initially was named "progressive codification of international trade law", and on a second moment was baptized as "elaboration of principles for international commercial contracts", at the beginning it had no real importance.

Only in 1980 a special working group was build with the task of editing the various chapters of Principles. The group, where were represented all legal systems and the main socio-economic systems of the world, included among its members some of the most well known experts in the field of international trade law contracts⁵.

¹ Carbone – Luzzatto, *Il contratto internazionale*, Torino, 1994, p. 8.

² Horn, *Uniformity and diversity in the laë of international commercial contracts*, in, Horn-Schmitthoff, *The transnational law of international commercial transactions*, The Hague, 1994, p.4.

³ Article 1 of the Statute

⁴ Unidroit 1971, C.D. 50 th session, p. 93

⁵ M.J. Bonell, *Un codice internazionale del diritto dei contratti: i Principi Unidroit dei contratti commerciali internazionali*, Milano, Giuffrè, 1995, p.21 ..

The works completed on February 1994 and on May the Board formally allowed the printing of the UNIDROIT Principles text recommending at the same time a wider use of them.

Principles initially edited in English, which was the language of the working group, then in order to facilitate their use in different countries, as it was decided earlier, principles will be published in as many language versions as they could⁶.

The success achieved by the UNIDROIT Principles in 1994 made possible the publishing of new principles in April 2004, which in substance left unchanged Principles of 1994, but added new chapters and articles in order to further improve their use (by extending the field of application at the same time, which nevertheless remains limited to international commercial contracts).⁷

Not many years later the latest edition of Principles was adapted ("UNIDROIT Principles 2010"). It was developed by an international group of experts in the field of international commercial contracts, including observers from many international organizations and arbitration centers. It was approved by the Board of Directors of UNIDROIT in both English and French original versions, in the spring of 2011. Principles of 2010, consist of 211 articles (differently from 120 articles in 1994 and 185 articles in 2004 an edition of Articles 185) and are divided into chapters, which are preceded by an introduction. Each disposition is accompanied by a commentary explaining the content and illustrating with examples the purpose.

b. European Principles

In the early eighties a committee formed upon the request of the European Community and the initiative of Ole Lando, composed of lawyers from different countries of the Community (now the European Union), began to prepare "Principles of European contract law" and those of obligations too.⁸

Just for this reason the Commission of European law of contracts was formed - known as "Lando Commission" in honor of its founder and president - who began his work in 1982.

⁶ *Ibidem*, p. 29

⁷ S. Angione & G. Pescatore *Ancora sull'importanza della scelta della legge applicabile ai contratti commerciali internazionali: la lex mercatoria ed i nuovi principi Unidroit*, p.3

⁸ C. Castronovo *I Principi di diritto europeo dei contratti. L'idea di codice*, in *Rivista di diritto commerciale e delle obbligazioni*, 1995, p.21.

European principles completed in 2003 and were published in their original version, in English, in three successive volumes: the first in 1995, which summarized chapters on general provisions, performance, non-performance and appropriate protection; the second in 2000, which is both a revised version of the previous chapters, and new chapters on representation, validity, interpretation, contents and effects; and the third in 2003 contains additional chapters about obligations with many different subjects, termination of contract, compensation, limitation, objection of the mandatory rules, conditions and capitalization of interest. In their final form European principles were summarized in 201 articles divided into 17 chapters.⁹

The principles of European contract law - from the beginning - were spreading throughout the European Union and objectively are related to all subjects and factors (European citizens), who have difficulty in understanding the Common Market without rules that govern it.

The idea for the creation of a common text which can overcome initial differences between countries, gave rise to this project, justified in terms of expectations, but eligible for a legal science that intends to solve real problems.¹⁰

2. The goal and the scope of application.

Unidroit Principles

The choice of law that must be applied to contracts is undoubtedly one of the most delicate, and at the same time decisive, in editing of an international contract.

The majority of States accept the possibility that stakeholders who are signing an international contract may choose freely the law they want to apply for the contract signing. This free choice of law that the contract will be subject is on the other hand an expression of a principle, the one of the autonomy of the parties, which if known massively either from legislation and codes of major *civil law* countries or *common law ones*.

In fact, as international trade involves an infinite number of state and national systems, it was necessary a normative model that could diminish or eliminate the impact of national barriers as the main enemy of international trade, and the UNIDROIT Principles are an example of this .

UNIDROIT Principles Preamble sets out the main goals and areas of application as follows:

⁹ M.J. Bonell, *Un codice internazionale del diritto dei contratti: i Principi Unidroit 2004*” Milano, Giuffrè, 2006 p.358

¹⁰ C. Castronovo, cit. p. 25

• Parties which require that their contract will be governed by UNIDROIT Principles may decide the following clause, possibly with exceptions or modifications: **"This contract is based on the UNIDROIT Principles (2004) [with the exception of Articles.....]"**

- *"These principles set out the general rules in the field of international commercial contracts"*
"The principles apply when the parties have agreed that the contract will be based on principles"()*

- *"The principles can be applied when the parties have not chosen the law that the contract will refer."*

"Principles can be used for interpretation or integration of instruments of uniform international law".

- *"Principles can be used for interpretation and integration of applied national law"*
"Principles can be used as a model for national and international legislators"

Also, UNIDROIT Principles can be used as teaching material and study material in the faculties of law, thus promoting as outlined in the relevant commentary - the study of the contracts law in comparative aspects.¹¹ The importance of the UNIDROIT Principles, lies in the fact that they are codified, not only in optics of codification and progressive development of international trade law, but also because anyone can refer clearly and fairly in contract formation.¹²

In terms of contractual freedom, it is noticed that the principles set from UNIDROIT should be understood in a more flexible way, as the parties may exclude their application, modify the contents, or partially reduce application.¹³

Most important thing is that principles have not binding character even though there are those who think that in the future they may take the form of a binding instrument, such as an arrangement, a form which so far is not contained.¹⁴

Finally we can say that, referring to their field of application "directly" UNIDROIT Principles can either considered as " principles for contracts in general" or as "principles for international commercial contracts", at least unless they represent a form of binding instrument - such as a deal.¹⁵

European principles

Chapter I, General Provisions (First Section) of the European Principles, Article 1:101 provides the main goals and areas of application as follows:

¹¹ Bonell, M.J, cit., p. 275

¹² V.Massari, *"L'efficacia dei principi Unidroit nei contratti internazionali"*, nel *Diritto&Diritti*, n.10-marzo 2002.

¹³ Alpa G. *"Prime note di raffronto tra i principi Unidroit e il sistema contrattuale italiano"* in *Contratto e Impresa*, p. 317.

¹⁴ F.Ferrari, *"I principi per i contratti commerciali internazionali dell'Unidroit ed il loro ambito di applicazione"*, in *Contratto e Impresa, Modelli contrattuali Europei*, 1998, p. 304 e ss.

¹⁵ *Ibidem*, p. 315.

- Principles of European Contract are destined to be applied as general rules of the contracts law in the European Union.

- The principles will be applied when the parties have agreed to incorporate them into a contract or agreed that their contract will be governed by them.

-The principles can also be applied when the parties:

a) have agreed that their contract will be governed by "general principles of law", or "lex mercatoria" or they have used similar expressions.

b) they have not chosen a system of rules or other rules of law to regulate contract.

-They can offer a solution to the dispute when the system or the provisions of the applicable law do not predict it.

2. UNIDROIT Principles and the European Principles: differences and similarities.

European Principles represent remarkable resemblance in the technique of preparing and in formal presenting with UNIDROIT Principles. A little important distinction is that the first (European Principles), in addition to the text of the relevant articles and comments, contain some examples that refer to the main sources of legislation and used judicial practices, briefly describe the manner in which the issue is handled in the diverse rights of the member states of the European Union. The lack of comparative cases in UNIDROIT Principles has been criticized because an indicator of previous national precedents with summaries of solutions, would give them a more convincing nature.¹⁶

An essential characteristic of UNIDROIT Principles is that they are not a binding instrument, derived by this we have two important conclusions: their flexibility, thus adaptation to the changing conditions of international trade practices and the fact that they do not suffer constraints that are derived from current differences between different legislations.¹⁷

UNIDROIT Principles are generally edited in a style closer to that of European codification than the analytical, typical of the statutes of common law systems.¹⁸

Regarding to the formal presentation, UNIDROIT Principles try to avoid the use of a terminology that belongs to a particular legal system, in most cases represent a terminology widely used in international contracts.

Regarding to the differences of substantive character, the essential difference between the two principles is their field of application: UNIDROIT Principles set out the general rules of

¹⁶ Bonell, M.J. cit. p. 360

¹⁷ *Ibidem*, p. 54.

¹⁸ Bonell, M.J. "*Un codice internazionale del diritto dei contratti: i Principi Unidroit 2004*", Milano, Giuffrè, 2006, f. 33 ss..

international contracts, while European principles are applied as general rules of contract law in the European Union. This means that the object of the UNIDROIT Principles is global, while the European Principles is limited to EU Member States.

Also, while the UNIDROIT Principles are applied to international commercial contracts, European principles are applied to all types of contracts, including internal contracts and professionals or consumers ones.¹⁹

UNIDROIT Principles explicitly state that "they can be used as a tool for the interpretation and fulfillment of instruments of uniform international law" and "as a model for national and international legislators", while, in terms of European principles, it is laid down at the outset that " they help either European Community bodies in the preparation of legislative measures, or judges, arbitrators and legal advisors in the implementation of these measures of community ".

Finally, UNIDROIT Principles address the specific cases mainly to trade relations between East and West, North or South, where the validity or execution of certain contracts subject to public authority, and clearly define that the stages of limitations does not preclude the law, taking into account the strong conditions that provides Islamic law.

While, on the contrary, we can say that the provisions of the European Principles clearly reflect their European approach. So Article 11:306, paragraph 1, on the right of recipients to request payment in any country within the European Union, if the transfer relates to a monetary obligation that must be settled in a particular Member State of the European Union, as well as Article 15: 101, which defines as "contract in contradiction with binding principles " those contracts which go against the "recognized principles as binding by the legislation of the Member States of the European Union."²⁰

¹⁹ *Ibidem*, p. 370.

²⁰ *Ibidem*, p. 371

Conclusion

Since the publication polemics were opened on the co-existence of these two instruments, seemingly quite similar, but the practical experience gained in recent years shows that, in fact, does not exist a competition between the UNIDROIT Principles and the European Principles*.

The main objective of the European Principles in the beginning was to provide the basis for a European code of contracts in the future, but also UNIDROIT Principles were proposed that in the future would turn into a binding international agreement.

In conclusion, we can say that, knowing their different fields of application, the territorial one and rationed material, in practice UNIDROIT Principles and the European Principles so far not only haven't had conflicts with each other, but they have done, each one in their own context, different roles of equal importance. This should not change even if one of them or both of them will become binding instruments.²¹

* In a decision of the CCI, arbitral tribunal, determined that the right should be applied in case of dispute review would be based on UNIDROIT Principles and not in European principles, motivating this choice based on the fact that are UNIDROIT Principles which reflect lex- MERKATORIA or general principles of international contractual law, whereas European Principles are only an academic project which aims to provide the basis for an European Code of contracts in the future and that's why they are not very well known in international economic environments.

²¹ *Ibidem*, p. 381

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University of Shkodra “Luigj Gurakuqi”, Shkodra, Albania