INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

**UNIDROIT RESEARCH SCHOLARSHIP PROGRAMMME***

**Research reports by Scholars hosted at UNIDROIT in 2015**

**Scholars**

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- BERTIZZOLO Maria Eugenia (Argentina)
- BOUWERS Garth (S. Africa)
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**UNIDROIT Report**

**Research period from 9 June to 10 July 2015**

**Faadhil Adams**

**University of Johannesburg**

**The scholarship was sponsored by the UNIDROIT Foundation in cooperation with the University of Johannesburg**

My scholarship period ran from 9 June 2015 – 10 June 2015. As a Corporate law lecturer to final year law students at the University of Johannesburg as well as assisting with research initiatives in my role as research assistant at the Research Centre for Private International Law in Emerging countries, free time in which to complete ones PHD is often limited and it is because of this that I hoped to utilise this period to its maximum potential. While writing this report, I am happy to report that I have made good progress to that end.

Firstly, before delving into the substantive content of the report I would like to thank UNIDROIT for hosting me for the 5 week period in which I was here. Having always had a fascination with Roman history, the ability to be present and witness a piece of this history firsthand was a remarkable experience. The setting of UNIDROIT in the heart of the old city in a villa that demonstrated the same beauty as the rest of Rome also added to the experience. Furthermore, I would like to thank UNIDROIT for the use of their library with its extensive collection of works.

I wish to extend my deepest gratitude to the UNIDROIT Foundation. Without their support the opportunity to be a visiting scholar in Rome would have been very difficult if not impossible.

From the period that I spent at UNIDROIT there are some things that stand out above others. One of the aspects that I enjoyed were the exchange meetings. Not only did they present an opportunity to think about issues that did not fall directly within my own field of knowledge but I found the discussion and debate afterwards to be somewhat robust and my feeling is that many of the speakers who presented left with a profound feeling that contributions had been made to their work or at the very least that there were still questions that needed to be answered. I look forward to presenting my own research here one day.

I would also like to thank the staff of UNIDROIT. Although, in the rest of Rome, there is a generally an easy going feeling as soon as one passes through the doors of UNIDROIT that energy changes. Beginning with the efficiency and helpfulness with which Ms Laura Tikanvaara welcomed us as well handled our logistical issues to Ms Bettina Maxion who from our very first meeting displayed a substantive knowledge of the material available. I also had the good fortune of developing acquaintanceships with some of the legal officers Mr Brydie-Watson and Mr Neale Bergman and from our conversations I was able to develop a better, first hand understanding, of the projects that UNIDROIT undertakes and the way the organization goes about its implementation.

A special word of thanks is reserved for Ms Frederique Mestre, who co-ordinated the scholarship programme and although our contact time was very limited, made us feel welcome.

The experience of living, working and being in Rome has been an experience that I feel will inform my decisions for years to come. Having never been to Europe I was not sure of exactly what to expect. Working with and meeting scholars from all over the globe definitely enlightens ones perceptions of the world and I am certain that these relationships will stand the future of the harmonization of private law in good stead. I am also thankful for the help provided by some of the other scholars in guiding and directing my work.

Furthermore, I would like to take the opportunity to thank UNIDROIT on behalf of the University of Johannesburg (UJ) the fruitful experiences of myself and my colleagues signal the beginning of a long and prosperous relationship between our two institutions.

**Research**

My time at UNIDROIT was divided into two research areas. The first period of two and a half weeks was spent drafting a proposal for my PHD thesis and the second period was spent drafting a paper for a conference being hosted by the UJ Research Centre for Private International Law in Emerging Countries in September.

**Towards a free movement of companies in the SADC's internal market – An analysis and critique of the European international company law and of the pertinent ECJ's jurisprudence as a model for the Southern African Development Community**

At the outset of this discussion on the free movement of companies it must be noted that free movement is only possible in Europe because freedom of establishment is entrenched in the European treaty (formerly in articles 43 and 48 of the EC treaty and currently the right of establishment is guaranteed in articles 49 and 54 of the Treaty on the Functioning of the European Union [TFEU]). The aim of the study is therefore to analyse the European position, on which there is extensive literature, in order to use it as a model for the development of the Southern African Development Community (SADC).

The free movement of companies initially fell within the exclusive purview of private international lawyers in Europe. The treaty has of course changed this position, but it can still be said that the ability of the company to move rests on the same principles. The first task of this work than becomes to analyse the most prevalent connecting factors the – the incorporation theory and the real seat doctrine, in order to analyse their effects on the movement of a company.[1]

This topic is especially relevant to Southern Africa and Africa as a whole, as many countries in the different African economic blocs have committed themselves to a free trade area which it is hoped will eventually lead to an economic organisation, cast in the same mould as the EU. Although in its infancy, it is likely that this economic union will face many of the same hurdles that the EU experienced in its formative years. As the EU already has vast experience on these matters it is hoped that EU law can be used as a model on which

[1] Buelle and Schillig "The mysteries of free movement of companies after Cartesio" 2010 *International and Comparative Law Quarterly* 303.

Africa can improve. On the 10 June 2015 a tripartite agreement, moving the African initiative forward, was concluded between SADC, OHADA and EAC.[2]

*Defining corporate mobility*

Many companies now operate in a global economy. It is therefore imperative, that the first issue that this proposal attempts to address is to set-out exactly what is meant by corporate mobility or movement of a company. A company, being a juristic person, much like a natural person, must have a nationality. Analogous to the case of natural persons, where their nationality or domicile governs personal issues such as the age majority, in the case of juristic persons (companies) the law that governs the company, also governs the personal issues of the company or more specifically the internal issues relating to a company.[3] Generally, juristic persons can be incorporated in any state, and will usually be governed by the law of that state, corporate mobility, however, entails a situation where an already established or incorporated company (juristic person) wants to move its central place of administration or management.[4]

Free movement essentially entails the ability of a company to relocate to another jurisdiction without having to liquidate first and therefore allows the company to retain both its juristic personality as well as all the contractual obligations tied thereto. The proposal for the 14th company law directive of the EU contains a similar definition. Free movement is defined as:

"allowing companies to exercise their right of establishment by migrating to a host Member State without losing their legal personality, through their conversion into a company governed by the law of the host Member State without having to be wound up. The transfer should not circumvent legal, social or fiscal conditions. Employees' participation rights should be preserved through the transfer."[5]

*Free movement and the right of establishment*

The rights of free movement and freedom of establishment must be understood in their overall context. Freedom of establishment can relate to a variety of factors, this meaning has been extended by European courts to any law of a country that restricts the establishment of a foreign company or the ability of a domestic company to transfer its central place of administration to another country.[6] The European courts have also differentiated between a primary right of establishment which was referred to earlier, which relates to a company being able to transfer its central place of administration from

[2] As of 16 June 2015 the following states have signed the declaration: Angola, Burundi, Comoro, DRC, Djibouti, Egypt, Kenya, Malawi, Namibia, Rwanda, Seychelles, Sudan, Tanzania, Uganda, Swaziland, Zimbabwe per http://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html (last accessed 10/07/2015).

[3] This would include aspects such as the share capital required in order to form the company or the types of businesses that the company can enter into; see further Centros Case C- 127/97 Centros Ltd v Erhvervs-og Selskabsstyrelsen [1999] ECR, par 14.

[4] European added value assessment – Directive on a cross border transfer of a company's registered office 14th company law directive http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/494460/IPOL-JOIN_ET(2013)494460_EN.pdf 17 (last accessed 10/07/2015).

[5] See European added value assessment (n 4) above 17.

[6] Buelle and Schillig (n 1) above.

one country to another,[7] and secondary rights of establishment which refer to the ability of the company to set-up branches or subsidiaries in other countries.[8]

*The two primary connecting factors*

There are two connecting factors that are primarily used by countries in order to ascertain the law applicable to the internal functioning of companies. They are the incorporation theory and the real seat theory.

The incorporation theory states that the place where the company was incorporated will govern the internal issues of the company.[9] The real seat theory on the other hand says that the company's actual seat of administration and not simply the registered place of business will determine the law governing the internal issues of the company.[10]

The theory that a country subscribes to, has important consequences on free movement. These consequences which also differentiate on the basis of whether the company is an outgoing company or an incoming company, seem to still be an issue of some debate within the EU.[11] Some examples are necessary in order to clarify the types of issues that may arise:

Example 1

Austria applies the real seat principle, which means that the company can only be subject to Austrian Law if it has its real seat in Austria. If the company moves its real seat out of Austria to the UK, it is no longer recognised as an Austrian company, however, it is not recognised in the UK either unless it incorporates in the UK, as the UK applies the incorporation principle.[12]

Example 2

In the event that a company in a state, applying the real seat principle, transfers its registered seat abroad, while the main activity or object remains in the home state, the company will still be subject to the law of the home state. However, if the host state applies the incorporation principle the company would be subject to both laws.[13]

*Ancillary issues to the law applicable to the company*

The questions relating to applicable law, however, do not end at this point, not all issues relating to the company will be allocated according to the same connecting factor, some issues may be subject to other laws. Issues which could be regarded as mandatory or in

[7] Ringe " No freedom of emigration for companies?" 2005 *European Business Law Review* 621.
[8] Ringe (n 7) above 621.
[9] Anderse and Soren "Free movement of companies from a Nordic perspective" *Maastricht Journal of European and Comparative Law* 47 55.
[10] Anderse and Soren (n 9) above 55.
[11] Buelle and Schillig (n 1) above 313.
[12] European added value assessment (n 4) above 15.
[13] European added value assessment (n 4) above 15.

the public interest will always fall in the domain of the place of incorporation. These issues will normally include things such as:[14]

- protection of the weaker party;
- protection of employee rights;
- minority shareholders;
- as well as the protection of creditors and investors.

The complexity of the applicable law to companies is demonstrated in these examples and the main body of work will attempt to clarify these issues in the SADC region.

**Conference 14-15 September 2015 - Private International Law in East and Southern Africa: The Application of the mandatory rules of a third country in East and Southern Africa**

*Party Autonomy*

As with most issues relating to private international law of contract any discussion on the overriding mandatory rules of another law must begin with a discussion on party autonomy. Party autonomy – the ability of the parties to choose the law governing their contract, is a notion that has virtually been entrenched worldwide.[15] It is also a concept that has been endorsed by most supra-national, regional and international instruments.[16] Party autonomy promotes legal certainty it allows for the determination of the law governing the contract without resort to localizing factors and is therefore one of the easiest determinants of the applicable law.[17]

This freedom that parties enjoy, in selecting the law governing their contract is, however, not without limitations. One of the most important considerations in these limitations is the issue of mandatory rules or overriding mandatory rules.

*Application of mandatory rules of another law*

The application of the mandatory rules of the forum or the mandatory rules of the proper law is not the subject of this paper. This paper aims to focus on a more contentious issue, the application of a law which is neither the *lex fori* nor the proper law of the contract. The

[14] Benedetelli "Conflicts of jurisdiction and conflicts of law in company law matters within the EU 'market for corporate models': Brussels I and Rome I after Centros" 2005 *European Business Law Review* 55 58.
[15] For examples of support for this principle in: South African law see *Representative's of Lloyd's v Classic Sailing Adventures (Pty) Ltd 2010 5 SA 90 (SCA)*; in Australian law see *John Kaldor Fabricmaker (Pty) Ltd v Mitchell Cotts Freight (Australia) (Pty) Ltd*. For the European position see Regulation (EC) on the law applicable to contractual obligations (Rome I) (2008). See further Juenger "The Inter-American convention on the law applicable to contracts: some highlights and comparisons" 1994 *The American Journal of Comparative Law*.
[16] See The Hague Principles on Choice of Law in International Commercial Contracts per http://www.hcch.net/upload/conventions/txt40en.pdf (last Accessed 10/07/2015), Rome I Regulation (n 15); Inter-American Convention on the Law Applicable to International Contracts of 1994 (the Mexico City Convention) per http://www.oas.org/juridico/english/treaties/b-56.html (last accessed 10/07/2015); UNIROIT Principles of International Commercial Contracts 2010 per http://www.oas.org/juridico/english/treaties/b-56.html (last Accessed 10/07/2015).
[17] Forsyth *Private International Law: The Modern Roman-Dutch law including the jurisdiction of the High Courts*(1996) 278.

question, ideally, is in which situations would the mandatory rules of another legal system find application.

*South African position*

South African private international is largely left to be determined by the common law. The South African position with regard to the application of mandatory rules of another law or of a foreign country is still somewhat in a state of flux, there are, however, certain decisions of the courts that can be used in this determination. In determining in which instances the mandatory rules of another law would be taken into consideration, South African courts are principally guided by English decisions, before the Rome I regulation came into force. In the *Henry* case Levinsohn J stated definitively that South African courts would not enforce performance that is illegal under the *lex loci solutionis*.[18] This position is supported by older *dicta* in the form of *Cargo Motors Corporation Lts v Tofalos Transport Ltd* which also indicates that the courts would only take the *lex loci solutionis* into consideration, [19] but at the same time definitively rules the *lex loci contractus* out. The conclusions that can be drawn from these cases are that the key consideration is illegality in terms of the place of performance. The mandatory rules of any other legal system can therefore be discounted in South Africa – the application of the of the *lex loci contractus*, the habitual residence, the place of business and the nationality of one of the parties would therefore not be possible.[20] This would appear to be a position supported by Forsyth who contends that allowing courts a wide discretion in the application of mandatory rules would diminish legal certainty.[21] This is also the position supported by the working group to the Hague Principles on Choice of Law in International Commercial Contracts.[22]

*European position*

The European position is that it is only the mandatory rules of the *lex loci solutionis* which will find application. This is the position as set-out in Article 9(3) of the Rome I regulation. Article 9(3) favours the application of the overriding mandatory rules of the *lex loci solutionis* but only in the event that those rules render performance unlawful. This position would seem to be directly in line with the South African position. The situation in which the overriding mandatory rules of another country could apply is therefore severely limited in respect of the Rome I regulation. This limitation on overriding mandatory rules to only the law of the place of performance, however, would not seem to be the ideal situation and the case below provides a good example in this regard.

*German Federal Labour Court Case*[23]

There is a very recent preliminary ruling of the German Federal Labour Court which highlights the importance of and also showcases the situations in which the determination

[18] *Henry v Branfield* 1996 (1) SA 244 (D).
[19] See further *Cargo Motors Corporation Ltd v Tofalos Transport Ltd 1972 (1) SA 186 (W)*; see also *Herbst v Surti 1991 (2) SA 75 (Z) at 78 F-I*.
[20] Schafer *Application of mandatory rules in the private international law of contracts* (2010) 316.
[21] See Forsyth (n 17), see further Schafer (n 20).
[22] Permanent Bureau of the Hague Conference "Draft commentary on the Draft Hague Principles on the Choice of Law in International Contracts" Available on http://www.hcch.net/upload/wop/princ_com.pdf (last accessed on 10/07/2015) 4.
[23] The full case was not available to me, although a summary of the essential facts is available at: http://conflictoflaws.net/2015/german-federal-labour-court-on-foreign-mandatory-rules-and-the-principle-of-cooperation-among-eu-member-states/ (last accessed 10/07/2015).

of whether or not mandatory rules of a third country are applicable becomes critical.[24] The German Federal Labour Court unwilling to decide a matter of such significance to the entire EU referred the matter to the Court of Justice of the European Union (CJEU).

Three questions relating to the interpretation of Art 9 and Art 28 Rome I Regulation were referred to the CJEU. The case takes place against the background of the deepening financial woes that Greece currently finds itself in. It concerns a claim for wages made by a Greek national who is employed by the Greek State at a Greek primary school in Germany, the problem faced by the German Federal Labour Court was whether to apply the Greek Saving Laws as an overriding mandatory provision although German law was the proper law of the contract.

As already mentioned the Greek savings laws that were the subject of the dispute, arose in the face of Greece's financial difficulties and they were the result of agreements between Greece the IMF and the EU. The purpose of these savings laws were to ensure that Greece met its obligations in terms of the loans granted to them by these institutions. They consisted of payment cuts in the public sector. The Greek teacher, the claimant, is claiming the difference between his original salary and the sums that it's been reduced by because of the Greek Saving Laws.

The characterization of the Greek Savings laws as mandatory laws does not provide any difficulties. Article 9(1) of the Regulation states that mandatory rules can be defined as "*provisions the respect for which is regarded as crucial by a country for safeguarding its public interest, such as its political, social or economic organisation, to such an extent that they are applicable to any situation within their scope, irrespective of the law otherwise applicable to the contract*". Taking into consideration the purpose behind the Greek savings laws it could be argued that all three criteria "political, social, or economic organisation" have been met. These laws clearly fall within the definition of mandatory rules.

A question of greater significance for this paper is whether the application of art 9 (3) means that the court cannot take the Greece's Savings laws into account because of the restrictions imposed by the article. Art 9(3) states that (besides the law of the forum) the only overriding mandatory rules that can be taken into consideration are the law of the place of performance, stating that "*[e]ffect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding provisions render the performance of the contract unlawful. […].*" There are a couple of issues that can be raised against the formulation of this article. Firstly, in a contract such as the one before the labour court, there are two separate places of performance and the article fails to indicate which one of the two should be considered. It is submitted that a clause along the lines of article 4(2) would have clarified matters significantly in cases such as these.[25] If the place of characteristic performance is to be the determining factor than as claimant performs his duties in Germany, Germany would be the place of performance. If the relevant consideration was the place of payment than again the place of performance would again

[24] In light of the recent referendum in Greece as well as talk of Greece's exit from the EU the reference to the CJEU shows the importance of determining exactly in which cases mandatory rules of a third country will become applicable.

[25] Rome I regulation (n 15) article 4(2) states that the relevant performance considered should be the characteristic performance.

be Germany. The application of Article 9(3) to the facts of the case lead the German court to the conclusion that it was not possible to apply Greek Savings Laws as mandatory rules.

There were also other considerations that the German court took into account. The first was the possibility that the mandatory rules of the third country, Greece in this case, could be applied not as part of its conflict of law rules but rather as part of Germany's substantive law.[26] The court considered this an application that was not outlawed by the Rome I regulation – it would be in line with the manner in which German courts considered third country overriding mandatory provisions before the Rome I Regulation entered into force. Until the EUCJ makes a decision it would seem that the position in Europe is also in a state of flux.

*The preferred position*

The *Greek Savings case* above, if anything, shows us that to leave the determination of the mandatory rules up to the *lex loci solutionis* alone, is not a satisfactory solution to the problem. There are a number of alternate theories that could claim application:

1. Schuldstatutstheorie or Proper Law doctrine;[27]
2. International Administrative Law;[28]
3. Special Connection Theory;[29]
4. Consideration on the level of substantive law. [30]

Schafer argues that in line with the modern trend, the best position would be to apply the special connection theory. As it is already an accepted position in Private International law. She argues further that application of the special connection theory must be differentiated on the basis of what kind of mandatory rule it is. So for instance if it is an import export regulation the connecting factor would be different to the situation where the mandatory rule is an anti-trust law or the protection of a weaker party.

This paper will ultimately explore all of these theories and then delve into the position of the various states in Sothern and Eastern Africa.

[26] This is a consideration that Schafer (n 20) also considers at 159.
[27] Schaffer (n 20) 137.
[28] Schafer (n 20) 140.
[29] Schafer (n 20) 142.
[30] Schafer (n 20) 159.

**Preliminary report of the research carried out during my visit to UNIDROIT**

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**Research Project: Contract farming as a tool for the development of the agribusiness in Argentina.**

**Period of stay: January and February 2015**

**The scholarship was sponsored jointly by the UADE and the UNIDROIT general fund**

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## INTRODUCTION

In Argentina, the productive chain as part of the agribusiness represents one of the most important pillars of the country's economy. This activity involves the primary sector (agriculture and animal husbandry) and the agricultural (AM) and industrial manufactures (IM), though the latter in a lesser extent. At the same time, the society's consumption pattern has evolved worldwide searching for better quality and innocuous food manufactured in an environmentally and socially responsible manner.

The complexity of the agricultural market reappraises the need of a legal structure capable of integrating different areas of legal knowledge. We may refer to the necessary interaction of legal relations such as: labour and contractual relations; those arising from intellectual property, real property and even environmental law. This legal structure must also integrate with economic, social and political aspects of agribusiness. Within this context, there is a need to consider the best regulatory framework for this business in a complete, dynamic and updated way and in harmony with the different interests that converge in relation to the matter.

At first, during our stay in UNIDROIT, we searched for bibliography related to agricultural law with the purpose of gathering general information to be used as context for the research work. It is important to highlight that our objective is the study of contract farming as a system for the production and supply of agricultural products.

**Argentina and the regulation of the agricultural business**

The Argentinian experience as regards the regulation of the agricultural business is a characteristic of the 20th century. Generally speaking, we may refer to different milestones in agricultural regulation. The agricultural land lease act (Act N°11170) was passed in 1921 with the purpose of distinguishing lease contracts from the agricultural land lease contracts and set restrictions in the negotiation capacity of the parties in the latter type. During the 1940s, new agricultural measures were implemented; for example, the Land Lease and Share-Farming Agency, under the supervision of the Ministry of Agriculture, was created, and an amendment to contractual requirements (Act N°13246) was made in 1948. Some academics highlight the economic harmonisation purpose of this act by creating different contractual types. In 1980, the outstanding Act N°22298 came into force. This act tried to modernize the legislation related to the contracts of lease of land. During the 1990s, an improvement in rural areas as regards applied technology gave rise to a minor growth in production which had an impact on the Gross Domestic Product (GDP). Some academics consider that despite of it, this increase was uneven when comparing the livestock market and the farm products market. Finally, during the successive legislative amendments, the principal discussion was mainly focused on the ownership and quiet enjoyment of the land and the benefits obtained therefrom.

From all possible aspects to investigate, we will centre our research work on contract farming. At the beginning, their object was limited to the quiet enjoyment of the rural property, but today their main object is agricultural production. Agricultural production by contract is a mechanism which facilitates the access to production and farming of agricultural resources. The practice of contract farming entails providing farmers with full advice. In this context, farmers produce a specified quantity and quality of goods for the contractor. Added to this usually the crop is sold exclusively to him at a predetermined price. Initially, the legislation considered the relationship between the landowner and the tenant undesirable and inefficient to satisfy the parties. Somehow, the 1980s' legislation tried to limit the participation of the State in order to balance and appreciate the autonomy of the individuals' contractual intent.

This business model seems to have considerable potential in countries where small-scale agriculture is still important, since small farmers cannot be competitive without having access to the services rendered by contract farming firms. In some countries, this is evidenced as an alternative to maximize land yield.

During our visit, we particularly looked for bibliographical references related to contract farming. Those references, related to the implementation of this type of contract in economies with small-scale agricultural producers, were of great benefit.

**The lack of specific regulations in relation to this kind of contracts and the role of soft law**

Due to the lack of specific legislation that regulate this type of agribusiness contracts in Argentina and in other countries, some academics consider that the general rules of contracts as well as the business practices should be applied. In this sense, the contract has to fulfil a certain number of requirements to be valid. Firstly, the parties must have legal capacity to enter into contracts. Secondly, the parties must be able to give their consent freely and be informed about the scope of the contract and the obligations derived from it. The object must be stated and lastly, the contract must state the rights and liabilities of the parties. The object and basis of the contract must comply with the law so as not to create an unlawful business.

During our stay, we also revised and updated the material related to international contracts, and the importance of the *lex mercatoria* through the bibliography and online database UNIDROIT has access to.

**Typical or atypical: Is this the problem?**

It is known that, for several years, UNIDROIT has been working in the preparation of a Legal Guide on Contract Farming with the collaboration of other international entities like FAO. The guide has been thought for several objectives we will explain in a simple way. In the first place, it aims at analysing from a legal point of view the type of agreement used in this class of business transaction. This includes a good practices guide in contract matters applied to this type. This will be a valuable tool for individuals because it would allow them to realise the maximum benefit from this type of contract due to the fact that they will have, in a unified and accessible way, all it may offer. In the second place, it is intended as a tool for the States to classify, amend and pass future laws on the subject. In this sense, it helps the States in their investigation of the outstanding laws. Finally, it seeks to provide a guide to those agencies intervening in the development of public policies as regards the implementation of and training in contract farming.

This instrument has been developed in several stages: drafting, revision, consultation and final edition. Today, the guide is in the last of these stages and it will be in the final stage during 2015.

In this sense and taking into account the significance of farming for Argentina and the need to set rules that harmonise the legislative loopholes which may arise in this type of contracts, the following

questions arise: Are specific regulations that govern these agreements necessary? Which will be the importance of this guide to local contracts?

To investigate the status of the guide and its scope, UNIDROIT granted us access to its working papers. Moreover, the Institute made available to us the reference material as well as the outcome of seminars, workshops and events carried out to discuss this matter.

**Research work plan**

The main aim of the research centred on the analysis of contract farming as a tool to develop agriculture in Argentina. Considering the lack of specific regulations related to this subject and making use of the development UNIDROIT is carrying out, we sought to broaden the bibliographical references through the Institute's database.

The first stage of the investigation was based on the search of bibliography. From Buenos Aires, we were able to visit UNIDROIT's website and the library's catalogue to get a list of works that could be of interest. This first list was enlarged with material obtained from the search of related matters, like international contracts, atypical contracts and Agricultural Law. This thorough search, allowed us to have access to works in Spanish, English and Italian.

As from January 7th, when our visit began, we were able to have direct access to the material we had located in the website. Moreover, we were able to obtain other material useful for the research work. We used bibliographical material in paper format as well as the online database the Institute is subscribed to.

The search for information took six weeks. During said term, a lot of material that will allow us to move forward in our investigation was scanned. Some characteristics of this search were pointed out in this report.

During a second stage related to the subject, the material available in UNIDROIT was used to improve our knowledge on Private International Law. In these terms, we were able to have access to valuable bibliography for our professional development in Argentina as professors of the subject. In a lesser extent, due to time constraints, we were able to obtain information related to intellectual property.

After our stay in Rome, the research will continue in Argentina for a term of six months. This stage will be carried out using the resources provided by the library and the electronic database of the *Universidad Argentina de la Empresa.*

The final research work will be, at least, an article or chapter of a book published in a local or international specialized publication in English or Spanish. A copy of the research will be sent to UNIDROIT for its inclusion in its database. Likewise, the learning acquired will be transferred to university students during our lectures on Private International Law and International Business Law.

**Acknowledgement**

We would like to thank all the members of UNIDROIT staff for their help, human quality and support before our arrival and during all our stay in Rome. We would specially like to highlight the work carried out by Ms Frédérique Mestre, Ms Laura Tikanvaara, Ms Bettina Maxion and Mr Reza Zardoshtian.

The experience was not only interesting but also highly productive and useful for our professional growth. Having the possibility of researching full time will allow us to improve the quality of the papers to be submitted. Moreover, it will enrich the analytical perspective of the researchers.

It is also important to point out the relationship between both parties of the Cooperation Agreement, UADE and UNIDROIT. This type of Scholarship Program allows professors and researchers to develop a specific task and make a humble but important contribution to the science of law.

Report on Period of Research at UNIDROIT of Garth Bouwers

(15 June - 10 July 2015)

**The scholarship was sponsored by the UNIDROIT Foundation in cooperation with the University of Johannesburg**

1. Professional Background

Upon completing the LLM degree (*cum laude*) in International Commercial Law at the University of Johannesburg (UJ) in 2013, I was appointed as Assistant Lecturer in the Department of Mercantile Law. During the course of 2014, I submitted a proposal for doctoral studies in Private International Law at UJ, which was subsequently approved. I lectured International Trade Law on a final year LLB level as well. In 2015, I was appointed as a lecturer at UJ. I lecture Law of Insolvency on a final year LLB level while working on my doctoral thesis. I hold the position of Research Associate at the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg.

2. Introduction

After a grueling two day journey from South Africa, with an overnight delay at Dubai International Airport, I finally arrived in picturesque Rome, full of anticipation and excitement. I had received a four week research scholarship at UNIDROIT- a tantalizing prospect and one that I could not wait to get underway.

My first day commenced in earnest on Monday, 15 June at UNIDROIT headquarters, located in the center of Rome, between via Nazionale and via Panisperna. There, I was greeted by Ms Bettina Maxion, the "ever-ready-to-assist" Liberian who, after a quick briefing introduced us to the scholars and interns who had already commenced with their period of research at UNIDROIT.

I was pleasantly surprised at the diversity of the group I would be working with during my time at UNIDROIT. With representation across four different continents, it truly was a melting-pot of different backgrounds, beliefs and legal traditions which has proved a special environment to work in.

The exchange meetings were particularly invaluable during my time at UNIDROIT. It provided a platform were proper discussions could be had, and ideas shared on a particular aspect of law. I found it a useful exercise and quite enjoyable as well – observing the views of a German, followed by comments from an Ethiopian, and a rebuttal from a Spaniard is not an everyday occurrence in South Africa.

Days at UNIDROIT were spent browsing the extensive online library catalogue. The availability of such a wide variety of books and journal articles proved pivotal to my output during the four weeks at UNIDROIT.

3. Research Projects

During my period of research, I focused on two separate but interrelated projects. The first entailed the preparation of a paper that I will present at the Commercial Private International Law in East and Southern Africa conference, hosted by the University of Johannesburg during the month of September. The title and partial preparation of my presentation below:

TACIT CHOICE OF LAW IN EAST AND SOUTHERN AFRICAN PRIVATE INTERNATIONAL LAW OF CONTRACT

The well-known American judge, when expressing his view on the complex nature of private international law, Cardoza J once remarked:

> "The average judge, when confronted by a problem in the conflict of laws, feels almost completely lost, and, like a drowning man, will grasp at straws."[1]

With that quote in mind, the need for a coherent body of rules in this intricate branch of law is imperative, not only to assist the courts as such, but also to provide a better understanding to those it aims to protect.

There is no doubt that in this era of globalization that the importance of international commercial law is likely to increase in most legal systems around the world.[2] In the midst

[1] McClean and Beevers *The Conflict of laws* (2009) 8.
[2] McClean and Beevers (n 1) 16.

of a substantial increase in the growth of international trade and commerce, with individual and corporate activity going international, there should be a concerted effort by states to ensure that their rules and principles of private international law are sufficiently adequate to meet this demand.[3]

As cross-border trade continues to grow, one issue in private international law that deserves special consideration, is the law applicable to international commercial contracts.

1. The Proper Law

The law applicable to a contract, sometimes referred to as "the proper law of the contract" or "the governing law", may, in principle, be expressly or tacitly chosen by the parties to the contract.[4] The proper law of a contract refers to a system of law which creates and governs the contract. While the proper law of a contract might not govern all aspects of a contract (for example, mandatory rules of the forum, and also, public policy considerations). It does apply to most of the substantive issues of a contract, including its formation, essential validity and discharge of a contract. One method of determining the proper law of the contract, as previously mentioned, is an examination into whether an express choice of law was made. Parties may go about making such a selection by explicitly stating, at the time of the contract, the law by which the contract shall be governed. Here, the concept of party autonomy comes into play.

Most legal systems adopt some form of autonomy under which parties are free to choose the law with which to govern the contract.[5] The concept has certain practical advantages, one of them being the promotion of certainty, in that both the courts and the parties to a contract know which law applies.[6]

[3] Setalvad *Conflict of Laws* (2009) 10. See also, Mclean and Beevers (n 1) at 2: with no corpus of international law and no system of international courts to deals with disputes that arise in private international law, it's essential that courts of particular national legal systems have satisfactory conflict of laws rules to turn to.
[4] Forsyth *Private International Law* (2012) 294. See also, Schwenzer, Hachem and Kee *Global sales and Contract Law* (2012) 52.
[5] Forsyth *Private International Law* (2003) 278. See also, Schwenzer, Hachem and Kee (n 4) 52; Yongping and Weidi "Contractual party autonomy in Chinese private international law" 2009 *Yearbook of Private International Law* 194.
[6] Forsyth (n 5) 278. See also, Juenger "Contracts choice of law in the Americas" 1997 *The American Journal of Comparative Law* 195 195-196.

The ability to choose the governing law is, however, not absolute. Certain limitations that may come into play in this regard include mandatory rules of the *lex fori*, the law of a third country and public policy considerations.[7] That said, this is not the focus of the presentation. Suffice it to say, it is a widely recognized concept in most legal systems of the world.

2. Tacit choice of Law

It goes without saying that parties to an international commercial contract are well advised to express their intention with regard to the proper law.[8] However, human error dictates that this is not always the case in practice. Ever so often, parties entering into agreements fail to take the necessary precautions in selecting the proper law with which to govern their contract.[9] When this scenario presents itself, it is left to the court to determine the proper law of the contract.

Here the court will attempt to determine the parties' unexpressed or tacit choice of law by searching within the four corners of the contract, but also the circumstances surrounding the contract.[10] So, although a tacit choice falls short of an express choice of the parties, it will still amount to a real agreement by the parties.

Tacit choice of law may seem a confused concept, and one that has not always been clearly perceived. The notion of inferring an actual intention is based upon making assumptions which may or may not be correct.[11] Be it, by looking at what is included in the contract, for example, the language or terminology used; or factors outside of the contract, for example, the prior conduct of the parties. These assumptions may have undesirable consequences for the parties to the contract, as their reasonable expectations may not necessarily be portrayed in the inferences drawn by the court.

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[7] Edwards, Sykes and Pryles *Australian Private International Law* (1991) 596-598: a choice of law will not be legal if a mandatory provision of the *lex fori* denies the parties the autonomy to choose the governing law. See also, Van Niekerk and Schulze *The South African Law of International Trade: Selected topics* (2011) 61: a choice of law may be flawed and not be given effect to if it was made to avoid legal prohibitions in the legal system most closely connected to the contract; Yongping and Weidi (n 5) 203-208.

[8] Van Niekerk and Schulze (n 7) 60.

[9] Forsyth "Enforcement of foreign arbitral awards, choice of law in contract, characterization and a new attitude to private international law" 1987 *SALJ* 4 14.

[10] Forsyth (n 5) 284. See Van Niekerk and Schulze (n 7) at 62: The terms 'tacit', 'implied' and 'presumed' have been used interchangeably in private international law; Schwenzer, Hachem and Kee (n 4) 55.

[11] North and Fawcett *Cheshire and North's Private International Law* (1987) 444 461.

It is not surprising that tacit choice of law has been subject to criticism and debate amongst a wide variety of scholars around the world, with some suggesting that tacit choice of law be done away with.[12] Nevertheless, most legal systems around the world recognize a tacit or implied choice of law.[13] However, as previously stated, the uncertainty around tacit choice of law remains apparent.

The Giuliano and Lagarde Report[14] provide a number of examples where a choice of law may be inferred.[15] The list is not an exhaustive one, but instead, contain the most common situations.[16]

They include:

(1) The use of standard form which is known to be governed by a particular system of law;
(2) Where the parties' have had previous dealings under similar contracts containing an express choice of law which has been omitted from the existing contract;
(3) Choice of a particular forum;
(4) Reference of specific provisions of a particular legal system contained in the contract;
(5) Choice of a particular place of arbitration;

Other factors that may be added are:

(6) Common residence of domicile of the parties;
(7) Place of performance of the contract; and
(8) From the several possible systems that could apply, the one that will give effect to the contract.[17]

Despite these indicators, there is no approach that can claim universal recognition.[18] The determination of tacit choice of law around the world remains highly divergent, with the weight attached to issues like choice of forum, monetary unit and form often at odds.

[12] See Forsyth (n 4) at 307: in the absence of an express choice, a better option would be a finding that the parties' minds never actually met and for the court to go on to assign the appropriate law.
[13] Schwenzer, Hachem and Kee (n 4) 55.
[14] Report on the Convention on the Law Applicable to Contractual Obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I [1980] *Official Journal* C-282/01.
[15] Nygh *Autonomy in International Contracts* (1999) 113.
[16] Nygh (n 15) 113.
[17] Nygh (n 15) 114. These factors are in no way conclusive of a tacit choice and may also vary in the weight that a court may attach to them.
[18] Fawcett and Curruthers *Cheshire North & Fawcett Private International Law* (2008) 9.

To provide a quick illustration: for example, in Australian law, it has been suggested that the inclusion of a choice of forum clause creates a very strong presumption that the parties have chosen the law of that country to govern the contract.[19] While the Hague Principles on Choice of Law in International Contracts seem to say something very different. The Commentary to the Principles provides that, choice of law applicable to a contract and the choice of a forum for dispute resolution should be distinguished.[20] Furthermore, a choice of court agreement, is not in itself equivalent to a choice of law.[21] (One can immediately see the differences when it comes to attaching weight to factors indicating a tacit choice).

3. Overview

With that as a backdrop, we will consider the approaches in determining tacit choice of law in East African countries, namely (TBC) as well as Southern African Jurisdictions, including South Africa, (TBC). In examining tacit choice of law, emphasis will be placed on related issues, including specific provisions dealing with tacit choice of law, the indicators that have been relied upon, as well as the weight that has been attached to these indicators. (The study would entail an investigation into whether any similarities or differences exists in the legal systems under discussion).

4. South Africa

The concept of tacit choice of law has not been clearly perceived by South African courts.[22] The line between 'tacit choice' and an 'assigned law' is often blurred and frequently confused.[23] Here, the court has the unenviable task of making an assumption, based on the terms of, as well as the circumstances surrounding the contract,[24] that the parties' minds have met on the question of choice of law, without actually recording this intention in their contract.[25] Despite the rarity of this occurrence, there are various cases in which the court came to a conclusion that such a choice did exist.[26]

[19] Davies, Bell and Brereton *Nygh's Conflict of Laws in Australia* (2010) 398. See also, Edwards, Sykes and Pryles *Australian Private International Law* (1991) 584.
[20] See Article 4 of the Hague Principles *per* www.hcch.net.
[21] (n 20) above.
[22] Forsyth (n 5) 283.
[23] Forsyth (n 5) 283.
[24] Forsyth (n 5) 284.
[25] Forsyth (n 5) 284
[26] Forsyth (n 5) 284.

In *Standard Bank of South Africa v Efroiken and Newman*,[27] which represents the orthodox view in South Africa, the Appellate division provided that, 'where parties did not give the matter a thought, courts have of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties'.[28]

There are a wide range of factors that the courts have considered in searching for what the parties have intended.[29] For example, in *Guggenheim v Rosenbaum*,[30] the indicators that led the court to conclude that the parties intended South African law should govern the contract, included the defendant's domicile in South Africa; the business was located here; and, even though the plaintiff and defendant entered into a promise to marry in New York, it was merely on a short visit with an intention to return to South Africa permanently.[31]

In *Improvair (Cape) Pty Ltd v Establissements Neu*,[32] Grosskopf held that 'there may be circumstances, e.g., where the contract deals with concepts peculiar to a particular system, in which the parties may be held to have agreed tacitly', but, he did acknowledge that such cases would be rare.[33]

Another factor that South African courts have taken as evidence of a tacit choice, is the inclusion of an arbitration clause providing for a place where future disputes are to be settled. In *Laconian Maritime Enterprises v Agromar Lineas*,[34] the fact that arbitration had to take place in London, Booysen J found this a strong pointer towards it being found that the parties ought to have chosen English Law as the proper law of the contract.[35] Although not conclusive, the court held that it remains a factor of considerable weight, particularly where the parties are of different nationalities.[36]

[27] 1924 AD 171.
[28] 1924 AD 171 at 185.
[29] Forsyth (n 5) 284.
[30] 1961 4 SA 15 (W).
[31] 1961 4 SA 15 (W) at 31.
[32] 1983 2 SA 138 (C).
[33] 1983 2 SA 138 (C) at 145.
[34] 1986 3 SA 509 (D).
[35] 1986 3 SA 509 (D) at 529.
[36] 1986 3 SA 509 (D) at 529.

However, In *Compagnie d' Armement Martime SA v Compagnie Tunisienne de Navigation SA*,[37] the court held that no rule of law can provide a conclusive guide as to actual intention. One should be mindful of the fact that we are considering *inducia* from which a choice might be inferred.[38] The fact that a certain *inducium* is present, does not necessarily mean that there has been a tacit choice of law.[39] This should be kept in mind when the question arises: should choice of forum constitute a tacit choice of law?

This is an important factor to consider for the mere fact that the legal systems of the world provide highly divergent answers to this question, but also courts conflate the two notions as well. It is generally accepted that choice of forum should be a factor in the determination of a tacit choice of law.[40] However, in certain jurisdictions, especially under the Common-law systems of Australia, and to a lesser extent, Canada, choice of forum almost automatically indicates a choice of law.[41]

This is the incorrect starting point, as choice of law and choice of forum are, in principle, separate issues and must be distinguished.[42] A forum may be chosen for its neutrality or expertise and not necessarily for the application of its domestic law.[43] As such, the starting point for South African courts (which is already generally accepted) is that choice of forum is a factor to be taken into account to determine the existence of a tacit choice of law, but in no way should it be decisive.

The second aspect of my research at UNIDROIT entailed the collection of relevant sources on the concept of party autonomy in international commercial contracts. This aspect will form a substantial part of chapter 1 of my doctoral thesis titled "Tacit Choice of Law – a Global Comparative Study".

Focus will be placed on defining the concept, the worldwide recognition of the concept (the reasons for its acceptance) and the limitations on freedom of choice i.e. public policy considerations; mandatory rules of the *lex fori*; mandatory rules of a third country etc.

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[37] 1970 3 SA 389 (WLR).
[38] Forsyth (n 5) 286.
[39] Forsyth (n 5) 286.
[40] Schwenzer, Hachem and Kee (n 4) 56. See also Neels and Fredericks "Tacit choice of law in the Hague Principles on Choice of Law in International contracts" vol 1 (2011) *De Jure* 101 108.
[41] n 19 above.
[42] Neels and Fredericks (n 40) 107.
[43] Neels and Fredericks (n 40) 107.

I have collected extensive material on this topic from the UNIDROIT library catalogue and it will undoubtedly be a great source of reference in my discussion under chapter 1 of my thesis. The title and short introduction:

PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL CONTRACTS

1. Introduction

In the world of business, especially in the modern era, it would seem as though everything moves at a rate of knots. Technology is constantly developing, which has an enormous impact on the way business is conducted. This is particularly true when it comes to international commercial transactions. At a click of a button, a businessperson sitting in his/her office in China can make contact with a South African supplier for the purchase of wheat. Contracts can be concluded between persons on different continents without actually ever meeting face-to-face. As long as residence from different states continue showing a willingness to do business with each other, international trade will continue to flourish. With that in mind, more emphasis should be placed on the private international law systems of states, ensuring that they do not remain stagnant and are up to international standards in dealing with the issues that invariably arise in international transactions.

As cross-border trade continues to grow, one issue in private international law that deserves consideration is the law applicable to international commercial contracts. As Lord Diplock put it:

> "My Lords, contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations."[44]

However, ascertaining the applicable law in an international commercial contract would be more of a challenge than almost any other topic in private international law,[45] for the simple reason that an international commercial contract may carry with it a multiplicity of connecting factors each pointing to different legal systems.[46] In these

[44] *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* 1984 AC 50 at 65.
[45] North and Fawcett *Cheshire and North's Private International Law* (1987) 444.
[46] North and Fawcett (n 45) 448.t

cases, a court would have to determine which system of law would govern the creation, validity and effect of the contractual obligation.[47] It is at this stage that the term "the proper law of the contract" comes into play….

4. A Word of Thanks

I would like to thank UNIDROIT for giving me this opportunity. A special thanks to Frédérique Mestre, Laura Tikanvaara and everyone involved at UNIDROIT who made this place feel like home during my time here. I would like to express my gratitude to the sponsors and the University of Johannesburg for making this trip a possibility.

[47] Nygh *Conflict of Laws in Australia* (1991) 271.

International Institute for the Unification of Private Law
Research Scholarships Program Report

# BONA FIDE ACQUISITION OF STOLEN CULTURAL PROPERTY

Prepared by

Siyu Cai

Rome, 4 May 2015-30 June 2015

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## Acknowledgement

The experience of learning and researching in UNIDROIT for two fruitful months is precious and unforgettable. I not only had a great chance to read abundant literatures and finish my essay under professional guidance, but also attended conferences, exchange meetings and research seminars. I am very grateful to have such a distinct opportunity to enrich my knowledge, broaden my horizons and communicate with talents from all over the world.

I would like to express my sincere gratitude to Ms. Frederique Mestre and donors of the scholarship for kindly providing me such a fantastic chance to come to UNIDROIT and research on *bona fide* acquisition of stolen cultural property.

I am very grateful to Ms. Marina Schneider for her patient, professional and constructive guidance of my research.

In addition, I would like to send my thanks to Ms. Bettina Maxion and Mr. Reza Zardoshtian for their constant and wonderful help in the library.

I am also really grateful to Ms. Laura Tikanvaara for her excellent logistical support throughout the whole process.

Last but not least, I would like to thank my mentor Ms. Yunxia Wang for her kind recommendation, continuous guidance, and inspiring encouragement.

## About the Research

*1. Introduction*

One of the most challenging issues in the field of protection of stolen cultural property is the question of bona fide acquisition. A key part of the illicit traffic is that stolen cultural property is transferred without permission. After years of circulation, it often turns out that the cultural property is in the hands of the third party who was unaware of the theft and assumes in good faith that his business partner had the right of disposal[1].

[1] The Restitution of Cultural Property, Beat Schonenberger, Stampfli Publishers Ltd. Berne, 2009, P99

Bona Fide acquisition of stolen cultural property is controversial. Since neither the owner nor the bona fide purchaser have done anything to warrant the loss of the goods[2], various preferences lead to different legal theories in civil law countries and common law countries. Moreover, the complex interests related to cultural property, as Beat Schonenberger pointed out, make the dilemma even more difficult. Its relevance can be extended beyond simple common property disputes, where a former owner demands the return of his assets. It is just as likely to be a compromise among scientific interests, financial interests, emotive interests and public interests. Sometimes even the interests of third parties can conflict with each other, for example, the open hostility between the museums and the archaeologists in the Steinhart case[3].

The first part of my research analyses the different groups of domestic regulations, including German law, French law, Swiss law, Italian law, British law, and Chinese law before the adoption of the conventions, based on distinguished legal principles. With the background presented in the first part, the second part is an introduction of two main conventions in this field, namely 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention") and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("1995 UNIDROIT Convention). The third part of my research focuses on the legislation and implementation of the conventions in China.

*2. Key issues*

(1)Attitudes toward restitution[4]

Whether a stolen cultural property can be acquired in good faith? In Germany, it only existed at public auction. In France and Switzerland, only if the owner pays compensation could stolen property purchased from a public market or from a merchant who deals in goods of the same kind be returned to the owner. In Italy, an immediate bona fide acquisition of movable property, including cultural property, was generally permitted. While in England, stolen cultural properties should be restituted. In China, it depended on criminal procedures. Article 3(1) of 1995 UNIDROIT Convention has a big influence on this question.

(2) Compensation

Should the good faith purchaser get compensation when he restitutes stolen cultural properties? What is the scope of the right to payment and the scope of compensation? The right to payment under certain circumstances was stated in French Law and Swiss Law. In French law, the compensation was limited to be given to "a person in possession". If a subsequent transfer is not effected in the described circumstances, he may not get compensation. While in Swiss Law, the stolen cultural property cannot be recovered from "the first purchaser or any subsequent bona fide purchaser" without compensation[5]. They both documented that the compensation is equal to the purchase price. Article 7 (b) (ii) of UNESCO Convention and Article 4 of UNIDROIT Convention are related to compensation.

(3)Time limitation

According to the legislation, an original owner may lose his claim not only through the derivative acquisition by a third party in good faith, but also through different durations of statute of limitation and prescription. It was regulated in Article 3 of UNIDROIT Convention.

[2] Lyndel . Prott, Commentary on the UNIDROIT Convention, 1997.
[3] The Restitution of Cultural Property, Beat Schonenberger, Stampfli Publishers Ltd. Berne, P38
[4] As is defined in 1995 Convention 1 (a)(b), "restitution" concerns stolen objects, whereas "return" relates to illegally exported objects. As a result, this article will use the word "restitution".
[5] Second study requested from UNIDROIT by UNESCO on the international protection of cultural property with particular reference to the rules of private law affecting the transfer of title to cultural property and in the light of the comments received on the first study, Gerte Reichelt, 1988

*3. Application*

Since the mid 19th century, innumerable Chinese antiquities have been flowing beyond the border illicitly by looting, smuggling, and other illegal means. Especially, during the Second Opium War, the occupation of Beijing by the Eight Nation Alliance, the Japanese invasion, and the Chinese Civil War, countless historic relics were stolen in a systematic manner[6]. In contemporary society, from 2009 to 2011, thefts against cultural objects that happened in China amounted to 1121, 964 and 1217 cases respectively.

At the same time, the art market in China is thriving. The principle of inalienability is applied to all cultural property owned by the State[7]. But for personal properties, there are two types of businesses dealing with cultural goods in the Chinese market, namely antique shops and antique auction houses. The number of antique shops is about 80 and these shops turnover about 500 million RMB annually. There are also about 200 antique auction houses, which generate an annual transaction volume of approximately 10 billion RMB[8].

These two elements drew attention from China to the illicit trade of stolen cultural property. China is now actively retrieving her stolen objects through diplomatic channels and means of legal action.

China became a contract party to the 1970 UNESCO Convention in 1989 and to the 1995 UNIDROIT Convention in 1997. With the accession to the 1995 UNIDROIT Convention, China made a declaration simultaneously, stating that a claim concerning the restitution of the stolen cultural objects is subject to a time limitation of 75 years, and reserving her right to extend the time limitation as provided in her law in the future. For the implementation of international conventions, Article 142 of the General Principles of the Civil Law of China provides that, when international conventions that China concludes or accedes to do not comply with civil laws, articles of international conventions shall prevail, except articles that China states she shall reserve.

In Chinese domestic legislation, bona fide acquisition is regulated in Article 106 of the Property Law of the People's Republic of China promulgated for effect on October 1, 2007. The criteria of bona fide acquisition includes good faith, reasonable price and registration or delivering depending on the request of law. The original owner may ask the person entitled to dispose of the real property or movable property to make compensation for his losses.

However, there is no specific civil regulations on the bona fide acquisition of stolen properties. In the property law, there is only an exception towards lost properties. "The owner or any other holder is entitled to recover a lost property." It is not mentioned in the Law of the People's Republic of China on Protection of Cultural Relics adopted in 1982 or the Regulations for the implementation of the Law adopted in 1992 either.

According to the Law Committee of National People's Congress, the reason why there is no special regulation about bona fide acquisition of stolen properties is that, original owners can request the judicial department to recover according to Criminal Law, the provisions of the Criminal Procedure Code, Public Security Administration Law and other relevant laws[9]. Under Article

[6] Zhengxin Huo, A Protected War: The Fight Against Illicit Traffic of Cultural Property in China, The 1970 UNESCO Convention, Edited by Jorge A. Sanchez Cordero, p151

[7] Including all property under ground, in inland waterways, or in territorial seas; sites of ancient culture, ancient tombs, cave temples, memorial buildings, stone carvings, mural paintings, typical buildings of modern and contemporary China, proclaimed as protected units by the State; cultural objects unearthed within the boundaries of China; cultural property collected or taken care of by state-owned collection units as well as other state organs, military units, state-owned enterprises, and public organizations; cultural objects acquired or purchased by the State, cultural objects donated to the State by citizens, legal persons, or other organizations; and all other cultural objects belonging to the State in accordance with laws. Moreover, all yet unfound cultural objects found by chance during legal or illegal excavations belong to the State.

[8] See http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/china_2010-11natrep_1970_en.pdf Last visit: 2015.6.29

[9] Law committee of The National People's Congress, Interpretation, legislation reasons and regulations about the Property Law, 2007, P195.

151 and Article 264, stealing precious cultural objects and smuggling prohibited cultural objects are serious criminal offences with penalties ranging from fines and confiscation of cultural objects to prison sentences. For the implementation of recovery, Interim Provisions on confiscating and dealing with stolen money and goods (1965) mentioned in part one is still an important reference for present judicial practice.

However, the social background of the Interim Provision, planned economy, has changed[10]. What is more, judicial certainty and acceptability may not be guaranteed if the restitution depends merely on the discretion of criminal judicial departments. There should be certain civil rules dealing with disputes based on civil law relationships.

The attitude of China can be seen from the provisions advocating restitution of stolen cultural property and compensation for good faith purchasers in Dunhuang Declaration, adopted by the 4th International Conference of Experts on the Return of Cultural Property held in China in September 2014. With the ongoing process of establishing civil code, it is hopeful for China to have explicit regulations about this problem.

## About the author

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**UNIDROIT Research Scholarship: Robin Cupido**

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*Importance of working at UNIDROIT*

I had the opportunity to spend four weeks at UNIDROIT (The International Institute for the Unification of Private Law) on a research scholarship. The scholarship programme allowed me to make use of the extensive library at UNIDROIT in order to work on my own research projects that will hopefully promote the development of the law in South Africa.

The Institute itself was begun as an offshoot of the (then) League of Nations in 1926, and was later established in its current form in terms of the UNIDROIT statute. The organisation that exists today is an independent body, of which there are currently 63 member states. UNIDROIT's work is aimed at the harmonisation and unification of international private and commercial law. This is achieved through the development of uniform law instruments and principles, the best example of which are the UNIDROIT Principles of International Commercial Contracts 2010, which is arguably the most widely known and used of the uniform law instruments.

The scholarship programme that I participated in was developed in order to provide lawyers from developing countries with access to the research facilities at UNIDROIT. As South Africa is a developing country, our work as legal academics is especially important for the future development and extension of our law, particularly in emerging fields of law. The assistance that I have received from the librarians and other staff members at UNIDROIT has been invaluable to furthering my personal research, and has allowed me the scope to broaden my field of study.

Initially, I had planned to work on a project linked to the relationship between long-term traders and the role that good faith would play in this relationship. However, I changed my topic to bring it in line with my proposed PhD research, which is more in the area of international e-commerce law. Details of my project will be discussed in the last part of this report. During my stay at UNIDROIT, I found many different sources that I would not have had access to otherwise, and was able to complete my PhD proposal, as well as do some substantial work on a research paper to be presented at a conference (Commercial Private International Law in East and Southern Africa) held in Johannesburg in September.

Another aspect of the research scholarship that I particularly appreciated was the opportunity to be exposed to legal minds from all over the world, and to begin to view

issues from these different perspectives. The other researchers at UNIDROIT come from both civil and common law systems, and it was extremely interesting to hold discussions on different private law issues, particularly my own area of study. The connections made during this time are invaluable, and it will hopefully open up the possibility of future meetings and collaboration between us.

The exchange meetings were also a wonderful opportunity to explore areas of the law that I had not previously had much knowledge of. During my short stay at the library, we had the chance to attend exchange meetings held by the Secretary-General of UNIDROIT, Mr Estrella Faria, Dr Keglevic, Mr Brydie-Watson and Prof Veneziano respectively. The Secretary-General's presentation was especially interesting, as it provided us with more insight into the aims and day-to-day operation of UNIDROIT, and afforded us a platform to ask questions about the organisation. I also found Mr Brydie-Watson's presentation regarding the Cape Town Convention very instructive, and learned something new from each exchange meeting. Being able to do research into emerging areas of law was a highlight of my time at UNIDROIT, and I am hopefully leaving with a new appreciation of how other legal systems typically approach topics, and an awareness of how our domestic law influences our views of varying legal issues.

As a lecturer of Private International Law, the fact that I could have the opportunity to work at UNIDROIT (an organisation that I teach my students about) has been invaluable to me, and has definitely had an impact on my work. I will carry this experience with me into my future work at the University of Johannesburg.

*Specific projects*

As mentioned above, I spent my time at UNIDROIT focusing on two separate projects, namely my PhD proposal (intended to be submitted in September) and a conference paper, also to be presented in September.

*1. PhD Proposal*

My proposed PhD topic is "Alternative and online dispute resolution schemes for consumers in Europe and the USA – a model for South African law?". This topic is of particular interest to me due to the recent focus of countries, regions and international organisations on consumer protection, especially in the promotion of trade. The growth of e-commerce and the internet has led to an expansion of cross-border trade, as it has opened up channels for parties in different countries to contract with each other without being bound by issues of distance, cost and time. Although this rise in electronic commerce has been advantageous, allowing businesses to reach a larger audience across the globe, it has also led to the creation of new challenges. A prime example of such a challenge is the question

of cross-border disputes which arise in the electronic environment, and the position of the consumer in these disputes.

There are a number of factors which could make disputes arising from e-commerce more difficult to resolve than the traditional offline disputes. There are issues of distance, applicable law and lack of funds to bring the parties together in the same place. Traditional dispute resolution measures in such an instance (court proceedings and suing parties based on contract) would be time-consuming and complicated, given that parties are not based in the same place. Such proceedings would also be costly, and could take years to resolve. It is thus clear that an alternative method would be more beneficial to the parties involved.

To avoid these issues and to meet the challenges that this new method of commerce creates, there has been a growing recognition that alternative dispute resolution measures would be well suited for resolving disputes that originated online. Although the traditional ADR procedures (arbitration, mediation and negotiation) provide an ideal framework to use in solving offline disputes, there are certain elements of electronic contracts and disputes that are not addressed by the existing rules. This has created the need for a new system which is tailored to address the very specific issues arising from electronic commercial transactions. This system, based on the existing ADR rules, has come to be known as online dispute resolution (ODR). ODR is

> "…a broad term that encompasses many forms of alternative dispute resolution (ADR) that incorporate the use of the internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when practicing in ODR. Rather, they might communicate solely online".[1]

Borrowing heavily from the traditional ADR rules, it is submitted that ODR can be used to resolve disputes on the internet. These types of disputes can arise from contracts concluded through electronic or digital means, or from situations where the entire transaction is conducted online, and the business and consumer have no other contact. The latter types of transactions include online marketplaces such as eBay or etsy.com, where the supplier is usually a company, and the consumer has a relative amount of anonymity as one of many who use the site. It is submitted that ODR can be especially useful in disputes arising from these situations, as the potential for error is large, and there is a large imbalance of power and resources between the consumer and the supplier. However, there are still some weaknesses in the law regulating ODR, as there is no legislation which clearly encompasses all the potential situations. The fragmented nature

[1] American Bar Association ABA Task Force on Electronic Commerce and Alternative Dispute Resolution Task Force, Draft "What is Online Dispute Resolution? A Guide for Consumers" USA 1 March 2002.

of the current law relating to ODR means that there are still many gaps which need to be filled, especially in the South African context.

The issue of a trust relationship between the consumer and the business is of particular interest, especially in light of the imbalance of power between them. For this reason it is important to establish a certain level of trust and faith between them that will regulate all their interactions at each stage of the contract. This differs from the relationship between a business and another business (B2B), where "buyers and sellers are repeat players and have an incentive to participate in good faith."[2] In the business to consumer relationship, it is all too easy for the business to take advantage of the consumer's weaker position. For this reason, it is of the utmost importance that there be some level of trust and good faith between the business and consumer, which some experts believe can be fostered by the use of alternative and online dispute resolution measures to solve any conflict arising out of this relationship.[3] A portion of my investigation will thus be dedicated to exploring this idea of good faith between the parties and the use of ADR and ODR measures as a method of building up this trust relationship.

The focus of my PhD investigation will thus be on the use of ADR and ODR in relation to online consumer contracts, particularly contracts concluded between a business and an individual consumer. These types of contracts are more commonly referred to as B2C contracts, and are potentially the type of contract which would give rise to most unresolved disputes. This is due to a number of factors, including the power imbalance, the large range in value that these claims can represent, and the distance between the parties, both geographically and relationally, as online B2C contracts are often "once-off", and there is not necessarily an existing or continuing business relationship between the parties.

The aim of my study will thus be to investigate the existing ADR and ODR measures, with specific reference to how these measures have been applied to online B2C contracts in other jurisdictions and on an international scale.

The proposed dissertation aims to evaluate the different alternative dispute resolution (ADR) and online dispute resolution (ODR) measures that could be used to solve disputes arising from online consumer contracts. The focus will be on the use of ADR and ODR measures in business to consumer (B2C) relationships. The investigation will centre on the existing models from continental Europe and the United States (including the relevant international legal instruments) with the aim of using those models as a basis for the

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[2] N Gopalsamy *Information Technology and E-Governance* (2009) New Age International 76.

[3] "The existence of trust between individuals makes conflict resolution easier and more effective. This point is obvious to anybody who has been in a conflict. A party who trusts another is likely to believe the other's words, assume that the other will act out of good intentions, and probably look for productive ways to resolve a conflict… The level of trust or distrust in a relationship therefore definitively shapes emergent conflict dynamics…" R.J. Lewicki, "Trust, Trust Development and Trust Repair", in M. Deutsch, E.C. Coleman & E.C. Marcus (eds.), *The Handbook of Conflict Resolution* (2006) Jossey-Bass 110.

potential development of South African law and the law relating to online dispute resolution in the African continent.

*2. Conference paper*

My other project that I have been working on is a paper to be presented at a conference on Commercial Private International Law in East and Southern Africa in September. It is on a similar topic, but takes a broader view, providing a general overview of the development of online dispute resolution on the African continent. The paper is entitled "Online Dispute Resolution: An African Perspective".

As mentioned above, electronic commerce has flourished across the globe, and a growing market is to be found in Africa. According to recent statistics, the number of internet users in Africa has soared, with more and more people becoming participants in the global marketplace. With this unprecedented boom comes an inevitable increase in the number of disputes arising from internet transactions. This naturally requires an efficient and innovative way of addressing these disputes, especially in instances involving consumer transactions. In the USA and the EU much support has been found for the use of online dispute resolution (ODR) measures, based on the traditional alternative dispute resolution measures. The EU has published legislation specifically regulating ODR, and detailing the situations where it would find application. Using these examples as a point of departure, the conference paper will evaluate the suitability of ODR for the African context. The unique challenges presented by electronic commerce on the African continent will be discussed, and the advantages and disadvantages of ODR will be explored. The paper will briefly consider the foreign models and their relevance to the future development of ODR in Africa. Lastly, some recommendations will be made regarding the future growth and implementation of ODR measures in Africa.

*Conclusion*

Being at UNIDROIT for the past four weeks has been extremely beneficial for my research. I had the opportunity to access books regarding cross-border consumer contracts, by authors such as Hill, Tang and Fox. These resources have been invaluable in helping me to construct my research proposal, and my upcoming conference papers.

The library staff's assistance, and the assistance of fellow researchers is much appreciated, and the opportunity to engage with people from different legal values has truly helped to shape my work. I am very grateful for the opportunity afforded me by UNIDROIT, and look forward to extending our relationship in the future, both as an individual and as a member of the University of Johannesburg.

# PROGRAMME DE BOURSES DE RECHERCHE UNIDROIT

**2015**

Sujet de recherche

« Réflexions sur un droit matériel applicable aux titres intermédiés dans l'espace OHADA »

(Séjour du 14 septembre au 30 octobre 2015)

***Cette bourse a été accordée par la "UNIDROIT Foundation***

**DAHODEKOU Coovi Prudence Léonce**
Doctorant en Droit

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**REMERCIEMENTS**

A l'issue de ce séjour de recherches, je me fais le devoir d'exprimer ma profonde gratitude à toutes les personnes qui ont contribué au bon déroulement de mon stage de recherches à UNIDROIT. Je pense :

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**INTRODUCTION**

Du 14 septembre au 30 octobre 2015 j'ai effectué un séjour de recherches à l'Institut International pour l'Unification du Droit Privé (UNIDROIT) situé à Rome (Italie.

Ce séjour a été pour moi l'opportunité d'élargir et de consolider mes connaissances en droit financier. En effet, ce séjour m'a permis de parcourir les notions de marchés financiers, d'appel public l'épargne, d'actions, d'obligations, de titres intermédiés, de sociétés cotées, de marché obligataire etc. Plus particulièrement, les recherches pendant ce séjour m'ont permis de découvrir davantage et d'approprier l'important travail effectué par UNIDROIT sur les titres intermédiés et par la même occasion de posséder les ressources documentaires y afférentes.

Face à la nouveauté de cette thématique dans les marchés financiers, l'engouement de certains milieux académiques à cerner la matière, l'absence de doctrine OHADA sur la question, il s'est avéré important d'esquisser une réflexion qui postule pour la construction d'un droit matériel uniforme sur les titres intermédiés. Ce thème peut être formulé comme : ***« Réflexion sur un droit matériel applicable aux titres intermédiés dans l'espace OHADA »***. Cette entreprise n'est pas étrangère à l'ancien thème revu sous la formulation suivante : ***« Les aspects juridiques des marchés financiers dans l'espace OHADA »***. En réalité, ce dernier englobe le premier. Et, il était envisagé d'y traité la problématique des titres intermédiés dans les marchés financiers africains. Dans tous les cas, le nouveau thème présente toutes les potentialités d'un thème pratique, original, pertinent et très utile pour la doctrine OHADA dans sa contribution à l'assainissement juridique des milieux financiers.

Le présent rapport a pour objectif de donner une description du sujet à travers la présentation des points essentiels et l'exposé des intérêts scientifiques qui sous-tendent la recherche (I). Il a aussi pour objectif d'exposer les avantages divers obtenus et les perspectives de recherches (II).

## I- DESCRIPTION DU SUJET DE RECHERCHES

Dans cette partie du rapport, il sera présenté brièvement les points essentiels de la recherche. Aussi sera-t-il évoqué les intérêts du sujet de recherche.

### A- Présentation des points essentiels de la recherche

La présentation de l'étude envisagée devra embrasser cinq (05) éléments : le contexte de l'étude, la problématique du sujet, la méthodologie envisagée, les hypothèses et les orientations majeures de la thèse.

L'étude envisagée porte sur un environnement juridique et économique en pleine évolution. Il s'agit de l'OHADA avec ses trois marchés financiers : les marchés financiers régionaux de l'UEMOA et de la CEMAC et le marché financier camerounais. En effet, les gouvernements de l'espace OHADA ont pris conscience du rôle que peuvent jouer les marchés financiers dans leur économie. Et pour les accompagner l'OHADA s'est mise dans une perpétuelle initiative de renforcement et de modernisation de son droit des affaires.

Cependant, la stabilité et la vitalité d'un marché financier exigent une réglementation globale du noyau central que sont les instruments financiers. Et sur ce point, des lacunes sont identifiées et méritent d'être corrigées. En effet, premièrement, il revient de constater que le législateur OHADA n'a pas cru devoir donner des clarifications sur des concepts clés du droit financier. Il s'agit entre autres de la notion d'instrument financier, (notion essentielle pour le droit financier). Celle de titre financier ne s'y trouve pas non plus. De telles clarifications n'existent pas dans les réglementations financières des trois marchés que comporte l'espace OHADA. Deuxièmement, il n'existe pas de droit financier uniforme. Même si quelques aspects de droit financier sont identifiés dans l'Acte uniforme révisé portant droit des sociétés commerciales, il se trouve que ce droit financier embryonnaire est noyé dans une concurrence ou contradiction avec les réglementations édictées par les autorités des différents marchés financiers concernés. Il s'agit notamment des règles applicables aux appels publics à l'épargne. Troisièmement, en soutien au deuxième point relevé, il est noté, relativement aux titres financiers, une absence totale de législation uniforme sur les règles matérielles à eux applicables lorsqu'ils sont détenus auprès d'un intermédiaire.

Dans un contexte d'émergence des marchés financiers OHADA, l'internationalisation des transactions financières accompagnée d'une importance grandissante des opérations sur titres, il est indispensable de proposer une réflexion qui incite à la construction d'un droit matériel uniforme sur les titres intermédiés. Tel se présente contexte de l'étude envisagée.

Une réflexion sérieuse sur les titres intermédiés et plus précisément sur le droit matériel à eux applicable dans l'espace OHADA suggère une problématique qui peut être formulée dans les termes suivants : Quelle est la nature juridique des titres intermédiés et des droits qui leur sont incorporés ? Quel est le régime juridique des relations entre le titulaire de compte, l'intermédiaire (ou les intermédiaires) et l'émetteur de titres ? Le droit OHADA des sûretés appréhende-t-il suffisamment les garanties susceptibles de grever les titres intermédiés détenus dans les marchés financiers ? Globalement existe-t-il ou peut-il exister un droit matériel uniforme qui régit la détention, le transfert des titres intermédiés et les garanties pouvant les grever ?

Pour répondre à cette question, il sera adopté dans l'étude, une méthodologie qui oscille entre sociologie juridique et analyse comparée. La sociologie juridique permettra de comprendre les raisons de l'édiction des règles régissant actuellement les marchés financiers de l'espace OHADA et surtout celles portant sur les titres financiers. L'analyse comparée quant à elle, amène à mesurer au regard des pratiques en cours dans les places financières des pays du nord, les possibilités d'une modernisation et surtout d'une uniformisation du droit matériel applicable aux titres intermédiés dans l'espace OHADA.

Cette méthodologie permettra de conduire l'étude en s'appuyant sur des hypothèses claires et précises. En effet, premièrement, les lacunes notionnelles et conceptuelles recensées sont d'une part liées à l'absence d'un droit financier uniforme et d'autre part à la dispersion et la contradiction entre droit OHADA et réglementations UEMOA et CEMAC. Deuxièmement, l'adoption et la pratique d'instruments financiers novateurs sont plombées par le déficit de professionnels au sein des régulateurs et des intervenants des marchés. Troisièmement, l'actuel droit des sûretés OHADA mérite d'être réaménagé pour mieux intégrer les questions de constitution de garanties sur les titres intermédiés, d'opposabilité et de rang des créanciers garantis.

Pour une étude constructive, teintée de critiques et portée par une analyse descriptive et comparée, il serait intéressant de rechercher, de suivre et de saisir les titres intermédiés dans les méandres du droit OHADA et des réglementations des marchés financiers de l'UEMOA, de la CEMAC et du Cameroun (Première partie). Ensuite il faudra reconnaître et résoudre l'urgence de construire un droit matériel OHADA applicable aux titres intermédiés en conformité avec les standards internationaux (Deuxième partie).

### B- Intérêts et Pertinence du sujet

Au regard des hypothèses sus indiquées, l'étude ne manque pas d'intérêts ni de pertinence. En effet, au plan théorique l'étude permettra de mettre en exergue les spécificités des titres intermédiés dans la confrontation qu'ils opèrent entre les notions et

concepts de droit des sociétés, de droit des procédures collectives, de droit des sûretés, de droit des voies d'exécution, de droit communautaire et de droit international privé.

Au plan pratique, vu la place dominante qu'occupent les titres intermédiés dans les transactions financières, la réflexion permettra de proposer des solutions aux professionnels, au législateur OHADA et aux universitaires pour une meilleure appréhension des modalités de détention, de conservation et de mise sous garantie des titres intermédiés.

Ce double intérêt porte la pertinence de l'étude. D'abord, une étude du genre est la première dans l'espace OHADA. Les études précédentes se sont focalisées et de façon très pointue sur les thématiques de régulation, de réglementation des marchés financiers. Ou encore, elles ont plaidé pour la construction d'un droit financier uniforme. Mais, la question des titres intermédiés n'a pas retenu outre mesure une attention particulière de la doctrine OHADA. Ensuite, le contexte international en perpétuel mouvement, l'adoption des instruments juridiques novateurs et très intégrateurs comme la Convention de Genève et celle de La Haye sur les titres sont autant de raisons qui autorisent voire harcèlent à se pencher sur le présent et le futur des marchés financiers de l'OHADA.

## II- AVANTAGES OBTENUS ET LES PERSPECTIVES DE RECHERCHES

Le séjour de recherches a permis d'arriver à une décision. La thèse sera désormais entreprise sur : ***« Réflexion sur un droit matériel applicable aux titres intermédiés dans l'espace OHADA »***. En fait, l'analyse des aspects juridiques relatifs aux titres financiers était vue dans le plan de traitement de l'ancien sujet : ***« Les aspects juridiques des marchés financiers dans l'espace OHADA »***. En plus, l'actuel sujet de thèse paraît plus technique, nouveau (pour l'espace juridique considéré) et très original. Cependant le thème sur : ***« Les aspects juridiques des marchés financiers dans l'espace OHADA »*** fera l'objet d'un article de doctrine. En cette matière l'exercice sera aisé. Les recherches documentaires sur ce dernier thème ont connu une grande évolution. Ainsi, il pourra être puisé dans ce fond documentaire pour la conduite des travaux sur le nouveau sujet de thèse.

S'agissant des ressources documentaires acquises, le séjour a permis d'obtenir de la bibliothèque d'UNIDROIT la consultation (et la copie de quelques pages) d'une dizaine d'ouvrages spécialisés et généraux et d'une centaine d'articles de doctrine sur le droit financier avec une occurrence sur les productions traitant de la question des titres intermédiés. Indépendamment des copies, l'accès illimité à la connexion Internet a permis d'accéder à d'autres moteurs de recherches tels que : Dalloz (test gratuit), lextenso.

S'agissant des perspectives de recherches, elles sont très prometteuses. En effet, loin de s'inscrire dans une vision de sensibilisation sur la Convention de Genève sur les titres de 2009, l'étude envisagée présente des intérêts certains pour la modernisation et pour l'uniformisation de l'arsenal juridique OHADA. Elle sera une première dans l'espace et pourra offrir une grande visibilité sur le droit financier OHADA quoiqu'embryonnaire. Aussi, la réflexion proposée, s'inscrivant dans une méthodologie comparatiste, pourra inciter à une coopération entre unités de recherches et plus précisément à une cotutelle de thèse. Sur ce point, en marge de la rencontre du groupe de travail sur le Guide législatif sur les Principes et de Règles visant à améliorer les transactions sur titres dans les marchés émergents, tenue les 23 et 24 octobre 2015 à UNIDROIT, des échanges très édifiants ont été faits avec deux experts de la matière. Il s'agit du Professeur Luc THEVENOZ de l'Université de Genève (Suisse) et du Professeur Thomas KEIJSER de Radboud University (Nijmegen, Pays-Bas).

**CONCLUSION**

Du 14 septembre au 31 octobre 2016, j'ai bénéficié d'un séjour de recherches très édifiant et très motivant pour la poursuite de mes travaux de thèse. Loin de constituer un moment de détente, ce séjour m'a permis non seulement d'évaluer mes connaissances antérieures mais il m'a permis également de les renforcer par d'autres. Nonobstant les quelques difficultés rencontrées, qui se présentent comme des défis, le séjour de recherches a été l'occasion de cerner la problématique des titres financiers détenus auprès d'un intermédiaire. Il en vaut vraiment la peine d'évoquer et de traiter cette problématique dans le contexte OHADA.

INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

PROGRAMME DE BOURSE DE RECHERCHE 2015

**RAPPORT FINAL**

Sujet de recherche : **L'encadrement juridique de la joint-venture OHADA : étude à la lumière des Principes UNIDROIT 2010**

Période de recherche : 14 septembre au 30 octobre 2015

Par Dr **Karel Osiris Coffi DOGUE**, (LL.D. Montréal)

**Cette bourse a été accordée par la « UNIDROIT Foundation »**

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- Enfin, à tous nos collègues et amis chercheurs d'UNIDROIT de la même période pour les précieux moments d'échanges cordiaux et intellectuels que nous avons pu avoir autour d'un repas où vers la machine à café.

## I- Introduction.

Bien que ce ne soit pas la première fois que nous venions à Rome et même à la Bibliothèque d'UNIDROIT (1er séjour à l'automne 2009 en tant que chercheur libre), du 14 septembre au 30 octobre, nous avons effectué un second séjour de recherche très bénéfique à cette même Bibliothèque d'UNIDROIT comme chercheur boursier. Notre recherche a principalement porté en premier lieu sur l'approfondissement d'un thème nouveau dans l'espace OHADA qui est la joint-venture ou coentreprise. Le séjour nous a permis en même temps de préparer un article de doctrine sur les « Actes uniformes OHADA et l'Agriculture contractuelle » en second lieu. Nous aborderons chacun de ces points, objet de notre séjour dans une première partie avant de mentionner les documents principaux consultés ainsi que les perspectives découlant de notre séjour de recherche.

## II- Objet du séjour

Nous développerons ici les deux sujets sur lesquels nous avons travaillé.

### a. Les joint-ventures OHADA et les Principes UNIDROIT 2010

Sur cette question, alors que l'OHADA a reporté *sine die* l'adoption d'un Acte uniforme sur le droit commun des contrats sur la base d'un avant-projet rédigé par le professeur Marcel FONTAINE, Expert d'UNIDROIT, (Avant-projet qui a fait l'objet de la thèse de doctorat du chercheur et disponible à la Bibliothèque d'UNIDROIT sous le titre « Jalons pour un cadre de référence en droit des contrats OHADA »), le Conseil des Ministres de l'Organisation a instruit le Secrétariat permanent de conduire des études sur la faisabilité de l'harmonisation de certains contrats spécifiques d'affaires au nombre desquels se trouve la ''**joint-venture**'' ou ''**coentreprise**''. Notre séjour nous a permis de confirmer d'abord l'intérêt général qu'il y aurait à harmoniser ce droit spécial des contrats de joint-venture dans l'espace OHADA. Ensuite, l'intérêt particulier qui résiderait dans le choix des Principes UNIDROIT dans leur nouvelle mouture à paraître probablement en 2016. Cette nouvelle mouture, objet d'échanges nourris et constructifs avec le Pr Michael Joachim BONELL intégrera justement la problématique presqu'ignorée antérieurement des contrats à long terme. Nous avons donc anticipé cette évolution des Principes UNIDROIT 2010 et intégré les amendements possibles dans nos commentaires.

Le fruit de ces analyses se trouvent dans le plan entièrement étoffé et envoyé notre superviseur de recherche externe, le Professeur Noël Ahonangnon GBAGUIDI qui y fera des observations avant la rédaction effective de l'ouvrage avant-gardiste à paraître sur la question en droit OHADA. La part contributive significative d'UNIDROIT et de sa bourse ne manquera pas d'être signalée.

### b. Les Actes uniformes OHADA et l'Agriculture contractuelle

Notre séjour nous a également permis de travailler sur le nouveau Guide sur l'agriculture contractuelle UNIDROIT/FAO/FIDA. Nous avons ainsi entamé la rédaction d'un article sur ''L'OHADA et les activités agricoles : Réflexions sur le nouveau Guide sur l'agriculture contractuelle UNIDROIT/FAO/FIDA''.

Il se fait que l'OHADA appréhende les activités agricoles dès qu'elles sont effectuées à titre de profession agricole. Ainsi, il est impérieux que les dispositions impératives de l'OHADA

applicables à l'Agriculture contractuelle soient identifiées afin de connaître le champ d'application effectif possible du Guide UNIDROIT/FAO/FIDA sur l'agriculture contractuelle dans l'espace concerné. Tel est l'objectif de cet article.

Nos recherches préliminaires ont d'ailleurs fait l'objet d'une brève présentation durant une conférence du Groupe des stagiaires et fonctionnaires d'UNIDROIT travaillant sur l'Agriculture contractuelle le jeudi 29 octobre 2015. Ce groupe est dirigé par Mme Frédérique Mestre avec à ses côtés M. Ercole DE VITO pour la Communauté de pratique.

## III- Documents consultés

Les documents consultés portent essentiellement sur notre sujet de recherche principal et pas sur l'agriculture contractuelle. Seuls les principaux ouvrages ont cependant été listés.


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- De LY Filip, « Les clauses de divorce dans les contrats de groupement d'entreprises internationaux », RDAI N°3, 1995, p. 279- 315.
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## III. Avantages effectifs et perspectives

### a. Publications et travaux subséquents

Les avantages principaux de ce séjour sont liés à la publication de travaux sous pu. Les travaux effectués sur la joint venture et l'agriculture contractuelle feront l'objet de deux publications doctrinales qui seront adressées à la Revue de droit uniforme en priorité. L'article sur l'agriculture contractuelle étant le plus abouti pour l'heure, il sera envoyé d'ici fin décembre 2015 pour suivre le processus de relecture interne à la Revue.

L'article sur la joint-venture sera finalisé dès publication des travaux du Groupe de travail d'UNIDROIT sur les contrats à long terme et les Principes UNIDROIT et traitera de cette évolution à la lumière du projet OHADA sur les joint-ventures.

Par ailleurs, nous avons pu finaliser durant notre séjour un article portant sur les contrats commerciaux OHADA (tiré de notre thèse de doctorat amendée) que nous enverrons également à la Revue de droit uniforme dans les semaines à venir dès réception des commentaires de quelques personnes contactées à cet effet.

### b. Suivi institutionnel OHADA

En guise de perspectives également et pour ouvrir de possibles relations entre les deux institutions, notre séjour fera l'objet d'un rapport officiel adressé au Secrétaire permanent de l'OHADA ainsi qu'au Directeur Général de l'ERSUMA, institution pour laquelle nous travaillons.

Enfin, à titre personnel, nous comptons mettre sur pied une équipe multidisciplinaire d'universitaires et praticiens (4 à 5 personnes) pour travailler sur un terme concret en lien avec l'agriculture contractuelle. Nous prendrons les contacts en ce sens et ferons un retour à Mme Mestre.

## IV. Conclusion

En tout, notre séjour a été on ne peut plus bénéfique. Les lignes qui précèdent permettent d'en juger. Qu'UNIDROIT en soit remercié et que Vive le droit privé uniforme !

# Non-Assignment Clauses

## IN TURKISH LAW AND COMPARATIVE LAW

ACADEMIC REPORT

UNIDROIT RESEARCH SCHOLARSHIP PROGRAMME

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*I would like to thank Ms. Frédérique Mestre especially for organizing the exchange meetings on current studies in UNIDROIT and truly encouraging the participants to share different perspectives of various legal systems. During these meetings, I had chance to zoom out of my research focus for a short time and to broaden my legal perspective and knowledge. Presentations of and references to the conventions and model laws of UNIDROIT drove my curiosity to a level that I began studying the Cape Town Convention and MAC Protocol and researching their effects on recent leasing regulation in Turkey, going further my research agenda.*

*I would like to thank Ms. Bettina Maxion who was always amazingly helpful and kind in solving any little problem of mine during my orientation to the library and the city of Rome. The information and guidance shared by Ms. Maxion regarding the use of library enabled me to begin my research on the second day of my arrival. I also thank Mr. Reza Zardoshtian for his kindness and understanding in delivering my numerous book requests.*

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Burcu Erbayraktar

## I. Scope and Methodology of the Research

During my stay in Rome, I researched international regulations and conventions on assignment of claims. Although my doctoral thesis is about the concept of non-assignment clause in general, during my stay, my research focus was legal consequence of non-assignment clauses in accordance with international conventions.

I worked on UNIDROIT International Factoring Convention, UNCITRAL Convention on Assignment of Receivables, PECL, Draft Common Frame of Reference and UNIDROIT Principles. Based on the common trend adobted by all of these regulations towards marketability of receivables, there have been recent developments in various national laws. Germany, Austria, France could be shown as major examples. My research over international aspect relatively enlarges towards certain domestic regulations in order to illustrate these developments.

The fundamental development both in international trade and in domestic situations is unambiguous and unanimous: The interest of the assignor at the marketability of the monetary claim is given a high priority, so ban-violating assignment of monetary claims shall be regarded effective also against the debtor. In contrast, the interest of the debtor at making payment to a specific person is rated as subordinate[1]. Non-assignment clauses exclusively serve the interests of the debtor, however prevent the creditor from using the claims for financing transactions if the applicable law applicable awards absolute effectiveness of these clauses.

In my research, I have noticed that both proponents and opponents of the non-assignment clauses refer to the principle of contractual freedom to support their points of view. Proponents suggests that right of the debtor to exclude assignment of the claims which will be directed against him could be designed as outflow of contractual freedom. Equally conclusive is the arguement of the opponent party citing that the freedom of the creditor to dispose its asset would be restricted in an inadmissible manner due to absolute effectiveness of non-assignment clauses[2]. One party sees assignment prohibitions, as long as they produce absolute effect, an infringement against the fundamental freedoms of the EC Treaty at European level[3]. However, the other opposes this opinion noting that limitation of the possibility of agreeing on prohibition of assignment is a justifiable need of intervention in the freedom of contract[4].

Considering the use of freedom of contract by both sides, I prefer to present all of the international and domestic regulations under two groups:

1. Absolute limitation of freedom of contract between assignor and assignee in favour of debtor: This category includes regulations where a non-assingment clause results in absolute restriction of freedom to contract between assignor and assignee. The rationale behind these regulations is protection of debtor. In other words, private interest of the debtor is favored interest in these regulations.

2. Limitation of freedom of contract between creditor and debtor in favor of the effectiveness of assignment: This catergory reflects the current international trend. Freedom of contract between creditor and debtor is restricted generally in three different levels and types in order to validate the ban infringing assignment. The common characteristics of these regulations is that: They all aim to increase marketability of receivables and to facilitate receivables financing. Therefore, public interest in marketability of receivables is found to be superior to the private interests of debtor in these regulations.

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[1] Rudolf, 298.

[2] The content of Art. 6 was highly controversial during the negotiations of the Convention. Both the proponents and the opponents of assignment prohibitions relied on the principle of contractual freedom in the negotiations. See: Unidroit, Acts and Proceedings II, Doc. CONF.7/C.1/S.R.16 (1988), S. 264 ff. S. Unidroit, Acts and Proceedings I, Doc. CONF.7/C.1/W. P.43 (1988), S. 251.

[3] Wilmowsky, 386.

[4] Reinien, 554.

## II. Absolute Limitation of Freedom of Contract between Assignor and Assignee in favour of Debtor

The regulatory model of the absolute effect of non-assignment clauses restricts the marketability of receivables at the strongest level. According to this construction, the prohibition of assignment affects *erga omnes*, i.e. for both between the debtor, the assignor and the assignee as well as towards (further) third parties. The contractual prohibition of assignment prevents the effectiveness of the assignment; it is in other words a negative prerequisite of the assignment. Ban-infringing assignment is absolutely ineffective. The Turkish Code of Obligations, the Swiss Civil Code, the German Civil Code, the Austrian Civil Code and the Dutch Nieuw Civil Code can be allocated under this category. Thus, Germany and Austria, which had awarded contractual prohibition of assignment originally an absolute effect such as Switzerland, relativized this position in 1994 and 2005 through legislative reforms. HGB of Germany and ABGB of Austria normalize now the effectiveness of ban-infringing assignment of monetary claims originating from bilateral trade transactions[5].

1. Turkey / Switzerland

According to Art.183 para.2 of Turkish Code of Obligations and Art. 164 para. 1 Swiss Code of Obligations, assignment of receivables should not to conflict with *"law, agreement or nature of the legal relationship"*. The assignment of a claim can be excluded therefore through a corresponding agreement between creditor and debtor *(the pactum de non cedendo)*. This agreement does not require any particular form and it can be made before or after the establishment of the claim. The effectiveness of the non-assignment clause is based on the principle of law of obligations, freedom of contract[6]: If the parties are free to establish a claim anyway, then they are also free to establish a claim whose effect is limited in a sense that its transfer can be difficult or impossible. The pactum de non cedendo affects according to the Turkish and Swiss Jurisprudence and Doctrine absolutely: The ban-infringing assignment is ineffective[7]. It remains both in the relationship between the assignor and the assignee, as well as against the debtor or other third parties without effect[8]. The lack of the transferability will in principle not be cured by the good faith of the assignee. The current solution of the Turkish and Swiss Code of Obligations favored therefore clearly the interests of the debtor.

2. Germany (BGB)

§ 399 BGB determines that a claim can not be transferred, *"if such a transfer is excluded by an agreement with the obligor "*. The ban-infringing assignment is ineffective according to jurisprudence and predominant German doctrine, where the ineffectiveness can be asserted not only by the debtor, but by anyone[9], unless it conflicts with the principle of good pursuant to § 242 BGB[10]. The non-assignment clause takes the marketability of the claim[11]. Those consequently remains in the assets of assignor and can be seized by its creditors[12]. German law provides, however, an important exception to the principle of the absolute effect of a contractual prohibition of assignment: For assignments of particular monetary claims arising from a two-sided commercial transaction, pactum de non cedendo only has relative effect according to § 354a HGB.

3. Austria (Civil Transactions)

Until the introduction of § 1396a ABGB in 2005, Austrian law knew no statutory regulation of assignment ban. According to the jurisprudence of the Supreme Court (Oberstes Gerichtshof), contractual transfer prohibitions based on the principle of private autonomy were admissible, and

[5] § 354a HGB and § 1396a ABGB.

[6] Von Tuhr/Escher (Fn. 9), S. 347.

[7] SPIRIG (Fn, 18), Art. 164, Rz. 158; CR CO l-PROBST, Art. 164, Rz. 66.

[8] Von Tuhr/Escher (Fn. 9), S. 347.

[9] BGH NJW 78, 813; 88,1210; MüKo BGB-ROTH, § 399, Rz. 45; Palandt-GRÜNEBERG, § 399, Rz. 12.

[10] BGH NJW 71,1311.

[11] BGH NJW 64, 243.

[12] BGH NJW 88,1210; 90,109.

impacted also against third parties[13]. This provision provides, however, similar to § 354a HGB, an exception for monetary claims *"between entrepreneurs and arising from entrepreneurial transactions*": Assignment prohibitions for such claims do not hinder the effectiveness of a ban-infringing assignment. They act between the assignor and the debtor but at least with a contractual nature.

4. Netherlands

The Nieuw Civil Code (NBW) regulates the assignment law in third (general part of property law) and in the sixth book (general part of the law of obligations) which entered into force on 1 January 1992. Due to its young age, codification of assignment law in NBW is particularly interesting from the aspect of Comparative Law, since it is assumed that the European legal developments of the 20th century have found reflectection in this new Civil Code. Contrary to this background, it is suprising that according to Art. 3:83 para. 2 NBW transferability of receivables by agreement between creditors and debtors can be excluded and this exclusion according to the jurisprudence of the Hoge Raad, the Supreme Court of the Netherlands, is absolutely effective[14]. The Court justified that conclusion based on the fact that a contractual prohibition of assignment not only lead to a restriction of the power of disposal of the assignor, but also it is determining the legal quality of the claim, and these restrict the transferability[15]. The effect of the non-assignment clause according to NBW therefore correspond to the codifications of Germany, Austria and Switzerland which were created in the 19th century or early 20th century, since the NBW includes no exception for monetary claims from bilateral commercial transactions.

## III. The International Trend: Limitation of Freedom of Contract between Creditor and Debtor in favor of the Effectiveness of Assignment

### A. Relative Limitation: Relative Ineffectiveness of Assignment

Relative ineffectiveness of assignment refers to an intermediate level of intervention in freedom of contract between creditor and debtor. Here, the freedom of contract between the debtor and the creditor appears to be limited due to the fact that debtor and creditor are legally not allowed to agree on an absolutely inalienable receivable.

The common characteristic of this approach is as follows: In case of a breach of non-assignment clause, only the debtor can successfully rely on the ineffectiveness of the assignment, but not the third parties such as the creditors of the assignor. In other words, the assignment is effective from the aspect of third parties. The regulations adopting this approach focus on debtor's interests, and value the interests of the debtor above the interest of the third parties with regards to ineffectiveness of the assignment.

#### The Principles of European Contract Law

Provisions of Chapter 11 of PECL do not merely refer to the assignment of monetary claims, but rather for example, the right on supply of a service may also constitute the subject of an assignment agreement.

If the assignor violates a non-assignment clause, then his assignment is ineffective towards the debtor in principle. The debtor can make payment to the assignor with discharging effect. In the relationship between the assignor and the assignee, the assignment is however, effective and entitles

[13] OGH 16.1.1984, JBI. 1984, (311), 322.

[14] HR 17.1.2003, C01/162HR, <http://zoeken.rechtspraak.nl>

[15] HR 17.1.2003, C01/162HR (Fn. 34), Nr. 7.

the assignee against the assignor, he can reclaim which he would have received in fulfillment of the assigned receivable by the debtor (Art.11:203 PECL).

However, the PECL provided three exceptions to the principle:

The assignment is also effective against the debtor, if the debtor approves the assignment (Art. 11: 301, paragraph 1 (a) PECL) or the assignee neither knew nor had to know of the contractual assignment prohibition (Art. 11:. 301 para 1 (b) PECL). The decisive time for the lack of knowledge (good faith) is not specified by this provision. For existing claims, it comes into consideration the point of time of the agreement on the assignment, and that in future the emergence of the claims. Without valid grounds, the assignee is not obligated to research whether there is a possible assignment restriction[16].

The third exception applies only to monetary claims and moreover only claims on future monetary payment (Art. 11: 301, paragraph 1 (c) PECL.). An assignment of future monetary claims is always effective against the debtor, i.e. even if the assignee knew the contractual transfer restrictions (or bans). A ban-infringing assignment of existing claims on monetary payment can therefore only with the consent of the debtor or under the condition that the assignee neither knew nor ought to have known the contractual ban or limitation, shall be (also) effective against the debtor.

If one of the exceptions are met, so the debtor can make a debt-discharging performance upon the proper notification of the assignment (Article 11: 303 PECL) only towards the assignee. The liability of the assignor for the breach of the contractual assignment restriction remains unaffected by the effectiveness of the assignment against the debtor (Article 11: 301 para.2 PECL).

**1. Draft Common Frame of Reference**

Also the latest international regulation on law of obligation provides an intermediate solution. Under the principle of III.-5: 108 para. 1 of the Draft Common Frame of Reference (DCFR) a contractual prohibition of assignment does not affect the assignability of a receivable. If the assignor violates a contractual prohibition of assignment, the debtor may, however, continue to make a debt-discharging performance to the assignor (111.-5: 108 para 2 (a) DCFR). However, a performance towards the assignee also makes debt-discharging impact. The debtor can therefore get rid of the liability by choosing to perform either to his previous creditor (the assignor) or to the current claim holder (the assignee)[17].

111.-5. 108 para.3 DCFR relativized the principle of para. 1 and 2 to the extent that the ban-infringing assignment shall be also against the debtor fully effective, if he approves the assignment (a), or if the debtor has caused the assignee groundedly to believe that assignability of the claim was not contractually limited (b). Finally, an anti-assignment clause does not prevent the cession if a monetary claim arising from the supply of goods or the provision of services shall be assigned (c). Under these conditions, a non-assignment clause can not restrict the transferability of a claim.

111.-5. 108 para.4 DCFR reserves however the claim of the debtor on damages caused by the breach of the prohibition of assignment explicitly - regardless of whether the assignment is relatively ineffective (paragraph 1 and 2.) or effective (para. 3).

3. Germany (German Commercial Code)

Until 1994, the German law of obligations knew only the absolute effect of the contractual prohibition of assignment pursuant to § 399 BGB. The cause for introduction of § 354 HGB was the fact that wholesalers were largely prohibiting assignment of claims arising from provision of goods and services largely, and thereby refinancing of small and medium enterprises were getting difficult. This hindered especially credit collateralization by means of assignment of claims and the factoring business significantly. § 354a para. 1 HGB confronts with this problem. According to this norm, assignment of monetary claims arising from a bilateral commercial transaction are effective despite

[16] Eidenmüller, 471; Rudolf, 296.

[17] Sigman / Kieninger, s.27.

the existence of a non-assignment clause. However, the ban has at least the effect that the debtor himself can perform to the assignor with knowledge of the assignment with discharging effect. Just like pursuant to 111.-5: 108 para 2 (a) DCFR, debtor can liberate by making payment to the recent or to the new creditor according to his choice. However, § 354 para. 1 HGB does not apply to the assignment of receivables under a loan agreement, whose creditors are certain credit institutions[18].

### B. Partial Limitation: Non-Assignment as a Negative Contractual Obligation

A third category of regulations ascribes the non-assignment clause purely obligatory effect between the parties, ie, between the debtor and the assignor. A ban-infringing assignment is effective according to this construction therefore also against the debtor. Debtor entitles however compensation claims against the assignor, because it has violated a contractual secondary obligation, which is not to assign the claim.

#### 1. UNIDROIT Convention on International Factoring (UCIF)

The UCIF regulates the legal consequences of a ban-infringing assignment in Art.6. This provision, which is assessed as the centerpiece of UCIF, includes three paragraphs[19]: Para. 1 UCIF lays down the principle, Para. 2 normalizes the exception to the principle, and Para. 3 refers to the eventual claims of the debtor against the supplier due to the infringing assignment.

*a. The principle according to Art. 6 para. 1 UCIF:* As a principle determines Art.6 para.1 UCIF that the assignment of receivables by the supplier to the factor, despite an agreement between the supplier and the debtor prohibiting such an assignment, is effective. According to the UCIF, passes therefore the claim effectively to the factor despite of a contractual prohibition of assignment; the factor becomes the new receivable owner. The subrogation affects not only the relationship between the supplier and the factor, but also against the debtor[20]. Since the factor is the new receivable holder also against the debtor, this can be charged with discharging effect only to the factor (Art.8 UCIF); the objections under Art.9 UCIF can be raised against the factor as well.

Art.6 para. 1 UCIF, however, focuses on determination of the effectiveness of an infringing assignment between the assignor and the assignee as well as against the debtor. Questions of priority, i.e. whether the assignee may rely on the assignment also against third parties, are principally not regulated[21].

*b. The exception provided in Art.6 para.2 UCIF:* Art.6 para.2 UCIF determines an exception to the principle of Art.6 para.1. Provided that debtor is established in a Contracting State which declared a reservation under Art. 18 UCIF, the infringing assignment is effective towards him. The reservation declaration under Article 18 has to be observed by all states, not only by the respective reservation States[22].

*c. Supplier's liability for denying anti-assignment:* Under Art.6 para.3 UCIF, the effective assignment of a receivable to the factor in accordance with Art.6 para.1 UCIF has no effect on the contractual obligation of the supplier against the debtor, as well as, on the liability of the supplier to the debtor[23]. In other words, the effectiveness of a ban-infringing assignment does not eliminate the breach of duty and the resulting legal consequences. A damage claim of the debtor against the supplier

[18] Kieninger, Art.6 FactÜ, Rn.7-21.

[19] UNIDROIT 1983, Study LVIII - Doc. 16, Rn. 34.

[20] Häusler, 185.

[21] Rudolf, 285.

[22] Rebmann, 610.

[23] UNIDROIT, Acts and Proceedings I, CONF. 7/C.I/W.P. 47, 253; UNIDROIT, Acts and Proceedings II, CONF. 7/C.l/S.R. 17, 269; CONF. 7/C.l/S.R. 20, 297.

and its conditions thereof can be grounded however only on the basic contract (or on a separate agreement on the prohibition of assignment) relevant domestic law.

*d. Subsequent assignments:* According to the provision of Art. 11 para. 1 (a) UCIF, Art. 6 UCIF applies even in the case of a subsequent assignment. A non-assignment clause included in the basic contract cannot prevent effectiveness of the first or the subsequent assignment. So that the claim passes from the factor to the subsequent assignee (Art. 6 para. 1 in connection with Art. 11 para. 2 UCIF). However, if the factoring agreement contains a provision, according to which factor is prohibited from doing a subsequent assignment, so UCIF does not apply for the further assignment of a claim which is contrary to this agreement (Art. 12 UCIF).

Art. 12 UCIF recognizes thus the prohibition of subsequent assignment with effect both for the supplier and the factor as well as with effect for the subsequent factor. Art. 11 UCIF is therefore insignificant in case of a ban-infringing further assignment by the factor. The application of UCIF will be excluded through a prohibition of assignment in factoring agreement for all subsequent assignments. On the other hand remains the application of UCIF over the factoring contract between the supplier and the factor- due to the clear wording of Art. 12 UCIF untouched[24].

## 2. UNCITRAL Convention on the Assignment of Receivables in International Trade (CARIT)

*a. The principle according to Art.9 Abs.1 CARIT*: Assignment of a claim is effective regardless of an agreement which in a way limits the right of the assignor to assign his claim. Regarding the effectiveness of an assignment in accordance with Art.9 Abs.1 CARIT, the debtor cannot successfully invoke the non-assignment agreement (which is between him and the original creditor) against the assignee.After notification of the assignment is carried out, a debt-discharging payment can only be made to the assignee. Regarding the debt liberating payment, the debtor of a receivable which is attached with an assignment restriction shall not be assessed differently from a debtor who has not concluded any corresponding agreement with his creditor[25].

Since Art.9 CARIT represents a provision, which affect the rights and obligations of the debtor, it is only significant for the debtor whether it has been at the time of conclusion of the basic contract located in a Contracting State or whether at this time the law applicable to the basic contract is the law of a Contracting State. Otherwise leaves the CARIT the rights and obligations of the debtor unaffected (Art.1 Abs.3 CARIT).

The problem of whether the right of the assignee over the receivable has priority over the right of a competing claimant, is determined fundamentally based on the law of the State in which the assignor is located (Art.22 CARIT)[26].

*b. The factual scope of Art.9 para.1 and para.2:* The provision of Art.9 para.1 of CARIT, however, is only applicable under the condition that the assigned claim is a one type of the claims enumerated in Art.9 para.3 (a-d) CARIT. Art.9 para.3 CARIT therefore constitutes a restriction of the factual scope of Art.9 paragraph 1 (and Abs.2) CARIT.

Paragraph 1 and 2 of Art.9 CARIT should be primarily applied for receivables arising from commercial and service transactions ("*trade receivables* ") but not for claims arising from financial contracts or financial service contracts ("*financial receivables*"). Regulatory purpose of Art.9 para.3 CARIT is to ensure that receivables arising from financial services, if they are outside of the scope of CARIT, are not subject to the provision of Art.9 CARIT which regulates the legal consequences of assignment of receivables infringing a non-assignment clause. The reason of the restriction of Art.9 paragraph 1 and 2 CARIT on certain receivables listed in Art.9 para.3 CARIT, inter alia, is to avoid

[24] Häusler, 328.

[25] Rudolf, 265.

[26] "*With the exception of matters that are settled elsewhere in this Convention and subject to articles 23 and 24, the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant."*

a contradiction of CARIT with existing and recognized commercial practices including the ones which are not enumerated in Art.9 para.3 CARIT.

*c.* *Subsequent assignments:* The provision of paragraph 1 of article 9 CARIT applies to non-assignment clauses between the assignor and the debtor (whether in basic agreement or in a separate contract) as well as between the assignor and the assignee[27].

*d. Consumer Receivables:* Art.9 CARIT also apply to assignments of receivables which originate from an agreement in which the debtor party is a consumer. If the assignor assigns its existing claim violating a non-assignment clause agreed with the consumer, this assignment shall be subject to the scope of article 9, paragraph 1 CARIT[28] in principle, which means that the assignment shall be also effective in relation to the debtor. However, if there is a provision existing in the national law applicable to the basic contract (s. Art.29 CARIT), which is in favor of the debtor (as consumers), and according to which an assignment violating a contractual prohibition (or a restriction) is *per se* or towards the debtor ineffective, then this national consumer protection provision has priority over Art.9 Abs.1 CARIT with respect to Art.4 Abs.4 CARIT.

*e. Liability of the Assignor:* Art.9 Abs.2, Art.9 CARIT leaves the obligations of the assignor of such an agreement (the contractual obligation, the obligation not to assign) or the liability of the assignor for breach of such an agreement untouched.

The liability of the assignor for breach of the contractual restriction (or. the ban) however has no effect on the legal position of the assignee. In order to protect the assignee thus determined Art.9 Abs.2 sentence 1 CARIT that the debtor can not cancel the main contract solely because of this breach of contract. On the other hand, Art.9 Abs.2 sentence 1 CARIT leaves other rights of the debtor resulting from the assignor's infringement unaffected[29].If the debtor could dissolve the main contract solely on the ground of an infringing assignment, the rule of Art.9 Abs.1 CARIT would (effectiveness of the assignment) lose their meaning[30].

*f. Reservation under Art.40 CARIT:* Convention permits the Contracting States to declare a reservation to Art.9 CARIT. Following Art.40 sentence I CARIT, a State at any time can make a declaration, whether or to what extent Art.9 CARIT is not binding on him, insofar as the debtor is a central or local government or a subunit of it, or for a public purpose established legal entity, which at the conclusion of the basic contract has its branch in the State which proposed this declaration.

## 3. UNIDROIT Principles of International Commercial Contracts

In the regulation of contractual assignment restrictions or prohibitions, UNIDROIT Principles draws a distinction between whether a right to payment of a sum of money or a right to other performance shall be assigned. A ban-infringing assignment of a right to other performance is effective, if the assignee neither knew nor ought to have known (Art 9.1.9 Abs.2 UNIDROIT Principles).

For the integrity of the assignee, this provision cuts off at the time of assignment. This is obviously meant the agreement on the transfer. This is for the assignment of existing claims appropriate, nevertheless seems as little suitable for infringing assignment of future claims, since in this time, the rights, which form the subject of the assignment, do not yet exist. To assess the integrity of the assignee, appears for the future claims therefore, the time of the emergence of the claim more appropriate.

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[27] Art.9 Abs.1 CARIT: "*... any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee…"* Report of Working Group, UN Doc.A/CN.9/420, Art.15 Abs.4; Report of Working Group, UN Doc. A/CN.9/456, Rn.104 and 106.

[28] UN Doc. A/CN.9/489, Rn.103.

[29] Expressed in Secretary Commentar, UN Doc. A/CN.9/470, Rn.102.

[30] With respect to other arguments as to why the debtor should not be entitled to terminate the contract, see 33. Report on the UNCITRAL session, UN. Doc. A / 55/17, Rn.142.

However, if the assignee knew the agreement or he would have to know, so the assignment of the right is ineffective not only against the debtor, but also in relation between assignor – assignee. The assignor has not fulfilled his assurance regarding the eligibility of the right for assignment (s. Art. 9.1.15 UNIDROIT Principles lit. b) and is liable to the assignee due to this infringement.

A ban-infringing assignment of a right on payment of a sum of money is always effective (Art 9.1.9 para 1 UNIDROIT Principles). This applies irrespective of whether it concerns an existing or a future monetary claim, and whether the assignee has the knowledge of the legal transaction restriction or prohibition. The debtor may free himself from his liability after receipt of the notice of assignment only through payment to the assignee. In all cases, in which the ban-infringing assignment is effective against the debtor, the effectiveness of the assignment does not affect the liability of the assignor for its infringement (s Chapter 4, Section 4 UNIDROIT Principles).

**4. Austria (commercial transactions)**

A "monetary demand between entrepreneurs from entrepreneurial transactions" may be assigned effectively according to § 1396a, para.1 ABGB despite a contractual assignment prohibition. Once the (ban-infringing) assignment and the assignee are both known by the debtor, he can in principle no longer with discharging effect make payment to the assignor. After all, the rights of the debtor against the assignor due to the breach of contract remains unaffected.

**5. The Reform Proposal for the Swiss Code of Obligations**

Under the research project, *"Swiss Code of Obligations and European Contract Law*", it has been proposed that anti-assignment clause only create i.e. purely contractual effect between the debtor and the assignor[31].

According to this proposal, a contractual of assignment shall not be capable of inhibiting the marketability of receivables, which corresponds the interests of the assignor and of the assignee. The interests of the debtor would be protected by that debtor can demand from the assignor compensation of the damages resulting from the ban-infringing assignment.

Because of its simplicity, this construction is also found to be preferable to the model of the relative effect of the transfer prohibition. This opinion criticizes the relative ineffectiveness of assignment as complicating the legal situation: The splitting of the effectiveness of the assignment is unnecessary, because an adequate level of debtor protection could be also reached by granting of compensation claims against contract-infringing assignor. In addition, debtor is free to secure his interest of making payment only to a specific person by an additional agreement on a contractual penalty.

**2. Absolute Limitation: The Absolute Ineffectiveness of Non-Assignment Clause**

Some regulations adopt an extreme position by annulling non-assignment clauses. In this case, a non-assignment clause does not oblige the assignor even contractually to refrain from the assignment. Accordingly, the debtor can assert no compensation claim in the event of a ban-infringing assignment against the assignor.

**1. United States of America (Uniform Commercial Code)**

The Uniform Commercial Code of United States nullifies non-assignment clauses regarding certain type of claims. Thus, the assignment of claims on monetary payment can be not effectively excluded according to §9-406 (d) UCC. This provision does not state only the effectiveness of the ban-infringing assignment, but also denies that debtor has entitled to claim damages for breach of the pactum de non cedendo. The prohibition of assignment is not effective therefore even in the relationship between debtor and assignor[32]. It is - in other words - void.

[31] Girsberger/Hermann, s.335-336.

[32] «[...] the clause [sc. das pactum de non cedendo] is of no effect whatsoever» (Official Comment zu § 9-406, N. 5).

### 3. France (Code de commerce)

After a revision of the law in 2001, French Code de commerce regulates nullity of contractual assignment prohibitions for certain claims[33]. A contractual exclusion of transferability therefore deploys according to Code de commerce basically no effect of any kind. This applies to all contracts which are drawn up by companies (as a debtor of the assigned receivables). However assignment prohibitions, which are agreed in favor of private persons or by members of the liberal professions are not covered.

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[33] According to this regulation: "*Sont les nuls clauses ou contrats prévoyant pour un producteur, un commerçant, un industriel ou une personne au immatriculée répertoire des métiers, la possibilité [...] d'interdire au cocontractant la cession à des tiers of créances qu'il détient sur lui* ".

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**Report on Visiting Research Scholarship**

## Scholarship sponsored by the UK Foundation

### Background

This report is contains brief overview of research undertaken from 1st of March to 30th of April at UNIDROIT library with financial support provided by UNIDROIT. The research has been conducted in furthering PhD dissertation in the field of secured transactions law. The title of the dissertation is "*New Legal Framework for Secured Transactions in Ethiopia Based on UCC Article 9, German and Hungarian Secured Transactions Laws"*

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**Objective of the Research Project in General**

Today, it is well recognized that modern secured transactions law is an important aspect of economic development across the globe because secured transactions law enhances access to credit and ultimately contributes to economic development and improvement of welfare. Ethiopia is a country where access to credit through secured transactions law is highly cumbersome. Ethiopian secured transactions law is characterized by fragmented security interest, i.e. security devices scattered across the civil code and other statutes, the limited number of nominated security devices ill-suited to modern commerce, traditional paper based authentication and registration system as well as exclusive reliance on court administered enforcement of security rights.

The goal of my research is to provide a new legal framework for secured transaction in Ethiopia The research, besides analyzing the Ethiopian law analyzes the secured transaction laws from three jurisdictions, namely the United States, Hungary, and Germany and addresses part of English law and jurisprudence on company charge.

Based on objective criteria of predictability, efficiency, comprehensiveness and transplantability, I argue that Ethiopia should adopt UCC Article 9 centered secured transactions law with certain readjustments to its socio-economic conditions. Therefore, the functional approach to and unitary concept of security interests, notice filing as a method of public notification, enforcement system with self-help repossession and the proper protection to possible abuses of debtor's rights and cautiously designed link between secured transactions law and other branches of laws is the normative framework under which Ethiopian secured transactions law should be re-designed.

To match the idiosyncrasies of Ethiopian economy and legal system with the proposed legal framework, the research also analyzes such aspects of secured transactions law that have been bypassed international reform projects so far. This will in particular include analysis of the role of receivers in the enforcement of floating securities-professionals that do not exist in Ethiopia. Finally, given the key role of agriculture in Ethiopia, warehouse receipt financing and special legal regime for agricultural financing is also focused up on.

As the purpose of the research is to revolutionize the entire secured transactions law of Ethiopia, certain economic/business activities such as agriculture, financing of infrastructure including rail way, the development of leasing and leasing industry, factoring, warehouse financing with focus on field warehousing and many others are given particular attention and are naturally beneficiaries of this work.

**The Research Period at UNIDROIT**

**The UNIDROIT Legal Instruments and my Research Project/Ethiopian Secured Transactions Law Reform**

At the risk of stating the obvious and boring someone who knows what the UNIDROIT does, it should be necessary to highlight that UNIDROIT engages in modernizing, harmonizing and coordinating private law and in particular commercial law including secured transactions law among states. Of particular interest to me among other things is UNIDROIT convention on taking international interests in mobile equipment (*hereafter* "the Cape Town Convention") and the Aircraft Protocol and the Rail Rolling Stock Protocol.

Ethiopia being one of the least developing countries has shown significant advance in economic development for the past decade or so. However, Ethiopia has still rudimentary secured transactions law (enacted in 1960 based on French legal tradition). Although France has reformed its secured transactions law, Ethiopia did not take such a step. Several reasons could be offered, among which the most significant to me is the ignorance of the Ethiopian government and policy makers to see the importance of reformed secured transactions law. On the positive side, Ethiopia is a state party to the Cape Town convention and the aircraft protocol. The obvious reason explaining Ethiopia's extra-ordinarily encouraging step in signing and ratifying the Cape Town convention and the aircraft protocol being that Ethiopian has one of the strongest airlines industry in Africa and perhaps in the world, and hence requiring developed system of international secured financing, such a step is not accompanied by parallel overall secured transactions law reform. Therefore, the acceptance of the Cape Town convention in Ethiopia is an evidence among others that it is recognized that Ethiopian secured transactions law should be reformed. The gap between the Cape Town framework and the domestic legal framework in terms of substantive provisions also deserves special attention.

UNIDROIT has also worked on what is referred to as "the rail rolling stock" protocol to the Cape Town convention. Ethiopia is has not signed this protocol yet. Recently, Ethiopia just built modern light railway providing public transportation service in the capital city- Addis Ababa. One of the most chronic problems domestic and cross-border transportation face, is lack of railway services. The lousily built light rail way service in the capital city is insufficient due to lack of financing. Hence, Ethiopia should ratify and implement the rail rolling stock protocol and take advantage of international financing in this area.

UNIDROIT is recently working on the MAC protocol to the Cape Town convention that is to govern taking and registering international security interest in high value agricultural and

mining equipment. Ethiopian being agricultural country should certainly be among the first in the signatories of the MAC protocol with serious intentions.

Parallel to implementing the Cape Town convention and the additional protocols, Ethiopia should bring its secured transactions law to reasonably comparable level. The reason is that the Cape Town and the additional protocols are industry specific and do not necessarily cover general secured financing. Even within agricultural financing for instance, the MAC protocol may not apply to security interest in assets below certain value. Hence, the reform of overall secured transactions law of Ethiopia should take place. However, it must be emphasized that the Cape Town framework and reformed secured transactions law are necessarily supplementary to each and both should co-exist; having one regime without the other might potentially undermine success in secured transactions law reform.

Hence, one of the things that I have been able to do during my research period at UNIDROIT is to investigate the link between the general secured transactions law in Ethiopia and the Cape Town convention and the additional protocols. The outcome of this part of my research leads to addition of sections in my dissertation dedicated to the Cape Town Framework and Ethiopian secured transactions law. Among other things, this is aimed at substantiating the claim that Ethiopian secured transactions law should be reformed, the Cape Town convention and the aircraft protocol has rules that are traditionally perceived as incompatible with civil law tradition in general and Ethiopian legal tradition in particular, such as self-help repossession, that Ethiopia did not opt out from and hence should be introduced in the national secured transactions law regime, Ethiopia should accept the rail rolling stock protocol and the forthcoming MAC protocol and other related substantive issues. As a country that is striving to attract foreign investors for capital inflow, Ethiopia must adhere to the Cape Town framework without prejudice to reforming its national secured transactions system.

**The MAC Protocol Working Group Meeting**

Besides library research, I had the privilege to observe the second meeting of the working group on MAC protocol held from 8th of April to 10 of April 2015. Observing this meeting has been extremely enriching for my research and my career. I was able to observe top experts in the field, drafting secured transactions law, struggling to put theories and norms in practical terms. For someone working on secured transactions law, no other experience could have been as enriching as this. The MAC protocol, it is obviously a work in progress. However, this is the single most instrument attempting to facilitate international financing in the agricultural and mining sector, the former of which is particularly important for Ethiopian economy. Hence, it is inevitable to address the MAC protocol in my dissertation.

It should be emphasized again that since Ethiopia is agricultural country, I was keenly interested in the discussion of the working group on the draft protocol. I believe that this is one of the legal instruments that might positively impact economies in developing countries more than many other international legal instruments. Besides observing the meeting, I had the chance to talk to some scholars and experts in the field and exchange ideas regarding my research project.

**Books/Literature**

To someone familiar with secured transactions law, it is well known that there is dearth of literature on German secured transactions law in English language. Central European University has one of the biggest libraries in Central and Eastern Europe. Nevertheless, there is insufficiency of German law literature in English. Working at UNIDROIT library helped me tackle this problem. I found more material on German secured transactions law in English language at UNIDROIT than in CEU library.

**Expression of Gratitude**

I should express my sincere gratitude to the UK Foundation for International Uniform law which generously supported my stay in Rome by providing financial support. I would not have had the opportunity to be part of such a unique experience without the financial support I have obtained.

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# Report über den Forschungsaufenthalt als Stipendiat bei UNIDROIT vorgelegt von

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**(Rom, 14.01.– 03.03.2015)**

# Georgisches Privatrecht und Rechtspraxis im Spiegel „UNIDROIT Prinzipien"

Während meines Aufenthalts am Internationalen Instituts für die Vereinheitlichung des Privatrechts (UNIDROIT) in Rom, habe ich die Grundregeln der Internationalen Handelsverträge (vom 1994) grundsätzlich erarbeitet, und bin zu dem Schluss gekommen, dass es für Georgien vernünftiger wäre, sich bei der Reform des nationalen Zivilrechts an nichtstaatlichem Recht zu orientieren. Die Grundregeln der Internationalen Handelsverträge (PICC) nehmen für sich in Anspruch, dass sie als Regelwerke bei der Rechtsreform inter alia als Modell für nationale Gesetzgeber dienen können. In der PICC-Präambel, in welcher von den Zielen dieses Regelwerks die Rede ist, wird dies in Abs. 6 mit folgenden Worten festgehalten: „They may serve as a model for national and international legislators". Genau von dieser Option muss der georgische Gesetzgeber Gebrauch machen. Seit ihrem Erscheinen haben die PICC einigen Gesetzgebern als Modell gedient. Im soeben erschienenen ersten akademischen Kommentar zu den PICC sind Russland, China, Estland und Litauen als prominenteste Beispiele dieser Entwicklung genannt. Diese Tatsache spiegelt die Tatsache wieder, dass

sich in einer mittlerweile globalisierten Welt auch die georgische Gesellschaft stark verändert hat. Als wissenschaftlichem Mitarbeiter steht mir an, der georgischen Rechtspolitik Ratschläge zu erteilen: der erste Vorschlag wäre derjenige, dass der georgische Gesetzgeber globale Harmonisierungs- und Rechtsangleichungsinitiativen regionalen Initiativen gegenüber bevorzugen muss.

Aus der Kurzanalyse des georgischen Zivilgesetzbuch ergibt sich, dass die Idee der Expertengruppe für die Erarbeitung G-ZGB (georgische Zivilgesetzbuch), das deutsche BGB in das G-ZGB so weit wie möglich zu übernehmen, nicht pragmatisch gedacht war. Jedoch wird auch klar, dass die Übernahme *en bloc* gemacht wurde: Bestimmungen des deutschen BGB wurden an georgischen Verhältnisse nicht angepasst. und dementsprechend könnte auch nicht im G-ZGB  zerstören sowie mit georgischen Komponenten vermischen und durch sie ergänzen.

In meiner Arbeit wird die Frage der Rezeption vom deutschen BGB im georgischen Recht und der damit verbundenen Transformation georgischen Vertragsrechts im Spiegel der „Unidroit Prinzipien" näher untersucht. Die Analyse des Rezeptionsprozesses wird zu diesem Zweck in zwei Probleme unterteilt: 1) Die Probleme des Gesetzestextes („law in the books") und 2) die Probleme der Rechtsauslegung- und Anwendung dieses gesetzten Rechts („law in action"). Mit dieser Aufteilung wird versucht, einen der größten Problembereiche des Rechtsreformprozesses in den Ländern des ehemaligen Sowjetblocks aufzuzeigen, nämlich das Grosse Risiko der Diskrepanz zwischen dem Gesetzestext und der Auslegung und Anwendung des Rechts in der Rechtswirklichkeit. Dieses Risiko ist in Ländern wie Georgien deshalb von einer so Grossen

Bedeutung, weil mit der Rechtsreform auch eine Reform der Rechtskultur (und damit auch der Auslegungs- und Anwendungskultur des Rechts) angestrebt wird. Diese lässt sich nicht so einfach und mechanisch abändern wie Gesetzestexte. Mit anderen Worten: Auch ein sehr moderner, fortschrittlicher Gesetzestext ist keine Garantie für eine entsprechende Praxis seiner Auslegung und Anwendung.

Die Vereinheitlichung der Gesetzestexte ist nur ein erster, allerdings ein sehr wichtiger Schritt der Rechtsreform. Daraus folgt, dass die Rezeption eines fremden Rechts eine passende Methodologie für dessen Auslegung verlangt. Da diese Methodologie in Georgien bisher fehlt, wird eines der Ziele meiner wissenschaftlicher Untersuchung sein, eine solche zu entwerfen.

Bei der Neukodifikation des georgischen Vertragsrechts, und insbesondere dessen allgemeinen Teils, wollte man zwei wichtige Ziele erreichen. Das erste und wichtige Ziel war die Modernisierung und die Anpassung des Vertragsrechts an die geänderten Lebens- und Marktverhältnisse. Das zweite Ziel bestand in der Harmonisierung des Vertragsrechts mit den Ergebnissen der internationalen und europäischen Arbeiten im Bereich der Angleichung des Rechts. Das zweite Ziel steht mit dem ersten in einem engen Zusammenhang. Die Ergebnisse der internationalen Harmonisierungsbestrebungen werden nämlich oft auch als Ausdruck modernster Regulierungsstandards gesehen. Die Umsetzung dieser Standards auf nationaler Ebene wie auch der „Anschluss" des georgischen Rechtssystems an diesen globalen „pool" des rechtsvergleichenden Wissens kann als untrennbaren Teil der ganzen Modernisierungsbestrebungen angesehen werden. Nach Jahren der

Geschlossenheit wäre ein solcher Gesichtspunkt sehr sinnvoll.
Als Professor an der georgischen Universität für Privatrecht würde ich die georgische Rechtspolitik in Frage stellen. Der Grund dafür ist, dass die Orientierung Georgiens an dem Rechtssystem eines einzigen Mitgliedstaates sich in Zukunft als problematisch erweisen könnte. Zwar wird Deutschland als größter Mitgliedstaat mit einer hochentwickelten Rechtswissenschaft stets einen gewissen Einfluss auf die Entwicklung des europäischen Rechts haben, doch spiegelt seine Rechtsordnung die Ideenvielfalt des europäischen Rechts nicht in voller Breite wider. Beispielsweise zeigt der Vorschlag für ein Gemeinsames Europäische Kaufrecht eine deutliche Tendenz zur Fokussierung auf Verbrauchergeschäfte, die im deutschen Kaufrecht nicht in gleicher Weise spürbar ist. Ich möchte darauf hinweisen, dass ein Land außerhalb der Europäischen Union, das sich auf Dauer am deutschen Recht orientiert, entsprechende Entwicklungen erst mit einer gewissen Verspätung zur Kenntnis nehmen kann, wenn sie nämlich im deutschen Recht ihren Niederschlag gefunden haben.

Meiner Ansicht nach sollte die georgische Rechtswissenschaft im Rahmen ihrer Aufgaben, nämlich der wissenschaftlichen Durchdringung des georgischen Rechts und der Ausbildung des wissenschaftlichen Nachwuchses, ihren Blick auch auf die europäischen Entwicklungen richten. Diese Entwicklungen sind in deutscher und englischer Sprache gut dokumentiert; gerade die deutsche Rechtswissenschaft nimmt intensiv an den europäischen Debatten teil. Dies geschieht freilich nicht oder nur in geringem Umfang in den Lehrbüchern, Kommentaren und Handbüchern, sondern in einer expandierenden neuartigen Literatur von Zeitschriften und Tagungsbänden. Wenn sich die georgische Wissenschaft

in diese Diskussionen einbringt, wird sie am ehesten eine autonome Entwicklung des georgischen Zivilrechts fördern können, wie sie 15 Jahre nach der Kodifikation angezeigt ist.

Die hier in Frage stehende Reform des georgischen Rechts findet nicht in einem Vakuum dekontextualisiert statt. Das Verständnis der Risiken, die den ganzen Transformations- bzw. Rezeptionsprozess begleiten, ist für den Erfolg des ganzen georgischen Rechtsreformprojekts von immenser Bedeutung. Diese Risiken sind eng mit dem Erbe des sowjetischen Rechts verbunden, welches die georgische Rechtskultur bis heute beeinflusst. Sie sind nur dann zielgerichtet und systematisch verwaltbar, wenn man sie klar identifiziert. Aus diesem Grund würde ich Hauptmerkmale des sowjetischen Rechts kurz vorstellen.

## Erbe der sowjetischen Rechtstradition

Das sowjetische Rechtssystem wurde vom Verwaltungsrecht und die Regulierung durch die verwaltungsrechtliche Methode dominiert. Diese Regulierungsphilosophie hat das ganze Recht und das ganze gesellschaftliche Leben stark geprägt. Sie lässt sich mit ein paar Maximen grob zusammenfassen. Die erste davon lautet: „Erlaubt ist nur das, was explizit erlaubt ist". Die zweite verdeutlicht, was mit der ersten genau gemeint ist: „Verboten ist alles, was nicht explizit erlaubt ist". Eine auf solchen Grundsätzen basierende Regulierung passte vielleicht zu einer zentral geplanten Wirtschaft eines totalitären Staates. Selbstverständlich erwies sie sich aber als untauglich für ein nach marktwirtschaftlichen Grundsätzen geführtes Handelsleben. Diese Eigenartigkeit des sowjetischen Rechts war auch einer der wichtigsten Gründe, weshalb man

in Georgien die Reform des Zivil-, Handels- und Wirtschaftsrechts als besonders dringend betrachtete. Die damalige Regierung verstand, dass das geerbte sowjetische ZGB nicht dazu geignet war, als Wirtschaftsverfassung der neu entstehenden Marktwirtschaft zu fungieren.

## GEORGISCHES PRIVATRECHT IM HISTORISCHCHEN KONTEXT

Nach der Auflösung der Sowjetunion im Jahre 1991 hat Georgien seine staatliche Unabhängigkeit wieder erlangt. Es begann ein langwieriger Transformationsprozess von der zentralen Planwirtschaft zur Marktwirtschaft. Unabhängigen Georgiens wurde das sowjetische Recht vererbt, welches jedoch den Bedürfnissen der freien Marktwirtschaft nicht entsprach. Mit dem politischen Entscheid, das Wirtschaftssystem Georgiens zu reformieren, realisierte man zugleich, dass dieses System ohne entsprechende Anpassungen des Rechtssystems, insbesondere des Privat- und Wirtschaftsrechts, nicht effizient funktionieren würde. Aus diesem Grund hat man praktisch zum gleichen Zeitpunkt den Reformprozess des Rechtssystems gestartet.

Das neue Zivilgesetzbuch Georgiens (im Folgenden: GZGB) wurde am 26. Juni 1997 verabschiedet. [1] Ein modernes Zivilgesetzbuch eines unabhängigen Georgiens, hatte es bis zu jenem Jahr nicht gegeben. Obwohl Georgien in seiner Geschichte eine bedeutende Rechtskultur entwickelte, konnte das Land nicht ungehindert an den europäischen Kodifikationsprozessen teilnehmen.[2]

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[1] Parlamentis uzkebebi. Sakanonmdeblo damateba (PU), 1997, Nr. 31.

[2] Ausführlich: Lado Chanturia, Das neue Zivilgesetbuch Georgiens: Verhältnis zum deutschen Bürgerlichen Gesetzbuch. In: Aufbruch nach Europa. 75 Jahre Max-Planck-Institut für Privatrecht.

Dennoch ist die Tätigkeit des Königs Wachtang IV. bemerkenswert: Der bis 1997 letzte und umfassendste Versuch, das georgische Recht zu kodifizieren, ist mit seinem Namen verbunden.

Die Veröffentlichung seines Kodex erfolgte am 15. Februar 1723. Der Text stellt überwiegend eine Sammlung bestehender Gesetze dar. Er besteht aus sieben verschiedenen Kapiteln und umfasst die mosaischen, griechischen und armenischen Gesetze, die Gesetze des Katholikos sowie die Gesetzessammlung des Wachtang selbst. Es verdient hervorgehoben zu werden, dass dieser Kodex auch nach dem Anschluss Georgiens an Russland zu  Anfang des 19. Jahrhunderts bis zum Ende der 60er Jahre des 19. Jahrhunderts in Russland fortgabt.

Da Georgien während des 19. Jahrhunderts ein Teil des russischen Reiches war, soll hier kurz erwähnt werden, wie die Kodifikation des Zivilrechts in Russland erfolgte. Bei der Entwicklung der neuen Kodifikationen hatte auch Russland zu jener Zeit kein Glück, auch zu Beginn des 20. Jahrhunderts gelang es in Russland nicht , ein Zivilgesetzbuch zu verabschieden, obwohl ein Entwurf schon vor dem ersten Krieg vorlag. Was Russland bis zur Revolution nicht glückte, haben erstaunlicherweise die Bolschewisten nach ihrem Sieg im Jahre 1922 durchgesetzt: Am 31. Oktober 1922 wurde das Zivilgesetzbuch der Russischen Sozialistischen Föderativen Sowjetrepublik verabschiedet. Ein knappes Jahr später, am 1. September 1923, übernahm Georgien das russische Zivilgesetzbuch von 1922 mit einigen Änderungen im Erbrecht. Die dreijährige staatliche Unabhängigkeit Georgiens von 1918 bis 1921 hatte nicht ausgereicht, um ein eigenständiges Zivilgesetzbuch zu erarbeiten und verabschieden zu

können.
Die letzte Kodifikation des sowjetischen Zivilrechts fand Anfang der 60er Jahre statt. Auf dieser Grundlage haben alle Unionsrepubliken, darunter auch Georgien, eigene Gesetzbücher verabschiedet. Die kurz vor dem Zusammenbruch der Sowjetunion erarbeiteten, reformorientierten Grundlagen der Zivilgesetzgebung sind nicht mehr durchgesetzt worden.

Im Jahre 1991, unmittelbar nach der Wiederherstellung der georgischen staatlichen Unabhängigkeit Georgiens, wurde die Frage der Verabschiedung eines neuen Zivilgesetzbuches auf die Tagesordnung gesetzt. Im selben Jahr beschloss die georgische Regierung, eine Kommission zur Ausarbeitung des neuen Zivilgesetzbuches zu bilden. Die Kommission bestand aus

Rechtswissenschaftlern und Rechtspraktikern und wurde von Professor Sergo Jorbenadze geleitet.
Der Staatsstreich Ende 1991, der Sturz des Präsidenten und der darauf folgende Bürgerkrieg (1992-1994) stellten die Kommission vor große Hindernisse. Trotz dieser Schwierigkeiten haben ihre Mitglieder die Arbeit nicht aufgegeben. Seit Anfang 1993 begann die Zusammenarbeit mit den deutschen Kollegen, unter der Leitung von Professor Rolf Knieper von der Universität Bremen.

Im Dezember 1995 wurde der von der Kommission erarbeitete Entwurf des Zivilgesetzbuches dem Justizminister vorgelegt. Im Sommer 1996 stellte der Justizminister den Entwurf dem Präsidenten von Georgien vor. Der Präsident hat daraufhin den Entwurf dem Parlament vorgeschlagen. Er wurde im Juni 1996 in erster Lesung angenommen und ein Jahr später,

am 26. Juni 1997, als das erste Zivilgesetzbuch in der Geschichte des unabhängigen Georgien vom Parlament einstimmig verabschiedet.

Das System des georgischen Zivilgesetzbuches entspricht dem System des Pandekten rechts.

**Es** hat einen allgemeinen Teil, der die für das ganze Privatrecht maßgebenden Regeln enthält.
**Im** ganzen orientiert sich das georgische Zivilgesetzbuch am deutschen Bürgerlichen Gesetzbuch, berücksichtigt aber auch moderne Entwicklungen des Privatrechts.

Mit wenigen Ausnahmen entspricht der Allgemeine Teil des georgischen Zivilgesetzbuchs dem allgemeinen Teil des Deutschen Bürgerlichen Gesetzbuches. Das erste Kapitel ist dem Personenrecht gewidmet und besteht aus zwei Abschnitten: Natürliche Personen (Art. 11-23) und juristische Personen (Art. 24 – 49). Von den Juristischen Personen des Privatrechts sind im Zivilgesetzbuch nur die Vereine und Stiftungen geregelt. Die Vorschriften über kommerzielle juristische Personen enthält das Gesetz über die gewerblichen Unternehmer, worauf Art. 29 des georgischen Zivilgesetzbuches lediglich hinweist. Die Regeln über die Juristischen Personen des öffentliches Rechts sind im gleichnamigen Gesetz festgelegt, [3] so das Zivilgesetzbuch sich auf einige wenige Bestimmungen beschränken kann, wie z. B.: „Juristische Personen des öffentlichen Rechts beteiligen sich an den zivilrechtlichen Verhältnissen wie diejenigen des Privatrechts"(Art.24 Abs.3 GZGB).

[3] Sakartvelos Sakanonmdeblo macne 1999, Nr. 20, Art.101.

Das Zivilgesetzbuch legt einen numerus clausus der juristischen Personen des Privatrechts fest. Juristische Personen, deren Zweck eine gewerbliche Tätigkeit ist, sind in Form einer Gesellschaft mit Solidarhaftung, einer Kommanditgesellschaft, einer Gesellschaft mit beschränkter Haftung einer Aktiengesellschaft, einer Kommanditgesellschaft, und einer Genossenschaft zu betreiben.[4] Juristische Personen, deren Zweck eine nichtgewerbliche Tätigkeit ist, können als Vereine oder Stiftungen bestehen.[5] Das ist das Ergebnis der Erfahrung, dass das Prinzip der freien Gründung juristischen Personen beliebiger Art, das in den ersten Jahren nach der Auflösung der Sowjetunion in Georgien galt, zu einem Chaos in der Wirtschaft und zur Unsicherheit von Gläubigern geführt hat.

## REZEPTION ZENTRALER, DIE GESAMTEN GRUNDREGELN PRÄGENDER GRUNDSÄTZE

Die „UNIDROIT Prinzipien" als Regelwerke sind auf bestimmten grundlegenden Ideen bzw. Grundprinzipien („basic underlying ideas") aufgebaut. Bonell bezeichnet diese Grundprinzipien im Zusammenhang mit den PICC als „basic ideas underlying the PICC". Folgende, die gesamten Grundregeln prägende Grundsätze zählen dazu:

1) Vertragsfreiheit (freedom of contract), 2) Offenheit gegenüber Gebräuchen und Gepflogenheiten (openess to usages), favor contractus, 4) Treu und Glauben und redlicher Geschäftsverkehr ( observance of good faith and fair dealing in international trade), 5) materielle und prozedurale Unfairness-Kontrolle des Vertragsinhalts

[4] Art.2.1 des georgischen Gesetzes über die gewerblichen Unternehmer.
[5] Art. 30 Abs1 S. 1 des georgischen Zivilgesetzbuches.

sowie des Prozesses des Zustandekommens des Vertrages (policing against unfairness).

Diese Grundprinzipien spielen bei den PICC eine zentrale Rolle. Nach meiner Meinung genau auf diesen Prinzipien muss georgisches Vertragsrecht aufgebaut werden.

## DIE „UNIDROIT PRINZIPIEN" ALS MODELL FÜR DIE ERGÄNZUNG UND AUSLEGUNG DES GEORGISCHEN VERTRAGSRECHTS

Die PICC-Präambel sieht vor das die PICC für die Auslegung und Ergänzung der Instrumente des internationalen Einheitsrechts benutzt werden können. Überdies können die PICC als Modell für nationale und internationale Gesetzgeber dienen (vgl. Präambel Abs. 6; Abs. 7 in der PICC-Version von 2004.) Die Grundregeln können jedoch auch Bedeutung erlangen, wo der Vertrag einem bestimmten nationalen Recht unterliegt. Das ist der Fall, wo immer es besonders schwierig, wenn nicht sogar unmöglich wird, die einschlägige Regel dieses nationalen Rechts im Hinblick auf eine bestimmte Frage festzustellen, eine Lösung jedoch in den Grundregeln gefunden werden kann. Die Gründe für eine solche Schwierigkeit liegen im Allgemeinen in dem besonderen Charakter der Rechtsquellen und/oder den Kosten des Zugangs zu ihnen.

Ein Rückgriff auf die Grundregeln als Ersatz für das eigentlich maßgebende nationale Recht muss natürlich als ultima ratio betrachtet werden; andererseits kann ein Rückgriff nicht nur im Fall absoluter Unmöglichkeit, die einschlägige Regel des anwendbaren Rechts festzustellen, gerechtfertigt sein, sondern auch dann, wenn die

erforderlichen Nachforschungen unverhältnismäßige Aufwendungen und/oder Kosten verursachen würden. Gegenwärtig ist es in solchen Fällen gängige Gerichtspraxis, die *lex fori anzuwenden.* Ein Rückgriff auf die Grundregeln hätte den Vorteil, die Anwendung eines Rechts zu vermeiden, welches in meisten Fällen einer der Parteien vertrauter sein wird als der anderen.

Im Hinblick auf ihre immanenten Vorzüge können die Grundregeln zusätzlich auch nationalen und internationalen Gesetzgebern als ein Modell für die Ausarbeitung von Gesetzen auf dem Gebiet des allgemeinen Vertragsrechts oder hinsichtlich spezieller Arten von Geschäften dienen. Auf nationaler Ebene können die Grundregeln besonders für diejenigen Länder wie zum Beispiel Georgien, nützlich sein, denen entwickelte Regeln über Verträge fehlen, und die beabsichtigen, Ihr Recht an internationale Standards anzupassen, zumindest hinsichtlich wirtschaftlicher Beziehungen mit dem Ausland.
Lassen Sie mich deshalb Schließen mit den besten Wünschen für eine selbstbewusste Fortentwicklung des georgischen Rechts im Lichte der Europäisierung unserer Disziplin.

# Research report

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## 1. Rationale for research at UNIDROIT

It has been an immense pleasure to return to UNIDROIT for further research, after the first time spent as an independent researcher in September 2014. Thanks to the financial support of the UNIDROIT Foundation I could continue my research on topics and issues which the Institute stands about at the forefront: worldwide private law harmonization. Research here has helped me establishing an umbrella framework for the unification and harmonization of laws in general and on specific issues and the challenges posed by the nature of the process and the great number of actors involved.

## 2. Doctoral thesis

I am pursuing my doctoral studies in law at the University of Hamburg since November 2012. My doctoral thesis endeavours to offer arguments from the field of social psychology in understanding the shortcomings to individuals' certainties in general and (un)certainties in law in particular, and based on these shortcomings, the arguments that harmonisation is the optimal way for reducing law uncertainties, and what could be the most optimal method of law harmonization which most avoids and addresses them.

The final aim is to contribute to the debate of private law harmonization in Europe and will argue that the most optimal area of law harmonization is the harmonization of procedure and procedural law. This model of harmonization should also evoke the idea of justice, as the other integral component of a rule of law. Legal certainty should be a metric for a whole concept of rule of law and also bring closer these two ideals of law.

Procedure first and procedural law second should be the targets for law harmonization and unification in Europe, and UNIDROIT has done a considerable work in this regard: the ALI-UNIDROIT Principles on Transnational Civil Procedure and the recent ELI-UNIDROT project on the European rules of civil procedure. These have been the main pillars of research at UNIDROIT.

## 3. Objectives at UNIDROIT (planned and achieved):

The thread has been understanding the common core and better law in all the principles, as well as understanding the points of convergences in scholars and other people involved thinking. A great comparative work has been done by analogy with the UNIDROIT principles for the unification and harmonization of International Commercial Law. The aim was to understand the philosophy behind the need for further harmonisation and unification, which appears to be the one in other areas: avoiding uncertainties stemming

from the increase in legal relationships of people from different cultures, including legal culture, the law technicalities, as well as law proliferation.

Further on, my research focused on:

- The harmonization of the terminology used in the principles and the accompanying challenges;
- The impact of the roman law on harmonization and unification of the law and the lessons drawn by the legal scholars today;
- The model-clauses.

During the stay at the Institute, I also had the opportunity to hold constructive discussions and talks with professionals and peer colleagues of procedure law, on my thesis arguments and the latest developments. This whole process helped me reconstructing the whole thesis and putting things further into prospective.

I had the immense pleasure to attend the lecture delivered by Mr José Angelo Estrella Faria, the Secretary General of the Institute, on the work and the future objectives and projects of the Institute. I got precious hints on different angles at approaching legal certainty. I also had a very fruitful meeting with Prof. Anna Veneziano which I very much thank for the valuable time and insights, as I have appreciated her exercise on model-clause and the principles on ICL. The talks with Ms Frédérique Mestre were also of great benefit.

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The research was made possible thanks to the great and numerous sources of information found in the library of the Institute, as follows:


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## 5. Follow-up and acknowledgment

The time spent at UNDROIT was a period of further reflection, of constructing and deconstructing arguments, of thinking out loud and latently, in the structural process of knowledge building and thesis writing. It has been a time of cross-cutting my entire research work. At the end of this completing experience, I have a holistic view of my thesis and the remaining time will be dedicated to its finalization and brining all the pieces together.

Harmonization as a concept *per se* and applied in different parts of private law is one of the main pillars of concentration for my research after my PhD as well. My long-term goal is to work, among a few other things, in the area of civil and civil procedure law as well as the (EU) private international law. Albania has recently upgraded to the candidate country status and prepares for a difficult process of approximating the law with the EU acquis, including the procedures laws and on the EU private international law, and I want to be among those involved but who brings the voice of the expert in the areas concerned.

Last but not the least, I wish to conclude this report by emphasizing the side of impact which is not only professional. For harmonization to succeed, getting to know the cultures is fundamental. I have been given this chance many times in my life thankfully, and this is why I feel lucky to have established a stand on law harmonization in Europe and beyond.

## 6. Special thanks

My special thanks extend to the UNIDROIT Foundation for the financial support. It is always very important, not only for the opportunity to be in a renowned institute and surrounded by experience, but also for the trust on my project and its outcome.

Last but not least I also wish to express my special gratitude to the Library personnel for their professional and amiable behaviour: Ms. Bettina Maxion, Ms. Laura Tikanvaara, Mr. Reza Zardoshtian, and Mr. Patricia Lemaire.

**Thank you!**

**UNIDROIT RESEARCH SCHOLARSHIP PROGRAMME 2015**

**Scholarship Final Report**

**for the International Institute for the Unification of Private Law**

**Rome, Italy**

**Research subject: "Legal rules and procedures on the transfer of ownership of agricultural lands in the European post - communist countries"**

**(A comparative legal analysis of Property Law)**

**Stoyan Panayotov Ivanov**

**Assistant Professor at the University of Sofia "Sveti Kliment Ohridski"**

**Bulgaria**

**Research period from 21st of September to 23rd of November 2015**

**Rome, 23 November 2015**

**Scholarship sponsored by the UNIDROIT Foundation**

***Acknowledgements***

This report is the result of my research in the International Institute for the Unification of Private Law (UNIDROIT) from 21st September to 23th of November of 2015, carried under the scholarship program provided by UNIDROIT. I had the precious and rare occasion to grant the research scholarship for 8 weeks and to have the chance to come to Unidroit in Rome to personally carry out my studies in the Eternal City on the interesting and significant topic "Legal rules and procedures on the transfer of ownership of agricultural lands in the post-communist European countries". Doing research in UNIDROIT as well as living in Rome was a fruitful and unforgettable time for my life. I also met a lot of very well educated and important people, for future partnerships in my academic career people. I made great contacts and I was lucky to create new friendships. However, it would not have been possible for me to successfully complete my research without the kindest support and help of many individuals and organizations, especially the University of Sofia, where I teach, and Professor Malina Novkirishka, my supervisor in Bulgaria. I would like to extend my sincere thanks and the deepest gratitude to all of them. Foremostly, I would like to express my sincere gratitude to the Scholarship Committee of UNIDROIT for providing me with the valuable opportunity. And sincere thanks is owed to Ms.Frédérique Mestre, Senior Officer, Internship and Scholarship Programme Coordinator at UNIDROIT, for providing me with such a wonderful and useful opportunity to come and to do my research at the institution. I want to express my thanks to Professor Anna Veneziano, Deputy Secretary-General, for her advice and help and pleasant communication. I also convey my sincere thanks and gratitude to Ms Laura Tikanvaara for her assistance and help to me since the first step of my application until the time that I had to go back to my country. I know that she spent lots of effort making my life in Rome comfortable and I will not forget her kindness and care to me. I would also want to thank Ms Bettina

Maxion and Mr Reza Zardoshtian- the librarians, who supported me in finding and using all the sources of documents in the library and were also ready and available for help and advice every time as well. I want to salute them for the entire organization of this huge library, their personal hospitality and responsibility in their success to ensure the good library environment. Also they both are very important factors in creating good relations between the scholars working in Unidroit and I can only congratulate them for their initiatives and results.

Furthermore, I want to thank all members of the UNIDROIT staff who were so kind and helpful to me during my stay at the Institute.

## I. Introduction

Ownership is a key issue in international and local trade. Every sale contract is affected by specific provisions regarding transfer of the title and other proprietary rights of land. Although domestic rules may be familiar to local businesses, practical difficulties and legal uncertainty occurs when foreign companies or citizens try to ascertain the legal rules and procedures of the Property Law of another country. This potential source of misunderstanding between parties involved in an international transaction is due to the absence of international legal instruments establishing principles that are accepted throughout the world and especially in Europe. In the absence of harmonized and equal rules on transfer of ownership of lands, I decided to conduct this research and to make a comparative legal analysis addressed to all interested parties in purchasing of agricultural land in Eastern Europe, describing the actual legal framework there.

My country of origin - Bulgaria - is an illustrious example of a country that has had a lot of problems and issues regarding the regulations and the legal procedures regarding the alienation of agrarian lands in the period following the fall of the communist regime in 1989 until nowadays. However, Bulgaria is not alone. The situation was and somewhere still is in almost all of the East-European countries. The legislation related to land restitution was changed often, which caused confusion and difficulties with enforcement. The legislators sought rectitude and, to this end, changed the law and re-drew boundaries bringing insecure land tenure. Disputes and conflicts contaminated the restitution process, and for every dispute the landowner was not sure in his land rights. Similarly, most people were unaware that legislation had been amended, which led to the fact that, in most cases, even a successful challenge to a land division plan would not have any effect on titles held by the landowners covered by the plan. Slowly, the legislation was perfected so that land owners could have secure title to their lands and could unmolestedly alienate them and, during the last couple of years. Even these transactions are available for foreigners- not citizens of the European Union - with small exceptions. In general, all the former socialist countries of Eastern Europe started the transition to market economy in the late 1980's and early 1990's the hard way. Therefore, I decided to conduct research to provide an overview of the comparative legal aspects of this transition, and chose the topic **"**Legal rules and procedures on the transfer of ownership of agricultural lands in the European post - communist countries". This is actually the transition of state ownership of agricultural land and the attending transition to a free land market for agricultural land. In the Eastern European countries, the laceration with the former communist system of collective State lands has been much more intense than in other areas of Civil law. Then one can still hesitate if the Eastern European States are still a group linked by some common particularities in land law or whether the return to their old traditions from the period before the WWII and to their original family of the legislations influenced of the Roman law tradition and Code Napoleon[FM1]. Of course I tried to focus mainly on the legal facets, the legislative solutions and remedies, the changes and the innovations of the Civil procedure

Codes and Laws and the Land Codes and Laws, the implementation of the Public Notary as an important autonomous subject in land transactions realizing *iurisdictio voluntaria* , and my scope was to make a comparison between the procedures and to outline the similarities and the differences of the actual Property Law regulating selling and buying lands in these countries. So when this idea came I was sure that the best place in Europe with a lot of resources and experts for consultation to accomplish my project was undoubtedly UNIDROIT.

## II. Scope and Purpose of the research

The purpose of this study is to describe the existing land law regarding the transactions of agrarian lands in the Eastern European countries.

Countries covered by this research are the following:

- Bulgaria, Romania- EU members;
- Croatia, Slovenia- former Yugoslavian Republics, EU Members;
- Serbia, Bosnia and Herzegovina, Macedonia, Montenegro- former Yugoslavian Republics, EU accession countries;
- Albania;
- Poland, Czech Republic, Slovakia, Hungary;
- Lithuania, Latvia, Estonia- former Soviet union republics, EU members;
- Russia, Ukraine, Belarus, Moldavia;

- I hope that I can prove that there are some common and even identic structures in the different legal systems of these countries.

- However, I also try to show how the several parts of every national system (land registration, land law and interests in land, sale of land, enforcement procedures) can be comprehended only jointly as building blocks, each of which is necessary for the respective national system.

This research does not have scope to make recommendations de *lege ferenda*. Despite the existing necessity of harmonization of the land law in Europe, which can only facilitate the citizens (at least in the EU countries), there are still many valid reasons why they have not been made yet:

- *Lex rei sitae* – this is presumably the oldest and most universally admitted principle of international private law. It is easily understandable by everybody that a different set of land law rules and procedures might refer to a land located in another state.

- The functioning of land law as actual law can only be understood if it is observed in its legal environment, that is in the context of land registration on the one hand, enforcement procedures of the Civil procedure codes on the other hand- and the national law of obligations regulating the transfer of ownership of lands in between.

- Land law is static. It was mostly harmonized in the different national legislations mostly in the 19th century. However, in many countries there are still cases in which the previous particular law applies to interests granted under the old regime.

- Finally, all of the examined in my research state legislation belong to the system of the Code Napoleon, so it is easier to understand the basic concepts nevertheless the different procedures or taxes applied sometimes in the distinguished countries.

## III. Research Contents

- **Land privatization process**- In the Communist countries a phenomenon occurred that is unique and unusual in its dimensions and characteristics for the whole human history. All the agricultural lands were nationalized (except for Poland and Yugoslavia) and taken from its original owners and cultivated in collective big state farms. So all the peasants were deprived from their traditional occupation. As a result the majority of this population left their own villages and went to seek a job in the towns and cities. Therefore, after the fall of the regime, the States had to return the ownership of the lands to their original owners (or in the most of the cases to their heirs) from whom they were taken against their will. This process required a lot of time and caused a lot of legal cases, plenty of different systems of redistribution of the lands or of compensation with money for its cost were introduced. These legal solutions were quite different in almost all of the countries in question, bar one: the price of the land in question was incredibly low, the people had lost the habit of cultivating it, it was not important to them anymore. They were totally disinterested of its ownership as a part of their life, rather they considered it as unexpected heritage and wanted to sell it as soon as possible, so a great deal of lands changed their owners immediately after the privatization. The entire process provoked big interest in land investments and land buying. Many foreign companies started to buy agricultural lands in Eastern Europe because in general, the quality of the lands was very good and the prices were much cheaper compared to prices in Western Europe or in Asia. Therefore, the governments made changes in the national Laws and Constitutions to permit foreigners and foreign legal entities to acquire lands. In some of the countries, there was great social and public debate because many of the local people were afraid of this innovation. However, it actually resulted positively for them because it brought money in their region and the necessity of new employees. Many claims of the former owners have been subject to cases in the national courts.

- **Lands owned by the State**- Many countries did not undergo a fast privatization process, and instead they just leased out that land. Some of them formally created "land funds" with an attempt to consolidate the separated lands and to rent it to a big farms or private businessmen. During the last years followed by the Big Crisis of 2008, the States sold out almost all of their reserves as they needed fresh funds. In those transactions, the State was a private subject and these deals were regulated by Private law.

- **Farm reorganization**- Many local farms were restructured in order to avoid all of the obstacles for marked development and to stimulate the local economy. The governments started to bankroll the farmers and many funds from the EU were adopted.

- **Transfer of ownership and land transactions**- At the beginning in Ukraine and Russia such transactions were not allowed but after the changes they became reality. The procedures for registration and notarization became simple and affordable in all of the examined countries. In my research I also reviewed the procedures and the formal order in which land transfer transactions are concluded:

- Preliminary contract and agreement on the transfer of ownership with down payment of 5-10% of the total cost of the land, binding the parties but does not yet transfer ownership.

- Final contract-conclusion of the contract usually notarial act or at least written form- it transfers the ownership.

- Payment of the entire amount is usually made directly when signing the final contract.

- Registration with declaratory not constitutive effect [FM2]in all of the post -communist countries.

- **Mortgage-** The mortgage is a real right in land created by the owner entitling the mortgagee to payment of certain sum of money out of the land with priority to other creditors on the forced sale on the property. Typically, it is used as security right.an important instrument to bring to the landowners finances and to accelerate the development of the agriculture. When the mortgage of agricultural land is recognized as a legal right, it is a very convenient scheme of providing credits to farmers. In fact, mortgages became popular recently in Eastern Europe when finally the lands have real market value and the governments made the procedures reasonably quick and effective. In some of the countries, a notarial form is necessary (Bulgaria, Poland), in others the certification of the owner`s signature is sufficient for the creation of the mortgage (Slovenia, Hungary). I think that Unidroit can have a great role in projects for unification of the Property law similar to Eurohypothec, as it has the competence and the experts on high level.

- **Registration-** It has always been one of the most important and key elements needed for a fully functioning transfer of ownership of lands. This system registers legal rights, so that right holders can be easily identified and have their rights protected. A particularly common characteristic of the registration form of the post-communist countries is that it not only has the effect of the assumption that registered rights really exist, and even further the protection of good faith, i.e. that a bona fides acquirer may rely on the content of the register (positive as opposed to a negative system)

- **Land fragmentation-** It was a problem that still exists in all of the Eastern European countries with the exception of Belarus, Russia and Ukraine. In the Balkan countries and especially in Bulgaria, Macedonia, Albania and Croatia it seems to be a great issue even now. The European Union tried to consult the governments how to consolidate the lands. Many of these programs and legislative measures are a combination of market assisted reform and government intervention at the community level. It is obvious that the foreign investors are interested in bigger plots of land, easier to cultivate, to save and of course to sell faster to big corporative clients.

## IV. Advantages and practical applications of the research:

As a result of my research, two articles will be published very soon in the couple of next few months in Bulgarian and English. The first one has the same name as the topic of my research and it will be a great guideline for every scholar, lawyer or just an investor who wants to buy lands in the examined countries. In addition, my article will be an important contribution for the Bulgarian legal doctrine as nobody has conducted a comparative analysis of the actual legislations of the post-communist countries thus far, and I think it will have a great and appreciable application for the future transactions and for the free market of lands in this part of the world. I will do my best to submit my article for publishing in Uniform Law Review and I hope that it will be approved by the journal`s committee. The second article resulting from my review will be "Sales contract of agricultural lands from a non EU citizen" - legal advices for potential buyer, review of the law practice and analysis of the current Bulgarian regulation and legal rules and procedures on the transfer of ownership.

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## V. Conclusions

In conclusion the time spent in Unidroit was very productive and useful for me and for my academic progress. I had the chance to use one of the best libraries for Comparative private law and to interact with some of the best legal experts in Europe. Thank you again one more time et que Vive le droit privé uniforme !

RESEARCH SCHOLARSHIP PROGRAMME REPORT
International Institute for the Unification of Private Law (UNIDROIT)

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Dr Ana Keglević
Assistant Professor, University of Zagreb, Faculty of Law, Croatia
Research project: Disgorgement of Profits - A Case for UNIDROIT?

*The research was carried out at UNIDROIT from 4 May 2015 to 30 June 2015 under a scholarship sponsored by the UNIDROIT Foundation. I would like to express sincere gratitude to the sponsoring institution for the opportunity offered.*

*A. Introduction to the project*

Disgorgement of profits is generally defined as a legal remedy requiring a party who profits from illegal or wrongful acts by using someone else right, to disgorge or pay back, any profits he or she made as a result of his or her illegal or wrongful conduct.

The topic of disgorgement of profits entwines two ideas. The first one considers the idea of restitution and skimming off illegally gained profit from the wrongdoer, thus returning it to the injured party. The second one, the disgorgement and punishment of the wrongdoer. The well-known statement that "Court never allows a man to make profit by a wrong…", by Lord Hatherly in the case Jegon v Vivian,[1] only strengthens this idea.

From the international and private law perspective there seems to be little support for the notion that the disgorgement remedy is universally available. Perhaps on first glance, disgorgement is more widely accepted in common law countries, for both equitable and legal wrongs. Some of the examples are breach of fiduciary duties and breach of confidence, but disgorgement is also available for some torts (tortuous liability), conversion, trespass to land and passing off. Sometimes, in common law countries, the instruments for the disgorgement of profits are often hidden under the concept of compensatory damages and, in some legal regimes, under the rules on disgorgement, restitutionary or gain-based damages. Contrary, disgorgement is not so widely accepted in civil law systems, mostly due to different understanding of the fundamental institutes, as well as due to the civilian concept of damages and unjust enrichment. Finally, disgorgement damages are not the only private law instrument to disgorge someone's profit. Some other branches of law such as criminal and administrative law, intellectual property law, capital market law, unfair competition and unfair commercial practices could may offer similar functional equivalents to disgorgement of profits.

The question is, thus, under which exact conditions and with which legal instrument illegally gained profits could be skimmed. A further question is in which part of the law relevant rules should be placed.

*B. Research at UNIDROIT library*

I am pleased to report that my research stay at UNIDROIT library had helped me to examine diverse approaches to the issue of disgorgement of profits in order to determine whether the topic holds potential for a future initiative of UNIDROIT. During my two months research stay I have analysed foundations, potential and perspectives for a harmonised approach to this field. I have not only concentrated on instruments that allow for disgorgement damages, but I have also analysed functionally equivalent mechanisms in order to develop a comprehensive and coherent understanding of the problem.

[1] *Jegon v Vivian* (1870-71) L.R. 6 Ch. App. 742 (761 Lord Hatherley).

In my initial proposal I have stressed out that I will deal with this topic from the international and comparative perspective. My research included number of questions such as: What are the rules governing the disgorgement of profits and how do they operate in practice? Do the UNIDROIT Principles of International Commercial Contracts (PICC) offer sufficient provisions or functional equivalents for the disgorgement of profits? Is there a need for a UNIDROIT initiative in this field and, if so, what should be the main elements of such an initiative? In other words, is there a case for an UNIDROIT unification and, if so, which form could it take?

The research at UNIDROIT library has helped me to make substantial progress in my research and answer some of the abovementioned questions. I believe disgorgement of profits from the wrongdoer plays important role today. Some of the reasons why infringements are usually highly profitable for the wrongdoer are: chances to detect a wrongdoer is very low, there is an apathy of the injured party in cases of nominal damage, and expected profits are sometimes still higher than the legal sanction.

When it comes to the disgorgement of profits due to the breach of contract, my research has shown that the national, international and supranational law do not offer general disgorgement of profits rule for all breaches of contract. Application of existing rules, mostly on damages with a function of restitution, is limited in their scope. In particular, this is in a view of analysed common law and civil law jurisdictions, provisions of Art 7.4.2. of UNIDROIT PICC, Art 74 of CISG and Book VI Art 6:101(4) of DCFR. Another possibility for disgorgement of profits could be extracted from the rules on breach of fiduciary duties and confidence, pre-contractual obligations and duty to negotiate in good faith, or duties to preserve secrecy of information obtained during negotiations. For example, Art 2.1.16. of UNIDROIT PICC is allowing, where appropriate, compensation based on the benefit received by the other party due to the breach of confidentiality. However from the comments and the working documents it is not clear in which cases such legal remedy could be applicable.

The function of restitution may also be fulfilled by some other remedies, so called functional equivalents. However, none of them fully meets the requirements of disgorgement. For example claims based on unjust enrichment, benevolent intervention in another's affairs or mandate relationships and disgorgement are independent of each other and are based on different legal requirements. In consequence, the application of these legal remedies within the scope of disgorgement of profits is limited. Thus, the general legal basis for disgorgement of profits for infringements of contract is lacking. Similar result could be drawn for other areas of law such as intellectual property legislation, competition law or company law. These areas of law reacted by developing specific *sui generis* remedies allowing the restitution of profit. However, they are designed to meet their specific needs and are thus lacking the general application.

Taking into account UNIDROIT PICC perspective, research has shown that the most of the research questions must be answered negatively. At the moment, Principles offer no clear basis for the disgorgement of profits rules, nor has there been much discussion on the topic in the preparatory documents. However, I believe this issue is relevant. Due to the international character of the Principles, I believe there should be no obstacle for the international commercial parties to agree on application of such remedy, under the condition that the applicable law allows for such a choice. At this point, general application of disgorgement rules still remains challenging issue on the international business scene.

*C. Scope of work at the UNIDROIT library and results obtained*

The results of my research carried out at UNIDROIT library has been:

- Presented to the UNIDROIT research group on 25 June 2015 in Rome. The title of presentation was: "Disgorgement of profits in domestic, international and transnational law"

- Preparation for a publication of an article under the same name in the Uniform Law Review (following an invitation for submission).
- Part of preparation for the publication of an article under the title "Disgorgement of Profits in Croatian Law" published by Springer.
- Part of the lectures within European Private Law Course at the University of Zagreb, Faculty of Law, Croatia.

*D. Other activities at UNIDROIT*

Besides using the library and available databases, I have also participated actively in daily activities of the Institute. In particular, I had a privilege to participate at the 94th session of the Governing Council of UNIDROIT held in Rome, from 6 to 8 May 2015 and at the International Conference celebrating 20 years of the UNIDROIT Convention on stolen or illegally exported cultural objects held in Rome on 8 May 2015. This allowed me to engage in conversation with the UNIDROIT staff and participate in discussions on the Institute projects, such as the project on long-term contracts.

*E. Conclusion and acknowledgements*

I would like to conclude this report by expressing my gratitude to UNIDROIT Scholarship Committee and the UNIDROIT Foundation for giving me the opportunity to undertake an academic activity on the highest level. Without such generous financial support my research stay at UNDROIT would not be possible.

I would like to express my very great appreciation to Professor Anna Veneziano, deputy Secretary General, for her extraordinary support and warm welcome from the beginning and her valuable and constructive suggestions during the planning and development of my research. Her willingness to give her time so generously has been very much appreciated. I am also extremely grateful to Ms Frédérique Mestre for making me welcome at the Institute and on a good advice and support on both academic and administration level. Her academic enthusiasm in working groups have been most useful to me.

Finally, many thanks to the staff of the Institute, in particular Ms Bettina Maxion for her generous assistance in finding old bibliographical material and preparatory documents needed for my research and Ms Laura Tikanvaara for her kindness and excellent administrative support throughout my research stay.

I am looking forward to future cooperation with UNIDROIT.

Sincerely yours,

Ana Keglević

# *International Institute for the Unification of Private Law*

# *UNIDROIT*

# *Research Scholarship Programme Report*

# *13 April – 12 of June 2015*


## *František Lipták*

## *Ph.D Candidate University of Pavol Jozef Šafárik, Slovakia*


## Scholarship sponsored by the UNIDROIT Foundation


**Acknowledgments:**

Firstly, I would like to express thankfulness and gratitude my to kind support of UNIDROIT scholaship programme and to committee which chose me for this prestigious position, which is of a great honour to me, to be allowed to conduct research as a Visiting Scholar at your institution.

I am very thankful for this opportunity which enabled me to research and study in depth legal phenomena related to my dissertation topic as well as to UNIDROIT working programme. I would like to express my thanks also to my colleagues, who were both intellectualy and personally enriching. I am also very thankful for the possibility to organize research seminar on my topic, held 9.6. 2015 in main reading room of the UNIDROIT, to gain insights, perspectives and constructive recommendations from interns, fellow researches and UNIDROIT staff. Apart from excellent access to articles and studies in databases which I needed for elaboration of my disseration as well as rich library fund containing articles and books and other publications very relevant for my research, which I could not acquire by other means, I would like to express my gratitude to people who were very helpful in number of daily aspects of my research stay while in Rome.

I would like to express my gratitude to Prof. Anna Veneziano and Professor Michael Joachim Bonell for their consultations, constructive insights and inspiring discussions which enabled to me concentrate on my research, increase the quality of the research and discussion of approaches for resolving interesting, but complex legal problems and to better structure

I would like to thank to Ms. Laura Tikanvaara for her kindness and help in every aspect during my research stay, for excellent logistics management during my stay in Rome. I would like to thank also Bettina Maxion and  for their assistance in library when needed for conducting my research.

I would like to very much thank to Mrs. Frédérique Mestre for possibilities of future cooperation and organizing research seminar.


**Name and details of Visiting Scholar:**

František Lipták / Mgr. (University of Pavol Jozef Šafárik) Ing. (Technical University of Košice, Faculty of Economics) Ph.D candidate (3rd year) (University of Pavol Jozef Šafárik).

**Profile of the Visiting Scholar**

I am Ph.D. Candidate in Commercial law and financial law at Department of Commercial and Business law, Faculty of law, University of Pavol Jozef Šafárik, Košice, Slovak republic.

Topic of my dissertation is Lex mercatoria and deciding cases ex aequo et bono. In my dissertation research, I aim at study of less formal method of dispute resolution, by definition „according to what is good and just" as opposed to classical dispute resolution methods based on strict application rules contained in legal order.

Before attending Visiting Scholar program at the UNIDROIT, I completed my Master in laws (Mgr. - Magister iuris) in 2012. In 2011 I commpleted my bachelor in laws at the Faculty of Law, University of Pavol Jozef Šafárik. In 2010, I completed my Master dergree in Economics (Ing. - Engineer Economist) with specialization at Finance banking and investments, at Technical University of Košice, Faculty of Economics, Košice, Slovak republic.
In 2008 I completed bachelor degree (with distinction) at the same university.

During my Ph.D studies, I spring 2014, I studies and coducted research at St. Petersburg State University, Russia, where I also attended ISLACO Conference, where I was also awarded prize for the best research in international section for my paper...

In autumn 2014 also absolved short research visit at Czech Academy of Sciences, Institute of State and Law, Prague, Czech republic.

In december 2014, I was awareded national prize for excellent results in science and research, with title Student Personality of Slovakia for academic year 2013/2014 for achievments dating to this period. Prize was awared by Junior Chamber Internation Slovakia with support of Slovak rector conference, President of the Slovak republic and Slovak Academy of Sciences.

In 2011 I was awarded by Prize of the Rector of the university for extraordinary study results.

Concerning my professional exprience, in 2013 I worked for 10 months in legal office as legal consulting intern, I was dealing with analysis and research complex legal problems in mostly in domestic and international commercial law.

From 2012, I worked as a volunteer for Slovak debate association, where I currently work pro bono.

**Description of the research project**

**Introduction**

This topic is very interesting both academically and practically, because there is a considerable number of grey areas and ambiguities surrounding this institute in both dimensions, in practice and theory, what offers opportunities to extending our knowledge on the subject, as well as offering practical insights related to the application of this procedural institute dealing with substantive legal issues.

The main goal of the research project is to understand the institute of ex aequo et bono and to propose approaches for resolving disputes ex aequo et bono. This involves defining ex aequo et bono and distinguishing it from other related concepts, analysing their intersections and overlaps and finally offering approaches of use of this institute, in transparent, beneficial and effective way.
Whatever simple, the formulation may appear to be on the first sight, issues and questions related to discussion on the substance of ex aequo et bono in particular are numerous and complex. They are demanding for further clarification and require in depth

research of application of this institutes to practical situations.

**Methodology**

What should be considered in first place, is conceptualization of ex aequo et bono, amiable composition, lex mercatoria, general principles of law and related concepts. Concepts, their contents, modus operandi and scope of application has to be distinguished, as well as results they generate when applied. Secondly, adressing the role, functions and possible feasibility of aplication of ex aequo et bono, including discussion on methodology of this insitute aplicable for the dispute resolution, while trying to adress specific issues related to construction of solutions in arbitration in equity. Research concentrates mostly on substantive questions regarding the amiable comositeur, as well as on procedural ones, which cannot be ignored.

In general, we can say that ex aequo et bono enables us to involve into dispute resolution process also extralegal factors which can be incorporated into decision making. Equity, justice and also what is „right" or „good" Question is, how this will look like in specific situation when applying this kind of arbitration and what kind of solutions may be offered and on what kind of arguments shall it be based on?

There exists some common criticism in literature concerning ex aequo et bono, regarding some of the atributes, which are considered to be missing, in comparison to „arbitration in law". However, the question should not be put into light of such comparative perspective in the first place. Primarily we should start from the premises and motivations of the parties, as institute ex aequo et bono or amiable composition is based on expression of the consent of the parties, who opt in into such regime of arbitration, as this kind of arbitration is not based in most cases on default rule principle, but the opposite.

To start from the premises, there are reasons why parties expressively and explicitly choose arbitration ex aequo et bono, because it suits their specific needs.

This is mostly because of existing deficiencies of domestic legal systems or complexities related to international commercial disputes and risks related to international private law and also possibly to preferences of parties regarding the operation of dispute resolution procedure. Parties may want something other than law and prefer it. If there is complex technical dispute, if there is a multiparty dispute, where there are different parties and conflict of laws rules generate only choice of legal order, then, it this does not have to adress preferences of some other parties, who are not familiar with the legal order, also ex aequo et bono enables to decide faster and spend less financial funds and time analyzing complex legal issues, but instead enables to adress business preferences of the parties when realizing large projects, i.e. in construction industry or real estate.

As it was already mentioned, conceptual issues regarding the approaches to what is amiable composition, what is ex aequo et bono, and how these constructs are understood in different jurisdictions varies among countries with different legal cultures, although, de lege lata, these institutes are known and present in legal orders and as well there exist also common features. In general, it is common that, while continental approach is related to opting into ex aequo et bono arbitration, otherwise applicable law takes place, in China and some jurisdictions of Latin America apply reversed approach, until opting into applicable law regime, equitable approach of ex aequo et bono takes place.

This means, that even conceptually, there exist discrepancies among different legal cultures, doctrines and even jurisdictions. However, after theoretical analysis of these issues, amiable composition and ex aequo et bono, as well as it is in practice, will be used as synonyms.

Now, we will discuss some of the  methodological questions.

Subsequently, I also studied empirical dimension of deciding cases ex aequo et bono. Apart from theories of justice and other arguments which can be raised in this specific kind of arbitration, empirically, from accessible arbitral awards, it is observable, that number of them uses substantive part of lex mercatoria as an inspiration for deciding cases by arbitration in equity. Namely, in these awards, we can see from their motivations that they apply UNIDROIT Principles, which are used for construction of equitable solutions as an source of inspiration. Then, if UNIDROIT Principles are relatively frequently used as an inspiration for amiable composition or arbitraton ex aequo et bono (institutes for whom there is only limited number of arbitral awards, because of low frequency of opting for amiable composition and ex aequo et bono ), there is a question, why, what kind of other approaches and solutions are admissible to arbitration in equity and on what basis in terms of legal argumentations, shall we prefer one approach, or one solution, in relation to another.

The most complex part of the research is to distinguish between possible approaches and their selection to arbitration of ex aequo et bono. There are several ways how to adress this issue and it is possible to construct number of competing approaches. The question is, however, how these competing approaches can be legitimized in perspective of parties legitimate expectations and sustainability in long term perspective of their existing business relationships. In this case, equitable arbitration as decision making process has to deal like all the other procedures, with choice of arguments and interpretation. Under law, this happens by making choice in terms of which of the interpretations of relevant legal rules should be established. In arbitration in equity, this is analogous paralel in choosing possible competing approaches and arguments to specific situations.

Once facts are established, arbitrator ex aequo et bono has competence to decide, by constructing solution. Solution can, however be inspired, by existing elaborated elements of lex mercatoria as well as by solutions which are contained in different domestic legal orders. Arbitrator ex aequo et bono, will, according to his views of what he considers to be equitable solution reflecting justice and goodness, decide accordingly, while he has considerable discretion in constructing solution which will fulfill aforementioned criteria, which may be legal or extralegal.

On one hand, discretion of arbitrator ex aequo et bono or amiable compositeur seems, prima facie, in general as too broad. We have to point out that there exist certain limits, which are those of public policy. Requirements of the principles of due process in arbitration are cannot be ignored and also, arbitration ex aequo et bono can only take place under those conditions. Principles of due process and right to be heard, independence and impartiality of arbitrators, just to name a few, cannot be ommited under ex aequo et bono or amiable composition and same standards are valid and applicable for aforementioned procedures. Procedurally speaking, this arbitration may have some of the discretional aspects or powers, however, it is not unlimited . This means, although, there exists wide interval for discretion in terms of solution searching and elaboration, this does not mean that this process is purely subjective and does not have limits.

Secondly, there is question, what is the purpose of ex aequo et bono. If we look at the issue not from the perspective of parties, but from our own perspective, what is the purpose of ex aequo et bono?
This question has to be specified. In first scenario, ex aequo et bono could possibly generate new solutions and new rules and enrich lex mercatoria in future. It could, but not necessarily, lead to de facto precedents.

However, most of the decisions remain unpublished and it is questionable, if one can expect uniformity or same standards in equal situations or how such a de facto precedent can operate, if majority of arbitral awards in general remain unpublished because of the emphasis, parties put on the aspect of privacy in international commercial arbitration.

In second scenario, if the purpose of ex aequo et bono is to generate solutions which parties consider legitimate, it is questionable if, these cases, for whom parties require for some reasons such specific procedure as ex aequo et bono, which is more flexible, last on the comparability of standards, instead of general legitimacy and acceptance of proposed solutions by the parties. If parties accept solution and find it legitimate, ex aequo et bono succeeds as a mean for management of contractual relationships, most probably long term contracts.

As ex aequo et bono is specific procedure for parties with preferences for better resolution of specific disputes, where they do not wish law to apply, we cannot say that there will be uniformity or de facto precedent creation, however, we cannot exclude the possibility that once facts are similar or situations are identical, solutions may be repeated and practice may emerge, but there is no guarantee, nor necessary requirement.

**Research seminar**

With kind help of Mrs. Frédérique Mestre, I was given an opportunity to have a research seminar, to gain feedback from our colleagues. As an output stemming from the research seminar, chapters on enforcement and recognition of arbitral awards will be adressed, as most of the research in ex aequo et bono which was elaborated dealth with substantive dimensions of amiable composition and ex aequo et bono,.

During the seminar, there were discussed also more general principles, which could be applied to construct solutions ex aequo et bono as well as specific situations where scholars interns and staff could express their views on „what is just and good" Potential of ex aequo et bono was discussed also the reasons for choice of this dispute resolution methods. Scholars and interns then discussed also specific issues related to perspectives of justice and equity in argumentation related to possible situations employing both legal and extralegal conceptions. In this case, different situations with alternatives of possible argumentation were examined and discussed, as well as issues related to different argumentative approaches.

Concerning the different approaches that were discussed included remarks and arguments related to approaches of behavioral law and economics, theories of justice, contractual and economic ballance, disregarding of legal provisions or provisions of the contract, and comparative approaches betweeen application of lex mercatoria and ex aequo et bono just to name a few.

It helped me to progress in research and to obtain different perspectives on the subject. Because of this help, I will be able to contribute more to answers to institute, which is considered very ambigous, as it was already mentioned.

As a conclusion I would like to express my gratitude to everyone who took part as well as to UNIDROIT, for enabling me to improve quality of my research output, which in future, I will use in my Ph.D thesis as well as in publications in journals. I am specially thankful for this opportunity because also consultations and advice I acquired, enriched my perspectives on legal issues which lie at the core of my research interest.

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Rome, 29 June 2015

**Report on the research stay at the UNIDROIT in May and July 2015**

**Acknowledgments**

I gratefully acknowledge the financial contribution of the UK Foundation for International Uniform law that has enabled this research stay. My gratitude is also due to Mrs Mestre and Mrs Tikanvaara for the coordination of the research stay as well as to Mrs Maxion for her support as librarian. It has been a honour and a pleasure to work in Rome.

**Content of the report**

This report will provide a brief overview of the goals of the research stay (1) and an abstract of my Doctoral research project (2). Thereafter, it will address the results in achieving the goal of the research stay including the short-term results (3) and long-term results (4) and, finally, mention other outcome of the research stay (5).

## 1. Goals of the research stay

This research stay aimed at gathering information on the harmonisation and global unification of private law necessary for one of the chapters of my PhD thesis. Furthermore, I wished to get a better understanding of the day-to-day work of the UNIDROIT within their legislative activities and extend my professional network.

## 2. Doctoral thesis: letter of intent in international commercial transactions

My doctoral research project is focused on letter of intent[1] in international commercial transactions. This topic may be briefly introduced as follows.

The rules of contact formation in most legal systems have been developed based on the working of discrete transactions – simple deals where extensive negotiations on important details of the contract rarely take place.

With the course of time, parties made their contracting increasingly sophisticated and complicated. Construction and development contracts, mergers and acquisitions of companies, and other complex deals are a good illustration thereof. In these contracts, the pre-contractual period – time between the start of negotiations and the conclusion of the contract – may last several weeks or even several years. The exact moment of a meeting of wills and other eventual obligations has become difficult to determine.

The mere process of contract formation is often accompanied by creation of various documents, such as letter of intent. These witness an aspiration of contracting parties to develop a flexible tool to regulate the formation of the contract in the way that is not determined by the classical legal doctrines and classical legal rules in general, be it common law or civil law. The issue reveals to be delicate for an international compromise, for instance for the Vienna Convention on the International Sale of Goods (CISG), and even for the soft law regulation. International soft law instruments, such as UNIDRIT Principles of International Commercial Contracts (UPICC), Principles of European Contract Law (PECL), Draft Common Frame of Reference (DCFR) do not regulate such documents in a straightforward manner.

The thesis focuses on the following research question. What is the legal nature of international letter of intent and can a harmonised international approach to such documents be formulated?

Sub-question 1. To what extent parties can create obligations binding in law that regulate the process of coming to an agreement in a complex contract in different legal systems in different legal systems? Confronting the practice of exchange of letters of intent to existing contract theories raises a question as to whether (and to what extent) parties are free to get around the requirements of the contract law and extra-contractual regulation.

England, U.S., the Netherlands and France have been selected for comparative law analysis based on the difference in the approaches to the agreements made in the course of negotiations and difference in the approach to the normative standards of good faith. If time allows, the research will also include Russian

[1] M. Fontaine & F. De Ly, *Drafting International Contracts. An Analysis of Contract Clauses* (New York, Transnational 2006) Chapter 1.

law, for an example of a country with a recently codified civil and commercial law (codified some 10 years ago and subject to an important amendments in 2014).

The starting point for the comparative analysis will be represented by the provisions included usually in the letters of intent in practice. This will be formulated based on the existing case law and on an interdisciplinary approach using the findings of study of negotiations, a developing field of study.[2]

Sub-question 2. Are there premises for formulating a harmonised approach to letter of intent? The answers to the first sub-questions will be related to the existing international soft law and hard law (UPICC 2010, PECL, DCFR, CISG, CESL).

### 3. Short term results of the research stay

During my research stay, I have gathered the information necessary for the chapter on the harmonisation of law in various sources on international contract law from the collection of the UNIDROIT library and could work with the *Travaux préparatoires* of the UPICC.

Based on the gathered information, I have written the chapter on the global uniform law and international soft law instruments (CISG, UPICC, PECL, DCFR, and CESL). At the moment of drafting this report, the chapter is almost finalised.

### 4. Long term results and expected outcome of the research stay

On the long term, this research stay should contribute to finalising my PhD thesis. The finalisation, defence, and publication are expected in 2016. After the publication, I will be delighted to send a copy of the book to the UNIDROIT library and to the UK foundation for International Uniform law.

Furthermore, the research stay has resulted in a draft article to be submitted for consideration for a publication in the *Uniform Law Review*. The article will present a reflection on the UPICC' s provisions on the recovery of damages. The text is still to be finalised and submitted to the *Uniform Law Review* in due course in 2015 or 2016.

Besides this, I had an opportunity to get the 'flavour' of the legislative activities and methods of the UNIDROIT. The UNIDROIT has offered me to attend the deliberations of the 94$^{th}$ session of the UNIDROIT Governing Council. The agenda included the discussion of the results of the study made by the Working Group on long-term contracts and, the Governing Council has extensively deliberated on the draft Guide on Contract Farming. Attending the session helped me understand the decision making process, the approach of the countries' representatives, and the difficulties involved.

An exchange meeting with the Secretary General of the UNIDROIT, Mr Estrella Faria, has also shed light on the strategy of the UNIDROIT for the future and the role of the Institute from a historical perspective. Furthermore, Mr Estrella Faria has discussed various factors driving the Institute's choices when it is faced an alternative between creating a soft law instrument or an international convention. The discussion has also addressed the UNIDROIT mandate and its interaction with the cognate international

[2] E. Pannebakker (2013), 'Offer and Acceptance and the Dynamics of Negotiations: Arguments for Contract Theory from Negotiation Studies', *Erasmus Law Review* 6(2), 131-141.

intergovernmental organisations including the Hague Conference on Private International Law and UNCITRAL.

**5. Other results**

The research stay has contributed to the extension of my network. I have met scholars and lawyers from more than 10 countries including Canada, US, Costa Rica, South Africa and some other African countries, and several EU countries.

My general knowledge was enriched thanks to the opportunity to attend a conference dedicated to the 20th anniversary of the 1995 Convention celebrated on Friday 8 May 2015 at the Capitole Hill Museum in Rome.

Finally, two exchange meetings organised by the UNIDROIT have been inspiring. The first meeting addressed the alternative dispute resolution. It was animated by Mr Liptak, visiting scholar at the UNIDROIT from Slovakia. The topic of the second exchange meeting was 'disgorgement of profits for breach of contract'; the meeting was animated by Professor Keglevic, visiting scholar at UNIDROIT from Croatia.

After the research stay, I remain at the disposal of the UNIDROIT for any issues where I could be of help.

International Institute for the Unification of Private Law
**UNIDROIT**

**Research Scholarships Programme Report**
25 March 2015-25 May 2015

Prepared by
**Farzaneh Shakeri**

# The Application of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects by Iran

## Challenges, prospects, and opportunities

**Acknowledgment:** Foremost, I would like to express my sincere gratitude to the Scholarship Committee of UNIDROIT for providing me this precious opportunity. And sincere thanks shall be given to Mr. José Angelo Estrella Faria, the Secretary General of UNIDROIT and Ms.Frédérique Mestre, Senior Legal Officer and Coordinator of the Scholarship Programme of UNIDROIT. I am also extremely grateful to Ms. Marina Schneider, Senior Legal Officer of UNIDROIT, for her generous support in facilitating my access to the relevant jurisprudence and inviting me to attend the meeting of the Embassy of Iran in Rome. I certainly remain indebted to the staff of the UNIDROIT library, especially Ms.Bettina Maxion and Mr. Reza Zardoshtian, who have provided kind help and support of my research. I also very much appreciate the excellent logistical support of Ms. Laura Tikanvaara.

**Name and Details of Researcher**: Farzaneh Shakeri, LLB, LLM (Tehran), MA (Strasbourg) LLM (Deusto/Tilburg), PhD Candidate (Tehran) (expected 2015), Iran

**Professional background of Researcher**: I am a doctoral candidate in Private and Islamic Law at the University of Tehran. My doctoral thesis analyzes existing and proposed international private law rules in relation to disputes arising out of infringements of intellectual property rights. Prior to my PhD candidature, I completed my Master 2 in Banking Law and Finance at Université de Strasbourg in 2013, during which time I was also an intern at the United Nations Commission on International Trade Law (UNCITRAL) in Vienna and the United Nations Office on Drugs and Crime (UNODC) in Tehran. Prior to this, I obtained an LL.M. in Transnational Trade Law and Finance at the Universidad de Deusto in Spain and Universiteit van Tilburg in the Netherlands (also as an Erasmus Mundus scholar). For my Master thesis, I focused on an in-depth study of waqf-based Islamic Finance. I

obtained my first LL.M in Private and Islamic from the University of Tehran in 2010. My first law degree is also from the University of Tehran.

Prior to arriving at UNIDROIT, I was a visiting fellow at the Max Planck Institute for Innovation and Competition in Munich. I also taught corporate law, negotiable instruments, commercial contracts, tort law, and Islamic law, among other subjects, at the University of Tehran and University of Economic Sciences in Tehran. I have also practiced law for some years and have served as a consultant to international companies in Iran. I am expecting to start another short-term fellowship at the Max Planck Institute for Comparative and International Private Law in Hamburg in 2016. I am also designated as an Assistant Professor and Assistant Director at the Michigan-Jindal Centre for Global Corporate and Financial Law and Policy at JGLS in India, to begin in July 2016.

**Name and Position of Research Supervisor**: Dr. Mohammad Habibi Modjandeh, Assistant Professor, Mofid University, Qom, Iran

**Description of Research Project:** As one of the ancient civilizations of the world, Iran has been faced with severe difficulties in protecting its cultural objects for decades. Some efforts have been made to cope with this problem in different ways by national and international organizations, including an initiative launched by UNODC as a part of its country program in Iran (2011-2014) to support Iran in countering trafficking in cultural property in close collaboration with UNESCO. Although valuable achievements have been made, including the ratification of UNTOC by Iran and the provision of technical legislative assistance to relevant national authorities of Iran by UNODC, the focus of the program is limited to public and criminal law-related aspects of the problem, whereas its private law-related aspects are overlooked. In this context, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter, the Convention), which was ratified by Islamic Republic of Iran in 2005, plays a crucial role in filling the gap. After 10 years since its entry into force, however, very few and sporadic efforts have been made for effective implementation of the Convention.

Considering the fact that the proper implementation and interpretation of an international instrument requires a sufficient understanding of its challenges and opportunities, this study tries to cover two areas. Firstly, the author tries to show the capacities of the Convention to protect cultural objects by taking into account existing relevant literature, including but not limited to its drafting history, Explanatory Report, and the commentaries on the Convention. In this regard, I provide a comprehensive analysis of the provisions of the Convention, applying case study (where applicable) so as to depict whether Iran has practically succeeded in taking advantage of the Convention, what could have been done differently, and how the

implementation of the Convention shall be formulated for the future. Secondly, I scrutinize Iranian laws with a scope of application relevant to the Convention for the purpose of showing whether they are compatible with the Convention, whether there is a need to modernize national legislation, and whether any new laws shall be enacted to provide a proper context to apply the Convention. In addressing the latter point, the Model Provisions on State Ownership of Undiscovered Cultural Objects (hereinafter the Model Provisions), jointly drafted by UNIDROIT and UNESCO, is taken into consideration. The goal of this study is to improve the effective implementation and sound interpretation of the Convention by raising the awareness of relevant national authorities, such as legislators and policymakers, and reviewing practical operations and enhancing the understanding of the Convention. In addition to legal scholars, who always benefit from a close examination of international instruments, my study is useful for three other target groups: firstly, Iranian judges who may face cases where the Convention is applicable; secondly, parties to disputes who intend to invoke the Convention before the seized court; and thirdly, Iranian legislators and policymakers who can also benefit from our reasoning and outcomes, which are highly advised to be taken into account for any future law-making policy. As far as the scope of the study is concerned, it is limited to a close examination of the Convention from the viewpoint of Iran's legal system. The Convention here is understood as an international instrument applicable to cases where Iranian cultural objects are stolen or illegally exported from Iran, as well as cases where foreign cultural objects are stolen or illegally exported and end up in Iran. However, relevant Iranian national laws and international hard and soft law, notably the Model Provisions, are taken into consideration when it is relevant to the advancement of the study. Concerning the methodology of the study, the author will use descriptive and analytical approaches, applying UNIDROIT studies and case laws as required.

Here are some examples of questions addressed in the research project:

1. Is the definition of cultural objects in Iran's legislation similar to that of the Convention?

2. Does Iran's legislation provide for state ownership of cultural objects that have been unlawfully excavated?

3. What is the definition of due diligence or any similar concept in Iran's legislation?

4. To what extent is the definition of due diligence (or similar concept) in Iran's legislation compatible with that of the Convention?

5. What mechanisms are provided for in Iran's legislation to prohibit the exportation of cultural objects, and to what extend are the mechanisms of use in implementing the Convention?

6. What are--or would be--Iranian courts' difficulties in applying the concepts enshrined in the Convention (for example, "significantly impairs" an interest, "significant cultural importance") when called upon to apply the UNIDROIT Convention – Article 5(3)?

7. Does Iran have any other or more favourable rules for the restitution and return of cultural objects, in comparison with the common, minimal legal rules provided for in the Convention?

8. What are the practical and legislative changes made in Iran's legal system after the ratification of the Convention in the way it protects cultural property?

**Practical applications of the research:** As mentioned above, the research consists of an assessment of the interpretation and application of the Convention in a national context, as well as an assessment of national laws governing the subject alongside the Convention in the country of interest, namely Iran. The outlined research will be published and distributed among the main relevant Iranian national authorities and will also be available to interested academics and practitioners.

A concrete example of the practical application of my research is found in a recent judgment delivered by the the Milan Court of Appeal, which invoked the Convention and ruled that Iran, as one of the countries of origin of the objects at stake, could petition for restitution of said objects. Regardless of the critiques of the decision, Iran can take the advantage of it to request the restitution of the objects. However, Iranian authority experts who are entrusted with the task for restitution are facing some hassles in determining the amount of the compensation which shall be paid according to the Convention. During two meetings that I have attended at the Embassy of Iran in Rome concerning the execution of the said decision, I realized that there are some misunderstandings and misinterpretations of the Convention by Iranian civil servants, which may endanger a sound implementation of the Convention. Therefore, by considering the facts of the case and challenges that Iran is facing in executing the decision, I was able, with the invaluable advisory opinion of Ms. Schneider, to draft a note addressing opportunities Iran can take in the case by implementing the Convention. Here there is a summarized version of the notes on practical operation of UNIDROIT Convention 1995 on the case[12]:

[1] These notes reflect only author's personal opinion and are not to be taken as reflecting the views of UNIDROIT or Ms.Schneider, I am thankful to Ms. Schneider for her comments and observation on my notes though.

*"In the case no 7270/13, the Milan Court of Appeal provides, in its judgment of 13 November 2013, that when a country of provenance requests for return of objects, the possessor shall be advised.*

*In this case, the defendant, Mr Mohammed Yousaf Merajuddin, who is a national of Pakistan was selling some cultural objects in his antique shop in Milan. As the possessor could not provide the Italian police with required documents showing the provenance of objects, objects were seized and he was summoned to the court. In rendering the judgment, the court invoked the 1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (hereinafter Convention).*

*Regarding the fact that according to the judgment Iran is considered as one of the countries of origin of the objects, the following points should be taken into account.*

*A. Some comments on the decision*

*Regarding the decision of the court with respect to the application of the Convention to the case and good faith of the possessor (exercising due diligence), it would be expedient to raise some observations:*

*1. Subjective Scope of the Convention*

*The subjective scope of application of the Convention encompasses cultural objects which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science (Article 2). But, in the current case, there is a reasonable doubt that the objects are not of the required importance so as to fall under the scope of the Convention. The purchase price paid by the possessor for each item as well as the sale price for each piece in his shop in Milan might be a criterion, left to the expertise opinion, to determine the value of the objects.*

*2. Due diligence*[3]

*Articles 4.1 and 6.1 of the Convention provide for 2 conditions upon which the possessor is entitled for compensation for restitution or return of objects: 1) The possessor neither knew nor ought reasonably to have known that the object was stolen and 2) The possessor can prove that it exercised due diligence when acquiring the object.*

*As a short note on the requirement of due diligence, it should be said that exercising due diligence is a condition which shall be proven by the possessor and therefore there is no presumption in favor of him in the Convention. Article 4.4 of the Convention provides for the necessity of regarding all the circumstances of the acquisition in determining the existence of due diligence and gives a non-exhaustive list of factors to be taken into account.*

[2] My knowledge about the facts of the case are mostly based on the information I received during two meetings at the Embassy of Iran in Rome and might not be accurate enough, as I have not had access to the whole case.
[3] The decision uses the word "good faith"

*In the current case, the decision states that upon the restitution request, the possessor shall be advised, which indirectly means that he is entitled to receive compensation. It is not, however, clear how the judge came to this conclusion and whether the possessor complied with the requirement of providing the court with proof of his due diligence. On the other hand, the facts of the case raise reasonable doubts as to the exercise of good faith by the possessor:*

*1) Character of the parties: The possessor is not an ordinary person. He is a dealer who has several years of experience in the purchase and sale of cultural and antique objects and runs an antique shop in Milan. Thus, he ought to have been aware of the importance of the objects.*

*2) He acquired the objects in Chatuchak Market in Bangkok, where it should come as no surprise to find objects of unknown or illegal provenance. Moreover, Thailand lacks sufficient and effective national legislation for the protection of cultural objects. This means that the possessor, as a professional dealer, was supposed to take some reasonable steps to find out about the legality and origins of the objects.*

*3) The price paid: The possessor paid an amount between 15 to 20 USD for each piece in Thailand, which seems, subject to the expertise opinion, far below the real value of the acquired objects.*

*B. Some suggestions for the compensation payment*

*Regardless of the critiques of the decision, one should admit that the judgment is final and that national remedies have been exhausted. As there is no way to challenge the decision with respect to the compensation payment, it is advisable to maximize the sound execution of the judgment. It is understood that as the decision mentioned the Convention, its execution may also be based on relevant provisions of the Convention. The main question to be answered at this stage is the amount of compensation. In determining the amount of the compensation:*

*Whereas Articles 4.1 and 6.1 stipulate fair and reasonable compensation;*

*Whereas purchase invoices of the objects acquired in Thailand show that the price paid for each piece was between 15 and 20 USD;*

*Whereas Iran was not involved in any of the stages, including closure of the shop, persecution, investigation, and legal proceedings;*

*Whereas Iran was informed by an Italian authority of the proceedings and court decision;*

*Whereas the Convention provides for compensation for objects and not expenses (save for the expenses explicitly addressed in the Convention);*

*Whereas the Convention requires fair and reasonable compensation only if the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object;*

*Whereas asking for an amount more than what was paid as purchase price for the objects in Thailand is incompatible with good faith and due diligence; and*

*Whereas the purpose of paying compensation to the possessor exercising due diligence upon acquiring the goods is to protect someone acting in good faith, not to make profit out of the situation;*

*In the current case, the possessor is only entitled to receive, as a maximum, the purchase price of the objects according to the invoices. Other incurred expenses, including direct and indirect damages, such as the closure of the shop and litigation expenses, shall be borne by the possessor. This solution is consistent with the general purpose of the Convention.*

*C. Further precautionary actions*

*Regarding the fact that seven countries were involved, in different ways, in the theft or illegal exportation of the objects, and five of these countries, namely Iran, Pakistan, Afghanistan, Cambodia, and China, are Contracting States to the Convention, it would be expedient for Iran to consult the relevant authorities of the said countries regarding the execution of the decision in order to avoid:*

*1. Any conflicts which may arise out of parallel requests for the return of the objects by these countries; and*

*2. Multiple payments to the possessor by different countries."*

**Advantages obtained by the researcher through research at the UNIDROIT:** I had extensive access to reading materials on cultural property law, including books, articles, and databases. Moreover, I had excellent, continuous interaction with fellow researchers, extremely supportive officers (especially Ms. Schneider) and the staff at UNIDROIT who are quite helpful to ensure that researchers are able to take a maximum advantage of their stay at the UNIDROIT library. During my stay at UNIDROIT, I also had the opportunity to attend the "Conference of the 20th Anniversary of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects", held on 8 May 2015 at the Capitoline Museums in Rome, as well as the "Conference on the 1995 UNIDROIT Convention –Twenty Years after its Adoption: The Mediterranean as a Testing Ground" held on 12 May 2015 at SIOI Headquarters, Rome.

In line with my research at UNIDROIT, I have been also very much appreciated having the opportunity to participate in the 94th session of the Governing Council of UNIDROIT (Rome, 6-8 May 2015) and the second meeting of the MAC Protocol Study Group (Rome, 8-10 April 2015). Attending these events at UNIDROIT has inspired me to start planning for my next research project on the

Cape Town Convention and its protocols--contingent upon finding some financial support--which is of high legal and economic importance for Iran as a growing market in this field. Moreover, my stay at UNIDROIT and participating in its international events are considered by the University of Tehran as a beginning for enhancing cooperation with UNIDROIT, the informal preliminary negotiations for which have already started.

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# RESEARCH REPORT

For the purpose of the International Institute for the Unification of Private Law's - UNIDROIT Research scholarship programme

ROME, JANUARY 27TH, 2015

Scholarship sponsored by the UNIDROIT Foundation

This report is submitted to the International Institute for the Unification of Private Law "UNIDROIT" upon completion of the research period running from the January 7th to the 29th 2015, done in the framework of it's Scholarship Programme.

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## AKNOWLEDGEMENTS

I would like to give my deepest thanks and regards to UNIDROIT for having granted me this scholarship which has given me the unique opportunity of researching in its excellent library and of having access to its bibliographical material which is rarely found elsewhere. Besides, I am deeply grateful for having been associated with the daily life of the Institute and been able to participate as an observer in the discussion of one of its projects, the one related to long-term contracts.

Therefore, I feel deeply indebted to all members of UNIDROIT. Specially, I give my sincere thanks to Mr Jose Angelo Estrella Faria, Secretary-General, with whom I had a enlightening legal discussion on Latin American legal issues; Professor Anna Veneziano, Deputy Secretary General, and Professor Michael Joachim Bonell who both gave me a warm welcome to the meeting of the working group on long-term contracts held at the Institute in January 2015; Ms Frédérique Mestre from whom I received valuable guidance on conducting my research, Ms Bettina Maxion, Librarian, who generously assisted me in finding the bibliographical material I needed for my research, Mr Reza Zardoshtian who patiently provided me with all the help and material I needed

to collect my research material and Ms Laura Tikanvaara who made every possible effort to assist me in my work and to make me feel at ease at the Institute.

The research stage at UNIDROIT's library has been an excellent and enriching opportunity to achieve research material and to interact with other high quality researchers in law, both in an amiable atmosphere. It has also provided me with an inside knowledge of UNIDROIT's work which makes me eager to continue in touch and cooperating with the Institute in the future.

## ABOUT THE AUTHOR

The author is a law graduate of the School of Law of the Pontificia Universidad Católica de Chile (Santiago de Chile), lawyer of the Chilean Supreme Court, PhD in Laws by King´s College London and Lecturer in Law at the Universidad de los Andes (Chile) and the Pontificia Universidad Católica de Chile. She is also a founder and active member of ADIPRI, the Chilean Association of Private International Law.

The author's areas of expertise are Private International Law and legal Ethics. Each year, she teaches several courses at the Universidad de los Andes: Philosophical and Ethical Foundations of Law, Private International Law, the European Private International Law of Contracts and a doctoral Seminar on Comparative Applicable Law for International Contracts. Furthermore, every year, she reads the course on Private International Law at the Pontificia Universidad Católica de Chile and acts as an arbitrator for some legal journals and collaborate with the Chilean Ministry of Foreign Affairs on studies related to Private International Law.

## ABOUT THE RESEARCH UNDERTAKEN AT UNIDROIT

The main purpose of my visit to the UNIDROT'S Library has been to collect up-to-date material for my research and academic work in three main areas of Conflict of Laws: the law applicable to international contracts, the governing law of non-contractual obligations and matrimonial property regimes.

I need this material for academic purposes and because, with other members of ADIPRI, the Chilean Association of Private International Law, I am involved in the study and drafting of a proposal of amendment of the Chilean Private International rules on contracts which intends to harmonize these rules with that of other Latin American and European jurisdictions.

Therefore, while in the Library I have collected bibliographical material on party autonomy in international contracts, which has been the focus of my research for several years now, and on the law applicable in the absence of choice of law by the

parties. Particularly, I have found interesting new bibliography –books and articles in law journals, not available in Chile- related to the Rome I Regulation. Besides, I have read classical literature on the subject as the works of O. Lando and H. Yntema.

As regards the applicable law of non-contractual obligations I have had access to the works of Von Ihering on culpa in contrahendo and numerous specialized articles and monographies dealing with the Rome II Regulation.

Relating to conflict of laws on matrimonial property regimes I have found some valuable comparative studies on European law, and some papers on Latin American law which are rarely available elsewhere.

Finally, I have collected valuable literature on harmonization of laws which can enlighten and support my work in the Chilean Association of Private International Law.

The material collected in the Library will allow me to prepare a research proposal to be presented to FONDECYT (the Chilean funding body for research) in April 2005 and to prepare a paper analysing Chilean conflict rules on Culpa in contrahendo to be published in a law journal indexed in Scopus.

## IMPORTANCE OF THE RESEARCH

Chilean conflict rules on contracts need to be updated in order to solve the problems that international contracts pose nowadays to the contracting parties. The Chilean Association of Private International Law is studying the drafting of new conflict rules in order to tackle these problems and harmonize Chilean rules with that of many countries, particularly in relation to party autonomy.

Party autonomy in international contracts, understood as the right of the parties to choose the governing law of a contract, is widely accepted worldwide and said to belong to the "common core of the legal systems". However, this autonomy is not clearly statutorily accepted in Chilean law though being widely practiced in the country. In fact, Chilean courts vacillate as to upholding choice of foreign law clauses in international contracts performed in Chile due to the strong territorialism of Chilean law. Thus, the amendment of this law in order to consolidate autonomy is needed to secure the validity of these clauses and to eliminate juridical uncertainty about their efficacy. Further, it will help to update, perfect and harmonize Chilean conflict rules with those of most countries (see: Vial Undurraga, M. Ignacia (2013): "La autonomía de la voluntad en la legislación chilena de Derecho Internacional Privado", *Revista Chilena de Derecho,* vol. 40 nº3, pp. 891-927).

Besides, the author has highlighted within the 2014 “Jornadas Chilenas de Derecho Internacional Privado, ADIPRI” the need of amendment of the Chilean conflict rules on Matrimonial Property regimes in order to accept in Chile the efficacy of matrimonial regimes legally acquired under foreign law so as to protect the legitimate and fair interest of the spouses who establish domicile in Chile. This amendment should also contribute to harmonize Chilean law with that of other Latin American and European countries who had successfully ruled on this matter. The research material collected in the Unidroit library on this subject will be extremely useful to support the need for this amendment and to provide updated knowledge about the different legal regimes adopted within other jurisdictions and their suitability for being adopted by Chilean law.