

THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND THE COVID-19 PANDEMIC

An element of legal security in international commercial relations during and after the pandemic economy

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Summary: Introduction. 1. The law applicable to international commercial contracts: the UNIDROIT Principles as a set of modern and adapted rules. 2. The solutions brought by the UNIDROIT Principles in face of the COVID-19 crisis: hardship and force majeure. Conclusions. Bibliographical references.

Abstract: In March 2020 the World Health Organization (WHO) recognized that the COVID-19 disease was a global pandemic which has already spread to all continents. The impact of the pandemic on the performance of contractual obligations affects contracts both domestically and internationally. In domestic contractual law the discussion is growing significantly, and some typical mechanisms are at the heart of the debate, in particular the force majeure and the hardship. However, frictions between the different legal systems involved might constitute an additional risk to international operations, since often there exists a lack of uniformity and coordination between the solutions envisaged across different jurisdictions. Besides, the determination of the applicable law to international contracts may be intricate. Relief for this situation might be found in modern transnational law instruments, like the UNIDROIT Principles on International Commercial Contracts, which offer flexible and modern solutions that can be adapted to the varied circumstances. This article aims, thus, to analyze the impact and the usefulness of UNIDROIT Principles during the COVID-19 pandemic and in the post COVID-19 economy, and how they can bring an element of legal security during and after the pandemic economy.

Keywords: International commercial contracts, COVID-19 pandemic, UNIDROIT Principles on International Commercial Contracts.

INTRODUCTION

In March 2020, the World Health Organization (WHO) recognized that COVID-19 disease, which was first reported in China in December 2019, was a severe global pandemic that had already spread to all continents.¹ In response to the declared pandemic, most countries implemented restrictive measures aiming to slow down the transmission of the disease and reduce its mortality.

Whether because of the natural effects of the pandemic or because of restrictive actions implemented by States, international trade and ongoing international contracts have been seriously affected.² Although the pandemic may interfere with the ordinary

¹ Cf. World Health Organization. Coronavirus disease (Covid-19) Pandemic. Available at: www.who.int/emergencies/diseases/novel-coronavirus-2019. Access on: 14.05.2020.

² There is not at present a single definition of “international contract” recognized by the international community. Different definitions are proposed by doctrine and jurisprudence and may vary depending on the legal system. In general, for a contract to be classified as international, two criteria are commonly recognized by the most modern legal instruments: the *legal criteria* and the *economic criteria*. According to the legal criteria, a contract is international when it contains elements of strangeness, or, in

execution of commercial contracts in many ways, the most evident problems concern performance by at least one of the parties. In many cases, the performance had become impossible, and in others, performance is still possible, but it has become substantially more difficult and/or onerous. In such a context, may the parties invoke COVID-19 related situations as an excuse for non-performance? If so, based on which concepts and under what conditions? And, what are the solutions offered to the parties where performance is still possible, but, under changed circumstances, it has become substantially more difficult and/or onerous?

In domestic contract law, some typical rules and principles are at the center of the debate, such as *force majeure* and *hardship*.³ However, these concepts vary considerably from country to country, with significant differences in their effects, especially between countries with an Anglo-Saxon heritage and those with Roman-Germanic traditions. Different interpretations are usually adopted, with distinct practical implications, bringing legal insecurity. In addition, the issue of the applicable law to international contracts is not necessarily harmonized, which intensifies the complexity of international commerce.

Considering this scenario, this article aims to analyze, in a first moment, the determination of the law (or the rules of law) governing an international contract and the

other words, when it has close ties with more than one national legal system. The second criteria, the economic one, which has had great success in French jurisprudence, defines as international, the contract that involves the needs of international trade. Recently, modern international instruments related to international commercial contracts and international arbitration tend to define the internationality of a contract in a broad way. The UNIDROIT Principles on International Commercial Contracts (2016) establishes that the concept of international contracts should be given the broadest possible interpretation, so as ultimately to exclude only those situations where no international element at all is involved, i.e., where all the relevant elements of the contract in question are connected with one country only. See UNIDROIT Principles of International Commercial Contracts (2016). Preamble. For a general analysis of the concept, see WITZ, Claude. *L'internationalité et le contrat : L'internationalité, bilan et perspectives*. Supplément Revue Lamy Droit des Affaires, February 2002, n. 49, pp. 59-66; For an analysis of the economic criteria, see ANCEL, Marie-Élodie; DEUMIER, Pascale; LAAZOUZI, Malik. *Droit des contrats internationaux*, 1. ed. Paris: Sirey, 2017, p. 5-14; For a Latino-American analysis, see BOGGIANO, Antonio. *Curso de Derecho Internacional Privado: Derecho de las relaciones privadas internacionales*, 2ª ed. ampliada y actualizada. Buenos Aires: Ed. Abeledo-Perrot, 2000, p. 680; STRENGER, Irineu. *Direito Internacional Privado*, São Paulo: Ed. Revista dos Tribunais, 1991, pp. 7-10; MAZZUOLI, Valerio de Oliveira, *Curso de direito internacional privado*, 4. ed. Rio de Janeiro: Forense, 2019, p. 408; DOLINGER, Jacob. *Contratos e obrigações no direito internacional privado* (Direito civil internacional, vol. II). Rio de Janeiro: Renovar, 2007, pp. 483-485; SILVA ALONSO, Ramon. *Derecho Internacional Privado: Teoría General, Derecho Civil Internacional, Derecho Comercial Internacional*, 6ª éd., Asunción: Intercontinental Editora, 2002, p. 273.

³ It can be mentioned as well, typical institutes of common law countries, such as *impossibility*, *impracticability*, *frustration*, *failure of presupposed conditions*, *act of God* and the *hardship* clause; and others, typical of civil law countries, such as “*force majeure*”, “*caso fortuito*”, “*fait du prince*”, etc. The hardship theory has been recognized by several legal systems with the emergence of other concepts, such as “*frustration of purpose*”, “*Wegfall der Geschäftsgrundlage*”, “*imprévision*”, “*excessiva onerosità sopravvenuta*”, “*onerosidade excessiva (clausula rebus sic stantibus)*”, etc.

usefulness of the UNIDROIT Principles on International Commercial Contracts, 2016 (hereof UNIDROIT Principles), as a set of modern and adapted rules to govern an international commercial contract (1), in order to examine, in a second moment, how the UNIDROIT Principles may relieve the main contractual disruptions caused by the COVID-19 pandemic and by the measures adopted as a consequence thereof (2).

1. THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS: THE UNIDROIT PRINCIPLES AS A SET OF MODERN AND ADAPTED RULES

While the parties are free to choose the law applicable to their contracts in matters of arbitration (principle of party autonomy),⁴ some countries are still reluctant to accept this principle in regard to State courts.⁵ Besides, the extent of this freedom varies from

⁴ The principle of party autonomy is one of the fundamental principles of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (“New York Arbitration Convention”), and also of the Inter-American Convention on International Commercial Arbitration of January 30, 1975 (“Panama Convention”). Although these instruments do not directly address the issue of applicable law, party autonomy is recognized, both with respect to the validity of the arbitration clause and to the arbitration procedure itself and the recognition of the award. On the other hand, the European Convention on International Commercial Arbitration, concluded in 1961, expressly provides in its Article VII that “the parties are free to determine the law that the arbitrators shall apply to the substance of the dispute”. Similarly, the International Commercial Arbitration Agreement of MERCOSUR of July 23, 1998 expressly states that “the parties may elect the law that will apply to settle the dispute on the basis of private international law and its principles, as well as international trade law” (Article 10). In addition, the UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (“UNCITRAL Model Law”) also accepts the principle of party autonomy (Article 28.1). Several national arbitration legislations go in the same direction, accepting the choice of law made by the parties.

⁵ In most of the legal systems, parties are free to choose the law governing their international contracts (principle of party autonomy), subject to certain limits (*e.g.*, mandatory rules or “*lois de police*” and public policy). In the European Union the subject has been harmonized since 1991 with the entry into force of the Convention on the law applicable to contractual obligations of 19 June 1980 (Rome Convention), and, more recently, with the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), while both instruments expressly recognize the principle of party autonomy. Despite this general acceptance, some countries are still reluctant to accept the principle. In Latin America, for example, only one of the three existing international conventions expressly accepts the principle and clearly defines its limits: The Inter-American Convention on the Law applicable to International Contracts of March 17, 1994 (the “Mexico Convention”). Unfortunately, only two countries have ratified it - Mexico and Venezuela - which drastically reduces its scope of application. In the absence of international rules on the subject, the domestic (national) rules of conflict of law will apply. Unlike Europe, in Latin America, most countries did not expressly state in their legislation whether the principle of party autonomy was accepted (or prohibited), leaving to the doctrine and jurisprudence to regulate the matter. Only a small number of Latin American countries have expressly accepted the principle in their domestic legislation (*e.g.*, Mexico, Argentina, Venezuela, Paraguay and very recently, Uruguay). For more information, see MAZZUOLI, Valerio de Oliveira; PRADO, Gabriella Boger. L’autonomie de la volonté dans les contrats commerciaux internationaux au Brésil. *Revue Critique de Droit International Privé*. Dalloz : Paris, v. 2, pp. 427-456, April-June, 2019. For elements of comparative law, see ALBORNOZ, M.M., *La loi applicable aux contrats internationaux dans les pays du*

one country to another. Some have almost no limits, while other systems require a close tie between the chosen law and the contract or exclude the possibility of choosing the law for certain types of contracts. The possibility of choosing non-State “rules of law” as the law governing international contracts, such as UNIDROIT Principles, in lieu of a particular national law is also controversial before State courts.⁶

Moreover, heterogeneous rules, from different sources may apply:⁷ uniform law instruments,⁸ domestic, international or community conflict of laws rules,⁹ as well as the

Mercosur, Thèse dact., Université Paris II, 2006; CERQUEIRA, F. Vieira da Costa, *Proposition d'un système dualiste de détermination de la loi applicable aux contrats internationaux dans l'espace juridique du Mercosur*, Thèse dact., Université de Strasbourg, 2010.

⁶ The possibility to the parties to choose a non-State law (“rules of law”) to govern their contract is also not clear. Generally speaking, if contracting parties choose arbitration as a dispute settlement mechanism, they may choose as the governing law “rules of law”, which include soft law instruments such as the UNIDROIT Principles (see Art. 28(1) UNCITRAL Model Law; Art. 21(1) ICC Rules). On the other hand, with some exceptions, if the contracting parties are litigation before national courts, the choice of law can only be from among the domestic law of States. Rome I regulation only allows incorporation by reference and does not permit choice of non-State law. The Mexico Convention went beyond the Rome I regulation, showing an openness toward non-State law (see articles 9 and 10). Some soft law modern instruments expressly broaden the scope of party autonomy by providing that the parties may designate not only State law but also “rules of law” to govern their contract, regardless of the mode of dispute resolution chosen (see Article 3 of the Hague Principles on Choice of Law in International Commercial Contracts and Recommendation 6.1 and 6.2 of the Guide on the law applicable to international Commercial contracts in the Americas. For an analysis of the challenges of applying the UNIDROIT Principles as the law governing international commercial contracts, see GAMA JR., Lauro. *Les Principes d'UNIDROIT et La Loi Régissant Les Contrats de Commerce* (Volume 406). In: *Collected Courses of the Hague Academy of International Law*, 2019.

⁷ Here meaning by *who* and *how* the rules are edited.

⁸ Uniform law instruments are directly applicable and provide a solution of substance. Such rules, qualified as norms “(...) specially designed to govern international relations, distinct in their content from internal rules, which have as object legal relations located only in an internal legal order”, are therefore original rules, more adequate to guarantee the security of international relations. Cf. LOQUIN, Éric. *Règles Matérielles du Commerce International et Droit économique. Revue internationale de droit économique*, 2010/1, t. XXIV, 1, pp. 81-101, p. 86.

In the field of international purchase of goods, we can mention the United Nations Convention on Contracts for the International Sale of Goods (CISG). This convention, considered as one of the fundamental treaties of international commercial law, entered into force on January 1st, 1988. To date, it has 93 Contracting States, covering all the continents. The CISG applies to all contracts of sale of goods concluded between parties whose places of business are in different States when the States are Contracting States. In such cases, the CISG applies directly, avoiding the use of conflict law rules to determine the applicable law to the contract. The CISG may also apply when the rules of private international law lead to the application of the law of a Contracting State or if the parties decide expressly to apply it, whether or not they have an establishment in a Contracting State (article 1). In fact, once incorporated into the law of a State by means of its ratification, the CISG becomes the genuine law of the international sale of goods of this State, and the domestic substantive rules do not therefore apply in such cases. Thus, whenever the law of that State that ratified the CISG is designated as applicable, the substantive rules of that convention will be applied directly, as the domestic law of international sale of goods. The UNIDROIT Principles are usually utilized to interpret the CISG (see Article 7 of the CISG).

⁹ Each State freely defines, in its domestic law, the conflict of laws rules. Conflict of law rules are indirect rules, which do not provide a direct solution in substance, but indicate the law applicable to a specific case. States may also attempt to harmonize conflict-of-law rules by adopting bilateral or multilateral conventions that contain conflict-of-law rules. In the European Union we can mention the current Rome I Regulation on the law applicable to contractual obligations, a community conflict-of-law rule addressing the law applicable to international contracts. Regarding the American continent, to date

so-called *lex mercatoria*.¹⁰ This heterogeneous scenario leads to significant legal insecurity, since parties may find it hard to know which method and/or which instrument will be applied in a specific case.¹¹ This situation is likely to hinder economic recovery, hampering transnational trade relations.

four international conventions are in force in this matter: The Treaty of Montevideo of 1889 and its revised version of 1940, the Bustamante Code, and the Mexico Convention. The Treaty on International Civil Law or Montevideo Treaty of 1889 was ratified by Argentina, Bolivia, Peru, Paraguay and Uruguay. Colombia acceded to the Treaty in 1992. In 1940, new treaties were signed in Montevideo, but were ratified only by Argentina, Paraguay and Uruguay (the 1940 Treaty on International Civil Law or Treaty of Montevideo of 1940). The Code of Private International Law, or Bustamante Code, was adopted in 1928, during the Sixth Pan-American Conference. It is in force in 16 States: Brazil, Bolivia, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela and the Bahamas. The 1994 Inter-American Convention on the Law Applicable to International Contracts (Mexico Convention) was formally adopted in 1994 by Bolivia, Brazil, Mexico, Uruguay and Venezuela. It was, however, ratified only by Venezuela and Mexico, and entered into force on 15 December 1996.

¹⁰ As regards international contracts, a body of rules consisting of the recognized and customary commercial principles and practices of merchants are of unprecedented and long-standing importance. "Systematized by Berthold Goldman, the *lex mercatoria* designates the set of rules of non-state or transnational origin, developed by operators of international trade for the purpose of their contracts. The content of the *lex mercatoria* varies according to the authors, but generally there is an agreement on two opponents, the practices and general principles, the two concepts being sometimes confused. This content is sometimes considered outdated: its content seemed difficult to understand, to know, to organize, either by its various elements, by its very nature, to present itself in an orderly and official manner. The savant codifications, and more particularly the Unidroit Principles, are therefore presented as a modern form of *lex mercatoria*." Cf. ANCEL, Marie-Élodie; DEUMIER, Pascale; LAAZOUZI, Malik. *Op cit.*, p. 40-41. See also: STRENGER, Irineu. *La Notion de Lex Mercatoria En Droit Du Commerce International (Volume 227)*. In: *Collected Courses of the Hague Academy of International Law*, 1991.

¹¹ Hierarchical criteria have been used to resolve antinomies between sources of private international law of different categories (for example, between an international treaty and a domestic law). In this sense, it is not uncommon for some domestic regulations to provide for the prevalence of treaties over national legislation in the field of international law. This solution, however, according to Erik Jayme, is not recommended for private international law in postmodernity. According to the author, instead of simply excluding a certain rule of law from the system by applying the hierarchical criterion, one should seek to coexist between these same sources through a "dialogue" (the "dialogue of sources"). Cf. JAYME, Erik. *Identité culturelle et intégration: le droit international privé postmoderne (Volume 251)*. In: *Collected Courses of the Hague Academy of International Law*, 1995. See also Lauro Gama, for whom the UNIDROIT Principles make it possible to relativize the tension between the *lex mercatoria*, national laws and the rules of private international law: "Les idées sous-jacentes à ce nouveau droit international privé des contrats consistent i) à dépasser une approche strictement conflictuelle des sources juridiques ; ii) à reconnaître l'existence d'un environnement juridique caractérisé par le pluralisme ; iii) à refuser l'absence de supériorité hiérarchique du droit émanant de l'Etat ; iv) à établir le « dialogue des sources » (E. Jayme) et la « conciliation des lois » (H. P. Glenn), ce qui permettrait l'intégration harmonieuse de systèmes normatifs d'origines diverses. Les Principes d'UNIDROIT permettent de relativiser la tension entre la *lex mercatoria*, les droits nationaux et les règles de droit international privé. Ils contiennent un certain nombre de dispositions dans son Préambule indiquant quand ils s'appliquent et comment ils s'harmonisent avec le droit étatique." GAMA JR., Lauro. *Les Principes d'UNIDROIT et La Loi Régissant Les Contrats de Commerce (Volume 406)*. *Op. cit.*, p. 119.

There is also the question of the articulation of the rules of conflict with uniform law. In general, uniform law instruments, like the CISG, will apply directly, before any analysis of the traditional conflict of laws method. This would be justified, mainly, by the degree of particularity of uniform law instruments, which are specialized and more appropriate rules to govern internationalized affaires. However, the application of uniform law instruments does not exclude the application of the conflictual rules, which will continue to apply in case of lacunae and for interpretation and complementation of the uniform law instruments. Charalambos P. Pamboukis affirmed the "rule of priority" of international material rules, or in other words, the direct application of uniform law. He sets out that the rule of uniform law is a priority if it

Because international contracts are risky transactions by their very nature, the parties often need contractual clauses tailored to their specific needs. They must know exactly how these clauses will be interpreted, and what their practical effects are, regardless of the court that will eventually examine a contractual dispute. The specific needs of international contracts require an interpretation adapted to its internationality, most of the time distinct from the interpretation arising from domestic laws, aimed at resolving purely internal issues. In this sense, the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles, 2016) are a very useful tool, bringing more certainty to international commercial relations.¹²

The UNIDROIT Principles was approved in 1994 by the International Institute for the Unification of Private Law (UNIDROIT). They were prepared by a group of independent experts from different legal systems and geo-political areas of the world,¹³ and are now in their fourth edition, adopted in 2016. The Principles represent the only global instrument offering a set of comprehensive general rules applicable to different types of commercial contract,¹⁴ and are not, as opposed to other transnational law

finds its source in an international convention. This is justified by two arguments: first, a formal argument, with a reasoning based on a conflict of sources and, second, a substantial argument, based on the rule of speciality, which in itself is based on an economy of reasoning. If the convention itself fixes its domain, applying only to international relations, it should prevail over the conflict rule. Cf. PAMBOUKIS, Ch. Droit International Privé Holistique : Droit Uniforme et Droit International Privé (Volume 330). In: *Collected Courses of the Hague Academy of International Law*, 2008, pp. 178-179.

¹² It is also worth pointing out that the Principles are an interesting and viable alternative for contractors who, in the international sphere, are reluctant to accept the national law of one of the parties to discipline the contractual relationship. The parties can thus overcome the difficulties faced in choosing the law applicable to the international contract, and reduce the uncertainties that arise in such situations, by using a political and nationally neutral set of rules, translated into more than twenty languages, and not identified with any particular legal system, nor with any specific economic system. See GAMA JR., Lauro. *Contratos Internacionais à luz dos Princípios do UNIDROIT 2004 – soft law, arbitragem e jurisdição*. Rio de Janeiro: Renovar, 2006.

¹³ In 1994, after twenty years of work since the initial idea of a new *ius commune* of contracts was first conceived, the first edition of the UNIDROIT Principles was finally published. Contrary to the negotiation of an international convention, the members of the Working Group on the UNIDROIT Principles do not represent their respective countries. They are independent experts, whose freedom vis-à-vis national diplomatic positions and intellectual autonomy enables them to build more freely a set of uniform rules appropriate to the needs of international commerce. Regarding the history of the edition of the UNIDROIT Principles, see GAMA JR., Lauro. *Les Principes d'UNIDROIT et La Loi Régissant Les Contrats de Commerce* (Volume 406). *Op. cit.*, p. 52.

¹⁴ As stated at the Preamble of the Principles, the restriction to “commercial” contracts is in no way intended to take over the distinction traditionally made in some legal systems between “civil” and “commercial” parties and/or transactions. The idea is rather that of excluding from the scope of the Principles so-called “consumer transactions” which, within the various legal systems, are increasingly being subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer.

documents, such as the CISG, geographically limited in origin or materially confined in scope to certain types of contract.¹⁵

Such principles, which are uniform soft law rules and,¹⁶ therefore, not mandatory, offer modern and flexible solutions, which can be adapted to the different circumstances of each jurisdiction.¹⁷ They will apply whenever the parties agree that their contract will be governed by them,¹⁸ or if they agree that the contract will be governed by general principles of law, by the *lex mercatoria* or by the usages and customs of international trade. They will also apply when no choice of law is made.¹⁹ Additionally, they may apply indirectly if the judge or arbitrator uses them as an interpretative source or as a

¹⁵ UNIDROIT Principles of International Commercial Contracts, 4th ed. 2016, full text available in English at: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>.

¹⁶ In the preamble of the Principles there is no precise indication of their nature as a legal norm. In the doctrine, there is a consensus that legal dogma based on juridical positivism does not have categories that serve an adequate classification of the UNIDROIT Principles. Therefore, the concept of soft law is what best expresses the legal nature of the Principles, although the expression is difficult for countries of civilist origins. When applied indirectly, the Principles embody general formulas such as general principles of law, *lex mercatoria*, commercial customs or usages. For a more detailed analysis of the subject, which differentiates the legal nature of the UNIDROIT Principles from the traditional concepts of general contractual clauses, *lex mercatoria* and general principles of law, see GAMA JR., Lauro. *Contratos Internacionais à luz dos Princípios do UNIDROIT 2004 – soft law, arbitragem e jurisdição*. Rio de Janeiro: Renovar, 2006; see also GAMA JR., Lauro. *Les Principes d’UNIDROIT et La Loi Régissant Les Contrats de Commerce* (Volume 406). *Op. cit.*

¹⁷ The UNIDROIT Principle have been translated into more than 20 languages and are therefore easier than access to national laws and international conventions. Moreover, lawyers, judges and arbitrators are provided with comprehensive and in-depth information through the official comments and illustrations contained in the Principles. In addition, it should be noted that several bibliographical references as well as case law relating to the practical application of this instrument are also available on the UNILEX website. The UNILEX website contain a large number of arbitral and judicial decisions, classified by origin (court or arbitral tribunal), by date, but also according to the relevant provision of the Principles that is applied. See: <http://www.unilex.info/instrument/principles>.

¹⁸ As the comment of the Preamble states, parties who wish to choose the Principles as the rules of law governing their contract are well advised to combine such a choice of law clause with an arbitration agreement. The reason for this is that the freedom of choice of the parties in designating the law governing their contract is traditionally limited to domestic laws. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them in the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum. On the contrary, if the parties agree to submit disputes arising from their contract to arbitration, they will be generally permitted to choose “rules of law” other than national laws to govern their contracts. Arbitrators are not necessarily bound by a particular domestic law and also most of the international instruments and national laws in the matter allows the choice of a non-domestic law. See point 4, “a”, of the Comment of the Preamble.

¹⁹ If the parties have not chosen the law governing their contract, it has to be determined on the basis of the relevant rules of private international law. International commercial arbitration rules are very flexible, permitting arbitral tribunals to apply the rules of law which they determine to be appropriate. State tribunals normally will be less flexible and will tend to apply a particular domestic law as the proper law of the contract. In both cases, judges and arbitrators may apply the Principles as a means of interpreting and supplementing the applicable law. See point 4, “c”, of the Comment of the Preamble. For a study of the application of the UNIDROIT Principles by judges and arbiters, see DARANKOUM, Emmanuel S. *L’application des Principes UNIDROIT par les arbitres internationaux et par les juges étatiques*. *Revue Juridique Thémis*, vol. 36, n. 2 (2002), pp. 421-480.

complement to the applicable domestic law or uniform law instruments, like the CISG.²⁰ The Principles have influenced national and international legislators and are being applied in practice by a vast number of parties, arbitrators, and courts in a variety of ways.²¹

Additionally, the use of the UNIDROIT Principles as the applicable law, or at least as a gap-filling instrument to the relevant applicable domestic law, is supported by substantial soft-law tools, such as the worldwide applicable Hague Principles on Choice of Law in International Commercial Contracts and the very recent OAS Guide on the Law Applicable to International Commercial Contracts in the Americas. Both soft-law instruments expressly accept party autonomy and recommend recognizing the parties' possibility of choosing non-State rules of law, such as the UNIDROIT Principles.²²

2. THE SOLUTIONS BROUGHT BY THE UNIDROIT PRINCIPLES IN FACE OF THE COVID-19 CRISIS: HARDSHIP AND FORCE MAJEURE

In the context of the COVID-19 crisis, the UNIDROIT Principles brings a modern and neutral law, adapted to international contracts. But, in this extreme situation, what are the substantial solutions provided for the parties in an international contract affected by the pandemic?

The Principles provide some ways to help resolve the major contractual disruptions caused by the COVID-19 pandemic and the measures adopted as a result. In general, the Principles bring two provisions – or motives –, which may impose a renegotiation of the contract, terminate the contract and/or exonerate a defaulting party from non-

²⁰ For a comparative study, between the CISG and the Unidroit Principles, see BRIDGE, Michael (2014) The CISG and the UNIDROIT principles of international commercial contracts. *Uniform Law Review, Revue de droit uniforme*, vol. 19 n. 4 (2014), pp. 623-642. For the application of the principles to interpret or complement other legal instruments, see also DARANKOUM, Emmanuel S. L'application des Principes 'UNIDROIT par les arbitres internationaux et par les juges étatiques. *Op. cit.*, p. 439.

²¹ Cf. UNIDROIT Principles of International Commercial Contracts, 4th ed. 2016, Preamble. The Comment of the Preamble of the Principles, precises that notwithstanding the fact that the Principles are conceived for international commercial contracts, there is nothing to prevent private persons from agreeing to apply the Principles to a purely domestic contract. Any such agreement would however be subject to the mandatory rules of the domestic law governing the contract.

²² See Articles 2 and 3 of the Hague Principles and Recommendation 6.1, 6.2, and 7.0 of the OAS Guide.

performance: the hardship (Articles 6.2.2 and 6.2.3), and the force majeure (Article 7.1.7).²³

As opposed to a more traditional approach, the Principles do not associate the possible use of force majeure to exonerate a non-performance with a strict impossibility of performance or a “frustration” of purpose. The reference to the concept of “impediment” allows the debtor to invoke force majeure even when some form of performance is still technically possible, but the impediment satisfies the strict requirements set out in Article 7.1.7. Moreover, the Principles bring innovative regulation with regard to hardship and its effects: they take into account the possible interest of the parties in preserving the value of the existing contract and at the same time address the supervening disequilibrium created by the hardship event. One of the main characteristics of the hardship rule is the right of the disadvantaged party to request renegotiations, certainly a more flexible way of encouraging the parties to find appropriate responses to the new situation created by the changed circumstances. Such flexibility facilitates reasonable resolution of disputes and the preservation of the contract, a relevant feature in times of insecurity caused by the COVID-19 pandemic.

According to Article 6.2.2 of the UNIDROIT Principles, there is *hardship* where the occurrence of events *fundamentally* alters the equilibrium of the contract, either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished. Beyond this general condition, four additional conditions must be fulfilled: (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.²⁴

²³ Very recently, the UNIDROIT Secretariat published a guide on the solutions of the UNIDROIT Principles of International Commercial Contracts in face of the Covid-19 health crisis: the “Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the Covid-19 health crisis”.²³ The note provides guidance as to how the Principles could help solve the main contractual disruptions caused by pandemic situations and how force majeure and hardship may apply under the pandemic situations. See UNIDROIT. *Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the Covid-19 health crisis*. Available at: <https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf>.

²⁴ It should be noted that under sub-paragraph (d) there can be no hardship if the disadvantaged party had assumed the risk of the change in circumstances. As the comment of the article establishes, a party who enters into a speculative transaction is deemed to accept a certain degree of risk, even though it may not have been fully aware of that risk at the time it entered into the contract. Cf. UNIDROIT Principles of International Commercial Contracts, 4th ed. 2016, p. 221.

The change of circumstances generated by COVID-19 must be fundamental and objectively ascertainable.²⁵ In such cases, the disadvantaged party may request renegotiation of the contract in order to adapt it to the new circumstances. The request for renegotiations must be made as quickly as possible after the time at which hardship is alleged to have occurred (Art. 6.2.3, paragraph (1)).²⁶ If the parties do not reach an agreement within a reasonable time, they may resort to the court, which may decide to terminate the contract at a date and on terms to be fixed or adapt the contract in order to restore the equilibrium (Art. 6.2.3, paragraph (3) and (4)). It should be noted that according to paragraph (2) of Article 6.2.3, the request for renegotiations does not entitle by itself the disadvantaged party to withhold performance, that may be justified only in extraordinary circumstances.²⁷

With regard to *force majeure*, Article 7.1.7 defines it as any non-performance that (a) was due to an impediment beyond the defaulting party's control and (b) that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or (c) to have avoided or overcome it or its consequences. The effect of applying Article 7.1.7 is to excuse the non-performing party from liability in damages.²⁸

Article 7.1.7 requires the occurrence of an impediment to performance, which may be a total or even a partial impediment. In some cases, the impediment will prevent any

²⁵ The UNIDROIT Principles do not define the exact quantitative measure to determine what should be considered “fundamental”. All relevant circumstances of the contract and its context (e.g. nature of the contract, characteristics of expected performance, relevant market conditions at a given time, etc.) must be analyzed in a particular case. In addition, the new facts must change the situation so substantially that it may have objectively led the parties not to conclude the contract or to have conclude it under different conditions if such a situation had been considered beforehand by the parties. A fundamental change in the equilibrium due to a cause related to COVID-19 must thus have either increased the cost of one of the parties' performance, or decreased the value of the performance for one of the parties (including cases where the performance no longer has any value for the receiving party), and in both cases the increase in cost or decrease in value must be objectively verifiable and determined. It should be noted, however, that if the disadvantaged party have already performed a part of the contract, it is not possible to invoke hardship of this part. The hardship concerns only performance not rendered. See UNIDROIT. *Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the Covid-19 health crisis*, p. 18.

²⁶ The UNIDROIT Principles do not precise the time for requesting renegotiations, which will depend upon the circumstances of the case: it may, for instance, be longer when the change in circumstances takes place gradually, likewise the measures that have being adopted by the countries to contain the COVID-19 crisis.

²⁷ Cf. UNIDROIT Principles of International Commercial Contracts, 4th ed. 2016, p. 218 et ss.

²⁸ Despite its name, the concept of force majeure envisaged in the Principles does not coincide with the traditional meaning given to that same expression in several domestic laws (both in civil law and common law jurisdictions). See UNIDROIT. *Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the Covid-19 health crisis*, p. 8.

performance at all, but in many others, it will simply delay performance and the effect of the article will be to give extra time for performance. There is a need to prove the existence of a relevant impediment and a causal link between the impediment and the non-performance. In the case of the COVID-19 pandemic, the party invoking the force majeure will need to prove causation between the pandemic, or the measures adopted thereof, and the non-performance of the obligation due under the contract. The solution may vary depending on the type of contract, the obligation involved, and the time and place where the contract were concluded or has to be executed.

According to Article 7.1.7, the impediment must also meet three conditions: it needs to be (a) out of the control of the obligor, (b) unforeseeable at the time of conclusion of the contract, and, (c) the obligor needs to prove that he could not have reasonably been expected to avoid or overcome the impediment or its consequences. Regarding the first condition, there can be little doubt on this requirement, since, in general, both the outbreak of the COVID-19 crisis and the measures adopted to prevent contagion are beyond the control of all parties to a contract.²⁹ Concerning the need of the impediment being reasonably unforeseeable, the second condition of the Article, an analysis of two elements would seem to be relevant in the COVID-19 crises: the time of conclusion of the contract and the place of business of the parties. Since, neither the moment of the outbreak of the health crisis, nor the measures adopted to contain it happened everywhere at the same time, it can vary considerably in regard of these two factors.³⁰ Finally, in relation to the third requirement, the proof that the obligor could not be expected to avoid or overcome the impediment or its consequences may be relatively easy if the measures imposed cause a complete shutdown of economic activity or if the pandemic affects directly a party who needs to perform a personal obligation. But if economic activity was less affected and/or alternative sources of supply or means of transportation were available: to what extent could the obligor reasonably be expected to resort to them? Sometimes, the obligor could find another way of performing his obligations, but it may represent a need to pay a

²⁹ It may be beyond the control of the party when one of the contracting parties is a public institution and when the impediment is related to the measures adopted by this institution. See UNIDROIT. *Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the Covid-19 health crisis*, p. 10.

³⁰ The Principles do not contain an express definition of “reasonableness”. An analyze of the case should be done *in concreto*. See UNIDROIT. *Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the Covid-19 health crisis*, pp. 10-12.

substantially higher price. In such a case the obligor might be entitled to invoke, if not force majeure, at least hardship and, thus, request renegotiation of the contract.³¹

Given the definitions of hardship in Article 6.2.2 and of force majeure in Article 7.1.7 of the UNIDROIT Principles, there may be concrete situations that can be considered both as hardship and force majeure.³² For example, imagine a situation where an export ban imposed as a consequence of the pandemic by a country's public administration effectively prevents a party from accessing a necessary raw material, which is exclusively produced in that country. If all the requirements of Article 6.2.2 are met, the impediment can be qualified both as force majeure and as hardship. The fact that the raw material could still be purchased from another supplier, but probably with major difficulty and at a higher price, could be regarded as an impediment to performance, but at the same time a more onerous alternative purchase could fundamentally alter the equilibrium of the contract, and, then, be regarded as hardship event.³³

If this is the case, it is up to the party affected by such events to decide which remedy should be used. If the affected party invokes force majeure, she is adopting a passive role in requesting that the full non-performance penalties of the contract will not be imposed upon her. The consequence is to have her non-performance temporarily exonerated and her obligations suspended, with the possibility of the other party to terminate the contract if the non-performance is fundamental (Article 7.1.7).³⁴ On the other hand, the party invoking hardship is not seeking to be exempted from the consequences of failing to perform the contract in the same way, but seeks instead to have the contract bent to her will so that it serves her purpose. The goal is to have the contract modified, in a revised and re-balanced manner.³⁵ In both cases, a special attention should also be given to the

³¹ See UNIDROIT. *Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the Covid-19 health crisis*, p. 13.

³² This may be because the definition of force majeure contained in the Principles does not refer to a literal notion of "impossibility" of performance of an obligation, but to a supervening "impediment" that escapes the control of the party and meets the requirements imposed in Article 7.1.7(1). Such an impediment, depending on the circumstances, may also meet the requirements of Article 6.2.2 of the Principles (hardship).

³³ See UNIDROIT. *Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the Covid-19 health crisis*, p. 24.

³⁴ The exoneration is only effective as long as the impediment is in course. This limitation reflects the temporary nature of the exonerating cause under the UNIDROIT Principles. As soon as the event of force majeure has ceased to produce its effects, the performance of the obligation, temporarily suspended, becomes exigible again. See DARANKOUM, Emmanuel S. *L'application des Principes UNIDROIT par les arbitres internationaux et par les juges étatiques*. *Op. cit.*, p. 457.

³⁵ See BRIDGE, Michael. The CISG and the UNIDROIT principles of international commercial contracts. *Uniform Law Review - Revue de droit uniforme*, vol. 19 n. 4 (2014), pp. 623-642, p. 15.

division of risks carried out by the parties under a contract, and how much risk the disadvantaged party assumed.³⁶

CONCLUSIONS

The COVID-19 pandemic has negatively affected international trade and international contracts in several ways. In international commercial contracts, frictions between the different legal systems involved might constitute an additional risk, since often there exists a lack of consistency and coordination between the solutions envisaged across different countries. In this scenario of uncertainty, the UNIDROIT Principles, although not being mandatory, provide a set of modern and flexible rules of law, able to support the parties, judges, and arbitrators in the resolution of contractual conflicts caused by the pandemic. They can be used as the applicable law chosen by the parties, as encouraged by the Hague Principles and the OAS Guide.³⁷ In some jurisdictions, if they cannot be used as the applicable law, they can still be used as a tool for interpretation and supplementing domestic law or the CISG's rules,³⁸ where appropriate. For example, in some of Latin America's countries, where there is no regulation on hardship, the UNIDROIT Principles may be an essential tool for maintaining the contract's continuation. They are also a useful tool for legislators, seeking to adjust or modernize their contract law.

The UNIDROIT Principles deal with the negative consequences of the pandemic and its measures through the regulation of force majeure and hardship. Provided all circumstances are met, the COVID-19 related situations may constitute a case of force majeure or, at least, hardship. The configuration of one of the two remedies will naturally depend on all the relevant circumstances of each particular case and will vary according

³⁶ See BRUNNER, Christoph. *Force Majeure and Hardship under General Contract Principles - Exemption for Non-Performance in International Arbitration*, Wolters Kluwer, 2009.

³⁷ For the use of UNIDROIT Principles to interpret and supplement domestic contracts, see GARRO M., Alejandro; MORENO RODRIGUEZ, José Antonio (Eds.). *Use of the UNIDROIT Principles to Interpret and Supplement Domestic Contract*. Springer International Publishing, Ius Comparatum. Global Studies in Comparative Law, vol. 51, 2021.

³⁸ Regarding the controversial acceptance of hardship under the CISG and its relationship with the UNIDROIT Principles, see CISG-AC. *Opinion No. 20, Hardship under the CISG*, Rapporteur Prof. Dr. Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2-5 February 2020. Available at: <http://cisgac.com/opinion-no20-hardship-under-the-cisg/>.

to the disparate context of the pandemic in each jurisdiction. First, it may be necessary to distinguish between the pandemic *per se* and the various measures imposed by public authorities in different countries. Special attention should also be given to the division of risks carried out by the parties under a contract, as well as the very definition of force majeure and hardship in the contractual instrument, which may have different implications. Time of conclusion of the contract and the place of business of the parties should also be considered, since the COVID-19 pandemic had different degrees of impact regarding geographical zone and period of the beginning of the pandemic.

Uncertainty situations, like the world of contracts is suffering at the moment, demand legal certainty in order to preserve and to encourage commercial exchanges. The crises are not only sanitarian, but also economic and social. There is a global need to ensure the preservation of commercial exchanges and their economic value. The UNIDROIT Principles appear, thus, as a modern, neutral and flexible instrument, able to assist the parties in ongoing and future contracts that may be negatively affected by the COVID-19 pandemic. They seek to protect the contractual relationship and provide greater legal security for conflict resolution. Moreover, they assist in the preservation and the development of international commerce, which, in a challenging and uncertain situation like the one we are facing, is essential for saving lives - and livelihoods.

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