– ESSAY COMPETITION –

30 YEARS OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Ardrit Gashi *

I

Principles in the field of law hold a significant importance. From Roman law,[1] it is evident that we relied confidently upon certain 'principles' whether derived from morality, justice, or law, as a source of inspiration for interpreting the law, making other laws, and resolving specific disputes. Sometimes they state a reason that argues in one direction but does not necessitate a particular decision.[2] But, sometimes also it is a common practice in legal life to refer to certain legal norms as 'principles'. In line with this observation, it should be acknowledged that the UNIDROIT Principles of International Commercial Contracts (hereafter: UNIDROIT Principles) are not merely principles;[3] but firstly, they encompass a comprehensive set of rules designed for international commercial contracts based on the principle of fair dealing in international trade; secondly, they may serve as a means of interpreting other commercial law instruments; and thirdly, they may operate in complementarity with other instruments concurrently. These 'principles' after more than three decades of development and several editions (first edition in 1994, second edition in 2004, 2010, and now the 2016 edition),[4] provide a comprehensive and

* Assistant Professor, University of Prishtina, Faculty of Law - Department of Civil Law and Arbitrator at Permanent Court of Commercial Arbitration, Kosovo Chamber of Commerce. E-mail: ardrit.gashi@uni-pr.edu ORCID: https://orcid.org/0000-0001-8123-7031

1 See for example, F. Schulz, *Principals of Roman Law* (Oxford: Clarendon Press, 1936).

2 See for example, R. Dworkin, *Taking Rights Seriously* (London: Bloomsbury Academic, 2013) 42.

3 The 2016 edition of the UNIDROIT Principles, like the 2010 edition, consists of 211 Articles (as opposed to the 120 Articles of the 1994 edition and the 185 Articles of the 2004 edition). See Official Comments of UNIDROIT Principals 2016 (viii). It is important that each article is followed by relevant official comments in order to explain and illustrate the rules in detail. These comments constitute an integral part, and it can be said that their reading is essential for a proper understanding of the UNIDROIT Principles' rules.

4 Indeed, to be more precise, these principles represent the culmination of over fifty years of concerted efforts aimed at bridging and harmonizing diverse legal traditions, before the first edition in 1994. It is essential to acknowledge the pioneering groups and esteemed professors, whose visionary endeavours sought to unify the world through the framework of the private law and contractual jurisprudence. A starting point for the modern debate may be considered the work of the Professor Ernst Rabel. He began work on the creation of an international uniform sales law in the late 1920s. This work began in earnest in the 1930s but was suspended on the outbreak of the Second World War. See E. McKendrick, 'Harmonisation of European Contract Law: The State We Are In' in S. Vogenauer and S. Weatherill (eds), *The Harmonisation of European Contract Law* (Oxford: Hart publishing, 2006) 6. After, in 1971 the Governing Council of UNIDROIT–the Institute's highest scientific organ,

modern framework for international sales and contract law. The epithets that can be attributed to these Principles are multidimensional. They provide "a balanced set of rules" designed for use throughout the world irrespective of the legal traditions and economic and political conditions of the countries in which they are to be applied. They are considered as "a private codification or "restatement" of international contract law. They reflect the "'common core' of global contract law" which the drafters selected what they considered the best solutions for contractual issues.[5] Hence, it is evident that the UNIDROIT Principles hold a distinct position within the international legal framework, and, not only from extensive publications in legal literature,[6] but also from numerous references of domestic,[7] and regional legislative initiatives.[8] All these benefits and advantages of the UNIDROIT Principles for the legal community are widely recognised already, and there are no longer any doubts on this matter.

This thirtieth anniversary provides an opportunity to reflect and objectively evaluate 'the role of the UNIDROIT Principles in the contemporary legal landscape, especially in contract drafting and dispute settlement, and their possible role in new frontiers of contract law.'[9] To accomplish this objective, the essay will revolve around presenting a compelling argument centred on fostering deep cooperation and engagement with the business community and pertinent stakeholders.

II

decided to include in the Work Programme the goal of a 'progressive codification of the law of contractual obligations.' The President of the Institute set up a small Steering Committee composed by the professors from civil law – René David, common law – Clive Schmitthoff, and the socialist legal tradition – Tudor Bucharest, with the task of preliminary inquiries on the feasibility of this project. After, in 1980 an international Working Group was established, chaired by Professor Michael Joachim Bonell, with the task of preparing various draft chapters of Principals. See M. J. Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd Edition, New York: Transnational Publishers, 2005) 28.

5 See Preamble (*Purpose of the Principles*) of UNIDROIT Principals 2016, 1-6.

6 See for example, *UNIDROIT Publications*, available at https://www.unidroit.org/publications/unidroit-publications/ (assessed 15 March 2024). Also, *Uniform Law Review,* available at https://www.unidroit.org/publications/uniform-law-review/ (assessed 15 March 2024). Also, UNILEX - A database of international case law and bibliography on the UNIDROIT Principles and on the United Nations Convention on Contracts for the International Sale of Goods (CISG), available at www.unilex.info (assessed 15 March 2024).

7 See for example, A. Garro and J. Rodríguez (eds), *Use of the UNIDROIT Principles to Interpret and Supplement Domestic Contract Law* (Heidelberg: Springer, 2021). Also, S. Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford: Oxford University Press, 2015).

8 See for example, O. Lando and H. Beale (eds), *Principles of European Contract Law: Parts I and II* (The Hague: Kluwer Law International, 2000).

9 UNIDROIT, 30 Years of the UNIDROIT Principles of International Commercial Contracts – Essay Competition, 19 January 2024, available at: https://www.unidroit.org/30-years-of-the-unidroit-principles-of-international-commercial-contracts-essay-competition/ (accessed 10 April 2024).

International commercial contracts are a domain where the relevance of economics and globalization is immediate and evident. Indeed, business stakeholders play a crucial role in shaping the landscape of international commercial contracts. Their practical experience and insights into market dynamics, trade practices, and contractual negotiations provide valuable input for the analysis and understanding of contract law. This collaborative approach fosters the development of contract law frameworks that are responsive to the needs and realities of the global business community. At this point, we can consider that there is room for further action or improvements. In my experience, many businessmen and their legal representatives have not familiarized themselves with the UNIDROIT Principles, and consequently have not explored their potential utility in their work. Businesses are typically focused on their expansion and profit maximization. However, when faced with disputes, they begin to consider legal recourse. In cases where contractual parties are from different business jurisdictions and their exchanges can be termed international, the first recommendation or inquiry often pertains to why they do not contract according to the UNIDROIT Principles, CISG,[10] and/or both together. Even in instances presented before arbitration, where parties stipulate that their dispute be resolved according to the *ex aequo et bono* rule,[11] the same question arises. Curiously, their response is typically met with another question: to which state do these rules belong? When informed that they do not belong to any state, they then assume whether they align more with the American or European legal system. Unfamiliarity with the UNIDROIT Principles can create a sense of uncertainty or reluctance to explore them further. However, it's important to recognize that taking the time to understand and integrate these principles into international business practices can yield significant benefits. In this regard, UNIDROIT should continue the excellent and useful practice of extending cooperation not only with institutions and schools of law, but also with economic chambers. Building a supportive community can help overcome challenges and build confidence in their use. Economic chambers provide direct access to businesses and serve as important hubs for businesses, providing valuable resources, networking opportunities, and support services. Extending cooperation with economic institutions such as economic chambers can be highly beneficial for promoting awareness and understanding of the UNIDROIT Principles among businesses. This partnership can facilitate the dissemination of information about the UNIDROIT Principles, as well as provide practical guidance and support

[10] United Nations Convention on Contracts for the International Sale of Goods (adopted: 11 April 1980, entered into force 1 January 1988). See United Nations, *Treaty Series*, vol. 1489, No. 25567.

[11] In such instances, when the contract does not specify the applicable law, commercial arbitration tribunals may exhibit more flexibility by allowing them to apply the rules of law which they determine to be appropriate. See for example, Rules of Arbitration of the International Chamber of Commerce (1998), Article 17(1).

for their implementation in business transactions and to understand their legal and commercial potential. Highlighting concrete examples of their use can help alleviate concerns and demonstrate their value in practice or share case studies and success stories that illustrate real-world examples of how the UNIDROIT Principles have been successfully applied in international transactions. Furthermore, the UNIDROIT Principles can contribute often to reduce the legal risks of a commercial contract since they are both a "can-do" and a risk management tool.[12] Hence, it is regrettable that, for example due to practical constraints, the opportunities presented by UNIDROIT Principles to not fully capitalized upon. The potential benefits of utilizing such a harmonized instrument often far outweigh the challenges associated with navigating unfamiliar international legal frameworks. Perhaps Professor Brödermann aptly describes this as 'A Wake-Up Call'.[13]

III

In practice, the UNIDROIT Principles serve primarily as a tool for interpreting and supplementing the relevant contract law in most cases. Courts and arbitral tribunals often turn to these principles for example to support the adoption of a particular solution within the framework of applicable domestic law, or to address gaps therein. In some cases, the reference in an award to the UNIDROIT Principles does not have a direct impact on the decision of the merits of the dispute at hand, individual provisions of the principles are cited, essentially to demonstrate that the solution provided by the applicable domestic law is in conformity with current internationally accepted standards of rules.[14] Undoubtedly, the value of utilizing the UNIDROIT Principles in this way is undeniable. Nevertheless, the legal potential of UNIDROIT Principals extends far beyond of such application. Consequently, it is imperative to inform and ensure that the parties are aware that the UNIDROIT Principles can be invoked right from the outset of their contractual relations. Contractual relations are delineated by a sequence of events or circumstances, each carrying a consequential ripple effect. Ultimately, this cascade of occurrences may culminate in adjudication before a judge or arbitrator. These legal adjudicators naturally rely on established precedent and jurisprudence.[15] The judge and arbitrator will

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12 E. Brödermann, 'The UNIDROIT Principles as a Risk Management Tool' in: UNIDROIT – *Eppur si muove:* The Age of Uniform Law, 1283.

13 See E. Brödermann, 'The UNIDROIT Principles of International Commercial Contracts' in P. Mankowski (ed), *Commercial Law – Article-by-article Commentary* (München: Beck-Hart-Nomos, 2018) 466.

14 See for example, International Bar Association, *Perspectives in Practice of the UNIDROIT Principles 2016* (UNIDROIT, 2019).

15 In contracts stipulating international litigation before a state court, the prevailing private international law regime frequently necessitates the selection of a national state law. Courts frequently rely on their own set of rules within private international law to ascertain the applicable

understandably apply what is familiar to them, and on the other hand, if there is any ethnocentricity there will be a twofold problem. Even more so when a soft law ought to be taken into consideration.

As it stands, the non-binding nature of the UNIDROIT Principles does not equate to a formal selection of the 'choice of law'. Consequently, the UNIDROIT Principles cannot supersede the mandatory rules of objectively applicable law[16] (the same cannot necessarily be asserted with regards to discretionary provisions). This approach warrants reconsideration in order to uphold the principle of party autonomy.[17] In support of this assertion, an *argumentum ad contrario* can be made, exemplified by the CISG.[18] CISG as a 'Convention' represent a hard-law instrument designed for the international sale of goods. It is legally binding on parties, judges, and arbitrators when the conditions outlined in the instrument itself are satisfied.

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jurisdiction through objective connecting factors. These factors ultimately guide the application of the 'law of a country'. See for example for Europe, Convention [80/934/EEC] on the Law Applicable to Contractual Obligations, 19 June 1980, Article 3(3). This provision states that: "The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'." See also, F. Ferrari and S. Leible (eds.), *Rome I Regulation – The Law Applicable to Contractual Obligation* (München: European Law Publishers, 2009) 27. Perhaps, the Hague Principles on the Choice of Law in International Contracts (approved on 19 March 2015 by the Hague Conference on Private International Law) signal a more appropriate direction, by permitting that: "The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise". Although the last sentence, "…unless the law of the forum provides otherwise." may introduce ambiguity and pose challenges for interpretation.

16 See for example, Article 1.4 of UNIDROIT Principals (2016).

17 There exists a close connection between party autonomy and the doctrine of freedom of contract. This connection underscores the importance of allowing parties to determine the governing law of their contracts as part of their broader freedom to negotiate and enter into agreements. This extends to the freedom to regulate terms and conditions, deriving from the substantive freedom of contract. See M. Wolff, *Private International Law* (Oxford: Clarendon Press, 1950) 414. Also, P. Nygh, *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999), 8. But the concept of autonomy is more complicated, largely because of the influence of Immanuel Kant. Kant posited the notion of a potential false consciousness, wherein an individual may desire or intend one thing while, in reality, they would (or should) desire something else if they were rational and thinking clearly. See M. Sellers (ed.), *Autonomy in the Law* (Dordrecht: Springer, 2008) 3. In legal practice, this principle can be abused by the economically dominant party, who may impose their own national law or significantly less equitable contractual terms. Consequently, states frequently intervene by mandating solutions through compulsory rules, as exemplified in private international law. However, such situations are less likely to arise with the application of the UNIDROIT Principles, given the explicit commitment to the principles of good faith and fair dealing in all stages of contractual relations.

18 United Nations Convention on Contracts for the International Sale of Goods (adopted: 11 April 1980, entered into force 1 January 1988). See United Nations, *Treaty Series*, vol. 1489, No. 25567.

However, based on the principle of party autonomy of the will, parties retain the ability to exclude its application from their contractual relations.[19]

In order to shift these perspectives and get out of this mindset–regarding ethnocentricity, a catalyst or impetus is essential. This driving force should emanate from the contractual parties themselves and the terms of their contracts. If, from the inception of their contractual engagement through negotiations, contractual definitions followed by an arbitration clause, the parties demonstrate a consistent incorporation of the UNIDROIT Principles (to the extent that they do not affect the applicable mandatory rules which the parties may not derogate), they may contribute largely to overcoming of these challenges before judges or arbitrators. Indeed, these facts would essentially dictate the entire trajectory of the contractual relation and the case in general.

IV

Why it would be valuable for businesses and contracting parties to incorporate and perform according to the UNIDROIT Principles? First of all, it is important to dwell on the language and drafting process of the contract, since this process essentially constitutes *private lawmaking* wherein parties negotiate and bargain for the inclusion of terms in the contract.

From the inception of the contract formation, the parties must reach an agreement[20] (*consensus ad idem*). This agreement necessitates communication, commonly conducted in the English language,[21] particularly when parties hail from different countries. Obviously, 'clarity' should be the paramount objective of any contractual relationship, commencing from the invitation to negotiate, through negotiations, offers, a corresponding acceptance, and ultimately permeating the entire contract. In this context, the notion of plain language or plain English, is indispensable and serves as an essential condition. But is this simple to achieve? Experience demonstrates that ensuring clarity throughout the entirety of the contract presents a significant challenge. Ambiguity frequently emerges from the intricacies of the English language. It is

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19 Article 6 of the CISG. This exclusion will occur, for example, if parties choose the law of a non-contracting State or the substantive domestic law of a contracting State as the law applicable to the contract. Derogation from the Convention will occur whenever a provision in the contract provides a -different rule from that found in the Convention. See United Nations Commission on International Trade Law (UNCITRAL), *Secretariat Explanatory Note to CISG*, No. E.10.V.14, 2010.

20 As has been pointed out by several authors 'the first requirement of a "contract", in the core meaning of the word, is the existence of an agreement or consent. See for example, R. B. Schlesinger (ed.), *Formation of Contracts. A Study of the Common Core of Legal Systems* (New York: Oceana Publications, 1968) 71.

21 English is now the global language of business. More and more multinational companies are mandating English as the common corporate language in an attempt to facilitate communication and performance across geographically diverse functions and business endeavours. See for example, T. Neeley, 'Global Business Speaks English' (2012) *Harvard Business Review* available at: https://hbr.org/2012/05/global-business-speaks-english (accessed: 01 April 2024).

beneficial to differentiate between ambiguity in semantics, pertaining to the meaning of words, and ambiguity in syntax, concerning the arrangement of words to form sentences. Syntax ambiguity often yields different interpretations depending on the perspective from which the sentence is analysed. This had caused, even in the English-speaking countries, the need to enact legislative measures on the using of plain language law in legal documents and contracts.[22] In the case of the UNIDROIT Principles, the English language utilized is straightforward and neutral, often representing a compromise between civil and common law systems, while avoiding terminology specific to any particular legal system.[23] The language aims to be comprehensible even to non-lawyers.[24] The English language employed in the UNIDROIT Principles is frequently characterized as simple, highly readable, and at times even elegant.[25] So, this would undoubtedly provide significant assistance and advantages for businesses to employing the legal language of the UNIDROIT Principles as *unique and universal* language in their contractual relations without worrying about its ambiguity under the cross-cultural background of various states and legal systems.

In this context, it can also be asserted that an agreement typically involves an offer from one party (the offeror) and a corresponding acceptance from the other party (the offeree).[26] However, it's important to note that there are several legal actions and negotiations that precede the final agreement. These legal actions, for example, consist of defining what constitutes an offer and distinguishing it from a mere invitation to negotiate; addressing the possibility of revoking an offer before acceptance by the offeree; determining the duration of the offer; specifying the requirements for a valid acceptance and establishing the timing of contract conclusion. When the contract is concluded, these preceding legal actions may appear minor. However, they hold significant importance in identifying and interpreting the intentions–

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22 For example, in 1977, New York State enacted the first broad plain language law. Now several states have enacted plain language laws. These statutes are generally of two types. One contains general, subjective criteria for plain language. The other contains specific, objective tests. See S. J. Burnham, *Drafting and Analyzing Contracts: A Guide to the Practical Application of the Principles of Contract Law* (Durham: Carolina Academic Press, 2016) 368.

23 "When drafting the individual provisions, experts had to find sufficiently neutral legal language on which they could reach a common understanding. Even in the exceptional cases where terms or concepts peculiar to one or more national laws are employed, the intention was never to use them in their traditional meaning." See Comment to Article 1.6 of UNIDROIT Principals (2016).

24 M. J. Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd Edition, New York: Transnational Publishers, 2005) 65. Also, M. J. Bonell, 'The law governing international commercial contracts and the actual role of the UNIDROIT Principles' (2018) 23(1) *Uniform Law Review* 8.

25 S. Vogenauer and J. Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford: Oxford University Press, 2009) 14.

26 See for example, extensively, F. Ferrari, 'Offer and acceptance inter absentes*' in J. M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006) 497.

guidelines of the parties in their contractual relations and may have legal consequences in the event of disputes. Disparities or differences regarding these legal actions not only exist between legal systems but also within states belonging to the same system.[27] Therefore, to overcome these differences, the UNIDROIT Principles play a crucial role in providing simplicity and flexibility for businesses and parties.[28] Thus, for example, while the parties or the legal representatives of these parties/companies are dealing with different terms of contract, one of them can perform any action towards the fulfillment of the prospective contract.[29] Or, where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, then this term shall be supplied after.[30] Or, if the parties leave a term to be agreed upon in further negotiations, this does not prevent a contract from coming into existence,[31] except if one of the parties insists that the contract is not concluded before agreement is reached on those matters or in that form.[32] In general, these legal actions that lead to the conclusion of the contract, but not limited, and the articles of the UNIDROIT Principles exhibit a logical and systematic progression, fostering comprehensive coherence, a thoroughgoing harmony and illustration. This systematic order offers significant benefits, enabling drafters in the contract drafting process to utilize it as a sort of *compendium* and glossary. And, these rules persist throughout the entirety of a contractual relationship, in harmony with the principles of conscientiousness and fairness, ensuring equitable conduct and resolution.

In this sense, it can be noted that based on the language and content of the UNIDROIT Principles, as well as extensive commentary literature, it becomes apparent and arguable that no domestic law of a specific country can establish such a legal frame of *reliable maximal standards* upon which businesses in international trade can rely in their activities.

V

In the end, to summarize briefly it may be concluded that contract law is and always has been the most important subject matter in international business law. Also, the UNIDROIT Principles encompass rules designed to regulate the formation, validity, interpretation, performance, and non-performance of international commercial contracts. From this standpoint, UNIDROIT Principals possess plenty of credentials to be regarded as an *international business law*–focused

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27 *Ibid*, 505–510.
28 See Article 2.1.1–2.1.12 of UNIDROIT Principals 2016.
29 Article 2.1.6 (3) of UNIDROIT Principles 2016: '…the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed'.
30 Article 4.8 of UNIDROIT Principles 2016.
31 Article 2.1.14 of UNIDROIT Principles 2016.
32 Article 2.1.13 of UNIDROIT Principles 2016.

on contracts and an *opinio juris* masterpiece. In this context, recalling the influence of 'mandatory rules' of domestic or even international law, as well as the legal character of the UNIDROIT Principles as 'soft law.' This character of 'soft law' should serve as a stage towards the adoption of binding rules in the future.

In addition, the principle of party autonomy, as a cornerstone of the freedom of contract, should arguably be expanded further to reduce mandatory rules, particularly those within domestic law. Even so, correspondingly, the promotion of cross-border exchanges necessitates safeguarding the freedom of parties from over-regulation or imposition of rules that they may not take into consideration.

The role of the UNIDROIT Principles has been firmly established across all academic and legal institutions, including law schools. Through this essay, a multitude of benefits stemming from the UNIDROIT Principles for businesses have been elucidated. Above all, it underscores the imperative call for the application of a *Bottom-Up* approach through direct collaboration with business actors. These actors serve as the primary catalysts for the application, progression, and modernization of the law.