

## UNIDROIT PRINCIPLES IN INTERNATIONAL TRADE CONTRACTS' REGULATION

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### **ABSTRACT**

*International trade has been facing a globalization process, which caused the inoperativeness of state laws in the field of business's dynamics. It soon became necessary to create a range of rules to regulate these kind of relations. Firstly, merchants began to regulate them through habits and practices, that took roots over the years, in each market sector (lex mercatoria). After the first world war, there were several attempts to create a harmonized normative system, which would control international trade contracts. One of the main institutions that has widely contributed to the harmonization and unification of the commercial law is, undoubtedly, the UNIDROIT Institute, through its principles, which had been improved and completed throughout time, applying its rules to several legal systems. This research intends not only to describe the importance of these principles but also to demonstrate its contribution to international trade and explain the reason for its success. Moreover, the upgrades introduced in the last version (2016) will be mentioned. At last, we will focus on the legal nature of these principles.*

**Keywords:** *globalization, International Trade, Lex mercatoria, uses and customs, UNIDROIT*

### **1. INTRODUCTION**

International contracts imply relationships established between different legal operator systems, and this implies a conflict of laws in space. Given this reality, it must be ascertained that the law is applicable to contractual relations connected with different legal systems. We can not ignore the sources of private international law. We will have to determine the legal complexity that regulate better because of the dynamics of these relationships and their specificities. To determine the most suitable law, many non-governmental entities have contributed, assuming a central role in the harmonization and unification of International Trade Law. In this sense, we will highlight the UNIDROIT institute. UNIDROIT Principles of International Commercial Contracts are an instrument to overcome the unpredictability of the law applicable to contracts made between traders from different states, and it justifies to underline their contribution to the discipline of international trade agreements.

## 2. THE EVOLUTION OF THE UNIDROIT PRINCIPLES

In medieval times, the uses and commercial customs, had mechanisms to avoid the application of the feudal rights of the time, these were ill-adapted to the dynamics of international trade. Thus was born the *Lex mercatoria*. (Sweet & Grisel, 2017). Its origin is essentially linked to the development of international maritime trade. We can not fail to point out the contribution of the main ports of the time, which are real commercial centers that stimulate international contractual relations (Junior & Oliveira, 2003) and (Oliveira, 2017). The universal and transversal character of *Lex mercatoria* is based on the communication between the merchants of different places in Europe (Azevedo, 2006). Besides being faithful to the customs and customs practiced by the merchants, it places great importance on the principle of contractual freedom, simplifying the behavior of the protagonists of these relations. With the development of common law and the realization of the sovereignty of national states (17th century), contrary to the transnational idea advocated by *Lex mercatoria*, there are some restrictions on its application. With the development of international trade and the application of local laws, which were not well adapted to this type of contract, States were obliged to adopt some of the instruments used in commercial practice. It was thus created the environment for the birth of what Berthold Goldman called the New Law Marchand. Nowadays, with globalization, national laws have proved to be increasingly ineffective in regulating international trade. Consequently, there is a need to create a disciplinary and homogenizing normative body of these international trade relations (Oliveira, 2017). In this sense, with the aim of creating a uniform discipline (Vidigal, 2010), the International Institute for the Unification of Private Law (UNIDROIT) emerges. It is an international organization, based in Rome, whose function is the harmonization of laws and principles for international contracting. It is a soft law instrument, therefore a flexible right. Opposing the hard law, that was rigid and inflexible (Oliveira, 2017). The UNIDROIT Institute, based in Rome, was created in 1926 and welcomed by 61 member countries. In 1971, a work program was presented to elaborate the Principles (Trahan, 2002). A special panel was set up in 1980 to draft the draft chapters, although the initial text was only approved in 1994. In 1998 occurred the first review in order to improve some of the existing issues and the introduction of new institutes, consequently, new articles appeared. The Principles were completed again in 2004. This is not a real review but an update. Some chapters and 61 new articles have been introduced. This update was mainly focused on the powers of the agents, the rights of third parties, assignment of rights, transfer of obligations, assignment of contracts, deadlines, prescription and resignation. In addition, the resignation to the adversary and the transfer of credit were consecrated. Lastly, we sought to establish a balance between the creditor and the debtor. As a result, the initial 120 articles have now risen to 185. In 2010, a new edition arose covering subjects related to the general law of contracts, namely training, interpretation, invalidity, illegality, compensation and limitation periods. The UNIDROIT Principles were presented as a "general part" of international contracts, which are essentially directed to contracts of instant execution. It should be borne in mind that they did not always provide adequate solutions for long-term contracting, in which time is a preponderant factor. As of 2013, it was necessary to introduce some adjustments. In this sense, some of the existing rules have been expanded. Following the adoption of the Model Clauses for the use of the UNIDROIT Principles, that need was even more evident. In this sense, the 2016 edition was important, upgrading some of the existing topics.

## 3. THE CONTRIBUTION OF THE PRINCIPLES FOR INTERNATIONAL TRADE

Today, having in view the globalization that is taking place around the world, trade is carried out through large-scale contractual instruments. Therefore, it is concluded that today's international trade is endowed with a dynamic cross-border (Topedino, 2000). The UNIDROIT principles are a complex legal instrument.

In its preamble, we find no references to its binding force (Basedow, 2000). However, they should not be considered as a traditional legal mechanism. We do not intend to address the problem on its legal nature, we understand that the concept of soft law is what best characterizes the Principles (Gama, 2014) & (Oser, 2008). It should be noted that soft law is a flexible, non-binding right, capturing itself as a commercial "deontology" (Marques dos Santos, 2005). The UNIDROIT principles constitute an alternative to the hard-law, characterized by a normative rigidity and state creation (Gama, 2014). They are thus versatile and an important instrument for the discipline of international contracting. In this sense, the principles include general rules on international contracts, showing characteristic traits to the various existing legal systems. They wish to respond to the specific problems of international trade (Oliveira, 2017). Based on the autonomy of the parties, the UNIDROIT principles, in accordance its Preamble, regulate international commercial contracts and may be applied when the parties so agree; when they agree to govern the contract under the general principles of law; where they have not chosen the applicable law; it may also be used to interpret or complement other international instruments of uniform law; to complement national law; and to be used as a model for national and international legislators. Briefly reviewing the UNIDROIT Principles, we can say that contractual freedom, corollary of the principle of the autonomy of the will, (Diniz, 2004), shows a total absence of special formalities. Underlining the binding nature of the parties, the principle of binding force of contracts ensures compliance with the will of the parties. In addition to these pillars, the principle of internationality is also mentioned. It prescribes an autonomous interpretation of the Principles, leaving aside the possibility of using national law. Another principle, transversal and not less important, is that of good faith. This guarantees the trust in the relations between the parties. Lastly, we have the principle of the primacy of uses and practices, which does more than emphasize the importance of *Lex mercatoria*, e.g. the uses and customs of each sector of the market (Oliveira, 2017).

#### **4. UNIDROIT PRINCIPLES OF 2016: NEWS**

The main purpose of the new edition / update was to take into account the special needs that long-term contracts require. An amendment was made to six provisions (Articles 1.11, 2.1.14, 5.17, 5.18 and 7.3.7) compared to the 2010 edition. The most significant part of the changes is found in the comments on each article, especially in the Preamble. "Long-term contracts" (Article 1.11) are defined as long-term, variable and complex instruments, implying a continuous relationship between the parties. This notion emerges from the complexity of the transaction, from the ongoing relationship between the parties and not just from the duration of the contract. This precept was added to clarify the comment 3 amendment, adding example contracts. Concerning Article 2.1.14 (1), the following is emphasized: where the parties intend to conclude a contract, leaving a clause for later negotiation or to be completed by a third party, such behavior will not prevent the conclusion of the contract. Such permission is particularly appropriate for contracts in which the parties, because of their duration and / or complexity, leave open one or more clauses. The parties now feel unable to determine certain aspects or do not wish to do so at the time of conclusion of the contract. Comment 3 has been amended, drawing attention to Sections 5 and 6 (Articles 5.1.7 and 6.1.1) and to the necessary articulation between the standards concerned. We also added comment 4 on the clauses intentionally left open in the context of long-term contracts. In regard to Article 4.8 on possible omissions, comments 1, 2 and 3 have been amended. This provision seeks, as regards the ambiguous clauses, to separate the situations of omission from those of interpretation. The Principles are thus intended to protect situations that constitute gaps not resolved by other rules of the Principles. However, there is a relationship between the provisions relating to filling the gaps, Article 5.1.2 and the provision under review. With regard to Article 5.1.7, modifications were made to comment 3, explaining in detail the operation of external rules regarding the

determination of the price by a third party. In the first paragraph of this commentary, only linguistic modifications were agreed upon. In the second paragraph, the parties are allowed, in accordance with their freedom, to establish the procedures to be followed by the third party in determining the price. It is further added that the parties may contest the determination of the price if it does not comply with the procedure which they have previously established. Let us imagine the following situation: the agreed procedure is based on the "market price". If not, the parties may challenge stating that the price determined by the third is unreasonable. A linguistic amendment was also introduced in the title of Article 5.1.8 "Termination of a contract of indefinite duration" to "Termination of Contract". And the words "can be terminated" to "can be rescinded" have been replaced in the text. The purpose of this amendment was to clarify that, once the contract has been concluded for an indefinite period, Articles 7.3.5 and 7.3.7 should be applied with regard to the refund. Comment 2 was added and an example was given regarding the termination of the contract and its consequences (Unidroit.org).

## **5. THE UNIDROIT PRINCIPLES AS SOURCE OF NEW MEXICAN LIABILITY**

The sources of medieval *Lex mercatoria* were mainly Roman law, maritime custom and the "laws" of European fairs of the time (Pereira, 2002). However, the new *Lex mercatoria*, fruit of the development of the international trade, gave origin to other sources. The New Law Merchant is a reality adapted to the current international contracts. It includes several elements that must be explained (Rodrigues, 2016). It is important to discuss their modes of revelation, especially on the UNIDROIT Principles. The sources of the new *lex mercatoria* are international contracts, customs and practices of international trade, general contracting conditions and standards forms, rules of professional associations and guidelines, general principles of law, codes of conduct, international conventions and model laws and arbitration decisions (Vidigal, 2010). Concerning international contracts, these are the main source of the international trade law, since their frequent use has led to the creation of standard contracts (Vidigal, 2010). Uses and customs are based on the acts practiced repeatedly by merchants, acts accepted by the merchant community. It should be noted that customs and customs vary over time, since the practice of international trade is constantly changing. This argument is used, above all, by those who do not consider uses as an effective source of *Lex mercatoria*. However, international organizations have sought to implement them through standardized precepts (Rodrigues, 2016). For example we have the Incoterms rules on international practices in contingent claims (ISP 98 / ICC), among others. In turn, the general contracting conditions and standard forms are general conditions and contractual models structured and updated by organizations recognized by merchants, e.g. ICC Uniform Rules for Demand Guarantees (ICC Publication No. 458). Regarding the rules of professional associations and guidelines, we will say that these are an aid to international contracts, in particular for the preparation of contracts and trade operations, e.g. Guide to Distributorship Agreements ICC (publication 441). The general principles of law are one of the main sources of the new *lex mercatoria*. They do not encompass only the general principles of law, but also the specific principles relating to international trade (Shulz, 2010). The general principles of international trade are no more than the result of comparing the laws of different systems (Vidigal, 2010). They stand out: the principle of good faith, which translates into the duty of loyalty and trust that must be established between the contracting parties; the principle of obligatory (*pacta sunt servanda*), means that the contract makes law between the parties, translates the obligation in the fulfillment of the established; the principle of autonomy of the will, manifesting itself in the freedom to contract. The general principles of international trade are expressed in the UNIDROIT Principles (Oliveira, 2017). They are also present in other instruments, namely in the Principles of European Contract Law. Currently, it is estimated that at least 215 decisions were based on the UNIDROIT Principles, with most of these decisions emanating from arbitral tribunals.

One of the hypotheses of application of the Principles is based on the choice of New Lex mercatoria as the law of the contract. In our view, this expresses well its source nature. To better understand its nature, let us highlight some of its characteristics. Firstly, the UNIDROIT Principles are considered to be a normative system by some Statistical Courts. Nevertheless, most States recognize the possibility for the parties to choose the law applicable to the contract. See the Inter-American Convention on the Law Applicable to International Contracts, 1994, in articles 9 and 10, which considers that lex mercatoria can be applied to the contract as dealing with general principles of international commercial law accepted by international organizations. It should be noted that the application of this Convention is very limited, but only between Mexico and Venezuela. However, it demonstrates the importance of lex mercatoria in international contracting. Secondly, despite the application of the Principles as a normative system that the arbitral tribunals have applied to us, whenever the parties establish this mode of conflict resolution, they can freely choose the rules of law applicable to their contract, and this choice may fall under national rules, such as the UNIDROIT Principles. In this sense, Article 17 of the Arbitration Rules of the International Chamber of Commerce. This does not occur in state courts that must, in principle, apply state law. The UNIDROIT Principles can be integrated into the contract as contractual clauses, not constituting a normative system. Thirdly, in the absence of an expressed choice by the parties to the UNIDROIT Principles to regulate the contract (Darankoum, 2002), arbitration jurisprudence has demonstrated through the theory of implicit negative will or negative choice the possibility of applying the Principles, judgment CCI 7375/1996 (Ferrarase, 2005) and (Marquis, 2002).

## 6. CONCLUSION

The UNIDROIT Principles are the source of the new lex mercatoria. Ask yourself: are they uses or principles? The answer will not be free of doubts, and there are those in the doctrine and jurisprudence that integrate them in the uses and who characterize them as principles. However, it seems to us that the issue has little practical effect (Topedino, 2000). With regard to codes of conduct, non-existing international conventions and model laws, we will say that the first aim regulate some aspects of private relations multi-location, for example the activities of multinational enterprises. The United Nation Code of Conduct on Transnational Corporation is an example of this. The model laws are drafts of laws created by international entities. These seek to be an inspiring source for some national legislators. As an example, UNCITRAL Model Law on Electronic Commerce stands out (Basedow, 2000). With regard to arbitral jurisprudence, it should be noted that this alternative mode of justice has been increasingly used throughout the world, with most international contracts constituting this model of dispute settlement. This is because, among many other advantages, it is noticeable the greater speed in the resolution of conflicts. Arbitral decisions are thus the source of the new lex mercatoria, since the arbitrators base their decisions on national rules. They pass court sentences which are a benchmark for future cases. Arbitral jurisprudence is, moreover, an effective way of spreading the new lex mercatoria (Darankoum, 2002). Today, with economic globalization and internationalization of relations, international contracts take place on the aegis a multiplicity of regulations. Consequently, the UNIDROIT principles play a key role in the need for harmonized rules, capable of providing greater legal certainty and predictability. The main purpose of the International Institute for the Unification of Private Law is to harmonize the rules of international commercial procurement, providing appropriate solutions to the requirements of international trade.

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