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TOPIC

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AS THE LAW GOVERNING THE CONTRACT

MASTER THESIS

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INTRODUCTION

Intensive development of the social life, processes of globalization, computerization, constantly changing technological and economic environment and rapidly increasing rate of international trade practice encouraged the establishment of a unique and independent legal system: the UNIDROIT Principles of International Commercial Contracts (hereinafter - the UNIDROIT Principles). Due to increasing numbers of international transactions as a rule concluded between remote parties involving transportation of goods and covering more than one legal system and different countries the parties usually do not trust each other or do not rely upon litigation for protection in a foreign legal system. Businessmen involved in cross-border transactions have been and still are increasingly dissatisfied with unsuitability of some national laws for international commerce and with results of the conflict-of-laws rules which often appear impractical.

In certain situations it might be difficult to determine the law governing the contract, i.e. should it be the domestic law of the seller's state or the domestic law of the buyer's state. Regardless of which law is applicable different rules might apply to international contracts. Differences in the law restrict international trade. The UNIDROIT Principles have been developed with a view to alleviating the aforementioned problems. The UNIDROIT Principles represent the balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are applied.[1] The UNIDROIT Principles are not binding, the so called "soft-law", and their acceptance depends upon their persuasive authority therefore there is a need to determine in what situations they may be applied.

Object of the research. The UNIDROIT Principles as the law governing the contract.

Purpose of the research. The purpose of this research is to determine the limits of application of the UNIDROIT Principles – when the international commercial contracts can be governed by them and when a dispute does not fall within the scope of their application.

Hypothesis. Contracting parties are allowed to choose the UNIDROIT Principles as the law governing the contract.

In order to achieve the purpose and to confirm or deny the hypothesis, the tasks of the research are as follows:

1. to determine the origin, formation and aims of the UNIDROIT Principles;

[1] Commentary of UNIDROIT Principles of International Commercial Contracts. International Institute for the Unification of Private Law (UNIDROIT). Rome, 2004.

2. to discuss different positions about the possibility for the parties to refer the UNIDROIT Principles as the law governing the contract used by domestic courts and by arbitral tribunals;

3. to examine whether the parties by choosing the UNIDROIT Principles as the law governing their contract enjoy unlimited autonomy or their freedom of contract is limited by the mandatory rules of the otherwise applicable domestic law or even by the UNIDROIT Principles themselves;

4. to illustrate ways in which parties can draft the choice-of-law clause;

5. to reveal advantages and disadvantages of the UNIDROIT Principles.

Methodology of research. In order to accomplish the tasks of this work and to make valid conclusions traditional methods – documentary, linguistic, logical, systematic, historical and comparative analyses – are applied. Main methods are historical and comparative. Historical analysis is used to reveal essential historical changes that encouraged and influenced the development of the UNIDROIT Principles. Comparative analysis is used to analyse and compare various legal documents, theories of scientists, courts and arbitration practice.

Sources. The author of this research analyzed material of the UNIDROIT Working Group for the Preparation of the UNIDROIT Principles, courts and arbitration practice connected with the UNIDROIT Principles as the law governing the contract. In this research the author mostly relied on articles of Michael Joachim Bonell who was a chairman of the UNIDROIT Working Group for the Preparation of the UNIDROIT Principles and on other authors, such as Arthur Hartkamp, Fabrizio Marella, Stefan Vogenauer, Jan Kleinheisterkamp, Ole Lando, Gesa Baron, Ulrich Drobnig, Alexander S. Komarov, Isabelle Veillard, Egidijus Baranauskas, Paulius Zapolskis, Tadas Žukas, Stasys Dazdauskas, Valentinas Mikelėnas, Hans van Houtte, Michael Frischkorn, Michael Mustill, Michael Pryles. The Official Commentary on the UNIDROIT Principles, UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL Rules, Rules of Arbitration of the International Chamber of Commerce were also analyzed.

1. THE UNIDROIT PRINCIPLES. ORIGIN. CHARACTERISTICS.

In 1994, the International Institute for the Unification of Private Law (hereinafter UNIDROIT Institute) published the UNIDROIT Principles. Drafters and some commentators celebrated them as the new lex mercatoria.[2] The UNIDROIT Principles are regarded as a written form of the lex mercatoria. Michael Frischkorn points out in his article "Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility": *"No longer do the parties have to rely on arbitrators picking and choosing what they think to be the rules of the Lex Mercatoria, now the parties can pick a list of rules and tweak that list if necessary to fit their particular needs."*[3]

To begin with the historical description of the lex mercatoria should be provided followed by explanation of the idea of the UNIDROIT Principles and elaboration thereon in the light of the specific characteristics. What connects the lex mercatoria and the UNIDROIT Principles? Can the UNIDROIT Principles be treated as one of examples of the lex mercatoria?

The lex mercatoria is a Latin expression for a body of trading principles used by merchants throughout Europe. Earlier it functioned as the international law of commerce. There is a lot of information about the lex mercatoria, however it is rather difficult to define it.

Some scientists[4] define the lex mercatoria as an autonomous and completely independent system, while others[5] argue that there is no such law as the lex mercatoria and that there is no reason for it to be adopted. In the international law the lex mercatoria is defined in different ways, such as:

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[2] Bonell, Michael Joachim. The UNIDROIT Principles of International Commercial Contracts, Towards a new lex mercatoria in: Revue de droit des affaires internationals, 1997., p. 8

[3] Frischkorn, Michael. Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility, European Journal of Law Reform, Vol. 7, Issue ¾, 2005., p. 334

[4] In 1960's professor Berthold Goldman claimed that the lex mercatoria is an autonomous legal system (Goldman, Berthold. Lex mercatoria, Forum Internationale No. 3, 1983., p. 1-24). His views were later expanded by Philippe Fouchard (Fouchard, Philippe. L'Arbitrage Commercial International, 1965, p. 423), by Philippe Kahn (Kahn, Philippe. La Vente commerciale internationale, 1964, p. 365), by the Lord Justice Michael Mustill (Mustill, Michael. The New Lex Mercatoria: The First Twenty Five-years, Liber Amicorum for the Rt. Hon. Lord Wilberforce, 1987, p. 149, p.174). Ole Lando claims that the binding force of the lex mercatoria stems from the recognition of it as an autonomous norm system by the business community and by state authorities (Lando, Ole. The Lex Mercatoria in International Commercial Arbitration, International and Comparative Law Quarterly No 34, 1985., p. 752)

[5] For example, George R. Delaume claims that without the supplementary role of the relevant national legal order and sometimes of the international legal order as well, the lex mercatoria may be a set of inoperative

1) a loosely organized system which consists of principles of international law, rules and standards, customs and international commercial practice;

2) main principles of law, international rules;

3) commercial principles and practices;

4) an independent set of rules aimed at regulating international trade and business relations.

The aforementioned definitions of the lex mercatoria are very generic. There are particular types of codifications which intersect with the definitions of the lex mercatoria in different ways. Michael Frischkorn gives three examples of codifications which represent the lex mercatoria: "*The international convention is exemplified by the CISG*[6]*. The CISG is the most widely accepted and has the most credibility but lacks an inherent flexibility. The international restatement is exemplified by the UNIDROIT Principles. The Principles were drafted in a semi formal manner which provides a certain modicum credibility while allowing a good deal more flexibility. The academic lists are exemplified by Lord Mustill's*[7] *list. These lists are informal compilations by academics which lack any inherent credibility outside of that imparted by the drafter but provide the maximum amount of flexibility since only the author can unilaterally update the list at anytime*."[8]

As we can see, the lex mercatoria is precisely defined legal system as it also incorporates the main principles of law, standards and customs. According to the Lithuanian professor Valentinas Mikelėnas the lex mercatoria is a trading law, which includes legal norms of the international law, commercial customs and is without national or official character.[9]

As indicated by Gesa Baron: "[…] *merchants created international legal structures and instruments that had to be recognized by national legal systems in order to reach a common base for*

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rules. Therefore it is impossible for the international commercial process to be truly autonomous. (Delaume, George R. Law and Practice of Transnational Contracts, 1988., p.100)

[6] CISG means United Nations Convention on Contracts for the International Sale of Goods. CISG text is posted on the website http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf

[7] Mustill, Michael. The New Lex Mercatoria: The First Twenty Five-years, Liber Amicorum for the Rt. Hon. Lord Wilberforce, 1987. The list is also provided in the Michael Priels article "Application of the Lex Mercatoria in International Commercial Arbitration". For example, some of Michael Mustill principles are as follows: pacta sund servanda – contracts should be enforced according to their terms; abus de droit (abuse of right) – unfair and unconscionable contracts and clauses should not be enforced; a contract should be performed in good faith etc. (Pryles, Michael. Application of the Lex Mercatoria in International Commercial Arbitration, University of New South Wales Law Journal, Vol. 31, Issue 1, 2008., p. 321)

[8] Frischkorn, Michael. Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility, European Journal of Law Reform, Vol. 7, Issue ¾, 2005., p. 336

[9] Mikelėnas. V. Sutarčių teisė: bendrieji sutarčių teisės klausimai: lyginamoji studija. Vilnius: Justitia, 1996.

international trade relations"[10]. Supporters of such idea had a dream to create a new lex mercatoria which would be recognized as an autonomous legal system in international trade and perform the same functions as the state. They started creating the international organizations such as the UNIDROIT and the United Nations Commission on International Trade Law (hereinafter UNCITRAL). Gesa Baron explains the subsequent processes as follows: "*Non governmental institutions like the International Chamber of Commerce started to foster international trade law by developing uniform standard rules and procedures. There emerged a trend of rediscovering the international character of the commercial law and to move away from the restrictions of national law to a universal international conception of international trade law*."[11]

The modern lex mercatoria was understood as customs and use of international trade and of those principles, concepts and institutions which are common to all or most of the states involved in cross border transactions.

Furthermore, Gesa Baron indicates that there are many different opinions even among the authors who advocate for the modern lex mercatoria: "*Some authors take a wide approach and adequate lex mercatoria with transnational commercial law. Hereby, they do not only classify international standard form contracts, general commercial practices, trade usages, customary law, codes of conduct, rules of international organizations and generally recognized principles of law as constituent elements of the lex mercatoria, but also international conventions and uniform laws".*[12]

Some other supporters of the idea of the lex mercatoria have a narrower approach as they emphasize customary, spontaneous and thus non-statutory nature of the lex mercatoria. Moreover, they exclude uniform laws, international conventions and other statutory law as a primary source of the lex mercatoria.

In his article "Application of the Lex Mercatoria in International Commercial Arbitration" Michael Priels points out: "*The debate on the lex mercatoria is centred on the basic questions or (1) whether [the lex mercatoria] actually constitute an autonomous legal order and can therefore be classified as a ‚law', (2) whether, if not a law, it comprises a sufficiently comprehensive body of*

[10] Baron, Gesa. Do the UNIDROIT Principles of International Commercial Contracts form a New Lex Mercatoria? CISG Database: Pace Institute of International Commercial Law, 1998., p. 3
[11] Ibid, p. 4
[12] Ibid, p. 5

rules to be capable of application to decide a dispute, or (3) whether it simply represents usage in international trade".[13]

As already mentioned before, scientists discussing the issues pertaining to the lex mercatoria are divided into two groups, i.e. "mercatorists" and "anti-mercatorists". They are interested in questions if the lex mercatoria is a law or an autonomous legal order which is distinct from national legal systems. The scientists are also interested in whether the lex mercatoria is a true body of law distinct and autonomous from national legal systems and whether the parties to a contract can validly choose the lex mercatoria as the law governing their contract by including the choice-of-law clause referring to the lex mercatoria (the general principles of international commercial law) as the proper law of the contract.

The Michael Priels provides a very clear definition of "anti-mercatorists" in the article „Application of the Lex Mercatoria in International Commercial Arbitration": *„There is no legislature which drafts international commercial laws. Nor is there international commercial court which is capable of developing a "precedent" for international commercial disputes. As such, opponents of a lex mercatoria deny its character as a law and question whether there are sufficiently developed principles which are capable of universal application to complex international transactions".*[14]

It's undeniable that the lex mercatoria, as such, is different from the traditional concept of "law" as the law to be found on law books, codes and case law. However, it is part of the "living law" which is the product of inventiveness, adaptability and creativeness of the merchants and which therefore concentrates on those legal norms that can be enforced in practice. Assuming that the lex mercatoria constitutes an independent legal system beside national law, the reference by the parties to the lex mercatoria, general principles of international commercial law and alike do not leave the contract in legal uncertainty and there is no reason why the parties should not be able to choose the lex mercatoria as the proper law of their contract.[15]

The author of this work favours the lex mercatoria and considers it to be a law. The main idea is that, in general, the law can emerge independently from a body that is capable of formalizing it. Gesa Baron supports this opinion: "*The binding force of the lex mercatoria does not depend on*

[13] Pryles, Michael. Application of the Lex Mercatoria in International Commercial Arbitration, University of New South Wales Law Journal, Vol. 31, Issue 1, 2008., p. 320

[14] Ibid, p. 319

[15] Bonell, Michael Joachim. The UNIDROIT Principles of International Commercial Contracts. Towards a new lex mercatoria in: Revue de droit des affaires internationales, 1997., p. 8

the fact that it is made and promulgated by State authorities but that it is recognized as an autonomous norm system by the business community and by State authorities."[16]

So if we regard the lex mercatoria as an independent legal system which exists alongside the national law, the reference by the parties to the lex mercatoria, the general principles of the international commercial law, does not leave the contract in a situation where in the event of breach of the contract no solutions to a problem can be found. In view of the above it can be concluded that there is no reason preventing the parties from being able to choose the lex mercatoria as a proper law of their contract. The lex mercatoria is not a precise, complete and exhaustive set of rules, but the national legal systems are not complete either and require gap-filling procedures.

Nowadays if contracting parties draft a provision that dispute, controversy or claim arising out of or in relation to the contract would be attended and organized by court of arbitration, national courts forward a case to arbitration in order to settle a dispute by arbitration in accordance with its rules. Therefore the international arbitration has developed into a legal institution which often relies on the lex mercatoria and on the so-called codification of the lex mercatoria, the UNIDROIT Principles, for the purpose of resolving disputes.

The main function of the UNIDROIT Principles is to define the common rules for the international commercial contracts and they are defined as modern source of the lex mercatoria.

1.1. The UNIDROIT Principles

Having provided a fundamental explanation of the lex mercatoria it is time to move to the in-depth analysis of the UNIDROIT Principles. The UNIDROIT Institute[17] is an independent intergovernmental organisation which was set up in 1926 as an auxiliary body of the League of Nations. The purpose of the UNIDROIT Institute is to study the needs and methods for modernising, harmonising and co-ordinating private and, in particular, commercial law between the states and groups of states. In 1940, the League of Nations ceased to exist and the UNIDROIT Institute was re-established on the basis of a multilateral agreement, the UNIDROIT Statute. The first article of the UNIDROIT Statute sets forth the purpose of the UNIDROIT Institute: "*The purposes of the International Institute for the Unification of Private Law are to examine ways of harmonizing and coordinating the private law of States and groups of States and to prepare gradually for the*

[16] Baron, Gesa. Do the UNIDROIT Principles of International Commercial Contracts form a New Lex Mercatoria? CISG Database: Pace Institute of International Commercial Law, 1998., p. 9

[17] For more information about UNIDROIT Institute and general overview see the web site http://www.unidroit.org/dynasite.cfm?dsmid=103284 //http://www.uncitral.org/uncitral/en/index.html // connection time 2011-03-13

adoption by various States of uniform rules of private law." [18] The main tasks of the UNIDROIT Institute are described as follows: a) to prepare drafts of laws and conventions with the object of establishing uniform internal law; b) to prepare drafts of agreements with a view to facilitating international relations in the field of private law; c) to undertake studies in comparative private law; d) to take an interest in projects already undertaken in any of these fields by other institutions with which it may maintain relations as necessary; e) to organize conferences and publish works which the Institute considers worthy of wide circulation.

The membership of the UNIDROIT is restricted to states acceding to the UNIDROIT Statute. There are 63[19] member states of the UNIDROIT representing the five continents and numerous different legal, economic and political systems as well as various cultural backgrounds. The UNIDROIT Institute is financed with annual contributions of its member states. These contributions are fixed by the General Assembly as well as the basic annual contribution from the Italian Government. Moreover, the extra-budgetary contributions for purposes identified by the donor may be established (e.g. trust funds).

The UNIDROIT Institute works in the field of commercial law and therefore has almost no political influence and concentrates more on technical decisions. This is the main difference between the UNIDROIT and UNCITRAL[20]. Both organizations have similar aims; however, the methods they use to fulfil their tasks differ considerably.

Previously the UNIDROIT Institute has made several attempts to adopt the international binding conventions, for example 1964 Hague Uniform Laws on the International Sale of Goods which served a source of inspiration for the United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG Convention). Later the UNIDROIT Institute decided to concentrate on non-obligatory documents such as model laws which can influence national legislature and main principles of law. What stimulated the aforementioned method of work of the

[18] STATUTE OF UNIDROIT. International Institute for the unification of Private Law (UNIDROIT), Rome., p. 2 // http://www.unidroit.org/mm/statute-e.pdf //http://www.uncitral.org/uncitral/en/index.html // connection time 2011-03-13

[19] List of Members of UNIDROIT is provided in a web site http://www.unidroit.org/english/members/main.htm //http://www.uncitral.org/uncitral/en/index.html // connection time 2011-03-13

[20] UNCITRAL is a legal body specializing in commercial law reform worldwide for over 40 years. UNCITRAL's business is the modernization and harmonization of rules on international business. For more information about UNCITRAL see the web site http://www.uncitral.org/uncitral/en/index.html // connection time 2011-03-13

UNIDROIT Institute? The answer lies in the fact that it is very difficult to adopt a convention because of the need to combine different opinions among the states and because it takes many years to reach consensus and even after many years of discussions the agreement might not be reached. Michael Frischkorn in the article "Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility" points out: „*International conventions are binding treaties between countries. In the realm of international law, conventions are at the forefront. Countries negotiate the convention on a certain topic. Once negotiation is complete, each country must ratify the convention and once a set amount of countries have ratified the convention, it becomes active for those countries. This method of negotiation and ratification provides a premium of credibility but this same system prevents any easy changes to the convention once it has been ratified. One of the best known and most widely accepted conventions is the Convention on the International Sale of Goods*."[21] UNCITRAL succeeded in adopting the CISG Convention after 20 years of different discussions and debates. The UNIDROIT Institute decided to draft non-binding documents, the so-called "soft-law" for addressing the problems arising from business relations. The soft-law is designated for judges, arbitrators and businessmen. The UNIDROIT Institute does not create binding legal documents because the main aim of UNCITRAL is to draft binding international commercial conventions.

The UNIDROIT Institute published its Principles of International Commercial Contracts. There are many differences between CISG Convention and the UNIDROIT Principles. As already mentioned, CISG Convention was adopted by the UNCITRAL organization. CISG Convention establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and the seller, remedies for breach of contract and other aspects of the contract. Moreover, the enforcement of the CISG Convention is conditional upon ratification thereof by the state, which means that the rules enshrined in CISG Convention are binding upon the states that have joined the CISG Convention. The question of advantageousness or disadvantageousness of the ratification is a matter of discussion. The CISG Convention is binding upon the state that ratifies it making the adoption of amendments extremely difficult. By contrast, the UNIDROIT Principles have much broader scope of application. The CISG Convention is applicable only to the sale of goods contracts, while the UNIDROIT Principles

[21] Frischkorn, Michael. Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility, European Journal of Law Reform, Vol. 7, Issue ¾, 2005., p. 335

regulate all commercial contracts. Furthermore, the UNIDROIT Principles are not an international treaty. This aspect might be construed as a drawback of this document because they are not binding upon the state or state courts. According to the creators of the UNIDROIT Principles, there was no intention to establish that states should adapt or ratify the principles in order to apply them as binding laws. The UNIDROIT Principles are based on the idea that the unification of the private law is also possible by means other than the legislative means. According to Hans van Houtte: *"[The UNIDROIT Principles] intend to be acceptable for lawyers from the different legal systems. Moreover, the Principles intend to be neutral. They were not drafted in the interest of a specific party or lobbying group and will strike a fair balance between the rights and obligations of all parties to contracts*."[22]

The UNIDROIT Principles do not result from diplomatic compromise between representatives of different and autonomous legal orders, therefore they are much more coherent and uniform in comparison with the international treaties. The UNIDROIT Principles: *"[…] reflect concepts found in many, if not all legal, systems. Since however the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions even if still not yet generally adopted. The objective of the UNIDROIT Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied. This goal is reflected both in their formal presentation and in the general policy underlying them".*[23]

So the UNIDROIT Principles allow lawyers and other international trade agents to have a set of rules which is independent and easily understandable. The UNIDROIT Principles are written in a clear and simple language, they are neutral and objective so that they can be easily understood even for laymen, let alone the lawyers. As Michael Frischkorn in the article "Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility" points out: "*Principles were drafted with clear and simple language so as to permit any educated person, even*

[22] van Houtte, Hans. UNIDROIT Principles of International Commercial Contracts, International Trade and Business Law Annual, Vol. 2, 1996., p. 6

[23] UNIDROIT PRINCIPLES, supra , note 1, Introduction, p. viii. UNIDROIT Principles Official integral version// http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf // connection time: 2010-12-02

if not a trained lawyer, [easily] to understand them. This reflects the purposes of the Principles, to make a set of rules which are accessible to those who would mostly like to use them".[24]

The UNIDROIT Principles were also drafted avoiding the use of terms peculiar to any legal system, which facilitates their understanding worldwide. This increases the chances for the contracting parties to reach common opinion how to deal with their contractual relations.

The UNIDROIT Principles were not drafted as a convention or model law to be transformed into the national law. Gesa Baron claims that "*the idea was to elaborate international principles of contracts without a direct binding force, the acceptance and application of which were exclusively dependent on its persuasive power and the authority of UNIDROIT*".[25]

To sum up this chapter, the UNIDROIT Principles might serve as a model law for the national legislators at the same time creating international commercial contracts. The UNIDROIT Principles can also be used as a tool to fill the gaps occurring in international commercial contracts.

1.2. Advantages and Disadvantages of the UNIDROIT Principles

The fact that the UNIDROIT Principles were created by independent experts and do not depend on any particular legal system has many advantages. Firstly, they are more flexible and can be rapidly adapted to changing circumstances in international trade practice. The UNIDROIT Institute is free to amend them any time when conditions in international trade practice changes. As pointed out by Michael Joachim Bonell: *"[...] the impact of the Principles may prove to be even greater than that of an international convention, for a convention has no force at the time it is concluded and represents at most a provisional indication of support by participating States which may or may nor crystallise, whereas the Principles represent the unconditional commitment and consensus of scholars of international repute from all over the world*"[26].

Secondly, the UNIDROIT Principles are formulated by experts who have economical and political freedom from local governments, so they reflect general international law, so governments are free to focus on more specific areas relating domestic contracts.

However, the UNIDROIT Principles also have their disadvantages. The UNIDROIT Principles are binding just if parties accept to apply them as the law governing the contract, in the absence of parties acceptance courts and arbitrators will apply them just if regard that it is

[24] Frischkorn, Michael. Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility, European Journal of Law Reform, Vol. 7, Issue ¾, 2005., p. 337

[25] Baron, Gesa. Do the UNIDROIT Principles of International Commercial Contracts form a New Lex Mercatoria? CISG Database: Pace Institute of International Commercial Law, 1998., p. 10

[26] Bonell, Michael Joachim. Towards Legislative Codification of the UNIDROIT Principles, Uniform Law Review, 2007., p. 237

fundamental instrument which can solve the problem. Some experts think that they have to be transformed into a binding instrument and incorporated into some international treaty. Michael Joachim Bonell discusses the issue: "*The need for a Global Commercial Code […] will grow with the globalization of communication and commerce […] When the world becomes one market, that market will require one law, and that law must include general principles of contract law […] [The UNIDROIT Principles] will have to be raised from their present status to that of rules of law binding on the courts […] they should be incorporated in the Code thus making their many mandatory and non-mandatory provisions part of that code […]*.[27]

The UNIDROIT Principles, as a non binding instrument, are very attractive and widely applied in practice, so the author of this work believes that the idea of transforming the UNIDROIT into a binding instrument is too radical because the application of a neutral instrument is much more attractive for contracting parties because they are not trusted by any national legislator.

1.3. Structure of the UNIDROIT Principles

The UNIDROIT Principles 2004 are composed of the Preamble (1994 version, with the addition of paragraphs 4 and 6 as well as the footnote) and 185 articles divided into ten chapters, namely Chapter 1: "General Provisions" (1994 version, with the addition of Arts. 1.8 and 1.12); Chapter 2, Section 1: "Formation" (1994 version) and Section 2: "Authority of Agents" (new); Chapter 3: "Validity" (1994 version); Chapter 4: "Interpretation" (1994 version); Chapter 5, Section 1: "Content" (1994 version, with the addition of Art. 5.1.9) and Section 2: "Third Party Rights" (new); Chapter 6, Section 1: "Performance in General" (1994 version) and Section 2: "Hardship" (1994 version); Chapter 7, Section 1: "Non-performance in General" (1994 version), Section 2: "Right to Performance" (1994 version), Section 3: "Termination" (1994 version) and Section 4: "Damages" (1994 version); Chapter 8: "Set-off" (new); Chapter 9, Section 1: "Assignment of Rights" (new), Section 2: "Transfer of Obligations" (new) and Section 3: "Assignment of Contracts" (new); Chapter 10: "Limitation Periods" (new).[28]

Each article has comments which are intended to explain the reasons for the black letter rule and the different ways in which it may serve in practice. In the article "UNIDROIT Principles of International Commercial Contracts" Hans van Houtte indicated: "*The different articles contain the basic rules. Each article, however, should be read together with the relevant Comments which explain and illustrate the proposed rule in a more detailed fashion. The Comments are an integral*

[27] Ibid, p. 239

[28] For More information see the web site http://www.unidroit.org/english/principles/contracts/main.htm - connection time 2011-03-14

part of the Principles. The text of the articles without the commentary is therefore insufficient. A proper understanding of the articles requires also consultation of the Comments."[29]

As mentioned above, the UNIDROIT Principles avoid the use of terminology that is peculiar to any national system. There are provisions which, for example, lay down the principle of freedom of contract and the formation of the contract which are formulated in general terms. This international character of the Principles is very important because they are neutral and not influenced by any national law, thus suggesting reasonable solutions for questions arising in drafting international commercial contracts or resolving problems arising from them.

1.4. Formation of the UNIDROIT Principles

While moving to a deeper analysis of the formation of the UNIDROIT Principles, the author of the research wants to draw attention to the fact that the Principles of European Contract Law were issued by the Commission on European Contract Law almost concurrently with the UNIDROT Principles. The Principles of European Contract Law and the UNIDROIT Principles were drafted almost at the same time, in the same manner and both became a soft-law as they address basically the same issues of contract law and are quite similar in terms of formal presentation.[30] Lars Meyer stated that: „*The Lando Commission*[31] *working procedures closely resemble those of the UNIDROIT Working group*".[32] As a result there was a fear that two instruments regulating the same relations will compete with one another. However a closer analysis shows that it is false assumption. The scope of the UNIDROIT Principles is related to international commercial contracts, while the Principles of European Contract Law are applicable to all kinds of contracts, even domestic ones and those made between businessmen and consumers. Territorial scope of the Principles of European Contract Law is limited to the Member States of the European UNION, while the UNIDROIT Principles can be applied all over the world without any boundaries. As stressed by Michael Joachim Bonell: "*It follows that the two instruments in actual practice not only do not*

[29] van Houtte, Hans. UNIDROIT Principles of International Commercial Contracts, International Trade and Business Law Annual, Vol. 2, 1996., p. 6

[30] The text of Principles of European Contract Law is posted on the website: http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm // connection time 2011-03-14

[31] The Commission on European Private Law is called the "Lando Commision" because of its founder Professor Ole Lando.

[32] Meyer, Lars. Soft Law for Solid Contracts - A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization, Denver Journal of International Law and Policy, Vol. 34, Issue 1, 2006., p.131

overlap, but may well coexist and play equally important, but not interchangeable, roles. Indeed, outside Europe or in commercial transactions involving non-Europeans, it will be the UNIDROIT Principles that apply, while within the European Union or in purely intra-European contracts, especially between merchants and consumers, the European Principles [Principles of European Contract Law] will prevail."[33]

The previous attempts to unify the private law were mainly concentrated on binding acts such as model laws and conventions. The UNIDROIT Principles are based on the idea that private law can also be unified by means other than the legislative means. The aim of the drafters of the UNIDROIT was "*to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied*".[34] Moreover, the UNIDROIT Principles are not convention or model law and in order to apply them there is no necessity to transform them into the national law. The idea was to create international not binding principles, the application and acceptance whereof was exclusively dependent upon the authority of UNIDROIT and its persuasive, autonomous, neutral power.[35] In the article "UNIDROIT Principles: a significant recognition by a United States District Court" Michael Joachim Bonell reveals why the UNIDROIT Principles have a neutral character: "*Prepared by a group of experts in the field of international contract law each acting in his or her individual capacity, albeit under the auspices of a prestigious intergovernmental organization, the UNIDROIT Principles lack any binding force*".[36]

The primary goal of the drafters was to develop a system of rules which is sufficiently flexible to take account of the constantly changing circumstances brought about by the technological and economic developments affecting cross-border practice and at the same time attempts to ensure fairness in international commercial relations. So the drafters wanted to create the UNIDROIT

[33] Michael Joachim Bonell. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar for the Same Purposes? in: Uniform Law Review, 1996., p. 245

[34] Commentary of the UNIDROIT Principles of International Commercial Contracts. International Institute for the Unification of Private Law (UNIDROIT), Rome, 2004., Note 68, Introduction, p. viii.

[35] Meyer, Lars. Soft Law for Solid Contracts - A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization, Denver Journal of International Law and Policy, Vol. 34, Issue 1., 2006., p. 132

[36] Bonell, Michael Joachim. UNIDROIT Principles: A Significant Recognition by a United States District Court, Uniform Law Review, Vol. 4, Issue 3, 1999., p. 652

Principles which would encompass very flexible rules and could be applicable irrespective of constantly changing circumstances in the international commercial relations.

In 1980, a special working group was set up for drafting various draft chapters of the UNIDROIT Principles. The members of the group which included representatives of all major legal and socio-economic systems of the world, were leading experts in the field of contract law and international trade law. Most of the members were academics, some high ranking judges and civil servants. It is important to mention that the members of the working group were not representatives of their governments or their legal systems. They had to work in their own capacity so it was impossible to take into account the law of every single country of the world. The process is described by Michael Joachim Bonell as follows: "*From among the national codifications or compilations of law greater attention was naturally given to the most recent ones, such as the United States Uniform Commercial Code and the Restatement (Second) of the Law of Contracts, the Algerian Civil Code of 1975, the 1985 Foreign Economic Contract Law of the People's Republic of China, the drafts of the new Dutch Civil Code and of the new Civil Code of Quebec, which finally entered into force in 1992 and 1994 respectively. As far as international legislation is concerned, such an important and universally applied instrument as the United Nations Convention on Contracts for the International Sale of Goods (CISG) was an obligatory point of reference. […] Moreover special attention was given to non-legislative instruments elaborated by professional bodies or trade associations and widely used in international trade*."[37]

The drafters completed enormous comparative work: they compared laws of numerous national systems and also tried to find synthesis between different legal systems, namely between the civil and the common law. The original text of the Principles is in the English language, but their text and the commentary have already been translated into German, French, Chinese, Italian, Spanish, Russian and many other languages.

The drafters of the UNIDROIT Principles focused on the identification and codification of general principles of the contract law - the Principles common for the developed national or domestic legal systems. They aimed at creating the rules that might be used as a guide to interpretation by judges and arbitrators. The drafters believed that arbitrators needed a special set of rules tailored to the international commerce which would help the parties to escape from difficult

[37] Bonell, Michael Joachim. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes? 1996., p. 2 // http://www.cisg.law.pace.edu/cisg/biblio/bonell96.html // connection time: 2010-12-05

conflict-of law rules, to reduce financial costs, and to save time. As indicated by Michael Joachim Bonell the UNIDROIT Principles have four basic purposes: 1) legislative model for states that wish to enact modern laws on international trade contracts; 2) a drafting guide of international contracts; 3) applicable law chosen by the parties in an international transaction; 4) normative reference for arbitrators or domestic judges in disputes involving international contracts.[38]

To sum up, the origin, history and formation of the UNIDROIT Principles is described in the first chapter. After having acquired the fundamental understanding of the UNIDROIT Principles, which is essential in order to proceed, the next chapter deals with the analysis of the UNIDROIT Principles as the law governing the contract. Were the expectations and goals of the drafters realised and achieved in practice? Can the UNIDROIT Principles – as non-binding and "soft-law" – serve as the law governing the contract?

[38] Bonell, Michael Joachim. The Unidroit Principles of International Commercial Contracts – General Presentation, in the UNIDROIT Principles: A Common Law of Contracts for the Americas, Acts of Inter-American Congress (November 1996), Valencia, Venezuela, UNIDROIT, 1998., p. 22

2. THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AS THE LAW GOVERNING THE CONTRACT

The Preamble of the UNIDROIT Principles sets forth the purpose of the UNIDROIT Principles: "*These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to implement or supplement domestic law. They may serve as a model for national and international legislators*."[39]

The UNIDROIT Principles apply only to the international commercial contracts. An international contract exists when a) the place of business of the parties is in different countries; b) when the contract has significant connections with more than one state, c) when a party has to choose between the laws of different states; d) when contract affects the interests of international trade. However, these elements are not directly enshrined in the UNIDROIT Principles. The main idea is to give the broadest possible interpretation to the concept of "international" contract. All situations where there is no international element, for example, where all main elements of the contract are connected just with one state, should be excluded from the scope of application. The term "commercial" contract means that the so-called "consumer contracts" are excluded from the scope of application of the UNIDROIT Principles. In different countries consumer contracts are governed by special rules mostly of a binding character. The UNIDROIT Principles are applied when both contracting parties are businessmen. Pursuant to the Commentary on the UNIDROIT Principles of International Commercial Contracts the concept of "commercial contract" should be understood in the broadest sense. This means that investment and/or concession agreements, contracts for professional services and other kinds of economic transactions should be regulated by the UNIDROIT Principles as well. But it should be emphasised that the application of the UNIDROIT Principles to other type of agreements is not restricted.

The Preamble of the UNIDROIT Principles defines practical application of the principles and situations in which they should be applied. The second paragraph of the Preamble to the UNIDROIT Principles stipulates: "*[The UNIDROIT Principles] shall be applied when the parties*

[39] Commentary o UNIDROIT Principles of International Commercial Contracts. International Institute for the unification of Private Law (UNIDROIT), Rome, 2004., Preamble - p.1

have agreed that their contract be governed by them".[40] There are many reasons for the parties to choose the UNIDROIT Principles instead of a particular domestic law as the law governing their contract.

Firstly, in a situation where parties have no equal bargaining power, the stronger party will insist on the choice of its domestic law. The International Court of Arbitration of the Russian Federation dealt with a case where a party, although having sufficient bargaining power to impose its own national law on the other party, preferred not to use that power based on the unpredictability of its own law and instead chose the UNIDROIT Principles.

The International Court of Arbitration of the Russian Federation stressed: "*A reason which may militate in favour of the wide use of the UNIDROIT Principles [in Russia] is the fact that Russian lawyers and business people do not seem to be as reluctant as their foreign counterparts to contemplate references to the Principles in place of the application of their domestic law on the ground that the former would not confer on them the advantages which parties to foreign trade contracts usually expect from the application of their own domestic law, namely well known and detailed regulation of business transactions to which they are accustomed*."[41]

Another scenario where the UNIDROIT Principles might be an alternative to the choice of a particular domestic law as the law governing an international contract is mentioned by Michael Joachim Bonell in the article "Soft Law and Party Autonomy: The Case of the UNIDROIT Principles" where he refers to experienced German attorney Eckart J. Brodermann's thoughts. Eckart J. Brodermann thinks that the UNIDROIT Principles are very useful to small and medium sized businesses working at an international level. Mentioned companies are too small to impose their own domestic law and it is too expensive for them to invest in a comparative analysis of a neutral law as a possible alternative solution. For these businesses the UNIDROIT Principles are an attractive, neutral and already available set of rules.[42]

Moreover the UNIDROIT Principles give a solution in cases where parties to the contract for tactical or strategic reasons decide to proceed on equal footing and choose the applicable law after arbitral proceedings have started. The aforementioned article gives an example of the dispute

[40] UNIDROIT PRINCIPLES, supra note 2, preamble., part 2, UNIDROIT Principles Official integral version// http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf // connection time: 2010-12-03

[41] Komarov, Aleksander S., The UNIDROIT Principles of International Commercial Contracts: A Russian View, Uniform Law Review, 1996., p. 247

[42] Bonell, Michael Joachim. Soft Law and Party Autonomy: The Case of the Unidroit Principles. Loyola Law Review, Vol. 51, Issue 2, 2005., p. 234

involving several hi-tech companies operating in different parts of the world. When arbitral proceedings started and the question arose as to the law applicable to the substance of the dispute, the parties agreed and decided to apply the UNIDROIT Principles. After careful examination the parties recognized the UNIDROIT Principles as being in line with the different domestic laws they had initially invoked, thereby regarding that application of one of these domestic laws would be pointless. In this situation the choice of the UNIDROIT Principles turned out to be beneficial for both parties ('win-win" situation).[43]

2.1. Application of the UNIDROIT Principles by domestic courts

Party autonomy is one of the cornerstones of the system of conflict-of-law rules in matters contractual obligations.[44] Choice of law clauses in contracts is the best example of party autonomy because very detailed control of the international contractual relations is clearly impossible for the states. Jan-Jaap Kulpers in his article "Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice" explains the importance of party autonomy in international relations: *"[…] a sovereign must exercise more restraint when a situation has contacts outside its territory and finally that [parties] choice of law promotes legal certainty and economic efficiency. Limitations on the private autonomy should be based on good reasons and not go beyond what is necessary."*[45] The autonomy of parties allows them to choose the law applicable to their contract. The question arises whether the parties can choose the UNIDROIT Principles as an applicable law to the international contract? Traders usually want their contract to be governed by the law selected by them, rather than by the law originating outside the contract. Depending upon the fact whether the application of the UNIDROIT Principles is invoked before an arbitral tribunal or before a domestic court we can identify two entirely different effects or consequences of such a choice. In these two situations the governing law differs.

Domestic courts are obliged to apply their own national law and also the conflict-of-laws rules which constitute a part of the national legal regulation. Traditional view is that the conflict-of-laws rules do not provide the possibility to choose a "soft-law" such as the UNIDROIT Principles as the law governing the contract and the choice of the law applicable to international agreements is

[43] Ibid., p. 235

[44] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7. 2008., Point 12 // http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF// connection time: 2011-03-15

[45] Kulpers, Jan-Jaap. Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice, German Law Journal, Vol. 10, Issue 11, 2009., p. 1507

limited to a particular domestic law. This is confirmed by the 1980 Rome Convention on the Law Applicable to Contractual Obligations[46] (hereinafter Rome Convention). The Rome Convention recently was replaced by the Rome I Regulation[47] which is a mandatory tool for the European Union (hereinafter EU) at large.

Rome I Regulation contains rules dealing with situations involving a conflict of laws in the field of contracts. It is well known truth that if the contract is connected with more than one country, it is also connected with several legal systems providing different legal solutions to the disputed legal question and the applicable law will have to be determined by the private international law (the conflict-of-laws rules). Private international law differs from country to country. So it is natural that counties involved in the process of European integration and Europeanization[48] started to unify conflict-of-laws rules in the field of international contracts. As a result of these efforts the Rome Convention was adopted in 1980. Constantly changing circumstances in the field of contract law stimulated the need to modernize the provisions of the Rome Convention which prevented from choosing the soft-law like the UNIDROIT Principles as the law governing the contract. Article 1 of the Rome Convention stipulated: "*The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries*."[49] So, as logically concluded by Egidijus Baranauskas and Paulius Zapolskis in their article "Europos sutarčių teisės derinimas: Europos Komisijos iniciatyvos", according to the aforementioned provision of the

[46] Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980/80/934/EEC, Consolidated version CF 498Y0126(03) // http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:HTML// connection time: 2010-12-03

[47] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7. 2008// http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF// connection time: 2010-12-03

[48] According to Arthur Hartkamp, the Europeanization is a process "where national frontiers are rapidly loosing their importance, where official policy is aiming at free flow of goods and services, where merging economies and companies require legal expertise exceeding national systems and languages". (Arthur Harthamp. Perspectives of the Development of a European Civil Law, 1999.)

[49] Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980/80/934/EEC, Consolidated version CF 498Y0126(03). Art.1// http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:HTML// connection time: 2010-03-14

Rome Convention the parties are prevented from choosing a non-state law (as well as the lex mercatoria or the UNIDROIT Principles) as the law governing the contract.[50]

Recently, the Rome Convention was replaced by the Rome I Regulation. The Rome I Regulation was drafted in consideration of numerous alternatives concerning the possibility for the contracting parties to choose the "soft-law" as the law governing the contract. Initially, the Commission proposed allowing the parties to choose the "soft-law" rules as the law governing the contract, planning to permit the use of the Principles of European Contract Law and the UNIDROIT Principles to be used as an applicable law. Article 3 of the Commission Proposal for a Regulation on the Law Applicable to Contractual Obligations stipulates that „*The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community. However questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation*".[51] The Commission points out: "*The form of words used would authorize the choice of the UNIDROIT Principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the lex mercatoria, which is not precise enough* […]"[52]. So the use of the lex mercatoria, which, according to the Commission was excluded.

Commission received many replies from citizens, governments, universities, legal professionals, academics who commented on the need to covert the Rome Convention into Rome I Regulation and who also expressed their opinion concerning the need to modernize some of the Rome Convention rules.[53] During Consultations on the conversion of the Rome Convention into Rome I Regulation many opinions were expressed concerning the idea to allow the contracting parties to choose the "soft-law" as the law governing the contract. For example, Peter Stone

[50] Baranauskas Egidijus, Zapolskis Paulius. Europos sutarčių teisės derinimas: Europos Komisijos iniciatyvos, Vilnius: Justitia, 2007., p. 18

[51] Commission Proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final,15 Dec. 2005, p. 14 // 14http://eurlex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf //connection time: 2011-04-06

[52] Ibid, p. 5// connection time: 2011-04-06

[53] Detailed consultations of citizens, organisations and public authorities on the conversion of the Rome Convention into Rome I Regulation can be found in the web site http://ec.europa.eu/justice/news/consulting_public/rome_i/news_summary_rome1_en.htm // connection time 2011-04-06.

expressed a negative opinion: *"I see no good reason for departing from the traditional rule, presently embodied in Article 3 of the Rome Convention, by which the parties' freedom is limited to choosing between the laws of various countries or territories […] Any extent of freedom of choice would increase uncertainty. Even where an international convention is in force, there may be differences in its interpretation in different Contracting States, and a choice of general principles obviously maximises the opportunity for dispute as to the applicable rules."*[54] The UNIDROIT Institute issued a completely different opinion on this matter: "[…] *by allowing to agree on the application of non state principles and rules, instead of law of a particular country, as the law governing the contract, the parties would be in a position to adopt a truly "neutral" solution more easily acceptable to both of them […] Moreover, by permitting parties even under the conflict of law rules applied by domestic courts to choose non-state principles and rules as the law governing their contract, the unjustified discrimination presently existing in this respect between litigation before a domestic court and litigation before an arbitral tribunal would disappear. Indeed there is no valid reason why parties to an international contract should enjoy a different degree of autonomy in choosing the applicable law depending on whether they decide to have their dispute settled by arbitration or by court decision*".[55]

However, after numerous discussions the proposed provision failed to get enough support during the legislative process.

Consequently, the Rome I Regulation was adopted on 17 June 2008 replacing the Rome Convention. In the article "Contracts in Cyberspace and the New Regulation Rome I" Michael Bogdan noticed: *"Similarly to the Rome Convention the Rome I Regulation is intended to be used in relation to all legal systems in the world, irrespective of whether the law specified by its conflict-of-law rules is the law of a Member State or not. In this sense, the Regulation is intended to have "universal application", without any requirement of reciprocity."*[56] Pursuant to Article 2 (Universal application) of the Rome I Regulation "*Any law specified by this Regulation shall be applied*

[54] Stone, Peter. Consultation on the conversion of the Rome Convention 1980 on the law applicable to contractual obligations into a Community instrument and its modernization p . 2// http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/university_essex_en.pdf/// connection time 2011-04-06

[55] Reply by the UNIDROIT Institute to question 8, p. 4 // http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/unidroit_en.pdf //connection time 2011-04-06

[56] Bogdan, Michael. Contracts in Cyberspace and the New Regulation Rome I, Masaryk University Journal of Law and Technology, Vol. 3, Issue 2, Fall 2009., p. 221

whether or not it is the law of a Member State".[57] So this means that for example nothing can prevent the Lithuanian seller and German buyer from selecting the New York law as the law governing their contract. It is obvious that according to the aforementioned Article of Rome I Regulation any legal system in the world can be applied. As it was noted in the previous chapter, some scientists defend the lex mercatoria (the UNIDROIT Principles are regarded as a written form of the lex mercatoria) as being an autonomous and completely independent legal system as well. The question arises whether the UNIDROIT Principles can be applied according to Rome I Regulation?

Article 3 of the Rome I Regulation stipulates that "*A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract*."[58] So Article 3 allows the contracting parties to choose the legal system by which they want their contract to be governed. It is worth mentioning here that the Rome I Regulation is applicable to contracts which contain an international element, e.g., contracts of pure domestic nature do not fall within the scope of application of the Rome I Regulation.

Article 4 of Rome I Regulation applies in the absence of an express choice of law clause in the contract. The term "the law of the country" is predominantly used in Article 4. The UNIDROIT Principles are not a law of any particular country, so the interpretation of the aforementioned terms obviously shows that applicable law according Rome I Regulation can be just the law of a particular State.

Nils Willem Vernooij points out in the article "Rome I: an Update on the Law Applicable to Contractual Obligations in Europe": "*Like the Rome Convention, Rome I does not allow the contracting parties to choose anything but national law. Therefore, non-State rules of law-such as lex mercatoria, the Principles of European Contract Law, or the UNIDROIT Principles of International Commercial Contracts - cannot be chosen as the law applicable to the contract. This intentional omission has been criticized as being out-of-touch with international commercial reality, contradictory to the principle of party autonomy and inconsistent with the arbitration laws of many*

[57] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations , OJ L 177, 4.7. 2008. // http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF// connection time: 2011-03-15

[58] Ibid//connection time: 2011-03-15

countries. However, Rome I does not preclude the contracting parties from incorporating by reference into their contract non-State rules."[59] In the beginning of explanatory note of Rome I Regulation (Point 13) it is stated: "*This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention*". [60] If the parties decide to incorporate some provisions of the UNIDROIT Principles while drafting their contract such clause in a contract has to be accepted by courts.

In view of the above, it can be concluded that according to the Rome I in the situations where the parties expressly refer to the UNIDROIT Principles as the law governing their contract, national courts of the European Union will determine the proper law of the contract on the basis of the Rome I rules and the UNIDROIT Principles will be binding upon the parties only if they are directly incorporated into the contract and only to the extent that they do not affect the rules of law from which parties are not allowed to derogate. As indicated by Hans van Houtte: " *[…] in the current stage of legal thinking, for national courts a contract has to be governed by a national legal system and so national courts will not (yet) accept the Principles as the proper law for contracts. In the eyes of national courts, therefore, parties who agree that the Principles will govern their contract can merely 'incorporate' these Principles into their contract which otherwise remains governed by national laws*."[61]

In Green Paper on policy options towards a European Contract Law for consumers and businesses[62] (hereinafter Green Paper), the EU Commission discusses the possibility of adopting the instrument setting out a uniform set of rules of European Contract Law which would be easily accessible in all official languages. The Commission expressly stated: "*An instrument of European Contract Law should respond to the problems of diverging contract laws […] without introducing additional burdens or complications for consumers or businesses. […] In the area it covers, the*

[59] Vernooij, Nils Willem. Rome I: an Update on the Law Applicable to Contractual Obligations in Europe, 15 Columbia Journal of European Law Online 71, 2009., p. 73// http://www.cjel.net/online/15_2-vernooij/ // connection time: 2011-03-15

[60] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7. 2008.,)// http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF// connection time: 2011-03-15

[61] van Houtte, Hans. UNIDROIT Principles of International Commercial Contracts, International Trade and Business Law Annual, Vol. 2, 1996., p. 15

[62] Green Paper on policy options towards a European Contract Law for consumers and businesses, COM (2010) 348 final, p. 4

instrument should be comprehensive and self-standing in the sense that references to national laws or international instruments should be as much as possible reduced."[63]

Several possibilities have been identified in respect of legal nature, scope of application and material scope of the future instrument. The author of this research has analysed the Green Paper and thinks that the EU Commission wants to create an instrument aimed at serving the similar interests like the UNIDROIT Principles.[64] The EU Commission considers that the instrument of the European Contract Law could range from a non-binding instrument, aimed at improving the consistency and quality of EU legislation, to a binding instrument setting out an alternative to the existing variety of national contract law regimes by providing single contract law rules. So it seems as if the Commission would like to create an instrument serving analogous purposes as the UNIDROIT Principles. Such future instrument would be adopted on political basis, rather than by academics and independent experts. In the opinion of the author of the research the Commission's initiative to create an instrument similar to the UNIDROIT Principles results from the fact that the existing private international law rules do not provide the possibility of choosing the UNIDROIT Principles as the law governing the contract. The Commission now seems to be trying to adopt the political instrument analogous to the UNIDROIT Principles.

The UNIDROIT Institute has developed the Principles of International Commercial Contracts which have served as model rules for legislators not only in Europe[65] but also around the world[66] and it was considered as a law governing the contract for parties to commercial contracts who were incorporating the UNIDROIT Principles into their contracts. The EU Commission points out that the sets of rules like the UNIDROIT Principles "[…] can not restrict the application of

[63] Ibid, p. 4

[64] For example, EU Commission points out: "An Instrument of European Contract Law […] could serve as a model, in particular to international organizations which have taken the UNION as a model for regional integration". Instrument of European Contract Law would benefit businesses with legal certainty. (Green Paper on policy options towards a European Contract Law for consumers and businesses, COM (2010) 348 final, p. 3). As it was mentioned above the UNIDROIT Principles also serve as a model for international and national legislators and are aimed at providing the contracting parties with legal certainty.

[65] For example, several provisions of the new Lithuanian Civil Code are modelled on the basis of the UNIDROIT Principles. (Lando, Ole. Issues and Tendencies of the Development of Contract Law Influence of the 'Troika', Vilnius: Justitia, 2007., p. 169)

[66] Commission refers that "[…] the Organization for Harmonization of Business Law in Africa has been working on developing a Uniform Act of Contracts largely inspired by the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT Principles […] have also inspired the Chinese Contract Act of 1999. (Green Paper on policy options towards a European Contract Law for consumers and businesses, COM (2010) 348 final, p. 3)

national mandatory rules".[67] The author of the research thinks that if the new instrument of European Contract Law is adopted in the form of the hard law (becomes binding) the parties to commercial contracts could incorporate the UNIDROIT Principles into their contract like they did earlier but the provisions of the UNIDROIT would bind the parties only to the extent that they will not be contrary to the applicable mandatory rules of the new instrument of European Contract Law. Otherwise, if the new instrument is not binding, it is not clear what will be the scope of its application.

The author of this research raises a natural question, i.e. whether the Commission wants to draft an instrument, which could be relied upon by the Commission and which could be used by courts. The answer to this question is pending in the future.

As it was mentioned in the beginning the general tendency is that parties can not choose a "soft-law" such as the UNIDROIT Principles as the law governing the contract. The courts of other non-EU countries also support this position.

For non-Member States, of the European Union the above mentioned treatment of the "soft law" by the national courts was expressed by the Federal Supreme Court of Switzerland. The decision of the Court is included in this research in order to show that even such a modern country like Switzerland, while boasting of its strong identity and due respect to its culture and traditions and at the same time being well-aware of challenges of the Europeanization has chosen to apply the domestic rules instead of the "soft-law".

Plaintiff, a Swiss company, entered into a contract with the Defendant, a Greek company, for the transfer of a football player managed by Plaintiff. The contract contained a clause in favour of the Swiss Court and a choice of law clause stating that "this agreement is governed by FIFA Rules and Swiss law". The FIFA Rules provided a two-year limitation period for claims arising out of this kind of contract, and the mandatory domestic rules – for four-year limitation period. In this case Federal Supreme Court of Switzerland noted: *"[…] the FIFA Rules have been prepared by a private organisation and therefore cannot be considered rules of law applicable instead of a particular domestic law. Consequently […] choice of the FIFA Rules as the law governing their contract amounts to a contractual incorporation of these Rules which would bind the parties only to the extent that they are not contrary to the mandatory provisions of the applicable domestic law.*

[67] Green Paper on policy options towards a European Contract Law for consumers and businesses, COM (2010) 348 final, p. 7

As to the merits, the Court stated that the limitation periods provided by Swiss law are mandatory and would therefore prevail over the conflicting provisions of the FIFA Rules, with the result that the claim brought by Plaintiff was not too late."[68]

The FIFA rules are not a state law as the UNIDROIT Principles, therefore author can claim that the Court would have reached the same conclusion if the parties would have indicated them as the law governing the contract.

Stefan Vogenauer and Jan Kleinheisterkamp points out : *„[…] other countries apparently take no position at all or a similarly negative one. This is so, for example, in Croatia and presumably for Serbia and Montenegro [...] Hungary and Romania. A similar result holds, at least in effect, in Norway, which follows Rome Convention in this regard.*"[69]

The author of the research is of the opinion that it would be very beneficial to allow the parties to the international commercial contract to choose the international rules as the law governing their contract.

Firstly, the possibility of applying the international principles and rules as the law governing their contract instead of the law of a particular country would place the parties in a position where they would be able to adopt a neutral solution more acceptable to both of them. It has already been mentioned more than once that such international principles and rules are better adapted to special needs of international transactions than domestic rules which naturally focus on domestic transactions.

In the opinion of the author there is no reason why parties to an international contract should not be equally treated in choosing the applicable law depending upon whether they decide to have their dispute settled by court decision or by arbitration.

2.2. Application of the UNIDROIT Principles by arbitral tribunals

The situation is completely different if the parties agree to submit disputes arising from their contract to arbitration. Arbitration is a legal technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more persons (the arbitrators or arbitral tribunal), by whose decision (the award) they agree to be bound. It is a settlement technique in which a third party reviews the case and imposes a decision that is legally binding for both sides. Arbitration is often used for the resolution of commercial disputes, particularly in the context of

[68] Award of 20 December 2005 // http://www.unilex.info/case.cfm?pid=2&do=case&id=1124&step=Abstract // connection time: 2010-12-03

[69] Vogenauer, Stefan and Kleinheisterkamp, Jan. Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC). Oxford; New York: Oxford University Press, 2009., p. 46

international commercial transactions. Fabrizio Marella discusses the matter in detail: "*It is well established in arbitration literature that parties may choose the law (or rules of law in most modern, widely used arbitration regulations) applicable to their contract. Increasingly, the realm of party autonomy is expanding such that it can encompass situations in which the object of choice is a national legal system or an anational legal system like lex mercatoria and UNIDROIT Principles. All these choices of lex contractus may be labelled as positive choices since parties declare in their contract, or during proceedings, what law or rules of law they want arbitrators to apply in order to resolve the dispute.*" [70]

Comment four to the Preamble of the Commentary of the UNIDROIT principles recommends parties who want to choose the UNIDROIT Principles as the law applicable to their contract to combine this choice of law statement with an arbitration agreement.

Arbitrators do not have a duty to apply a particular domestic law and may base their decision on international principles and rules, especially if the parties expressly request them to do this. This is clearly seen when arbitrators have to decide ex aequo et bono or as amiable compositeurs.[71] As Hans van Houtte points out: "*In the event that the arbitrators are allowed to decide as amiable compositeurs, ie ex aequo et bono, they do not have to apply a specific national law and can therefore use the Principles as autonomous standards. Moreover, it has become widely accepted that international commercial arbitrators who are not amiable compositeurs, do not have to apply a specific national legal system but may apply transnational rules (such as general principles of law or the lex mercatoria). In that event they may consider the Principles to be part of these transnational rules*."[72] Arbitrators are allowed to base their decisions on *rules of law* that do not belong to any particular domestic law and it is clearly seen in the main legal documents arbitrators are following while solving disputes - Article 28 of UNCITRAL Model Law on International commercial Arbitration states: "*The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."* Article 17 of Rules of Arbitration of the International Chamber of Commerce (ICC Rules of Arbitration) entrenches that

[70] Marella, Fabrizio . Choice of Law in Third Millenium Arbitrations. The Relevance of UNIDROIT Principles of International Commercial Contracts. Vanderbilt Journal of Transnational Law. Vol.36., 2003.
[71] Clauses in arbitration agreements allow the arbitrators to decide the dispute according to the legal principles they believe to be just, their honesty and without being limited to any particular national law.
[72] van Houtte, Hans. UNIDROIT Principles of International Commercial Contracts, International Trade and Business Law Annual, Vol. 2, 1996., p. 15

„The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute".[73]

In the aforementioned arbitration laws the term "law" is replaced by "rules of law" in order to make it clear that the parties' freedom of choice is not restricted to domestic laws, but also includes rules of law of a transnational character.[74] The terminology which is used indicates that these provisions are intended to allow the parties to choose as the rules applicable to the substance of the dispute not only the domestic law (the law of a particular state), but also other principles and rules of transnational character. Therefore there are no doubts that the parties are free to choose the UNIDROIT Principles as the rules of law according to which the arbitrators have to decide possible disputes arising from their contract.

Arbitral tribunals apply "soft-law" (e.g., the UNIDROIT Principles) if the parties explicitly say that they want their disputes to be solved according to the provisions of some particular document. If the parties choose the UNIDROIT Principles as the law applicable to their contract the arbitrators need to observe the provisions of the UNIDROIT Principles. It can be illustrated by the case where the defendant, a Mexican grower and claimant, a U.S. distributor, entered into agreement which contained an arbitration clause in which the parties expressly referred to the UNIDROIT Principles as the law governing the substance of any potential disputes. Claimant brought an action before the Centro de Arbitraje de México against the defendant arguing that defendant had breached the contract. The arbitral tribunal first of all confirmed the validity of the parties' choice of the UNIDROIT Principles as the law applicable to the substance of their dispute in view of the fact that according to Article 1445 of the Mexican Commercial Code the arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties and the fact that the UNIDROIT Principles have been applied in a great number of international arbitration proceedings.[75]

The parties sometimes agree that their contract shall be governed by the general principles of law, the lex mercatoria or the like. In these situations the arbitrators are exposed to an extremely broad field of interpretation.

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[73] International Chamber of Commerce, Rules of Arbitration, 2004., Art. 17// http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf // connection time 2010-12-05

[74] Bonell, Michael Joachim. Soft Law and Party Autonomy: The Case of the UNIDROIT Principles. Loyola Law Review, Vol. 51, Issue 2, 2005., p. 241

[75] ICC Award of 30 November 2006 // http://www.unilex.info/case.cfm?pid=2&do=case&id=1149&step=Abstract// connection time: 2010-12-05

Stefan Vogenauer and Jan Kleinheisterkamp claim that "the lex mercatoria is a vague and very contentious concept, which describes non-national and transnational rules of law that have been created […]".[76] As stated by Michael Joachim Bonell: *"[…] in most cases where the parties expressly choose transnational law as the law governing their contract, they do so by referring to "general principles of law", "transnational principles of law", "the lex mercatoria", "principles of international law", etc. Yet even if the contract is silent as to the applicable law, arbitrators themselves sometimes decide […] to base their decision on "general principles of law", "the lex mercatoria" or the like rather than on a particular domestic law*.[77]

The question which arises to the author of this research is whether the UNIDROIT Principles can be used in determining the content of the general principles of law, transnational principles of law, the lex mercatoria and the principles of international law?

There are two main opinions that might serve the answer to this question. The first opinion is that it is extremely difficult or even impossible to determine the content of concepts such as general principles of law, transnational principles of law, the lex mercatoria, the principles of international law, etc., so reference to the UNIDROIT Principles can reduce this uncertainness because they are a well-defined set of rules considered to be a codification of the lex mercatoria. Another opinion is that the lex mercatoria is a very flexible and informal body of rules and a reference to it does not express the parties' intentions to apply the UNIDROIT Principles.

Speaking about the actual arbitration practice the UNIDROIT Principles have already been interpreted as a source of general principles of law or the lex mercatoria. The clearest example of it can be the case where a French company and a Costa Rican company concluded a contract in which the parties had agreed that any dispute should be resolved on the basis of good faith and fair usages and with regard to the most sound commercial practices and friendly terms. The Arbitral Tribunal decided to apply the UNIDROIT Principles which it considered to constitute "*the central component of the general rules and principles regulating international contractual obligations and enjoying wide international consensus*".[78]

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[76] Vogenauer, Stefan and Kleinheisterkamp, Jan. Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC). Oxford; New York: Oxford University Press, 2009., p. 50

[77] Bonell, Michael Joachim. The UNIDROIT Principles and Transnational Law, Uniform Law Review, 2000., p. 204

[78] Ad hoc arbitration Arbitral Award of 30 April 2001 // http://www.unilex.info/case.cfm?pid=2&do=case&id=1100&step=Abstract// connection time: 2010-12-05

Another exemplary case in which the Arbitration Tribunal applied the UNIDROIT Principles occurred in Russia. A Russian company and a German company concluded a contract. The agreement provided that all disputes arising out of it were to be resolved in accordance with the general principles of the lex mercatoria. In its submission to the arbitration court the claimant referred to the UNIDROIT Principles in support of its arguments. The arbitral tribunal interpreted the contract provisions designating the applicable law and concluded that in the instant case it would be sufficient to apply the general principles of law and the terms and conditions of the agreement to settle the dispute and decided to apply the UNIDROIT Principles as an expression of the general principles or the lex mercatoria.[79]

Arbitrators are generally permitted in the context of international disputes to base their decisions on a-national law or "soft-law" such as the UNIDROT Principles. However even in an international commercial arbitration party autonomy is not unlimited. The UNIDROIT Principles themselves contain provisions from which the parties may not derogate: if the parties derogate the mandatory UNIDROIT Principles provisions, they put themselves outside the system of the UNIDROIT Principles with the consequence that the UNIDROIT Principles will no longer apply as the law governing the contract, but will bind the parties only at the contractual level. According to Michael Joachim Bonell *"[…] a limitation of party autonomy occurs due to the fact that the UNIDROIT Principles contain provisions from which parties may not derogate. According to article 1.5, "the parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles" Most of the mandatory provisions are expressly declared as such. This is the case with article 1.7 on good faith and fair dealing […] with article 7.4.13(2) on agreed payment for non-performance, and with article on limitation periods. Exceptionally, the mandatory character of a provision is only implicit and follows from the content and purpose of the provision itself […].*[80]

By declaring some provisions of the UNIDROIT Principles to be mandatory, the UNIDROIT Principles support their aim to be a self-sufficient, autonomous legal system for international commercial contracts. Parties, judges, arbitrators should know that when choosing the UNIDROIT Principles as the lex contractus their contract is fairer if they do not derogate from basic provisions such as those on exemption clauses, on good faith, or on agreed payments for non performance.

[79] ICC Arbitral Award of 05 November 2002 // http://www.unilex.info/case.cfm?pid=2&do=case&id=857&step=Abstract// connection time: 2010-12-05

[80] Bonell, Michael Joachim. Soft Law and Party Autonomy: The Case of the UNIDROIT Principles, Loyola Law Review, Vol. 51, Issue 2, 2005., p. 250

The question arises, what if the parties disregard mentioned restrictions and, although choosing the UNIDROIT Principles as the law governing their contract exclude the application of one of the so called "mandatory"[81] provisions contained there?

It is unlikely in general that the parties would in practice ever agree, for example, not to be bound by the duty to act in good faith. On one hand, the non-binding character of the UNIDROIT Principles allows for parties to apply them as a whole and also to indicate that they intend to be bound by some, but not all of their provisions. On the other hand, if the parties refer to the UNIDROIT Principles as the law governing their contract but, at the same time, exclude some of their mandatory provisions, they put themselves outside the system of the UNIDROIT Principles with the consequence that the UNIDROIT Principles will no longer apply as the law governing the contract.

The arbitrators apply the UNIDROIT Principles as the law governing the contract but the parties may not derogate from the mandatory provisions of the UNIDROIT Principles, if they do so the UNIDROIT Principles can no longer be applied as the law governing the contract.

In a number of arbitral decisions the UNIDROIT Principles have been applied as the rules of law governing the contract. Until June 2007 the total number of arbitral awards referring in one way or another to the UNIDROIT Principles reported in the www.unilex.info (in the UNILEX database) was 146.[82] However taking into account of arbitral awards confidential nature, the actual number of awards referring to the UNIDROIT Principles is much greater. The arbitrators refer to the UNIDROIT Principles because the parties expressly choose them as the law governing the substance of the dispute or because the contract referred to general principles of law, the lex mercatoria or the like.

The arbitrators have gone even further and applied the UNIDROIT Principles in the absence of any choice of law clause in the contract. In the aforementioned situation the arbitrators relied on the important arbitration rules according to which they may "*apply the rules of law which they determine to be appropriate*"[83], for example, the award rendered by the ICC International Court of

[81] For example, good faith and fair dealing.

[82] Bonell, Michael Joachim. Towards a Legislative Codification of the UNIDROIT Principles, Uniform Law Review, Vol. 12, Issue 2, 2007., p. 235

[83] International Chamber of Commerce, Rules of Arbitration, 2004., Art. 17, http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf // connection time 2010-12-05

Arbitration (hereinafter ICC Court) in 1996[84]. The case concerned a contract between an Italian company and a government agency of a Middle Eastern country. The contract did not contain any choice of law clause, since both parties had insisted on the application of their own national law. In a previous partial award on the question of the applicable law, the Arbitral Tribunal had declared that it would base its decision on the terms of the contract, supplemented by general principles of trade as embodied in the lex mercatoria. Subsequently, when dealing with the merits of the dispute, it referred, without further explanation, to individual provisions of the UNIDROIT Principles, thereby implicitly considering the latter a source of the lex mercatoria.

Another case in question is considered by the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation in 1999[85]. The case concerned a sales contract between a Russian and an English party. Buyer had to return the goods delivered by Seller and asked for the reimbursement of the costs incurred. Seller objected to the amount claimed, arguing that Buyer has not properly followed the instructions Seller has given it concerning the time and order in which to return the goods. In interpreting Seller's instructions the Arbitral Tribunal resorted among other legal sources also to the UNIDROIT Principles. In particular it referred to Art. 4.2(2) UNIDROIT Principles, according to which statements and other conduct of a party shall be interpreted, unless the other party knew or could not have been unaware of that party's intention, according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances. In this case there was no provision in an agreement which would state what rules are governing the contract. Parties asked arbitrators to apply general principles. Arbitrators applied the UNIDROIT Principles as the general principles of law which are sufficient to solve the dispute.

To conclude, we can confirm that only in the context of arbitration the parties are permitted to choose the soft law such as the UNIDROIT principles as the law governing their contract.

2.3. Choice of law clauses in favour of the UNIDROIT Principles

The parties who want to choose the UNIDROIT Principles as the law governing their contract may choose of the two model clauses enshrined in the footnote to the Preamble: "This contract shall be governed by the UNIDROIT Principles (2004), [except as to Articles…]", or "This

[84] ICC award No. 8261 of 27 September 1996. // http://www.unilex.info/case.cfm?pid=2&do=case&id=624&step=Abstract // connection time: 2010-12-05

[85] ICC Arbitral Award of 16 April 1999. // http://www.unilex.info/case.cfm?pid=2&do=case&id=672&step=Abstract// connection time: 2010-12-05

contract shall be governed by the UNIDROIT Principles (2004), [except as to Articles…], supplemented when necessary by the law of [jurisdiction X]".

The two clauses mentioned above differ. The first one refers to the UNIDROIT Principles as the sole law governing the contract with the consequence that in case of gaps in the UNIDROIT Principles the solution should be found within the system of the UNIDROIT Principles itself.[86] In the second clause the parties choose a particular national law to govern all questions not expressly settled by the UNIDROIT Principles. As pointed out by Michael Joachim Bonell: "*This latter approach may be preferable, if not in general, at least in the case of complex transactions which may give rise to questions not dealt with at all by the UNIDROIT Principles so that the choice of an additional fully developed and possibly neutral domestic law would permit parties to save considerable time, energy, and legal costs in the event of a dispute*".[87]

Michael Joachim Bonell in the article "Soft Law and Party Autonomy: The Case of the UNIDROIT Principles" gives an example of the choice of law clause which refers to the UNIDROIT Principles as the sole law governing the contract. General Motors, Ford, Daimler Chrysler, Nissan, Peugeot concluded and agreement which stated: "*The product agreement shall be construed in accordance with the UNIDROIT Principles of International Commercial Contracts, with the exception of Section 4.6 ["Contra proferentem rule"] which is excluded due to the difficulty of providing explicit language to cover each possible interpretation that may arise in a multi-national legal structure*".[88] This example even states the reason why the parties exclude contra proferentem rule.

An example of the choice of law clause of the parties' choice of a particular national law to govern all questions not expressly settled by the UNIDROIT Principles is the Model Contract for the International Commercial Perishable Goods adopted in 1999 by the International Trade Centre UNCTAD/WTO, stating:*"Insofar as any matters are not covered by the foregoing provisions, this Contract is governed by the following, in descending order of precedence: the United nations Convention on Contracts for the Sale of Goods; the UNIDROIT Principles of International Commercial Contacts, and for matters not dealt with in the abovementioned texts, the law*

[86] UNIDROIT PRINCIPLES, supra note 2, Art. 1.6. UNIDROIT Principles Official integral version// http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf // connection time: 2010-12-10

[87] Bonell, Michael Joachim. Soft Law and Party Autonomy: The Case of the UNIDROIT Principles, Loyola Law Review, Vol. 51, Issue 2, 2005., p. 243

[88] Ibid., p. 244

applicable at… or, in the absence of a choice of law, the law applicable at the Seller's place of business through which this contract is to be performed."[89]

The choice of law clauses in favour of the UNIDROIT Principles can be expressed also in other ways. The parties may begin with the general statement that "this contract shall be governed by the law of country Y, supplemented and interpreted, whenever necessary, by the UNIDROIT Principles", or alternatively that:

- This agreement is governed by the laws of…;
- In the interpretations of the Parties' rights and obligations under this agreement due weight shall be given to applicable practices in international trade. When defining these practices, reference shall be made to the UNIDROIT Principles of International Commercial Contracts;
- The agreement shall be performed in a spirit of fair dealing and good faith;
- Any questions relating to this Agreement which are not implicitly or explicitly settled by the provisions contained in this Agreement shall be governed in the following order: a) by the principles of law generally recognized in international trade as applicable to international contracts, b) by the relevant trade usages, c) by the UNIDROIT Principles of International Commercial Contracts.

We can clearly see from the last three provisions that the UNIDROIT Principles will be applied only as a means of supplementing and interpreting legal sources that the parties have chosen as a primary law governing their contract.

There are two editions of the UNIDROIT Principles, so the choice-of-law clause can be either in favour of the 2004 edition, or in favour of the 1994 edition. The parties who want opt for the 1994 edition are free to do so, but they should explicitly state that. In the absence of an express reference to one of the above mentioned editions of the UNIDROIT Principles it shall be presumed that the latest edition will apply.

2.4. Contractual Incorporation of the UNIDROIT Principles

When drafting contracts the parties have two possibilities – to draft the terms of the contract themselves, or take them from external sources and incorporate them into their contract. The main advantage of such incorporation is that the parties save time, because there is no need to think and negotiate long hours until the best solution is found. Provisions which the parties incorporate into their contracts are drafted by specialists in the respective area of law or trade and successfully tested in practice. The parties to international transactions usually belong to different legal systems and

[89] Ibid., p. 244

may have difficulty in finding legal terminology which would treat both of them equally. If the parties incorporate the UNIDROIT Principles while drafting their contract we can claim that they are using neutral terminology that is available in almost all main languages of the world.

As pointed out by Michael Joachim Bonell in the article "UNIDROIT Principles in Practice: The Experience of the First Two Years": *" […] Principles have been translated into many languages. The complete version (i.e. the text of the articles and the comments) is available in Chinese, English, French, Italian, Portuguese, Russian, Slovak and Spanish, while the German version is in preparation.*[90] *In addition, the "black letter rules" have been translated into Arabic, Bulgarian, Czech, Flemish, Hungarian, Korean and Serbian, while a Japanese translation is in preparation".*[91]

The UNIDROIT Principles cover a great variety and number of topics. The parties can choose to incorporate either single chapters, for example, on contract interpretation, limitation periods, damages for non-performance, or just individual provisions, for example, those on force majeure, on hardship. They may do so in two ways – firstly, by giving reference to the respective chapters or provisions of the UNIDROIT Principles, secondly, by transposing individual provisions directly into their contract.

The terms of the UNIDROIT Principles incorporated into some particular contract will bind the parties only to the extent that that they do not affect the mandatory rules of the domestic law governing the contract from which parties may not derogate by agreement.

In words of Ulrich Drobnig: "*The non mandatory-rules of the law of the contact can be replaced by the parties incorporating the UNIDROIT Principles[…].The situation is quite different with respect to the mandatory rules of the lex contractus. They prevail over any contrary rule of the Principles, if the latter had been chosen by the parties*".[92]

It is not easy to provide precise statistics how often in actual practice the parties use the UNIDROIT Principles in whole or in part while drafting their agreements. Some statistics is provided in the article "UNIDROIT Principles in Practice: The Experience of the First Two Years" by Michael Joachim Bonell: "*27,3 percent of the persons who replied to the UNIDROIT Secretariat's questionnaire (30 in number) indicate that they choose the UNIDROIT Principles as*

[90] The author refers to the UNIDOIT Principles first published in 1994. The new version of the UNIDROIT Principles appeared in 2004 and is available in English, French, Italian, Chinese and many other languages.
[91] Bonell, Michael Joachim. UNIDROIT Principles in Practice: The Experience of the First Two Years. Uniform Law Review, Vol. 2, Issue 1, 1997., p. 38
[92] Drobnig, Ulrich. The use of the UNIDROIT Principles by National and Supranational Courts, Institute of International business Law and Practice, 1995., p. 223

the law governing their contract: half of them by expressly referring to the Principles in the contract […] and the other half by considering the UNIDROIT Principles as an expression of "general principles of law", "the lex mercatoria" or the like (almost a third specifying they had done so on more than one occasion)."[93]

Very often the parties use the UNIDROIT Principles when drafting their contracts even without openly stating such use. An example of undeclared incorporation of individual provisions is the settlement agreement contained in a recent award of the International Centre for Settlement for Investment disputes (ICSID). The parties, the Government of Ukraine and a US investor – in addition to the terms of settlement, indicated fourteen "*Principles of interpretation and implementation of the agreement*", all of which had been almost literally taken from the UNIDROIT Principles.[94]

[93] Bonell, Michael Joachim. UNIDROIT Principles in Practice: The Experience of the First Two Years. Uniform Law Review, Vol. 2, Issue 1, 1997., p. 40

[94] Cf. Josep Charles Lemire v Ukraine, ICSID Case No. ARB (AF)/98/, 2000., p. 457

3. ROLE OF THE UNIDROIT PRINCIPLES IN LITHUANIA

It is important to analyze what role the UNIDROIT Principles play in Lithuania. In this subchapter the author will concentrate on how the UNIDROIT Principles were incorporated into the Lithuanian legal system. For the purpose of determining whether the UNIDROIT Principles can be applied as the law governing the contract in Lithuania, the existing legal regulation of the contract law will be analyzed, also showing how national courts of Lithuania interpret and use the UNIDROIT Principles in their practice giving examples from the Lithuanian Supreme Court practice. There are numerous discussions on the possibility of applying autonomous rules like the UNIDROIT Principles as the law governing the contract. As mentioned in the previous chapters there are two basic opinions regarding the possibility to choose a non-state law as the law governing the contract. Some authors predicate that the parties can choose just their national law, while others claim that the UNIDROIT Principles are sufficient to be applied as the law governing the contract.

Pursuant to Article 1.37 of the Civil Code of the Republic of Lithuania: "*Contractual obligations shall be governed by the law agreed by the parties. Such agreement of the parties may be expressed in the form of separate terms of the concluded contract or it may be determined in accordance with the factual circumstances of the case. The law of the state designated by the agreement of the contracting parties may be applied to the whole contract or only to a part or parts thereof*." As we can see is not clear from this provision, whether the contracting parties can choose the UNIDROIT Principles as the law governing the contract. Would such choice be legal and supported by the Lithuanian courts? The Commentary of the Civil Code of the Republic of Lithuania provides the explanation of Article 1.37, stating in particular that Article 1.37 has been drafted in observance of provisions of the Rome Convention. Article 1.37 of the Civil Code of the Republic of Lithuania completely resembles the provisions entrenched in the Rome I Regulation. As mentioned before, the Rome I Regulation does not allow choosing a "soft-law" as the law governing the contract.[95]

The UNIDROIT Principles were referred to by the Lithuanian Supreme Court in making several decisions.

In a dispute between two Lithuanian companies concerning the interpretation of the contract the Court held that reference has to be made first of all to the real intention of the parties and where

[95] Dazdauskas, Stasys. Bendrosios sutarčių teisės vienodinimo įtaka Lietuvos sutarčių teisei (Impact of Unification of Genera Contarct Law. Doctoral dissertation: social sciences: law (01 S)//Vilnius University), Vilniaus universitetas, 2008., p. 73

such intention cannot be established reference has to be made to the meaning that a reasonable person in the same situation of the parties would attach to the contract term in question. In this respect the Court referred to Art. 6.193 of the Civil Code of the Republic of Lithuania mentioning that the article according to the accompanying Commentary is based among others on Article 4.1 of the UNIDROIT Principles. [96]

In another case the plaintiff, a Lithuanian company, entered into a contract on sale of shares with the defendant, a Lithuanian natural person. The defendant, after having made a down payment of 20% of the total price, refused to pay the balance. When the plaintiff sued the defendant requesting the payment of the outstanding sum, the defendant invoked hardship on the ground that in the meantime the company had become insolvent with the consequence that the value of the shares was considerably diminished.

While the defendant was successful in the courts of the first and second instance, the Supreme Court decided in the plaintiff's favour. According to the Court in the case at hand the defendant was not entitled to invoke the doctrine of changed circumstances or hardship as the latter does not apply to monetary obligations and in any case in the case at hand the risk of fluctuations of the price of the shares was deemed to be assumed by the defendant. In this respect the Court referred to Article 6.204 of the Civil Code of the Republic of Lithuania which in substance corresponds to Articles 6.2.1 to 6.2.3 of the UNIDROIT Principles. [97]

Another decision which the author wants to mention here was taken in 2005[98]. The plaintiff, a Lithuanian construction company, conducted a bidding procedure for a construction deal. The defendant, another Lithuanian construction company, after being declared winner and having negotiated with the plaintiff the terms of the contract to be concluded, at the very last moment broke off negotiations on account of having been offered a more profitable deal. The plaintiff claimed damages for culpa in contrahendo.

The Court found that the defendant had acted in bad faith and was therefore liable to pay damages covering not only the expenses incurred by the plaintiff in connection with the negotiations but also the value of the lost opportunity. The Court based its decision on Article 6.163 of the Civil Code of the Republic of Lithuania, which almost literally corresponds to Article 2.1.15 of the UNIDROIT Principles, and in interpreting that provision it referred to Article 2.1.15 of the UNIDROIT Principles and its Comments.

[96]Supreme Court of Lithuania decision of 11 February 2002., Number: 3K-3-281
[97] Supreme Court of Lithuania decision of 19 May 2003., Number: 3K-3-612
[98] Supreme Court of Lithuania decision of 19 January 2005, Number: 3K-3-38

One more exemplary case occurred in 2006[99]. Two Lithuanian parties had entered into negotiations for the sale of a plot of land. After reaching a preliminary agreement subject to confirmation by a formal contract, one of the parties refused to conclude the final contract, prompting the other party to bring a suit for damages.

In deciding in favour of the plaintiff the Court referred to Article 6.165(4) of the Civil Code of the Republic of Lithuania dealing with damages for breach of preliminary contracts, and also to both the UNIDROIT Principles and the Principles of European Contract Law. While noting that neither of these two instruments contains special provisions on preliminary contracts, the Court referred to Comment 2 to Article 2.13 (present Article 2.1.13) ("Conclusion of contract dependent on agreement on specific matters or in a specific form") of the UNIDROIT Principles stating that "*in commercial practice [...] it is quite frequent that after prolonged negotiations the parties sign an informal document called "Preliminary Agreement" [...] containing the terms of the agreement so far reached but at the same time state their intention to provide for the execution of a formal document at a later stage*", as well as to the Comments on Article 2.15 (present Article 2.1.15) ("Negotiations in bad faith") and concluded that "*the party which breaks off negotiations without having good reason for this, and having at the same time created 'a founded trust and belief' that the contract will be concluded, is to be qualified as a party which breached the principle of good faith, and is therefore obliged to pay damages caused to the other party consisting not only of negotiation expenses, but also of the value of the lost opportunity*". In the same context the Court also quoted Article 3.301(2) and (3) of the European Principles.

We can see from the mentioned cases that the UNIDROIT Principles are not an alien in the practice of the Supreme Court of Lithuania. Courts give references to the provisions of the UNIDROIT Principles either expressly or automatically by applying norms of the Civil Code of the Republic of Lithuania. There is a need to stress that such situation is not accidental, because many norms of the UNIDROIT Principles are almost literally transposed to the Civil Code of the Republic of Lithuania. Michael Joachim Bonell points out that: "*Most of the provisions of the Civil Code of the Republic of Lithuania dealing with contracts in general follow very closely the UNIDROIT Principles*"[100]. Isabelle Veillard in her article "General and Commercial Character of the

[99] Supreme Court of Lithuania decision of 6 November 2006, Number 3K-P-382/2006

[100] Bonell, Michael Joachim. The UNIDROIT Principles in Practice – The experience of the First Two Years., 1996., p. 3

UNIDROIT Principles of International Commercial Contracts"[101] adds that the authors of the Civil Code were so impressed by pertinence of the UNIDROIT Principles regulation that they chose to adopt as many rules established by the UNIDROIT Principles as possible, such that the majority of these rules were finally incorporated into the Lithuanian legislation. In Lithuania the number of rules taken from the UNIDROIT Principles was drafted in very detailed manner because of their innovative nature. In the Commentary of the Civil Code of the Republic of Lithuania the professor Valentinas Mikelėnas confirms what was mentioned above claiming that the second part of the Civil Code of the Republic of Lithuania (Articles 6.154 – 6.228) has been drafted according to the UNIDROIT Principles which were prepared in 1994.[102]

In view of the above we can conclude that many norms of the Civil Code of the Republic of Lithuania are taken from a "soft-law", i.e. from the UNIDROIT Principles. Some parts of the UNIDROIT Principles have been literally transferred to the Lithuanian law, so courts and legal practitioners while construing and applying the Civil Code of the Republic of Lithuania should refer to the official comments of the UNIDROIT Principles and also analyze the practice of foreign courts ant arbitration, otherwise the norms of the Civil Code of the Republic of Lithuania will exist just in paper and will be "a dead law".[103] In case of international disputes Rome I Regulation has to be applied in Lithuania. As it was mentioned before Rome I Regulation precludes parties from applying "soft-law" as the law governing the contract.

[101] Veillard, Isabelle. General and Commercial Character of the UNIDROIT Principles of International Commercial Contracts, The International Business Law Journal, Vol. 2007., p. 479-492

[102] Mikelėnas V. ir kt. Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė. Vilnius Justitia, 2003., p. 191

[103] T. Žukas "UNIDROIT Tarptautinių komercinių sutarčių principų ir Europos sutarčių teisės principų recepcija Lietuvoje: Trečiasis recepcijos etapas ir Šveicarijos patirtis" Vilnius: Justitia, 2007 P.127

4. TRENDS AND PERSPECTIVES OF THE UNIDROIT PRINCIPLES

The UNIDROIT Institute is currently working on a 3-rd edition of the UNIDROIT Principles to include new chapters on illegality, unwinding of failed contracts, plurality of obligors and obligees, conditions, and termination of long term contracts for just cause. The Working Group for the preparation of a third edition[104] of the UNIDROIT Principles of International Commercial Contracts held its fifth session in Rome from 24 to 26 May 2010. The Rapporteurs were asked to revise their drafts in the light of the discussions and to submit them in their final version as soon as possible so as to enable the Secretariat to proceed to the editing of the new edition of the UNIDROIT Principles. It is expected that the UNIDROIT Governing Council will formally approve the integral version of the new edition of the UNIDROIT Principles at its next session in May 2011 so that the volume will be ready for distribution by June 2011[105].

Michael Joachim Bonell in the draft of the future chapter of the UNIDROIT principles on "Mandatory rules", which is relevant to mention in this research, suggests to interpret article 1.4 (Mandatory rules) in the way mentioned below. Article 1.4 of the UNIDROIT Principles entrenches "*Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law*."

The main idea is that in the future new 3-rd edition the UNIDROIT principles will remain non-binding instrument and the mandatory rules will prevail over the UNIDROIT Principles. Neither the UNIDROIT Principles as such, nor the individual contracts concluded in accordance with the UNIDROIT Principles can be expected to prevail over mandatory rules of national law, whether of national, international or supranational origin, applicable in accordance with the relevant rules of private international law.[106] It is stressed that the notion of "mandatory rules" shall be

[104] Members of the working group list is provided in the website http://www.unidroit.org/english/workprogramme/study050/wg03/wg-members.htm // connection time 2011-01-15

[105] Note on the fifth session (2010)- 24-26 May, 2010 // http://www.unidroit.org/english/workprogramme/study050/wg03/wg-2010.htm // connection time 2011-01-15

[106] Mandatory rules of national origin are those enacted by States autonomously (e.g. particular form requirements for specific types of contracts). Mandatory rules of international or supranational origin are those derived from international conventions or general public international law (e.g. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; Hague-Visby Rules, United Nations Convention against

interpreted as broad as it is possible. The mandatory rules referred to in the Article 1.4 are laid down by specific legislation and their mandatory nature may either be expressly stated or inferred by way on interpretation. In the various national legal systems limits on freedom of contract may also derive from general principles of public policy whether of national, international or supranational origin (e.g. prohibition of corruption, protection of human dignity). For the purpose of what was mentioned the notion of "mandatory rules" shall be understood in a broad sense.

In case of incorporation of the UNIDROIT Principles as terms of contract the traditional and still prevailing view adopted by domestic courts with respect to soft law instruments is stressed – the parties' reference to the UNIDROIT Principles is regarded to be an agreement to incorporate them in the contract, the individual agreements concluded in accordance with the UNIDROIT Principles will first of all encounter the limit of the principles and rules of the domestic law governing the contract from which parties may not derogate. Such comment is suggested by Michael Joachim Bonell in the draft future chapter of the UNIDROIT principles on "Mandatory rules".[107] Compared with the previous comment of the 2004 edition of the UNIDROIT Principles[108] this comment is more detailed.

Corruption; United Nations Universal declaration of Human rights, etc.) or adopted by supranational organizations (e.g. European Community competition law).

[107] Working Group for the preparation of Principles of International Commercial Contracts , Fifth session, Rome, 24-28 May 2010, UNIDROIT 2010, study L – Doc. 115, Original: English, February 2010.

[108] UNIDROIT Principles 2004, Art. 1.4., p.14 // UNIDROIT Principles Official integral version// http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf // connection time: 2010-12-02

CONCLUSIONS

1. The UNIDROIT Principles are treated as a written form of the lex mercatoria. The lex mercatoria represents flexibility that is excluded by national laws.
2. There is no common opinion among the authors whether the lex mercatoria is an autonomous legal system or an actual legal system and whether it can replace the national law.
3. The independent drafting process, wide scope of applicability and innovative "soft-law" character of the UNIDROIT Principles have become the main reasons of its popularity among business community in the field of international commercial relations.
4. The conflict-of-laws rules do not provide for the possibility to choose a "soft-law" such as the UNIDROIT Principles as the law governing the contract: the choice of the law applicable to international agreements is limited to a particular domestic law. So even where the parties expressly refer to the UNIDROIT Principles as the law governing their contract, the proper law of the contract will still be determined by the national courts on the basis of the conflict-of-laws rules which usually lead to the applicable domestic law. In arbitration the parties' choice of the UNIDROIT Principles as the law governing the contract is respected.
5. It is recommended for the parties who want to choose the UNIDROIT Principles as the law applicable to their contract to combine this choice of law statement with an arbitration agreement, because arbitrators do not have a duty to apply a particular domestic law and may base their decision on the international principles and rules, especially if the parties expressly request them to do this.
6. When drafting contracts the parties have two possibilities – either to draft the terms of the contract themselves, or take them from external sources and incorporate them into their contract. If the parties incorporate the UNIDROIT Principles into their contract it means that they are using neutral terminology existing almost in all main languages of the world.
7. Most of the provisions of the Civil Code of the Republic of Lithuania dealing with contracts in general follow the UNIDROIT Principles very closely. The second part of the Civil Code of the Republic of Lithuania (Articles 6.154 – 6.228) has been drafted according to the UNIDROIT Principles which were prepared in 1994, so the Lithuanian courts while explaining and applying the Civil Code of the Republic of Lithuania should refer to the official comments of the UNIDROIT Principles and also keep analyzing the practice of foreign courts ant arbitration.

8. The UNIDROIT Institute is currently working on a 3-rd edition of the UNIDROIT Principles. After long discussions a new 3-rd edition of the UNIDROIT principles will still remain a non-binding instrument so the mandatory rules will prevail over the UNIDROIT Principles.
9. On one hand the hypothesis is denied, but on the other – it is confirmed. The present conflict-of-laws rules do not allow the parties to choose the UNIDROIT Principles as the law governing the contract. Domestic courts are bound by their own national law. Arbitrators do not have such an obligation and therefore quite often apply UNIDROIT Principles as the law governing the contract.

LITERATURE

National legal acts

1. Lietuvos Respublikos civilinis kodeksas// Valstybės žinios, 2000-09-06, Nr. 74-2262

National Literature

2. Baranauskas, Egidijus ir Zapolskis, Paulius. Europos sutarčių teisės derinimas: Europos Komisijos iniciatyvos, Vilnius: Justitia, 2007.

3. Drazdauskas, Stasys. Bendrosios sutarčių teisės vienodinimo įtaka Lietuvos sutarčių teisei, Vilnius: Vilniaus universitetas, 2008.

4. Mikelėnas, Valentinas ir kt. Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė., Vilnius: Justitia, 2003.

5. Mikelėnas, Valentinas. Sutarčių teisė: bendrieji sutarčių teisės klausimai: lyginamoji studija, Vilnius: Justitia, 1996.

6. Žukas, Tadas. UNIDROIT Tarptautinių komercinių sutarčių principų ir Europos sutarčių teisės principų recepcija Lietuvoje: trečiasis recepcijos etapas ir Šveicarijos patirtis, Vilnius: Justitia, 2007.

International legal acts

7. Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980/80/934/EEC, Consolidated version CF 498Y0126(03) // http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:HTML// connection time: 2010-12-03

8. International Chamber of Commerce. Rules of Arbitration, 2004 // http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf // connection time 2010-12-05

9. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 // http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF // connection time: 2010-12-03

10. Statute of UNIDROIT. International Institute for the Unification of Private Law (UNIDROIT) // http://www.unidroit.org/mm/statute-e.pdf connection time: 2010-12-02

11. The UNIDROIT Principles Official integral version// http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf // connection time: 2010-12-02

Case law

12. Award of 20 December 2005// http://www.unilex.info/case.cfm?pid=2&do=case&id=1124&step=Abstract // connection time: 2010-12-03

13. ICC Award of 30 November 2006 // http://www.unilex.info/case.cfm?pid=2&do=case&id=1149&step=Abstract// connection time: 2010-12-05

14. Ad hoc arbitration Arbitral Award of 30 April 2001 // http://www.unilex.info/case.cfm?pid=2&do=case&id=1100&step=Abstract// connection time: 2010-12-05

15. ICC Arbitral Award of 05 November 2002 // http://www.unilex.info/case.cfm?pid=2&do=case&id=857&step=Abstract// connection time: 2010-12-05

16. ICC award No. 8261 of 27 September 1996 //http://www.unilex.info/case.cfm?pid=2&do=case&id=624&step=Abstract // connection time: 2010-12-05

17. ICC Arbitral Award of 16 April 1999 // http://www.unilex.info/case.cfm?pid=2&do=case&id=672&step=Abstract// connection time: 2010-12-05

18. Cf. Josep Charles Lemire v Ukraine, ICSID Case No. ARB (AF)/98/1, 15 ICSID REVIEW FOREIGN INV. L.J., 2000.

19. Supreme Court of Lithuania decision of 11 February 2002., Number: 3K-3-281

20. Supreme Court of Lithuania decision of 19.May 2003., Number: 3K-3-612

21. Supreme Court of Lithuania decision of 19 January 2005, Number: 3K-3-38

22. Supreme Court of Lithuania decision of 6 November 2006, Number 3K-P-382/2006

Foreign literature

23. Baron, Gesa. Do the UNIDROIT Principles of International Commercial Contracts form a New Lex Mercatoria? CISG Database: Pace Institute of International Commercial Law, 1998.

24. Bonell, Michael Joachim. The UNIDROIT Principles of International Commercial Contracts. Towards a new lex mercatoria in: Revue de droit des affaires internationals, 1997.

25. Bonell, Michael Joachim. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes? 1996. // http://www.cisg.law.pace.edu/cisg/biblio/bonell96.html // connection time: 2010-12-05

26. Bonell, Michael Joachim. The UNIDROIT Principles and Transnational Law. Uniform Law Review, 2000.

27. Bonell, Michael Joachim. Towards a Legislative Codification of the UNIDROIT Principles, Uniform Law Review, Vol. 12, Issue 2, 2007.

28. Bonell, Michael Joachim. UNIDROIT Principles in Practice: The Experience of the First Two Years. Uniform Law Review, Vol. 2, Issue 1, 1997.

29. Bonell, Michael Joachim. Soft Law and Party Autonomy: The Case of the UNIDROIT Principles. Loyola Law Review, Vol. 51, Issue 2, 2005.

30. Bonell, Michael Joachim. An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts. 2d. ed., 1997.

31. Bonell, Michael Joachim. UNIDROIT Principles: A Significant Recognition by a United States District Court. Uniform Law Review, Vol. 4, Issue 3, 1999.

32. Bonell, Michael Joachim. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar for the Same Purposes? Uniform Law Review, 1996.

33. Bogdan, Michael. Contracts in Cyberspace and the New Regulation Rome I, Masaryk University Journal of Law and Technology, Vol. 3, Issue 2, 2009.

34. Commentary of the UNIDROIT Principles of International Commercial Contracts. International Institute for the Unification of Private Law (UNIDROIT), 2004.

35. Commission Proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final (Dec. 15, 2005) // http://eurlex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf //connection time: 2011-03-14

36. Delaume, George R. Law and Practice of Transnational Contracts, 1988.

37. Drobnig, Ulrich. The use of the UNIDROIT Principles by National and Supranational courts, Institute of International Business Law and Practice, 1995.

38. Frischkorn, Michael. Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility, European Journal of Law Reform, Vol. 7, Issue ¾, 2005.

39. Goldman, Berthold. Lex mercatoria, Forum Internationale No. 3, 1983.

40. Green Paper on policy options towards a European Contract Law for Consumers and Businesses, COM (2010) 348 final // http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF// connection time 2010-12-28

41. Harthamp, Arthur. Perspectives of the Development of a European Civil Law, 1999.

42. van Houtte, Hans. UNIDROIT Principles of International Commercial Contracts, International Trade and Business Law Annual, Vol. 2, 1996.

43. Komarov, Alexsander, The UNIDROIT Principles of International Commercial Contracts: A Russian View, 1 Uniform Law Review,1996.

44. Kulpers, Jan-Jaap. Party Autonomy in the Brussels I regulation and Rome I Regulation and the European Court of Justice, German Law Journal, Vol. 10, Issue 11, 2009.

45. Lando, Ole. Issues and Tendencies of the Development of Contract Law Influence of the 'Troika', Vilnius: Justitia, 2007.

46. Lando, Ole. The Lex Mercatoria in International Commercial Arbitration, International and Comparative Law Quarterly, 1985.

47. Marella, Fabrizio. Choice of Law in Third Millenium Arbitrations. The Relevance of UNIDROIT Principles of International Commercial Contracts, Vanderbilt Journal of Transnational Law, Vol.36, 1996

48. Meyer, Lars. Soft Law for Solid Contracts - A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization, Denver Journal of International Law and Policy, Vol. 34, Issue 1, 2006.

49. Mustill, Michael. The New Lex Mercatoria: The First Twenty Five-years, Liber Amicorum for the Rt. Hon. Lord Wilberforce, 1987.

50. Pryles, Michael. Application of the Lex Mercatoria in International Commercial Arbitration, University of New South Wales Law Journal, Vol. 31, Issue 1, 2008.

51. Veillard, Isabelle. General and Commercial Character of the UNIDROIT Principles of International Commercial Contracts, The International Business Law Journal, Vol. 2007, Issue 4, 2007.

52. Vernooij, Nils Willem. Rome I: an Update on the Law Applicable to Contractual Obligations in Europe, 2009 // http://www.cjel.net/online/15_2-vernooij/ // connection time: 2011-03-15

53. Vogenauer Stefan, Kleinheisterkamp Jan. Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC). Oxford, New York: Oxford University Press, 2009.

Internet sources

54. List of Members of UNIDROIT is provided in a website http://www.unidroit.org/english/members/main.htm// connection time 2011-03-14

55. Text of the CISG Convention is provided in a website http://www.uncitral.org/uncitral/ // connection time 2011-04-06

56. Text of the Principles of European Contract Law can be found in a website http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm // connection time 2011-03-14

57. Members of the working group working programme is provided in a website http://www.unidroit.org/english/workprogramme/study050/wg03/wg-members.htm// connection time 2011-04-06

58. Members of the working group for the preparation of a third edition of the UNIDROIT Principles list is provided in a website http://www.unidroit.org/english/workprogramme/study050/wg03/wg-members.htm // connection time 2011-03-15

59. Note on the fifth session of the working group for the preparation of a third edition of the UNIDROIT Principles (2010)- 24-26 May, 2010 is provided in a website http://www.unidroit.org/english/workprogramme/study050/wg03/wg-2010.htm // connection time 2011-04-06

SANTRAUKA

1994 metais Tarptautinės privatinės teisės unifikavimo institutas priėmė UNIDROIT Tarptautinių komercinių sutarčių pricipus (toliau - UNIDROIT Principai). Kai kurie mokslininkai UNIDROIT Principus vadina naująja lex mercatoria. Pirmoje darbo dalyje atskleidžiama lex mercatoria sąvoka, bruožai, bendra UNIDROIT Principų charakteristika bei UNIDROIT Principų kūrėjų tikslai.

Antrojoje darbo dalyje UNIDROIT Principai analizuojami kaip sutarčiai taikytina teisė. Diskutuojama, ar UNIDROIT Principų kūrėjų tikslai išsipildė praktikoje? Ar UNIDROIT Principai būdami "švelnioji teisė", t.y., neturinti privalomos galios, gali būti taikomi kaip sutarčiai taikytina teisė? Priklausomai nuo to, ar UNIDROIT Principus taiko teismai ar arbitražo institucijos, dvi skirtingos pasekmės gali būti išskiriamos. Nacionaliniai teismai privalo taikyti savo šalies nacionalinę teisę bei spręsdami ginčus, turinčius tarptautinį elementą, remtis tarptautinės privatinės teisės normomis, kurios yra nacionalinės teisės dalis. Tradiciškai tarptautinės privatinės teisės taisyklės nenumato galimybės taikyti nevalstybinę teisę (pvz., UNIDROIT Principus), kaip sutarčiai taikytiną teisę. Taikytina teisė dažniausia yra apribojama kurios nors valstybės nacionaline teise. Arbitrams sprendžiant ginčus yra leidžiama taikyti teisės taisykles (pvz., UNIDROIT Principus), kurios nepriklauso jokiai konkrečiai valstybei.

Trečiojoje dalyje analizuojama, kaip UNIDROIT Principai taikomi Lietuvoje. Tam, kad butų išsiaiškinta, ar UNIDROIT Principai Lietuvoje gali būti taikomi kaip sutarčiai taikytina teisė, analizuojama Lietuvos Aukščiausiojo Teismo praktika. Pažymėtina, kad savo sprendimuose Lietuvos teismai remiasi UNIDROIT Principų normomis tiesiogiai jas cituodami arba netiesiogiai taikydami Lietuvos Respublikos civilinio kodekso normas, kadangi daug UNIDROIT Principų normų yra beveik pažodžiui perkelta į Lietuvos Respublikos civilinį kodeksą.

Ketvirtojoje dalyje išskiriami UNIDROIT principų privalumai ir trūkumai. Lankstumas ir greitas jų pritaikomumas prie nuolat besikeičiančių aplinkybių yra vieni didžiausių UNIDROIT Principų privalumų. Tačiau tai, kad UNIDROIT Principai yra "švelnioji teisė" reiškia, jog nesant šalių susitarimo, jog jos taikys UNIDROIT principus, jie galės būti taikomi tik tokiu atveju, jeigu ginčą sprendžianti institucija laikys, jog UNIDROIT principai yra pagrindinis instrumentas, kuriame numatytas problemos sprendimas ir nuspr3s juos taikyti.

Penktojoje dalyje yra atskleidžiamos UNIDROIT Principų tolesnio vystymosi perspektyvos. Pažymima, jog Tarptautinės privatinės teisės unifikavimo institutas rengia trečiąjį UNIDROIT

Principų leidimą. Po ilgų diskusijų nuspręsta, jog naujausias UNIDROIT principų leidimas taip pat liks "švelnioji teisė", t.y., neturės privalomos galios, ir nacionalinės teisė turės pirmenybę prieš juos.

Raktiniai žodžiai: tarptautinis komercinis sandoris, arbitražas, sutarčiai taikytina teisė, lex mercatoria, UNIDROIT Principai, "švelnioji teisė".

SUMMARY

The first version of the UNIDROIT Principles was published in 1994 by the International Institute for the Unification of Private Law. Some lawyers regard them as being the new lex mercatoria. Part I deals with the main features of the lex mercatoria, discloses the general characteristics of the UNIDROIT Principles and expectations and aims of the drafters.

Part II contains the analysis of the UNIDROIT Principles as the law governing the contract. It discusses whether the expectations and goals of the drafters of the UNIDROIT Principles have been reached and whether the UNIDROIT Principles as a non- binding, "soft-law" might be used as the law governing the contract. Two completely different effects or consequences follow from the application of the UNIDROIT Principles iinvoked before an arbitral tribunal or before a domestic court. Domestic courts are obliged to apply their own national law and also the conflict-of-laws rules which form part of national legal regulation. A traditional view is that the conflict-of-laws rules do not provide for the possibility to choose a "soft-law" such as the UNIDROIT Principles as the law governing the contract, the choice of the law applicable to international agreements is limited to a particular domestic law. Arbitrators are allowed to base their decisions on the rules of law (like the UNIDROIT Principles) that do not belong to any particular domestic law.

Part III elaborates on the role of the UNIDROIT Principles in Lithuania. In order to find out whether the UNIDROIT Principles can be applied as the law governing the contract in Lithuania, the practice of the Supreme Court of Lithuania is analyzed. It is stressed that Lithuanian courts rely on the provisions of the UNIDROIT Principles either expressly or automatically by applying the norms of the Civil Code of the Republic of Lithuania because many norms of the UNIDROIT Principles are almost literally transposed to the Civil Code of the Republic of Lithuania.

Part IV distinguishes the advantages and disadvantages of the UNIDROIT Principles. Flexibility and rapid adaptability to changing circumstances in the international trade practice is described as being one the principal advantages of the UNIDROIT Principles. However a non-binding character means that in the absence of parties' acceptance the UNIDROIT Principles can be applied only if they are regarded as a fundamental instrument which can solve the problem.

Part V introduces the trends and perspectives of the UNIDROIT Principles. The UNIDROIT Institute is currently working on a 3-rd edition of the UNIDROIT. The main idea is that in pending new 3-rd edition the UNIDROIT Principles will still remain a non-binding instrument and the mandatory rules will prevail over the UNIDROIT Principles.

Keywords: international commercial contract, arbitration, law governing the contract, the lex mercatoria, the UNIDROIT Principles, “soft-law”.