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A short dissertation on the Unidroit Principles and their future perspectives

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tive connection according to Article 10(1) EGBGB where foreign conflict of law rules prescribe such a renvoi due to the different qualification of the question regarding the name of a person (in this case: a divorced Turkish wife's right to a name as consequence of a divorce, according to

Article 13 of the Turkish conflict of law rules). (*Headnotes of the Court*)

For the full text of the decision, please refer to section II of this issue, at 123.

INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

A short dissertation on the Unidroit Principles and their future perspectives

Alfredo Ferrante *

I. Introduction

The application of the Unidroit Principles (UPICC)¹ is widespread in international contracts. Undoubtedly, the new version of 2004 contributed to improving the preceding one. However, the expected 2010 third edition offers the opportunity to make a number of brief observations, which do not aim at criticising the Unidroit principles, but rather try to confer a more legitimate uniformity upon them. They may be applied on the basis of party autonomy, or may serve as a model for national and international legislators (Preamble).² Since 2001, Estonia and Lithuania have incorporated the Unidroit Principles in their respective Legal Systems. Another national body of law inspired by the Unidroit principles is the Civil Code of Russia.³ For these reasons, the importance of the Principles is unquestionable, even though European countries such as Spain have not yet applied the Principles in any national jurisprudence.

Although a distinction has to be made between the commercial and the general character of the Principles, in certain cases both characters must comply with the "same rules of law". Accordingly, we must analyze the Principles from a synallagmatic point of view relative to the equilibrium between performances and the weaker party's interests.

The analysis will demonstrate how commercial contracts must also be subject to the general principles of preservation

of contract. To ensure a synallagmatic relationship, a commercial contract, such as a sale, must strike an equilibrium between the parties' performances.

This article will analyse two important legal issues: a) the potential discrepancy between Art. 3.10 and the concept of legal protection in the case of "hardship"; and b) the consequences of the regulation established by Arts. 5.16 and 5.17 of the Principles. The contribution, though brief and simplified, offers a novel perspective on interpreting the Principles and presents an application in which the analysed problems are especially relevant.

II. The Potential Discrepancy between ART. 3.10 and Legal Protection in the case of "Hardship"

Balance between the performances of the parties and between their obligations is the most important point of reference to be analyzed vis-à-vis synallagmatic relationships. All possible remedies and guarantees can be found to maintain this balance, not only at the actual time of its creation, but also in the course of the execution of the contract.⁴

A comparison between Art. 3.10 and legal protection in the case of hardship is necessary because each of these cases concerns both synallagma and the weaker party. As a consequence, it must be determined whether these two legal mechanisms have the same legal aim.

A. Analysis of Art. 3.10. UPICC

When there is excessive synallagmatic disparity, the Unidroit Principles offer the parties the right to avoid the contract or one of its terms. This is what Art. 3.10 calls "Gross disparity": the creation in the contract of an "excessive advantage" for one of the two parties.

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¹ The bibliography in this field is vast. In this paper, we shall cite only some of the most important texts. Above all: Unidroit Principles of International Commercial Contract Rome, Unidroit, 2004; *Bonell, M. J., An International Restatement of Contract Law. The Unidroit Principles of International Commercial Contracts*, New York, Transnational Publishers, III edition, 2005. For the jurisprudence and bibliographical references, see <http://www.unilex.info>.

² For a broader panoramic view concerning the application or the incorporation of the Unidroit Principles *vid Bonell, M. J., op cit. supra* note 1, pg. 268 and ss.

³ *Vid Doudko, A. G., Hardship in Contract: the Approach of the Unidroit Principles and Legal Developments in Russia*, in *Uniform Law Revue*, Rome, Unidroit, 2000, pg. 483 and ss.

⁴ The reference here is to the difference between the genetic and the functional synallagma. For all: *Bechmann, August, Der Kauf nach gemeinem Recht*, Scientia Verlag Aalen, Vol. I, 1965, pg. 540 and ss.; *Gallo, Filippo, Synallagma e conventio nel contratto*, Torino, Giapichelli, Vol. I, 1995, pg. 83; *Rodeghiero, Andrea, Sul sinallagma genetico nell'emptio venditio classica*, Padova, Cedam, 2004.

The effects of this kind of regulation are the following:

A) In the case of a “weak subject”, there is a *Diritto Potestativo*, i.e. a right enabling a party to avoid the contract.⁵

B) The predisposition of the Unidroit Principles against the principle of preservation of contract is reinforced by the mandatory character of this kind of right, which is contained in Art. 3.19. The mandatory character of this provision does not permit the parties to regulate their contractual clauses in a different way.

C) In all the situations established by this article, where a disparity or disadvantage exists, the parties can never reach an agreement for the preservation of the contract. Under these circumstances, they cannot maintain the contract and its obligations. In this case, the weaker party has power over the fate of the contractual relationship and can decide to maintain the contract (preserving a disadvantageous position due to the gross disparity of obligations) or to avoid the contract and terminate it. For these reasons, Art. 3.10 may run counter to the principle of preservation of contract.

In this situation, Art. 3.10 does not allow the other party, or the actual weaker party, to renegotiate the obligations of the contract. This means that Art. 3.10 does not permit a perfect and total re-equilibrium of the performances: either the contract will be maintained with a gross disparity between the obligations of the parties (because the weaker party has decided not to avoid the contract) or the contract will be avoided by the weaker party with no possibility of renegotiation. For these reasons, we may conclude that Art. 3.10 runs against the general principle of preservation of the contract.

There is only a single possibility which permits a renegotiation of the contract; i.e., a modification of the terms of the contract by a judge. Only a judge (or an arbitral tribunal) may adapt the terms of the contract. This kind of renegotiation – and the new equilibrium of the respective performances – is possible only for one of the two parties: the “weaker party” or the party who has the right to avoid the contract. However, the two parties can never introduce a new adaptation of the contract alone (because of the mandatory character of Art. 3.10). This system does not permit the free re-equilibrium of a synallagmatic contractual relationship. It does, however, provide a *Diritto potestativo*⁶ to the weaker party to avoid the contract.

The scope of application of Art. 3.10 is very broad. It must be applied, for example, every time one of the two parties has taken “unfair advantage of the party’s dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience⁷ or lack of bargaining skill”. In addition, the general reference of Art. 3.10. 1(b) – that the disparity depends on “the nature and purpose of the contract” – allows its application to all situations.

⁵ Avoidance takes effect retroactively and leads to the restitution of whatever the relevant party has received (art. 3.17).

⁶ See: *Messina, Giuseppe* “Sui cosiddetti Diritti potestativi” in *Studi in Onore a Carlo Fadda*, Vol. VI, Napoli, editorial Luigi Piero, 1906, Vo. VI, pg. 281 I et seq.

⁷ *Vid* art. 21 Swiss Code of Obligations.

B. Hardship, Arts. 6.2.1. et seq. UPICC

The protection in the case of hardship (Arts. 6.2.1, 6.2.2, and 6.2.3) can also be applied to the case of synallagmatic contracts.⁸ How is it possible to combine the hardship articles with Art. 3.10? First, hardship is directly related to the performance required of each party. Second, it must increase the cost of a party’s performance or reduce the value of the performance a party receives.

The provisions on hardship apply when (Art. 6.2.2)

(a) the relevant events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

Hardship permits either an adaptation of the contract with the aim of restoring the equilibrium of the respective performances⁹ or the termination of the contract. Thus, the parties can decide to renegotiate the contract in two different and opposing ways. However, when one party decides to terminate the contract, there is no *Diritto Potestativo* for the party (as opposed to what occurs in the case of Art. 3.10 UPICC). In the case of hardship, the termination of the contract can be reached only if the party follows some specific behaviour.

In the case of hardship, specific obligations for the disadvantaged party exist: the party is obliged to indicate “the grounds on which the disadvantage is based” and must request renegotiations “without undue delay”. Only in these cases, i.e., only if the subject complies with these legal conditions, is the termination of the contract possible.

It is therefore not so simple to terminate the contract in the case of hardship. This means that the legal system of hardship tends towards the principle of preservation of contract.

C. Comparison

This analysis of Art. 3.10 and the rules on hardship allows the following conclusions:

I) Both concepts could be applied under the same circumstances i.e. a disequilibrium between performances or obligations. In fact, all the hypothesis of Art. 6.2.2. lit. a), b), c), e) and d) could be included in the concepts of “economic distress or urgent needs”, in the concept of “improvidence, ignorance, inexperience or lack of bargaining skill” of one of the parties, or in the broader concept of “the nature and purpose of the contract”.

The compatibility and cumulability of both remedies is gen-

⁸ The analysis of the meaning of *Writings in confirmation* (art. 2.1.12) in its relationship to a potential synallagmatic disequilibrium would be of great interest.

⁹ Except the hypothesis in which the parties have reached an agreement.

erally accepted. A contract may be adapted or terminated under the rules of hardship or Art. 3.10.¹⁰

II) Art. 3.10 and hardship seek two opposing effects and antithetical juridical consequences (preservation of contract). Art. 3.10 offers an unconditional *Diritto Potestativo*, without any other requirements. The party can decide to avoid the contract whenever there is a “Gross Disparity”.

In the case of hardship (as well as in the case of Art. 3.10), the disequilibrium of performances does not automatically produce effects. However, the hardship system (as opposed to that of Art. 3.10) tends to support the principle of preservation of contract. In fact, only in few situations (and in the worst hypothesis) will renegotiation of the contract result in the termination of the contract (vid 6.2.2). It should be noted that renegotiation of the contract will not be permitted in all the cases in which the weak or disadvantaged party is unable to indicate the grounds or fails to make his request in due time.

This situation presents a potential discrepancy: two mechanisms which can be applied to the same case (i.e. in favor of weaker party) have opposing legal aims.

An observation is needed in this respect: Art. 3.10 and “excessive advantage” must exist at the time of conclusion of the contract and for this reason they can be related with the genetic synallagma. In contrast, hardship can arise in the phase of the execution of the contract and hence is related to the functional synallagma. Nevertheless, the potential discrepancy still persists: a legal situation can exist in which the weak party could apply both remedies. Moreover, in these situations we always have disequilibrium of performance. However, the Unidroit Principles have adopted a different position. Both of these two different remedies must be analyzed in relation to disequilibrium, which exists between the parties, and the aim of preserving the contract. Hardship makes it clear that its purpose must be related to the principle of the binding character of the contract¹¹ it is for these reason that Articles 6.2.1 – 6.2.3 can be considered as an expression of the basic idea of favor contractus.¹² In contrast, Art.3.10 runs contrary to this basic idea, although it can be applied (eventually) in similar cases.

It is true that hardship can be applied if there is a “weak subject”, due to an alteration of the synallagmatic relationship as in the case of Art. 3.10. Furthermore, in the case of hardship, only the weak party also has a right at his disposal in the case of Art. 3.10. In the case of hardship and in the case of Art. 3.10, the alteration of equilibrium of the contract must be fundamental. However, the Unidroit Principles have established two different solutions for the weak party, in situations that should be the same and in which the two remedies can be cumulative.

¹⁰ Vid Unidroit Principles of International Commercial Contract 2004, *supra* note 1, pg. 107.

¹¹ Vid Unidroit Principles of International Commercial Contract 2004, *supra* note 1, pg. 182.

¹² Cfr Bonell, M. J., *supra* note 1, pg. 117 and 303. The same author defines the favour contract as “the aim of preserving the contract whenever possible, thus limiting the number of cases in which its inexistence or validity may be questioned or in which it may be terminated before time” (pg. 102).

III) The Unidroit Principles do not make any reference to the mechanism of reduction of price. It can also be noticed that the renegotiation of the contract reached by Art. 6.2.3 also permits requesting or obtaining a reduction of price. This is due to the fact that the parties could reach an agreement or, in the case of dispute, a judge can adapt the contract in order to restore the equilibrium of performance.

This kind of modification could also include the reduction of the price. However, it should be noted that the Unidroit Principles do not afford due importance to this kind of action, and no reference has been made to it in the entire text.

This action could be seen as an effective remedy for remodelling or reaching a synallagmatic equilibrium in every pathologic case. It also contributes to reinforcing the principles of preservation of contract. For all these reasons, it should have been taken into consideration and introduced in the text of the Unidroit Principles. In contrast, it should be considered that Art. 9:401 of the Lando Principles¹³ specifically planned this kind of remedy in the case of the performance of one party not being perfect.

Furthermore, if the lack of the remedy of the reduction of price can be compensated with the mechanism of damages, its introduction in the Unidroit Principles should be considered.

III. The Consequences of the system established for the determination of quality of performance and price (ARTS. 5.1.6 AND 5.1.7)

Chapter 5 of the Principles establishes – in Arts. 5.1.6 and 5.1.7 – the characteristics which a good to be sold should have in case its quality or price have not been determined.

Articles 5.1.6 and 5.1.7 establish and anchor the quality and the price of goods to general criteria such as “quality that is reasonable and not less than average” or “a price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances”.

By establishing general criteria, the purpose of these articles is to maintain the contract in a case where the parties have not drawn up the contract in a perfect way.

Art. 5.1.6 and Art. 5.1.7 would appear to run contrary to Art. 3.10. The aim of the first two articles is to preserve the contract although “the performance is neither fixed by, nor determinable from, the contract” or there are no provisions to determine price.

An observation must be made here. This system permits preserving the contract as a valid contract, but it does not establish an “absolute” criterion to determine price. In fact, it establishes a “fixed” criterion (“a quality that is reasonable and not less than average” or “a price generally charged” has

¹³ The European principles are published in three successive volumes between 1995 and 2003: Lando, O., – Beale, H. (eds) *The Principles of European Contract Law, Part. I: performance, non-performance and remedies*, London, M. Nijhoff Publishers, 1995; Lando, O., – Beale, H., *Principles of European Contract Law, Part. I and II (combined and revised)*, London, Kluwer Law International, 2000; Lando, O., – Clive, E., – Prüm, A., Zimmermann, R. (eds) *Principles of European Contract Law*, London, Kluwer Law international, 2003.

always to be applied). However, this price will be included only in a “range” and will never be absolute.

An example may help here. In the month of February 2006, an Italian party (A) stipulates a contract of sale with a Spanish party (B). (A) buys 500 Mercedes model X cars, but the price is not determined. The price of the Mercedes, applying Art. 5.1.7, is the price generally charged at the time of the contract.

The Unidroit Principles offer us this fixed criterion, which could be, for example, the price of a Mercedes of the same quality. But what is the right amount? Perhaps the average price on the date of conclusion of the contract? Should it be the price in the month of February? What is the trade or market of reference, Italy or Spain?¹⁴ The judge will be able to establish only a range of prices, for example between 18,000 and 18,500 Euros, but he is not able to specify the price because it will depend on a variable mechanism (excepted for fixed price commodities on the Market or on the Stock Exchange: for example wheat, corn).¹⁵ The problem may possibly be the reference to the price “for such performance in comparable circumstances in the trade” (Art. 5.1.7. (1)). A reference to the price generally set by the seller would be better. This would allow for more precision in the determination of the price, limiting the possibility of reference to the trade or market price. It would also be easier for a judge to determine.

The mechanism of Art. 5.1.7 creates certain inconveniences: for example the determination of the price of reference for a good which presents frequent, sharp fluctuations. Systems of perfect competence permit a good of the same quality to be sold with a very different price range within a short period of time. A fluctuation of 3 or 4 % (the Mercedes example) would be really important for the economy of the seller or the buyer (in the example, 500 Euros x 500 cars...250,000 Euros!), above all in the system of the Unidroit Principles which can be applied to commercial contracts between two enterprises. The lack of determination of one of the two performances destroys the synallagmatic relationship because it does not permit the original, fair equilibrium between the performances of the parties to be evaluated.

Note should also be taken that this case presents a vigorous consolidation of the principle of preservation of contract against the normal inclination of European civil codes. We know that the Italian Codice Civile and the Spanish Código Civil require that the price must be determined or determinable, otherwise the disposition of Art. 5.1.7 will also be applied in the case in which “the contract does not make provision for determining the price”.¹⁶

Articles 5.1.6 and 5.1.7 afford more importance to the principle of preservation of contract than to the principle of equilibrium of the contract. Synallagma and preservation of the contractual relationship are both important and both must be preserved. Always and in every contract of sale. Accordingly, these articles should also consider the synallagmatic relationship.

If the original equilibrium of a contract could not be established, it would be more difficult to analyze the remedies in the case of a good sold which lacks conformity. A proper re-equilibrium of performance can be calculated if the relationship between the performance (synallagma) is clear and known from the moment of its creation. Correct restoration of performance is possible only if we can compare the original performances. Performance must always be defined at every moment of the duration of the contract. For these reasons, synallagma must exist in both the phase of creation of the obligation and the phase of execution.¹⁷ Only if we can establish each performance correctly can we regulate the correct, original synallagma established by the parties.

In order to establish quality of performance, International and European Legislation may be of some assistance. The United Nations Convention on Contracts for the International Sale of Goods (CISG) and Directive 99/44¹⁸ regarding certain aspects of the sale of consumer goods and associated guarantees have introduced the concept of conformity of the good and have contributed to changing the old concept of defect or fault in performance (in the case of the sale of goods). It seems clear that the European Directive has consolidated the concept of the weaker party in the case of consumers. The Unidroit Principles should likewise make reference to the lack of conformity of goods. This could be of help in considering performance in a better way in the case of sale and in order to better protect the weaker party.

Although the Unidroit Principles are general and are aimed at international and commercial contracts, they should have considered these important details. May a consumer not buy a good in a foreign nation?¹⁹ The concept of lack of conformity came into being with Art. 35 of the United Nation Convention on Contracts for the International Sale of Goods (CISG). It has been reinforced with Art. 2 of Directive 99/44 and produced the key reform of German Civil Law.²⁰ The Unidroit Principles should have introduced this concept because “CISG is an obligatory point of reference in the preparation for the Unidroit Principles”.²¹

¹⁴ In these case the system is in the hands of the clever party or of the party who has the best lawyer who will apply the best legal criteria for his customer.

¹⁵ Cfr Art. 1474.2 Italian *Codice Civile*, Art. 1448 Spanish *Código Civil*.

¹⁶ This system has been accepted in the Unidroit Principles because normally the lack of determination of the price is an widespread international practice. However, I consider an incongruence to still exist in the legal terms. *Vid* ICC International Court of Arbitration of September 1999, parties unknown: “Selon le droit brésilien tel qu’il ressort des débats échangés entre les parties, le caractère déterminable du prix suffit à la validité des contrats. Interrogée par [la défenderesse], la société [...] (acheteur dans les contrats litigieux) a expressément confirmé la régularité et l’efficacité des contrats. Il s’agit d’opérations normales et récurrentes, sur des marchandises qui ont un prix de marché. Parla clause dite

d’« arrosage », les acheteurs s’engageaient a prendre les quantités de sucre nécessaires pour que la banque soit remplie de ses droits, en cas de chute des cours. Le Tribunal note surabondamment que la vente sans fixation préalable d’un prix est courante dans le commerce international, comme le montrent la convention de Vienne du 11 avril 1980 sur la vente internationale de marchandises (art. 55) ainsi que les principes Unidroit relatifs aux contrats du commerce international (art. 5.7).” at <http://www.unilex.info/dynasite.cfm?dssid=2377&cdsmid=13621&cx=1>.

¹⁷ *Vid* foot note n.4.

¹⁸ Official Journal L 141 of 4 June 1999.

¹⁹ I do not exclude that the Unidroit principles could also be applied in the case of consumers in the (not too near) future. They would, however, require profound and substantial modification.

²⁰ *Vid* Gesetz zur Modernisierung des Schuldrechts of 26 November 2001.

²¹ Bonell, M. J., *supra* note 1, pg. 305.

“The lack of conformity” produces a disparity in the performances. The same occurs in the hardship situation, in which the defect is considerable. For these reasons “Gross Disparity” should also be analyzed in relation to the quality and the price of the good.

The Unidroit Principles are, beyond any question, a reference point for the current and future commercial law system and have contributed to the simplification of commercial transactions. Nonetheless, excessive simplification may also

possibly generate some inconsistencies with regard to commercial law.

For these reasons, the Unidroit Principles need reforming vis-à-vis the aforementioned points: i.e., better harmonization between Art. 3.10 and hardship (above all in order to reconcile the theory of preservation of contract and synallagma), the introduction of the action of price reduction and the concept of lack of conformity of the good in relationship to the concept of “gross disparity” and performance quality.

INTERNATIONAL AND EUROPEAN INTELLECTUAL PROPERTY LAW

Industrial property rights and copyright law

ECJ 20 September 2007 – C-371/06 – **Benetton Group SpA v G-Star International BV**
First Directive 89/104/EEC¹ – Article 3(1)(e), third indent, and Article 3(3) – Trade marks – Sign – Shape which gives substantial value to goods – Use – Advertising campaigns – Attractiveness of a shape acquired prior to the date of application for registration on account of recognition of it as a distinctive sign

The third indent of Article 3(1)(e) of First Directive 89/104/EEC is to be interpreted as meaning that the shape of a product which gives substantial value to that product cannot constitute a trade mark under Article 3(3) of that directive where, prior to the application for registration, it acquired attractiveness as a result of its recognition as a distinctive sign following advertising campaigns presenting the specific characteristics of the product in question.

Facts: Sa G-Star designs, manufactures and markets clothing (in particular jeans) of the trade mark of the same name. It is the proprietor of two shape marks for goods in Class 25 as defined by the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as amended and revised, that is to say for clothing. Those two marks were registered on 7 August 1997 and 24 November 1999.

Protection was sought for each of them, respectively, on the basis of the following distinctive elements:

– sloping stitching from hip height to the crotch seam, kneepads, yoke on the seat of the trousers, horizontal stitching at knee height at the rear, band of a contrasting colour or of another material at the bottom of the trousers at the rear, all on one garment;

– seams, stitching and cuts on the kneepad of the trousers, slightly baggy kneepad.

Benetton manages textile trading undertakings. In the Netherlands it sells its products through franchisees.

On 25 May 2000, G-Star brought an action against Benetton before the Rechtbank of Amsterdam (NL) in order to preclude any manufacture, marketing and/or distribution in the Netherlands of trousers with the mark Benetton. In support of its application, G-Star maintained that Benetton had infringed the trade mark rights attached to its Elwood design trousers by manufacturing and putting on the market, in the summer of 1999, trousers with, inter alia, an oval kneepad and two lines of sloping stitching from hip height to crotch height.

Benetton challenged the application and, as a counterclaim, sought the annulment of the registered marks on the basis of the second paragraph of Article 1 of the Uniform Benelux Law on Trade Marks on the ground that the shapes at issue determined the market value of the goods to a great extent as a result of their beauty or original character.

The first instance court dismissed G-Star’s claims based on an infringement of its trade mark rights and Benetton’s counterclaim. Both parties lodged appeals before the Gerechtshof of Amsterdam (NL), which allowed G-Star’s appeal and dismissed Benetton’s application for annulment.

Benetton lodged an appeal in cassation before the Hoge Raad (NL) challenging that analysis by the Gerechtshof. The Hoge Raad points out that the contested considerations of the Gerechtshof’s decision are based on the idea that the prohibition laid down in the third indent of Article 3(1)(e) of the Directive does not have to preclude a lawful trade mark registration where, at a given time prior to the application for registration, the attractiveness of the shape was a consequence of its attractiveness linked to recognition of the shape as a mark. The Hoge Raad points out that, in its judgment in Case C-229/99,² the Court held that, pursuant to Article 3(3) of the Directive, signs which cannot be registered under

¹ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989, L 40 at 1-7).

² ECJ 18 June 2002 – C-229/99 – *Philips* [2002] ECR I-5475 = [2002] EuLF (E) 294.