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UNIDROIT Principles of International Commercial Contracts: A Powerful Instrument that Unites rather than Further Divides

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Abstract: The UNIDROIT Principles of International Commercial Contracts have been in commercial use for over 30 years. This article aims to examine this instrument from a broader perspective, demonstrating why it is an extraordinary legal tool that seems to be gaining in importance in an increasingly divided world. This study analyses these principles from the perspective of their international character, their drafters, and their content. It is then demonstrated why this instrument has the potential to build, within the framework of international cooperation, one rational voice regarding their interpretation.

This article employs the dogmatic-legal method. The primary objective of this research approach is to analyze the character of the UNIDROIT Principles of International Commercial Contracts and their background. The aim is to determine whether these principles are indeed an outstanding soft-law international instrument that can still be of seminal importance in today's world.

Key words: international commercial contracts, commercial contracts, The UNIDROIT Principles of International Commercial Contracts, UPICC, soft law, international instruments of soft law.

I. Introduction

We live in an increasingly divided world. The world in which rational thinking often has to give way to emotions and the populist voices that are based on them. However, even in such a world, we can find rational principles that transcend divisions and are commonly accepted based on their merits. They are expressed in 'the most important soft law instrument in the field of general contract law' (Bonell, 2018, p. 15): the UNIDROIT Principles of International Commercial Contracts (hereinafter: **the UNIDROIT Principles**).[2] As was aptly noted: 'Since the beginning of the world, we have been in the power of words'.[3] The main thesis of this article is that the UNIDROIT Principles are powerful words that can unite, not divide, which is exactly what we need right now. They provide an opportunity to solve many disputes based on common rules and through expert, rational and inclusive legal debate.

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2 The full text of them can be found: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/ (access 30.3.2025).

3 Pl. Od początku świata jesteśmy we władzy słów [above is the author's own translation]. R. Piotrowski, Dwugłos o TVP – a debate with Prof. Romanowski, 16.01.2024 Warsaw, available: https://www.facebook.com/watch/live/?ref=watch_permalink&v=1029724124786938 (access 13.03.2025).

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II. Beyond national borders

If we are dealing with a domestic transaction, it is quite logical that it should usually be governed by national law. In the case of a cross-border transaction, it seems a 'natural' conclusion that it should be governed by international rules. Otherwise, one of the parties to the transactions is favored, mostly without good reason, since it is dealing with its own laws (Dennis, 2014, p. 136; other disadvatanges Bonell, 2018, pp. 16-20). The other party is disadvantaged because it must deal with foreign legal rules.[4] In theory, parties may be able to choose so-called neutral laws; however, in practice, the bargaining power of the parties is often unequal, and one party is able to impose its own rules (Compare: Bonell, 2018, pp. 17 and 40). Contractors are also often unable to unanimously agree on neutral laws, leaving this issue unsettled (Bonell, pp. 40-41).

UNIDROIT noticed this problem and these 'market niches' quite early on. The UNIDROIT Principles were first published in 1994, and the fourth edition was published in 2016. Some may argue that there is no difference between choosing a well-written 'neutral' domestic law and choosing the UNIDROIT Principles for an international transaction. However, this statement does not take into account one very important fact. As previously mentioned 'since the beginning of the world, we have been in the power of words'; therefore, control over them is a key issue. In the context of national legislation, this power resides with national lawmakers, while the authority to interpret the law rests primarily with national judges.

On the other hand, the Principles were approved by the intergovernmental organization, i.e. the UNIDROIT. Sixty-three Member States joined,[5] hailing from all five continents (Bonell, 2018, p. 20). Therefore, it is fair to say that we are dealing with a truly international legal voice that transcends national borders.[6] In this context, it would be at least inaccurate to suggest that the UNIDROIT Principles attempt to establish a Western narrative that grants Western world dominion over the rest of the globe. The discussed instrument demonstrates that principles such as, e.g., freedom of contracts (Art. 1.1. of the UNIDROIT Principles) or acting in accordance with good faith (Art. 1.7. of the UNIDROIT Principles) have no national borders. It is therefore unsurprising that 'they have been welcomed from their first appearance' (Bonell, 2018, p. 20) and are considered 'a significant step towards the globalization of legal thinking' (Perillo, 1994, p. 318). Most importantly, it is the globalization of common values rather than the particular interests of a certain group.

In summary, the first strength of the UNIDROIT Principles is their non-national nature.

4 The above statements are, of course, a simplification, since the laws that govern a contract or dispute depend on the relevant conflict-of-law rules. However, these rules will usually indicate the domestic law of one of the parties. More about conflict-of-law problems in the context of cross-border transactions: Baptista, p. 1211.

5 See https://www.unidroit.org/about-unidroit/membership-old/ (access 15.03.2025).

6 However, it should be noted that few African states have joined UNIDROIT. See, for example, the map available here: https://www.unidroit.org/about-unidroit/membership-old/ (access 15.03.2025). Noteworthy, the UNIDROIT Principles are an opt-in instrument; therefore, they do not prevent parties from choosing national laws to govern their contracts.

III. Eminent experts instead of politicians

In many countries, legislative committees prepare drafts of legal acts. Even if these drafts are often quite good pieces of law, they are frequently impaired later on by politicians who 'know-better' or who try to introduce their own particular interests into them, thus disturbing the coherence of the legal act. Moreover, in weak democracies, legislative committees may be formed based more on connections or loyalty than on expertise.

The UNIDROIT Principles are free from the aforementioned potential problems. Rather than being prepared by national legislators, individual companies or national trade associations, they were prepared by a group of **eminent international experts** (Veneziano, 2013, p. 524; Bonell, 2018, p. 20). These specialists came from 'all of the major legal systems and geo-political areas of the word' (Bonell, 2018, p. 20). The instrument in question is not the result of politically imposed interests or values, but of heated expert debate (Bonell, 2018, p. 22). Furthermore, as already mentioned, the entire enactment process was supervised and ultimately approved by an intergovernmental organization, namely UNIDROIT (Bonell, 2018, p. 39).

Therefore, the second strength of the UNIDROIT Principles lies in their **drafters**. These two already discussed strengths alone demonstrate that we are dealing with an instrument of more than appropriate **democratic legitimacy** (opposite views: Symeonides, 2014, pp.141-142; Radicati di Brozolo, 2012, p. 857).

IV. Outstanding merits

The above-indicated heated debate was full of conflicting interests and rules (Bonell, 2018, p. 22). The final choice between them was not based on 'majority rule', the imposition of interests by the most powerful, or emotions, but on **rational debate**, i.e., 'which of the rules under consideration had the most persuasive value and/or appeared to be particularly well suited for cross-border transactions (the <<better rule>> or <<prestatement>> approach)' (Bonell, 2018, p. 22; Veneziano, p. 524). Most importantly, this thoughtful discussion was not fruitless, nor was it full of rotten compromises (Mistelis, 2001, p. 22). On the contrary, we obtained an exceptional set of rules widely recognized for their intrinsic merits (Bonell, 2018, pp. 23-24).[7] To avoid paying mere lip service to their uniqueness, some arguments must be provided.

Firstly, it should be noted that this is a '**voluntary' instrument**, i.e. an opt-in scheme (Dennis, 2014, p. 115). No rational person would agree to apply poor-quality rules voluntarily. In practice, parties not only agree to employ them into their contracts, but courts also apply them, even in the absence of a reference to them in the disputed agreement (Dennis, 2014, pp. 131-132). In one of its judgments, the Swiss Supreme Court indicated that this instrument constitutes 'a set of general principles and rules prepared by independent academics and comparable to domestic legal systems as to **intrinsic equilibrium, comprehensiveness and**

7 M. Bonell invokes Justice Finn of the Federal Court of Australia who states: 'the Principles contain much that is recognizable in many legal systems of the world even when it does not fully accord in its detail with the law of any particular country' (Finn, 2010, p. 194).

general recognition' [own emphasis].[8] Furthermore, courts use them, *inter alia*, as 'gap fillers' in reference to the United Nations Convention on Contracts for the International Sale of Goods, hereinafter: CISG (Bonell, 2018, pp. 33-34; Dennis, 2014, p. 121). Additionally, recognize them as '**a code of international contract**' [own emphasis].[9] Similar bold statements can be found in the literature, where we can read that they constitute a 'paradigmatic source of non-national law' (Berger, 2014, p. 520) or are seen as 'one of the most successful and ambitious recent soft law instruments' (Gabriel, 2016, p. 284). Lastly, the Official Commentary on the Hague Principles indicates the UNIDROIT Principles as an example of a neutral and balanced set of rules of law that are 'generally accepted on an international level' (Cf. Comment 3.6.).[10]

To sum up, the third strength of the UNIDROIT Principles lies in their **merits**.

V. A platform to build one common international voice

If we are to make progress ('go forward'), we cannot spend forever arguing about every step and providing equally important but different opinions on the direction in which the step should be taken. The authors of the UNIDROIT principles have done everything they can to avoid this problem.

First, they took care of the language. Not only did they make it 'concise and straightforward' (Bonell, 2018, p. 22), they also made it domestic law neutral.[11] This means that the accusation that the discussed instrument tries to impose the terminology and interests of the Western world can be rejected. As the literature aptly indicates, the UNIDROIT Principles create 'a legal lingua franca to be used and uniformly understood throughout the world' (Bonell, 2018, p. 22; for examples of this approach: Bonell, 2005, pp. 65-68).

However, language is merely the basis on which we can work, and it does not guarantee an unambiguous interpretation on its own. Language is an imperfect tool; therefore, even a concise and seemingly straightforward provision can lead to at least three divergent interpretations by three different law professors.[12] This situation is not hypothetical. The author of this article lives in a country where there are many commentaries refer to the same article.[13] In practice, because of the above, it is often extremely difficult to provide a law firm client with an unambiguous legal opinion. The result is that citizens who obtained confusing advice may begin to doubt the rule of law and the entire justice system.

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8 The full text of the judgment is available here: http://www.unilex.info/case.cfm?id=1124 (access 11.03.2025).

9 Fr. (…) les principes d'Unidroit forment un code des contrats internationaux (…). See: Cour d'Appel of Reims, 4 September 2012 (available at http://www.unilex.info/case.cfm?id=2121, access 8.03.2025). This decision is commented in: Ferrari et al., pp. 97 et seq.

10 Available: https://www.hcch.net/en/instruments/conventions/full-text/?cid=135 (access 12.03.2025).

11 M.J. Bonell indicates that the authors 'deliberately avoids terminology peculiar to any given legal system' (Bonell, 2018, p. 22).

12 P. Schlechtriem indicates that 'No codification is ever perfect, (…)' (Schlechtriem, 2005, p. 789).

13 See for example numerous commentaries to the Polish Civil Code which can be found in such legal bases as LEX (Wolters Kluwer) and Legalis (C.H. Beck). For example in LEX you can find 12 commentaries to article 3531 of the Polish Civil Code (The principle of freedom of contract and its limitations) and in Legalis another 9. This footnote does not even indicate other sources as: monographs, scientific articles or case law in reference to the indicated article.

In this context of the above, the value of official comments, which are quite popular in the case of international instruments, cannot be underestimated.[14] The authors of the UNIDROIT Principles were most likely aware of the above-mentioned problem and the value of such commentary. It is worth noting that the instrument in question is not only composed of black-letter rules.[15] There are also integral versions of the Principles[16] where each article is supplemented by comments largely based on actual case law (Bonell, 2018, p. 21). Importantly, the integral version of UNIDROIT Principles is available free of charge,[17] removing any barriers to access. Therefore, a platform exists to build one coherent international legal voice.

However, the question may be asked whether we are dealing with a one-sided voice, deprived of international pluralism. Firstly, the international character of the UNIDROIT, the experts involved in the work and the discussed instrument have already been elaborated on, so there is no need to repeat the above remarks. Secondly, we should consider the UNIDROIT Principles case law. The fact that it is perhaps not yet fully and sufficiently developed[18] can be viewed as both a drawback and an advantage. Courts and arbitral tribunals from all over the world can apply the UNIDROIT Principles, thereby influencing the development of common narrative surrounding their interpretation (M.J. Bonell, 2018, p. 39).[19] Court decisions and even some arbitral awards applying or referring to this instrument are 'reported and annotated'. The available case law is collected and accessible, again, free of charge.[20] Unfortunately, many arbitral awards are not published (Dennis, 2014, p. 120).

Therefore, the fourth strength of the UNIDROIT Principles lies in their potential to build, on a cooperative basis, a one-voice regarding their interpretation, which is not a biased cry, but can be a common and rational voice.

VI. Conclusions

Given that language is an imperfect tool, can a 'perfect' international legal instrument ever be created? An instrument that:

- is approved by a widely recognized intergovernmental organization rather than a national legislator?
- is drafted by recognized international experts instead of biased politicians?
- with respect to its content is the outcome of rational, heated, inclusive and open debate?

14 See for example official comments to Hague Principles (https://www.hcch.net/en/instruments/conventions/full-text/?cid=135, access 12.03.2025) or Goode, 2022.

15 In the 2016 edition: 11 chapters with 211 provisions. See: https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf (access 11.03.2025).

16 The plural form was used because there are integral versions in reference to different language versions. See: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/ (access 11.03.2025).

17 https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/ (access 11.03.2025).

18 M.J. Bonell observes that this fact has impacted the certainty and predictability of solutions based on the UNIDROIT Principles. However, he also indicates that the volume of case law is constantly growing (Bonell, 2018, p. 39).

19 With respect to the uniform interpretation of the CISG, see Dennis, 2014, pp. 35-36.

20 See UNILEX, On CISG and The UNIDROIT Principles, https://www.unilex.info/ (access 11.03.2025).

- enables a common and, where possible, unambiguous interpretation?

Even if the UNIDROIT Principles are not flawless,[21] they are as close to perfection as an international legal instrument can be. Alternatively, and more pessimistically, they are 'the best way forward' (Dennis, 2014, p. 151).

Its extraordinary character is a sign of the times when we believed in cooperation across national borders, recognized that a friendly approach was better than hostile one, and that a rational approach was better than an emotional one. We believed and recognized the authority of legal experts, and the most importantly, we saw that there are actually more things that unite us than divide us.

Some may argue that the UNIDROIT Principles are not suited to an era of deglobalization. However, deglobalization and nationalism are based on the argument of 'strength'. This is based on the assumption that our national laws are superior and should be used and imposed on others. This approach is short-sighted and will not help us to deal with increasingly large and complex global problems. The UNIDROIT Principles provide an opportunity to solve many disputes based on common rules through rational and inclusive legal debate. They allow us to work together to reach coherent solution, rather than working separately and achieving divergent results. This is what we need now: cooperation, not division.

As the Polish Nobel Prize winner Olga Tokarczuk said: 'the one who has the story and tells it – he/she rules'.[22] The UNIDROIT Principles provide an opportunity to collaborate together in telling the story of international commercial contract law, and the author of this paper hopes that this story will continue to be told successfully for another 30 (sic!), even 300, years.

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21 See for example the problem of choosing the UNIDROIT Principles to govern parties contracts in case of international litigation (Dennis, 2014, pp. 128-129).

22 Pl. Ten, kto ma i snuje opowieść – rządzi [above is the author's own translation]. Olga Tokarczuk's speech during the Nobel Prize award ceremony, 10.12.2019, available in Polish: https://www.rp.pl/kultura/art956101-czuly-narrator-pelny-tekst-noblowskiego-wykladu-olgi-tokarczuk (access 12.03.2025).

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