Association Européenne des Juristes d'Entreprise

EUROPEAN COMPANY LAWYERS ASSOCIATION

NEWSLETTER - OCTOBER 2012

Editorial:

Dear colleagues,

as some of you know ECLA approaches 30 years of its existence. Next year there will be the 30th anniversary of setting of the first structure of in-house lawyers in Europe – of ECLA in 1983. For the ECLA Executive Board this means starting of preparation works on proposals for the General Assembly in Berlin how to celebrate this anniversary and how to utilize the assets of ECLA in the future. All ECLA members were provided with the White Paper prepared by ECLA President Dr. Peter Kriependorf and therefore, there is necessary base available for our fruitful discussion in the upcoming Berlin General Assembly. The ECLA Executive Board is looking forward to any proposal or initiative regarding the 30th ECLA anniversary and regarding the future ECLA directions.

Before the ECLA representatives will meet in Berlin there is a lot of information ECLA Executive Board would like to share with ECLA members and individual members of ECLA members. There are some interesting benefits (discounts, free issues and free conference fees) available from strategic partners of ECLA and from other partners. You may also find interesting the article written for ECLA by prof. Michael Joachim Bonell regarding the development in the field of international commercial contracts at UNCITRAL.

I hope you will find this Newsletter interesting for you and I am looking forward to your feedback.

Petr Šmelhaus, ECLA General Manager

ECLA welcomes its new Strategic Partner – EURid

ECLA has three levels of cooperation with sponsors or partners – Sponsor, Strategic Partner and Partner. Strategic Partner is the middle level of this categorization. Aside to GLG, our Strategic Partner since last year, ECLA has contracted a second one, recently – European Registry for Internet Domains (EURid). Please find here the introduction of our new Strategic Partner EURid:

Resolve .eu disputes the easy way

It's no secret that court proceedings can be time-consuming and costly. Thankfully, when it comes to disputing .eu domain name registrations, there is a convenient online alternative that allows you to resolve such disputes for your clients online, without a courtroom in sight.

The .eu Alternative Dispute Resolution (ADR) procedure is handled by the Prague-based Czech Arbitration Court. The court's rulings are legally binding, unless the losing party chooses to appeal the decision (within 30 calendar days) through a conventional court of law.

Although .eu domain name registrations can be challenged in any regular court, most .eu domain name disputes are resolved through ADR.

When is ADR appropriate?

You can start an ADR procedure against a .eu domain name holder if:

- The complainant, your client, has a prior right to the domain name in question. For example, they hold a trademark on or own a company by the same name, and;
- There is reason to believe that the domain name holder registered the name for speculative and abusive purposes.

Why ADR is a good alternative?

- All ADR cases are conducted online and by email.
- Cases can be conducted in 21 official EU languages.
- They are resolved by panellists who are usually intellectual property experts.
- Cases take an average of four months to resolve.
- Cost-efficient thanks to lower fees

Lower fees

For six months, from 1 July 2012, basic ADR proceedings are half price at 600 euro only. EURid, the .eu registry, is contributing to the costs of the ADR procedure for this period of time to make to make it more accessible and cost-

efficient for holders of prior rights, such as brand and trademark owners, domain name holders and registration companies while maintaining the quality of the rulings.

During 2011, 47 .eu ADR cases were filed and 42 decisions were published, of which 38, or 90%, were in favour of the complainant. In total since .eu's launch in 2005, there have been over 1 000 .eu proceedings.

The ADR procedure is outlined in article 22 of the European Commission regulation 874/2004. For more information you can also visit the official website of the Czech Arbitration Court, www.adr.eu.

ECLA continues in the Strategic Partnership with GLG.

ECLA renewed its partnership with GLG for another one year period. We hope you, our readers, can utilize some of their useful products. Here is the GLG´s announcement for the readers of the ECLA Newsletter:

Global Legal Group useful tools and CDR Conference

ECLA and **Global Legal Group** (www.glgroup.co.uk) are proud to announce the continuation of their strategic partnership for 2012-2013.

Commercial Dispute Resolution is the world's leading online and print source of disputes news and analysis.

All ECLA members are entitled to **FREE ACCESS** to www.cdr-news.com, which gives in-depth and comprehensive daily updates on global commercial disputes, covering litigation, arbitration and ADR, white-collar crime, regulatory issues and third-party funding. To gain accesses simply email Kevin Byrne at kevin.byrne@glgroup.co.uk quoting code **ECLAWEB0912** to receive your username and password.

Also available to ECLA members at a special discounted price of **EUR 600** per year (standard price EUR 1,180) is subscription to **CDR Magazine**, issued six times per year, containing unique features, interviews and expert analysis from CDR's in-house experts and the world's leading

dispute resolution lawyers. To subscribe, email Kevin Byrne at kevin.byrne@glgroup.co.uk quoting code **ECLAMAG0912** and you will also receive, **FREE**, the last two back issues of CDR magazine.

ECLA members are also cordially invited to the **CDR Conference on 26-27 November 2012 in London**. National in-house counsel association heads can receive their attendance ticket **free of charge** and national in-house counsel associations' members for **EUR 650** (normal price EUR 1,500). Please visit http://www.cdr-news.com/conferences/cdr-conference-london for details of the location and schedule of sessions.

The **International Comparative Legal Guide** series provides current and practical comparative legal information in 25 practice areas.

Our comprehensive guides follow a question and answer format to ensure thorough coverage of each topic within different legal systems worldwide.

Each guide draws together the collective expertise of our contributors to provide a valuable and convenient resource, updated annually.

The ICLG series provides a practical insight for general counsel, government agencies and private practice lawyers keeping them abreast of law and policy globally.

All guides are available free of charge to registered users at http://www.iclg.co.uk

The **Global Legal Insights** series provides readers with a series of essential insights into the current law-related issues affecting their business.

Each book focuses on a specific legal practice area, providing readers with expert analysis of legal, economic and policy developments through the eyes of the world's leading lawyers. The entire series is free to access at www.globallegalinsights.com.

UNIDROIT Principles 2010: Towards a 'Global' Contract Law

BY

MICHAEL JOACHIM BONELL

The present state of the law governing international commercial contracts is far from satisfactory. Despite the unprecedented growth in the volume of trade and the development of increasingly integrated markets, cross-border transactions continue to a large extent to be subject to domestic laws which may not only vary considerably in content, but are often ill-suited for the special needs of international trade.

The UNIDROIT Principles of International Commercial Contracts (hereinafter: the UNIDROIT Principles) represent a new approach to international contract law. They are a non-legislative codification or "restatement" of the general part of the law of international commercial contracts prepared by a group of experts from all over the world including numerous observers representing important international organisations and other interested institutions and arbitration centers, without the formal involvement of Governments. Consequently, unlike legislative instruments such as the UN Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles are not intended to be ratified by States and to become integral part of the respective domestic laws. However they differ from other internationally widely used soft law instruments, such as the INCOTERMS or the Uniform Customs and Practices relating to Documentary Credits (UCP) issued by the International Chamber of Commerce, as they have been produced under the supervision of and finally adopted by an intergovernmental organisation such as the International Institute for the Unification of Private Law (UNIDROIT). Moreover and more important, while most international uniform law instruments, be they of legislative or non-legislative nature, are restricted to particular types of transactions (sales; carriage of goods by sea, road or air, etc.) or to specific topics (delivery terms; modes of payment, etc.), the UNIDROIT Principles have a much broader scope as they deal with international commercial contracts in general, including long-term and relational contracts, with respect to which they provide a comprehensive normative framework covering virtually all the most important problems which may arise in the context of the formation and performance of individual transactions.

First published in 1994 and with a second edition in 2004, the UNIDROIT Principles

are now in their third edition adopted in 2010 ("UNIDROIT Principles 2010"). The UNIDROIT Principles 2010 consist of a Preamble and 211 articles ("black letter rules") divided into 11 chapters on general provisions, formation including authority of agents, validity including illegality, interpretation, content including third party rights and conditions, performance including hardship, non-performance and remedies, set-off, assignment of rights, transfer of obligations and assignment of contracts, limitation periods and plurality of obligors and obligees. Each article is accompanied by comments and, where appropriate, by factual illustrations intended to explain the reasons for the black letter rule and the different ways in which it may operate in practice.

The drafting style of the UNIDROIT Principles resembles that of civilian codes rather than that of Anglo-American statutes. The language is concise and straightforward so as to facilitate comprehension also by non-lawyers, and deliberately avoids terminology peculiar to any given legal system thereby creating a legal lingua franca to be used and uniformily understood throughout the world.

As to their content the UNIDROIT Principles represent a mixture of both tradition and innovation. In other words, while as a rule preference was given to solutions generally accepted at international level ("common core" approach), exceptionally solutions best suited to the special needs of international trade were preferred even though they represented a minority view at domestic law level ("better rule" approach).

II. THE PURPOSES OF THE UNIDROIT PRINCIPLES

Even though the UNIDROIT Principles may be applied in practice only by virtue of their persuasive value, they may – and actually do – play a considerable role in a number of different contexts.

1. THE UNIDROIT PRINCIPLES AS THE RULES OF LAW GOVERNING THE CONTRACT

First of all, the UNIDROIT Principles may be chosen by the parties or applied by courts and arbitral tribunals as the rules of law governing the contract (paras. 2 – 4 of the Preamble).

One may think of a variety of situations in which parties – be they powerful "global players" or small or medium businesses – wish to avoid the application of any domestic law and prefer instead to "de-nationalise" their contract by subjecting it to a genuinely neutral a-national or transnational legal regime. In the past for this purpose the parties had no other choice than generically to refer to "generally accepted principles of international commercial law", the "lex mercatoria" or

the like, leaving it to the adjudicating body to determine what in each given case was the precise meaning of such rather vague formulas. A valid alternative may now be the recourse to an easily accessible and comprehensive restatement of international contract law such as the UNIDROIT Principles. And indeed, recent experience shows that in actual practice parties more and more often agree on the UNIDROIT Principles as the law governing their contract; likewise an increasing number of Model Contracts prepared by international agencies such as the ICC or the ITC UNCTAD/WTO in the field of commercial agency, distributorship, joint ventures, etc. contain a reference to the UNIDROIT Principles either as the exclusive lex contractus or in conjunction with other sources of law (e.g. a particular domestic law; general principles of law prevailing in a given trade sector; usages).

What still remains to be seen is whether, and if so to what an extent, under the relevant rules of private international law parties are permitted to choose a soft law instrument such as the UNIDROIT Principles as the law governing their contract in lieu of a particular domestic law.

In the context of international commercial arbitration the answer is nowadays generally in the affirmative: Art. 28 (1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration expressly states that "[t]he 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 […]" (emphasis added), and similar provisions may be found in the forty or so domestic arbitration laws enacted world wide on the basis of the UNCITRAL Model Law.

By contrast, as far as court proceedings are concerned, the tradi¬tional and still prevailing view is that the parties' freedom of choice is limited to a particular domestic law, with the result that a reference to the UNIDROIT Principles will be considered as a mere agreement to incorporate them into the contract and as such can bind the parties only to the extent that they do not affect the mandatory provisions of the lex contractus.

Turning to actual practice, of the 284 or so decisions referring in one way or another to the UNIDROIT Principles reported in the UNILEX database <http://www.unilex.info> more than a third – all arbitral awards – apply the UNIDROIT Principles as the rules of law governing the substance of the dispute.

In some cases the UNIDROIT Principles were expressly chosen by the parties either as the sole legal basis for the decision by the arbitral tribunal or in conjunction with other sources of law. Interestingly enough, more often than not the parties had agreed on the application of the UNIDROIT Principles only after the commencement of

the arbitral proceedings, sometimes on the suggestion of the arbitral tribunal itself.

In other cases the UNIDROIT Principles were applied where the parties had agreed that their contract would be governed by and/or the arbitral tribunal would decide the merits of the dispute in accord¬ance with no further specified principles and rules of supra-national or transnational character, such as the "general principles of the lex mercatoria", "general principles of international contract law", "general principles of equity", "laws and rules of natural justice". The recourse by the arbitral tribunal to the UNIDROIT Principles was justified on the ground that they constitute a particularly authoritative and reliable expression of the principles and rules in question. Only in a few cases was the application of individual provisions of the UNIDROIT Principles expressly excluded because the arbitral tribunal considered them not yet sufficiently accepted by the international legal and business communities.

Finally, there are also cases where the arbitral tribunal applied the UNIDROIT Principles as the rules of law governing the substance of the dispute even in the absence of any choice-of-laws clause in the contract or where the choice-of-laws clause was manifestly invalid because the parties had made a reference to non-existing legal sources as the law governing their contract (e.g. "Anglo-american law"; "European law"). In so doing, the arbitral tribunal normally relied on the relevant statutory provisions or arbitration rules, according to which – to quote the language used in Art.21 of the 2012 ICC Rules of Arbitration – "[it] shall apply the rules of law which [it] determines to be appropriate".

2. THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING INTERNATIONAL UNIFORM LAW INSTRUMENTS

The UNIDROIT Principles may also play a role in interpreting and supplementing international uniform law instruments (cf. para. 5 of the Preamble).

In practice it is in particular with respect to the 1980 United Nations Convention on Contracts for the International Sale of Good (CISG) that not only arbitral ribunals but also domestic courts increasingly resort to the UNIDROIT Principles for this purpose.

Thus, on a number of occasions Art. 7.4.9(2) of the UNIDROIT Principles, according to which the applicable rate of interest is the average bank short-term lending rate to prime borrowers prevailing at the place for payment for the currency of payment, has been referred to in order to fill the gap in Art. 78 CISG which grants the right to interest but does not fix the applicable rate. Likewise, Art. 6.1.6 of the UNIDROIT Principles has been invoked to

determine under CISG the place of performance of the seller's obligation to return the price unduly paid by the buyer. Recently, in a case concerning a sales contract in which the seller invoked hardship due to an unforeseeable 70% increase in the price of the goods, the Belgian Supreme Court, after noting that CISG does not expressly address hardship, held that the gap was to be filled having regard to the "general principles governing the law of international commerce" as contained, among others, in the UNIDROIT Principles, and in accordance with Art. 6.2.3 concluded that the seller was entitled to request renegotiation.

3. THE UNIDROIT PRINCIPLES AS A MEANS OF INTERPRETING AND SUPPLEMENTING DOMESTIC LAW

Finally, the UNIDROIT Principles may play a significant role in the interpretation of the domestic law governing the contract chosen by the parties or applicable by virtue of the relevant conflict-of-laws-rules of the forum (para. 6 of the Preamble).

In almost half of the decisions reported in the UNILEX database the UNIDROIT Principles were used by both arbitral tribunals and domestic courts for this purpose. Even more important, the domestic laws governing the individual contracts in the cases in question were far from being only those of less developed countries or countries in transition to a market economy. Indeed, they included inter alia the laws of Australia, England, Finland, France, Greece, Italy, the Netherlands, New Zealand, Switzerland and the State of New York, thus confirming that even highly sophisticated legal systems do not always provide clear and/or satisfactory solutions to the special needs of current international commercial transactions, while the UNIDROIT Principles may actually offer such a solution.

To be sure, more often than not the reference to the UNIDROIT Principles had no direct impact on the decision of the merits of the dispute at hand, and individual provisions of the UNIDROIT Principles were cited essentially to demonstrate that the solution adopted under the applicable domestic law was in conformity with current internationally accepted standards and rules.

Yet in a number of cases the courts and arbitral tribunals resorted to the UNIDROIT Principles in support of the adoption of one of several possible solutions under the applicable domestic law, or in order to fill a veritable gap in the latter.

Most of the cases in question concerned international disputes, but there are also decisions referring to the UNIDROIT Principles which related to disputes of a purely domestic character.

III. CONCLUDING REMARKS

In endorsing the 2004 edition of the UNIDROIT Principles, the United Nations Commission on International Trade Law (UNCITRAL) congratulated UNIDROIT "on having made a further contribution to the facilitation of international trade by preparing general rules for international commercial contracts" and commended "the use of the UNIDROIT Principles […] as appropriate for their intended purposes". Over the years the UNIDROIT Principles have been favourably received both by academics and by practitioners and are increasingly being used all over the world in a number of ways.

In particular, the UNIDROIT Principles are chosen by parties to international commercial contracts as the rules of law governing their contract and applied by arbitral tribunals as the rules of law applicable to the substance of the dispute even in the absence of a request to this effect by the parties.

Morevover, they are increasingly referred to by both arbitral tribunals and domestic courts as background law to interpret and supplement the applicable domestic law including international uniform law instruments incorporated therein.

It may be expected that the new 2010 edition of the UNIDROIT Principles, containing additional provisions on important subjects such as restitution in case of failed contracts, illegality, conditions, and plurality of obligors and of obligees, will be given even greater attention by the international legal and business communities.

BIBLIOGRAFIA

The UNIDROIT Principles 2010 (black letter rules and comments) are at present available in English and French (cf. UNIDROIT Principles of International Commercial Contracts 2010 and Principes d'UNIDROIT relatifs aux contrats du commerce International 2010, distributed by UNIDROIT publications@unidroit.org) as well as in Italian (cf. Principi UNIDROIT dei contratti commerciali internazionali 2010, distributed by the publisher Casa Editrice Giuffrè http://www.giuffre.it). The black letter rules only have so far been translated also in German, Japanese, Portuguese, Russian and Spanish (http://www.unidroit.org/english/principles/contracts/principles2010/translations/blackletter2010-main.htm).

Events Calendar

- 57th session of **UNCITRAL Working Group II (Arbitration and Conciliation)** to be held in Vienna, Austria, 1-5 October 2012. ECLA offers the opportunity to observe some future UNCITRAL activities to interested individuals of ECLA members.
- The **NUJ Conference "Contemporary trends in the professional work of jurists in EU working in official and labour relations"** will take place on October 19th in Sofia, Bulgaria,
- LawTech Europe Congress "**Electronic Evidence Computer Forensics Legal Technology**", English language, Prague - November 12th 2012, FREE VIP entry tickets with the code: ECLA-1066 at http://www.regonline.com/Register/Checkin.aspx?EventID=1074428, the conference brochure is attached to the Newsletter.
- ECLA´s **General Assembly** will be held in Berlin on 16th November.

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