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UNIDROIT 90th ANNIVERSARY: FORTHCOMING 2016 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Abstract

This paper begins with a general overview of the UNIDROIT contributions to the modernisation and harmonisation of private law during the 90 years of its existence. Special attention was paid to the UNIDROIT Principles of International Commercial Contracts. Welcomed from their first appearance as "a significant step towards the globalisation of legal thinking", they represent one of the Institute's most successful projects and one of the most important "soft-law" instruments. The paper explores the recently adopted amendments and additions to the 2010 UNIDROIT Principles particularly relevant in the context of long-term contracts. The analysis is limited to the notion of long-term contracts and supervening events. In the case of hardship, the UNIDROIT Principles, inspired by the principle favor contractus, which is one of the basic ideas that underlie them, encourage negotiation between the parties to the end of continuing the relationship rather than dissolving it. Similarly, in the case of force majeure, parties to long-term contracts may provide, in light of the duration and nature of the relationship and, possibly, large initial investments whose value would be realised only over time, the continuation, whenever feasible, of the business relationship and envisage termination only as a last resort. Although the preconditions differ from that in hardship clauses, in respect to the procedure for the solution of the problems and certain future consequences, they may be similar if not identical.

Key words: *The International Institute for the Unification of Private Law (UNIDROIT), The UNIDROIT Principles of International Commercial Contracts, Long-Term Contracts, Force Majeure, Hardship.*

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1. THE UNIDROIT CONTRIBUTIONS TO THE MODERNISATION AND HARMONISATION OF PRIVATE LAW

The International Institute for the Unification of Private Law (hereinafter: UNIDROIT or the Institute) is an independent intergovernmental[1] organisation with its headquarters in Rome. Its purpose is to study the needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform legal instruments, principles and rules to achieve those objectives. Set up in 1926[2] as an auxiliary organ of the League of Nations, the

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[1] Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 63 member States are drawn from all continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds. A list of member States is available at: http://www.unidroit.org/about-unidroit/membership, date of access: 20.08.2016.

[2] To celebrate the 90th anniversary of its foundation, UNIDROIT has held a series of events devoted to the role and place of private law in supporting the implementation of the international community's broader cooperation and development objectives. These events include: "Practicing International Law at the United Nations", organized in cooperation with the Italian Society for the International Organization (SIOI), by hosting a keynote lecture delivered by Mr Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel; "The League of Nations and UNIDROIT", aimed to address the legacy of the League of Nations and its relationships with UNIDROIT; "Private Law, International Cooperation and Development", an International Symposium held on the occasion of the Special session of the General Assembly of the International Institute for the Unification of Private Law (UNIDROIT) celebrating the 90th anniversary of its foundation; "Creating a favourable Legal Environment for Contract Farming", an International Conference hosted by UNIDROIT in collaboration with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) under the auspices of the Ministry of Foreign Affairs and International Cooperation of Italy; the "United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts: Contrast and Convergence", an International Contract Law Conference organized in cooperation with the CISG Advisory Council on the occasion of the 95th session of the UNIDROIT Governing Council; and "Eppur si muove: The age of Uniform Law – Festschrift for Michael Joachim Bonell, to celebrate his 70th birthday". See http://www.unidroit.org/unidroit-90th-anniversary, date of access: 08.08.2016.

Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute.[3]

The Institute has an essentially three-tiered structure, made up of a Secretariat, a Governing Council and a General Assembly. The Secretariat is the executive organ of UNIDROIT responsible for carrying out its Work Programme from day to day. It is headed by a Secretary-General appointed by the Governing Council on the nomination of the President of the Institute. The Secretary-General is assisted by a team of international civil servants and supporting staff. The Governing Council supervises all policy aspects of the means by which the Institute's statutory objectives are to be attained and in particular the way in which the Secretariat carries out the Work Programme drawn up by the Council. It is made up of one *ex officio* member, the President of the Institute, and 25 elected members, mostly eminent judges, practitioners, academics and civil servants. The Governing Council is chaired by the President of the Institute. The General Assembly is the ultimate decision-making organ of UNIDROIT: it votes on the Institute's budget each year; it approves the Work Programme every three years; it elects the Governing Council every five years. It is made up of one representative from each member Government. The Presidency of the General Assembly is held, on a rotating basis and for one year, by the Ambassador of one of the Organisation's member States.

The Institute's basic statutory objective is to prepare modern uniform rules of private law understood in a broad sense.[4] However, experience has demonstrated a need for the occasional incursion into public law, especially in areas where hard and fast lines of demarcation are difficult to draw or where transactional law and regulatory law are intertwined. Uniform rules prepared by UNIDROIT are concerned with the unification of substantive law rules, they will only include uniform conflict of laws rules incidentally. New technologies and international commercial practices call for new, harmonised and widely acceptable solutions. Generally speaking, the eligibility of a subject for harmonisation or even unification will to a large extent be conditional on the willingness of States to accept changes to domestic law rules in favour of a new international solution on the relevant subject. Legal and other arguments in favour of harmonisation have to be accordingly weighed carefully against such perception. Similar considerations will also tend to determine the most appropriate sphere of

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[3] Available at: http://www.unidroit.org/about-unidroit/institutional-documents/statute, date of access: 08.08.2016.

[4] See Statute of UNIDROIT, Article 1.

application to be given to uniform rules, that is to say, whether they should be restricted to truly cross-border transactions or extended to cover internal situations as well. While commercial law topics tend to make for most of the international harmonisation initiatives, the broad mandate given to UNIDROIT allows the organisation to deal with non-commercial matters as well.

The uniform rules drawn up by UNIDROIT have, in keeping with its intergovernmental structure, generally taken the form of international Conventions, designed to apply automatically in preference to a domestic law once all the formal requirements for their entry into force have been completed. Conventions were adopted by diplomatic Conferences convened by member States of UNIDROIT.[5] However, alternative forms of unification and harmonization have become increasingly popular in areas where a binding instrument is not felt to be essential. Such alternatives may include model laws[6] which States may take into consideration when drafting domestic legislation or general principles[7] which the judges, arbitrators and contracting parties they address are free to decide whether to use or not. Where a subject is not judged ripe for uniform rules, another alternative is the legal guides,[8] typically on new business techniques or types of transaction or on the framework for the organisation of markets both at the domestic and the international level. Generally speaking, "hard law" solutions (i. e. Conventions) are needed where the scope of the proposed rules transcends

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[5] Convention on Agency in the International Sale of Goods; UNIDROIT Convention on Substantive Rules for Intermediated Securities; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; UNIDROIT Convention on International Factoring; Convention relating to a Uniform Law on the International Sale of Goods (ULIS 1964); Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC 1964); UNIDROIT Convention on International Financial Leasing; Convention on International Interests in Mobile Equipment (The Cape Town Convention); Convention providing a Uniform Law on the Form of an International Will; International Convention on Travel Contracts (CCV).

[6] Model Franchise Disclosure Law; UNIDROIT Model Law on Leasing; UNESCO – UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects.

[7] UNIDROIT Principles of International Commercial Contracts (further in footnotes: the UNIDROIT Principles or the Principles); Principles on the Operation of Close-out Netting Provisions; ALI (American Law Institute)/UNIDROIT Principles of Transnational Civil Procedure.

[8] UNIDROIT/FAO (the Food and Agriculture Organization of the United Nations)/IFAD (the International Fund for Agricultural Development) Legal Guide on Contract Farming; UNIDROIT Guide to International Master Franchise Arrangements.

the purely contractual relationships and where third parties' or public interests are at stake as is the case in property law,[9] because they most care about achieving balance between leading legal systems.[10]

UNIDROIT's work has also served as the basis for a number of international instruments adopted under the auspices of other international organisations. By reason of its expertise in the international unification of law, the Institute is moreover at times commissioned by such other organisations to prepare comparative law studies and/or draft Conventions designed to serve as the basis for the preparation and/or finalisation of international instruments in those Organisations. The Hague Conference on Private International Law, UNIDROIT and the United Nations Commission on International Trade Law (UNCITRAL), the three private-law formulating agencies, are quite appropriately referred to as "the three sisters".[11]

2. THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

2.1. General remarks

The UNIDROIT Principles of International Commercial Contracts (hereinafter: the UNIDROIT Principles or the Principles)[12] represent a non-binding codification or international restatement of the general principles of contract law. Welcomed from their first appearance as "a vital contribution to the process of international unification of law"[13] and "a significant step towards the globalisation of legal thinking",[14] over the years they have been well received not only by academics but also in practice, as demonstrated by the extensive body of bibliography and the numerous court decisions and

[9] See http://www.unidroit.org/about-unidroit/overview, date of access: 08.08.2016.

[10] I. Spasić, *UNIDROIT – Doprinos unifikaciji nekih od najvažnijih pitanja međunarodnog trgovinskog prava,* Strani pravni život, 2/2009, 31.

[11] See http://www.unidroit.org/about-unidroit/overview, date of access: 08.08.2016.

[12] The UNIDROIT Principles were first published in 1994. The second edition came exactly ten years after the appearance of the first edition, while the third edition was published in 2010.

[13] Foreword to the 1994 edition of the UNIDROIT Principles.

[14] Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts (further in footnotes: UPICC Model Clauses), Introduction, para. 1, http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses, date of access: 12.08.2016.

arbitral awards rendered world-wide that refer in one way or another to the UNIDROIT Principles.[15]

There is, however, a clear perception that the potentialities of the Principles in transnational contract and dispute resolution practice have not yet been fully realised. This is due to a large extent to the fact that the UNIDROIT Principles are still not sufficiently well-known among the international business and legal communities so that much remains to be done to bring them to the attention of all their potential users worldwide. While this is true of all international uniform law instruments, with respect to the UNIDROIT Principles there is an additional factor to be taken into consideration. Unlike binding instruments, such as e. g. the 1980 United Nations Convention on Contracts for the International Sale of Goods, which are applicable whenever the contract falls within their scope and the parties have not excluded their application, the Principles offer a greater range of possibilities of which parties are not always fully aware.[16] Being a "soft law" instrument, their acceptance will depend upon their persuasive authority.[17]

Since the UNIDROIT Principles are intended to provide a system of general rules[18] especially tailored to the needs of international[19] commercial[20]

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[15] For an up to date collection of international case law and bibliography on the UNIDROIT Principles see the database UNILEX: http://www.unilex.info, date of access: 12.08.2016.

[16] UPICC Model Clauses, Introduction, para. 2.

[17] See R. D. Vukadinović, *Lex mercatoria kao pravedno pravo u međunarodnom trgovinskom (privrednom) pravu,* Pravni život, 9-10/1994, 1220.

[18] The UNIDROIT Principles provide a set of rules covering virtually all the most important topics of general contract law, such as formation including the authority of agents; validity including illegality; interpretation; content, third party rights and conditions; performance; non-performance and remedies; set-off; assignment of rights, transfer of obligations and assignment of contracts; limitation periods; as well as plurality of obligors and of obligees.

[19] The international character of a contract may be defined in a great variety of ways. The solutions adopted in both national and international legislation range from a reference to the place of business or habitual residence of the parties in different countries to the adoption of more general criteria such as the contract having "significant connections with more than one State", "involving a choice between the laws of different States", or "affecting the interests of international trade". The UNIDROIT Principles do not expressly lay down any of these criteria. The assumption, however, is that the concept of "international" contracts should be given the broadest possible interpretation, so as ultimately to exclude only those situations where no international element at all is involved, i. e. where all the relevant elements of the contract in question are connected with one country only. Notwithstanding that, there is nothing to prevent private persons

contracts, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.[21] There are a number of significant ways in which the UNIDROIT Principles may find practical application, the most important of which are explained in the Preamble.

They shall be applied when the parties have agreed that their contract be governed by them.[22] There are several reasons for which parties – be they

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from agreeing to apply the Principles to a purely domestic contract. Any such agreement would however be subject to the mandatory rules of the domestic law governing the contract. Comment 1 and 3 to the Preamble of the UNIDROIT Principles.

[20] The restriction to "commercial" contracts is in no way intended to take over the distinction traditionally made in some legal systems between "civil" and "commercial" parties and/or transactions, i. e. to make the application of the Principles dependent on whether the parties have the formal status of "merchants" (commerçants, Kaufleute) and/or whether the transaction is commercial in nature. The idea is rather that of excluding consumer transactions from the scope of the Principles, which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, i. e. a party who enters into the contract otherwise than in the course of its trade or profession. (Comment 2 to the Preamble of the UNIDROIT Principles). On the notion of consumer in the European Union Law see J. Vujičić, *Pojam potrošača: slučaj Costea,* u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. S. Đorđević), knjiga 3, Kragujevac, 2015, 513-525.

[21] See Introduction to the 1994 edition of the UNIDROIT Principles.

[22] The parties may refer to the Principles exclusively or in conjunction with a particular domestic law or "generally accepted principles of international commercial law" which should apply to issues not covered by the Principles. In all these cases the parties may refer to the UNIDROIT Principles either in their entirety or with the exception of individual provisions thereof which they do not consider appropriate for the kind of transaction/dispute involved. Parties intending to indicate in their contract more precisely in what way they wish to see the UNIDROIT Principles used during the performance of the contract or when a dispute arises might use one of the UPICC Model Clauses. If the parties refer to the UNIDROIT Principles without specifying the edition, it should be presumed that the reference is to the current edition.

Parties are well advised to combine such a choice of law clause with an arbitration agreement. The reason for this is that domestic courts are bound by the rules of private international law of the forum, which traditionally and still predominantly limit the parties' freedom of choice in designating the law governing their contract to national laws. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them in the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum. As a result of this treatment of non-state rules, the Principles will bind the parties only to the extent that they do not conflict with the rules of the applicable law from which the parties may not contractually derogate (mandatory rules). The situation is different if

powerful "global players" or small or medium businesses – may wish to choose the UNIDROIT Principles as the rules of law governing their contract or, in case of a dispute, as the rules of law applicable to the substance of the dispute. Parties are usually reluctant to agree on the application of the domestic law of the other. The choice of a "neutral" law, i. e. the law of a third country, to avoid choosing the domestic law of either party presents obvious inconveniences, since such "neutral" law is foreign to both parties and to know its content may require time consuming and expensive consultation with lawyers of the country of the law chosen. Moreover, and even more importantly, the UNIDROIT Principles, prepared by a group of eminent jurists in the field of contract law and international trade law, representing the major legal systems and regions of the world,[23] and available in in a large number of languages,[24] are aiming to establish a balanced set of rules designed for use throughout the world irrespective of

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the parties agree to submit disputes arising from their contract to international commercial arbitration. Arbitrators are not necessarily bound by a particular domestic law. This is self-evident if they are authorised by the parties to act as amiable compositeurs or ex aequo et bono. In such a case the arbitral tribunal will apply the UNIDROIT Principles as the rules of law governing the substance of the dispute only to the extent that their strict application does not lead to an inequitable result in the dispute at hand. But even in the absence of such an authorization, the parties are nowadays generally permitted to choose "soft law" instruments such as the UNIDROIT Principles as the "rules of law" in accordance with which the arbitral tribunal shall decide the dispute (see e. g. Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration). In line with this approach, in arbitration the UNIDROIT Principles, as the "rules of law", would apply to the exclusion of any particular national law, subject only to the application of those rules of domestic law which are mandatory irrespective of which law governs the contract. Since such "overriding" mandatory rules are for the most part of public law nature (e. g. prohibition of corruption; exchange control regulations; anti-trust rules; environmental protection rules; etc.), their application along with the UNIDROIT Principles normally will not give rise to any true conflict. See UPICC Model Clauses; R. D. Vukadinović, *Međunarodno poslovno pravo, opšti i posebni deo,* Kragujevac, 2012, 888.

[23] See Introduction to the 1994, 2004 and 2010 edition of the UNIDROIT Principles.

[24] The official Languages are: English (black-letter and integral), French (black-letter and integral), Spanish (black-letter and integral), German (black-letter) and Italian (black-letter). The Principles (black-letter) are also available in other languages: Arabic, Chinese, Greek, Hungarian, Japanese, Persian, Portuguese, Romanian, Russian, Turkish and Ukrainian. See http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010, date of access: 12.08.2016.

the legal traditions and the economic and political conditions of the countries in which they are to be applied.[25]

Other than an explicit choice by the parties, the Principles may be applied as a manifestation of general principles of law, the *lex mercatoria* or the like referred to in the contract.[26] They may also be applied even when the parties have not chosen any law to govern their contract. If the contract is silent as to the applicable law, it has to be determined on the basis of the relevant rules of private international law. In the context of international commercial arbitration such rules are very flexible, permitting arbitral tribunal to apply "the rules of law which it determines to be appropriate".[27]

Other possible uses of the Principles are to serve as a means of interpreting and supplementing international uniform law instruments[28] and

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[25] See UPICC Model Clauses, Model Clauses choosing the UNIDROIT Principles as the rules of law governing the contract (Model Clauses No. 1), General remarks, para. 1. This goal is reflected both in their formal presentation and in the general policy underlying them. The UNIDROIT Principles deliberately seek to avoid the use of terminology peculiar to any given legal system. The international character of the UNIDROIT Principles is also stressed by the fact that the comments accompanying each single provision systematically refrain from referring to national laws in order to explain the origin and rationale of the solution retained. Regarding their substance, the UNIDROIT Principles are sufficiently flexible to take account of the constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practice. At the same time they attempt to ensure fairness in international commercial relations by expressly stating the general duty of the parties to act in accordance with good faith and fair dealing (Article 1.7) and, in a number of specific instances, imposing standards of reasonable behaviour. See Introduction to the 1994 edition of the UNIDROIT Principles.

[26] However, such reference by the parties to not better identified principles and rules of a supranational or transnational character has been criticised, among other grounds, because of the extreme vagueness of such concepts. See Comment 4 lit. b) to the Preamble of the UNIDROIT Principles.

[27] See e. g. Article 21(1) of the 2012 Rules of Arbitration of the International Chamber of Commerce. This may occur when it can be inferred from the circumstances that the parties intended to exclude the application of any domestic law (e. g. where one of the parties is a State or a government agency and both parties have made it clear that neither would accept the application of the other's domestic law or that of a third country), or when the contract has connecting factors with many countries none of which is predominant enough to justify the application of one domestic law to the exclusion of all the others. Comment 4 lit. c) to the Preamble of the UNIDROIT Principles.

[28] International uniform law instrument, even after its incorporation into the national legal system, only formally becomes an integrated part of the latter, whereas from a substantive

domestic law. The Principles may in addition serve as a model to national and international law-makers for the drafting of legislation in the field of general contract law or with respect to special types of transactions.[29] The list set out in the Preamble of the different ways in which the Principles may be used is not exhaustive. They may also serve as a guide for drafting contracts. Furthermore, the Principles may be used as course material in universities and law schools, thereby promoting the teaching of contract law on a truly comparative basis.[30] Last but by no means least, it is necessarily to point out that the UNIDROIT Principles, by the very fact of their existence, prove that the reasonable compromise between different legal systems is possible.[31]

2.2. Adoption of additional rules and comments to the UNIDROIT Principles concerning long-term contracts

The Principles were originally conceived mainly for ordinary exchange contracts such as sales contracts to be performed at one time. In view of the increasing importance of more complex transactions – in particular long-term contracts – the UNIDROIT Governing Council at its 95th Session, which was held in Rome from 18 to 20 May 2016, adopted the amendments and additions to the 2010 UNIDROIT Principles recommended by the Working

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point of view it does not lose its original character of a special body of law autonomously developed at international level and intended to be applied in a uniform manner throughout the world (For this approach see e. g. Article 7 of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG)). Transformation of the mandate to fill gaps by reference to the general principles on which the CISG is based into reference to the sources outside that instrument is subjected to criticism. See H. M. Flechtner, *The Exemption Provisions of the Sales Convention, including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court,* The Annals of the Faculty of Law in Belgrade – Belgrade Law Review, No. 3, 2011, 84-101. In order to achieve its goal, since international uniform law instrument often risk remaining little more than a dead letter, it is necessary to be familiar with case law, drafting history and travaux préparatoires which refer to it (J. Vujičić, *Opozivost ponude prema uniformnim pravilima*, Pravo i privreda, 10-12/2012, 88-89).

[29] The UNIDROIT Principles most recently have been cited as a source of inspiration for the parts devoted to contract law of the new Argentinian Civil Code. See UNIDROIT 2015 – Study L – Misc. 31 Rev. – March 2015, 1, http://www.unidroit.org/english/documents/2015/study50/s-50-misc31rev-e.pdf, date of access: 12.08.2016.

[30] See Comment 8 to the Preamble of the UNIDROIT Principles.

[31] J. Perović, *Principi evropskog ugovornog prava i UNIDROIT Principi*, u: Budvanski pravnički dani – Aktuelna pitanja savremenog zakonodavstva (ur. S. Perović), Beograd, 2000, 410.

Group on Long-Term Contracts,[32] with the exception of the new provisions

[32] The Memorandum prepared by the Secretariat concerning possible future work on long-term contracts recalled that the UNIDROIT Principles as they now stand (UNIDROIT Principles 2010) already contain a number of provisions which take into account, at least to a certain extent, the special needs of long-term contracts. Yet at the same time the Memorandum pointed out that there were still issues particularly relevant in the context of long-term contracts that the Principles in their present form did not address at all or only in part. The Governing Council expressed its appreciation for the Secretariat's Memorandum which provided a useful basis for further examination of the topic and invited the Secretariat to undertake preliminary in-house steps to identify the issues related to long-term contracts that might be given more adequate consideration in a future edition of the UNIDROIT Principles. Following this decision the Secretariat undertook an inquiry among the members and observers of the Working Group that had prepared the 2010 edition of the UNIDROIT Principles as well as other experts who over the years had shown particular interest in the Principles, soliciting additional comments and suggestions as to the proposed work on long-term contracts. All the replies received stressed the importance of the topic which would constitute a useful integration of the current version of the Principles, and welcomed the decision of the Governing Council to recommend it for inclusion in the Institute's Work Programme 2014-2016. On the basis of a second Memorandum of the Secretariat containing an analytical survey of specific issues that might be addressed in the envisaged work on long-term contracts, the Governing Council decided to instruct the Secretariat to set up a restricted Working Group composed of experts that had shown particular interest in the proposed work on long-term contracts for the purpose of formulating proposals for possible amendments and additions to the black letter rules and comments of the current edition of the Principles.
The Working Group's first session was held at UNIDROIT's seat in Rome from 19 to 22 January 2015. The session, which was attended also by a number of observers representing international organisations and other interested bodies (UNCITRAL; the CISG Advisory Council; the ICC Commission on Arbitration and ADR; the International Law Institute, Washington, DC (USA); the Norwegian Oil & Energy Arbitration Association; ENI SpA, Milan), was devoted to the examination of a position paper on "The UNIDROIT Principles of International Commercial Contracts and Long-term Contracts" prepared by the Chairman of the Working Group Michael Joachim Bonell, Emeritus Professor of Law at the University of Rome I and consultant to UNIDROIT, and containing a list of issues with related proposals or questions for further consideration by the Working Group (UNIDROIT 2014 – Study L – Doc. 126 – October 2014, http://www.unidroit.org/english/documents/2014/study50/s-50-126-e.pdf, date of access: 15.08.2016). After careful examination and lengthy discussion, the Working Group decided to focus on particular issues and reached conclusions with respect to each of them. Various members of the Group were appointed to serve as Rapporteurs and prepare drafts based on those conclusions for the next session. The Working Group's deliberations and conclusions are recorded in detail in the Report of the first session (UNIDROIT 2015 – Study L – Misc. 31 Rev. – March 2015). The Working Group's second

on termination for compelling reason, to take into account also the characteristics and needs of these transactions and authorised the Secretariat to prepare and publish a new edition to be known as the "2016 UNIDROIT Principles of International Commercial Contracts".[33] Such amendments and additions are: Preamble – amendments to the footnote and Comment 2; Article 1.11 (Definitions) – addition to a black letter rule and of a new Comment 3; Article 2.1.14 (Contract with terms deliberately left open) – amendments to a black letter rule and Comments 1-3, and addition of a new Comment 4; Article 2.1.15 (Negotiations in bad faith) – amendments to Comment 2 and addition of a new Comment 3; Article 4.3 (Interpretation – Relevant circumstances) – amendments to Comment 3 (which will become Comment 4) and addition of a new Comment 3; Article 4.8 (Supplying an omitted term) – amendments to Comments 1-3; Article 5.1.3 (Co-operation between the parties) – amendments to Comment (which will become

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session was held in Hamburg from 26 to 29 October 2015 at the kind invitation of the Max Planck Institute for Comparative and International Private Law. The deliberations at the session were based on a Note summarising the conclusions of the Group's first session and drafts prepared in advance of the session by the Rapporteurs on the following topics: Notion of "long-term contracts" (Michael Joachim Bonell and Neil Cohen); Contracts with open terms (Sir Vivian Ramsey); Agreements to negotiate in good faith (Neil Cohen); Contracts with evolving terms (Michael Joachim Bonell); Supervening events (Neil Cohen); Co-operation between the parties (Michael Joachim Bonell); Restitution after ending contracts entered into for an indefinite period (Reinhard Zimmermann); Termination for compelling reasons (Sir Vivian Ramsey and Reinhard Zimmermann); and Post-contractual obligations (Catherine Chappuis). After careful examination of the Note and various drafts, the Working Group reached agreement on its recommended amendments and additions to the UNIDROIT Principles' black-letter rules and comments. The Working Group's deliberations are reflected in the Report of the second session (UNIDROIT 2016 – Study L – Misc. 32 – January 2016, http://www.unidroit.org/english/documents/2016/study50/s-50-misc32-e.pdf, date of access: 15.08.2016). In April 2016 the Secretariat submited to the Governing Council for its consideration and adoption the Working Group's recommended amendments and additions to the provisions of the UNIDROIT Principles 2010, with the exception of Articles 6.3.1-6.3.2 on termination for compelling reason which would be new provisions. See UNIDROIT 2016 – C. D. (95) 3 – April 2016, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf, date of access: 15.08.2016.

[33] See UNIDROIT 2016 – C. D. (95) Misc. 2 – May 2016; Summary of the Conclusions of the 95th Session of the UNIDROIT Governing Council, Rome 18 – 20 May 2016, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-misc02-e.pdf, date of access: 15.8.2016.

Comment 1) and addition of a new Comment 2; Article 5.1.4 (Duty to achieve a specific result; Duty of best efforts) – addition of a new Comment 3; Article 5.1.7 (Price determination) – amendments to a black letter rule and Comments 2-3; Article 5.1.8 (Contract for an indefinite period) – amendments to a black letter rule and existing Comment (which will become Comment 1) and addition of a new Comment 2; Article 7.1.7 (Force majeure) – addition of a new Comment 5; Article 7.3.5 (Effects of termination in general) – amendments to Comment 3 and addition of a new Comment 4; Article 7.3.6 (Restitution with respect to contracts to be performed at one time) – amendments to Comment 1; and Article 7.3.7 (Restitution with respect to contracts to be performed over a period of time) – amendments to a black letter rule and both Comments 1 and 2.

2.2.1. Notion of Long-Term Contracts

The 2010 edition of the UNIDROIT Principles does not separately address long-term contracts, but it does not ignore them completely. There is no express reference to long-term contracts in the black-letter rules[34] and only three references in the comments.[35] While these provisions contain the only explicit references to long-term contracts, there are several other provisions related specially to, or particularly relevant to, long-term contracts.[36]

Although the Principles take long-term contracts into consideration, they do not define them. Given their rather vagueness, the notion of long-term contract is by addition to the black letter rule of Article 1.11 (Definitions)

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[34] For the sole purpose of laying down different rules on restitution in case of termination, Articles 7.3.6 and 7.3.7 refer to "contracts to be performed at one time" and "contracts to be performed over a period of time". In accordance with the addition to the black letter rule of Article 1.11 (Definitions), the notion "contracts to be performed over a period of time" was replaced with the notion "long-term contracts". See UNIDROIT 2016 – C. D. (95) 3, Annex 1 – April 2016; Proposed Amendments/Additions to the UNIDROIT Principles on the Notion of "Long-Term Contracts", Rapporteurs: Professors M. J. Bonell and N. Cohen (further in footnotes: UNIDROIT 2016 – C. D. (95) 3, Annex 1 – April 2016), 5-6, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf, date of access: 15.08.2016.

[35] See Comment 3 Illustration 2 on Article 2.1.6 (Acceptance of offer by silence or inactivity); Comment 1 on Article 2.1.14 (Contract with terms deliberately left open) and Comment 5 on Article 6.2.2 (noting that hardship will normally be of relevance to long-term contracts, i. e. those where the performance of at least one party extends over a certain period of time).

[36] See e. g. Comment 5 on Article 6.2.2 (Definition of Hardship).

defined as a contract which is to be performed over a period of time and which normally involves, to a varying degree, a complexity of the transaction and an ongoing relationship between the parties.[37] Therefore three elements typically distinguish long-term contracts from ordinary exchange contracts with instantaneous performance (so-called "discrete" or "one-shot" contracts): duration of the contract, an ongoing relationship between the parties and the complexity of the transaction. "If one were to describe the difference using a metaphor, it could be said that the difference between a one-shot contract and a long-term contract is the difference between a trade and a marriage."[38] The contrast is between a single exchange at a single time between parties who may be strangers to each other and, on the other hand, an extended relationship involving repeated performance with some degree of mutual interdependence between the parties. For the purpose of the Principles, the essential element is the duration of the contract, while the latter two elements are normally present to varying degrees, but are not required. The extent to which, if at all, one or the other of the latter elements must also be present for the application of a provision or the relevance of a comment referring to long-term contracts depends on the rationale for that provision or comment.[39] Depending on the context, examples of long-term contracts may include contracts involving commercial agency, distributorship, franchising, leases, concession agreements, contracts for professional services, supply agreements, construction contracts, industrial cooperation, contractual joint-ventures, etc.[40]

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[37] See UNIDROIT 2016 – C. D. (95) 3, Annex 1 – April 2016, 3.

[38] Comments and Suggestions by Professor Neil B. Cohen, in: Annex I of UNIDROIT 2014 – Study L – Doc. 126 – October 2014, ii.

[39] For instance, the new Comment 2 on Article 5.1.3 (Co-operation between the parties) presupposes an ongoing relationship between the parties and a transaction involving performance of a complex nature (e. g. contract for the construction of industrial works, distributorship agreement or franchising agreement). See UNIDROIT 2016 – C. D. (95) 3, Annex 6 – April 2016; Proposed Amendments/Additions to the UNIDROIT Principles on Co-operation between the Parties, Rapporteur: Professor M. J. Bonell, 3, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf, date of access: 15.8.2016.

[40] New Comment 3 on Article 1.11 (Definitions). See UNIDROIT 2016 – C. D. (95) 3, Annex 1 – April 2016, 3-4.

2.2.2. Force majeure and Hardship

Long-term contracts are by nature subject to supervening events. The problems with their legal consequences has for many years played a certain role in the law of contracts of different countries. The question is how to overcome their influence on existing contracts. Currently this phenomenon is gaining increasing importance, in particular for international commercial contracts. The rationale is extensive. The increasing internationalisation of economic life has heightened the interdependence not only of individual countries, but also of individual partners and economic processes. Disturbances in one part of the world may therefore affect contracts between parties located in quite different parts of the world.[41] The characteristics of modern international commercial contracts make them especially sensitive to change of circumstances; the time horizon of contracts has prolonged, the subject matter of contracts has become more complex, for the achievement of certain economic aims often a whole network of contracts becomes necessary, the importance of the fulfilment of certain contracts is growing, not only for the parties, but also for their respective countries.[42]

The impediments to contracts that are not attributable to the parties are various. Some impediments make the fulfillment of the contract wholly or partially impossible either temporarily or permanently. In practice such impediments are covered frequently by force majeure clauses. The main purpose of these clauses is the exemption in case of breach of contract.[43] More recently force majeure clauses envisage, besides this function, special legal

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[41] There have been a number of global events in recent years that have jeopardised the fulfillment of international commercial contracts. Firstly, there was the 2008 financial crisis and global recession. This was followed by a number of natural disasters, including the 2010 eruption of the Icelandic volcano Eyjafjallajokull which caused enormous disruption to air travel across western and northern Europe, the 2011 Japanese earthquake and tsunami which caused nuclear accidents in Fukushima, floods and droughts affecting the export of commodities such as coal and wheat crops, etc. There has also been revolutionary wave of demonstrations and protests, riots, and civil wars in the Middle East and North Africa.

[42] UNIDROIT 1983 – Study L – Doc. 24; Progressive Codification of International Trade Law, Proposed Rules on Hardship with Introduction and Explanatory Report (prepared by Prof. Dr. D. Maskow of the Institut für ausländisches Recht und Rechtsvergleichung, Potsdam–Babelsberg) – Rome, February 1983 (further in footnotes: UNIDROIT 1983 – Study L – Doc. 24), 1, http://www.unidroit.org/english/documents/1983/study50/s-50-024-e.pdf, date of access: 19.08.2016.

[43] *Ibid.*, 4.

consequences aimed at overcoming effects of force majeure on the contractual obligations, *inter alia* by modification of the contract.[44] In the case of force majeure, parties to long-term contracts can anticipate that, in light of the duration and nature of the relationship and, possibly, large initial investments whose value would be realised only over time, they would have an interest in continuing rather than terminating their business relationship. The question was whether for long-term contracts provisions on force majeure could be adapted to meet the concern of keeping the contract alive to the greatest extent possible. Accordingly, the new Comment 5 on Article 7.1.7 (Force majeure) of the UNIDROIT Principles, inspired by the principle *favor contractus*, states that the parties to long-term contract may wish to provide in their contract for the continuation, whenever feasible, of the business relationship even in the case of force majeure, and envisage termination only as a last resort.[45]

Another category are impediments that, although not making the performance of the affected obligations impossible,[46] fundamentally alter the

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[44] Comment 4 on Article 7.1.7 (Force majeure), after recalling that the definition of force majeure in paragraph 1 of this Article is necessarily of a rather general character and that international commercial contracts often contain much more precise and elaborate provisions in this regard, openly invites the parties to adapt the content of this Article, whenever appropriate, so as to take into account the particular features of their transaction.

[45] Such provisions can take a number of forms. For instance, a long-term contract may contain a provision to the effect that, except where it is clear from the outset that an impediment to a party's performance is of a permanent nature, the obligations of the party affected by the impediment are temporarily suspended for the length of the impediment, but for no longer than 30 days, and any right of either party to terminate the contract is similarly suspended. The provision can also state that, at the end of that time period, if the impediment continues the parties will negotiate with a view to agreeing to prolong the suspension on terms that are mutually agreed. If such agreement cannot be reached within a given period of time, disputed matters will be referred to a dispute board pursuant to the ICC Dispute Board Rules and the parties will be bound by that procedure. See New Comment 5 on Article 7.1.7 (Force majeure). UNIDROIT 2016 – C. D. (95) 3, Annex 5 – April 2016; Proposed Amendments/Additions to the UNIDROIT Principles on Supervening Events, Rapporteur: Professor N. Cohen (further in footnotes: UNIDROIT 2016 – C. D. (95) 3, Annex 5 – April 2016), 2-3, http://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf, date of access: 19.08.2016.

[46] In both cases the presupposition is that the events are beyond the control of the disadvantaged party, but in the hardship case the events only make performance much more burdensome for one party or useless for the other, whereas in the force majeure case

equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.[47] In order to deal with this kind of impediments, hardship

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the events make performance impossible, temporary or permanently. These differences constitute the reason for having different rules, but in practice sometimes it is not possible to draw a sharp distinction between these two situations. In rerum natura there does not necessarily have to be difference. There could be factual situations which could be qualified in both ways. If this is the case, it is for the party affected by these events to decide which remedy to pursue. If it invokes force majeure, it is with a view to its non-performance being excused. If, on the other hand, a party invokes hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms. That is why rules on force majeure must be read together with provisions dealing with hardship. Only under one condition one can clearly say that force majeure is one thing and hardship another, and that condition is when one confines force majeure to impossibility which is objective and absolute. Then one can say that everything else is either irrelevant or will maybe become relevant under the hardship provisions. Since the concept of force majeure is no longer confined to absolute impossibility, as it has been softened to include also situation where performance is possible but very very burdensome, at that point there is no longer a clear line of division between the cases. UNIDROIT 1992 – P. C. – Misc. 16; Working Group for the preparation of Principles for International Commercial Contracts, Summary records of the meeting held in The Hague from 19 to 23 November 1990 (prepared by the Secretariat of UNIDROIT) – Rome, October 1992 (further in footnotes: UNIDROIT 1992 – P. C. – Misc. 16), 11 et seq., http://www.unidroit.org/english/documents/1992/study50/s-50-misc16-e.pdf, date of access: 19.08.2016. See also Comment 6 on Article 6.2.2 (Definition of hardship), Comment 3 and new Comment 5 on Article 7.1.7 (Force majeure) – UNIDROIT 2016 – C. D. (95) 3, Annex 5 – April 2016, 2.

[47] See UNIDROIT Principles, Article 6.2.2 (Definition of hardship). The nature and importance of the events as such is not relevant, their effects for the contract must be decisive. Changes with minor consequences shall not be taken into consideration. The consequences must be serious. Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations (UNIDROIT Principles, Article 6.2.1 (Contract to be observed)). This makes it clear that it is not simply a question of changed circumstances, but of an extraordinary change of circumstances leading to imbalance beyond the normal risks of the contract. The principle of the binding character of the contract is not however an absolute one. When supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they create an exceptional situation referred to in the UNIDROIT Principles as hardship. These rules are intended to strengthen the principle pacta sunt servanda by providing for exemption where an application of this principle would lead to a breakdown of the contract rather than to its performance, thus having an effect which is the opposite of that it is intended to have. The importance of the changes

clauses[48] can be used, which balance business people's legitimate expectations of performance with the harsh reality that circumstances can change to make performance so hard that the contract simply must change. By definition hardship does not render performance impossible, therefore the adaptation of the contract to the changed circumstances is the most suitable reaction to a hardship situation.[49] Most often, the modification will take the form of an increase of remuneration, but it can also take the form of a change of the non-monetary performance, or even of both performances, or it may

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for the contract is described in an abstract manner in order to cover all relevant cases. This is the most important aspect of a hardship situation. What is "fundamental", obviously depends on the circumstances of the case. It is not possible to make hard and fast rules. Most important are, of course, alterations in the value of the performances (e. g. alterations of the equilibrium of 50% or more should be considered as fundamental). Determination whether or not hardship situation exists represents an application of law, however vague the relevant criteria may be. UNIDROIT 1990 – Study L – Doc. 46; Working Group for the Preparation of Principles for International Commercial Contracts, Chapter 5: Performance, Section 2: Hardship (Draft and Comment prepared by Professor Dietrich Maskow, Hochschule für Recht und Verwaltung Potsdam, pursuant to the discussions during the meeting of the Working Group held in Rome from 14 to 17 April 1986 and 20 to 23 May 1987) – Rome, September 1990 (further in footnotes: UNIDROIT 1990 – Study L – Doc. 46), 1, 4. and 9, http://www.unidroit.org/english/documents/1990/study50/s-50-046-e.pdf, date of access: 19.08.2016.

[48] The general approach to the unification and harmonisation of international trade law taken by UNIDROIT has been described by professor Michael Joachim Bonell as to "be based on current trade practice as reflected in international conventions or in instruments of purely private character such as general conditions or standard forms of contract, rather than on the principles traditionally adopted by the various national laws". (UNIDROIT 1981 – P. C. – Misc. 3; Informal Working Group on the Progressive Codification of International Trade Law, Report on the second meeting held in Hamburg from 23 to 25 February 1981 (prepared by the Secretariat of UNIDROIT), 16) This approach is of special importance in respect of hardship. International conventions are rather reluctant to deal with the problem of hardship, while some countries have regulations or established court practices covering elements of this problem. (UNIDROIT 1983 – Study L – Doc. 24, 6) The phenomenon of hardship has been acknowledged by various legal systems under the guise of other concepts such as frustration of purpose, Wegfall der Geschäftsgrundlage, imprévision, eccessiva onerosità sopravvenuta, etc. All of these terms has a very specific meaning in particular legal systems, and their using would be the same as making a tacit reference to those specific meanings. The term "hardship" was chosen because it is widely known in international trade practice as confirmed by the inclusion in many international contracts of so-called hardship clauses. See Comment 2 on Article 6.2.1 (Contract to be observed).

[49] UNIDROIT 1990 – Study L – Doc. 46, 7.

result in the termination of the contract with a regulation of its legal consequences.

As primary legal consequence, hardship entitles the disadvantaged party to request the other party to enter into renegotiation of the original terms of the contract. The request shall be made without undue delay and shall indicate the grounds on which it is based.[50] The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.[51] The reason for this lies in the exceptional character of hardship and in the risk of possible abuse of the remedy. Whether or not it is right to suspend performance will depend on the circumstances. Thus in extraordinary situations, in order to avoid greater difficulties, it may be justified to withhold performance of the contract.[52]

If the parties fail to reach agreement on the adaptation of the contract to the changed circumstances within a reasonable time, paragraph 3 of Article 6.2.3 (Effects of hardship) of the UNIDROIT Principles authorises either party to resort to a court. Such a situation may arise either because the non-disadvantaged party completely ignored the request for renegotiations or because the renegotiations, although conducted by both parties in good faith, did not have a positive outcome. How long a party must wait before resorting to the court will depend on the complexity of the issues to be settled and the particular circumstances of the case.[53]

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[50] UNIDROIT Principles, Article 6.2.3 (Effects of hardship) para. 1. The requirement of an indication of the grounds is intended to enable the other party better to assess whether or not the request for renegotiations is justified. An incomplete request is to be considered as not being raised in time, unless the grounds of the alleged hardship are so obvious that they need not be spelt out in the request. (Comment 3 on Article 6.2.3 (Effects of hardship)) In the second situation it would amount to an abuse of right if the other party insisted on the grounds being expressly given. UNIDROIT 1990 – Study L – Doc. 46, 8.

[51] UNIDROIT Principles, Article 6.2.3 (Effects of hardship) para. 2.

[52] For example, A enters into a contract with B for the construction of a plant. The plant is to be built in country X, which adopts new safety regulations after the conclusion of the contract. The new regulations require additional apparatus and thereby fundamentally alter the equilibrium of the contract making A's performance substantially more onerous. A is entitled to request renegotiations and may withhold performance in view of the time it needs to implement the new safety regulations, but it may also withhold the delivery of the additional apparatus, for as long as the corresponding price adaptation is not agreed. See Comment 4 on Article 6.2.3 (Effects of hardship).

[53] Comment 6 on Article 6.2.3 (Effects of hardship). By stating that the intervention of the court may be requested in cases where either the renegotiations have not commenced or no agreement between the parties has been reached "within a reasonable time", this provision makes it clear that there is a time limit for opening the renegotiation process

At this second step, a court which finds that a hardship situation exists may react in a number of different ways.[54] A first possibility is for it to terminate the contract. However, since termination in this case does not depend on non-performance by one of the parties, its effects on the performances already rendered might be different from those provided for by the rules governing termination in general. Accordingly, paragraph 4 (a) provides that termination shall take place "at a date and on terms to be fixed" by the court. Another possibility would be for a court to adapt the contract with a view to restoring its equilibrium (paragraph 4 (b)). In so doing the court will seek to make a fair distribution of the losses between the parties. The adaptation will not necessarily reflect the full loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance.[55] Paragraph 4 of Article 6.2.3 (Effects of hardship) of the UNIDROIT Principles expressly states that the court may terminate or adapt the contract only when this is reasonable. The circumstances may even be such that neither termination nor adaptation is appropriate and in consequence the only reasonable solution will be for the court either to direct the parties to resume

("without undue delay") and also one for reaching an agreement, but their exact determination can only be made in each single case. In other words, since the time limit may vary depending upon the different situations, it was preferable to adopt a flexible approach instead of their fixing. (UNIDROIT 1986 – P. C. – Misc. 9; Working Group for the preparation of Principles for International Commercial Contracts, Report on the meeting held in Rome from 14 to 17 April 1986 (prepared by the Secretariat of UNIDROIT) – Rome, April 1986, 15, http://www.unidroit.org/english/documents/1986/study50/s-50-misc09-e.pdf, date of access: 20.08.2016) Where the time limit is not observed the disadvantaged party does not lose its right to ask for renegotiations, but it will be liable for any damages resulting from the fact that the other party was requested to renegotiate with delay. The delay in making the request may also affect the finding as to whether hardship actually existed and, if so, its consequences for the contract, i. e. the outcome of the negotiations and/or the decision of the court as far as the adaptation or the terms of termination of the contract are concerned. When the court finds that a party has not invoked hardship on time the conclusion may be that the party is not as affected as it claims and therefore the terms for any revision or the termination of the contract may be less favourable than if it has invoked it much earlier. However, in some situations hardship may develop over time, and it may be difficult to fix the exact time at which it becomes true hardship. Comment 2 on Article 6.2.3 (Effects of hardship); UNIDROIT 1992 – P.C. – Misc. 16, 25 et seq.

[54] See UNIDROIT Principles, Article 6.2.3 (Effects of hardship) para. 4.

[55] Comment 7 on Article 6.2.3 (Effects of hardship).

negotiations with the view to reaching an agreement on the adaptation of the contract, or to confirm the terms of the contract as they stand.[56]

It may be doubted whether a court decision modifying a contract can be considered to be within the jurisdictional function of the court, and indeed in certain countries this is not accepted. On the other hand, there is a tendency both at national and at international level to attribute greater powers to the courts also in this respect. The decisions a court is empowered to take are clearly intended to overcome a possible deadlock developing between the parties. The extensive powers of the court might work as an incentive for the parties to come to an agreement, perhaps with the assistance of a court, instead of running the risk of having unexpected terms imposed upon them.[57]

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[56] *Ibid.*

[57] UNIDROIT 1990 – Study L – Doc. 46, 9; UNIDROIT 1992 – P.C. – Misc. 16, 19.

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