Globalization and International Commercial Contracts: the UNIDROIT Principles

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Introduction

The processes of globalization affect all spheres of human activity. The law, being reflection of the objective phenomena occurring in society, cannot remain away from this universal tendency. Globalization of law often requires reassessment of many components of the national legal heritage for the purpose of making the legal regulation of certain issues more urgent and do not create obstacles to the integration within the regional and universal international organizations. It should be recognized that the law is easier than other social regulators perceive globalization as the legal provisions are rather mobile; they change frequently under the influence of time. In the last decades the international restatements of general principals of Contract Law gain the special importance. They are not legally binding, but authoritative enough for wide application. These sources of law integrate various legal systems, so the study of non-state codifications is the actual direction of current researches.

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The processes of globalization in private law are closely connected with the sphere of world trade. Globalization of world trade after 2012 faced significant difficulties which are caused by, first of all, the slowdown of global trade. For the first time in four decades, trade has grown more slowly than the global economy, despite the overall increase in incomes. The economists consider many objective factors influencing these processes, for example, the problems in financial system of the European Union or practical refusal of such large player of the world market as China from globalization processes[1]. At the same time, world trade is regulated by such an important instrument as international commercial contracts. The efficiency of world trade depends on the recognition of the contracts concluded, valid and enforceable.

Today widely recognized that the most effective and modern regulator of the international commercial transactions is the rules of international origin and, in particular, the so-called transnational rule of law set out in the codifications of authoritative international organizations.

This article will focus on the reflection of the processes of globalization in the legal regulation based on the Principles of International Commercial Contracts UNIDROIT (hereinafter the UNIDROIT Principles) 2010[2].

1. The UNIDROIT Principles – an autonomous source of Transnational Law

Since the adoption in 1994 of the first edition of the UNIDROIT Principles has passed a relatively insignificant period of time, which was marked not only by the improvement and expansion of the subject of legal regulation, but also the recognition of the document as a significant source of transnational law.

As it was specified in the Preamble to the first edition of the UNIDROIT Principles, "In offering the UNIDROIT Principles to the international legal and business communities, the Governing Council is fully conscious of the fact that the UNIDROIT Principles, which do not involve the endorsement of Governments, are not a binding instrument and that in consequence their acceptance will depend upon their persuasive authority"[3]. The members of the Working Group for the preparation of the UNIDROIT Principles sought to create the provisions which could be applied to the regulation of relationship of the economic entities belonging to the states of various legal families

[1] Constantinescu, Mattoo, Ruta, 2014: 39.

[2] UNIDROIT, 2010, *Principles of International Commercial Contracts.*

[3] See (note 2), Introduction to the 1994 edition.

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(Continental or Romano-Germanic, Anglo-American, Social etc.), and also being at the different levels of economic development and using various legal practices[4].

It would not be wrong to say that the UNIDROIT Principles has primarily scientific nature, because this document was created by prominent scientists, experts in the field of contract law, from various countries in a personal capacity. Such membership of the Working Group has created the opportunity to use in the formulation of the UNIDROIT Principles the legal categories and approaches have a common value for all legal systems because of their wide application ("common core" approach) or the progressiveness recognized in scientific community ("better rule" approach)[5]. In the last of these situations the provisions of International Trade Law, as a rule, did not find support in the most national legal systems. These provisions were included in the act of *soft law* for approbation and incorporation into the business practices. In this regard it is enough to remember the provisions about: *battle of forms* (Art. 2.1.22), *agreed payment for non-performance* (Art. 7.4.13), *hardship* (Art. 6.2.1-6.2.3), *pre-contractual liability* (Art. 2.1.15 and 7.4.1) etc. Appearance in uniform international contractual practices the Restatement of Contract Law, including rules of conduct and dispute settlement, certainly contributed to the acceleration of the globalization of world trade.

2. Evolution of the UNIDROIT Principles in the 2004 and 2010 editions

In the 2004 edition the subject sphere of the UNIDROIT Principles was extended. The document included the following additions: five new chapters, new provisions of the Preamble, three new articles in the first two chapters. Some editorial changes of both the text of the UNIDROIT Principles, and comments to them were also made. Without pursuing the aims to stop in detail on all innovations of the 2004 edition, it would be desirable to point to the most essential moments reflecting of the processes of globalization in international commercial transactions and their legal regulation.

The name of codification testifies that it has to contain the most fundamental, essential provisions of the Contract Law which could be considered as principles. However, the UNIDROIT Principles can be confidently called the set of rules for the conclusion and execution of international commercial transactions, not only the set of principles of Contract Law.

[4] See Bonell, M.J., 2005.

[5] Bonell, M.J., 2007: 233-234.

Realizing importance of the private-law principles and possibility of their universal application, creators included in the 2004 edition new Art. 1.8, which served as development of the principle of "good faith and fair dealing" under Art. 1.7. According to the UNIDROIT Principles a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment (Art. 1.8 "inconsistent behaviour"). It should be noted that this ban of inconsistent behaviour has roots in national legal systems. So, the Romano-Germanic legal family uses the principle of venire contra factum proprium, in Anglo-American system the unfair party (in fact allowed "inconsistent" behavior) loses the right for objections (estoppel). According to Art 2 of the Civil Code of the Republic of Belarus (hereinafter – CC) honesty and reasonableness of participant of civil legal relations is expected, as far as other is not revealed. However, in the practice of dispute resolution on commercial transactions this principle has not received wide application. The reason of non-use of so fundamental private-law category partly seems in the absence of the provisions promoting interpretation of the principle of "honesty and reasonableness of participant of civil legal relations" in Belarusian law. The interpretation of this principle is possible by using of the provision on "inconsistent behaviour". On the basis of the Preamble the UNIDROIT Principles may be used to interpret or supplement domestic law. Thus, the example of the principle of "good faith" and the provision on "inconsistent behavior" demonstrates positive influence of the considered international codification on introduction in business practice of flexible categories of private-law regulation.

The UNIDROIT Principles in the 2004 edition reflected the current practice of the conclusion of international commercial contracts by electronic means of communication[6]. According to Professor Ch. Ramberg, "e-commerce is mostly of interest since, due to its borderless nature, it clearly points to the need for harmonisation of substantive law. The traditional International Private Law rules are not suitable for solving borderless electronic transactions"[7]. Non-state codifications, including the UNIDROIT Principles, have to play a special role in this situation.

Edition 2004 also brought to the UNIDROIT Principles a number of provisions which, in its traditional sense, cannot be classified as the general part of the Law of Obligations. For example, the provisions concerning: assignment of rights, transfer of obligations, assignment of contracts (Chapter

[6] Ramberg, Ch., 2005: 51-52.

[7] Ramberg, Ch., 2004: 244.

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9); set-off (Chapter 8); Limitation periods (Chapter 10). From the point of view of globalization of legal regulation Chapter 10 “Limitation periods” seems especially interesting. According to modern provisions of the International Private Law the institution of limitation periods fall under the regulation of the statute of obligations. In other words, questions of limitation periods are regulated by the law applicable to the contract. So, according to Art. 12 (1) (d) Regulation (EC) № 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter – Rom I) the law applicable to a contract shall govern the various ways of extinguishing obligations, and prescription and limitation of actions[8]. The national legislation of the Republic of Belarus (Art. 1118 CC) provides, that the limitation period shall be determined in accordance with the law of the country, applicable for regulation of the corresponding relation[9]. Moreover there is an exception concerning requirements, to which the limitation period shall not extend. The list of these requirements shall be determined in accordance with the law of the Republic of Belarus, if at least one of the participants of the corresponding relation is the citizen of the Republic of Belarus or the legal person of the Republic of Belarus. Thus, if the applicable law is defined on the basis of party autonomy, such a choice also extends to the question of limitation period. However if the contractual parties agree to use the UNIDROIT Principles as the regulator of their relationship, there is a question of opportunity to apply the provisions of the mentioned codification about limitation period (Chapter 10 “Limitation periods”). The novelty of the UNIDROIT Principles in the 2004 edition about limitation periods, undoubtedly, represents expansion of the limits of party autonomy. This follows from the fact that in many national legal systems the rules on the limitation periods are classified as mandatory, they may not be derogated from by agreement. So, under Art. 199 CC limitation periods and the procedure for their calculation may not be changed by agreement of the parties. At the same time there is a point of view, based on consideration of the UNIDROIT Principles as the main source of the substantive law, chosen according to the principle of party autonomy. Thus any provisions of the applicable national law, determined by the court (arbitration) using conflict rules, are secondary and not apply if there is appropriate regulation in the text of the UNIDROIT Principles, except for so-called “overriding” provisions[10]. The mentioned tendency indicates the ongoing process of globalization of legal regulation, as

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[8] EU (2008), *Regulation (EC) № 593/2008.*

[9] Art. 1208 of the Civil Code of the Russian Federation contains similar provision.

[10] See for example: Boguslavskij, M.M. (2005): 111; Marysheva N.I. (2004): 94.

the solution of the problem, which traditionally related to the field of domestic law, is moved to the level of the non-state international codification of Trade Law.
The UNIDROIT Principles in the 2010 edition do not contains a considerable amount of innovations. However, the developers have brought the document to the model of a systematic act of Private Law, which is able to replace the corresponding national regulation. All provisions, developed within the third edition are divided into some categories:
1) provisions, which reflect interests of the majority of the states, that is have average nature of regulation;
2) provisions having innovative, progressive character, which have not yet known to the legislation of many states;
3) assessment provisions, which manifests flexible regulation of the UNIDROIT Principles[11].
One of the most important problems, which obtained a solution in the new edition of the UNIDROIT Principles, there was a problem of illegality of the contracts, caused by the infringement of a mandatory rule, whether of national, international or supranational origin (Chapter 3, Section 3 "Illegality"). These provisions were not introduced in the previous editions, as at the national level there is a diversity of approaches to the definition of the concept of "mandatory rules". In this context, it does not refer to the simple mandatory regulations; it is about the so-called "overriding" rules. They form the basis of the relevant legal order: national, international and supranational, and may not be violated, even with reference to the principle of freedom of contract. Art. 1.4 of the UNIDROIT Principles and the commentary thereto became a significant step towards the understanding of the content of "mandatory rule" as the Private Law category. As a private law codification of international origin, the UNIDROIT Principles pay attention to the International and European public order. So, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995)[12] is recognized as the source of mandatory rules of International Law. The United Nations Convention against Corruption has the similar status[13]. The European public order is also reflected, in particular, in the Charter of Fundamental Rights of the European Union[14]. Therefore, globalisation of legal approaches is manifested in opportunity on the basis of the UNIDROIT Principles to recognize illegality of

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[11] Alimova Y.O. (2011): 10.
[12] UNIDROIT, 1996.
[13] UN, 2003, *United Nations Convention against Corruption.*
[14] EU 2012, *Charter of Fundamental Rights of the European Union.*

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the international commercial contracts, not only referring to violations of mandatory rules of the national legislation, but also mandatory rules of the international and supranational law. It should be noted that the application of the mandatory rules depends on whether the dispute is resolved in state court or in commercial arbitration, as well as the role of the UNIDROIT Principles in this contract: recognized as a part of the contractual conditions or major substantive regulator. At the same time and in the context of this research it would be desirable to pay attention to the fact that illegality of the international commercial contracts got the international and supranational foundations thanks to the UNIDROIT Principles in the 2010 edition.
Other novelties of the UNIDROIT Principles in the 2010 edition were the result of in-depth comparative legal studies and involved, in particular, the issues of conditional contracts (Chapter 5, Section 3: "Conditions") and plurality of contractual parties (Chapter 11: "Plurality of obligors and of obliges").

3. The impact of the UNIDROIT Principles on the reform of the national Private Law: on the examples of the certain countries

Hailed as "a significant step towards the globalisation of legal thinking"[15] the UNIDROIT Principles have been taken by a number of national legislatures as a source of inspiration for the reform of their domestic contract laws[16].
It is well known, that the rules of Private Law the most complicated give in the process of harmonisation. We can confidently say that the globalization of legal regulation in the field of Contract Law has concerned today only those contracts where the differences in national law are not significant. Among them should be mentioned the contract of sale of goods, regulated by the United Nations Convention on Contracts for the International Sale of Goods[17]. This Convention has had a huge impact on the regulation of sale of goods in many countries, including in view of its provisions has developed new edition of 1998 of the Civil Code of the Republic of Belarus (Chapter 30). Nevertheless, this international document affects only one contractual obligation of international character. A similar remark can be formulated concerning the Ottawa Convention on International Financial Leasing of

[15] Perillo, J.M., 1994: 281.
[16] Bonell, M.J., 2007: 235.
[17] UN, 1980, *United Nations Convention on Contracts for the International Sale of Goods.*

1988[18] or the Ottawa Convention on International Factoring of 1988[19]. Today it is not possible to prepare the private-law act accumulating general provisions of Contract Law in the form of international treaty. The contemporary states cannot objectively fulfill the obligation to bring its internal legislation into full compliance with the requirements of such a hypothetical international treaty, as the general part of Contract Law of various countries is very different. In this situation, instruments of *soft law* come to the fore in the process of harmonization of Contract Law. In elaborating of these instruments authors shouldn't have looked back at expediency of introduction to the text of certain progressive provisions, in view of possibility of their subsequent disapproval of states. For this reason it is possible to call with confidence the non-state codifications and, first of all, the UNIDROIT Principles quintessence of modern approach in private-law regulation. The unofficial status of the UNIDROIT Principles is covered with an excess by authority of the authors and support from business community. All mentioned aspects undoubtedly create the preconditions for the application of the UNIDROIT Principles in the reform of the national Civil Law.

The reorganization of the German Law of Obligations can be a bright example of such reforming[20]. Fundamentals of the German Law of Obligations is the German Civil Code (hereinafter BGB), which has been applied for over a hundred years[21]. Many provisions of this legal act are already substantially out of date. In addition an extensive modernization of the Law of Obligations in Germany was caused by the necessity to transpose EU directives into the national legislation. Moreover the gaps in German legal regulation were only partly filled with jurisprudence. As a result, BGB was supplemented by the essential institutions, for example, positive breach of an obligation; fault in conclusion of a contract *(culpa in contrahendo)* and after conclusion of a contract *(culpa post contrahendum)*; the doctrine of hardship etc. These institutions considerably closer to the system of remedies which is increasingly recognized internationally and which has found its most modern manifestation in the Principles of European Contact Law and the UNIDROIT Principles[22].

In this paper the questions of limitation periods and features of their fixing in the act of non-state codification have already considered. However, despite the

[18] UNIDROIT, 1991-1992a, *Convention on International Financial Leasing*.

[19] UNIDROIT, 1991-1992b, *Convention on International Factoring.*

[20] Götz-Sebastian Hök and Wolfgang Jahn, 2003.

[21] German Civil Code (version 2013).

[22] See Zimmermann R., 2002.

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fact that the rules on the limitation periods can be attributed to the general part of Contract Law only conditionally, these provisions have a significant impact on the reform of German law. Thus, the standard limitation period under the old legislation was thirty years that did not correspond to the requirements of modern economic circulation. In this connection it was formulated many special periods, and the so-called "standard limitation period" in practice could not be regarded as a general. Thus, reduction the standard limitation period should lead to the parallel elimination of a number of special limitation periods. Old limitation period was replaced by a period of three years (Art. 195 BGB), which is also contained in Art. 10.2 UNIDROIT Principles. The standard limitation period commences at the end of the year in which the claim arose and the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence (Art. 195 (1) BGB). This provision of the legislation represents subjective "criterion of knowledge", which is characteristic of contemporary Private Law and is directed on protection of interests of the obligee. Article 10.2 of the UNIDROIT Principles formulates subjective "criterion of knowledge" more simply, beginning calculation of the standard limitation period from the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised. It is possible to assume that since the beginning of the subjective obligee's right to bring a claim to the moment when the obligee obtained such knowledge; very considerable period can pass. In this regard, the new edition of BGB (Art. 199 (3) BGB), and the UNIDROIT Principles (Art. 10.2 (2)) set the maximum limitation period. According to the UNIDROIT Principles the maximum limitation period is ten years beginning on the day after the day the right can be exercised. Under BGB general maximum limitation period (statute-barred) is also ten years beginning after the claims for damages arose, notwithstanding knowledge or a grossly negligent lack of knowledge of the obligee. The legislator sets longer thirty-year period from the date on which the act, breach of duty or other event that caused the damage occurred, regardless of how the claims for damages arose and of knowledge or a grossly negligent lack of knowledge of the obligee. Ten-year or thirty-year periods are applied depending on what of these periods will expire first. Moreover, if the claims for damages based on injury to life, body, health or liberty, notwithstanding the manner in which they arose and notwithstanding knowledge or a grossly negligent lack of knowledge, are statute-barred thirty years from the date on which the act, breach of duty or other event that caused the damage occurred.

Thus, if we compare the rules on the standard limitation period, provided by the UNIDROIT Principles, and the reformed BGB, it is possible to note that the mentioned international codification is basis for the harmonisation of national legislations of various countries. At the same time the domestic rules continue to be more detailed and in this aspect it is possible to speak about formulation at the international level of *the principles* of legal regulation of limitation period.

Talking about improvement of internal regulation using the UNIDROIT Principles, it is also impossible to forget that many provisions of the national legislation, and in particular provisions of BGB, can serve as basis for progressive development of the mentioned non-state codification. According to Professor R. Zimmerman, German law contains a number of rules and ideas which can and should, be used to refine the international Principles. This is true, particularly, where the new rules reflect well-established and tune-tested experiences of one hundred years of legal development under the old law of obligations[23].

The UNIDROIT Principles is of considerable importance in the improvement of the legislation of the countries where the regulation of private relations only recently began to take the principles inherent in a market economy. A good example of this development is the experience of Lithuania[24].

The tendency of use of the UNIDROIT Principles for the formulation of recommendations about harmonisation of the national law of the member States of regional organizations seems interesting. In 2004, the UNIDROIT prepared a draft Model Law on Contracts for the OHADA (L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires, which includes 16 states)[25]. The Draft was prepared by Marcel Fontaine, which is a member of the Working Group on the UNIDROIT Principles. It is necessary to pay attention to the following advantages of such implementation of the considered international codification: by adopting and adapting these Principles, OHADA will give itself the ability to tap the growing worldwide case-law and literature on these Principles. Access to this comparative material will be valuable in the implementation of the Uniform Act on contracts when adopted. Reciprocally, experience from the OHADA member States can in the future be fed into the worldwide network of users of the Principles, thus

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[23] Zimmermann R., 2002.

[24] See Mikelenas V., 2000: 243 et seq.

[25] See Fontaine M., 2004: 573 et seq.

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enriching the knowledge of such users and expanding the range of tried solutions to commercial contract law issues arising under the Principles[26].
Consequently, global approaches in private-law regulation can be based on drafting and practical application of the general principles which on the one hand should be applied by participants of the contractual relations for their improvement and achievement of stability, and on the other hand, are the necessary precondition and a reference point for harmonisation of the national legislation of the modern states. Such global approaches enrich judicial and arbitration practice, which is connected with the international commercial contracts, and also are based on modern legal doctrine.

4. Application of the UNIDROIT Principles for the interpretation of contractual terms, as well as an instrument for autonomous qualification

4.1. Interpretation of the provisions of Contract Law on the basis of the UNIDROIT Principles

The legal concepts contained in the UNIDROIT Principles, developed due to the comparative legal studies, they are compromise and progressive, aimed at regulating and facilitating of the world trade. At the same time such qualification of notions and concepts isn't based on any, even directly interested national legal system, therefore it is autonomous and can be considered as an example of processes of globalization in sphere of legal regulation of international commercial contracts. Indeed, there are legal reasons for applying of the UNIDROIT Principles as an instrument of the unified interpretation of the concepts used in the national substantive Contract Law. According to the Preamble of the UNIDROIT Principles they may be used to interpret or supplement domestic law. Thus it is necessary to consider that this international codification itself is not legally binding, as well as the above-mentioned provision of the Preamble is dispositive.
Based on the example of the Belarusian legislation, it is possible to note the existence of the diverse approaches to the regulation in the field of the Law of Obligations in national legislation and in accordance with the UNIDROIT Principles. Thus, the foreign economic transaction, in which at least one participant is the legal person of the Republic of Belarus or the citizen of the

[26] Date-Bah S.K., 2008: 221.

Republic of Belarus, under Art. 1116 (2) of the Civil Code of the Republic of Belarus, shall be concluded in written form, regardless of the place of conclusion. The failure to comply with the simple written form of a foreign economic transaction shall entail the invalidity of the transaction (according to Art. 163 (3) of the Civil Code). Article 1.2 of the UNIDROIT Principles contains the general principle of "no form required" for international commercial contracts, which fully complies with the provisions of the UN Convention on Contracts for the International Sale of Goods 1980[27]. Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses. Therefore, the interpretation of the concept of "form of international commercial contract" by the courts (arbitrations) of the Republic of Belarus cannot be carried out using the UNIDROIT Principles.

This situation can be found out even on a number of fundamental provisions of Contract Law. For example, "the concept of hardship" under the UNIDROIT Principles (Articles 6.2.1-6.2.3) and "change and dissolution of contract in connection with significant change of circumstances" (Art. 421 CC). Notwithstanding a certain similarities, these legal phenomena cannot be regarded as identical, which creates objective impossibility to interpret one concept via another.

However, the provisions of the UNIDROIT Principles seem the most useful in the interpretation of the terms and concepts used by the parties in the contract, but the applicable substantive law does not know these concepts. For instance, the contractual parties have referred to the "Anticipatory non-performance" as a ground for termination of the contract, but they have not explained its contents. The civil legislation of the Republic of Belarus does not provide similar ground for termination of obligations, but admits the possibility of termination of an obligation at the demand of one of the parties in the instances provided for by the legislation or by the contract (Art. 378 CC). In this situation, it is necessary to use Art. 7.3.3 of the UNIDROIT Principles ("Anticipatory non-performance") for the interpretation of the contractual provision, this states: "Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract".

Moreover, if the contractual parties have chosen the UNIDROIT Principles as a source of the applicable substantive law, the situation is changing and all the

[27] UN, 1980: 31.

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terms of the contract shall be interpreted on the basis of the UNIDROIT Principles.

4.2. The UNIDROIT Principles as a capable instrument for the autonomous qualification

There are at least four theories directed to solve the qualification problem. Among them: qualification by the substantive *lex fori, lex causa* qualification, autonomous qualification and functional qualification. In this paper I would like to pay attention to autonomous qualification, which was developed by Ernst Rabel and is particularly unique one[28]. This theory assumes that the notions used by International Private Law are to be interpreted independently from the meaning that would be given either on the substantive level or the level on conflict of laws by the national legal systems. Interpretation of legal concepts has to be done in line with comparison of the different national laws. This comparison should lead to the determination of a globally unified meaning of the terms[29]. In this regard autonomous qualification can be considered as one of manifestations of globalization in the law. However, without advanced process of the harmonisation of the laws on the supranational, or at least on the level of the international law, the development of the unified terminology and concepts necessary for unified qualification must fail[30].

Could the UNIDROIT Principles be considered as a unified set of terminology, developed thanks to comparative jurisprudence which can effectively be applied at autonomous qualification? It is possible to answer on this question positively only in part. This article has already considered the issue of the legal nature of the UNIDROIT Principles as the document which is not legally binding. This document contains not only the recognized approaches in the field of Contract Law, but also new progressive tendencies, not widely accepted[31].

The problem of qualification in Private International Law appears in almost all places, where the conflict rules contain the notions derived from substantive law. M. Lehmann has proven correctly that due to the differences in the legal traditions it is extremely difficult to find a basis for the common notion of the

[28] Rabel E., 1931: 241-288.

[29] Fryderyk Zoll, 2009: 17.

[30] Koch/ *Magnus/ v. Mohrenfels,* 2004: 19.

[31] See p.3 of this paper.

contract[32]. Consequently, the theory of autonomous qualification is almost useless. This uselessness resulted from the existing differences of the national legal systems, especially in sphere of private law.
This is certainly true if the applicable law is determined on the basis of the national conflict rules. These rules use the concepts of domestic law, which must be interpreted using the legislative toolbox of the relevant national law. In this regard, the most applicable qualification is qualification by the substantive *lex fori* and *lex causa* qualification. However autonomous qualification gains the special importance for the interpretation of the concepts of conflict rules which contain in the international or supranational sources. An example of such a supranational source is a Regulation Rome I[33], the concepts contained therein should be interpreted on the basis of an act of supranational origin. We are today in the stage of European law development which allows us to think about implementation of Rabel's theory. The idea of legislative toolbox and the emergence of texts aiming to create a vision of a single private law create a common word of notions and concepts[34]. The Draft Common Frame of Reference (DCFR)[35] is an important candidate to play such a role. However, here there are the problems, which are partly due to the fact that the DCFR is not an official text. It is a private "academic" project.
However, if we refer to an international treaty containing conflict rules in the field of international sale of goods, naturally the question arises about the source used in the interpretation of such a treaty. For example, the concepts of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1986[36] may only be interpreted using the theory of autonomous qualification. The most obvious source of internationally harmonized terminology is the UNIDROIT Principles. Since the abovementioned Hague Convention has not been widely recognized and has not entered into force, within the framework of Hague Conference on Private International Law the Principles on Choice of Law in International Commercial Contracts was approved on 19 March 2015[37]. It seems that all terms and concepts of the Hague Principles must also be interpreted in

[32] Lehmann M., 2007: 20-21.
[33] EU, 2008, *Regulation (EC) № 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.*
[34] Fryderyk Zoll, 2009: 20.
[35] *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference,* 2009.
[36] HCCH, 1989, *Convention on the Law Applicable to Contracts for the International Sale of Goods 1986.*
[37] HCCH, 2015, *Principles on Choice of Law in International Commercial Contracts.*

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accordance with the UNIDROIT Principles. Thus, autonomous qualification on the basis of the unified provisions of the UNIDROIT Principles is only valid for interpretation of acts of the International Private Law with the international origin.

Conclusion

The role of the UNIDROIT Principles in the legal globalization process is predetermined by series of circumstances.
First, we should pay attention to the legal nature of this source, which is an act of *soft law*. The optional nature of the UNIDROIT Principles creates the possibility to include in its content not only the provisions that are widely recognized in the international trade practice, but also a number of innovative ideas that appeal to the international business community. Introduction of innovations in legal consciousness is the necessary process during globalization of the law.
Despite the fact that the UNIDROIT Principles is not a legal binding document, the scope of its application, particularly in arbitration practice, is very significant. By February 2015 the total number of cases handled by the arbitration and state courts using the UNIDROIT Principles, according UNILEX, reached 418[38]. However, the total number of court (arbitration) decisions handed down under the UNIDROIT Principles, is much more. Many cases remain unpublished because of their confidential nature.
The evolution of the UNIDROIT Principles in editions of 2004 and 2010 demonstrates the expansion of the subject of its regulation, including due to issues that are not directly related to the general part of Contract Law. The developers pursued the aim to give to the UNIDROIT Principles character of the universal regulator of international trade, which has high credibility.
The UNIDROIT Principles have impact on reform of the national legislation of various countries. This tendency can be seen in economically developed countries (the reform of the German Civil Code 2002), and in the countries which began process of amendment of their legislation taking into account requirements of market economy only recently (for example, Lithuania). The UNIDROIT Principles may be used as basis for the development of model legislation in the framework of international regional organizations (for example, OHADA).

[38] UNILEX on CISG & UNIDROIT Principles, 2015.

The role of the UNIDROIT Principles in the process of legal globalization is also manifested in their use for the purposes of interpretation of the terms of international commercial contracts, as well as a basic instrument for autonomous qualification of the concepts contained in the international rules of conflict.

Bibliography

Alimova Y.O. (2011), *The Principles of International Commercial Contracts UNIDROIT: normative nature and role in the regulation of cross-border commercial relations: Thesis Abstract*, Moscow, Russian Federation, (in Russian).

Boguslavskij, M.M. (2005), *Private International Law*, Moscow, Russian Federation, 5th ed. (in Russian).

Bonell, M.J. (2005), *An International Restatement of Contract Law – The UNIDROIT Principles of International Commercial Contracts*, Transnational Publishers, Inc., Irvington, NY, 3rd ed.

Bonell, M.J. (2007), "Towards a Legislative Codification of the UNIDROIT Principles?", *Uniform Law Review*, 233-245.

Constantinescu, C., Mattoo, A., Ruta, M. (2014) "Slow Trade", *Finance & Development*, vol. 51, no. 4, 39-43.

Date-Bah S.K. (2008). "The Preliminary Draft OHADA Uniform Act on Contract Law as Seen by a Common Law Lawyer", *Uniform Law Review*, 217-222.

EU (2008), *Regulation (EC) № 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations*, OJ L 177, 4.7.2008, p. 6–16.

EU (2012), *Charter of Fundamental Rights of the European Union*, OJ C 326.

Fontaine M. (2004). "The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts", *Uniform Law Review*, 573 et seq.

Fryderyk Zoll (2009). "The Draft Common Frame of Reference as an Instrument of the Autonomous Qualification in the Context of the Rome I Regulation" in *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, European law publishers GmbH, Munich, 17-25.

German Civil Code (2013), which includes the amendment(s) to the Act by Art. 4 § 5 of the Act of 1.10.2013 (Federal Law Gazette I p. 3719), http://www.gesetze-im-internet.de/englisch_bgb/index.html, accessed 24 October 2015.

Götz-Sebastian Hök Berlin and Wolfgang Jahn (2003), "Reform of the German Law of Obligations in Sale Contracts", *Eurojuris Law Journal*, Berlin, 2003.

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HCCH (1989). Convention on the Law Applicable to Contracts for the International Sale of Goods (concluded December 22, 1986), Collection of Conventions (1951-1988), edited by the Permanent Bureau of the Conference, Hague, 326-340.

HCCH (2015). *Principles on Choice of Law in International Commercial Contracts (approved on 19 March 2015)*, HCCH Publications, Hague.

Koch/ Magnus/ v. Mohrenfels (2004). *IPR und Rechtsvergleichung*, 3th ed., Munich, 19 et seq.

Lehmann M. (2007). "Vertragsbegriff und vorvertragliche Rechtsverhältnisse", Leible / Ferrari, *Ein neues Internationales Vertragsrecht für Europa*, Jena, 20-30.

Marysheva N.I. (2004), *Private International Law*, Moscow, Russian Federation (in russian).

Mikelenas V. (2000). "Unification and Harmonisation of Law at the Turn of the Millennium: the Lithuanian Experience", *Uniform Law Review*, 243 et seq.

Perillo, J.M. (1994), "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review", in 43 *Fordham Law Review*, 281 et seq.

Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (2009). Von Bar / Clive / Schulte-Noelke (eds.), Munich.

Rabel E. (1931). "Das Problem der Qualifikation", *Rabels Zeitschrift*, nr. 5, 241-288.

Ramberg, Ch. (2004), "E-commerce", in *Towards a European Civil Code*, 3d fully revised and expanded edition, Eds. A. Hartkamp; Hesselink; E. Hondius; C. Joustra; E. du Perron; M. Veldman, Kuwer, Part 3 Chapter 1, 229-244.

Ramberg, Ch. (2005), "E-Commerce", in *UNIDROIT Principles: New Developments and Applications*, Special Supplement ICC International Court of Arbitration Bulletin, ICC Publishing, 51-56.

UN (1980), *United Nations Convention on Contracts for the International Sale of Goods*, Vienna, 11 April 1980, Treaty Series, vol. 1489, p. 31.

UN (2003), *United Nations Convention against Corruption*, General Assembly resolution 58/4, 31 October 2003, New York, 2004.

UNIDROIT (1991-1992a), *Convention on International Financial Leasing, Diplomatic Conference*, Ottawa, 9 to 28 May 1988, Rome, UNIDROIT, vol. I-II.

UNIDROIT (1991-1992b), *Convention on International Factoring*, Diplomatic Conference, Ottawa, 9 to 28 May 1988, Rome, UNIDROIT, vol. I-II.

UNIDROIT (1996), *Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, Diplomatic Conference, Rome, 7 to 24 June 1995. Acts and Proceedings. Rome, Presidenza del Consi glio dei Ministri, Dipartimento per l'Informa-zione e l'Editoria, XVII – 374.

UNIDROIT (2010), *Principles of International Commercial Contracts*, http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf, accessed 24 October 2015.

UNILEX on CISG & UNIDROIT Principles, http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311, accessed 24 October 2015.

Zimmermann R. (2002). "Breach of Contract and Remedies under the New German Law of Obligations", Rom: Centro di studi e ricerche di diritto comparato e straniero, http://w3.uniroma1.it/idc/centro/publications/48zimmermann.pdf, accessed 24 October 2015.

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