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BOOK REVIEW

THE UNIDROIT PRINCIPLES

ANN LOUSIN*

An International Restatement of Contract Law - The UNIDROIT Principles of International Commercial Contracts. By Michael Joachim Bonell.† *Transnational Juris Publications, Inc.*, 1994. Pp. vi, 152. *with appendices consisting of the eight official versions of the text (English, French, German, Italian, Spanish, Arabic, Chinese and Russian).* \$95.00.

This book is a tour de force in international commercial law. Professor Bonell, who was Chairman of the Working Group that prepared the UNIDROIT Principles, has provided us with the first thorough introduction to the UNIDROIT Principles of International Commercial Contracts. His book is an indispensable reference for any U.S. commercial lawyer who has clients who make contracts with foreign parties.

Although the book contains the official English version of the text of the UNIDROIT Principles, most readers should also buy a copy of the UNIDROIT Principles as published by the International Institute for the Unification of Private Law itself. That organization, called UNIDROIT or The Rome Institute for short, is the creator of the UNIDROIT Principles, and its publication includes both the text and the official commentary. For space reasons, Professor Bonell has not included the official commentary, although he recommends that anyone consulting the UNIDROIT Principles consult both the text and commentary. Instead of writing annotations to the text and commentary of each article of the UNIDROIT Principles, Professor Bonell has chosen to discuss the history of the formation of the document and the basic themes that run through it.

In his Introduction and first two chapters, Professor Bonell traces the development of the concept of a private, as opposed to a public, route to the standardization of private commercial law and

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explains the development of the UNIDROIT Principles. When European scholars began to assert the need for a unification of commercial law approximately one century ago, most assumed that publicly-enacted legislation, or statutes, would be the vehicle for the unification.¹ Yet, there was also a long tradition of *ius commune*, a kind of common law of Europe. Derived in part from Justinian's Corpus Juris, it enabled Europeans to share some common legal norms while divided into different political entities.

As Professor Bonell points out, the United States experienced a similar phenomenon. Specifically, the American Law Institute has created Restatements of the common law as explicated by the courts in the fifty states.² The Restatements cover many different areas of the law. Courts refer to these Restatements in cases in all the states. Clearly, therefore, there is a *ius commune* in the United States.

On the international level, The European Union (EU) began the process of establishing "Principles of European Contract Law" in 1980. In effect, it will probably be a Restatement of Contracts for the fifteen, or by then more, members of the EU,³ two of which are common law countries and the remainder of which are continental code countries. Professor Bonell suggests that private parties can incorporate the European Principles in their contracts by reference.⁴

The UNIDROIT Principles that are the subject of his book are a global version of the European Principles and have been in place since 1994. The rules of commercial contracts vary around the globe more than the rules of commercial contracts vary among the fifty U.S. states. The task of standardization or of finding a *ius commune* was thus much more difficult. Moreover, most countries' contracts laws are truly designed for purely domestic deals and do not envision one party belonging to a separate legal culture. When international commercial contracts arise, the parties often choose one of the parties' countries as a forum state under conflicts of law rules.

One way to achieve transnational legal norms is to adopt conventions on commercial law, which have the effect of being treaties among governments. The United Nations Convention on Contracts for the International Sales of Goods is an example of a recent successful treaty in this field. As Professor Bonell points out,⁵

1. MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 1-2 (1994).

2. See *id.* at 4 (noting that the success of the Restatements is evidenced by the new "generations" of Restatements).

3. *Id.*

4. *Id.* at 5. Professor Bonell notes that parties would still comply with that forum's rules established for conflict of laws. *Id.*

5. *Id.* at 11.

however, these treaties are positive law and by their nature inflexible. In order for these treaties to be effective around the world, a substantial number of countries must agree to their provisions twice: first at the drafting stage and second at the adoption stage.

A principal advantage of a UNIDROIT restatement is that it allows private parties to adopt the UNIDROIT Principles on a given subject on their own, without prior approval by their governments, and indeed to reject the Principles as well. Since the UNIDROIT Principles in question are inevitably the result of compromises made by the drafters from many countries, they are an international *lex mercatoria*. They are truly a transnational version of the "law merchant" that informed the commercial law of Britain, both common law and statutes, for centuries and enabled British merchants to deal with European merchants on a more certain basis. One can also say that the UNIDROIT Principles are the closest we shall get to putting established trade customs on paper.

The preparation of the UNIDROIT Principles took almost a quarter of a century. In 1971, the UNIDROIT Governing Council agreed to put the concept on its "Working Programme." However, according to Professor Bonell, the idea did not achieve priority status until 1980, when a Working Group was created with the assignment of drafting the different sections of the Principles.⁶ Professor Bonell gives full credit to the individuals, whom he lists,⁷ who assisted in some way.

Chapter Two's description of the drafting process is valuable as history. The three main legal systems of the world, the common law, the civil law and the socialist regimes, all had representation in the drafting process. Since English was the working language, the original drafts were in English. In February, 1994, the Working Group concluded its drafting and turned the drafts over to a special Editorial Committee chaired by Professor E. Allan Farnsworth, the American contracts scholar. American lawyers familiar with his drafts of the Restatement (Second) of Contracts will find the style of the UNIDROIT Principles similar to the style of the Restatement.

In May 1994, the Governing Council of UNIDROIT approved the final draft and recommended its distribution around the world. The world had Principles of International Commercial Contracts in actuality as well as in theory.

In Chapters Three and Four, Professor Bonell describes the structure and scope of the UNIDROIT Principles and certain aspects of their content. There is a Preamble and 119 articles, di-

6. *Id.* at 18.

7. *Id.* at 18-22.

vided into seven chapters,⁸ an organization familiar to anyone who has worked with a civil law code. The scope of the UNIDROIT Principles is limited to "international" and "commercial" contracts because there are continuing differences among the domestic laws of contracts, both commercial and otherwise, around the world. Inevitably, there were compromises among the three legal systems, even on such basic matters as the nuances of the scope provisions.

Article 1.6 is particularly important because it establishes the baseline for "interpretation and supplementation of the Principles." The "international character" of the Principles, the need for "uniformity in their application" and the need to settle issues "in accordance with their underlying general principles" are all key phrases in Article 1.6. American lawyers familiar with UCC 1-102 will find this article and the values it expresses unsurprising.

Chapter Four on the content of the UNIDROIT Principles is quite detailed. Professor Bonell compares the provisions of the UNIDROIT with those of The United Nations Convention on Contracts for the International Sale of Goods (CISG),⁹ which is a logical partner with the UNIDROIT Principles in many international commercial relationships. Professor Bonell maintains that the three most important ideas underlying the UNIDROIT Principles are 1) the freedom of contracts;¹⁰ 2) "openness to usages;"¹¹ and 3) *favor contractus*.¹² The first underlying idea hardly needs explanation to either common law or civil law lawyers. The second is related to the ideas of course of performance, course of dealing and usage of trade so familiar to American lawyers who have dealt with the Uniform Commercial Code.¹³

The third idea is less familiar to Americans, as it is primarily a civil law concept. Professor Bonell describes *favor contractus* as "the aim of preserving the contract whenever possible, thus limiting the number of cases in which its existence or validity may be questioned or in which it may be terminated before time."¹⁴ An American lawyer would be well-advised to read his explanation of *favor contractus* in practice before advising a client in an international commercial transaction involving the UNIDROIT Principles.

Professor Bonell also describes at some length two other key ideas that permeate the UNIDROIT Principles. One is good faith and fair dealing, which means different things in different legal

8. *Id.* at 25.

9. *Id.* at 44-49.

10. *Id.* at 55-61.

11. *Id.* at 61-65.

12. *Id.* at 65-79.

13. See U.C.C. §§ 1-205, 2-208 (1996).

14. BONELL, *supra* note 1, at 65-66.

systems.¹⁵ The other key idea is "policing against unfairness,"¹⁶ which includes what common law lawyers would call contract defenses. Because these concepts are common to the international commercial world but do not truly carry the same meaning in different legal systems, an American lawyer is, once more, well-advised to read these portions of the text before advising an American client regarding the UNIDROIT Principles.

In Chapters Five and Six, Professor Bonell concludes by describing the potential role of the UNIDROIT Principles. Obviously, they can become part of most, or even all, international commercial contracts by reference; however, they can also become models for drafting contract clauses.¹⁷

Perhaps Professor Bonell is too ambitious when he says that the UNIDROIT Principles can also serve as models for both international and domestic legislation in commercial law.¹⁸ However, the very existence of the UNIDROIT Principles is a great achievement. Anecdotal evidence suggests that European lawyers are beginning to incorporate them into their contracts and assume that the EU "Principles of Contract Law" will be similar to the UNIDROIT Principles. Therefore, perhaps he is justified in predicting such great success for the UNIDROIT Principles.

My only criticism of this book, and it is perhaps not even that, is its occasional references to texts in non-English languages. The text of the book is in English, but Professor Bonell does quote, in both text and footnotes, from statutes and commentaries in French, Italian and German, without translations. Of course, European lawyers are often familiar with these languages and indeed often use Latin legal maxims that few modern American lawyers know, let alone can use. I can offer English, some German, a little French and less Latin, but it was still difficult to puzzle through some of the references. Any English-language reader ought to be aware that there is a truly "international" aspect to the language in this book. It is, however, the indispensable commentary and analysis on the UNIDROIT Principles and, as said at the beginning of this review, a tour de force.

15. *Id.* at 80-81.

16. *Id.* at 90-91.

17. *Id.* at 115.

18. *Id.* at 107 (citing UNIDROIT Principles, Preamble, paragraph 6).

