

Unification of rules regulating international private contractual obligations

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Introduction

Among the sources of particular importance for legal regulation of international private contractual obligations are international instruments such as international conventions, sources of «soft law», rules of national law based on elaborations of international governmental and non-governmental organizations. The rules of these documents have emerged owing to the process, which in the legal doctrine is generally called unification of legal rules.

The aim of the article is to analyze the concept, the methods of unification of rules regulating international private contractual obligations, to determine its stages and results.

The Concept of Unification

There is no generally accepted definition of “unification”. Some authors explain the term “unification” as a law-making process. There are two points of

view within this approach. According to one of them “unification” covers the creation of rules identical for different legal systems. For example, according to the definition given by UNCITRAL “the unification of the law of international trade can be defined as the process by which conflicting rules of two or more systems of national laws applicable to the same international legal transaction is replaced by a single rule”¹.

According to the second opinion “unification” is a law-making process aimed at the creation, amendment or termination of uniform rules, which are common for the different legal systems².

¹ Unification of the Law of international trade: note by the Secretariat. Official Records of the General Assembly, Twentieth Session, Annexes, agenda item 92, document A/C. 6/L. 572 // Yearbook of the United Nations Commission on International Trade Law. – 1970. – V. I. – P. 13.

² Довгерт А.С. Система приватного права та структура проекту нового Цивільного кодексу України // Українське право. – 1997. – № 1. – С. 16–27; Международное частное право: учеб./Отв. Ред. Г. К. Дмитриева. – М.: Проспект, 2010. – С. 93.

The close approach to the latter view determines the unification as the process of creation of the same for the different legal systems rules and ensuring their uniform implementation in national law of the states. For example, O. Rudenko defines the unification of international private law in EU as “a process of creation of uniform rules of international private law and ensuring their uniform implementation, which is carried out within constant communication and coordination of wills of contracting parties representing Member States bound together by a particular form of international cooperation and which is aimed at the harmonization of relationships between individuals and legal entities of these states in certain areas”³).

There is also a broader understanding of unification under which it covers not only lawmaking but also the application of legal rules.

Thus, according to A. Korovina unification is the process of purposeful cooperation between states which embraces not only the elaboration of uniform rules and their adoption by states, but also the ensuring of their application in accordance with the agreements⁴.

In my opinion, the unification is the process of creation, amendment and application of legal rules which are identical for several legal systems. The termination of legal rules is not covered by this process as far as no can unify the absence of legal rules. The inclusion of application of the relevant rules to the process of unification can be explained by the necessity of application of evaluative categories (such as “reasonable”, “fundamental”), which are in wide use in international uniform documents. The content of such terms is defined within the application of legal rules, which includes their interpretation. Therefore, unification cannot cover only creation and amendment of legal rules, it must include their application.

However, the unification is not only a “process”, but also the principle of creation and application of the legal rules. In this sense, it is the guiding idea of the creation, amendment and application of the legal rules common for different legal systems. The realization of the principle of unification is ensured by the process of unification.

Methods of Unification

³ Руденко О.В. Уніфікація міжнародного приватного права у ЄС: Дис. ... канд. юрид. наук. – К., 2007. – С. 49–50.

⁴ Коровина О. П. Методы унификации норм в международном частном праве.

Автореф. дис. ... канд. юрид. наук. – М., 1988. – С. 13.

The creation of uniform legal rules is provided by various methods. For example, A. L. Makovsky identifies two methods (types) of unification: 1) the creation of uniform rules which takes place because of influence of various legal systems on each other; 2) the creation of uniform rules by using of international legal instruments (international treaties)⁵. The latter method he named as “International treaty unification”.

International treaty unification in turn can be direct, indirect or mixed. In case of direct unification a state party to a treaty undertakes to ensure within its jurisdiction the observance of legal rules established by international treaty, which are complete and prepared for use in the system of internal law. Legal rules created using this method of unification can not be amended or modified by the state party to the treaty.

Indirect unification means that the state party undertakes to set in its legislation a legal rule, the content of which is defined in the treaty with a greater or lesser degree of detail.

Mixed unification takes place when treaty sets uniform rules from which the

state party may derogate to some extent, in some way⁶.

The unification can be carried out without state's undertaking by a treaty. Particularly, it takes place in case of elaboration of “model law” which is used as a base for national law that can coincide with the model law or differs somehow from it⁷.

Some authors distinguish two stages of the unification of law. The first stage is a stage of reaching agreement between the states on uniform regulation of certain relations, which is drawn up as a treaty, which contains legal rules designed to regulate these relations. The second stage of unification consists in perception of international law by national law of certain states⁸.

According to other authors unification can be made with the help of reference to international law in the national codified acts on international private law⁹.

O. Rudenko identifies two ways of unification of European Private International law: 1) the conclusion of an international convention (conventional unification); b) in the form of the application of

⁶ Ibid. – P. 52–55.

⁷ Ibid. – P. 35–37.

⁸ Международное частное право: учеб./Отв. Ред. Г.К. Дмитриева. – М.: Проспект, 2010. – С.94.

⁹ Крутий Е.А. Роль национальных кодификаций в процессе унификации МЧП // Международное публичное и частное право. – 2012. – № 4. – С. 17.

⁵ Иванов Г.Г., Маковский А. Л. Международное частное морское право. – Л.: Судостроение, 1984. – С. 35.

the Treaty Establishing the European Community and EU secondary law¹⁰.

Depending on the subject of regulation N. Vilkova defines the unification of conflict rules and substantive rules. Depending on the method of formation she identifies international law unification method and private law unification method. The first one is carried out by the creation of international conventions. Method of private unification is realized through the development of documents of private law nature designed by governmental and non-governmental organizations to regulate relations arising from international commercial contracts¹¹. Besides, the author identifies the direct and indirect methods of unification. The direct method consists in application of uniform documents only to relations between subjects belonging to states that have signed and ratified the relevant international conventions¹².

With the indirect method provisions of international conventions are applied to the relations between subjects belonging to

states that have not signed and ratified the relevant conventions¹³.

K. Zweigert and H. Kötz consider that the main instrument of unification is a uniform law, which is an integral part of the multilateral treaty, created by experts of comparative law, states parties of which undertake to incorporate it into national law and to apply it as a national law¹⁴.

However, these authors recognize the impossibility of such an ideal way of unification. Thus, they note that in practice, rules, common to law order of all participating countries, are included to the uniform law. The differences are eliminated by including to the uniform act the best option enshrined in national law of a state, if it suits all participating countries, or by developing new standards as a result of use comparative legal method¹⁵.

Results of Unification

According to UNCITRAL there are three types of results of unification in the field of international trade law: 1) uniform or model national laws; 2) international conventions; 3) standard contract provi-

¹⁰ Руденко О.В. Уніфікація міжнародного приватного права у ЄС: Дис. ... канд. юрид. наук. – К., 2007. – С. 85.

¹¹ Вилкова Н.Г. Договорное право в международном обороте. – М.: Статут, 2002. – С. 78–86.

¹² Ibid. – P.90.

¹³ Вилкова Н.Г. Договорное право в международном обороте. – М.: Статут, 2002. – С.93.

¹⁴ Цвайгерт К., Кетц Х. Введение в сравнительное правоведение в сфере частного права: В 2-х т. Т.1. Основы / Пер. с нем. – М.: Междунар. отношения, 1998. – С.40.

¹⁵ Ibid. – P.41.

sions and general conditions of sale. It has also been noted that “the development of trade custom and of international commercial arbitration has...contributed to the elimination of divergencies in national law”¹⁶.

There are certain steps which should be taken before carrying out the unification. The first step consists in the selection of issues which are considered necessary to study and to draft a uniform document. This can be made by legal experts or agencies concerned with economic or technical aspects of the selected problems. The second step is aimed at the preparation of the study of the problem. Such studies include analysis of various laws and consideration of the extent to which they accord with certain economic and other practical purposes. These include “vertical” and “horizontal” researches. The first one covers the study of national law of different countries. The second one provide for the comparison of solutions achieved under the different systems and laws, which contains an analysis of the causes of differences and an opinion on the

possibility of unification. The third step is the drafting of the document¹⁷.

International conventions are mostly the result of the work of intergovernmental organizations.

Standard contracts and general conditions of sale are usually drawn up by various trade associations and are expanded by contacts between the associations on a national or regional basis¹⁸. Most general conditions and standard forms originate from trade customs¹⁹.

To carry out unification UNCITRAL uses three types of techniques: legislative, contractual and explanatory. In most cases all of them contribute to the convergence of the established practice, but in some cases, these using of techniques leads to “preventive” harmonization “establishing new principles and practices that will minimize divergence when national laws on new issues are developed. This has been typical in areas of commerce affected by new technology or new business practices, such as electronic commerce”²⁰.

¹⁶ Unification of the Law of international trade: note by the Secretariat. Official Records of the General Assembly, Twentieth Session, Annexes, agenda item 92, document A/C. 6/L. 572 // Yearbook of the United Nations Commission on International Trade Law. – 1970. – V. I. – P.14.

¹⁷ Ibid. – P.15.

¹⁸ Ibid. – P.16.

¹⁹ Ibid. – P.17.

²⁰ Справочник ЮНСИТРАЛ. Основные факты о Комиссии Организации Объединенных Наций по праву международной торговли. – Вена: Издание ООН, 2007. – С.13.

Using legislative techniques results in the creation of conventions, model laws, legislative guides and model provisions.

The choice of the document to be created as a result of unification depends on the aim pursued. If it consists in a high degree of coherence laws of the various states, the preference is given to convention. Where the high degree of coherence is impossible or if it is desirable to achieve a greater flexibility, the preference is given to model law or legislative guides²¹. Such guides include the information that is useful to states for consideration what provisions of the model law might have to be changed taking into account national circumstances, as well as the information on matters which are not covered by the model law but which, nevertheless, are relevant to the subject matter of the model law²².

If the states are not ready to agree on a single approach, it's impossible to draft a convention or a model law. In such cases it's more appropriate to develop a set of principles or legislative recommendations. They offer a set of possible legislative solutions to certain issues. In some cases legislative recommendations offer several options for solving of particular problems. As a result, the national legislator may choose one of them to be the most

suitable, taking into account the peculiarities of its legal system, or use the proposed legislative solutions as a standard with which the domestic legislation must comply²³.

In some cases UNCITRAL develops model provisions, which are recommended for use in future conventions and in revisions of existing ones²⁴.

Since unification consists not only in creation or amending the rules, but also in their uniform application, UNCITRAL has established a system for collecting and disseminating of judgments and arbitral awards – “Case law of UNCITRAL texts” (CLOUT). The functioning of this system resulted in creation of UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (last revised in 2012)²⁵ and UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration²⁶.

It should be added that unification by uniform interpretation of certain docu-

²³ Ibid. – P.17.

²⁴ Ibid. – P. 18.

²⁵ UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012). – [On-line]: <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>. (Last visited: 27.04.2015)

²⁶ UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration. – [On-line]: Режим доступа: <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>. (Last visited: 27.04.2015).

²¹ Ibid. – P. 14.

²² Ibid. – P.16.

ments is also ensured by UNIDROIT. This organization has established Unilex system²⁷, which covers judgments and arbitral awards (or extracts from them), which were made with a reference to UNIDROIT Principles or CIGS and bibliography for each article of these documents.

UNIDROIT also created the UNIDROIT/IDIT CMR DATABASE together with Institute of International Transport Law which contains “Case Law and Doctrinal analysis in French and English from around 15 countries about the Convention on the Contract for the International Carriage of Goods by Road (CMR, Geneva, 19 May 1956)”²⁸.

The contractractual technique used by UNCITRAL leads to the creation of standardized contracts or contractual provisions.

If the development of a standard contract or contractual provision is impossible, UNCITRAL uses explanatory technique. As a result contractual parties obtain a legal guide “that discusses various issues underlying the drafting of a particular type of contract; considers various solutions to those issues; describes implications, advan-

tages and disadvantages of those solutions; and recommends the use of certain solutions in particular circumstances”²⁹. Explanatory technique of unification is also used for the development of recommendations concerning the interpretation of the texts of treaties.³⁰

They are created to achieve a uniform interpretation of the text of the treaty, in cases if there are changes in commercial practice, technology development, the divergence in interpretation by the courts. Recommendations regarding the interpretation are used when there is a need for amending the text of a treaty, which, however, can not be satisfied or which satisfaction is too complex³¹.

A significant development of secondary law governing contractual obligations has taken place in EU recently. This is the basis for the conclusions that in modern times there is a tendency of replacing treaty as a means of unification by reg-

²⁷ UNILEX. – [On-line]: <http://www.unilex.info/dynasite.cfm?dssid=2375&dsmid=14276>. (Last visited: 27.04.2015).

²⁸ Base CMR UNIDROIT-IDIT: Court Cases – [On-line]: http://www.idit.asso.fr/_private/moteur_cmj/jurisprudence/expert22.php. (Last visited: 27.04.2015).

²⁹ Справочник ЮНСИТРАЛ. Основные факты о Комиссии Организации Объединенных Наций по праву международной торговли. – Вена: Издание ООН, 2007. – С.19.

³⁰ e.g. Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006). – [On-line]: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf>. (Last visited: 27.04.2015).

³¹ Ibid. – P.21.

ulations and directives at the regional level³².

In general it can be said that the modern legal thought is characterized by a broader approach to understanding of unification. According to it, among other things, unification is carried out by the “means which are not of legal nature”. They include “rules and principles, which, although are not of a legal nature, but are observed and applied de facto”³³.

This idea is explained by the fact that modern times are characterized by a broad approach to the understanding of law and the departure from legal positivism. Among the principles which are observed as obligatory in different jurisdictions, regardless of whether they were legally entrenched, are legal certainty, freedom of contract, narrow interpretation of exceptions, primacy of special rules over general ones.³⁴

We agree with the fact that the application of general principles recognized in most legal systems contributes to the unification of law. That it why art. 7 (2) of CIGS establishes the rule that “Questions

concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in Conformity with the law applicable by virtue of the rules of private international law”³⁵.

Conclusions

In our view, unification covers the creation and amendment of legal rules, their entry into force and application.

The creation or amendment of uniform rules involves several stages. The first stage includes the selection of institutions of contract law which needs to be unified. To do this one should research the case law and sources that analyze it.

The second stage covers the comparative research of the selected legal institute or specific issues in different national legal systems.

The drafting of uniform document takes place at the third stage. It should be noted that it comes about if the comparative legal study has resulted in the conclusion that the differences in legal regulation

³² Матвеева Т.В. Роль международного договора в международном частном праве: Автореф. дис. ... канд. юрид. наук. – М., 2006. – С.9.

³³ Базедов Ю. Возрождение процесса унификации права: европейскоедоговорное право и его элементы // Государство и право. – 2000. – № 2. – С.69.

³⁴ Ibid.

³⁵ United Nations Convention on Contracts for the International Sale of Goods. – [On-line]: <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>. (Last visited: 27.04.2015).

of certain issues can be overcome by uniform rules.

The fourth stage of creation or amendment of the uniform rules governing international contractual obligations includes coming them into force, which depends on the type of document that contains uniform rules.

For example, the order of entry into force of a treaty usually is set by a particular treaty and by the rules of national legal system governing the state's accession to international treaties.

The uniform customs, standard contracts or contractual provisions are approved by the organization that developed them according to its charter or other document under which the organization operates.

The entry into force of international uniform document may depend on certain state's procedural actions (the ratification, the acceptance, the approval, the accession, the deposit of a certain number of the written documents, which provide formal evidence of mentioned actions).

The ratification or other state's action which is evidence of its consent to the terms of the treaty may bind the state to amend its national legislation by implementation of the uniform law which is an integral part of the treaty or by making

amendments and supplements to domestic legislation in some other ways.

There is no special procedure for entry into force of some international uniform documents (uniform customs, standard contracts, contractual provisions, recommendations, guides). They are published, so the businessmen have an opportunity to become familiar with them. Usually these documents are applied if contractual parties have reached agreement to use them or have authorized international commercial arbitration to do so.

However, it is worth noting that unification can be carried out by borrowing of rules of treaty (even if the state has not acceded to it) or of foreign laws.

The important step of unification is the application of uniform rules which should be made uniformly in different jurisdictions. Databases containing judgments and arbitral awards with reference to international uniform documents are intended to serve to this purpose.

Unification can result in the creation obligatory or recommendatory rules.

One of the methods of unification is the selection and application of the principles of law in accordance with international standards.