

## **The Role of Principles of Law in Regulation of International Contract Obligations**

*Dikovska Iryna*

### **Die Rolle von Rechtsprinzipien bei der Regelung internationaler Vertragspflichten**

*Rechtsprinzipien spielen eine bedeutende Rolle bei der gesetzlichen Regulierung internationaler Vertragsprinzipien. Sie steuern das Verhalten der Parteien und dienen als eine bedeutsame Quelle für die Interpretation von Verträgen, Gepflogenheiten und anderen internationalen oder nationalen Rechtsdokumenten, welche auf die Verträge anwendbar sind.*

*Die Rechtsprinzipien erlauben darüber hinaus auch eine Lückenfüllung in Vertragsvorschriften. Gleichzeitig verursacht der generelle Charakter der Rechtsprinzipien aber auch gewisse Verständnis- und Anwendungsprobleme.*

*Das Ziel dieses Beitrags richtet sich darauf, die Bedeutung dieser Rechtsprinzipien bei der Regelung internationaler Vertragspflichten zu untersuchen, eine Differenzierung dieser Rechtsprinzipien und Rechtsregeln zu entwickeln sowie diese Rechtsprinzipien einer systematischen Betrachtung zu unterziehen.*

## Introduction

The principles of law play a significant role in the legal regulation of international contract obligations: they regulate parties' behavior and serve as an important source for the interpretation of contracts, treaties, usages, other legal international and national documents applicable to the contracts. The principles of law also allow to fill the gaps in regulation of contract obligations. At the same time the general character of principles of law causes some problems connected with their understanding and application.

**The aim of the article** is to find out the role of the principles of law in legal regulation of international contract obligations, to establish a difference between the principles of law and legal rules and to define a system of such principles.

**The notion of the term “principle”.**

The word “principle” can be used with different meanings. Explanatory dictionaries usually defines it as:  
1) a basic, an emanent provision of

some scientific system, theory; 2) a basic law of some exact science; 3) an inner conviction; 4) a rule of conduct<sup>1</sup>.

Oxford dictionary distinguishes the following meanings of the term “Principle”: “a fundamental truth or proposition that serves as the foundation for a system of belief or behaviour or for a chain of reasoning; a general scientific theorem or law that has numerous special applications across a wide field; a fundamental source or basis of something”<sup>2</sup>.

The word “principle” can be used in a subjective and or objective meaning. In a subjective sense it signifies an inner conviction, from which one can not retreat and which follows from the requirements of morality. In the objective sense it means the base, which underlies the processes or phenomena.

## Principles of law.

<sup>1</sup> Короткий тлумачний словник української мови: близько 6750 слів/ за ред. Д.Г.Гринчишина. – К.: Рад.шк., 1988. – С.229.

<sup>2</sup> Oxford Dictionary. – [On-line]: <http://oxforddictionaries.com/definition/english/principle>. (Last visited 22.04.2014).

The theory of law defines principles of law as fundamentals and sense of law, the ideas of law which express its essence<sup>3</sup>. There are general principles of law, principles of a particular branch of law, principles of several branches of law, principles of different legal institutes.

The principles of law play a special role in regulation of private relationships. I. Kant, while determining the notion of private law, notes that it is a law according to which the duty and coercion are not founded on the law directly, but on justice and human freedom to be his own master<sup>4</sup>.

Principles of law have been applied for regulation of civil relations by Roman jurists, who applied their ideas about fairness in order to settle a dispute<sup>5</sup>. The understanding of law principles depends of the type of legal thinking. According to positivist ap-

<sup>3</sup> Нерсесянц В. С. Общая теория права и государства. Учебник для юридических вузов и факультетов. – М.: НОРМА - ИНФРА • М, 1999. – С. 491.

<sup>4</sup> Кант И. Сочинения в шести томах. Т.4. Ч.1. - М.: Мысль, 1965. - С. 231.

<sup>5</sup> Смітюх А.В. Принципи міжнародних комерційних договорів УНІДРУА та Lex Mercatoria в контексті міжнародного приватного права: Дис. ...канд. юрид. наук. – О., 2004. – С. 62-63.

proach law principles are generalized provisions of current legislation or underlying ideas of law. The theories of natural law understand principles of law as moral values, religious beliefs, ethical advantages<sup>6</sup>.

Some authors consider that principles acquire legal characteristics if they are set in the legislation<sup>7</sup>.

There is a widespread belief that principles of law belong to legal rules of a general character, which have a high level of abstraction. Usually this point of view is supplemented by a thesis that principles of law are not the ideas, since the recognition of them as such deprives their practical significance<sup>8</sup>.

<sup>6</sup> Сидоркин А.С. Принципы права: понятие и реализация в российском законодательстве и судебной практике: Дис. ...канд. юрид. наук. - М., 2010. – С.13-33.

<sup>7</sup> Зайчук О.В. Принципы права в контексті розвитку загальної теорії держави і права //Альманах права. Основоположні принципи права як його ціннісні виміри. Науково-практичний юридичний журнал. Випуск 3. — К.: Ін-т держави і права ім. В. М. Корещького НАН України, 2012.– С. 23.

<sup>8</sup> Сидоркин А.С. Принципы права: понятие и реализация в российском законодательстве и судебной практике: Автореф. дис. ... канд. юрид. наук. - М., 2010. – С.8; Кузнецова О.А. Нормы-принципы российского гражданского права. –М.: Статут, 2006. – С. 10.

The objection of this point of view is based on the thought that mixing principles of law with legal rules leads to the denial of principles of law. Principles of law and legal rules perform a regulatory function. At the same time the regulatory function of the principles of law is wider than the analogous function of legal rules. Legal rules establish the necessity to observe a particular kind of behaviour. The regulatory function of principles of law takes more than that. Principles of law not only regulate the behaviour of the participants of legal relations, but also determine a main sense of a particular branch of law or legal institute, the type of interpretation and application of their rules<sup>9</sup>.

Principles of law can be set in the legislation directly or follow from its sense.

R. Dworkin uses the term “principle” as “a standard other than a rule.” He defines “principle” as “a standard that is to be observed, not because it will advance or secure an economic,

<sup>9</sup> Грибанов В.П. Осуществление и защита гражданских прав. – М.: Статут, 2000. – С.217.

political, or social situation, deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality”<sup>10</sup>.

The author gives some examples of the legal principles: “No one shall be permitted to profit by his own fraud or to take advantage of his own fraud, or to found a claim upon his own iniquity»; “In the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens”<sup>11</sup>.

M. Hesselink’s point of view is close to R. Dworkin’s one. M. Hesselink defines principles as starting points for legal reasoning. He gives special attention to differentiation between principles and values. He supposes that: “...our values express our conceptions of the good. These may be individual or political... Although values and principles are closely connected these concepts can also be distinguished.

<sup>10</sup> Dworkin R. Taking rights seriously. – Harvard University Press, 1978. - P.22.

<sup>11</sup> Ibid. - P. 19.

Principles belong to the law, values to the law makers”<sup>12</sup>.

On my point of view, the constant and common recognition of particular values lead to the emergence of principles of law. For example, freedom, which is a generally recognized value, is a base for the principle of contractual freedom. Thus, generally recognized values are the base of principles of law.

The principles of law, even if they are fixed in legislation, do not turn into legal rules. The fixation of the principles in legislation creates the possibility of their application by courts and other law-enforcement bodies, but does not change their quality.

### **Principles of Law in Regulation of International Contract Obligations**

Principles of law are the regulators of contractual parties' behaviour,

---

<sup>12</sup> Hesselink M.W. If you don't like our principles we have others. On core values and underlying principles in European private law: a critical discussion of the new 'Principles' section in the draft CFR. Paper presented at the conference 'The foundations of European private law', held 27-29 September 2009, at the European University Institute in Florence. – [On-line]: <http://ssrn.com/abstract=1514449>. (Last visited: 22.04.2014).

which have a general character and set the direction of influence on contractual parties' behaviour.

In spite of the fact that principles of law can be set in the legislation, they can not be identified with the principles of legislation.

The principles of law direct the legislator toward the creation of the rules of behaviour. The principles of law also can regulate relationships directly.

The principles of legislation guide subjects of law in the legislative system. They assist in choice of necessary legal rule.

Principles of law determine the substance of law. Principles of legislation solve a problem of optimal structural content of legislation.

The principles of law, which are used for legal regulation of international contractual obligations, consists of general principles of law, principles of international private law and principles of contract law.

General principles of law are fundamentals, which express the most

essential features, content, peculiarities and regulatory mechanism of law. The principles of humanism, equality before the law, democracy and justice are generally reckoned among general principles of law.

There are several researches in legal doctrine devoted to “the general principles of law recognised by civilized nations”. The reason of interest to this topic is provoked by art. 38 (1) of the Statute of the International Court of Justice, which set down that “The Court, whose function is to decide in accordance with international law as are submitted to it shall apply: (a) international conventions; (b) international custom; (c) the general principles of law recognised by civilized nations; (d) subject to the provisions of Article 59 judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.

There are many interpretations of the term “the general principles of law recognised by civilized nations”. For

example, B. Cheng supposes, that they include the principle of self-preservation, the principle of good faith, the principles of responsibility, procedural principles<sup>13</sup>. There are also other determinations of “the general principles of law recognised by civilized nations”<sup>14</sup>.

The general principles of law are applied by the European Court of Justice and by the national courts of the member states when determining the lawfulness of legislative and administrative measures within the EU. The European Court of Justice has recognised that general principles of European Union law are principles of human rights, proportionality, legal certainty, equality before the law and subsidiarity<sup>15</sup>.

---

<sup>13</sup> Cheng B. *General Principles of Law as Applied by International Courts and Tribunals*. – Cambridge: Cambridge University Press, 1994. – 490 p.

<sup>14</sup> Земскова П.Е. *Общие принципы права, признанные цивилизованными нациями, в международном праве: Автореф. дис. ... канд. юрид. наук.* - М., 2010. – 26 с.; *Міжнародне право: Навч. посібник / За ред. М. В. Буроменського* – К.: Юрінком Інтер, 2005. – 336 с.

<sup>15</sup> Гердеген М. *Європейське право.* - К.: КІС, 2008. – с. 181-186.

General principles of law can be applied by international commercial arbitration, if the parties have expressly authorized it to solve the dispute in accordance with some non-state regulators (lex mercatoria, general principles of law etc.).

According to Note “General Principles of Law in International commercial arbitration” general principles applied by international commercial arbitration include the following: “1. A sovereign government may make and be bound by contractual agreements with foreign Private Parties... 2. The corporate veil may be lifted to prevent a beneficial owner from escaping contractual liability... 3. Force majeure justifies nonperformance of a contract such that the loss is borne fairly by the parties. 4. Contracts that seriously violate bonos meres or international public policy are invalid. 5. Equitable compensation constitutes the primary remedy for damages. 6. The right of property and of acquired vested rights is generally inviolable – a state may not effect a taking without

equitable compensation. 7. A party may not receive unjust enrichment”<sup>16</sup>.

The general principles of international private law can be determined as fundamentals, on which the system of legal regulation of international private relationships is based.

There are many classifications of principles of international private law. Usually such principles as rule of law, person’s freedom, inviolability of the right of property, freedom of contract, freedom of business activity, the opportunity to defend somebody’s violated right or interest in the court, reasonableness, justice, good faith, conflict principles: proper law and parties’ autonomy are referred to principles of international private law<sup>17</sup>.

International commercial contract relations can be a subject of lex mercatoria regulation. According to A. Merzko’s point of view there are gen-

<sup>16</sup> Note, General Principles of Law in International Commercial Arbitration, 101 Harv.L.Rev. 1987/88, at 1816 et seq. - [On-line]: <http://www.translex.org/127400>. (Last visited: 22.04.2014).

<sup>17</sup> Калакура В.Я. Принципи міжнародного приватного права//Міжнародне приватне право. Загальна частина: підручник/ за ред. Довгерта А.С. і Кисіля В.І. –К.: Алерта, 2012. – С.134-147.

eral and special principles of *lex mercatoria*. General principles of *lex mercatoria* include general principles of international law, which regulate interstate relationships and do not regulate relationships between natural and legal persons directly. They consist from the general principles of international public law, principles of international economic law, principles of international trade, general principles of law, principles of civil and trade law, general principles of international private law. Special principles of *lex mercatoria* include principles of contractual law<sup>18</sup>.

The attempts to find the model of legal regulation of civil relationships in Europe have stimulated the selection of principles of European contract law, common to all European countries. There are different systems of such principles. For example, according to the scientists from the Association of Henri Capitant and Society of comparative legislation there are three guiding principles of European contract

<sup>18</sup> Мережко А.А. Транснациональное торговое право (*lex mercatoria*). – К.: Таксон, 2002. – С. 191-237.

law: freedom of contract, contractual certainty, contractual fairness<sup>19</sup>.

The jurists, who developed DCFR, have taken up another position. In this document all principles were grouped into underlying and overriding principles. Underlying principles include freedom, security, justice and efficiency.

The protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare and the promotion of the internal market were placed into the category of overriding principles. The developers of DCFR note that such principles “furnished grounds for arguments about the merits of particular rules”. Freedom, security, justice and efficiency also

<sup>19</sup> The Association Henri Capitant des Amis de la Culture Juridique Française and the Société de législation comparée, Fauvarque-Cosson B., Mazeaud D. Guiding Principles of European Contract Law // European Contract Law. Materials for a Common Frame of Reference. - [On-line]: [http://www.legiscompare.fr/site-web/IMG/pdf/19\\_Guiding\\_Principles.pdf](http://www.legiscompare.fr/site-web/IMG/pdf/19_Guiding_Principles.pdf). (Last visited: 22.04.2014).

have a role to play as overriding principles, so they have a double role<sup>20</sup>.

There are other classifications of principles of contract law in doctrine. For example, K. Berger, while analysing UNIDROIT Principles of International Commercial Contracts, has defined that are three principles, set in this document: freedom of contract (art. 1.1.), *pacta sunt servanda* (1.3.), good faith and fair dealing (1.7.)<sup>21</sup>.

In Ukrainian doctrine of civil law the following principles are referred to principles of contract law: freedom of contract, freedom of business activity, judicial protection of civil rights and interests, justice, fairness and reasonableness, binding force of contract, cooperation<sup>22</sup>.

## Conclusions

Principles of law are the guidelines, the chief legal fundamentals for legal regulation of international private contract obligations. They are based on people's imagination about good and justice. Principles of law have universal character and have influence on contractual parties' behaviour, processes of law creation and application of law. The most important principles for legal regulation of international contractual obligations are general principles of law, principles of international private law, principles of contract law. The principles of law can not be mixed with the principles of legislation.

---

<sup>20</sup> Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on European Civil Code and the Research Group on EC Private Law (Acquis Group). – - [Online]: [ec.europa.eu/justice/contract/files/european-private-law\\_en.pdf](http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf). (Last visited: 22.04.2014).

<sup>21</sup> Berger K.P. *The Creeping Codification of the New Lex Mercatoria* 2nd. Revised Edition.- The Netherlands: Kluwer Law International. – 2010. – P. 206.

<sup>22</sup> Боднар Т.В. Договірні зобов'язання в цивільному праві (Заг. положення): Навч. посіб. – К.: Юстініан, 2007. – С. 112-116.