UNCITRAL – TRADITIONS AND PERSPECTIVES

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Introduction

The United Nations Commission on International Trade Law (UNCITRAL) issues harmonized and modern legal texts providing rules for commercial transactions. Its objective is to remove obstacles to international commerce arising from differing national rules. UNCITRAL identifies the obstacles and creates solutions by its functions and legal instruments – conventions, model laws and rules, legal and legislative guides and recommendations, case law, etc. One of most important typical activities of UNCITRAL has traditionally been the coordination and cooperation with other bodies working in the field of international trade law. The legal texts covered the following areas: international commercial arbitration and conciliation; online dispute resolution; international sale of goods; security interests; insolvency; international payments; international transport of goods; electronic commerce; procurement and infrastructure development; micro-, small and middle enterprises (MSME).

UNCITRAL's work is based on the contribution of practical experience and policy solutions from all countries, at all stages of development, so that its texts are acceptable worldwide.

The UNCITRAL rules are applicable also in Bulgaria (some of conventions and model laws). One typical example is our International Commercial Arbitration Act which is corresponding to the Model Law on International Commercial Arbitration. Bulgarian international commerce could benefit a lot from utilization of UNCITRAL legal instruments. Namely these uniform harmonized acts have the opportunities to facilitate the formation of international commercial contracts between Bulgarian and foreign companies.

The main goal of this piece of research is to outline the perspectives of UNCITRAL pertaining to the improvement of its functions and texts and, first of all, the Model Laws. The coordination between organizations assisting the UNCITRAL's activities in the attempt to harmonize and modernize its legal instruments has been given priority in this paper.

Methods utilized in this research are mainly analysis and synthesis, and the legal methods are historical and comparative.

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History of UNCITRAL's creation

Throughout history, merchants as well as the polities have achieved spontaneous production of rules governing national and international commerce. There are many reasons for businessmen, governments, scientists in law and business studies, practicing lawyers and trade associations to look into the feasibility, start substantial research and to recommend systematic harmonization of commercial international law. However, not all of the aforementioned groups and institutions took an interest in this process at the same time and, especially, not all of them held the same view on this matter. Some groups have even voiced strong reservations or expressed the opposite opinions and activities undertaken by others. The most important reasons for this have been identified as follows:

First, this is the reservation of most practitioners concerning the conflict of laws' rules. As it is well known, all questions pertaining to the conflict of laws are basic in the matter of Private International Law (PIL). These norms often have been named "lawyer's law" or even "scholar's law", but they continue to serve as an incentive for the development of harmonized substantive law. This is, for example, the strong-worded position of Prof. Friedrich Juenger (Juenger, 2000).

The second reason relates to the trend to enter into international business transactions without being familiar with the national applicable laws. Nowadays the risks to apply different national laws are presumably lower namely because of the undertaken harmonization of law process. As a result, the applicable law is the same irrespective of whether it is domestic or foreign. It suffices to mention the international uniform rules relative to international sales of goods consisting in Convention of International Sale of Goods (CISG) admitted in 1980 (Marinova, 2013). The same is the case with vast majority of uniform laws instruments.

Third, historically, there is a political and an ideological reason of the institutionalized law's harmonization. Finally, merchants and polities have achieved the general conclusion that the economic opportunities would be facilitated by a framework of harmonized rules of commercial law. For this reason, UNIDROIT as a special agency of the League of Nations in the wake of World War I was set up. By analogy, the United Nations Commission on International Trade Law (UNCITRAL) was established in 1966. Its creation was based not only on political, ideological, economic or legal considerations, but also on ethical ones, given that, arguably, the new independent nations need to be involved in universal harmonization of trade law. Namely the development of international trade through harmonized commercial law is the motto of the UNCITRAL's creation.

Nowadays, the situation is different and far more difficult when formulating the reasons to harmonize international commercial law. The objective now is not to create a universal private law, as was the case at the beginning of harmonization

process. Today the intergovernmental organizations make attempts to identify some new commercial law's solutions to tackle the newly arising problems. Two examples could be cited as relevant in this respect: the rules governing the multinational holding patterns should be harmonized (Steven Rogers, 1996); the categories of mobile equipment should be governed by one set of rules which are applicable irrespective of where this equipment is located.

UNCITRAL was set up in 1966 as a commission of the United Nations General Assembly (UNGA) with the general mandate to further the progressive harmonization and unification of international trade law. Special emphasis was placed on the Commission's role to coordinate the work carried out by other organizations, on the setting up a kind of international body tasked with the coordination and supervision of activities in many regional and universal, general and specialized organizations, both governmental and non-governmental (Gutteridge, 1949, Schmitthoff, 1966).

Structure and functions of UNCITRAL

Working groups of UNCITRAL

Initially, UNCITRAL had twenty-nine member States. Today its membership consists of 60 Member States. The General Assembly elects members for terms of six years and the UNCITRAL's structure is organized so as to ensure the representation of the various geographic regions, as well as the principal legal and economic systems of the world and in particular, the developing countries. UNCITRAL's legislative activities are conducted at three levels.

First, the Commission at annual sessions has to finalize and adopt draft texts referred by working groups (WG).

Second, the WG carry out the substantive work on topics included in the Commission's work program. Proposals for topics to be included in the work program may be made by governments or be the result of consultations with other entities such as non-governmental organizations and trade associations as observers. These observers participate fully in the discussions. The decisions are taken by consensus rather than by vote. The finalized instruments are either adopted by a Diplomatic Conference or more frequently by the UN General Assembly.

It is interesting to analyze whether the mode of adoption and the success of an instrument are related to each other.

Third, the last level belongs to the Commission Secretariat (the Secretariat), based in Vienna. It assists the Commission, prepare and service annual meetings of UNCITRAL, as well as the biannual meetings of six WG. The International Trade Law Division of the UN Office of legal Affairs with its headquarters in Vienna provides also such assistance.

Apart from its legislative activities, UNCITRAL is engaged in documenting and making accessible sources relevant for the harmonization of trade law

and in providing database assisting governments, judges and advocates in the implementation, interpretation and application of its text (Case Law on UNCITRAL Texts – CLOUT).

Therefore, international and regional professional organizations and industry associations are regularly consulted and invited to participate in the work of UNCITRAL. Some of them customarily even take lead in the development of UNCITRAL's instruments. Examples are the Comité Maritime International (CMI), the International Bar Association (IBA), among other bodies.

The main units of UNCITRAL's structure are its Working groups (WG). As their name suggests, they conduct the day-to-day work on developing legislative texts. The WG represent a mix of the Commission Member States, other UN Member States, attending meetings as observers, as well as intergovernmental and non-governmental organizations invited to attend also as observers.

The first one is the WG I dealing with Micro-, Small and Middle Enterprises (MSME). The aim of this WG is to reduce the legal obstacles in this field [Official documents of UN GA, 68th Session, Supplement № 17 (A/68/17), §321]. It is necessary to examine the legal the issues pertaining to the simplicity of their registration, bearing in mind the principle of small enterprise's priority. The WG comprises representatives from all Member States of the Commission, as well as observers from EU, Mundial Bank, Legal Consulting Association of Asian and African countries, Organization on Law Harmonization in Africa (OHADA – fr.), American Bar Association (ABA), National Law Center of Inter-American Free Trade (NLCIFT), New York State Bar Association (NYSBA), etc.. The WG I confirmed the examination at its XXVIII Session in May 2017 of Legislative Guide project on general principles of enterprise's legislation. The main goals of this project are to encourage the activities of MSME: in the framework of contemporary economy; to create a "unique desk"; to establish the harmonization of all enterprises to be registered, but to determine those of them which are obliged to do it; to provide an improvement of this registration process in the aim to achieve certain benefice of larger enterprises; to organize an electronic register and identification data utilization;

In this context it is also worth mentioning the adoption of Legislative Guide Project on Ltd responsibility (ELtd – UNCITRAL).

WG I reached the conclusion that the participation of MSME in international trade is difficult because of fragmentation of legal structures. In its attempt to improve the activities of these enterprises, the WG provides an international legal instrument, as well as a formation of enterprises chain contract. This is how some activities of MSME could be eliminated, which will in turn facilitate their access in the international commerce.

WG II prepares legal instruments dealing with regulation of international disputes in the field of international commerce. In particular, its functions include

the examination of questions as follows: concurrence procedures; establishment of Ethical Arbitral Code; reform of system dealing with the regulation if disputes between investors and States [Official Documents of UN GA 70th Session, Supplement № 17/A/70/17, § 135 to 142]; international commercial conciliation.

There are some subjects excluded from the application of this instrument like consumers protection, family and labor relations.

WG IV is engaged with the problems of electronic commerce (e-commerce). Undoubtedly, this is the most promising and lengthy matter within all activities performed by UNCITRAL. This WG has come up with a draft Model Law, as will be further analyzed in the paper.

WG V prepares UNCITRAL's instruments in the field of insolvency law. The main goals of this WG are as follows: facilitation of the international insolvency procedures concerning multinational enterprises; recognition and enforcement of insolvency awards; projects of legislative dispositions.

The most important questions relate to the following: the authorization to ask for recognition and enforcement of insolvency award in foreign State and the enforcement of the insolvency award in the State of its origin; the reasons to refuse the recognition and the enforcement of this type of judicial award; insolvency of MSME.

WG VI has committed to preparing legal instruments in the field of securities problems and especially, the Guide of incorporation of Model Law on mobile securities.

UNCITRAL's activities

Traditional UNCITRAL activities

Taking into account the large number of intergovernmental and non-governmental organizations involved in the drafting of legislative UNCITRAL's instrument rules and standards, it could be concluded that that the coordination of these activities should be and has been given the greatest priority (Faria, 2005).

However, this paper will focus on three circumstances that, in the view of UNCITRAL, are the main obstacles to an ideal level of cooperation in commercial law harmonization: the insufficient institutional cooperation between formulating agencies; the sometimes difficult interface between international negotiations and internal consultations; the growing role of regional organizations.

To explain the first identified obstacle, a case in point is the most famous and ambitious of UNCITRAL's products – the Convention on International Sale of Goods (CISG), which is a prime example of cooperation. Undoubtedly, this universal convention would not have been successfully completed had the ground not been leveled by the extensive work done by UNIDROIT in the preparation of the Hague Uniform Laws (the laws into force before the adoption of CISG).

In the attempt to achieve successful results, this institutional cooperation has also taken the form of exchange of expertise in the preparation of uniform law instruments. A relevant example in this regard is the co-operation between Hague Conference and UNCITRAL in the formulating of the choice of law rules in the UN Convention on Assignment of Receivables in International Trade (2001).

Another way to achieve cooperation is though the allocation of work among the various organizations. A case in point are secured transactions, where UNIDROIT has the task to work on transactions on transnational and connected capital markets, while the Hague Conference has to work on the applicable law and UNCITRAL – on the guide related to secured transactions.

Needless to say, the coordination between these tasks and the organizations for their implementation is by no means an easy process. There are instances when the compromise made to avoid the real or potential difficulties suggests drawing a clear distinction between the legal instruments which have been prepared by different organization. It is my opinion that this delimitation has been justifiably described as "artificial" (Goode et al. 2007). This conclusion is very important because the resulting fragmentation of uniform commercial law breeds ground for criticism of the people who regard the harmonization of private law in general and international commercial law in particular as a futile, harmful, or simply inefficient process. Indeed, certain topics may require harmonizing efforts at different levels or at different forums.

The basic question concerning UNCITRAL's activities in the process of law harmonization is whether coordination can possibly be improved through a more proactive role of UNCITRAL (Spassova, T, 2015). Even though the answer could be "yes", the effectiveness of the tools available to UNCITRAL should not be overestimated.

As was mentioned above, one of most frequent obstacles to commercial law harmonization is the growing role of regional organizations involved in this process. As a subsidiary body of the UN General Assembly, UNCITRAL is undoubtedly well placed to make recommendations to other organizations without the same degree of universality. Yet it is worth noting that, as independent subjects of public international law, intergovernmental organizations are not obliged to follow these recommendations. This is a problem even for the coordination between organizations sharing a close relationship with UNCITRAL, above all UNIDROIT and The Hague Conference. This problem also exists in cooperation between UNCITRAL and other UN bodies, such as the UN Economic Commission on Europe (ECE) or UN Conference on Trade and Development (UNCTAD).

The third identified obstacle to harmonization pertains to the difficult interface between international negotiations and internal consultations. In this context it should be noted that the direct and collegial relationship between the staff of the multilateral organizations (including UNCITRAL) and national experts who take

part in their activities, has replaced institutional ties and has had some success in preventing conflicts between formulating agencies. While the Ministry of Foreign Affairs in most countries is often in charge of the internal role for coordination for a great part, if not all, of the multilateral organizations like UNCITRAL, this function may involve various units within the Ministry.

An organization with a broad constituency, such as UNCITRAL, may be better suited to carry out projects aimed at promoting law reform in developing countries. One of these projects is the UNCITRAL Model law on Procurement of Goods. Conversely, an organization with an extensive academic network and smaller membership, like UNIDROIT, is much better placed to promote a project such as the Principles of International Commercial Contracts, than UNCITRAL. Here is important to add that States, having interest in a particular project, could render one of those organizations more attractive than the others. Having in mind this, we could better answer the question about the cooperation between international and internal bodies involved in the harmonization of law process.

Apart from the co-ordination of organizations in the rules-making procedure another traditional activity of UNCITRAL is the furniture of States councils concerning the signature and ratification of UNCITRAL instruments, including conventions and Model Laws, or its legislative Guides. The forms of this activity could be different ones: realization of information missions and participation in seminars and conferences organized at regional and national level; state's assistance to evaluate the necessities to reform their commercial law by examination of national legislation; promotion of assistance to make a redaction (reduction?) of national laws with the aim to apply the UNCITRAL's instruments texts; providing assistance to multilateral and bilateral agencies in their utilization of UNCITRAL texts; setting up councils at international organizations, professional associations, lawyer's organizations, commercial chambers, arbitration centers, among other bodies, in the process of utilization of UNCITRAL texts; organization of activities dedicated to facilitate the application and the interpretation by judges and other practitioners the legal instruments of UNCITRAL.

Law instruments of UNCITRAL

Conventions and Model laws

One of most important activities of UNCITRAL is the preparation and adoption of so called "UNCITRAL's Model Laws".

Some of the most popular Model Laws that could be identified are the Model Law on International Commercial Arbitration, the Model Law on international commercial conciliation, the Model Law on e-commerce, the Model Law on mobile securities.

A special place is given in this paper also to the UNCITRAL Arbitral Rules as a type of UNCITRAL texts.

The 1985 UNCITRAL Model Law on International Commercial Arbitration is designed to make available to national legislatures a set of principles and rules that can be adopted to provide or improve national laws governing international commercial arbitration and to bring such laws into closer harmony with each other. This Model Law has been a considerable success and legislation based on it has been enacted in more than forty jurisdictions in the world. The Model Law covers all stages of the arbitral process, from the agreement to arbitrate to recognition, enforcement and the judicial review of arbitral awards. Concerning the procedural issues there is considerable connection between the Model Law and the UNCITRAL Rules of Arbitration. In fact, the major difference between them consists of the manner to give their effect. The Model Law is given effect by legislation and the Rules of Arbitration – by agreement of the parties.

The Model Law provides a framework for the law relating to international commercial arbitration. The key principle is the party autonomy. For example, the contract's parties have the right to determine issues and, in so far as it lays down rules, these are frequently default rules. That is to say, the parties are free to contact out of them. Another important feature of the Model law is the limited supervisory role given to the courts.

The principal provisions of the Model Law deal with the following issues: the arbitration agreement; the composition of the arbitral tribunal; jurisdiction of the arbitral tribunal; conduct of arbitral proceedings; making of award and termination of proceedings; recourse against the award and the recognition and enforcement of awards.

In 1976 the UNGA adopted the UNCITRAL Arbitration Rules, a landmark in the modernization of international commercial arbitration. They have become very popular in regulating ad hoc proceedings. Moreover, they have improved the development of many rules of leading arbitral institutions, such us the American Arbitration Association (AAA), the International Arbitral Tribunal of International Chamber of Commerce (ICC), etc. As it has been mentioned above, in comparison with the Model Law, the use of these rules depends on the choice of contract's parties. The party initiating recourse to arbitration (the claimant) gives to the other party (the respondent) a notice of arbitration.

According to UNCNITRAL Arbitration Rules (art. 28 (1)), contract's parties could incorporate another type "rules of law" such as the UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law as the law applicable to the substance of their dispute. Furthermore, the INCOTERMS – the International Commercial Terms on the contracts of international sales of goods – should also be mentioned in this respect (Marinova,

2013), as well as the general principles of law and the lex mercatoria (the customs in the field of international commercial law).

It is also worth mentioning the obvious similarities between the UNCITRAL Model Law and ICC Rules. In both cases the contract parties are free to agree upon rules of law and the arbitral tribunal can only decide ex aequo et bono where the parties have agreed to give it such power. However, there is a significant difference between these two instruments of law harmonization. It concerns the power of the arbitrators when the parties have not chosen the law or he rules of law applicable to their contract. In such a case the ICC Rules do not confine the arbitrators to a choice of "law", but enable them to choose the "rules of law" which they determine to be "appropriate", for example, the UNIDROIT Principles above mentioned, even where the parties have not chosen it. In comparison with ICC Rules the UNCITRAL Model Law do not confine the arbitrators such discretions and possibilities (Caron, Caplan, Pellonpaa, 2006).

In the UNCITRAL Arbitral Rules, in comparison with ICC rules, there is no reference to "rules of law", like in the UNCNITRAL Model Law.

Concerning the above-mentioned possibility of the contract parties to use lex mercatoria, or general principles of commercial law as the applicable substantive law, I should underline that if the domestic laws and court practices resort to this opportunity, the UNCITTRAL Rules must respect such a choice.

In this regard the Model Law on international commercial conciliation, as well as two international conventions – the UN Convention on Transparency in Arbitration between investors and States based on agreement and UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards should also be mentioned.

Another Model Law of UNCITRAL as mentioned above is the Model Law on e-commerce which concerns the transferable e-documents and especially, the questions dealing with this subject as follows: e-operations; international recognition and utilization of transferable documents utilization; identity management and confidential services; contractual aspects of "cloud" information; technical assistance and co-ordination.

The Model Law in this field is conformed to the UN Convention on utilization of e-communications in international contracts (New York, 2005).

As it was mentioned above, WG VI prepared the Model Law on mobile securities. This legal text covers the following issues: creation of real mobile securities; opposition of real mobile securities; registration system; priority of mobile securities; rights and obligations of parties and of third debtors; realization of real mobile securities.

I should underline here the Chapter VIII of Model Law concerning the conflict of laws. The scope of the parties' will autonomy should be determined and some

examples of rules regulating this will autonomy in different countries should be given as reference.

Perspectives of UNCITRAL'S Development

As far as the perspectives of UNCITRAL's activities are concerned, the most important ones should be outlined.

Firstly, a frequent trend is the promotion, utilization and uniform interpretation of its legal instruments in the field of electronic commerce (e-commerce). Issues such as e-signature, e-operations, identity data, among other matters, should be given due attention.

Second, concerning the insolvency, the UNCITRAL Secretariat has been committed to promoting the utilization and the adoption of Model Law on the Insolvency as well as Legislative Guide on Insolvency Law. This process is organized by mutual cooperation between UNCITRAL and INSOL international (an organization with functions especially dealing with insolvency problems). In 2017 these two international organizations celebrated their 20 years of co-operation.

Third, one of most popular perspectives of UNCITRAL activities is the strong encouragement of discussions and the dialogue on the topic of improvement and facilitation of MSME's development.

Finally, concerning the sale of goods, the UNCITRAL Secretariat has continued to promote the adoption utilization and uniform interpretation of two conventions – UN Convention on International Sale of Goods contracts (Vienna Convention, 1980 – CISG) and Convention on the Prescription in the matter of International Sale of Goods. One of substantive perspectives here is the comparison made between the CIGS and Hague Principles on the choice of applicable law dealing with international commercial contracts.

A large number of conferences, seminars and round tables have been organized by the Secretariat of UNCITRAL to tackle the aforementioned problems and challenges. Their main goal is to create a uniform international legislation which could facilitate the process of progressive legal regulation of international commerce and, in general, the future development of international trade. One of most representative meetings was the Congress dedicated on 50th anniversary of UNCITRAL, organized by the Secretariat in Vienna (4-6 of July 2017). Many participants of Member States, as well as many observers, including practitioners, judges, academics, international officials and other experts and guests took part in. The author of this paper also had the great honor to participate and to present a paper dedicated on the international sale of goods contracts on behalf of the Bulgarian Association of Comparative Law. The Congress was titled "Modernizing International Trade law to Support Innovation and Sustainable Development".

The discussions held concerned the reform of international commercial law and the innovation in this area. The main goal of this process is to facilitate the establishment of Sustainable Development Program in Horizon 2030. The accent has been made on the interest of UNCITRAL legislative solutions aimed to avoid the obstacles to the international commerce. Some of actual questions discussed have presented the perspectives of UNCITRAL's activities development, and namely: the benefits of UNCITRAL texts at international, regional and national level; further opportunities and challenges in the process of harmonization and unification of international trade law; integrated systems to support cross-border trade; blockchain and smart contracts; transport, trade facilitation and payments; emerging issues in the credit economy; regional perspectives on secured finance law reform; efficient and effective insolvency regimes, new frontiers in dispute settlement (international commercial arbitration and conciliation); case law on UNCNITRAL texts.

Conclusion

The current state of affairs in the improvement of UNCITRAL's activities is by no means ideal, yet successful coordination between UNCITRAL and other organizations has been observed. The challenge, therefore, is to look for ways to build on the positive achievements. One possible way is to create institutional mechanisms and establish ties between various organizations specialized in the unification of the private or private international law and ultimately in international commercial law. For example, a possible solution is the creation of joint coordinating committee comprised of representatives of the respective secretariats and a member of Member States appointed by each organization.

The main results achieved in this paper is the identification of the role and importance of UNCITRAL as a prestigious international body establishing harmonized legal instruments to facilitate the international commerce (or trade?).

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UNCITRAL – TRADITIONS AND PERSPECTIVES

Abstract

The subject of this paper is to identify the role and importance of the UN Commission on International Trade Law (UNCITRAL) – one of most popular UN organizations. Its main functions and objectives have been analyzed, especially with regard to the law-making process.

The main goal of this piece of research is to outline the perspectives of UNCITRAL pertaining to the improvement of its functions and texts and, mostly of the model laws. The coordination between organizations assisting the UNCITRAL's activities in the attempt to harmonize and modernize its legal instruments has been given priority in this paper.

The UNCITRAL rules are applicable also in Bulgaria and this is one of most important reasons of this study.

Key words: UNCITRAL, legal instruments, international commerce, international trade law, traditions, perspectives.

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