Les Principes d'UNIDROIT et les contrats internationaux : aspects pratiques – profil de la problématique

Messieurs les doyens, M. le sous-ministre délégué, Mme le juge, M. Lefevbre, chers collègues et amis, mesdames et messieurs, c'est un grand honneur ainsi qu'un immense plaisir pour l'Organisation que je représente et pour moi-même personnellement d'être ici et de participer au travail de la 12e édition des Journées Maximilien-Caron et, plus particulièrement, aux activités du Centre de droit des affaires et du commerce international et du Barreau canadien.

Bien que j'aie passé presque une année à Montréal il y a dix ans et que je parlais le français un peu plus couramment qu'aujourd'hui, je continuerai en anglais car j'ai appris pendant ces mois qu'évidemment, l'anglais des juristes francophones était dix fois meilleur que mon français. Et bien que je vous parlerai en anglais, je suis heureux d'être dans une ville bilingue et en compagnie bilingue d'une identité culturelle distincte. Car dans un milieu anglais pur, d'être le conférencier d'honneur et de parler pendant que d'autres sont en train de déjeuner, demande quelques blagues ou au moins une citation pertinente d'*Alice au Pays des Merveilles*, dont je ne possède pas de version française. Et si j'en avais une, il y aurait le dilemme de combien de temps peut-on attribuer à la substance sans le faire d'une manière inacceptablement ennuyeuse pour le public ou, au contraire, combien de temps peut-on consacrer au divertissement sans décevoir la grande majorité qui aurait certainement préféré inclure une session supplémentaire de travail en sacrifiant son déjeuner. Ce n'est pas facile pour un allophone de se trouver parmi des anglophones. Utilisant l'idiome majoritaire de la belle Province dans cette ouverture, on évite tous ces pièges.

Since I was asked to give an overview of "future work", I shall not address the current work on Part II of the Principles of Commercial Contracts. Reference has already been made to some

of the items during the morning session; others will certainly be mentioned this afternoon. Rather I shall focus on two projects which, to a large extent, owe much to Canadian legal thinking and to Canadian scholars and practitioners and which are about to be finalised, and on two others that are "in the pipeline" but are still at a very early stage.

Firstly, a model law on disclosure in franchising is about to be discussed by a Committee of governmental experts. Its origins go back many years when the Governing Council decided to look into the feasibility of a convention dealing with this then rather innovative distribution technique. However, the Study Group came to the conclusion that the subject was too broadly defined. Under the chairmanship of Me. Alex Konigsberg, Montreal, it developed instead a new type of instrument, the "Guide on International Master Franchise Arrangements", followed by the model law focusing on the negotiation and the stage of the conclusion of a franchising contract and identifying those areas where lack of information on the part of the future franchisee throughout the world leads to numerous uninformed decisions, a waste of precious resources and endless litigation.

Secondly, I am pleased to announce that the most time and staff-consuming but also the economically most important of our projects has reached the finishing line. Its origins, again, are Canadian. More specifically, the Canadian Government's proposal, made after the 1998 diplomatic Conference in Ottawa, to look into the feasibility of extending the lessor's protection under the UNIDROIT leasing convention to other creditors. Starting point of the draft Convention on International Interests in Mobile Equipment is the fact that credit for high-value mobile infrastructure equipment (such as aircraft, railway rolling stock and space assets) is exceedingly expensive because the creditor's (be it the conditional seller, the lessor or the secured party in a classic security taking) position is very insecure. The reason is the conflict-of-laws rule of the *lex rei sitae* governing proprietary rights in movables. Our draft Convention (and a series of equipment specific protocols) creates a genuinely international interest, not in need of recognition once the asset moves from one jurisdiction to another, whose constitution is very simple, and provides for clear priorities both in the case of the debtor's default and its insolvency. The interest is entered into an international, notice-filing fully electronic registry,

where a potential creditor can make searches against the uniquely identifiable asset. There are estimates that the convention may cut credit costs by anything between 5% and 25%. The draft Convention and the first Protocol (on matters specific to aircraft equipment) will be adopted by a diplomatic Conference to be held in Cape Town this autumn.

A joint venture carried out by the American Law Institute and UNIDROIT are the "Principles and Rules of Transnational Civil Procedure". Its starting point is the analysis that all rules on civil procedure, codified and judge made, are based on the assumption that both plaintiff and defendant are residents of the forum state and familiar with the forum's ways and means to organise dispute resolution in its courts. As we know, ever more often this is not the case because one – if not both – party is foreign. This creates both a fairness gap and an efficiency gap. The "Principles and Rules" address this situation providing a set of guiding principles and more detailed rules especially designed for transnational litigation in its entirety, from service of process to appellate review and provisional measures but carving out issues of jurisdiction and recognition of foreign judgments.

Finally, the Governing Council just authorised a far-ranging project "Transactions on Transnational and Connected Capital Markets". It comprises the following items: (i) the taking of security in securities in indirect holding systems and other transactions carried out within clearing and settlement institutions; (ii) substantive rules applicable to "delocalised" transactions; (iii) assistance for developing trading on emerging markets; (iv) development of standards for "global shares"; and (v) the feasibility of developing harmonised rules for world-wide takeover bids.

Mesdames et Messieurs, mon temps arrive à son terme. Vous ne serez pas surpris de savoir que j'aurais préféré continuer. Non seulement parce que le programme de travail d'UNIDROIT est si riche, mais aussi, ou plutôt, parce que je suis un juriste. Et bien que la première langue de cette ville et de la Faculté de droit de l'Université de Montréal est le français, je pense que vous connaissez tous le manuel médical anglais qui contient aussi un chapitre intitulé « Comment vérifier l'état de santé d'un juriste ». Il

est très bref et dit : « Regardez sa bouche – si elle est fermée, il est mort ».

Merci de votre attention et de votre patience.

Herbert Kronke
Secrétaire général
Institut international pour
l'unification du droit privé
(UNIDROIT)