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“Pre-contractual agreements in International commercial contracts: legal dynamics and commercial expediency”

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Abstract (inglese)

The subject of international contracts has been acquired more and more importance and diffusion in the last years. This is a consequence of the deep changes occurred in the trade relationships world.

Nowadays, thanks to the creation of a European unique market and, moreover, as a direct effect of the globalization, most part of the businessmen tend to push their affairs across the national borders, when they don't set aside the “geographic” dimension and they make use of the most modern instruments of communication provided by technology (e-commerce).

Many problems arise from the category of international commercial contracts: first of all, there is not a specific definition of it and it is not always easy to establish which (national) regime is applicable in the single case, despite of all the existing rules (e.g. Rome Regulation).

Another big issue is the enormous complexity (due to the economic value) of negotiation stage, when the potential partners, usually: communicate to each other their will or the extent to which they are disposed to partially scale down their own interests; establish the single steps to reach the agreement; evaluate the feasibility of the affair.

In this complex context they often write down the points they agree upon and they rarely ask any lawyers to do this. The result is that these, absolutely non-technical documents, often give birth to big disputes.

The adjudication of a dispute arising from an International contract necessitates the taking into consideration by the judge or arbitrator of legal developments in several domestic jurisdictions, transnational legal instruments and any emerging International legal practices in commercial agreements. Judges and Arbitrators need to justify their judgements or awards by reference to such developments and practices beyond the confines of the chosen domestic law.

This thesis looks at legal effects of pre-contractual documents in Common Law and Civil Law systems and in transnational legal instruments, i.e. Unidroit Principles of Commercial Contracts, Principles of European Contract Law, Draft Common Frame of Reference, U.N. Convention on the International Sales of Good (CISG) and the, recently proposed, Common European Sales Law.

More specifically, two main issues are considered: first, the extent to which a pre-contractual declaration or representation may be binding in itself, i.e. have some contractual effects of its own or other quasi-contractual effects. Second, the extent to which a pre-contractual declaration or representation may acquire legal effect by being incorporated in a future contract or by inducing a future contract.

The methodology followed consists, first, of an analysis of the rules of formation of contracts in the most representative systems of common and civil law and in the transnational documents referred to above. Then follows a study of the treatment of letters intent and other pre-contractual statements in the theory and practise of national and transnational law.

The thesis concludes as follows: 1) reflections on current trends in national and transnational law; 2) policy factors affecting legal evolution; 3) the interface between state law and transnational law; 4) relationship between hard law and soft law.