Can It Be Done? Adopting the UNIDROIT Principles Through Party Autonomy under Omani Choice-of-Law Rules
Yehya Ikram Ibrhaim Badr

Luca G. Castellani

The Role of the UNIDROIT Principles in Harmonizing Rules of Contract Law: The Draft OHADA Uniform Act on Contracts Inspired by the UNIDROIT Principles
Marcel Fontaine

Mandatory Rules as Limitations on Freedom of Contract in the UNIDROIT Principles of International Commercial Contracts
Henry Deeb Gabriel

The UNIDROIT Principles and the Restatement of the Indonesian National Law of Contracts
Bayu Seto Hardjowahono

The Turkish Perspective: Differences and Similarities between the UNIDROIT Principles of International Commercial Contracts 2010 and National Laws
Ergun Özsunay

How We Monetarily Restore Trafficked Victims and Accurately Calculate Their Stolen Wages
Benjamin Thomas Greer
Contents

Welcome to the Journal ix

ARTICLES

Can It Be Done? Adopting the UNIDROIT Principles Through Party Autonomy under Omani Choice-of-Law Rules
Yehya Ikram Ibrhaim Badr 1

Luca G. Castellani 19

The Role of the UNIDROIT Principles in Harmonizing Rules of Contract Law: The Draft OHADA Uniform Act on Contracts Inspired by the UNIDROIT Principles
Marcel Fontaine 31

Mandatory Rules as Limitations on Freedom of Contract in the UNIDROIT Principles of International Commercial Contracts
Henry Deeb Gabriel 45

The UNIDROIT Principles and the Restatement of the Indonesian National Law of Contracts
Bayu Seto Hardjowahono 63

The Turkish Perspective: Differences and Similarities between the UNIDROIT Principles of International Commercial Contracts 2010 and National Laws
Ergun Özsunay 77

How We Monetarily Restore Trafficked Victims and Accurately Calculate Their Stolen Wages
Benjamin Thomas Greer 121
INTERVIEW

English for Human Rights: The Power of Language to Enhance Knowledge, Skills, and Values

An Interview with Irene Lee Kiebert and Stephen Guy Dillon-Weston. . . . . . 137

BOOK REVIEW

An Action Plan to Preserve the Human Dignity of Victims of Human Trafficking

Book Review: Human Dignity and the Future of Global Institutions, Edited by Mark P. Lagon and Anthony Clark Arend

Mohamed Y. Mattar . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 143

BIBLIOGRAPHY

Trafficking in Persons: An Annotated Legal Bibliography Covering Five Years of Scholarly Work, 2010-2014

Mohamed Y. Mattar . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 147
Welcome to the Journal

Dear Reader,

Welcome to the seventh edition of The Protection Project Journal of Human Rights and Civil Society. Volume seven focuses on two main topics, the harmonization of the law in international commercial contracts and trafficking in persons. The articles on the harmonization of the law were presented at a conference on the 2010 UNIDROIT Principles on International Commercial Contracts organized by The Protection Project and Sultan Qaboos University in Muscat, Oman, in March 2014. The article on trafficking in person was presented at The Protection Project Annual Symposium on Trafficking in Persons held on November 2012 in Washington DC. The Journal also includes an interview on the importance of language in promoting human rights, a book review on human dignity and the future of institutions and a bibliography on trafficking in persons covering the period between 2010 and 2014.

Although some years have passed since the work presented in the Journal was first written, the material still remains current today and a useful reference for students, scholars and members of civil society interested in human rights.

We encourage students and academics to contribute scholarly articles for inclusion in our future editions of the Journal in the areas of legal reform, human rights education, trafficking in persons, corporate social responsibility, religious dialogue, civil society initiatives, and clinical legal education, all of which constitute the core work of The Protection Project.

We hope you find this Journal informative.

Sincerely,

Mohamed Mattar
Executive Director
The Protection Project
Can It Be Done?

Adopting the UNIDROIT Principles Through Party Autonomy under Omani Choice-of-Law Rules

Yehya Ikram Ibrhaim Badr *

In May 2013, Sultani Decree 29/2013 promulgated the Omani Civil Transactions Law (OCTL), which contains several choice-of-law rules. 1 Among them is article 20, which adopts party autonomy as a choice-of-law rule for contracts. This article examines whether article 20 gives the contracting parties the freedom to choose the 2010 UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts as the law governing their contract. It also discusses the constraints and legal bars that might exist under the OCTL and might discourage adoption of the Principles.

In the next section, I examine the wording of article 20 to determine whether the contracting parties can choose the Principles as a non-state law. I conclude that article 20 allows the selection of the Principles as the law governing the contract. In the third section, I examine the constraints that the OCTL imposes on the parties’ ability to choose the Principles. They include statutory restraints that stem from the existence of Omani special legislation together with non-statutory restraints, the traditional public policy defense, and the duty to comply with Islamic sharia law. I demonstrate that neither Omani public policy nor Islamic sharia law prevents the parties from selecting the Principles if the Omani courts adopt an open-minded approach to choice of law in general.

Party Autonomy under Article 20 of the OCTL

Party Autonomy within the Arab Region

Most Arab states have codified choice-of-law rules that are included in their civil code. Those rules are copied from the Egyptian Civil Code,2 as evidenced by

* Assistant Professor, Department of Private International Law, Faculty of Law, Alexandria University

1 The OCTL is published in Omani Official Gazette 1012.

2 A notable exception is the Kuwaiti Civil Code, which does not contain choice-of-law rules. They are found in a special law: the Kuwaiti Law Regulating Legal Relationships with Foreign Elements, Act 5/1961, Official Journal, appendix 316, of February 27, 1961.
the almost identical wording of the party autonomy choice-of-law rule adopted by most Arab civil codes. Thus, the success of the Arabic version of the UNIDROIT Principles will depend on its compatibility with the party autonomy choice-of-law rule adopted by such jurisdictions. This article focuses on the OCTL because it is the most recently promulgated legislation on the subject.

**Is Choosing the Principles as a Non-state Law Permissible?**

According to article 20 of the OCTL:

1. The contractual obligations are governed by the law of the state of the domicile when such domicile is common to the contracting parties, and in the absence of a common domicile by the law of the state where the contract was concluded. These provisions are applicable unless the parties agree otherwise.

2. Contracts relating to immovables are governed by the law of the place in which the immovable is situated.

---

3  Article 19 of the Egyptian Civil Code, Law 131 of July 16, 1948; article 59 of the Kuwaiti Law Regulating Legal Relationships with Foreign Elements; article 27 of the Qatar Civil Code, law 22 of 2004; article 19 of United Arab Emirates Civil Code, Federal Law 5 of 1985.

4  Article 19 of the Egyptian Civil Code states:

   Contractual obligations are governed by the law of the domicile when such domicile is common to the contracting parties, and in the absence of a common domicile by the law of the place where the contract was concluded. These provisions are applicable unless the parties agree, or the circumstances indicate, that it is intended to apply another law. However, contracts relating to immovables are governed by the law of the place in which the immovable is situated.

Article 19 of United Arab Emirates Civil Code provides:

(1) The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same state, but if they are resident in different states, the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply.

(2) The lex situs of the place in which real property is situated shall apply to contracts made over such property.

Article 27 of the Qatari Civil Code states:

1. In terms of the substantive conditions to be imposed and the effects thereof, a contract shall be governed by the law of the jurisdiction of the domicile common to the contracting parties. If the domicile of one party is different from that of the other party, the law of jurisdiction where the contract is concluded shall be applied, unless the contracting parties agree otherwise or the circumstances indicate that another law is intended to be applied.

2. Contracts relating to immovable property, however, shall be governed by the law of the jurisdiction in which the immovable property is situated.
We start our analysis of article 20 as a condition precedent for adopting the Principles\textsuperscript{5} by pointing to its correct interpretation, because it was, unfortunately, poorly drafted. Article 20 clearly adopts the party autonomy choice-of-law rule for contracts. This rule allows the contracting parties to choose the law they wish to govern their contract, with the exception of contracts affecting real estate and within certain limits discussed later. However, adopting the Principles as the law governing the contract is not free from controversy.

A quick view of the wording of article 20 suggests that the contract should be governed by the law of a state, *dawlaha*. Article 20 specifies that the governing law should be either the law of the state where the contracting parties’ common domicile is located or the law of the state where the contract was concluded, if such common domicile does not exist. Both connecting factors are relevant only if the parties have decided not to exercise their option to choose a law to govern their contract. This interpretation of article 20 may suggest that the contracting parties’ freedom of choice is limited to state rules and that, therefore, the parties cannot validly select the Principles as the law governing their contract.

Such an interpretation poses a serious challenge to the adoption of the Principles as the law governing the contract under the OCTL. The Principles are not the law of any state—but rather principles of contract law derived from various legal systems and prepared by lawyers from different parts of the world. Therefore, a question remains: Can the contracting parties freely choose the Principles as the law governing their contract under the OCTL despite their not being the law of a state?

Article 20 presents no straightforward answer to this question. Because the wording of the article on the parties’ freedom of choice imposes no limits, we have to resort to article 25 of the OCTL to answer this question. According to article 25, issues that are not addressed by the choice-of-law rules within the OCTL should be resolved according to “the principles of private international law.”\textsuperscript{6} Hence, the parties’ freedom to choose the Principles is derived from the parties’ freedom to choose the law governing the contract. Therefore, if the parties’ freedom to choose the law governing the contract is limited to selecting the law of a given state, the parties could not validly choose the Principles as the law governing the contract and vice versa.

\textsuperscript{5} The preamble of the Principles states, “They, the principles, shall be applied when the parties agree that their contract be governed by them.”

\textsuperscript{6} This same article is found in several other Arab civil codes. See article 24 of the Egyptian Civil Code; article 69 of the Kuwaiti Law Regulating Legal Relationships with Foreign Elements; article 34 of the Qatari Civil Code; article 23 of United Arab Emirates Civil Code.
However, a brief examination of the current body of choice-of-law literature demonstrates that the extent of freedom given to the parties to choose the law governing their contract is heavily debated between two groups of choice-of-law scholars. The first group believes that the contracting parties are completely free to choose any law to govern their contract, even if the chosen law has no relation whatsoever to the contract. Those scholars believe that the choice-of-law clause is a clause that can be negotiated freely among the contracting parties, as with any other clause in the contract.

Therefore, if the parties choose a foreign law or the Principles to govern their contract, then it is incorporated into the contract as a contractual stipulation. Afterward, it can be tailored to accommodate the parties’ needs. Consequently, the chosen law is not treated as a single block of an indivisible body of rules. On the contrary, the parties have the freedom to cherry-pick the rules applied to their contract, according to their needs. Thus, the rules that the parties did not select will not be applied to their contract.

Nonetheless, the contracting parties’ freedom of choice is not limited to total or partial selection of a single national law. The parties may also create a specific mixture of rules from several different national laws to govern their contract, a practice that is known as **dépeçage**. The parties may even detach their contract from the ambit of any national law; the contract, in this case, is thus described as a **contract sans loi**.

Several jurisdictions have adopted this position on party autonomy, such as Quebec in Canada, under the auspices of article 3111 of Quebec’s Civil Code, and Mexico and Venezuela, through the ratification of the 1994 Inter-American Convention on the Law Applicable to International Contracts, as well as by

---

7 Comment 2.5 to article 2(1) of the Hague Conference on Private International Law, Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts, July 2014, states, “Article 2(1) imposes no other[than the freedom to choose the law of any State or ‘rules of law’ as provided in Article 3] limitation or conditions on the selection of the chosen law.” Comments 2.14 and 2.15 to article 2(4) explain this stance by claiming that this approach is “in line with the increasing delocalisation of commercial transactions,” and thus “the Principles adopt a more expansive concept of party autonomy than some States which require such a connection or another reasonable basis for the parties’ choice of law.” See also Hafiza El Haddad, Al Mogaz Fi Al-Qanoun Al-Dawli Al Kahss, Volume 1, Halibi Law Books Beirut Lebanon 371 (2010).


choice-of-law enactments in several U.S. states, such as California,\(^{13}\) New York,\(^{14}\) Louisiana,\(^{15}\) and Oregon.\(^{16}\) The parties’ freedom of choice is not limited to the law of these jurisdictions. As a result, in theory, the contracting parties can choose non-state rules as the law governing the contract,\(^ {17}\) and their choice should be honored by the courts in the preceding jurisdictions.

The second group of choice-of-law scholars believe that the contracting parties are not absolutely free to choose the law governing their contract. This group believes that the contracting parties’ choice of law should not be recognized unless it meets the substantial relationship test.\(^ {18}\) This test restricts the parties’ freedom of choice to the law of a jurisdiction that has a substantial connection to the contract in question, or else the court will be disregard the parties’ choice-of-law clause.\(^ {19}\) Accordingly, the chosen law is not treated as a contractual stipulation that can be tailored by the contracting parties.\(^ {20}\)

13 California Civil Code §1646.5 (West, 2013) reads:

> the parties to any contract, agreement, or undertaking, contingent or otherwise..., may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state.” (emphasis added)

14 N.Y. General Obligations Law: NY Code §5-1401 (McKinney, 2014) states:

> 1. The parties to any contract, agreement or undertaking, ... may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state.” (emphasis added)

15 Louisiana Civil Code Annotated article 3540 (2013) states:

> All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537.

16 Oregon Revised Statutes (ORS) § 15.350 (2011) states:

> (1) Except as specifically provided by ORS 15.320, 15.325, 15.330, 15.335 or 15.355, the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen. The choice of law may extend to the entire contract or to part of a contract. (emphasis added)


19 Section 187(2) of the Restatement (Second) of Conflict of Laws (1971) states:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, ... unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice, or ...” (emphasis added)

The parties’ freedom of choice is limited\textsuperscript{21} and cannot override the mandatory rules in the national law of a substantially connected jurisdiction. Thus, the parties cannot choose international customs, known as \textit{lex mercatoria}, or the Principles.\textsuperscript{22} Under the substantial relationship test, the parties cannot freeze the national law’s rules by inserting a \textit{gel de droit} clause. Under the substantial relationship test, the court will ignore the parties’ invalid choice of unrelated law, or rules, and apply the law of the substantially connected jurisdiction.\textsuperscript{23}

Nonetheless, this group of choice-of-law scholars realized that it is not practical to set a stringent limit on the parties’ freedom of choice. They recognized that the parties may choose a non-state body of rules or an unrelated law to govern a contract for a legitimate reason, such as when the parties choose a set of rules that are well known to professional or business groups. In addition, the parties may have a legitimate interest in choosing an unconnected law that is known for providing a detailed framework for a certain type of contract, as is the case with the English law of maritime insurance contracts.\textsuperscript{24} As a result, the courts will respect the contracting parties’ choice of an unrelated law or non-state rules such as the Principles as long as a legitimate interest underlies the selection.

The legitimate interest approach is now widely accepted as a general principle in private international law, and it is adopted in several choice-of-law documents, such as the \textit{Second Restatement of Conflict of Laws}, the \textit{Draft Hague Principles on Choice of Law in International Contracts}, and the European Union’s Rome I regulation on the law applicable to contractual obligations. I start with section 187 of the \textit{Second Restatement}, which directs the court to disregard the parties’ choice of law if “either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice ….” Hence, the parties’ selection of an unrelated law to govern their contract will be respected, as if it met the substantial relationship test, when a reasonable basis exists for that selection.

Another example is the \textit{Draft Hague Principles on Choice of Law in International Contracts}. Article 3 expressly states that the parties’ choice of law extends


\textsuperscript{22} Peter M. North, \textit{General Course on Private International Law}, Receuil des Cours 1990-I (Leiden: Kluwer, 1990), 162.


to “rules of law that are generally accepted on an international, supranational, or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.” Finally, I come to the Rome I regulation: “This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention” (emphasis added).\(^\text{25}\) The importance of the Rome I regulation stems from its status as the binding framework for choice-of-law rules for contracts across the European Union\(^\text{26}\) and its direct application to contractual choice-of-law issues in more than 20 member states of the European Union.\(^\text{27}\)

Hence, the parties can choose the Principles as the law governing the contract unless the forum’s law forbids the parties from doing so. Thus, the Principles’ nature as non-state rules does not, per se, prevent the parties from choosing them as the law governing the contract.

Conversely, not all non-state rules are eligible to be recognized as a valid selection under the substantial relationship test. First, the chosen rules must have gained some level of recognition beyond a national level.\(^\text{28}\) This is the case with the Principles, which are now being used by auto parts suppliers around the globe for all transactions that take place in Covisint, which is a testament to their general acceptance beyond a national level.\(^\text{29}\)

Second, the chosen rules must be comprehensive in nature, thereby allowing them to provide the parties with a complete legal framework for their contract without the need to fill in the gaps through external subsidiary sources.\(^\text{30}\) A brief look at the Principles confirms that they are a comprehensive and precise set of rules unlike the lex mercatoria or “general principles of law.”\(^\text{31}\) The drafters of the Principles aimed at providing a set of rules capable of providing a solution for

---


\(^\text{26}\) Article 249 of the Treaty of Rome states, “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”


almost every single issue related to contracts, from formation to consequences and termination.\textsuperscript{32}

Third, the rules must establish a balance between the parties in regard to their mutual duties and performances.\textsuperscript{33} Finally, the rules must be established by a neutral international body that is representative of diverse legal, political, and economic perspectives to be considered as universally acceptable,\textsuperscript{34} which is the case with UNIDROIT, the organization that has been responsible for preparing and updating the Principles since 1994.\textsuperscript{35}

In conclusion, I believe that it is now safe to say that the general principles of private international law allow the parties to adopt the UNIDROIT Principles as the law governing the contract even though the Principles are non-state rules. Thus, the Omani courts should allow the choice of the Principles under the auspices of article 20 of the OCTL through inserting a choice-of-law clause in the contract unless the Omani legislature forbids such a choice within Omani special legislation or when the Principles violate Omani public policy. Nonetheless, can the Omani court apply the Principles as the implied choice of the parties?

\textit{Express Choice versus Tacit Choice}

Although it might seem elementary that the parties can validly choose the law governing their contract, expressly or implicitly, examination of the possibility of adopting the Principles through a tacit choice of law is important, because the text of article 20 of the OCTL, unlike article 19 of the Egyptian Civil Code, does not address tacit choice of law.\textsuperscript{36}

Once again, I believe article 25 of the OCTL can help us overcome this hurdle by interpreting the parties’ choice of law under article 20 to include both express and implied choice of law. Here a reference can be made to article 19 of the Egy-


\textsuperscript{33} Comment 3.12 to article 3 of the \textit{Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts}, July 2014.

\textsuperscript{34} Comment 3.11 to article 3 of the \textit{Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts}, July 2014.

\textsuperscript{35} See the UNIDROIT statute, which is available at http://www.unidroit.org/about-unidroit/institutional-documents/statute.

\textsuperscript{36} Under article 19 of the Egyptian Civil Code, the Egyptian courts will apply the parties’ implied choice of law that can be inferred when “the circumstances indicate that it is intended to apply.” Moreover, the Preamble of the UNIDROIT Principles interprets the parties’ choice of “general principles of law” and \textit{lex mercatoria} as a choice of the UNIDROIT Principles even though the drafters realized that this interpretation may not be completely acceptable for the courts. See comment 4.b. to the Preamble to the UNIDROIT Principles and Alain Prujiner, “Comment utiliser les principes d’UNIDROIT dans la pratique contractuelle,” \textit{Revue juridique Themis} 36 (2002): 561–82, 568.
tian Civil Code and article 3(1) of the Rome I regulation. Under both articles, the parties can choose the Principles tacitly to govern their contract. As a result, it is safe to say that tacit choice of law is allowed under the general principles of private international law.

Therefore, an Omani court should take into consideration the parties’ prior transactions that included an express choice of the Principles or the parties’ use of a model contract that uses the Principles as the governing law, such as the Model Contract for International Commercial Sale of Perishable Goods of the International Trade Centre (ITC), or the ITC’s other model contracts. Thus, the parties’ use of a model contract should indicate their tacit choice of the Principles as the law governing the contract in question.

Limitations against the Parties’ Choice of the Principles under the OCTL

Here we are confronted by two types of limitations that might prevent the application of the Principles by the Omani courts. The first is the statutory limitation. The statutory limitation can be either special legislation or an international convention, according article 24 of the OCTL. The second type of limitation is non-statutory: the public policy defense and the Islamic sharia compliance requirement. Both limitations might, according to article 28 of the OCTL, bar the application of the Principles.

Statutory Limitation

Article 23 specifically states that “the preceding articles are not applicable if there is a contradictory article in special legislation or an international treaty in force in the Sultanate of Oman.” Interestingly, the Omani legislature, as did other legislatures of the Gulf Cooperation Council, decided not to limit the application

---

37 Article (3)1 reads, “A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case."
41 Article 68 of the Kuwaiti Law Regulating Legal Relationships with Foreign Elements; article 33 of the Qatar Civil Code; article 22 of United Arab Emirates Civil Code.
of the chosen law to issues addressed by mandatory rules, *lois de police*.\(^{42}\) The Omani legislature opted to disregard the parties’ choice if it contradicted the provisions of Omani special legislation.

The legal connotation of the term *special legislation, thasri’ khas*, is important in Arabic legal terminology. It refers to rules that represent an exception to the general rules or default rules. Therefore, it is not limited to mandatory rules as understood by choice-of-law scholars.\(^{43}\) In addition, article 23 limits the parties’ freedom of choice to contracts that are not themselves governed by special rules in the OCTL, such as contracts that affect real estate situated in the Sultanate of Oman.\(^{44}\)

In other words, the viability of article 20 as the legal basis of the party autonomy choice-of-law rule is limited to contracts that are not governed by special legislation. Unfortunately, this limitation makes legal certainty under article 20 a difficult task. The contracting parties will have to examine the entire Omani body of special legislation to determine on a case-by-case basis if they have the freedom to choose the law governing their contract.

For example, maritime transport is governed solely by the Omani Maritime Law.\(^{45}\) According to article 1 of the Omani Maritime Law, “The provisions of this law govern all sort of maritime navigation whether the navigation aims at achieving profits or not, whether it is carried out by natural or juristic persons.”\(^{46}\) Therefore, the contracting parties to contracts of maritime transport of persons or cargo cannot choose the Principles to govern their contract.

In contrast, the Omani Trade Law allows the choice of the Principles in commercial contracts, and it even gives it precedence over the statutory rules in the Omani Trade Law. Article 4 states:

> If there is no contract, or if it exists and is silent, or the contractual stipulation in question is void, the statutory rules in this legislation and other legislations are applied to all issues addressed by the rule’s text or context.\(^{47}\)

---


44. See article 20(2), OCTL.


46. Ibid.

The same problem of legal uncertainty exits with international conventions that are in force within the Sultanate of Oman. The provisions of those treaties determine the admissibility of the parties’ selection of the Principles. Again, the contracting parties will have to go through a case-by-case analysis to determine whether they can choose the Principles to govern their contract.

**Non-statutory Limitations**

According to article 28 of the OCTL, “The provisions of foreign law applicable by virtue of the preceding articles shall not be applied if these provisions are contrary to either the public policy and morality in the Sultanate of Oman” or Islamic sharia. I start with the public policy defense and then analyze sharia.

**The public policy defense**

It would not be an exaggeration to say that the public policy defense is a watchdog over the conflict-of-law rule. On the one hand, the public policy defense has unpredictable effects on the outcome of the case, because it does not furnish the court with a rule of decision. On the other hand, a choice-of-law rule does not give the judge a blank check to apply any foreign law regardless of how offensive its contents are to the forum’s values or legislative policy. However, the public policy defense not only differs from one state to another but also varies within the same state overtime. States’ values change as a result of their accumulated historical and socioeconomic experiences throughout the course of history. This particular aspect of the public policy defense is the reason for its being described as a cover used to effectuate substantive justice in individual cases. The public

---

48 See also article 28 of the Egyptian Civil Code; article 73 of the Kuwaiti Law Regulating Legal Relationships with Foreign Elements; article 38 of the Qatar Civil Code; article 27 of the United Arab Emirates Civil Code.

49 Article 27 of the United Arab Emirates Civil Code is similar.


policy defense allows the court in certain cases to apply forum’s law without being accused of parochialism.\footnote{Ibid., 988.}

Another criticism of the public policy defense is that it is exercised without sufficient theoretical analysis. The court does not have to elaborate on why the foreign law is offensive to the forum’s values.\footnote{Holly Sprague, “Choice of Law: A Fond Farewell to Comity and Public Policy,” California Law Review 74, no. 4 (1986): 1447–77, 1450.} I believe that criticism is true and that it can be attributed to the fact that the public policy defense is undefinable in nature.\footnote{David Sindres, La distinction des ordres et des systèmes juridiques dans les conflits des lois (Paris: LGDJ, 2008), 192. See also Andreas Bucher, “L’ordre public et le but social des lois en droit international privé” in Hague Academy of International Law, Recueil des Cours, vol. 239 (Leiden: Martinus Nijhoff, 1993), 9–116, 25.} It is designed to offset over flexibility of the traditional choice-of-law rules that designate a foreign law without paying attention to whether its contents might offend the forum’s fundamental values.\footnote{Sprague “Choice of Law,” 1452.}

One hopes the Omani courts would mitigate the role of public policy in article 28 of the OCTL by taking several steps. First, the Omani courts should require a substantial relationship between the forum (the Sultanate of Oman) and the facts of the case as a condition precedent for using the public policy defense against the application of the Principles.\footnote{Audit, Droit international privé, 270. See also Bucher, “L’ordre public et le but social des lois en droit international privé,” 52; Sindres, La distinction des ordres et des systèmes juridiques dans les conflits des lois, 193; Henri Batiffol and Paul Lagarde, Traité de droit international privé, 8th ed. (Paris: Pichon et Durand-Auzias, 1993), 576.} The public policy defense would operate when applying the Principles generated an injury in the Sultanate of Oman. Conversely, if the Principles generated an injury outside the Sultanate of Oman, then the Omani courts would not allow the use of the public policy defense. Consequently, the protection of the public policy would be balanced against the need to apply the choice-of-law rule.\footnote{Bucher, “L’ordre public et le but social des lois en droit international privé,” 66.}

Second, the Omani courts should focus on the effects generated by the Principles when they are applied to the facts of the case.\footnote{Batiffol and Lagarde, Traité de droit international privé, 575; Audit, Droit international privé, 264; Mo Zhang, “Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings,” North Carolina Journal of International Law and Commercial Regulation 73, no. 1 (2011): 83–157, 106.} The public policy defense should be used only when the Principles create effects that are fundamentally unacceptable to the Omani legal system. Not every rule within the Principles that gives a result different from that generated by Omani law is a violation of Oman’s...
public policy. As a result, the Omani courts should examine both the content and the effects of the principles in question to determine whether they violate Omani public policy. The challenge remains in determining when the Principles violate Omani public policy, which is difficult to decide because the public policy concept, which suggests leaving the matter to the court’s discretion.

Third, the Omani courts must apply the public policy defense with a negative effect and a positive effect. The negative effect prevents the application of the foreign law. The positive effect allows the application of the Omani law in an area that was previously reserved for foreign law according to the Omani choice-of-law rule. So how far should public policy exclude foreign law? The majority of the choice-of-law scholars seem to agree that the public policy defense should be confined to the partial exclusion of the foreign legal rule in question. The public policy defense should not result in discarding foreign legal rules that do not offend the forum’s public policy.

This approach, which has been adopted by the Egyptian and French courts as well as the courts of several other countries, is consistent with the public policy defense’s goal of protecting Omani fundamental values. It is also consistent with the nature and function of the choice-of-law rules. We should resolve choice-of-law problems without further aggravation of the situation. We should not substi-

70 Mayer, *Droit international privé*, 172.
72 Frank Vischer, *Droit international privé* (Fribourg, Switzerland: Ed. universitaires, 1974), 25.
tute the Principles as a whole with the Omani law because the former contain some rules that are unacceptable to Omani values.\textsuperscript{73}

**Compliance with Islamic sharia**

Now we reach the final statutory limit on the parties’ choice of the Principles, which is the non violation of Islamic sharia. This issue deserves a detailed discussion since it is not common to find a code that expressly deals with the intersection between Islamic sharia and the operation of choice-of-law rules in general.

**The basic concepts of Islamic sharia**

To begin our analysis, we must define what it is considered *Islamic sharia* as stated in article 28 of the OCTL. We must distinguish between two types of rules when we analyze Islamic sharia. The first are the immutable rules of faith and conduct (*Ahkam al 'abadat*) that address the relationship between man and God observed by pious Muslims, such as the rules governing the performance of prayers, fasting, and alms giving.\textsuperscript{74} Second are the mutable rules of transactions (*Ahkam al Mu’malat*) that address the relationships between persons and within society.\textsuperscript{75}

The distinction between both types of rules is important because, as far as choice of law is concerned, it is possible to imagine a conflict between the rules of transactions and the Principles. Hence, the Omani courts might refuse to apply the Principles to the facts of the case because they violate a rule of transaction. In contrast, rules of faith and conduct will not give rise to a court dispute. Those rules do not address issues of trade and transactions. Therefore, rules of faith and conduct should not be an obstacle to the application of the Principles.

Another extremely important distinction to bear in mind when dealing with Islamic sharia is the distinction between Islamic sharia and Islamic *fiqh*. Islamic *sharia* is the body of rules included in sacred scripts whereas Islamic *fiqh* is the elaborated system of scholarship developed by Muslim jurists. We are concerned with Islamic sharia as a body of rules contained in sacred scriptures, which might bar the application of the Principles. Once again, we need to understand the different sources of Islamic sharia.

\textsuperscript{73} Ahmad Mosallem, *L’ordre public devant le juge égyptien: Étude comparative de droit international privé* (Cairo: Imperial Université Foud, 1950), 61.


\textsuperscript{75} Hamad Hassan, *Al-Madkhal Lil Dirasyat Al-Fiqh Al-Islami*, El-Toubgey lil Nasher, Cairo, Egypt, 1981, 15.
Under Islamic sharia, we have two types of sources that have intrinsic legal value. The first source of Islamic sharia is the Qu’ran. The Qu’ran contains only between 80 and 500 verses that discuss legal issues, such as family law, wills and testaments, and some general rules on contract law and torts. The second source of Islamic sharia is the Sunna, which comprises the verbal and behavioral narrations of the Prophet Mohammed, peace be upon him. Unlike the Qu’ran, the Sunna is not contained in a single reference but is compiled within several different collections that were written some years after the death of the Prophet Mohammed, peace be upon him. Consequently, it is common to find a hadith—a verbal narration—that has more than a single wording or whose authenticity is sometimes challenged. Hence, the authenticity of a hadith is subject to a hierarchical classification system developed by Muslim jurists.

The limited rules contained in the Qu’ran and the Sunna forced Muslim jurists to devise new legal tools for issues not addressed by either type of sacred script. Muslim jurists resorted to exercising *ijtihad* without running into text skepticism or interpretive adventurism. This body of unscripted rules and tools devised by Muslim jurists around the Qu’ran and the Sunna is called Islamic *fiqh*. Hence, Islamic sharia is the main source of rules while Islamic *fiqh* is an attempt to further develop the rules of Islamic sharia. As a result, Islamic *fiqh* has an inferior legal value and does not take legal precedence over Islamic sharia.

The distinction between Islamic sharia and Islamic *fiqh* is important in determining the possibility of adopting the Principles as the law governing the contract. First, Islamic sharia, as a body of rules, is immutable, whereas Islamic *fiqh* as an interpretation of the Qu’ran and the Sunna is dynamic and evidentiary and, therefore, mutable. If we agree that Islamic sharia is the body of rules found in the sa-

---

83 Khan, “Fana and Baqa Infinities of Islam,” 529.
cred scripts, it will be easy to determine beforehand if the Omani courts will honor the parties' choice of the Principles. In this case, we are enforcing a defined set of rules that are not subject to alteration. Thus, the Omani courts will simply compare the rules in the sacred scripts and the Principles to determine that the latter does not conflict with the former. If the Omani courts find that some of the articles within the Principles are incompatible with Islamic sharia, they will disregard those articles according to article 28 of the OCTL.

However, Islamic *fiqh* does not have the same fixed nature of Islamic sharia because it is made by Muslim jurists. Consequently, it will be a challenge for the contracting parties to determine beforehand whether their choice of articles of the Principles will be honored by the Omani courts in the future. One cannot predict with precision in which direction Islamic *fiqh* will evolve: it might evolve in a direction that will disallow the application of one or more articles of the Principles that were previously allowed under Islamic *fiqh*, or vice versa.

Second, Islamic sharia is contained in a limited number of references that have a coherent structure. In contrast, Islamic *fiqh* is composed of a vast literature ranging from books to individual *responsa* (*fatwa*). Islamic *fiqh*, unlike canon law, was developed outside a unitary hierarchical structure.\(^84\) Neither the Caliphate nor the modern national state controls the development of Islamic *fiqh*.\(^85\) This explains the existence of several schools of Islamic *fiqh*, madhab, with equal legitimate presence within the daily life of millions of Muslims. Each madhab has its own juristic tools heritage. Each madhab may have several points of view on a given issue. Some views are adopted by the majority of the jurists; others are adopted by the minority,\(^86\) reflecting the interaction between *fiqh* and the surrounding societal economic and social developments.\(^87\)

Accordingly, it will be difficult for both the contracting parties and the Omani courts to reach a firm stand on the admissibility of articles of the Principles under Islamic *fiqh*. The admissibility of the Principles will be determined on a case-by-case basis. The outcome of that analysis will not be predictable. As we have seen earlier, unlike Islamic sharia, Islamic *fiqh* is not immutable. Therefore, the present findings on Islamic *fiqh* cannot serve as a precedent for future cases. Consequently, the inclusion of Islamic *fiqh* within the construction of the term Islamic sharia will

---


\(^86\) Abu-Odeh, “Modernizing Muslim Family Law,” 1068.

undoubtedly create a perfect storm that will be more disruptive than the public policy defense.

Conversely, the Omani courts might adopt the Egyptian Supreme Constitutional Court’s definition of Islamic sharia. The Egyptian Supreme Constitutional Court defined Islamic sharia as follows: “the Shariah rules which have a definite meaning and a definite connotation, Al-Ahkam al Shar ‘iyya al-qat ‘iyya fi Thubuuthawadalalatiha.” This definition distinguishes between Islamic sharia and Islamic fiqh. Only the immutable rules contained in the sacred scriptures, which are not subject to conflicting interpretations, are regarded as Islamic sharia. As a result, if the court applies the Principles, it will not take fiqh into consideration. In this case, Islamic fiqh will not interfere with the operation of article 28 of the OCTL.

Party autonomy under Islamic sharia

To conclude this article, I make some remarks on the Islamic sharia rules on contracts. First, contracts under Islamic sharia are free from metaphysical elements, although the binding effect of the contract is based on the Holy Qu’ran. In other words, the binding effect of any contractual arrangements stems from the parties’ will and not from any other source. Second, the rules available in the sacred scriptures are very limited and abstract, such as the necessity of an equitable consideration, freedom of will to make the contract, prohibition of riba (usury) and gharar (gambling contracts). The sacred scriptures focus on contracts of sale and loans, which were the most important contracts concluded between the parties when these documents were revealed.

---

89 Mosallem, L’ordre public devant le juge égyptien, 102.
90 “O you who have believed, fulfill [all] contracts,” Surat Al-Mā’idah [5:1]; “Those who fulfill the covenant of Allah and do not break the contract,” SuratAr-Ra’d [13:30]; “O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it.” Surat Al-Baqarah [2:282].
Third, the concept of ‘uqud (contract in Arabic) is not limited to contracts as understood by Western lawyers; it is a general term used to describe all types of obligations.94 Muslim jurists used the contracts’ fiqh, in its expansive meaning, as a tool to accommodate sharia rules with the economic and social developments within the Caliphate.95 This concept allowed the parties to use contracts as a tool to devise the rules they needed to govern their mutual relationship as long as it did not directly contradict the rules contained in the holy scriptures.96 In other words, contracts were used as a remedy for the rarity and the rigidity of Islamic sharia’s rules.

As a result, party autonomy occupies a high standing within Islamic sharia, to the extent that Islamic jurists developed the maxim Al-‘uqud Shari‘at Al-Muta‘aqdeen, the contract is the parties’ sharia. Therefore, the parties are free to choose and insert whatever stipulations they wish in their contracts. They can agree on an ad hoc set of clauses or a comprehensive set rules such as the UNIDROIT Principles. The parties’ choice of the Principles will not be challenged for incompatibility with Islamic sharia as long as it does not involve riba or gharar. It is more likely that the Omani court will strike down the parties’ choice of the Principles on other grounds, such as violating Omani special legislation.

**Conclusion**

Article 20 of the OCTL allows the parties to adopt whatever rules they wish to govern their contracts. The article allows the selection of the UNIDROIT Principles for international contracts, provided that the Omani courts adopt an open-minded approach in interpreting articles 25 and 28 of the OCTL. Neither the public policy of the Sultanate of Oman nor the Islamic sharia prevents the contracting parties from choosing the UNIDROIT Principles as the law governing their contract. Nonetheless, choice of law is an area where the mindset of the courts plays a decisive role. The courts will determine whether “soft” law instruments such as the UNIDROIT Principles succeed in achieving the ever-elusive aim of legal certainty and uniformity.

---

Promoting Uniform Law in Countries Influenced by Islamic Law

Luca G. Castellani*

Contract law represents a crucial part of all legal systems. Indeed, contract law is based on important policy, ideological, and philosophical considerations. History and tradition also play an important role in shaping it. As a result, contract law typically contains the fundamental features that define the specific traits of any jurisdiction.

Moreover, contract law is critical for economic development because it significantly affects the ability of a legal system to support and promote economic activities. Hence, legislative models deemed to be most efficient and effective in supporting business are often adopted in other jurisdictions. Among legal texts transplanted from one jurisdiction to another, sales law exercises special influence because provisions relating to sales of goods are often used as a blueprint for other contracts.

In the past two centuries, however, only a handful of the contract law texts have achieved the status of influential legislative models. Those texts include the French Civil Code (Code Napoléon, 1804); the German Civil Code (the Bürgerliches Gesetzbuch, 1900); the English Sale of Goods Act, 1893; and article 2 of the U.S. Uniform Commercial Code, originally adopted in 1952. Regional models are also relevant: in the Arab world, the Egyptian Civil Code of 1948 and the Iraqi Civil Code of 1951—both prepared by ‘Abd al-Razzāq al-Sanhūrī—are promi-

* Legal Officer, United Nations Commission on International Trade Law (UNCITRAL) Secretariat. The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

nent. Of course, exceptions to and variations of the original models are plentiful; when legal models are transplanted, they are necessarily altered to account for such factors as preexisting law and practice.

The most recent and most modern sales law model is the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG). In fact, the CISG has known remarkable success both as a treaty and as a source of inspiration for regional and national legislation, as well as for the preparation of ancillary texts of contractual nature, such as the UNIDROIT (International Institution for the Unification of Private Law) Principles of International Commercial Contracts.

Regional legislative initiatives inspired by the CISG include, most recently, the Common European Sales Law. At the domestic level, China provides a well-known example of enactment of the provisions of the CISG. In Japan, the CISG is exercising significant influence on the ongoing civil code reform. In Brazil, judicial decisions made reference to the CISG to interpret and apply domestic law well before the convention entered into force there. Moreover, as already mentioned, the effect of the CISG reaches well beyond the field of sales because of the influence that the contract for sale of goods has on the general theory of contracts.

The CISG offers a well-balanced and carefully crafted legal regime for contracts for the international sale of goods, thus introducing certainty in commer-

---


3 Although the connection of the Principles to CISG is evident, it is sometimes overlooked that all texts based on the Principles are also rooted in the CISG.


7 Materials on the CISG in Brazil are available on the CISG-Brasil website, at http://www.cisg-brasil.net/.

cial exchanges. The regime is specifically designed for long-distance trade. It is, therefore, particularly appropriate for cross-border transactions, given the peculiar challenges posed by the distance between parties, such as higher costs and longer time for carriage of goods.

The success of the CISG owes much also to the conditions surrounding its preparation and adoption. In fact, the CISG is the product of decades of work. Extensive preparatory studies led to the adoption of the 1964 Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)9 and the 1964 Convention Relating to a Uniform Law on the International Sale of Goods (ULIS).10 However, Socialist and developing countries perceived the drafting process of the ULF and the ULIS as not inclusive of their needs and views. Additional input from Common Law jurisdictions was also possible. Therefore, the international legal community deemed appropriate to task the then newly established United Nations Commission on International Trade Law (UNCITRAL) with the revision and completion of the work on contracts for the international sale of goods because UNCITRAL’s universal composition provided ample assurance of inclusiveness. UNCITRAL’s assistance with the uniform laws allowed representatives of states influenced by Islamic law to participate in the drafting process,11 thus ensuring that concerns related to the compatibility of the CISG with Islamic law would be considered and accommodated as much as possible.

The CISG and Islamic Law

Compatibility between the CISG and Islamic law is a major condition for broader adoption of the CISG by states influenced by Islamic law. It was also the most prominent matter raised by those states during the preparation of the convention, which is particularly interesting in light of the fact that parties to the contract for the sale of goods may vary, by agreement, any provision of the CISG (except article 12) in accordance with article 6 of the CISG. Therefore, CISG provisions apply only as the default legal regime in absence of any opting out or choice of different provisions. However, states influenced by Islamic law seemed to be particularly concerned by possible difficulties stemming from the application of the

10 Ibid., 107.
CISG as the default legal regime. Unfortunately, the relation between the CISG and Islamic law has not attracted significant attention in academic literature.\(^\text{12}\)

One issue that has been discussed in the literature pertains to article 78 CISG,\(^\text{13}\) on interest, and is related to the prohibition against interest (ribā) contained in Islamic law and other religion-based laws.\(^\text{14}\) The CISG originally contained an explicit provision on the determination of interest, but that provision was deleted at the final drafting stage because of the objections made by delegations of those states whose national law did not recognize such a rule.\(^\text{15}\) The solution that was eventually adopted might be criticized both for being too vague and for actually introducing an obligation to pay interest, though undetermined in its amount. However, in reality, the adopted text offers a reasonable compromise meant to permit the adoption of the treaty by all states. Of course, concerned contractual parties may decide to opt out of this provision, or they may take appropriate steps to prevent any difficulty at the enforcement stage. Likewise, parties to the contract wishing to have more stringent provisions on interest may agree to do so by, for example, adopting the detailed text contained in article 7.4.9 of the Principles. In the absence of stipulations on interest, several solutions have been suggested to determine the interest rate under the CISG. Referring the Principles may not be an effective solution, because the approach taken in that text is different from that of the CISG. In particular, article 7.4.9 of the Principles, which is more precise in determining the amount of interest than is article 78 of the CISG, could be considered more directly in breach of the prohibition of ribā; hence, resorting to the Principles

\(^{12}\) Moreover, academic works in Arabic are unfortunately vastly unreported in global databases and bibliographies; hence, non-Arabic speakers are unaware of them. Similar considerations may be given to the Farsi literature on the CISG. Among works in English, see Fatima Akaddaf, “Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?” *Pace International Law Review* 13, no. 1 (2001): 1–58.


would frustrate the very purpose of article 78 of the CISG. However, resorting to domestic law to determine the interest rate will lead to a result compatible with Islamic law only if the domestic legal system is mindful of Islamic law principles. One way to circumvent the prohibition against interest is to declare the exclusion of foreigners or of legal entities from that prohibition. For the same purpose, arbitrators characterize interest in awards that are given in Islamic jurisdictions as either compensation for damages or another form of indemnity.

The legislative history of article 78 of the CISG reminds us that it is not possible to adopt a uniform rule without consensus, and there is no consensus without a common ground. For instance, article 4 of the CISG excludes certain matters from the scope of application of that convention because the drafters felt that differences in legal traditions on those matters could not be reasonably reconciled. For the same reason, the CISG does not contain any provision on contract clauses for an agreed sum due on failure of performance. In the latter case, UNCITRAL found a novel solution by adopting, in 1983, a “soft law” text: the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance. However, that approach was not particularly successful in promoting uniformity.

Another challenge to uniformity between national legal systems is that the legal systems themselves are constantly evolving. For instance, the Egyptian Civil Code contains a provision on interest, which was unsuccessfully challenged as contrary to Islamic law under the Egyptian constitution. The outcome of similar constitutional challenges in the future is particularly difficult to predict.

In summary, the issue of interest under the CISG in relation to Islamic law exemplifies well the uniform law’s peculiar task of providing both flexibility and predictability. The compromise text of article 78 of the CISG aims at serving both goals.

The comparison between the principle of good faith in the CISG and in Islamic law has also been the object of research. Although details may vary, one common

16 See Dawud, Interest under CISG and al Shari’a, 14–16, and the references therein.
22 Bawar Bammarny, “Treu und Glauben und UN-Kaufrecht (CISG), Eine rechtsvergleichende Untersuchung mit Schwerpunkt auf dem islamischen Rechtskreis,” (Frankfurt am Main, Germany: Peter Lang, 2011). This research demonstrates the possibility and desirability of comparative investigation that frames the relationship between CISG and Islamic law against the broader background of main global contract law models.
conclusion is that the function performed by good faith in Islamic law is similar to that performed by the same notion in the CISG.\textsuperscript{23} Some add that the similarity goes as far as to presume good faith.\textsuperscript{24} However, codifications in Arab states have introduced elements from the Romano-Germanic legal family, and presumptions could be one such element.

Other CISG matters that have been discussed in light of Islamic law include the reference to practices and usages in the interpretation of the contract (article 7(2), CISG); the “parole evidence rule” (article 8(3), CISG) and the freedom of form of the contract (article 11, CISG); and specific performance (article 28, CISG).\textsuperscript{25} The conclusion is that CISG provisions and prevailing Islamic law provisions are usually compatible, if not similar.\textsuperscript{26} This analysis may be also considered through the general perspective of developing countries.\textsuperscript{27}

The Pattern of Adoption and Actual Use of the CISG in States Influenced by Islamic Law

Bahrain, Egypt, Iraq, Lebanon, Mauritania, and Syria are the states parties to the CISG whose legal systems are influenced by Islamic law; they are only 6 of the 22 member states of the Arab League.\textsuperscript{28} The rate of participation of states influenced by Islamic law in the CISG is, therefore, not fully satisfactory.

Egypt, Iraq, and Syria were among the early adopters of the treaty, which is not surprising, because those states have traditionally been a source of legal knowledge in the region and are at the forefront of legal reform. Moreover, Egypt and Iraq took direct part in preparing the treaty and, therefore, had a higher level of awareness of its importance. Unfortunately, not much is known about Mauritania’s accession. Bahrain and Lebanon became parties more recently, in line with their longstanding commercial tradition. Given the responses of those Arab League states to the CISG, we might ascertain two trends: a first wave of adoptions, which was driven by longstanding

---

\textsuperscript{23} Ibid., 182; see also El-Saghir, “CISG in Islamic Countries,” 515–16.


\textsuperscript{25} On specific performance, see Mahdi Zahraa and Aburima Abdullah Ghith, “Specific Performance under the Vienna Sales Convention, English Law, and Libyan Law,” Arab Law Quarterly 15, no. 3 (2000): 304–32, which reaffirms that the general principle under Libyan law (and Islamic law) is that “parties will comply with their obligations specifically and in good faith.”


\textsuperscript{28} Obviously, jurisdictions concerned by Islamic law are not limited to member states of the Arab League. Reference to the Arab League is made only as a statistical benchmark.
capacity in the civil and commercial law field, and an emerging second wave, which is based on trade considerations and the desire to get further engaged in the field.

With respect to actual use of the CISG, the status is not promising. Out of the six previously mentioned states parties to the CISG, only Egypt has cases reported in the Albert H. Kritzer CISG Database\(^{29}\) and none of them in Case Law on UNCITRAL Texts (CLOUT).\(^{30}\) In the single Egyptian case from a state court, the CISG was applied by the initiative of the supreme judicial body of that country, the Court of Cassation, because both the parties to the dispute and the lower courts had failed to declare its applicability.\(^{31}\)

This quick survey of the application of CISG in Arab countries is, of course, far from complete. Many decisions may remain unreported because of lack of collection mechanisms, linguistic barriers, or other factors. However, CISG awareness in Arab countries does appear to be limited.

However, the CISG has influenced Egyptian domestic law—namely on party autonomy, open-price contracts, and avoidance for nondelivery with Nachfrist notice.\(^{32}\) Indeed, it is not rare for the CISG to be more influential as a model law than as a treaty.\(^{33}\) This observation highlights that, besides the obvious advantages to traders in adopting the CISG, an underlying effect of the adoption of that text is the circulation of modern legal notions in adopting jurisdictions.

The CISG and Arabic

One relevant topic of discussion about the CISG in jurisdictions influenced by Islamic law is Arabic. Arabic is a language often used in the Middle East and North Africa, where the influence of Islamic law is significant. Arabic is also one of the six official languages of the United Nations. Therefore, the CISG has an official Arabic version, which is as authentic as the other language versions of the CISG.

Some commentators have noted linguistic discrepancies between the Arabic text and other language versions of the CISG.\(^{34}\) At least to some extent, those discrepancies

---

\(^{29}\) Organized by Pace Law School at Pace University, this database can be accessed at http://www.cisg.law.pace.edu/.

\(^{30}\) CLOUT is the UNCITRAL case law database and can be accessed at http://www.uncitral.org/en/case_law.html.


\(^{32}\) El-Saghir, “Interpretation of the CISG in the Arab World,” 371–73.

\(^{33}\) A similar influence took place, for instance, in Brazil and Colombia.

\(^{34}\) El-Saghir, “CISG in Islamic Countries,” 511–12.
have been addressed according to the practice of the secretary general of the United Nations as depositary of multilateral treaties on the correction of translation errors.\textsuperscript{35}

Another frequently discussed issue is that of the perceived discrepancy between the terminology used in the CISG and the national legal terminology. In other words, the commentator does not recognize familiar notions and, therefore, remarks that language differences will create difficulties in implementation of the convention. Although this issue is common to all official CISG texts, the matter is possibly more complex with respect to the Arabic language because of the limited awareness of CISG terminology in Arabic. Hence, reference to domestic notions, often indicating different concepts with the same Arabic term—or using different Arabic terms to indicate the same concept—is frequent when commenting on the CISG.

The linguistic discrepancy between the CISG and domestic notions is intentional. The drafters of the CISG adopted terminology that had no specific meaning in any given national legal system as a way to prevent the interpretation of the CISG through preexisting, similarly named domestic notions (the “homeward trend”).\textsuperscript{36} The CISG should be interpreted in light of the principles contained in its article 7. The fact that the CISG brings a terminological rupture to existing legal notions should be welcome.

Strategies for Promoting the CISG in States Influenced by Islamic Law: Explaining Benefits and Ensuring Ownership

The analysis of the relationship between the CISG and Islamic law has not highlighted any major argument for preventing a broader participation of states influenced by Islamic law in the CISG. In this section, we will explain the reasons for supporting that broader participation.

Several arguments are usually put forward to promote the adoption of the CISG. Those arguments are based on the reduction of transaction costs associated with the adoption of a modern text that is able to balance the interests of all parties.\textsuperscript{37} The reduction of transaction costs would translate into lower prices of


imported and exported goods. Thus, final users and consumers could receive more value for their money, and exporters could be more competitive in global markets.

The CISG provides parties to the contract for a sale of goods with a uniform and easily accessible law that applies to all cases unless contractual parties decide otherwise. This aspect is particularly important for cases in which parties have limited access to qualified legal advice during the negotiation of a contract, as is often the situation when micro, small, and medium-sized enterprises are involved. Promotion of such enterprises may be particularly important for countries committed to diversifying their economies, for instance, to reduce dependency on export of commodities.

Moreover, the availability of a neutral text may prevent (a) the imposition by the stronger contractual party of its national law as the law of the contract or (b) the choice of the law of a third country as the law of the contract. Such outcomes are less desirable because, in both cases, at least one party (in the latter case, two) will have to accept a law it does not know.

In addition, the mechanism to determine the applicability of the convention under article 1 of the CISG greatly simplifies the search for applicable law when no choice of law has been made in the contract. Article 1 also minimizes the possibility, in the determination of the applicable law, of divergent results that proceed from the application of different private international law rules on the basis of the lex fori.

In its substance, the CISG endorses the principle of conservation of the contract (i.e., favor contractus). The principle aims at minimizing economic losses in case of partial nonperformance by upholding the effects of the valid parts of the contract to the maximum extent possible. Moreover, the CISG contains a comprehensive and carefully balanced system of contractual remedies for promoting cooperation between buyer and seller in addressing any lack of performance. This approach is particularly effective in minimizing economic losses when applied to long-distance transactions; similar mechanisms may not exist in national law, which is usually designed for short-range transactions.

In particular, the CISG can be useful in supporting cross-border supply-chain operations, which represent a prominent feature of the global economy. Indeed, sales of goods constitute a fundamental building block of those supply chains, which typically span over several jurisdictions. The availability throughout the chain of an applicable law with provisions that are easily ascertainable by all parties facilitates significantly proactive supply-chain management.

The nonhegemonic nature of the CISG, which is reflected in the prevalence of party autonomy, ensures that existing usages and practices, including those typical of commodities trade, are not displaced by the adoption of the CISG. In other
words, economic operators that are not sufficiently protected under the law and are economically vulnerable will get adequate legal support, but operators who have already found their ideal contractual setting will not be affected.

The recent accession of Bahrain to the CISG warrants further considerations. Bahrain is currently engaged in building a modern legal system with the purpose of supporting not only cross-border trade but also the provision of legal services, particularly in the field of alternative dispute resolution. A modern legal market may bring significant economic benefits to Bahrain. Legal services providers typically focus on arbitration. However, Bahrain is becoming increasingly aware of the importance of offering additional services, such as those related to contract management. Professionals already familiar with the provisions of the CISG will have an advantage in offering such services.38

Additional important benefits relate to linguistic aspects. The text of the CISG is widely known, and numerous books and articles that comment on it are readily available in several languages. Thousands of decisions regarding the CISG have been collected and are often available at no cost. The CLOUT database, for example, provides abstracts of many of those decisions in Arabic. The amount of available information on the CISG is greater than the available text on most, if not all, of the national legal systems of countries influenced by Islamic law.

The previously mentioned arguments support the broader adoption of the CISG as a treaty. Another set of equally strong and valid arguments pertains to the impact of the CISG as model legislation that introduces modern elements in contract law. Indeed, the adoption of the CISG may bring new perspectives in a legal system and have a positive effect on the development of national law. It is not unusual for a jurisdiction to adopt the principles and the provisions of the CISG at the domestic level after having tested them for some time at the international level. Such was the case in China and appears to be the case in Japan.

A final argument for broader adoption is that the CISG offers an ideal starting point for regional legal unification. States that are already cooperating in regional organizations, such as the Gulf Cooperation Council, might wish to further enhance their economic interaction. In doing so, they should consider that the CISG could operate as the common sales law at both the regional and the global level. Regional legislative projects should (a) leverage on the CISG as a starting point; (b) consider integrating it with other global texts, such as the UPICC; (c) and carefully ensure compatibility between various levels of legislation.

However, adoption of the CISG is not sufficient for ensuring ownership of the text. In particular, more needs to be done to promote awareness and effective use of the CISG among Arabic-speaking traders, legal practitioners, and academics.

One promising suggestion for such promotion is the preparation of a CISG commentary in Arabic. Distinguished Arabic-speaking experts belonging to different states (not necessarily states that are already CISG parties) could illustrate the various articles of the CISG. The drafting exercise would require coordination and cooperation among the authors, which would further increase interaction in the CISG Arabic-speaking community. The commentary could be approved by the consensus of all authors and thus acquire a highly regarded status. The result would be a useful tool for guidance in all Arabic-speaking jurisdictions. The preparation of the commentary could also provide an opportunity to search for, comment on, and disseminate throughout the international community any further CISG-related decisions that are rendered in Arabic. Ideally, such an exercise should lead to the establishment of a robust network of observers and reporters, so that future decisions could be promptly summarized and included in case law databases and other compilations, such as the UNCITRAL Digest of Case Law on the CISG.39

Academics can play a critical role in promoting awareness of the CISG.40 The CISG is not yet widely taught in the universities of states influenced by Islamic law, especially as a separate topic. A particularly effective manner of promoting CISG awareness is by means of arbitral moot courts. Fortunately, the Annual Willem C. Vis Middle East Pre-moot has been organized since 2011, with ever-increasing success. The participation of teams from states influenced by Islamic law should be further encouraged by organizing more events and by ensuring that participation in those events is as broad as possible. Indeed, the available resources for legal education in those states may vary dramatically, but educational needs are similar; solidarity could greatly assist in filling financial gaps.

**CISG and Uniform Law in the Broader Context of the Dialogue with Islamic Law**

Policy considerations are needed to complete the discussion on the relevance of the CISG in states influenced by Islamic law. Increased familiarity with and use of the CISG will promote steadier participation of those states in drafting, adopting, and implementing new uniform law standards. Increased participation will ensure that the views and needs of Islamic commercial lawyers are kept in line with their needs.

outstanding mercantile tradition and in consideration of global codification efforts. States influenced by Islamic law are not particularly active in drafting uniform texts, and a contribution from them akin to that provided during the preparation of the CISG is rare. Unfortunately, such limited engagement may lead to an increasing separation between uniform law and Islamic law precisely when Islamic commercial law is gaining increasing importance, especially with respect to Islamic financing.

Much of the needed additional engagement may be obtained by better coordinating existing resources or by assigning additional ones. For instance, the UNCITRAL Secretariat does not have any Arabic-speaking legal officers because of a number of problems, including staff limitations. This issue necessarily affects UNCITRAL’s ability to understand and engage the legal systems influenced by Islamic law. As UNCITRAL is implementing a new strategy that focuses on regional centers, states influenced by Islamic law might be interested in hosting such implementation, thereby significantly contributing to the dialogue between uniform law and Islamic law. This experience would give UNCITRAL the opportunity to spearhead new initiatives, such as those previously mentioned.

Better mutual understanding will help dispel doubts about the compatibility between Islamic law and the methods for producing uniform law standards. The discussion about the relation between Islamic law and international legal standards is only now starting, and the time has come to begin discussing uniform law in the context of the joint global effort to pursue the rule of law in commercial transactions.

---


43 A recent initiative calls, correctly, for the use of the comparative method in promoting commercial law reform in Arab states. See Philippe de Méneval, “Réformer le droit commercial dans les pays arabes: Développer un partenariat avec la Banque mondiale,” *La Semaine Juridique*, no. 51 (2013): 2358–60. One hopes that due attention will also be given to recipients’ ownership and the inclusion of local views and needs.
The Role of the UNIDROIT Principles in Harmonizing Rules of Contract Law

The Draft OHADA Uniform Act on Contracts Inspired by the UNIDROIT Principles

Marcel Fontaine*

The launch of the Arabic translation of the 2010 edition of the UNIDROIT Principles is a major event. The contribution I would like to offer relates to my experience in a project that aims to harmonize the general law of contract between the African countries that are members of the Organization for the Harmonization of Business Law in Africa (OHADA). The UNIDROIT Principles were chosen as a model for this project. So far, the project has not been adopted, for reasons I will explain. However, during its elaboration and in the debates that followed its submission, the project has raised several fundamental issues about retaining the UNIDROIT Principles as a model, some of which could be of interest to Arab countries.

I will successively deal with (a) the UNIDROIT Principles as a model for legislators, (b) OHADA, (c) the conception and elaboration of the draft, (d) later developments and debates concerning the draft, (e) the basic issues relating to local specificities and the purposes of legislation or harmonization, and (f) the perspectives for the future harmonization of general contract law in OHADA. The conclusion will discuss the extent of the possible relevance of the OHADA experience in the context of Arab countries.

The UNIDROIT Principles as a Model for Legislators

The preamble to the UNIDROIT Principles enumerates some possible uses of the instrument. The last paragraph states that the principles “may serve as a model for national and international legislators.”

* Professor Emeritus Catholic University of Louvain, Belgium
The UNIDROIT Principles have served as a model in many instances. Several national legislators have used the principles as one of their sources of inspiration for the reform of their domestic laws of contract. For example, even before the publication of the first edition in 1994, draft texts of the principles were used in the preparation of what would become, in 1995, the new Civil Code of the Russian Federation. The UNIDROIT Principles were also chosen in later years as a model for new civil codes enacted in Estonia, Lithuania, and Hungary. The principles served as an important reference in the reform of the German Civil Code, which entered into force in 2002. More recently, the principles have inspired several provisions of some of the drafts under discussion, which could lead to a reform of the French Law of Obligations.

The Chinese Contract Law of 1999 was also influenced by the UNIDROIT Principles, as were projects of modernization of contract law in Iran, Pakistan, Turkey, and Mongolia. Drafts for the revision of article 2 of the U.S. Uniform Commercial Code referred to several provisions of the Principles.1

Because of the UNIDROIT Principles’ worldwide influence on legislation, OHADA decided from the outset that its draft of a uniform act on the law of contracts should also take inspiration from the Principles.

OHADA

OHADA was created by the Treaty of Port-Louis on October 17, 1993 (revised by the Treaty of Quebec on October 17, 2008). OHADA is an international institution that promotes law harmonization between its member states.

The treaty is open to all African countries belonging to the African Union, as well as to other African countries that receive the unanimous agreement of OHADA member states. Seventeen countries are now OHADA members: Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Comoros, Côte d’Ivoire, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea (Conakry), Guinea-Bissau, Mali, Niger, the Republic of Congo (Brazzaville), Senegal, and Togo. The working languages are English, French, Portuguese, and Spanish. Since most members were former French colonies, French still is the dominant language.

The organization has a defined institutional structure. Its political branches include the Conference of Chiefs of States and Governments, the Council of Min-

---
isters, and the Permanent Secretariat (based in Yaoundé). Its judicial branches include the Common Court of Justice and Arbitration (located in Abidjan) and the Superior Regional School for Magistrates.

By way of appeal, the Common Court rules on the decisions pronounced by the appellate courts of the contracting states in all business issues pertaining to the application of the uniform acts. This feature of the Common Court allows it to render a final decision without reverting the case to national courts and contributes to the development of uniform interpretations of OHADA law.

OHADA has been very active since its creation in 1993. In a period of 20 years, the organization has adopted uniform acts that address general commercial law, commercial companies and economic interest groups, securities, simplified recovery procedures and measures of execution, collective proceedings for wiping out debts, arbitration, accounting systems, road transports, and cooperatives.

Once adopted by the Council of Ministers, a uniform act enters into force after 90 days, without any further initiative from member states. It is directly applicable and overrides any contrary national legislation.

Despite the successful record of the uniform acts’ adoption process, actual application of the uniform texts may be more difficult in regions where social, economic, and political conditions are still precarious.

**Harmonizing the Law of Contracts: Conception and Elaboration of the Draft**

At the Bangui meeting in 2001, the OHADA Council of Ministers adopted a program for further harmonization of business law that covered several subjects, including, ambitiously, the general law of contracts. At the Brazzaville meeting in 2002, the ministers asked the Permanent Secretariat to get in touch with UNIDROIT to discuss the drafting of a uniform act on contracts that would take into account the recent international evolution of the law of contracts, and integrate preoccupations of romano-germanic as well as common law systems. With those concerns in mind, OHADA’s particular interest in the UNIDROIT Principles was understandable.

UNIDROIT offered its cooperation. I had been a member of the working group that had prepared the first two editions of the UNIDROIT Principles and French—the language of most OHADA countries—is my native language. Hence, I was chosen as an expert with the mission of drafting the Uniform Act on Contracts for
OHADA. A first meeting took place in Rome with representatives from OHADA and UNIDROIT to define methods and basic orientations.

Before starting the preparation of the draft, I visited nine of the OHADA member states, where the local OHADA commissions had arranged for me to meet with representatives of the professions mostly affected by contract law, including judges, lawyers, notaries, professors, public officers, and members of trade associations. These interviews enabled me to gather invaluable information on the current state of the law of contracts in the different countries and to understand their perceptions about OHADA, UNIDROIT, and law harmonization in general.

In the course of these preliminary discussions, two principles emerged as the basis of the future draft on the law of contracts. The first principle was that the uniform act should deviate as little as possible from the UNIDROIT model, which already enjoyed broad international recognition. The availability of abundant existing literature and case law on the UNIDROIT Principles would be advantageous to OHADA countries. Another advantage, appreciated by OHADA representatives who did not speak French, lay in the availability of the model in different languages (including English, Portuguese, and Spanish translations). OHADA countries also appreciated the fact that using the UNIDROIT Principles as a model would enable them to participate in a wider movement toward harmonization of general contract law. The UNIDROIT Principles model could also serve as an incentive for neighboring English-speaking African states, where common law prevails, to join OHADA in the future.

The second principle was that the future act, while remaining close to the UNIDROIT model, should nevertheless take “African specificities” into account, particularly those of OHADA countries. The inclusion of such specificities seemed to be a self-evident requirement, but their implementation turned out to be difficult, and some fundamental questions gradually appeared. I will return to this issue later in this article.

After this background work, I began drafting the Uniform Act on Contracts. It consisted of a codification of 224 articles, including an introductory chapter concerning the scope of application of the act and 13 further chapters dealing with the different aspects of the law of contracts (such as formation, validity, interpretation, performance, and non-performance) and certain general matters of the law of obligations (such as plural obligations and prescription).

The influence of the UNIDROIT Principles is evident in the draft for the reasons previously indicated. Many provisions of the draft have been taken word-
for-word from the Principles, or with only slight amendments. An additional justification for the heavy influence of the Principles is that, as a member of the working group that had prepared the first two editions of the UNIDROIT Principles, I remembered the discussion behind each provision and that the final texts had been deemed acceptable by a group of comparative lawyers from different legal systems.

However, the second edition of the UNIDROIT Principles—the latest edition available during the drafting of the Uniform Act of Contracts, still contained a few gaps, which had to be addressed in the draft. Provisions concerning matters such as illegality, nullities, confusion, and conditional and plural obligations (roughly 30 articles out of 224) have been drafted with inspiration from models other than the UNIDROIT Principles, particularly the Civil Code of Quebec.  

I delivered the completed draft of the Uniform Act on Contracts to the OHADA Permanent Secretariat in September 2004, together with an explanatory note.

**Later Developments and Debates Concerning the Draft**

The procedure for the adoption of the Uniform Act of Contracts was launched early in 2005, when the Permanent Secretariat of OHADA submitted the draft to the national OHADA commissions set up in all member states. After collecting the different opinions, OHADA was to have submitted the draft to the Common Court of Justice and Arbitration, along with the opinions and a report from the Permanent Secretariat. The Common Court would then have given its own advice, and the Permanent Secretariat would have finalized the draft for submission to the Council of Ministers for possible adoption.

However, the procedure never reached an advanced stage. Only 2 national commissions out of 16 turned in a report, and no further steps were taken. The project gradually stalled for several reasons. First, OHADA as an institution was then experiencing some organizational and financial difficulties. Second, during this time, voices were being raised against the rhythm of harmonization, which had been extremely impressive during the first 15 years since OHADA’s creation in 1993. A large number of acts had already been adopted dealing with important

---

2 Since then, the third edition of the UNIDROIT Principles has been released, and it now includes provisions on most of the subjects that were missing in 2004. Should the draft Uniform Act of Contracts be considered again within OHADA, the new UNIDROIT provisions should replace the texts inspired by other sources for the sake of coherence.


4 At the time, OHADA had 16 member states. The Democratic Republic of Congo was not yet a member.
matters such as general commercial law, company law, bankruptcy law, securities, accounting systems, and arbitration law. However, actual implementation had been far from satisfactory and met with many obstacles, including problems related to the time and effort needed for adequate formation of the different legal operators and for the assimilation of the new rules. Critics in several countries recommended a pause in the movement—or at least a slowing down of its pace—especially with respect to fundamental matters such as contract law. Third, a major source of reluctance to go forward with the harmonization of the law of contracts lay in the fact that in OHADA, the Common Court of Justice and Arbitration seated in Abidjan is the court of last resort for all matters related to OHADA uniform acts. Whenever a case dealing with an act has to go to the upper level of jurisdiction, it is submitted to the Common Court, which delivers a final ruling on the case. As a result, the national supreme courts are deprived of their jurisdiction in all cases involving uniform acts, and each new act causes additional dispossessions in favor of the Court in Abidjan. Here, too, concerns were especially acute with respect to contract law, a major sector of litigation. Such concerns were raised many times during the preparatory missions, not only by national supreme court judges, but also by local lawyers who had been losing business because of harmonization. Undoubtedly, the Common Court’s exclusive authority in cases involving Uniform Acts played an important part in stalling the process for the adoption of the draft Uniform Act on Contracts. Fourth, the choice initially made by the OHADA Council of Ministers and implemented in the draft to use the UNIDROIT Principles as a model came under criticism when the details of the draft became more public. Adverse reactions came mainly from critics in certain French and African circles who were concerned that the adoption of an act based on the UNIDROIT Principles would mean the abandonment of French legal tradition and its replacement with rules of other origins. This kind of loyalty to French tradition should have been expected. Most OHADA member states were former French colonies, had been subject to the French Civil Code, and had continued in the same legal tradition after their independence—most often with unchanged legislation.\footnote{Only Senegal, Mali, and Guinea (Conakry) have adopted new comprehensive legislation on the law of obligations, but even this new legislation stayed firmly within in the French tradition.} Furthermore, many African lawyers from the region had been educated in French law faculties.

The issue of maintaining or moving away from the French model had been discussed during the preliminary interviews with lawyers from nine OHADA member states. In general, the lawyers had not opposed the change, especially in consideration of the advantages of endowing the OHADA countries with a modern law of contracts based on an internationally recognized model. However, when we asked
more specific questions about some of the consequences of abandoning the French model, such as eliminating the notion of “cause” in the law of contracts, we saw that the change could bring some resistance.

Reactions, of course, varied in interviews with lawyers from OHADA member states with different legal traditions—Spanish law in Equatorial Guinea, Portuguese Law in Guinea-Bissau, and common law in the English-speaking part of Cameroon.⁶ In such states, the departure from the French legal tradition (which had occasionally caused some difficulties with earlier uniform acts) raised fewer objections than in French-speaking regions. Still, specific questions generated some hesitation: lawyers in the English-speaking part of Cameroon were indifferent to the absence of “cause” in the UNIDROIT model but were disappointed to hear that the notion of “consideration” was also absent from the model.

We had to point out, especially to lawyers who practiced civil law, that the change from their tradition was not a step toward submission to common law. This point was especially sensitive because during that period the first Doing Business reports of the World Bank were drawing outrage in several civil law countries—especially France—because they seemed to proclaim the alleged superiority of the common law over the civil law in terms of economic efficiency.⁷ It was necessary to explain that the UNIDROIT Principles belong neither to the civil law tradition nor to the common law tradition; they were a new product based on rules that had taken their inspiration from different sources and were considered to be acceptable by lawyers from both systems.

Mere resistance to change can only partially explain the initial opposition encountered by the draft Uniform Act on Contracts. Some of the opposition came from the fact that, if adopted, all lawyers dealing with contract law in the member states would have lost the advantage of their earlier experience and would have had to reeducate themselves to the new legal system. Nonetheless, most believed that the effort was not insurmountable and were prepared to accept the challenge, understanding the benefits of changing to a more modern and competitive legal set of rules.

However, a final issue remained: the degree to which local specificities should be taken into consideration. I will now discuss this issue in the larger context of identifying the objectives undertaken by the harmonization efforts.

---

⁶ At the time, the Democratic Republic of Congo, where the Belgian legal tradition prevails, was not yet an OHADA member state.

The Role of the UNIDROIT Principles in Harmonizing Rules of Contract Law

The Issue of Local Specificities and the Purposes of Legislation or Harmonization

Although at first it seemed self-evident that a uniform act on the law of contracts for the OHADA countries should take African specificities into account, this aspect turned out to be one of the most challenging.

The first problem was to identify what was meant by African specificities. During the preliminary interviews, this was the first question asked to the lawyers but many of them could not provide a clear answer. The dean of a law school promised to set up a commission to find out what such specificities could be, but nothing ever came out from such endeavor. When the lawyers provided an answer, they sometimes referred to (a) traditional customary practices; (b) more general traits of the African environment, such as the high level of illiteracy and the weakness of the legal culture; or (c) the legal tradition imported by colonization. All three matters deserve special attention and their respective weights must be examined separately when drafting harmonized texts.

Attempting to take local customs into consideration is no easy task in the context of law harmonization in an area as vast as the one covered by OHADA. The first task is to find out about customs relating to contracts; many studies have been made and are available in literature, but they are usually case studies of a particular region. The way a certain type of transaction is traditionally agreed on and performed in Mali is probably different from parallel customs in Gabon. Oftentimes, important differences arise even within the same country. If a law of unification or harmonization for the 17 OHADA countries intends to take traditional customs into consideration, it cannot limit itself to the local customs of one particular area. Only more general traits can be taken into account, and such traits also have to be determined. The very purpose of harmonization is to eliminate or attenuate differences and including all local specificities would run counter to that objective.

Some aspects of the African environment are common or widespread in OHADA member states. The level of illiteracy is usually high, and the legal culture is relatively weak. These aspects are certainly relevant in the context of law harmonization.

Illiteracy obviously has to be taken into account when dealing with form requirements (e.g., contract formation, evidence, or the different types of notifications that can be required in various circumstances, such as termination for breach or assignment of claims). In Africa, witnesses play an important part not only in customary practice but also under existing legislation. However, matters of evidence were not to be dealt with in the draft, because OHADA then envisaged
that there would be a separate act on evidence. With respect to illiteracy, it was apparent that an act inspired by the UNIDROIT Principles would not encounter such problem, as the Principles consistently avoid formal requirements involving the written form.\textsuperscript{8}

The relative weakness of the legal culture is a more challenging issue. The main problem is the low level of public awareness that legal rules govern private agreements and can be used to resolve disputes. This low public awareness is associated with a widespread ignorance of the existing law coupled with the severe shortcomings of the judicial systems in many countries, at least at the lower levels. Such handicaps, however, cannot be fixed by the reform of a particular field of law. Admittedly, an effort could be made to use a relatively accessible style of legal drafting (indeed, the UNIDROIT Principles are fairly good in this respect), but the text of a law cannot be overly simplified. For the most part, such problems can be solved only at a much more general level, such as by initiatives to improve education (especially concerning the role of law and legal institutions in society) and by efforts to raise the judicial system to desirable levels of competence and efficiency.

Another approach advanced was to consider “local specificities” not as original African traits, but as legacies of the legal systems currently in place in most OHADA countries (i.e., those inherited from the former colonial powers—in most cases, France). Some of the hostile reactions to those parts of the draft that entailed a painful departure from the “traditional” legal environment were due to that approach. (Such reactions are exemplified by passionate discussions about the envisaged disappearance of “cause” from the law of contracts). This rather unexpected interpretation of African specificities has its merits,\textsuperscript{9} but it fails to recognize that other legal systems are also present in the OHADA member states (Spanish, Portuguese, and Belgian law, as well as common law in English-speaking Cameroon). It is also incompatible with the choice of the OHADA Council of Ministers to use the UNIDROIT Principles as a model for the Uniform Act on Contracts.

The underlying question however, remains: what is the ultimate goal of the envisaged harmonization of the law of contracts? Or, in other words, for whom and for what purposes are the future rules to be designed?

The issue was raised during the discussions on the scope of application of the future act. The OHADA deals, in principle, with the harmonization of business law (the initials \textit{DA} in \textit{OHADA} stand for \textit{droit des affaires}—business law). This objective was clear in the case of the uniform acts adopted in matters such as company

\textsuperscript{8} See, for example, UNIDROIT Principles, articles 1.2 (“Form”) and 1.10 (“Notice”).

\textsuperscript{9} Indeed, one person interviewed strongly welcomed the perspective that allowed, at long last, the legal system imposed by the colonizing country to be discarded.
or bankruptcy law. However, other acts (e.g., the uniform acts on secured transactions, recovery procedures, and arbitration) have extended their scope of application, making no distinction between civilian and business matters. Was the future act on contracts to deal only with business contracts or with contracts in general? Would it address both private and commercial contracts? Although some would prefer an act reserved for business contracts (in particular, with a view of limiting the transfer of competence from the national courts to the OHADA Common Court of Justice in Abidjan), most people, including me, favor the solution of having a single act for all contracts, irrespective of their private or commercial nature.

- Interviewees favoring a single law quoted several reasons. First, having two separate contract laws would cause problems in delimiting their respective areas of competence, especially in relation to mixed contracts between retailers and consumers. Second, most people considered the debate on commercial versus noncommercial contracts to be outdated. Codes or laws covering the full range of civil and commercial obligations already existed in several countries, such as Italy, Mali, Senegal, and Switzerland. The main argument was that there was no general theory of commercial contracts; the only general theory of contracts was enshrined in countries’ civil codes, which served as a common core for private law as a whole. A single act would serve to modernize the civil codes. Should this unified solution prevail, its impact on the issue of African specificities cannot be underestimated. Civilian transactions are apt to be heavily influenced by local common practices. Business transactions are, by nature, more exposed to outside influences, and they have often developed their own common practices. This contrast between civilian and business transactions adds an element of complexity to the identification of the specificities which represent and additional obstacle to the process of harmonization.

- The issue of the ultimate goal of the harmonization of the law of contracts was also discussed was when interviewees where asked to give examples of local specificities (the question was sometimes put in more concrete terms: “If I buy fruit on the Bamako market, which original rules or practices could apply to the transaction?”). The most frequent reaction was one of perplexity. The second most common response was that local specificities should have no effect on the future uniform act. Many interviewees believed that OHADA countries needed new, harmonized legislation, not for governing transactions on the Bamako market, but for attracting investors and for enabling African businesses to engage in globalized international trade with the support of a modern legal background.
These responses highlight the importance of defining the intended purposes of harmonization. Obviously, the rules will not be drafted the same way if they are meant to satisfy the needs of actors in local transactions or if they are drafted with the intent of attracting investors and helping firms engage in international trade. If the latter objective is privileged, strictly local specificities may not be taken into consideration (apart from the fact that the very idea of harmonization is incompatible with such an approach).

Furthermore, sometimes, local uses and peculiarities are taken into consideration, not for the purpose of incorporating them into the proposed rules, but to remedy the problems they may cause or even to eliminate them. In the discussions concerning evidentiary rules, for instance, some individuals recommended using as few form requirements (e.g., the intervention of notaries) as possible to take the high level of illiteracy into account. Others, however, were of the opinion that such requirements should be widely used to protect the illiterate weaker party. Current debates about the importance of the informal sector in Africa also reveal that a main desire is to encourage more movement to the formal sector, which would involve modifications to the current ways of doing business. In light of this concern, steps such as simplifying formal requirements and reducing costs to set up businesses are not meant to make life more comfortable for operators in the informal economy but, rather, to induce them to leave the informal sector and come under the control of regulations, with their attached benefits. Another relevant issue is that of corruption, which is very widespread in OHADA countries, as, unfortunately, in most parts of the world. To the extent that legislators and regulators consider corruption, it can only be for the purpose of curbing it.

If the main purposes of OHADA’s efforts to harmonize laws are determined to be to attract investors and to strengthen the position of African firms engaged in international trade, then local specificities, assuming they are identified, should be taken into consideration only in a limited way. This consideration, of course, raises new questions about the proposed choice to apply the future uniform act to civilian as well as to business contracts. Some of the interviewees gave the partial answer that the existence of a legislation adapted to the standards of contemporary international business would not affect practices on the Bamako market. Local actors would continue to follow their own traditions.

In fact, article 1/8 of the draft, which was inspired by article 1.9 of the UNIDROIT Principles, would have that effect:

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) The parties are bound by a usage that is widely known to and regularly observed by parties to contracts of the same nature except where the application of such a usage would be unreasonable.

The relevance and importance of such a provision in the context of the local specificities issues should not be underestimated.

Perspectives for the Future Harmonization of General Contract Law in OHADA

The procedure for adopting the draft OHADA Uniform Act on Contracts, launched in 2004, has not been pursued, and it is unlikely that it will be resumed. However, the need to harmonize the general law of contracts in the region will continue to be felt. Hence, sooner or later, OHADA can be expected to launch a new project.

The Council of Ministers, however, is currently engaged in another direction. Given that harmonizing the general law of contracts was considered to be an overly ambitious project at this stage, the council decided in 2011 that, for the time being, new uniform acts should deal with particular kinds of contracts (such as contracts of leasing or factoring), and some of these projects have been launched. The council’s decision, however, may not be wise. Some specific kinds of contracts are already covered by existing acts (e.g., contracts on commercial leases, sales, and agency in the Uniform Act on General Commercial Law), and the difficulties in implementing unified particular rules are apparent when each member state still applies its own general law of contracts. Such difficulties can only increase with the multiplication of specific regulations.

Outside factors also tend to support the prediction that the harmonization of general contract law will again be considered in OHADA. In the 10 years since the draft was elaborated, many developments have occurred in other parts of the world that reveal the increasing relevance of such a project. In some East Asian countries, Principles of Asian contract law have been drafted. In Europe, efforts begun with the drafting of the Principles of European Contract Law (similar to the UNIDROIT Principles, but devised in the narrower context of the European Union) and continued in the so-called Draft Common Frame of Reference have led to a 2011 document, the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. This proposal seems to have some chance of being adopted in the near future. Even though the proposal is centered on sales contracts, it incorporates many rules of what could become a general law of contracts for the European Union. In Eastern and Southern Africa, discussions are also taking place about the possible harmonization of contract law.
On the other hand, some important recent developments have arisen concerning the UNIDROIT model used for the OHADA draft. The influence of the UNIDROIT Principles continues to increase in many parts of the world, especially since the release of the third edition of the UNIDROIT Principles in 2010, with additional chapters filling the largest remaining gaps. The present conference illustrates the importance of the event, and the rapid publication of the Arabic translation confirms the international relevance of the Principles, as is also testified by the number of countries that have used the Principles as a model for reforming their law of contracts. France itself has undertaken to modernize its law of contracts, and the two successive projects prepared by the French chancellery have taken inspiration from the UNIDROIT Principles. This development is interesting in light of the previously mentioned fear that an OHADA draft on contracts inspired by the UNIDROIT Principles would represent a break from the French tradition.

Considering all these recent developments, if OHADA were to resume its project to harmonize the general law of contracts, the draft of 2004 could still be a relevant reference, although it would have to be revised. For the sake of coherence, the new rules introduced by the 2010 edition of the UNIDROIT Principles should replace the other rules on identical issues included in the original draft. However, even though the adoption procedure has been interrupted, the draft has generated many comments: it has been discussed at several conferences, has inspired many publications, and has been the subject of several doctoral theses. Such comments, often consisting of useful critical observations and suggestions, should naturally be taken into consideration. More recent contract legislation that has developed around the world should be examined, especially the recent proposals for reforming the French law of contracts. Also, the general structure of the draft could be improved. Drafters will have to decide the scope of application of the new act—whether it would extend to all contracts or only commercial contracts.

OHADA will have to undertake a substantial amount of work, but harmonizing the general law of contracts ought to be a priority and should replace the current emphasis on drafting multiple uniform acts dealing with individual contracts without the support of basic principles.

Conclusion

What effect do all the recent developments in contract law legislation have on Arab countries, especially in light of the Arabic translation of the 2010 edition of the UNIDROIT Principles? The story I have relayed here mainly concerns one
possible use of the UNIDROIT Principles: using them as a model for legislation—in particular, for the law of contracts between the 17 OHADA member states. The experience of OHADA, however, can serve as a source of discussion regarding the use of the Principles as a model for reforming the contract law in individual countries and the use of the Principles as the applicable rules for private contractual agreements.

There are specific situations within the OHADA context that are not present or relevant in other parts of the world, such as the issues related to the transfer of competence to the Common Court of Justice and Arbitration. However, the advantages of using the UNIDROIT Principles as a model have universal relevance. The same can be said about the need to consider local specificities, an issue that cannot be disassociated from the process of defining the purposes of the envisaged law reform of unification.

For Islamic countries, the issue of local specificities will be heavily influenced by the question of the compatibility of the UNIDROIT Principles with the principles of *sharia*.

Although Islam is the dominant religion in many OHADA member states, Islamic legislation and local specifications were only briefly mentioned by the numerous interviewees I met with in Africa when preparing the draft. Does this relative silence mean that the UNIDROIT Principles raise no major difficulty as a possible model for law reform in Islamic countries? I am sure this question will be discussed further as Islamic countries look to harmonize their laws, and I am looking forward to the debate.
Mandatory Rules as Limitations on Freedom of Contract in the UNIDROIT Principles of International Commercial Contracts

Henry Deeb Gabriel*

In this paper I suggest that, despite the restrictions in the UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts on freedom of contract by the applicability of mandatory rules, the Principles warrant consideration by parties to an international contract because the Principles provide a balanced and transparent set of rules that avoid the widely varying standards of contract formalities, performance requirements and remedial structures that may exist in other legal systems.

The UNIDROIT Principles recognize freedom of contract and party autonomy. These rights are restricted, however, by otherwise applicable mandatory rules of law. Moreover, even absent the express provision in the principles on mandatory rules,¹ the mandatory rules would inevitably take precedence over the principles because the principle of freedom of contract does not generally provide for the exclusion of mandatory rules.

Because the UNIDROIT Principles are most likely to be used in conjunction with arbitration, this restriction on freedom of contract may be minimal if the arbitration clause is properly drafted. Although in a judicial proceeding the agreement is generally governed by the lex fori (the law of the place where the court sits), in an international commercial arbitration, the law is often governed by the lex arbitri (the law of the place of the arbitration as determined by the parties). Thus, with thoughtful planning, parties can maximize the effectiveness of the UNIDROIT Principles by minimizing the mandatory rules that would otherwise govern the agreement by choosing the lex arbitri most favorable to the transaction. By doing

* Professor of Law, Elon University; Member of the Working Group and Chairman of the Editorial Committee of the 2010 UNIDROIT Principles of International Commercial Contracts; Member of the UNIDROIT Governing Council.

¹ UNIDROIT Principles of International Commercial Contracts 2010, article 1.4.
so, the parties may be able to avoid some of the limitations of domestic law that are counter to the expectations of contracting parties in international commerce.

I do not intend to suggest that anything is inherently wrong with mandatory rules. In fact, they usually embody sound social policies. The problem with mandatory rules, from an international transactional perspective, is the possibility of uncertainty about the rights and obligations of the parties that enter into the agreement. This uncertainty makes it difficult to counsel clients and draft agreements that accurately reflect the respective obligations if the parties have a dispute. Moreover, the mandatory rules of a specific jurisdiction may not reflect the parties’ expectations in an international commercial transaction.

The Principles of International Commercial Law: What They Are and Where They Come From

The UNIDROIT Principles are the product of the International Institute for the Unification of Private Law. UNIDROIT was set up in 1926 as an auxiliary organ of the League of Nations. Following the demise of the League of Nations, the organization was reestablished in 1940 on the basis of a multilateral agreement. UNIDROIT is an independent intergovernmental organization. Its purpose is to examine ways of coordinating the private law of states and to prepare gradually for states’ adoption of uniform rules of private law. UNIDROIT’s member states are drawn from around the world and represent a variety of different legal, economic, and political systems.\(^2\)

The UNDROIT Governing Council approved the project to draft the Principles of International Commercial Contracts in 1971, but a working group was not set up until 1980. The first set of principles was approved in 1994. This document is composed of a preamble and 119 articles divided into seven chapters: “General Provisions” (chapter 1); “Formation” (chapter 2); “Validity” (chapter 3); “Interpretation” (chapter 4); “Content” (chapter 5); “Performance” (chapter 6); and “Nonperformance” (chapter 7). Chapter 6 has two sections dealing with “Performance in General” and “Hardship,” respectively, whereas chapter 7 has four sections: “Nonperformance in General,” “Right to Performance,” “Termination,” and “Damages.”

\(^2\) UNIDROIT has 63 member states: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, the Holy See, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, San Marino, Saudi Arabia, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, the United Kingdom, the United States, Uruguay, and Venezuela.
The Protection Project Journal of Human Rights and Civil Society

The second set of principles was promulgated in 2004. The 2004 principles do not replace the 1994 principles but supplement them with new chapters on “Setoff” (chapter 8); “Assignment of Rights, Transfer of Obligations, Assignment of Contracts” (chapter 9); and “Limitation Periods” (chapter 10), as well as including a new section 2 to chapter 2 on the “Authority of Agents.”

A third set of principles was completed in 2010. The 2010 edition adds new sections on illegality, conditions, restitution in failed contracts, and plurality of obligors and obligees. It also amends some of the sections in the general provisions, the grounds for avoidance, and termination. In addition, some reordering of the principles has been made.

The Advantages of the UNIDROIT Principles

The UNIDROIT Principles may be used in various ways. First, they are designed for international contracts, and they reflect the expectations of international commerce more than most domestic laws would reflect those expectations. In addition, to the extent that a transaction may be governed by other international law, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), the broad scope of the UNIDROIT Principles may be a useful supplement to the other law.

The UNIDROIT Principles could apply as the law of the agreement in several situations. First, they apply when the parties to a contract have agreed that the contract is governed by them. Second, they may apply when the parties have agreed that their contract is to be governed by general principles of law such as

---


4 The only substantive change made from the original 1994 text is an amendment to article 2.8(2) on the effect of holidays occurring during or at the expiration of the period of time fixed by an offeror for acceptance. This section is now a new article 1.12.

5 The American Uniform Commercial Code, for example, is primarily based on American domestic case law, and it reflects a particularly American, if not common law, legal perspective.
the *lex mercatoria* (merchant law). Third, they may apply when the parties have not chosen any law to govern their contract. Fourth, they may be used to interpret or supplement international uniform law instruments or to provide the basis for international commercial contract custom and usage. Fifth, they may be used to interpret or supplement domestic law.

Before looking at any of these particular uses, one must remember that the UNIDROIT Principles were drafted with the goal of providing guidance for international commercial contracts. Embedded in this purpose is the notion that parties to both domestic and noncommercial contracts have different expectations from those that arise in international commercial contracts. Thus, to the extent that an agreement is either a domestic or a consumer contract, the UNIDROIT Principles would probably not be the best model, because both domestic and consumer contracts would normally entail expectations and assumed risks different from those in an international commercial contract. Moreover, any court is unlikely to have a basis for looking outside domestic law in these circumstances. For international commercial contracts, the UNIDROIT Principles can fill this need. In addition to using them to interpret existing rules, they may be the basis for filling gaps that the otherwise applicable international or domestic law does not address. For exam-

---

6. It is unlikely that a court would find this situation specific enough to warrant a choice-of-law clause; therefore, in such a case, the principles would most likely apply only in an arbitration.

7. Absent a choice-of-law clause, a court would inevitably apply the default law of the jurisdiction. Thus, only an arbitration tribunal would likely apply the principles in a case where the parties have not specified the law to govern the transaction. There are three reported arbitration cases in which the tribunal, acting as *amiable compositeur*, chose the principles as the governing law.

8. This use appears to be more theoretical than practical: there are only two reported cites of the principles being used for this purpose. In particular, when the CISG is the governing law, hundreds of cases exist already, interpreting every provision of the CISG, as well as hundreds of article and books exploring its every nook and cranny.

9. There is no reported court decision having done this; however, 15 arbitration decisions have used the principles as a basis to determine international customs and trade usage. Even if the parties do not expressly choose the principles as the governing law of the transaction, the principles can be a source of guidance to courts. In an analogous situation, the American restatements of law, which cover areas of American domestic law, are similar to the UNIDROIT Principles, and American courts have used them widely as a basis for interpreting existing rules of law. For a discussion of the similarities between the principles and the American restatements, see Michael Joachim Bonell, “The UNIDROIT Principles of International Contracts and CISG: Alternatives or Complementary Instruments?,” *Uniform Law Review* 26 (1996): 26–39. See also, Kristen Adams, “The American Law Institute: Justice Cardozo’s Ministry of Justice?” *Southern Illinois University Law Journal* 32 (2007): 173–210.

10. Explaining why the principles might be used as guidance for the interpretation of domestic law, the comments that accompany the preamble to the UNIDROIT Principles state, “Especially where the dispute relates to an international commercial contract, it may be advisable to resort to the Principles as a source of inspiration.” See UNIDROIT Principles, Preamble, comment 6. This comment suggests the limited scope but important possible application of the principles: those cases in which a domestic law is the governing law, but the contract itself is an international contract. The cited cases and arbitral decisions on this point have been limited to circumstances where the principles have been cited either to interpret how the domestic law should apply in an international case or to supplement the findings in the case by the customs and usages of international practice derived from the principles.
ple, because the UNIDROIT Principles of International Commercial Law have a broader scope than the CISG, the principles have been used to resolve questions not addressed by the latter.

In this article, I concentrate on the use of the UNIDROIT Principles as the governing law of a contract by express agreement of the parties. This topic raises the question of why parties might want to choose the principles. Although, as I later discuss, their use is limited somewhat by the application of mandatory rules, what I would like to discuss first is why, even with these limitations, the UNIDROIT Principles provide a preferable choice of law for international commercial contracts.

Balancing Party Expectations in International Commercial Law

For hundreds of years, international commercial contracts have been driven by an implicit lex mercatoria: an international commercial law that is based on the practices and expectations of parties in international trade. These practices have evolved from the practical experience of businesses that reflect how international trade is conducted. Moreover, these business practices tend to be universal and thus not grounded in any particular domestic law. Business parties in international contracts have a broader scope than the CISG, the principles have been used to resolve questions not addressed by the latter. In this article, I concentrate on the use of the UNIDROIT Principles as the governing law of a contract by express agreement of the parties. This topic raises the question of why parties might want to choose the principles. Although, as I later discuss, their use is limited somewhat by the application of mandatory rules, what I would like to discuss first is why, even with these limitations, the UNIDROIT Principles provide a preferable choice of law for international commercial contracts.

Balancing Party Expectations in International Commercial Law

For hundreds of years, international commercial contracts have been driven by an implicit lex mercatoria: an international commercial law that is based on the practices and expectations of parties in international trade. These practices have evolved from the practical experience of businesses that reflect how international trade is conducted. Moreover, these business practices tend to be universal and thus not grounded in any particular domestic law. Business parties in international trade have a broader scope than the CISG, the principles have been used to resolve questions not addressed by the latter.

In this article, I concentrate on the use of the UNIDROIT Principles as the governing law of a contract by express agreement of the parties. This topic raises the question of why parties might want to choose the principles. Although, as I later discuss, their use is limited somewhat by the application of mandatory rules, what I would like to discuss first is why, even with these limitations, the UNIDROIT Principles provide a preferable choice of law for international commercial contracts.

Balancing Party Expectations in International Commercial Law

For hundreds of years, international commercial contracts have been driven by an implicit lex mercatoria: an international commercial law that is based on the practices and expectations of parties in international trade. These practices have evolved from the practical experience of businesses that reflect how international trade is conducted. Moreover, these business practices tend to be universal and thus not grounded in any particular domestic law. Business parties in international

---

11 The major areas of scope in the principles that are not covered by the CISG are limitation periods, assignment of rights and delegation of duties, third party rights, and setoff.


13 UNIDROIT has given a general statement of the reasons to choose the principles:

> There are several reasons for which parties—be they powerful “global players” or small or medium businesses—may wish to choose the UNIDROIT Principles as the rules of law governing their contract or, in case of a dispute, as the rules of law applicable to the substance of the dispute. Except where one of the parties is in a position to persuade the other to accept its own domestic law, parties are usually reluctant to agree on the application of the domestic law of the other. The choice of a “neutral” law, i.e. the law of a third country, to avoid choosing the domestic law of either party presents obvious inconveniences, since such “neutral” law is foreign to both parties and to know its content may require time consuming and expensive consultation with lawyers of the country of the law chosen. The UNIDROIT Principles are a useful alternative to the choice of both the domestic law of one of the parties and the law of a third country. The UNIDROIT Principles provide a balanced set of rules covering virtually all the most important topics of general contract law, such as formation, interpretation, validity including illegality, performance, non-performance and remedies, assignment, set-off, plurality of obligors and of obligees, as well as the authority of agents and limitation periods. Moreover, and even more important, the UNIDROIT Principles, prepared by a group of experts representing all the major legal systems of the world and available in virtually all the major international languages, are designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.

commercial transactions often have these expectations in mind, whether explicit or implicit.\textsuperscript{14}

In addition, in contemporary international trade, a substantial number of trading partners will be from disparate legal systems. These systems have widely varying standards of contract formalities, performance requirements, and remedial structures.\textsuperscript{15}

The UNIDROIT Principles are intended to address both of these concerns. First, the principles are drafted to address the particular needs of international commercial transactions. Moreover, the principles are meant to be universal\textsuperscript{16} and therefore avoid the particular requirements of what may be an unknown foreign legal system.

\textit{Avoiding Legal Parochialism}

Most domestic law is based broadly on either the common law or the civil law. Although both legal families provide ample latitude to craft contractual agreements, counsel who are used to practicing in one of the traditions may be uncomfortable working in the other legal family or even with another domestic law within the same legal family.\textsuperscript{17} The UNIDROIT Principles avoid this problem to a substantial extent by having been drafted to be independent of, rather than to work

\begin{footnotesize}
\begin{enumerate}
\item In many jurisdictions, separate laws govern domestic and international arbitrations in recognition that the expectations of the parties differ, depending on whether the transaction is domestic or international.
\item See, for example, UNIDROIT Principles article 2.1.1, which provides that a “contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.” The import of this provision is clear: if the parties have begun or completed performance or made substantial preparations for performance, a contract will be assumed. In other words, when the parties act as if they have a contract, formalities of formation are not necessary.
\item Of course, one of the potential drawbacks of a universal set of rules is the inability to be too specific on some points. For example, the principles do not attempt to define \textit{commercial}. Any attempt would have resulted in failure because the domestic standards that delineate between commercial and consumer transactions are too varied to accommodate.
\item There is a natural tendency to prefer one’s own domestic law, if for no other reason than familiarity. This preference should not necessarily be determinative. For instance, as pointed out by the president of the International Court of Arbitration of the Russian Federation:

A reason which may militate in favor of the wide use of the UNIDROIT Principles is the fact that Russian lawyers and business people do not seem to be as reluctant as their foreign counterparts to contemplate references to the Principles in place of the application of their domestic law on the ground that the former would not confer on them the advantages which parties to foreign trade contracts usually expect from the application of their own domestic law, namely the well-known and detailed regulation of business transactions to which they are accustomed.

\end{enumerate}
\end{footnotesize}
in conjunction with, any particular domestic law or legal tradition. Moreover, the principles assume an international, and not a domestic, transaction and therefore are designed to reflect the expectations of international commercial contracts.

The unified rules of contracts contained in the UNIDROIT Principles avoid a specific problem that could arise if one of the parties is unfamiliar with the intricacies of a specific jurisdiction’s law of contracts in a common law jurisdiction. Specifically, the rules of contract in a common law jurisdiction are typically a combination of both statutory and case law, which creates a potential trap for anyone unfamiliar with the law of a particular jurisdiction. Conversely, choosing the UNIDROIT Principles provides a unified body of rules and interpretations.

The UNIDROIT Principles also avoid some legal concepts and terms that are specific to certain legal families or domestic laws. Thus, for example, in the formation provisions, the principles eschew concepts such as consideration and cause and focus instead on the process of contract formation. Likewise, the principles avoid terms such as warranty, whose meanings are not consistent even among common law jurisdictions, much less between common law and civil law jurisdictions.

**Favoring Freedom of Contract and Party Autonomy**

Consistent with the general expectations of international commercial contracts, the UNIDROIT Principles embody a strong policy favoring freedom of contract and party autonomy. The concepts of freedom of contract and party autonomy are the hallmarks of contract law, and thus the statement of these bedrock concepts in the principles might be thought to add nothing that would not be assumed in an otherwise applicable domestic law. This may not be the case, however, in some developing economies that lack a strong tradition of enforceable contract rights.

---


19 This problem can be particularly daunting in a federal system. Thus, for example, to speak of an American law of commercial contracts is somewhat misleading because commercial law is for the most part state and not federal law. The laws of 50 separate states (and several districts and territories) govern commercial transactions, each jurisdiction with its own contract and commercial law. The same problem exists in Canada and Australia.


21 For purposes of an international contract for the sale of goods, the concepts of party autonomy and freedom of contract are well embedded in the CISG.
particularly where contract and property rights are subject to some level of government regulation and interference.

By choosing the UNIDROIT Principles as the substantive law of the agreement, the parties signal to an arbitral tribunal that they intend the broadest latitude in their allocation of rights and duties. Such rights include the right of the parties to specify with particularity the basis for performance and nonperformance, the standards for default, and the structure of remedies and damages on nonperformance.

**Favoring Contract Validity**

Through various provisions, the UNIDROIT Principles provide a strong preference for contract validity. By choosing the principles, the parties signify their intent to maintain the agreement irrespective of some technical legal impediments.

Significantly, this intent includes the absence of any requirements of consideration or cause as a predicate to formation. The parties thus avoid technical arguments against contract formation after the performance of the agreement has begun.

Reflecting actual business practice, the UNIDROIT Principles also provide for the possibility of open terms: “If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent the contract from coming into existence.”

A particularly important set of provisions, especially for arbitration, are those regarding hardship. By giving the arbitral tribunal the power to adapt the contract or to require the parties to renegotiate the contract, the UNIDROIT Principles encourage the maintenance of the agreement irrespective of changed circumstances that might otherwise force a contract termination. Likewise, in the case of “gross disparity” the principles provide for adaptation to allow the contract to continue under more reasonable terms rather than avoid the agreement.

Another important provision in the UNIDROIT Principles that encourages the continuation of agreements when a breach has occurred is the right of the defaulting party to cure the defect. Because minor breaches are common in major international commercial transactions, this provision prevents the nondefaulting party from avoiding an agreement for minor but curable problems.

---

22 UNIDROIT Principles, chapter 3, section 2.
23 Ibid., article 2.1.14.
24 Ibid., articles 6.2.1, 6.2.2, and 6.2.3.
25 Ibid., article 3.10.
26 Ibid., article 7.1.4.
The UNIDROIT Principles also favor contract validity. Although under some domestic laws a minor breach may give the nonbreaching party the right to terminate the agreement, under the principles, a nonbreaching party can terminate the agreement and suspend its performance only when the breach constitutes “fundamental nonperformance.” This higher standard of nonperformance for termination provides a means to continue the agreement when a minor breach occurs.

**Favoring Trade Usage**

Another important aspect of the UNIDROIT Principles that is consistent with international practice is their encouragement of trade usage as terms to the agreement. Thus, the parties are bound not only to “[a]ny usage to which they have agreed and … any practices which they have established between themselves,” but also “a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned, except where the application of such a usage would be unreasonable.” Importantly, this standard provides an objective basis for trade usage; in other words, not what the parties actually knew, but what a party in that business should have known in international trade. This provides an objective standard that prevents one party from being bound to the subjective understanding of the other party, who might come from another country where the usages are not the same.

Trade usage under the principles includes both usages that define basic contract rules and the underlying substantive obligations. For example, evidence of trade usage may be used to show basic contract rules of formation and the time and order of performance. It may also be used to show the substantive obligations, such as the quality of the contracted goods or services.

**Applying Realistic Treatment of Form Contracts**

An anomaly in contract law is the treatment of conflicting form contracts. In the case of inconsistent forms (such as a purchase order and an invoice), rules have

---

27 See, for example, the American Uniform Commercial Code, section 2-601.
28 UNIDROIT Principles, article 7.3.1. This, of course, is the default rule, and under the principles the parties are free to set any good faith standard for nonperformance that will constitute a breach.
29 CISG, article 9.
30 UNIDROIT Principles, article 1.9(1).
31 Ibid., article 1.9(2).
32 Obviously, if both parties have the same subjective understanding, the parties “had reason to know” what the other party understood. In other words, the principles do not supplant a subjective standard with an objective standard; the objective standard subsumes the subjective standard.
33 UNIDROIT Principles, articles 2.1.6(3) and 2.1.7.
34 Ibid., articles 6.1.1 and 6.1.4.
evolved in accordance with the twin assumptions that (a) parties must actually agree on the terms of the contract and (b) a form with terms that are inconsistent with those of a prior form is a counteroffer.\(^\text{35}\) Thus, many legal systems will treat the last form as the final counteroffer, with performance being deemed as the acceptance. What this approach effectively does is artificially treat the terms on the final form as binding on both parties when clearly the party whose form is not the final form did not really agree to those terms.

The UNIDROIT Principles embody a significant variation from this formation rule for standard term contracts. “Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.”\(^\text{36}\) In the case of standard terms, “Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.”\(^\text{37}\) Thus, when the parties use standard terms, the conflicting terms cancel each other out and do not become part of the agreement. If the terms cancel out so much of the agreement that no basis exists for finding a contract, the agreement fails for lack of assent. In this regard, the UNIDROIT Principles set out rules that reflect those terms that the parties have actually agreed on and, by doing so, limit agreements to those terms that have in fact been agreed to by the parties.

**Embodying Broad Requirements of Good Faith**

The UNIDROIT Principles embody a broad concept of good faith: “Each party must act in accordance with good faith and fair dealing in international trade.”\(^\text{38}\) This seemingly innocuous statement provides a basis to avoid local concepts of good faith and instead emphasize that the focus is on international norms of behavior.

Unlike some common law jurisdictions where good faith is required only in the performance of the contract,\(^\text{39}\) the obligation of good faith in the UNIDROIT Principles covers all aspects of the transaction, including the negotiations and contract formation.

---

35 This is the basic rule of the CISG. See CISG, article 19.
36 UNIDROIT Principles, article 2.19(2).
37 Ibid., article 2.22.
38 Ibid., article 1.7.
39 See, for example, American Uniform Commercial Code section 1-304: “Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.”
The Effect of Mandatory Rules on the Choice of the UNIDROIT Principles

Thus, the UNIDROIT Principles provide a balanced and neutral basis for the expectations of international commercial contracts without injecting the localized expectations embedded in a specific domestic law. The question, though, is whether parties have the freedom to choose the principles solely as the basis of the agreement, or whether the parties will be restricted by the mandatory laws of an applicable jurisdiction that asserts a claim in the outcome of the dispute. In other words, what specifically is the relationship between the principles and mandatory law outside the principles?

First, note that the UNIDROIT Principles expressly address the question of mandatory rules. Article 1.4 states, “Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international, or supranational origin, which are applicable in accordance with the relevant rules of private international law.”

To a significant extent, this section is nothing more than a reminder to parties that freedom of contract does not extend to allow parties to avoid those rules of law that the governing jurisdiction will enforce as a matter of public policy. In other words, the same mandatory rules would apply whether or not this article were in the principles.

Moreover, this limitation applies both when the parties choose the principles as the applicable law and when the parties incorporate the principles as terms to the contract.

---

40 UNIDROIT Principles, article 1.4.
41 This point is noted in article 1.4, comment 1, of the UNIDROIT Principles:

> Given the particular nature of the Principles as a non-legislative instrument, neither the Principles nor individual contracts concluded in accordance with the Principles, can be expected to prevail over mandatory rules of domestic law, whether of national, international, or supranational origin, that are applicable in accordance with the relevant rules of private international law.

42 Ibid., comment 4.
43 Ibid., comment 3. The choice of the UNIDROIT Principles as the substantive law of the agreement may be restricted under some domestic laws. For example, under section 1-301(a) of the American Uniform Commercial Code, the parties’ choice of law is limited to those agreements where the chosen law bears a reasonable relation to the chosen jurisdiction. The specific problem for courts, as a matter of choice of law, is that the principles may not be considered law in the traditional sense because they are not legislative enactments. In a properly drafted agreement, though, this restriction should not prevent the application of the principles if the agreement specifies that the principles are not binding as a choice of law but, instead, are binding as the explicit terms of the agreement itself. This approach is simply the application of the principles as freedom of contract and not as choice of law. This possibility is expressly noted in UNIDROIT, “Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts,” 14–15.
The question is whether the parties can choose a forum or law that avoids the mandatory laws of a specific jurisdiction when those mandatory laws do not reflect the agreement that the parties intend.

I am assuming the following: the parties have chosen arbitration as the means to resolve disputes and have exercised their right to choose the substantive law to govern the agreement by a choice-of-law clause. In that case, what is the effect of mandatory laws? To answer this question, I must first address the question of whose mandatory law.

When the parties expressly choose the application of the UNIDROIT Principles but do not choose arbitration, the role of the courts should be straightforward. Subject to any restriction that the jurisdiction’s law may have on choice of law, including the application of mandatory rules, the court should simply apply the principles. The court will inevitably apply its own mandatory domestic laws (the lex fori) regardless of what other substantive law it would apply as directed by the choice-of-law provision or by its conflict-of-laws rules. Thus, the use of the principles will be limited by the mandatory rules of the domestic law.

The more vexing question is whether the court must apply the mandatory rules of a foreign jurisdiction if the law of that jurisdiction is the law that governs the contract, either by way of a choice-of-law provision or by the applicable conflict-of-laws rules. This question has no universal answer.

44 UNIDROIT Principles, Preamble, comment 4.
45 This is, of course, subject to any mandatory rules that the governing jurisdiction may have that would overrule or supplement the principles. This point is recognized in the principles: “Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international, or supranational origin, which are applicable in accordance with the relevant rules of private international law.” UNIDROIT Principles, article 1.4.
46 See, for example, the European Union (Rome) Convention on the Law Applicable to Contractual Obligations (1980). Article 7(2) states, “Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.” I am assuming that a valid choice-of-law provision exists that directs the court to apply another law than its own and that, under its own substantive law, the court would apply the other law.
47 Such rules would be those rules from which the domestic law does not allow the parties to derogate by agreement.
48 For example, if a conflict existed between article 7.1.6 and the local law on unfair contract terms, the mandatory rules of the local law would apply.
49 Even if the parties choose the UNIDROIT Principles to govern the agreement, the application of the principles will be limited to the scope of the principles, and other legal issues will inevitably be governed by another law.
50 For example, article 7(1) of the Rome Convention provides for the application of the foreign jurisdictions’ laws:

When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied
Not only is there no clear universal answer to the question of applicability of foreign mandatory rules, there is a further complication as to which foreign law would apply in the first place under the court’s conflict-of-laws rules. This latter problem can often be avoided by a choice-of-law clause that specifies the operative substantive law.

Yet even that provision may not suffice, because in addition to the law of the _lex fori_ and the _lex contracti_, the law of another country may apply if that country has a close connection to the contract.

Thus, if the parties were to litigate their international commercial law dispute in a court, the agreement would possibly be subject to the mandatory laws of three different jurisdictions, and significantly, exactly which jurisdictions’ laws would apply would not be clear. Obviously, this situation is not ideal.

Much of this uncertainty can be avoided by choosing arbitration and the place of arbitration. First, we should consider the law of the _lex arbitri_—the place of whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

However, several states that are parties to the Rome Convention, including Germany and the United Kingdom, made a reservation to this provision and are not bound by it.

Just a short list of factors courts have looked to for determining the law of the contract includes the following: (a) the residence or main domicile of the signatory parties, (b) the main place of business of the signatory parties, (c) the state in which the business was incorporated, (d) the state nominated for arbitration proceedings in case of a conflict (lex loci arbitri), (e) the language used to write the contract, (f) the format of the contract (only relevant if the contract format is unique to a state or group of states within the comity group), (g) the currency in which payment for performance of the contract is specified to be made, (h) the nation of registration of any ship involved in performance of the contract, (i) the state where completion of the contract is specified to occur (lex loci solutionis), (j) a pattern of similar contracts involving the same parties, (k) the state where any third parties to the contract are located, and (l) the state where any insurance companies connected with the contract are located.

This concept, for example, is embodied in article 7(1) of the Rome Convention:

> When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and consequences of their application or non-application.

Even among parties to the Rome Convention, this rule is not uniform; Germany, Ireland, Luxembourg, and the United Kingdom have taken reservations from this provision.

Generally, the law in the United States is consistent with the Rome Convention. See, for example, Restatement (Second) Conflict of Laws, section 187(2) (1971):

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied … unless … application of the law of the chosen state would be contrary to the fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.

Of course, those jurisdictions that extend the reach of mandatory rules to those jurisdictions that have a close contact to the contract vary in defining what constitutes a close contact.
Mandatory Rules as Limitations on Freedom of Contract

arbitration. Is an arbitral tribunal obligated to follow the mandatory rules of the place where the award is rendered?

Support is growing for the proposition that in international commercial arbitration there is no lex fori. This proposition, to a large extent, is grounded on the observation that the choice of where to arbitrate is rarely based on the law of that place but is more likely based on the availability of the parties, the evidence, the arbitrators, and an accommodating institution, if the arbitration is an institutional arbitration. Without a lex fori, the only mandatory law will be those mandatory rules that are derived from the law that the parties choose to govern the transaction.

It is here that the parties may be able to limit the application of mandatory rules:

Where, as is the traditional and still prevailing approach adopted by domestic courts with respect to soft law instruments, the parties’ reference to the Principles is considered to be merely an agreement to incorporate them in the contract …, the Principles will first of all encounter the limit of the principles and rules of the domestic law that govern the contract from which parties may not contractually derogate (so-called “ordinary” or “domestically mandatory” rules). Moreover, the mandatory rules of the forum State, and possibly of other countries, may also apply if the mandatory rules claim application irrespective of what the law governing the contract is, and, in the case of the mandatory rules of other countries, there is a sufficiently close connection between those countries and the contract in question (so-called “overriding” or “internationally mandatory” rules).

Conversely, “if the dispute is brought before an arbitral tribunal [and] the Principles are applied as the law governing the contract …, they no longer encounter the limit of the ordinary mandatory rules of any domestic law.” In other words, if the parties choose the principles as the governing law and do not merely use the

---

53 What procedural arbitral law will apply is a separate question. Although this question may be significant in its own right, in this article I focus on the applicable substantive law of the agreement.

54 For example, in Sapphire International Petroleum Ltd. v. National Iranian Oil Company, 13 ICLQ 1011 (1964), the arbitral tribunal noted:

Contrary to a State judge, who is bound to conform to the conflict of laws rules of the State in whose name he metes out justice, the arbitrator is not bound by such rules. He must look to the common intention of he parties, and use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities.

55 See, for example, Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, 5th ed. (New York: Oxford University Press, 2009), 234.

56 UNIDROIT Principles, article 1.4, comment 3.

57 Ibid., comment 4.
principles as terms to their agreement, then the governing law, being the principles, will have no mandatory rules outside the principles.\textsuperscript{58}

Can parties therefore use arbitration to avoid all mandatory rules outside the UNIDROIT Principles? The answer is no. First, as noted by the principles themselves, “since in international arbitration the arbitral tribunal lacks a predetermined \textit{lex fori}, it may, but is under no duty to, apply the overriding mandatory rules of the country on the territory of which it renders the award.”\textsuperscript{59} The main source of arbitral concern, also noted in the principles themselves, is as follows:

In determining whether to take into consideration the overriding mandatory rules of the forum State or of any other country with which the case at hand has a significant connection, the arbitral tribunal, bearing in mind its task to “make every effort to make sure that the Award is enforceable at law” (so expressly e.g. Article 35 of the 1998 ICC Arbitration Rules), may be expected to pay particular attention to the overriding mandatory rules of those countries where enforcement of the award is likely to be sought. Moreover, the arbitral tribunal may consider it necessary to apply those overriding mandatory rules that reflect principles widely accepted as fundamental in legal systems throughout the world (so-called “transnational public policy” or “\textit{ordre public transnational}”).\textsuperscript{60}

This provision effectively leaves the parties with two sources of mandatory legal rules that are not likely to be avoided by the use of the Principles.

First are those principles of transnational public policy that are considered so universal that they cannot be avoided, such as illegality and fraud.\textsuperscript{61} These restrictions on freedom of contract should be understood by both parties irrespective of what other local law might apply and therefore should not raise the concern of surprise that might otherwise arise with the application of the mandatory rules of an unknown jurisdiction. In addition, parties should be encouraged to abide by transnational public policy, and therefore the application of these mandatory rules serves a salutary function.

The second source of mandatory rules that may apply in an arbitration otherwise governed by the UNIDROIT Principles is those mandatory rules that may

\textsuperscript{58} An example where this application may give a different result is the limitation period. If the principles are incorporated into a contract otherwise governed by a domestic law, the domestic law’s limitations will govern. If the principles are the governing law, then the limitation period in the principles will govern, because no conflicting domestic limitation period applies.

\textsuperscript{59} UNIDROIT Principles, article 1.4, comment 4.

\textsuperscript{60} Ibid.

\textsuperscript{61} Other examples of transnational public policy include bribery, smuggling, violation of child labor laws, and illicit drugs.
apply in the jurisdiction of enforcement.\textsuperscript{62} Because arbitrators routinely give consideration to the enforceability of their awards, this is a source of law that arbitrators are likely to consider irrespective of whether it otherwise is within the express terms of the parties choice-of-law clause.

**Choice-of-Law Clauses That Minimize the Limitations Imposed by Mandatory Legal Rules**

To aid parties in use of the principles, in 2013 UNIDROIT promulgated model clauses and a guide for their use.\textsuperscript{63} It is important to consider that these clauses are choice-of-law clauses, not arbitration clauses. As has been discussed, the parties may have the most autonomy by choosing arbitration as the method of dispute resolution, and therefore they should include an arbitration clause in addition to the choice-of-law provision.\textsuperscript{64}

The model clauses are designed to be used for the four major purposes of the UNIDROIT Principles: as the rules to govern the contract,\textsuperscript{65} as terms incorporated in the contract,\textsuperscript{66} as supplementary law to the CISG,\textsuperscript{67} and as interpretive terms to otherwise applicable domestic law.\textsuperscript{68} To use the principles as supplemental or interpretive terms assumes that the parties have determined that they wish a substantive law other than the principles to govern the agreement, and therefore these usages

\textsuperscript{62} See, for example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article 5(2)(b). Thus, for example, irrespective of where a contract may be created or performed or where a dispute may be arbitrated, if enforcement is sought in the United States, it will be subject to the U.S. Foreign Corrupt Practices Act.

\textsuperscript{63} UNIDROIT, “Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts.”

\textsuperscript{64} This point is expressly noted in UNIDROIT, “Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts”, 5:

> Parties choosing the UNIDROIT Principles as the rules of law governing their contract or the rules of law applicable to the substance of the dispute are well advised to combine such a choice-of-law clause with an arbitration agreement. Domestic courts are bound by the rules of private international law of the forum, which traditionally and still predominantly limit the parties’ freedom of choice to domestic laws, so that a purported choice of non-state rules such as the UNIDROIT Principles will be considered not as a choice of law but, rather, as an agreement to incorporate them into the contract. The consequence of this treatment of non-state rules is that they bind the parties only to the extent that they do not conflict with the rules of the applicable domestic law from which the parties may not vary by agreement (for some examples of such “ordinary” mandatory rules of the applicable domestic law.

\textsuperscript{65} UNIDROIT, Model Clauses for the Use of the UNIDROIT Principles of International Contracts, model clause 1.1, 6–8.

\textsuperscript{66} Ibid., model clause 2, 14–15.

\textsuperscript{67} Ibid., model clause 3, 16–19.

\textsuperscript{68} Ibid., model clause 4, 20–22.
are not relevant to our discussion. As has been discussed previously, to use the principles as incorporated terms in the agreement rather than as the operative rules of the agreement leaves the principles subject to the mandatory rules of the law of the forum or of the contract and thereby restricts the principles to some extent. Thus, it is the clauses that provide for the principles as the governing rules of the contract that concern us.

We are provided three model clauses for the UNIDROIT Principles to govern the contract: (a) choosing only the principles to govern the contract; (b) choosing the principles to govern the contract supplemented by a particular domestic law; and (c) choosing the principles to govern the contract, supplemented by generally accepted principles of international commercial law. These three model clauses are likely to achieve different levels of certainty as to what the operative rules of the agreement will be.

The potential problem of designating the UNIDROIT Principles only as the governing law is recognized in the comments to the model clauses: issues outside the scope of principles may have to be resolved, and absent a specific choice-of-law provision that covers this eventuality, the parties will be subject to the uncertain application of conflict-of-laws rules by the arbitrators to determine the applicable law. This situation can be avoided, as noted by the comments to the model clauses, by designating the law that governs those aspects of the agreement outside the scope of the principles.

Of the two options provided—generally accepted principles of international commercial law and a particular domestic law—the greater certainty will come from designating a specific domestic law, given that the concept of generally accepted principles of international commercial law is itself rather uncertain. 69 The application of a specific domestic law, of course, reopens the possibility of mandatory rules under the domestic law; however, these rules are going to be the ones that govern aspects of the contractual relationship outside the scope of the UNIDROIT Principles and therefore do not affect the applicability of the principles and the parties’ expectation that the principles will govern those parts of the agreement within their scope. Both choices, however, at least mitigate the uncertainties of the application of conflict-of-law rules that may lead to an unpredictable application of the law.

Conclusion

Parties cannot arrange their affairs so that they are wholly free from mandatory rules that might impinge on their freedom of contract. However, by choosing

69 In fact, the actual existence of these standards has often been questioned.
the UNIDROIT Principles to govern their agreement, they have the advantage of a neutral set of legal principles that reflects international commercial trade and fully provides for the customs and trade usage of their transaction. Moreover, if they resolve their dispute in arbitration, the parties can limit the effect of otherwise mandatory law and, just as important, limit the possibility of the application of unknown mandatory rules.
The UNIDROIT Principles and the Restatement of the Indonesian National Law of Contracts

Bayu Seto Hardjowahono*

With a population exceeding 250 million in 2015, the Republic of Indonesia is the fourth-most populated country in the world. This vast archipelagic country has always been a multiethnic and multicultural entity: more than 85 percent of its population is Muslim, and the remaining portion is well spread among Catholicism, Protestantism, Hinduism, Buddhism, and other local indigenous beliefs. Indonesia attained its independence from the Netherlands in August 1945 after a 350-year era of colonialism and economic imperialism, followed by a brief occupation by Japan during the last 3 to 4 years of World War II in the Pacific. During the last 75 years of the Dutch colonial period, the government adopted most of the 19th-century legal codifications of the Kingdom of the Netherlands in Indonesia (the Netherlands Indies), including its civil code, criminal code, commercial code, criminal procedural law, and civil procedural law. With these rather intricate legal policies in operation, the Dutch laws and regulations were placed side by side with the existing, diverse traditional indigenous local laws (known as the Adat Law) and with far eastern traditional laws that supported the colonial economic interests of extracting the rich natural resources in the region and then exporting those commodities, mainly to Europe.¹

Book III on the law of obligations of the Indonesian civil code is one of many old laws that continue their role as the main legal source for “modern” contract and tort law practice in Indonesia. Since the nation’s independence, under the transitional provision of the 1945 constitution, this set of legal principles and rules on

---

* Dr. Hardjowahono was dean of the Faculty of Law, 2007–2010 and 2013–2015, and is now a senior faculty member at Parahyangan Catholic University, Bandung, Indonesia.

¹ See articles 131 and 163 of the Netherlands Indies State Regulation of 1925 (Indische Staatsregeling), which segregated citizens in the region into three distinct groups—the Europeans, the Far Easterners, and the Indigenous Natives—and through a complex procedure, subjected each of these groups to a different system of laws and regulations. These colonial legal–political approaches were also responsible for the development of an internal conflict-of-laws system, the echoes of which could still be felt in court decisions addressing “true” private international law issues well after independence.
contracts and torts preserves its place as the primary legal source governing most
domestic business and trade transactions. Hence, when establishing the legal issues
surrounding a concluded formation or the validity and enforceability of contem-
porary domestic and international business and commercial transactions, the legal
profession and the courts rely greatly on the supplementary and noncompulsory
character of the code—particularly the principles of universal application of party
autonomy (article 1320), *pacta sunt servanda*, and good faith and fair dealings
(article 1338, paragraphs 1–3). In other words, the surviving general principles
and rules of contract law within the Indonesian civil code are used to determine the
validity of contracts resulting from modern business transactions, though some of
these principles are hardly recognizable within the code’s framework. Innovative
contracts are considered valid and enforceable if they correspond to the aforemen-
tioned provisions of article 1320 (on validity of contracts based on consensualism),
article 1338 (on the binding character of contracts and the intention of each parties
to be bound), and a handful other articles covering the general principles of con-
tracts (good faith and fair dealings, grounds for avoidance, etc.). This does not, by
any means, imply that such legal inference is incorrect. This is simply to say that
under the basic principles of contracts, the Indonesian general law of contracts
has been developed within an environment of hasty generalizations, where people
fail to appreciate specific issues concerning the protection of the just and valid
expectations of stakeholders in specific economic transactions. As a result, such
protections need to be provided through the enactment of various mandatory laws
outside the codification.²

In the meantime, while practical use of *Adat Law* is diminishing (except in a
few transactions concerning traditional land tenancy and production-sharing enter-
prises in rural communities), many in the legal community hold strong views
regarding the need to revisit and recognize the *Adat Law’s* fundamental principles
on justice and equity, as well as the principle of harmony between individual and
collective interests, as the philosophical basis for future contract law. Another im-
portant development that has progressively gained recognition since the early 21st
century is the introduction of the Indonesian interpretation of Islamic *Syari’ah*
(sharia) principles and rules in some specific economic activities (primarily banking
and insurance).³ Such rules are currently in force and apply under the jurisdi-
cion of a distinctive Islamic Court, which exists alongside the General Court and
specifically handles *Syari’ah* legal issues. Dualism in procedural and substantive

---

² See for example, Government Regulations on Franchising, Laws on Construction Services, Rules of
Government Procurement, Ministry Regulations of Commercial Agency and Distributorship, etc.

³ See the Supreme Court of the Republic of Indonesia, Directorate General for Religious Courts, and
matters in resolving private law issues is, therefore, unavoidable and has caused the country to drift away from legal unification.

Legal reform efforts to develop a new national civil code by enhancing and adding articles within the structure and system of the old civil code began during the 1970s and 1980s. Such projects, however, were eventually discontinued, in most cases probably because of the immense difficulties involved in working out new and nationally acceptable legal principles and rules with regard to the value-laden parts of the civil code (sections on personal status, family and matrimonial affairs, property, and succession). In those particular areas of private law interaction, conflicting multicultural, multiethnic, multisubregional, multireligious, and multipolitical values often came into play. In any case, the disharmonious atmosphere became the generally accepted excuse for abandoning private law reform during the last two decades of the 20th century. As a result, national priority on legal reform policies shifted rather heavily toward enactment of specific laws and rules to sustain the continuously changing macroeconomic and national political sectors. Within this environment, new ad hoc rules and regulations on microeconomic activities were favored and tended to be dictated by immediate market needs (or political interests), thus widening systemic inconsistencies among the rules and regulations.

In late 2012, the National Board for Legal Development, an institution instrumental to the Indonesian Ministry of Justice and Human Rights, eventually set up a small team with the sole responsibility of preparing an academic draft of a new Indonesian national contract law that would replace book III, part V, of the civil code. Given the extreme options of creating an entirely new codification of civil and commercial matters on the one hand and of leaving the legal development on such issues to be dictated by immediate market needs on the other, the team, for reasons that were both legitimate and pragmatic, eventually decided to develop a partial codification, focusing solely on the law of contracts.

From the outset, the team faced the difficult challenge of fabricating a unified and nationally acceptable law of contracts amid the various legal traditions and the extensive contemporary use of antiquated Western legal instruments from the colonial era. The team’s attempt to balance the use of these colonial laws with the urgent need to conform with modern contractual commitments and practices often produced disparate and uncertain results in contractual relations. This problem was exacerbated by the need to adapt the laws to take into account the rapidly growing private and semipublic interactions generated during global economic and business transactions manifested from formerly unknown contractual instruments. All things

4 This path was taken in the Netherlands through the immense but successful task of abandoning the old civil code and creating the new civil code (Het Nieuwe Burgerlijk Wetboek van Nederland).
considered, the team recognized the urgent need for a new and “genuinely national” set of contract law principles and rules that was compatible with the growing number of domestic and transnational business and commercial activities and that would accommodate diverse domestic and sectoral interests. The team’s working objectives were to focus on putting together an innovative rationale for a new representation of the Indonesian law of contracts that would offer the flexibility to deal with ongoing needs in modern domestic and international business transactions and harmoniously accommodate the basic principles of justice, fairness, and reasonable protection of the parties’ and the public’s interests and expectations. Although this path of reform was generally accepted, the team found that it was indeed easier said than done. This short article aims to outline the challenges that must be considered in such efforts. Such challenges, in many respects, go beyond the legal and technical issues, to touch on converging social values and cultural issues.

**Critical Challenges**

Although it is well settled among Indonesian private law scholars that the Indonesian positive law of contracts is simply one part of book III of the existing civil code on the law of obligations, the team nevertheless concentrated solely on structuring academic and legal-political justifications for establishing a new national law on contracts. The assignment was complicated and challenging because some persistent Indonesian general contract practices were greatly influenced by the outmoded civil code, and some international practices reflected the introduction and influence of Anglo-American contract models. Thus, a hesitancy existed to apply a “true” private international law approach to resolving international contractual disputes.

Another important issue that was not comprehensively anticipated by the team during their initial work in 2012–13 was the establishment of the Association of Southeast Asian Nations (ASEAN) Economic Community (AEC), which Indonesia committed to join in 2016 as one of the founding nations. Various consequences and new challenges could be attributed to the establishment of the AEC as Indone-

---

5 See Badan Pembinaan Hukum Nasional, Kementerian Hukum dan Hak Asasi Manusia.


7 With the overall purpose of achieving a single ASEAN market and production base, AEC member countries committed themselves to five core elements: (a) free flow of goods, (b) free flow of services, (c) free flow of investment, (d) freer flow of capital, and (e) free flow of skilled labor. In addition to the above, two essential components were also agreed upon: (a) the priority integration sectors and (b) food, agriculture, and forestry. See ASEAN, “ASEAN Economic Community Blueprint,” ASEAN Secretariat, Jakarta, 2008.
Asia’s membership in the organization required major adjustments to the country’s national trade and economic policies. In response, the current administration put several wide-ranging economic policies in place in the form of regulatory packages. Most of these regulatory changes were aimed at maintaining national economic growth and heightening the country’s economic competitiveness in regional and international trade. They included incentives and deregulations in (a) banking and financial services; (b) exports and imports; (c) capital controls; and (d) mining, oil, gas, and other services. This short article will not deal with these issues; rather, it will touch on essential reforms that would have supported the aforementioned immense national and international economic policies but were disregarded—in particular, legal reform of the national subsystems implementing the law of obligation and private international law. Legal reform initiatives dealing with these fundamental areas, including the team’s recommendations, were stranded in academic drafts. Making things more complicated, the Indonesian reform of domestic and international contract law needed to take into account actual variances of legal traditions and cultures among the 10 ASEAN member countries.8

The essential problems confronted by the team in building a new and genuine national contract law are summarized in the sections that follow.

**Scope of the Reform**

While working to build an entirely new set of national legal principles, norms, and rules on contracts, which was expected to become a subsystem of a larger system of the law of obligations, the team came to consider whether detachment from larger system would be advisable. Attempting a complete overhaul of the larger system of private law would be extremely time consuming9 and eventually counterproductive to the immediate and pragmatic need for contract law reform that would strengthen Indonesia’s role in the world economic market. Once the AEC became operational, the urgency became even more intense. Thus, one of the crossroad questions for the team was whether it should produce a new codified

---

8 From ASEAN’s perspective, the current Indonesian legal system, together with those of Thailand and Vietnam, is greatly influenced by the civil law tradition. Singapore maintains its strong inclination toward the English Law—a major part of Malaysian and Brunei Darussalam legal system developed under the English Common Law—but contains aspects of Islamic Law. The Philippines maintains its civil law tradition combined with Anglo-American legal characteristics, and the remaining legal systems of Cambodia, Lao PDR, and Myanmar have developed within the socialist law tradition. For more information about ASEAN legal systems, see the website of the ASEAN Law Association at http://www.aseanlawassociation.org/legal.html.

9 The recodification process of the Dutch civil code in the Netherlands that resulted in the gradual enactment of the present Dutch civil code (Het Nieuwe Burgerlijkwetboek) took more than four decades and, until recently, was still an ongoing process. See Arthur S. Hartkamp, Marianne M. M. Tillema, and Annemarie E. B. ter Heide, *Contract Law in the Netherlands* (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2011).
law of obligations or simply a partial codification of contract law. The team finally recommended that, all things considered, the latter option was more achievable, although some further complications loomed on the horizon, including, but not limited to, the urgency to redefine the general principles of the law of obligations commonly applicable to contracts, torts, and other noncontractual obligations.

**Sociocultural Concerns**

During numerous research and academic seminars, the team submitted its thoughts and opinions to stakeholders within the legal profession and academia. Strong sociocultural ideas expressed by some of the stakeholders favored the creation of a new system of contract law principles and rules that not only substantively but also philosophically and ideologically would be derived from a modern interpretation of the nation’s worldview that recognized the ideology as expressly written in the preamble to the 1945 constitution. Other stakeholders reasoned that the new law should also take the Syari’ah economic law and the Adat Law principles on contracts into account.

These different viewpoints left the team with a perplexing situation to be resolved while creating a workable system of contract law compatible with the demands of modern practice of international commercial contracting. The team was, in due course, driven to recommend a complete restatement of contract law, thereby aiming to develop an acceptable and workable set of principles and rules on contracts and to adopt universally accepted fundamental norms on contracts that would offer compatibility with the local and national concepts of justice, fairness, and protection of legitimate expectations of parties to contractual relations.

**Absence of Unified Principles and Rules of Contract Law**

Similar inquiries conducted by the team revealed that current commercial contracts for transactions involving exchanges of goods and services—whether they were purely domestic or contained foreign elements—frequently used specific types of contractual instruments originating from common law tradition, such as franchising, escrow, commercial agency, distributorship, project financing, and other corporate arrangements. Moreover, various modern types of contracts originating from international business practices also existed to deal with electronic commerce, international construction and infrastructural projects, international movements of human resources, and so forth. In Indonesia, such commercial practices found their legal basis in the existing general principles of freedom of contract, *pacta sunt servanda*, or good faith and fair dealing, and they relied heavily on
the noncompulsory nature of the civil code. As a result, such contractual arrangements were substantively disconnected from the old civil code. To some degree, inconsistencies found in court judgments settling disputes in comparable types of contract could be attributed to the absence of unified modern principles and rules of contract law.

Team members concurred that a complete restatement of the contract law, putting less weight on links with a particular legal tradition, was the best and most viable option. At the same time, they decided that it was necessary to give adequate consideration to national and public interests that might take precedence over individual gains, thus allowing the state, to a reasonable degree, to assert its sovereignty over domestic and international trade.\footnote{See Maren Heidemann, Methodology of Uniform Contract Law: The UNIDROIT Principles in International Legal Doctrine and Practice (London: Springer, 2010), 7–13.}

**Lack of Private International Law or Conflict-of-Law Rules**

Other studies conducted by the team showed that the existing civil code did not contain any private international law or conflict-of-law rules that might have enabled the courts to determine the applicability of the code in resolving contract cases containing foreign elements.\footnote{In other words, the availability of choice-of-law principles—besides other conventional private international law questions concerning choice of jurisdiction and recognition and enforcement of foreign judgments issues, which theoretically belongs to the procedural elements of private international law—was at issue. See C. M. V. Clarkson and Jonathan Hill, The Conflict of Laws (Oxford, U.K.: Oxford University Press, 2011).} In comparison, the new Dutch civil code anticipated this need and added book 10 on conflict of laws, which essentially is a set of codified principles and rules covering general conflict-of-law issues that can arise from civil and commercial matters, including choice-of-law issues arising from contractual cases.\footnote{See Mathijs H. ten Wolde, Jan G. Knot, and Nynke A. Baarsma, Book 10 Civil Code: On the Dutch Conflict of Laws (Groningen, Netherlands: Hephaestus, 2011), title 13, articles 153–56, 63.} Within the Asian context, the People’s Republic of China, as one of the new world economic superpowers and as an important trading partner of ASEAN member countries, took a similar route quite recently by enacting a codified private international law.\footnote{Law of the People’s Republic of China on the Laws Applicable to Foreign-Related Civil Relations (adopted at the 17th session of the Standing Committee of the 11th National People’s Congress, 28 October 2010).} Independent from any civil or commercial law codifications, the new law includes rules to cope with contractual issues (chapter 6, articles 41–47).

One major problem in Indonesia is that it does not have a law covering private international legal issues, apart from three archaic choice-of-law rules enacted during the colonial era that were influenced by the Italian statute theory of the 16th
Other conflict-of-law rules passed after independence are dispersed as provisions within various laws on specific issues. These provisions are mainly aimed at regulating the applicability of such laws in a manner unrestrained by general conflict-of-law principles. Furthermore, most of these rules have a strong tendency to endorse the applicability of Indonesian law in legal affairs containing foreign elements, and thus they do not have positive effects on the development of a modern system of private international law. Therefore, the team recognized the necessity of adding a set of private international law rules as part of the new national contract law, although doing so would create another difficult choice between setting up an all-encompassing private international law codification and devising a set of new conflict-of-law provisions on contracts as part of the new contract law.

Moreover, following the establishment of the AEC, the fundamental question affecting Indonesian legal reform concerns whether it should uphold the main function of private international law to maintain national laws (i.e., use the national governing law to determine international contract cases), or whether it should opt to reduce private international law issues as far as possible by establishing or adhering to internationally observed substantive principles and rules on contracts. The team was inclined toward the latter approach and opened the possibility of using the UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts not merely as the applicable law governing international contracts but also as the model law to be followed in restating the Indonesian law of contracts. Of course, local circumstances and interests would still have to be taken into consideration, and sufficient renewed private international law and choice-of-law rules would be needed to cope with specific contractual issues.

One must admit that oversimplifications exist when one speaks of using a set of new (foreign) principles and rules of law, which naturally interfere with the existing polyjural system in a country such as Indonesia. Further studies on the social effects of the UNIDROIT Principles within the Indonesian legal system need to be done to gain a fuller understanding of this situation.

14 Articles 16, 17, and 18 of the Algemene Bepalingen van Wetgeving (General Rules for Legislation), State Gazette 1847, no. 23. Article 16, in its essence, contains a choice-of-law rule for personal matters (personalia), article 17 contains a similar rule applicable for issues concerning immovables (realia), and article 18 provides a private international rule for legal acts (mixtas).


17 Ibid., 6.
The UNIDROIT Principles and Restatement of National Contract Law

The UNIDROIT Principles of International Commercial Contracts have been known in Indonesia since not long after their first publication in 1994. However, in some law schools the UNIDROIT Principles were considered merely a systematic compilation of principles and rules on international business contracts as were other unified legal instruments or international trade usages, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) or the International Chamber of Commerce publications (Incoterms and the Uniform Customs and Practice for Documentary Credits). It was not until the publication of the second edition in 2004 and the third edition in 2010 that the Principles received extensive acknowledgment as one of the few tangible and comprehensive sources of the new lex mercatoria, sometimes referred to as “transnational commercial law.” In some law school curricula in Indonesia, the Principles even became the core content for legal subjects, such as international business transactions or international business contracts. However, the Principles have not often been used in practice to govern transnational commercial contracts involving Indonesians and foreign parties. Lack of bargaining power of Indonesian parties in transnational transactions more often led to the application of foreign national laws through the regular choice-of-law clauses. The outdated Indonesian civil code and lack of adequate national private international law rules drove foreign parties away from using Indonesian law, unless doing so was unavoidable because of the mandatory application of laws or because of administrative rules with mandatory characteristics.

The team saw the UNIDROIT Principles as a practical alternative for dealing with the anticipated constraints mentioned elsewhere in this article. In particular, the Principles allowed the team to cope with its task of providing a comprehensive restatement of national contract law within a limited timeframe. The most important purposes of the Principles are to provide a set of contract principles and rules suited for international commercial contracts (a) to be applied subject to express choice by the parties to govern their contract, equivalent to a conventional choice of law of a relevant national legal system; (b) to be applied to fill in gaps when parties of international contracts encounter vague general principles of law and the like; or (c) to be applied in the absence of any choice of law by the parties, preferably

---

18 For further historical explanation, see Michael Joachim Bonell, “The UNIDROIT Principles of International Commercial Contracts,” in Transnational Law in Commercial Legal Practice (Münster, Germany: Quaidis, 1999), 7–44.
19 Principles, Preamble, comments 3 and 4.
20 Ibid., comment 4.
21 Ibid., comments 4 and 5.
when the parties agree to submit their disputes to international commercial arbitration. In the Indonesian context of fabricating its new contract law, however, the importance and relevance of the UNIDROIT Principles are clearly in their “intrinsic merits” that they “may, in addition, serve as a model to national … law-makers for the drafting of legislation in the field of general contract law.”\textsuperscript{22} From this last perspective, the Principles offer the best possible solution for Indonesia because of their completeness, structured character, evolving character, and predictability.\textsuperscript{23}

The completeness of the UNIDROIT Principles is demonstrated by its 211 articles, which cover almost every possible issue within the life cycle of a commercial contract. The team’s proposal to opt for partial codification was open to change and enhancement much like the Principles.

Structured character is clearly demonstrated when any undertaking to propose an entirely new set of contract law principles and rules is started. The task involves formulating a new set of all-embracing principles and rules, starting with those that have a high level of abstraction (basic and general principles of contracts) and continuing down to the highly technical rules that cover every aspect of the whole contract’s life cycle interwoven in a systematic and interdependent structure. The Principles possess those qualities; therefore, using them as a model law offers a great deal of convenience, as long as some internal adjustments to ensure their compatibility with domestic values and interests are made.

Evolving character, according to Emmanuel Gaillard, points to the ability of a legal system to “evolve over time in order to take into account the needs of the society which it is designed to regulate.”\textsuperscript{24} The UNIDROIT Principles, designed as a comprehensive system of principles and rules of international and commercial contracts, do, in fact, possess such features. Their continuous enhancement and substantial additions with each new edition since their first publication in 1994 display both flexibility and openness to change. The time is opportune for Indonesian legislators to adopt the UNIDROIT Principles as a model law because they can rest assured that they will be saved from painstaking efforts to ensure the flexibility of the future national contract law.

Predictability, according to Gaillard, represents the characteristic of a genuine system of legal rules that “enable the parties to assess the likely outcome of any

\textsuperscript{22} Ibid., comment 7.


\textsuperscript{24} Ibid., 62.
diverging views that may arise.” I strongly believe that the principles and rules contained in the UNIDROIT Principles satisfy this requirement. They represent a system of legal rules able to provide predictable solutions in cases where parties to a contract do not agree to regulate their transaction otherwise or do not put their mutual understanding within their contract at all.

Other open issues not directly covered by the Principles but nonetheless necessary to modify are the existing rules on “specific contracts” within book III, parts V to XVIII of the Indonesian civil code. The types of specific contracts that deserve special rules and the reasoning supporting them may differ from one legal system to another, but they usually concern the protection of less advantaged parties, and such notions evolve in line with developing societal needs. Contracts concerning labor, insurance, consumer protection, construction, finance, and banking are some examples of categories that require special attention.

Last, but unquestionably of major and pressing importance in proposing the use of the UNIDROIT Principles as a model law, is that the Principles represent best practices in international commercial contracting and, to a certain extent, provide rules more likely to result in better and more just solutions to various contractual issues at both the national and the international levels. The use of the Principles as a model for Indonesia’s contract law reform may, on the one hand, provide an instrument to unify contract law at the national level and may, on the other hand, be an important step in attaining regional or international harmonization of contract law. The focus of the work may be shifted from drafting new provisions to the process of formulating provisions not found within the Principles and adapting some existing provisions to principles emanating from national fundamental values. In addition, the Indonesian legislators must look to formulating an inclusive set of private international law rules to uphold and support the provisions within the UNIDROIT Principles that require the use of such rules.

As previously mentioned, the delicacy of that task is heightened by Indonesia’s 2007 commitment to take part in the ASEAN Economic Community by 2016. One of the distinctive features of AEC is that

25 Ibid., 63–64.
26 For more in-depth analysis on this matter see Bajuseto Hardjowahono, The Unification of Private International Law on International Commercial Contracts within the Regional Legal System of ASEAN (Groningen, Netherlands: Hephaestus, 2005), 117–24.
27 For example, legal vacuums are left open by article 3.1.1, article 5.2.1, and new provisions concerning precontractual rights and obligations.
28 A few such provisions are articles 1.2, 1.4, 1.6, and 3.3.1.
29 See ASEAN, “ASEAN Economic Community Blueprint,” ASEAN Secretariat, Jakarta, 2008.
An ASEAN single market and production base shall comprise five core elements: (i) free flow of goods; (ii) free flow of services; (iii) free flow of investment; (iv) freer flow of capital; and (v) free flow of skilled labour. In addition, the single market and production base also include two important components, namely, the priority integration sectors, and food, agriculture and forestry.\(^{30}\)

It is not too difficult to picture from the preceding that new and pressing needs will become more than real. Indonesia has to formulate new national legal policies that will place it on an equal footing with other ASEAN members that have highly diverse levels of economic development, not to mention divergent legal systems rooted in different legal traditions and history. The creation of a single market and production base, standing on free flows of goods, services, investments, capitals, and skilled labor in the region, will require immediate reform of the Indonesian legal system—in particular its contract law. The difficult task will be keeping a harmonious approach to building a new national contract law that accommodates and serves regional needs to develop an effective and productive regional economic community while also offering just and fair protection of national interests against threats and disadvantages common in any international economic integration in general and transnational contracting practices in particular. The UNIDROIT Principles offer a valuable and comprehensive framework for modern and internationally accepted commercial contract rules, emphasizing “better rules” rather than preserving traditional legal roots. The crucial challenge in this respect, however, is how to formulate basic contractual norms and technical rules that absorb the country’s already pluralistic domestic legal values (Syariah, Adat law, and other sociocultural interests). The challenge, therefore, lies in effectively putting the Principles within the Indonesian polyjural system while enabling it to operate within the regional polyjural culture of ASEAN.

Conclusion

The expediency of using the UNIDROIT Principles as a model law in the process of restating and developing Indonesia’s national law of contract is clear. The innate characteristics of the Principles as a complete system of legal principles and rules and their fundamental compatibility with the basic values of natural, legal, and contractual justice emanating from the universal values recognized within the pluralistic legal culture in Indonesia make them viable as the basic framework for a national law of contract in Indonesia. Moreover, three decades after their publication, the UNIDROIT Principles proved that they are one of the most comprehensive and tangible sources of transnational commercial law possessing the

\(^{30}\) Ibid., 6.
qualities for a general law of contract. They, therefore, provide assurance that they would serve one of the main purposes for reform in Indonesia, which is to promote uniformity in their application.

Open-ended issues, however, including those concerning private international law or conflict of laws, the applicability of mandatory rules in relation to illegality and contract avoidance, and further elaboration of principles and rules in specific contracts commonly set up as part of a codified contract law, require great attention and time-consuming and meticulous labor.

For Indonesia, using the Principles as a model law, both with regard to structure and substance, to achieve the country’s desire to establish a truly national law of contract is beyond debate. The persistent problems mainly rest on how to establish and formulate specific contract rules that may offer a harmonious balance between an internationally accepted set of principles and rules and the urge to protect diverse national interests.

To close this somewhat overly simplified discussion, I would note that the existing official translations of the Principles into 10 languages, besides the original versions in English and French, and the launch of the Arabic version, again affirm the universal acceptance of this highly acclaimed work worldwide. I am proud to take part in this important event.
The Turkish Perspective
Differences and Similarities between the UNIDROIT Principles of International Commercial Contracts 2010 and National Laws

Ergun Özsunay*

This paper compares the UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts 2010 and the new Turkish Code of Obligations, No. 6098 of 2011 (TCO).† The UNIDROIT Principles are composed of 11 chapters. The comparison between the UNIDROIT Principles and the rules and solutions of the Turkish law of obligations has been carried out by following the system of the Principles.

General Provisions

Freedom of Contract

Under the Principles, the parties are free to enter into a contract and determine its content (Principles, article 1.1).

Freedom of contract is also one of the basic principles of the Turkish law. The parties may determine the form, kind, and content of a contract (TCO, article 26).

Freedom of Form

According to the Principles, contracts, as a rule, are not subject to any form. The same principle applies to the subsequent modification or termination of a contract by agreement of the parties (Principles, article 1.2).

* Professor, Istanbul University Faculty of Law (Emeritus), Istanbul Culture University Faculty of Law.

† The TCO (Official Gazette, No. 27836 of February 4, 2011) is book 5 and an integral part of the Turkish Civil Code, No. 4721 of November 22, 2001 (Official Gazette, No. 24607 of December 8, 2001). This code is based on the former Code of Obligations of 1926, which was modeled on the Swiss Code of Obligations and has been revised in the light of new Swiss legislation, European Union legislation, and some international conventions. See Ergun Özsunay, “Legal Culture and Legal Transplants: Turkish National Report,” ISAJIDAT Law Review 1, no. 2 (2011): 1121–37.
Freedom of form is also one of the basic principles of the Turkish contract law (TCO, article 12). Nevertheless, some contracts must follow specific forms to be considered valid. The required form can be official or written. For example, a contract for sale of registered immovable property requires an official form; a written form is necessary for a contract for assignment of a claim, for suretyship, and so forth. Moreover, the parties may themselves agree on a specific form for the conclusion, modification, or termination of their contract (TCO, article 13 et seq.).

**Principle “Pacta Sunt Servanda”**

Under the Principles, “a contract validly entered into is binding upon the parties” (Principles, article 1.3).

The principle that “agreements must be kept” (pacta sunt servanda) is also one of the basic principles of Turkish contracts law.²

**Mandatory Rules Restricting the Principle of Freedom of Contract**

According to the Principles, “nothing in these Principles shall restrict the application of mandatory rules” (Principles, article 1.4).

Mandatory rules prevail also in Turkish law. The mandatory nature of legal norms may either be expressly stated or inferred by way of interpretation. The rules related to public policy are in general mandatory. Mandatory rules restrict freedom of contract (TCO, article 27).

**Interpretation of the Principles**

Under the Principles, “in the interpretation of these Principles, regard is to be had to their international character” (Principles, article 1.6).

**Good Faith and Fair Dealing**

According to the Principles, “each party must act in accordance with good faith and fair dealing in international trade” (Principles, article 1.7).

Under the Turkish Civil Code (TCC), good faith is also one of the fundamental principles of Turkish law (TCC, article 2). Turkish contract law requires “fair dealing” between parties to a contract. Abuse of a right is prohibited by the TCC (article 2(2)). No one is allowed to use its rights to cause damage to others. Exces-

---

sive use of a right includes an abuse of a right. “Inconsistent behavior” of a party also means an act against the “principle of good faith” (TCC, article 2(2)).

**Usages and Practices**

Under the Principles, parties are bound by any usage to which they have agreed and by any practices that they have established between themselves (Principles, article 1.9).

The same principles prevail in Turkish law.

**Computation of Time**

Under the Principles, “if the last day of a period is an official holiday or a non-business day at the place of business of a party to perform the act, the period is extended until the first business day which follows, unless the circumstances indicate otherwise” (Principles, article 1.12).

Similar solutions can be found in Turkish law (TCO, articles 91–95). For instance, if the time of performance is at the beginning or the end of a month, the time of performance is deemed to be the first or the last day of that month (TCO, article 91). If the time of performance is on a holiday by law, then the day of performance is extended to the next day. Nevertheless, agreements to the contrary can be made (TCO, article 93).

**Provisions Dealing with Contract Formation**

**Offer**

According to the Principles, “a contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement” (Principles, article 2.1.1). According to the Principles, a “proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offerer to be bound in case of acceptance” (Principles, article 2.1.2).

---

3 Ergun Özsunay, “Abuse of Rights under Turkish Civil Law,” in *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions: Papers Presented at the Second International Conference on Aequitas and Equity, the Faculty of Law, the Hebrew University of Jerusalem, May 1993*, edited by Alfredo M. Rabello (Jerusalem: Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem, 1997), 645–61.

The principles of “definiteness of an offer” and “intention to be bound” also prevail in Turkish law (TCO, articles 5 and 8.1).  

Effectiveness and Withdrawal of an Offer

Under the Principles, “an offer becomes effective when it reaches the offeree.” However, “[a]n offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer” (Principles, article 2.13).

The TCO lays down the same rules (TCO, article 10).

Revocation of an Offer

Under the Principles, “until a contract is concluded, an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance” (Principles, article 2.1.4).

Under Turkish law, offers are as a rule revocable. Some exceptions exist, however, to the revocability of offers. If the offer contains an indication of irrevocability (a firm offer), it is irrevocable (TCO, article 3). Another exception is the reliance by the offeree on the irrevocability of the offer.

Rejection of an Offer

The Principles state that “an offer is terminated when a rejection reaches the offerer” (Principles, article 2.1.5).

The same rule prevails in Turkish law. Rejection may be express or implied.

Definition of Acceptance

Under the Principles, “a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance” (Principles, article 2.1.6). “An offer must be accepted within the time the offerer has fixed or, if no time is fixed,
within a reasonable time, having regard to the circumstances” (Principles, article 2.1.7).\(^8\)

**Express and Implied Acceptances**

Acceptance can be express or implied. Acceptance by conduct (e.g., payment of an advance on the price, shipment of goods, or beginning the work) is a mode of acceptance (Principles, article 2.1.6).

The same solutions are found in Turkish law. The typical implied acceptance acts are “acceptance by performance conducts” (e.g., shipment of goods, etc.) and “acceptance by acquisition acts” (e.g., consuming the goods, etc.) (TCO, article 6).

**Late Acceptance**

Under the Principles, late acceptance is normally ineffective. The offerer may nevertheless “accept” late acceptance (Principles, article 2.1.9).

The same rule prevails in Turkish law (TCO, article 5).

**Withdrawal of Acceptance**

According to the Principles, “An acceptance may be withdrawn if the withdrawal reaches the offerer before or at the same time as the acceptance would have become effective” (Principles, article 2.1.10).

This principle prevails also in Turkish law (TCO, article 10).

**Modified Acceptance**

Under the Principles, “a reply to an offer which purports to be an acceptance but contains additions, limitations, or other modifications is a rejection of the offer and constitutes a counteroffer” (Principles, article 2.1.11).

In Turkish law, an acceptance with modifications is considered a counteroffer.\(^11\)

---


9 See Oğuzman and Öz, *Borçlar Hukuku: Genel Hükümler*, vol. 1, 75.

10 Ibid., 69.

Conclusion of Contract Dependent on Agreement on Specific Matters

According to the Principles, “where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters, no contract is concluded before agreement is reached on those matters” (Principles, article 2.1.13).

The same rule prevails in Turkish law. For a contract to be concluded, a manifestation of the parties’ mutual assent is required. The parties must agree with regard to all essential points.12

Contract with Terms Deliberately Left Open

According to the Principles, if the parties intentionally leave open one or more terms because they are unable or unwilling to determine them at the time of the conclusion of the contract and refer for their determination to an agreement to be made by them at a later stage, this situation does not prevent a contract from coming into existence (Principles, article 2.1.14).

This rule is also valid under Turkish law. According to the TCO, ancillary points can be reserved. If an agreement regarding such ancillary points is not reached, the judge will determine them in accordance with the nature of the transaction (TCO, articles 1 and 2).

Negotiations in Bad Faith

Under the Principles, as a rule, parties are free to decide not only when and with whom to enter into negotiations with a view to concluding a contract, but also if, how, and for how long to proceed with their efforts to reach an agreement. Therefore, a party is not liable, as a rule, for failure to reach an agreement. However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party (Principles, article 2.1.15).

Turkish doctrine has adopted the same solution. A party negotiating in bad faith or breaking off negotiations in bad faith can be held liable for damages (precontractual liability, culpa in contrahendo).13

---

12 Ibid., 70 et seq. See also Köçayusufluşaoğlu, Borçlar Hukuku: Genel Bölüm, 171 et seq.
**Contracting under Standard Terms**

According to the Principles, “standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with [the] other party” (Principles, article 2.1.19).

The notion of “standard terms” also exists in the TCO article 20. Such terms must be easily understandable. They cannot be contrary to the principle of “good faith” (TCO, article 25). If such standard terms are ambiguous, they are interpreted in favor of the nondrafting party rather than in favor of the party who prepared them (TCO, article 23).

**Provisions Dealing with Authority of Agents**

Section 2 of chapter II of the Principles governs the grant of authority to an agent that acts in its own name or in that of its principal. Section 2 also governs the rights and duties between the principal and agent (Principles, articles 2.2.1 et seq.).

**Establishment and Scope of the Authority of the Agent**

Under the Principles, the granting of the authority to the agent by the principal is not subject to a particular requirement of form. The principal’s grant of authority to an agent may be express or implied. The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted (Principles, article 2.2.2).

These rules prevail also in Turkish law (TCO articles. 40 et seq.). However, granting of authority to an agent for performing certain transactions is subject to use of an official form (e.g., sale of real estate).

**Disclosed Agency**

Under the Principles, “where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly affect the legal relations between the principal and the third party and no legal relation is created between the agent and the third party” (Principles, article 2.2.3(1)).


The “disclosed” agency in the Principles exists in Turkish law as “direct representation,” under which a contract made by the agent directly binds the principal and the third party to each other (TCO, article 40).  

Undisclosed Agency

When agency is undisclosed, an agent acts within the scope of its authority on behalf of a principal, but the third party neither knows nor ought to know that the agent is acting as an agent (Principles, article 2.2.4). In such cases, the agent’s acts affect only the relations between the agent and the third party and do not directly bind the principal vis-à-vis the third party.

Undisclosed agency is defined in Turkish law as “indirect representation” (TCO, article 40.2).

Agent Acting without or Exceeding Its Authority

Legal consequences and case of “apparent authority”

Under the Principles, where an agent acts without authority, its acts do not bind the principal and the third party to each other. The same applies if the agent has been granted authority of limited scope and exceeds its authority (Principles, article 2.2.5(1)). Nevertheless, an agent acting without or exceeding its authority may bind the principal and the third party to each other in two cases. The first case occurs when the principal ratifies the agent’s act. The second case deals with “apparent authority.” According to the principle of apparent authority, a principal whose conduct leads a third party reasonably to believe that the agent has authority to act on its behalf may not invoke against the third party the lack of authority of the agent and is therefore bound by the agent’s act (Principles, article 2.2.5(2)).

The TCO lays down similar provisions related to lack of authority and apparent authority (TCO, article 46).

Ratification

According to the Principles, “an act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification, the act produces the same effects as it had initially been carried out with authority.” The principal may ratify at any time. Nevertheless, the third party may, by notice to the

---

16 See Oğuzman and Turgut Öz, Borçlar Hukuku: Genel Hükümler, vol. 1, 221 et seq., 245.
17 Ibid., 222.
18 Ibid., 250.
principal, specify a reasonable period of time for ratification. If the principal does not ratify within that time, it can no longer do so (Principles, article 2.2.9).

Article 46.2 of the TCO lays down the same solution for Turkish law.19

**Liability of agent acting without or exceeding its authority**

According to the Principles, an agent acting without authority or exceeding its authority is, failing ratification by the principal, liable for damages to the third party (Principles, article 2.2.6(1)). Nevertheless, the unauthorized agent is not liable if the third party knew or ought to have known that the unauthorized agent had no authority or was exceeding its authority (Principles, article 2.2.6(2)).

The same solution can be found in the provisions of article 47 of the TCO.20

**Termination of Authority**

An agent’s authority may be terminated on several grounds: revocation by the principal, renunciation by the agent, carrying out of the acts for which authority had been granted, loss of capacity, bankruptcy, and death or cessation of the existence of the principal or the agent. Under the Principles, whatever the grounds for termination of the agent’s authority, termination is not effective in relation to the third party unless the third party knew or ought to have known of it. Notwithstanding the termination of its authority, the agent may perform the acts that are necessary to prevent harm to the principal’s interest (Principles, article 2.2.10).

The solutions related to the termination of the agent’s authority laid down by TCO in articles 42–44 are similar to those in the Principles.21

**Provisions Dealing with Validity of Contract**

**Validity of Mere Agreement**

Chapter 3, section 1, of the Principles makes clear that the mere agreement of the parties is sufficient for the valid conclusion, modification, or termination by agreement of a contract. There is no need for “consideration” (as under the common law system). Furthermore, there is no need for cause, which exists in some civil law systems (Principles, article 3.1.1).

All contracts are consensual under Turkish law (TCO, article 1).

---

19 Ibid., 248 et seq.
20 Ibid., 250–51.
21 Ibid., 239 et seq.
**Initial Impossibility**

According to the Principles, “the mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract” (Principles, article 31.3(1)).

The initial impossibility of the subject matter of a contract is a ground of nullity under Turkish law (TCO, article 27). If the impossibility of performance occurs after the conclusion of contract, the obligation is deemed to be extinguished (TCO, articles 136–37).

**Grounds for Avoidance**

Under the Principles, “mistake, fraud, threat, gross disparity, [and] illegality” are the grounds for avoidance.

**Mistake**

According to the Principles, a “mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded” (Principles, article 3.2.1). A party may avoid the contract for mistake only if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would have concluded the contract only on materially different terms or would not have concluded it at all had the true state of affairs been known.

The Principles also include the following provisions:

- **Error in expression or transmission.** According to the Principles, “an error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated” (Principles, article 3.2.3).

- **Remedies for nonperformance.** Under the Principles, “a party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for nonperformance” (Principles, article 3.2.4).

- **Loss of right to avoid.** According to the Principles, a mistaken party may be prevented from avoiding the contract if the other party declares itself willing to perform or actually performs the contract as it was understood by the mistaken party (Principles, article 3.2.10).

---

22 Ibid., 83, 87.

23 See Kocayusufpaşaoğlu, *Borçlar Hukuku: Genel Bölüm*, 94 et seq.
Under Turkish law, an error is regarded as one of the grounds of defect relating to declaration of intention. Several kinds of essential error exist, such as error in contract, error in person, and error in the amount. A person acting under material (essential) error at the conclusion of a contract is not bound by it (TCO, article 30). Nevertheless, a party cannot invoke error as contrary to good faith. Furthermore, the mistaken party is bound by a contract if the other party declares itself willing to perform the contract as it was intended by the mistaken party (TCO, article 34).24

**Fraud**

Under the Principles, “a party may avoid the contract when it has been led to conclude the contract by the other party’s fraudulent representation” (Principles, article 3.2.5). Fraud may be regarded as a special case of mistake caused by the other party. Fraud may involve either representations of false facts or nondisclosure of true facts.

Under Turkish law, fraud is also one of the grounds of defect in declaration of intention. The defrauded party is not bound by the contract concluded by fraud even if its error is not essential (TCO, article 36).25

**Threat**

According to the Principles, threat is another ground for avoidance. However, the threat must be of so imminent and serious a character that the threatened person has no reasonable alternative but to conclude the contract on the terms proposed by the other party. Furthermore, the threat must be unjustified (Principles, article 3.2.6).

Under Turkish law, if a contracting party has been unlawfully forced to conclude a contract under a threat originating from the other party or a third person, it is not bound by the contract (TCO, article 37.1). The imminence and seriousness of the threat is evaluated by objective standards. Threat can be directed against a person or property. It may also affect reputation or economic interests.26

---

24 Ibid., 393 et seq.; Oğuzman and Turgut Öz, *Borçlar Hukuku: Genel Hükümler*, vol. 1, 94 et seq.; Tekinay et al., *Borçlar Hukuku: Genel Hükümler*, 427 et seq.


**Gross disparity (lesio enormis)**

According to the Principles, a party may avoid a contract in cases where gross disparity exists between the obligations of the parties such that one party has an unjustifiably excessive advantage. The elements of gross disparity are the excessive and unjustifiable advantage of a party. The advantage must be based on the dependence, economic distress, or urgent needs of the other party or on its improvidence, ignorance, inexperience, or lack of bargaining skill (Principles, article 3.2.7).

Under Turkish law, the requirements of gross disparity are similar to those of the Principles (TCO, article 28). In cases of gross disparity, the contract is voidable by the party that is not bound by that contract.27

**Confirmation**

According to the Principles, the party entitled to avoid the contract may either expressly or impliedly confirm the contract (Principles, article 3.2.9).

Under Turkish law, the party whose declaration of intention has been affected by essential mistake, fraud, or threat may confirm the contract that is not binding on it. Likewise in a case of gross disparity, the contract can be confirmed by the exploited party. In the preceding situations, if such a party does not declare to the other party within one year that it is not bound by the contract, then the contract is deemed to be confirmed (TCO, article 39.1).28

**Contracts Infringing Mandatory Rules**

According to the Principles, where a contract infringes a mandatory rule—whether of national, international, or supranational origin—the effects of that infringement are the effects, if any, expressly prescribed by that mandatory rule (Principles, article 3.3.1).

Under Turkish law, if a contract is contrary to the mandatory rules (i.e., specific statutory provisions, provisions protecting rights attached to the personality of a human being, provisions relating to public policy, etc.), it is null and void (TCO, article 27).

---


Principles of Interpretation

Principles of Interpretation under the UNIDROIT Principles

Chapter 4 of the UNIDROIT Principles lays down the principles of interpretation.

Common intention of the parties

According to the Principles, a contract shall be interpreted according to the common intention of the parties. Thus, a contract preference shall also be so interpreted. In cases where the common intention of the parties cannot be established, the contract shall be interpreted in accordance with the meaning that reasonable persons of the same kind as the parties would have given to it in the same circumstances (Principles, article 4.1). These two methods are called the “subjective test” and the “reasonableness test.”

Interpretation of statements and other conduct

In interpretation of unilateral acts (statements and other conducts of a party), preference shall be given to the intention of the party concerned if the other party knew or could not have been unaware of that intention (Principles, article 4.2).

Relevant circumstances

Under the Principles, in applying the subjective test and the reasonableness test, the following relevant circumstances shall be taken into account: (a) preliminary negotiations between the parties, (b) practices that the parties have established between themselves, (c) conduct of the parties subsequent to the conclusion of the contract, (d) the nature and purpose of the contract, (e) the meaning commonly given the terms in the trade concerned, and (f) usages (Principles, article 4.3).

Reference to contract or statement as a whole

According to the Principles, terms and expressions should be interpreted in light of the whole contract or statement in which they appear (Principles, article 4.4).

All terms to be given effect

Under the Principles, “unclear contract terms” should be interpreted to give effect to all terms rather than to deprive some of them of effect (Principles, article 4.5).
Contra proferentem rule

If contract terms supplied by one party are unclear, an interpretation against that party is preferred (Principles, article 4.6).

Linguistic discrepancies

If a contract is drawn up in two or more language versions that are equally authoritative and a discrepancy occurs, preference should be given to the version in which the contract was originally drawn up (Principles, article 4.7). Nevertheless, in practice, the parties usually expressly indicate which version shall prevail.

Supplying an omitted term

According to the Principles, where the parties have not agreed with respect to a term that is important for a determination of their rights and duties (“omitted terms”), an “appropriate term” shall be supplied. In the determination of an appropriate term, the intention of the parties is consulted first. The other factors related to omitted terms are the nature and purpose of the contract, good faith and fair dealing, and reasonableness (Principles, article 4.8).

Principles of Interpretation under Turkish Law

Similar principles of interpretation prevail in Turkish law. First, as regards the kind, content, and interpretation of a contract, the “real intent” common to the parties should be given preference. The incorrect statement or manner of expression used by the parties, whether caused by error or with the intention of concealing the true nature of the contract, cannot be taken into account (TCO, article 19; cf. Principles, article 4.1).

The interpretation principles elaborated and developed by the dominant Turkish doctrine and practice are as follows: interpretation in accordance with the principle of good faith, interpretation in favor of the validity of contract (favor negotii), interpretation in favor of the obligor (favor debitoris), and interpretation against the party who drafted the contract (contra proferentem rule).29

---

29 See Kocayusufpaşaoğlu, Borçlar Hukuku: Genel Bölüm, 331 et seq., 335 et seq.; Eren, Borçlar Hukuku: Genel Hükümler, 466 et seq.
Provisions Dealing with Content of Contractual Obligations

Express and Implied Obligations

According to the Principles, “the contractual obligations of the parties may be express or implied” (Principles, article 5.1.1). Implied obligations stem from (a) the nature and purpose of the contract, (b) practices established between the parties and usages, (c) good faith and fair dealing, and (d) reasonableness (Principles, article 5.1.2).

In Turkish law, contractual obligations of the parties may also be express or implied. Implied obligations stem particularly from the principle of good faith and the social and economic contacts of the parties.\(^\text{30}\)

Cooperation between the Parties

According to the Principles, each party should cooperate with the other party when such cooperation may reasonably be expected for the performance of that party’s obligations. Particularly in contracts relating to common projects, each party should cooperate (Principles, article 5.1.3).

In Turkish law, the duty of cooperation between parties stems from the principle of good faith.\(^\text{31}\)

Duty to Achieve a Specific Result and Duty of Best Efforts

According to the Principles, “to the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result” (Principles, article 5.1.4(1)). Sometimes a party is bound only by a “duty of best efforts” (Principles, article 5.1.4(2)). Obligations of both types may coexist in the same contract. In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, several factors should be taken into account, such as the nature of the obligation, price or other terms of the contract, and degree of risk in performance of an obligation (Principles, article 5.1.5).

These concepts exist also in Turkish law (cf. TCO, article 470 et seq.).

Determination of Quality of Performance

Under the Principles, where the quality of performance is neither fixed by nor determinable from the contract, a party is bound to render performance of a quality

---

30 See Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 1, 37 et seq.
31 Ibid., 78–80.
that is reasonable and not less than average in the circumstances (Principles, article 5.1.6).

A similar concept can be found in the TCO, article 86 (average quality).32

**Price Determination**

According to the Principles, “where a contract does not fix or make provision for determining the price, the parties are considered to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price” (Principles, article 5.1.7).

A similar concept of “determination of price by reference to external factors” can be found in article 207.3 of the TCO, which deals with sale contracts (determinable price).33

**Contract for an Indefinite Period**

According to the Principles, a “contract for an indefinite period” may be ended by either party by giving notice a reasonable time in advance (Principles, article 5.1.8).

The distinction between contracts for a definite period and contracts for an indefinite period can be found in Turkish law. Contracts for an indefinite period can be terminated by giving notice to the other party.34

**Release by Agreement**

According to the Principles, an obligee may release the obligor from its obligation. Moreover, an obligee may renounce its rights. The renunciation of the obligee’s rights requires an agreement between the parties (Principles, article 5.1.9).

These solutions are also valid for Turkish law (TCO, article 132).35

---

32 Ibid., 290–91.
35 See Oğuzman and Öz, *Borçlar Hukuku: Genel Hükümler*, vol. 1, 554 et seq.
Provisions Affecting Third-Party Rights

Contracts in Favor of Third Parties under the Principles

Under the Principles, the parties (called the “promisor” and “promisee”) may confer by express or implied agreement a right on a third party (called the “beneficiary”). The existence and content of the beneficiary’s right against the promisor are determined by the agreement of the parties (Principles, article 5.2.1). The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made (Principles, article 5.2.2). The conferment of rights on the beneficiary includes the right to invoke a clause in the contract that excludes or limits the liability of the beneficiary (the so-called Himalaya clause in bills of lading) (Principles, article 5.2.3).

Revocation

The promisor and promisee are free to revoke the third party’s rights at any time until the beneficiary has accepted them or has reasonably acted in reliance on them (Principles, article 5.2.5).

Renunciation

In addition, the beneficiary may renounce a right (the benefit) conferred on it (Principles, article 5.2.6).

Defenses

The promisor may assert against the beneficiary all defenses that the promisor could assert against the promisee (Principles, article 5.2.4).

Contracts in Favor of Third Parties under Turkish Law

Under Turkish law, two kinds of contracts exist in favor of third parties. In the first kind, the beneficiary cannot assert any claim against the promisor (imperfect contract in favor of third party) (TCO, article 129.1). Only the promisee may claim performance in favor of the beneficiary. In the second kind of contract in favor of a third party (perfect contract), the beneficiary or its successors may assert the claim for performance (TCO, article 129.2). Regarding the defenses by the promisor against the beneficiary, Turkish law has adopted the same solution as the Principles.36

36 Öğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 2, 428 et seq.; Tekinay et al., Borçlar Hukuku: Genel Hükümler, 218 et seq.; Eren, Borçlar Hukuku: Genel Hükümler, 1095 et seq.; Hatemi and Gökyayla, Borçlar Hukuku: Genel Bölüm, 281. See also Sener Akyol, Tam Üçüncü Şahıs Yararına Sözleşme (İstanbul: Vedat, 1976), 9 et seq., 23 et seq.
Conditions

Types of Conditions

Under the Principles, parties to a contract may make their contract or one or several obligations arising under it dependent on the occurrence or nonoccurrence of a future uncertain event. If a contract or contractual obligation can be made to depend on the occurrence of a future uncertain event, it takes effect only if the event occurs (suspensive condition). In some jurisdictions, such a condition is known as a condition precedent (Principles, article 5.3.1). The other type of condition is resolutive condition, when a contract or a contractual obligation comes to an end on the occurrence of a future uncertain event (article 5.3.1). In some jurisdictions, such a condition is known as a condition subsequent.

The TCO has laid down the rules for both types of conditions (TCO, articles 170 and 173). The same definitions of condition are valid under Turkish law as under the Principles.  

Effect of Condition

Under the Principles, unless the parties otherwise agree, the fulfillment of a condition has prospective effect only. Therefore, in case of a suspensive condition, the contract or contractual obligation automatically becomes effective from the moment the future uncertain event occurs (Principles, article 5.3.2(a)). In the case of a resolutive condition, the contract or contractual obligation comes to an end from the moment the future uncertain event occurs (Principles, article 5.3.2(b)).

Regarding the effects of both kinds of condition, Turkish law has similar solutions to those in the Principles.  

Interference with Conditions

Under the Principles if fulfillment of a condition (suspensive or resolutive) is prevented by a party contrary to the duty of good faith and fair dealing or the duty of cooperation, that party may not rely on the nonfulfillment of the condition (Principles, article 5.3.3).

The same solution can be found in article 171 of the TCO.  

---

37 Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 2, 491 et seq.; Tekinay et al., Borçlar Hukuku: Genel Hükümler, 328 et seq.; Kılıçoğlu, Borçlar Hukuku: Genel Hükümler, 754 et seq.
38 Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 2, 504 et seq., 513 et seq.
39 Ibid., 504 et seq.
Duty to Preserve Rights

Under the Principles, “pending fulfillment of a condition, a party may not, contrary to the duty to act in accordance with good faith and fair dealing, act so as to prejudice the other party’s rights in case of fulfillment of the condition” (Principles, article 5.3.4).

The same solution prevails in Turkish law (TCO, article 171).

Restitution in Case of Fulfillment of a Resolutive Condition

Under the Principles, the fulfillment of a resolutive condition normally has prospective effect only. However, the parties are free to determine that a resolutive condition is to operate retroactively (Principles, article 5.3.5).

A similar solution can be found in the provisions of the TCO under article 173.3.

Provisions Dealing with Performance of Obligations

Time of Performance

Regarding time of performance, the Principles distinguish three situations: (a) where the contract stipulates the precise time for performance or makes it determinable, a party must perform its obligations at that time; (b) if the contract does not specify a precise moment but a period of time for performing, anytime during that period chosen by the performing party is acceptable; (c) in any other case, performance must occur within a reasonable time after the conclusion of the contract (Principles, 6.1.1).

Under the TCO, if neither the contract nor the nature of the legal relationship determines the time of performance, performance is deemed due and may be claimed immediately (TCO, article 90). The other times of performance laid down by the Principles can also be valid under Turkish law.

Performance at One Time or in Installments

Under the Principles, performance is due at one time unless the circumstances indicate otherwise (Principles, article 6.1.2).

---

40 Ibid., 506
41 Ibid., 513 et seq.
According to the TCO, the performance, in principle, should be made at one time (TCO, article 84).

**Partial performance**

Under the Principles, the obligee is entitled, in principle, to reject partial performance. However, if partial performance is accepted, additional expenses should be borne by the other party (Principles, article 6.1.3).

According to the TCO, the obligee is not bound to accept partial payment if the whole debt is due and payable. If the obligee accepts partial payment, the obligor cannot refuse to make payment of the part of the debt that has been recognized by it (TCO, article 84).  

**Order of Performance**

Under the Principles, in bilateral (synallagmatic) contracts, the parties are bound to render their performances simultaneously unless the circumstances indicate otherwise (Principles, article 6.1.4).

The same rule is valid in the Turkish law (TCO, article 97).

**Earlier Performance**

Under the Principles, the obligee may reject an earlier performance unless it has no legal interest in so doing. Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligation if that time has been fixed irrespective of the performance of the other party’s obligations (Principles, article 6.1.5).

Under Turkish law, if no different intention of the parties can be derived from the contents or the nature of the contract or from the circumstances, the obligor may make earlier performance (TCO, article 96).

**Place of Performance**

Under the Principles, if the place of performance is neither fixed by nor determinable from the contract, a party is to perform (a) a monetary obligation, at the obligee’s place of business, and (b) any other obligation, at its own place of business (Principles, article 6.1.6).

---

43 Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 1, 288.
44 Ibid., 346 et seq. See also Kılıçoğlu, Borçlar Hukuku: Genel Hükümler, 594 et seq.
45 See Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 1, 304, 322.
Turkish law has laid down different rules relating to the place of performance. Under the TCO, the place of performance is determined by the express or implied agreement of the parties. In the absence of such an agreement, the following principles apply: (a) monetary obligations are paid at the obligee’s place of domicile; (b) an obligation relating to delivery of goods is performed at the place where the goods are located at the time of conclusion of the contract; and (c) any other obligations are performed at the place of the obligor’s domicile (TCO, article 89).46

Costs of Performance

According to the Principles, each party should bear the costs of performance of its obligations, such as transportation costs in delivering goods or bank commission in making a monetary transfer (Principles, article 6.1.11).

Under Turkish law regarding contracts of sale, unless otherwise agreed on or customary, the seller should bear the costs of delivery. The buyer should bear the costs of transportation unless otherwise agreed on (TCO, article 211).47

Payments

Under the Principles, payment may be made in any form used in the ordinary course of business at the place of payment:

- Payment by check or other instrument. The obligor may pay in cash; by check, banker’s draft, or credit card; or in any other form, such as an electronic means of payment. However, an obligee who accepts a check, any other order to pay, or a promise to pay is presumed to do so only on the condition that it will be honored (Principles, article 6.1.7).

- Payment by funds transfer. Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions (banks) in which the obligee has revealed that it has an account (Principles, article 6.1.8).

- Currency of payment. If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless that currency is not freely convertible or the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed (Principles,

---

46 Ibid., 330 et seq. See also Tekinay et al., Borçlar Hukuku: Genel Hükümler, 807 et seq.; Eren, Borçlar Hukuku: Genel Hükümler, 938 et seq.; Kılıçgöllü, Borçlar Hukuku: Genel Hükümler, 535 et seq.; Hatemi and Gökyayla, Borçlar Hukuku: Genel Bölüm, 225.

47 See Yavuz, Türk Borçlar Hukuku: Özel Hükümler, 70 et seq.
article 6.1.9). Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due (Principles, article 6.1.9(3)).

- **Currency not expressed.** If a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made (Principles, article 6.1.10).

Under Turkish law, monetary obligations are performed, as a rule, in the national currency, Turkish lira (TCO, article 99.1). If the monetary obligation is expressed in a foreign currency, payment can be made in the national currency according to the applicable rate of exchange prevailing when payment is due unless the parties have agreed that payment should be made only in the currency specified in the contract (TCO, article 99.2).48

**Imputation of Payments**

According to the Principles, if an obligor owes several monetary obligations at the same time to the same obligee and makes a payment the amount of which is not sufficient to discharge all those debts, the payment discharges first any expenses, then interest due, and finally the principal (Principles, article 6.1.12). In the absence of imputation, payment is imputed to obligations according to the following criteria in the order indicated:

- The obligation that is currently due or that is the first to fall due
- The obligation for which the obligee has least security
- The obligation that is the most burdensome for the obligor
- The obligation that arose first

If none of the preceding criteria applies, payment is imputed to all obligations proportionally (Principles, article 6.1.12(3)).

Under Turkish law, the TCO lays down similar provisions. If the obligor owes several monetary obligations to the same obligee, the obligor has the right to declare which debt it wishes to discharge (TCO, article 101.1). If there is no valid declaration concerning discharge, the payment is imputed to an obligation that is due. In the event of several obligations being due in addition to the one that has been legally enforced, and where none has been legally enforced, payment is imputed to the obligation that is the first to fall due. If several obligations are due at the same time, payment is imputed to all obligations proportionally (TCO, article 102).49

48 See Oğuzman and Öz, *Borçlar Hukuku: Genel Hükümler*, vol. 1, 298 et seq.
49 Ibid., 312, 500, 594.
Application for Public Permission

According to the Principles, if the law of a state requires public permission for the validity or the performance of a contract and neither that law nor circumstances indicate otherwise, one of the following provisions apply: (a) if only one party has its place of business in that state, that party should take the measures necessary to obtain the permission, or (b) in any other case, the party whose performance requires permission should take the necessary measures (Principles, article 6.1.14). The Principles contain provisions relating to the procedure in applying for permission and refusal of permission (Principles, article 6.1.15–17).

Hardship

Hardship occurs when events after the conclusion of the contract fundamentally alter the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished (Principles, articles 6.2.1 and 6.2.2). The requirements for hardship have been specified by the Principles as follows: (a) events causing hardship must take place or become known to the disadvantaged party after the conclusion of the contract, (b) these events could not reasonably have been taken into account by and should be beyond the control of the disadvantaged party, and (c) risks must not have been assumed by the disadvantaged party.

According to the Principles, in a case of hardship, the disadvantaged party is entitled to request renegotiation. This request must be made as quickly as possible without undue delay and should indicate the grounds on which it is based. Hardship does not of itself entitle the disadvantaged party to withhold performance. Renegotiation can be carried out in good faith and fair dealing and is subject to the duty of cooperation. If the parties fail to reach agreement on the adaptation of the contract to the changed circumstances within a reasonable time, either party may resort to the court. The court may terminate the contract at a date and on terms to be fixed or may adapt the contract with a view to restoring its equilibrium (Principles, article 6.2.3).

The concept of hardship is recognized by various jurisdictions, in terms such as frustration of purpose, Wegfall der Geschäftsgrundlage, imprévision, and the like. These concepts have been adopted by Turkish legal doctrine. The TCO has recognized the concept of “hardship and its effects” regarding the performance of

---

50 Such provisions have not been laid down by the TCO. However, similar provisions can be found in other legislation. See the Act on Direct Foreign Investments, No. 4875 of June 5, 2003, article 3 et seq. (Official Gazette, No. 25141 of June 17, 2003) and its implementation regulation (Official Gazette, No. 25205 of August 20, 2003).
obligations (TCO, article 138). In cases where the equilibrium of the contract has been altered fundamentally (e.g., a dramatic rise in the price of raw materials, the introduction of new safety regulations, or a substantial increase in the cost), the adaptation of the contract to the changed condition can be requested by the disadvantaged party through an action for adaptation (the so-called judicial intervention for corrective purpose of contract).  

Provisions Dealing with Nonperformance

Chapter 7 of the Principles (articles 7.1.1–7.4.13) deals with the issues of nonperformance in four sections:

- Section 1: Nonperformance in General
- Section 2: Right to Performance
- Section 3: Termination of Contract
- Section 4: Damages

Nonperformance in General

According to the Principles, nonperformance is failure by a party to perform any of its obligations under the contract. Nonperformance includes also “defective performance” and “late performance” (Principles, article 7.1.1). Nonperformance may be excused because of the conduct of the other party to the contract (i.e., interference by the other party) (Principles, article 7.1.2); because performance is withheld (Principles, article 7.1.3); or because unexpected external events occur (force majeure).

Withholding of performance

Under the Principles, if the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance (Principles, article 7.1.3(1)). If the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed (Principles, article 7.1.3(2)).

This solution can be found in article 97 of the TCO: the principle of exceptio non adimpleti contractus.  


52 See Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 1, 346 et seq.
Cure by nonperforming party

Under the Principles, if certain conditions are met, the nonperforming party may cure the situation by correcting the nonperformance. This remedy aims at preserving the contract and minimizing economic waste. Cure may be effected after the nonperforming party gives notice of cure. Notice of cure must be given without undue delay after the nonperforming party learns of the nonperformance (Principles, article 7.1.4). The conditions of cure by the nonperforming party are as follows: cure must be appropriate in the circumstances; the aggrieved party must not have any legitimate interest in refusing cure; and cure must be effected promptly after notice of cure is given (Principles, article 7.1.4 (1)). Cure may include repair and replacement. On effective notice of cure, rights of the aggrieved party that are inconsistent with the nonperforming party’s performance are suspended until the time for cure has expired. The aggrieved party may withhold performance pending cure (Principles, articles 7.1.4(3) and (4)).

The TCO has not laid down such provisions relating to the right to cure of the nonperforming party. In contracts of sale, “repair and replacement” have been mentioned as the choices of the buyer (TCO, article 227).

Granting of an extension of time for performance

Under the Principles, in a case of nonperformance, the aggrieved party may by notice to the other party allow an additional period of time for performance (Principles, article 7.1.5(1)). This solution deals with the situation where one party performs late and the other party is willing to give extra time for performance. It is inspired by the German concept of Nachfrist. During the additional period, the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages, but it may not resort to any other remedy (Principles, article 7.1.5(2)).

The solution adopted by the TCO is somewhat different. Under the TCO, if a party to a bilateral contract is in default, the other party may grant an appropriate time for performance or have it granted by the judge (TCO, article 123).

Exemption clauses

According to the Principles, “a clause which limits or excludes one party’s liability for non-performance or which permits one party to render performance

53 The same remedies can be found in consumer contracts. See Consumer Protection Act, No. 6502 of November 7, 2013 (Official Gazette, No. 28835 of November 28, 2013), article 11, which deals with choice of rights by the consumer.

54 See Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 1, 517 et seq.
substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract” (Principles, article 7.1.6). Exemption clauses are to be distinguished from forfeiture clauses, which permit a party to withdraw from a contract on payment of an indemnity.

The TCO has laid down somewhat different provisions: an agreement entered into in advance according to which the obligor will not be liable for its gross negligence is null and void (TCO, article 115.1).55

**Force majeure**

According to the Principles, “non-performance is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences” (Principles, article 7.1.7). This article covers the doctrine of frustration in the common law system and impossibility in the civil law system by doctrines such as force majeure, Unmöglichkeit, and the like, but it is identical to none of these doctrines. The Principles have chosen the term *force majeure* because it is widely known in international trade practice (the so-called force majeure clauses in international contracts). When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract (Principles, article 7.1.7(2)).

Under Turkish law, force majeure in the strict sense constitutes a ground for termination of the obligor’s performance (“impossibility” under article 136 of the TCO). However, if the performance of the obligor becomes partly impossible because of circumstances for which it cannot be held liable, it may be excused only for the part of its performance that has become impossible (TCO, article 137).56

**Right to Performance**

**Performance of monetary and nonmonetary obligations**

According to the Principles, in case of a monetary obligation, if the obligor does not make payment, the obligee may require payment (Principles, article 7.2.1). Where a party that owes a nonmonetary obligation does not perform, the other party may require performance (the principle of specific performance), unless

55 Ibid., 420–25. See also Eren, *Borçlar Hukuku: Genel Hükümler*, 1085 et seq.
(a) performance is impossible in law or in fact; (b) performance or enforcement is unreasonably burdensome or expensive; (c) the party entitled to performance may reasonably obtain performance from another source; (d) performance is of an exclusively personal character; or (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the nonperformance (Principles, article 7.2.2).

Regarding performance of a monetary obligation, the TCO has laid down similar provisions (TCO, article 83 et seq.). Regarding performance of nonmonetary obligations, the obligor has to compensate the obligee for the damage arising from nonperformance unless he proves that no fault is attributable to it (TCO, article 112). If the obligor’s performance is to do something (obligation to act), the obligee can obtain authorization to effect performance at the expense of the obligor. If the obligor is under the obligation to abstain from acting (obligation not to act), it must compensate damages arising from nonperformance (TCO, article 113).

Repair and replacement of defective performance

According to the Principles, “the right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance” (Principles, article 7.2.3).

Similar solutions can be found in Turkish law (TCO, article 113).

Judicially imposed penalty

Under the Principles, an order for performance or a judicial penalty can be obtained by the aggrieved party from the court in the case of nonperformance. Legal systems differ about whether judicial penalties should be paid to the aggrieved party, to the state, or both (Principles, article 7.2.4).

Under Turkish law, specific performance can be demanded from a court, but the law has no provision imposing a judicial penalty for nonperformance.

Change of remedy

Under the Principles, the aggrieved party may abandon the remedy of requiring performance of a nonmonetary obligation and opt instead for another remedy. Furthermore, if the decision of a court for performance of a nonmonetary obliga-

57 See Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 1, 379 et seq.
58 See also the buyer's rights in a sales contract at TCO, article 227. Regarding consumer contracts, see Consumer Protection Act, No. 6502, article 11, which deals with the rights of consumers of defective goods and services.
tion cannot be enforced, the aggrieved party may invoke any other remedy (Principles, article 7.2.5).

Turkish law has no similar solution (TCO, article 113).

**Termination of Contract**

**Right to terminate in case of fundamental nonperformance**

According to the Principles, “a party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.” Examples of fundamental nonperformance include nonperformance that substantially deprives the other party of its expectations, failure to strictly comply with an obligation when strict compliance is of essence under the contract, intentional nonperformance; cases where the aggrieved party has no reliance on future performance (Principles, article 7.3.1).

In Turkish law, similar solutions can be found in article 125.2 of the TCO.  

**Anticipatory nonperformance**

Under the Principles, if prior to the date of performance by one of the parties it is clear that there will be a fundamental nonperformance by that party (e.g., one party declares that it will not perform the contract), the other party may terminate the contract (Principles, article 7.3.3).

In Turkish law, a similar solution can be found in TCO article 124.  

**Effects of termination**

According to the Principles, “termination of the contract releases both parties from their obligation to effect and to receive future performance” and “termination does not preclude a claim for damages for non-performance” (Principles, article 7.3.5).

Similar solutions can be found under Turkish law.  

**Restitution on termination**

According to the Principles, on termination of a contract to be performed, either party may claim restitution of whatever it has supplied under the contract (Principles, articles 7.3.6 and 7.3.7).

---

59 See Oğuzman and Öz, *Borçlar Hukuku: Genel Hükümler*, vol. 1, 520 et seq.
60 Ibid., 519, 541–42.
61 Özsunay, “Precontractual Liability,” 323 et seq.
In Turkish law, a similar solution can be found in article 125.3 of the TCO.\textsuperscript{62}

**Damages in Nonperformance**

According to the Principles, “any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except the non-performance is excused” (e.g., force majeure) (Principles, articles 7.4.1). Under the Principles, the right to damages may arise not only in the context of nonperformance of the contract, but also during the precontractual period (i.e., negotiations in bad faith, breach of duty of confidentiality, etc.).

A similar solution can be found under Turkish law.\textsuperscript{63}

**Full compensation**

Under the Principles, the aggrieved party is entitled to full compensation for harm sustained as a result of the nonperformance. Damages usually cover loss suffered and loss of profit. Further compensation for nonpecuniary harm (i.e., physical suffering or emotional distress) can be demanded (Principles, articles 7.4.2). This rule might find application in international commerce with respect to contracts concluded by artists, outstanding athletes, and consultants engaged by a company.

The same solutions are valid for the Turkish law (TCO, articles 114.2 and 51 et seq.).\textsuperscript{64}

**Certainty of harm**

According to the Principles, compensation is due only for harm, including future harm that is established with a reasonable degree of certainty. Compensation may be due for the loss of a chance in proportion to the probability of its occurrence. If the amount of damages cannot be established with a sufficient degree of certainty, the assessment is made by the court (Principles, article 7.4.3).

The same rules are valid for Turkish law (TCO, articles 50, 54, and 55).\textsuperscript{65}

**Proof of harm by current price**

Under the Principles, if the aggrieved party has terminated the contract and has not made a replacement transaction, but a current price for the performance is

\textsuperscript{62} Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 1, 528.
\textsuperscript{63} Ibid., 313 et seq.
\textsuperscript{64} Ibid., 416, 426, and 440.
\textsuperscript{65} Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 2, 84 et seq.
contracted for, the aggrieved party may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm (Principles, article 7.4.6).

Similar solutions can be found in the TCO in its provisions on sales contracts (TCO, article 213).66

**Contributory negligence and mitigation of harm**

Under the Principles, if the harm is due in part to an act or omission of the aggrieved party, the amount of damages is to be reduced (Principles, article 7.4.7). Moreover, the aggrieved party has a duty to mitigate harm (Principles, article 7.4.8).

The same solutions are valid for Turkish law (TCO, article 52).67

**Manner of monetary redress**

According to the Principles, damages are to be paid in a lump sum. However, they may be payable in installments if such payments are appropriate given the nature of the harm (Principles, article 7.4.11).

Turkish law has adopted the same solution (TCO, article 51).68

**Interest on damages**

Unless otherwise agreed, interest on damages for nonperformance of non-monetary obligations accrues from the time of nonperformance (Principles, article 7.4.10).

A similar solution can be found in Turkish law.69

**Setoff Provisions**

**Conditions of Setoff**

Setoff is a convenient means of discharging obligations at once and at the same time. Under the Principles, when two parties owe each other an obligation arising from a contract or any cause of action, each party may set off its obligation against the obligation of the other party. By mutual deduction, both obligations are dis-

---

66 See Yavuz, *Türk Borçlar Hukuku Özel*, 82 et seq.
67 See Oğuzman and Öz, *Borçlar Hukuku: Genel Hükümler*, vol. 2, 119 et seq.
68 Oğuzman and Öz, *Borçlar Hukuku: Genel Hükümler*, vol. 1, 115.
69 Ibid., 313 et seq.
charged up to the amount of the lesser obligation. Setoff avoids the need for each party to perform its obligation separately (Principles, article 8.5). The obligor from which payment is asked and that sets off its own obligation is called the **first party**. The obligee that first asks its obligor for payment and against which the right of setoff exercised is called the **other party** (Principles, article 8.1(1)). The conditions of setoff are as follows: (a) each party must be the obligor and the obligee of the other, (b) the first party must have the right to perform its obligation, and (c) the other party’s obligation must be ascertained both as to its existence and as to its amount (Principles, article 8.1).

Under the Principles, payments in different currencies are not performances of the same kind as required by article 8.1. However, if the payments are to be made in currencies that are convertible, setoff may be exercised (Principles, article 8.2).

Turkish law solutions relating to setoff are rather similar to those in the Principles (TCO, article 139 et seq.). An obligor may waive its right to setoff in advance (TCO, article 145). In suretyship, the surety may refuse to satisfy the obligee to the extent the principal obligor has a right to setoff (TCO, article 140). In a case of bankruptcy of the obligor, obligees may set off their claims even if they are not due (TCO, article 142).

**Setoff by Notice**

The right of setoff is exercised by notice to the other party (Principles, article 8.3). The notice must specify the obligations to which it relates. If the notice does not specify the obligation against which setoff is exercised, the other party may, within a reasonable time, declare to the first party the obligation to which setoff relates. If no such declaration is made, the setoff will relate to all the obligations proportionally (Principles, article 8.4).

The TCO lays down similar provisions relating to the notice for setoff (TCO, article 143).

**Effect of Setoff**

Setoff discharges the obligations. If obligations differ in amount, setoff discharges the obligations up to the amount of the lesser obligation. Setoff takes effect from the time of notice (Principles, article 8.5).

---

70 Ibid., 584 et seq.; Tekinay et al., *Borçlar Hukuku: Genel Hükümler*, 1012 et seq.; Eren, *Borçlar Hukuku: Genel Hükümler*, 1270 et seq.

71 Oğuzman and Öz, *Borçlar Hukuku: Genel Hükümler*, vol. 1, 587 et seq.
The same solution can be found in article 143 of the TCO.\textsuperscript{72}

**Provisions Dealing with Assignment of Rights**

Chapter 9 of the Principles deals in three sections with assignment of rights, transfer of obligations, and assignment of contracts (Principles, articles 9.1.1–9.3.7).

**Assignment of Rights**

**Definition**

Assignment of a right means the transfer by agreement from one person (assignor) to another person (assignee) of the assignor’s right to payment of a monetary sum or other performance from a third person (obligor) (Principles, article 9.1.2). In principle, all monetary rights or rights to other performances may be assigned unless a prohibition of assignment exists. Rights may also be assigned partially. Moreover, the assignee may assign the assigned right to another person (Principles, article 9.1.11).

Turkish provisions comply with this definition and its solutions (TCO, article 183). An obligee may assign its right unless the law, an agreement, or the nature of the legal relationship is to the contrary (the so-called nonassignment clauses).\textsuperscript{73}

**Kinds of rights to be assigned**

Under the Principles, not only existing rights but also future rights may be assigned (Principles, article 9.1.5). Even a number of rights may be assigned without individual specification, provided that such rights can be identified as rights to which the assignment relates at the time of the assignment or when they come into existence (Principles, article 9.1.6). Nevertheless, the transfer of certain types of instruments governed by special rules (e.g., negotiable instruments or transfer of a business) are outside the scope of the provisions related to assignment of rights (Principles, article 9.1.2).

The TCO lays down similar provisions in article 183.\textsuperscript{74}

\textsuperscript{72} Ibid., 597.

\textsuperscript{73} Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 2, 543 et seq. See also Tekinay et al., Borçlar Hukuku: Genel Hükümler, 240 et seq.; Kılıçoğlu, Borçlar Hukuku: Genel Hükümler, 768 et seq.; Hatemi and Gökyayla, Borçlar Hukuku: Genel Bölüm, 357.

\textsuperscript{74} See Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 2, 554 et seq.
Assignment agreement

Under the Principles, a right can be assigned by mere agreement between assignor and assignee, without notice to the obligor. In principle, the consent of the obligor is not required for the assignment to be effective between the assignor and the assignee (Principles, article 9.1.7).

Under Turkish law, assignment agreement is subject to use of a written form. However, a “promise for assignment” is not subject to any form (TCO, article 184).75

Notice to the obligor

Under the Principles, only after the obligor receives a notice of assignment does the assignment become effective to the obligor. The notice of assignment can be made by the assignor or the assignee. After the obligor receives such a notice, it is discharged only by paying the assignee (Principles, article 9.1.10). If the assignee gives the notice of assignment, the obligor may request that the assignee provide within a reasonable time adequate proof that the assignment has been made (Principles, article 9.1.12).

The same solutions can be found in Turkish law (TCO, article 190).76

Defenses and rights of setoff

Under the Principles, the obligor may assert against the assignee all defenses that the obligor could assert against the assignor. The obligor may exercise against the assignee any right of setoff available to the obligor against the assignor up to the time notice of assignment was received (Principles, article 9.1.13).

Turkish law lays down similar provisions (TCO, article 188).77

Rights related to the right assigned

Under the Principles, “the assignment of a right transfers to the assignee (i) all the assignor’s rights to payment or other performance under the contract in respect of the right assigned, and (ii) all rights securing performance of the right assigned” (Principles, article 9.1.14).

A similar solution can be found in article 189 of the TCO.78

75 Ibid., 550.
76 Ibid., 548, 586.
77 Ibid., 570–76.
78 Ibid., 563–64.
Undertakings of the assignor

According to the Principles, the assignor undertakes toward the assignee that (a) the assigned right exists at the time of assignment, (b) the assignor is entitled to assign the right, (c) the right has not been previously assigned to another assignee and it is free from any right or claim from a third party, and (d) the obligor does not have any defenses (Principles, article 9.1.15).

Under Turkish law, if the assignment has been made “in return for a performance” the assignor guarantees (a) the existence of the right at the time of assignment and (b) the ability of the obligor to pay (TCO, article 191). In accordance with the guarantee of the assignor, the assignee may claim the performance (i.e., payment) with interest, the costs of assignment, and the costs of any unsuccessful proceedings against the obligor (TCO, article 193).79

Transfer of Obligations

The Principles deals with transfer of obligations in chapter 9, section 2 (Principles, article 9.2.1 et seq.).

Definition and modes of transfer

Transfer of obligations means the transfer of an obligation (to pay money or other performance) from the “original obligor” to another person (the “new obligor”). Such a transfer may occur in two ways: (a) by an agreement between the original obligor and the new obligor or (b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation (Principles, article 9.2.1).

Turkish law has similar provisions (TCO, articles 195–96 and 201).

Transfer by agreement between the original obligor and the new obligor

Transfer by agreement between the original obligor and the new one can be made with the consent of the obligee (Principles, article 9.2.3). The obligee may give consent in advance (Principles, article 9.2.4). With the obligee’s consent, the new obligor becomes bound by the obligation. The original obligor is not necessarily discharged (Principles, article 9.2.5).

In Turkish law, similar solutions can be found (TCO, article 195).80

79 Ibid., 585 et seq.
80 Ibid., 585, 587 et seq. See also Tekinay et al., Borçlar Hukuku: Genel Hükümler, 268 et seq.; Kılıçoğlu, Borçlar Hukuku: Genel Hükümler, 806 et seq.
Transfer by agreement between the obligee and the new obligor

Under the Principles, “the obligee may discharge the original obligor.” Moreover, “the obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly” (Principles, article 9.2.5). Under the first option, the obligee may fully discharge the original obligor. Under the second option, the original obligor and the new obligor become jointly and severally liable toward the obligee.

This kind of transfer of obligation has been regulated by the TCO as an “external undertaking of obligation” (TCO, articles 196 and 201). 81

Third-party performance

Under the Principles, “without the obligee’s consent, the obligor may contract with another person that this person will perform the obligation in place of obligor, unless the obligation in the circumstances has an essentially personal character.” In such a case, “the obligee retains its claims against the obligor” (Principles, article 9.2.6).

In Turkish law, this kind of transfer is called an “internal undertaking of obligation by a new obligor” (TCO, article 195). 82

Defenses and rights of setoff

According to the Principles, when obligations are transferred, the new obligor may assert against the obligee all defenses that the original obligor could assert against the obligee. The new obligor may not exercise against the obligee any right of setoff available to the original obligor against the obligee (Principles, article 9.2.7).

Similar provisions can be found in the TCO under article 199. 83

Assignment of Contracts

Chapter 9, section 3, of the Principles deals with the issues relating to assignment of contracts (Principles, article 9.3.1 et seq.).

Definition

According to the Principles, assignment of a contract means the transfer by agreement from one person (“assignor”) to another person (“assignee”) of the as-

---

81 See Oğuzman and Öz, Borçlar Hukuku: Genel Hükümler, vol. 2, 592 et seq.
82 Ibid., 587 et seq.
83 Ibid., 601 et seq.
signor’s rights and obligations arising out of a contract with another person (“other party”) (Principles, article 9.3.1).

Turkish law contains the same definition (TCO, article 205).84

**Requirement of consent of the other party**

Under the Principles, the assignment of a contract requires the consent of the other party (Principles, article 9.3.3). The other party may give its consent in advance (Principles, article 9.3.4).

The TCO has laid down similar provisions (TCO, article 205).85

**Discharge of the assignor**

The other party may (a) discharge the assignor or (b) retain it as an obligor in case the assignee does not perform properly (Principles, article 9.3.5).

The TCO has laid down similar provisions (TCO, articles 191–93).

**Defenses and rights of setoff**

Under the Principles, assignment of a contract entails both an “assignment of the original rights” and a “transfer of the original obligations” from the assignor to the assignee. As a consequence, the provisions concerning defenses in such cases apply in case of assignment of contract (Principles, article 9.3.6).

The TCO has adopted the same solutions (TCO, article 188).

**Provisions Dealing with Limitation Periods**

**Notion of a Limitation Period**

Article 10.1 of the Principles regulates the consequences of lapses of time. Two kinds of passage of time are distinguished. In some cases, a lapse of time extinguishes rights and actions (“forfeiture period,” or hak düşümü süresi). In most cases, a lapse of time operates only as a defense against an action in court. Under the Principles, lapse of time (“limitation period,” or zamanaşımı süresi) does not extinguish rights but operates only as a defense (Principles, articles 10.1 and 10.9).

---


**Limitation Periods under the Principles**

Although periods of limitation of rights and claims are common to all jurisdictions, they differ in length. Under the Principles, “the general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee’s right can be exercised.” The Principles state that the maximum limitation period is 10 years, beginning on the day after the day the right can be exercised (Principles, article 10.2).

Under Turkish law, unless otherwise laid down by law, all claims are subject to a 10-year limitation period (TCO, article 146). For the following claims, the limitation period is five years: (a) rent and interest and other periodic performances such as fees; (b) claims relating to board and accommodation (delivery of foodstuffs at restaurants, etc.); (c) claims arising from the work of craftsmen; and (d) claims relating to mandate and agency agreements and the like (TCO, article 147).  

**Modification of Limitation Periods by the Parties**

According to the Principles, the parties may modify the limitation periods. However they may not (a) shorten the general limitation period to less than one year, (b) shorten the maximum limitation period to less than four years, or (c) extend the maximum limitation period to more than 15 years (Principles, article 10.3).

Turkish law has adopted a different solution. The limitation periods laid down by the TCO cannot be altered by agreement of the parties (TCO, article 148). Moreover, limitation periods cannot be waived in advance (TCO, article 160).

**New Limitation Period by Acknowledgment**

According to the Principles, if the obligor before the expiration of the general limitation period acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgment (Principles, article 10.4).

Under Turkish law, acknowledgment of a claim is one of the grounds for the interruption of the running of the limitation period. If a claim is acknowledged by the obligor, in particular by making interest and installment payments or by giving a guarantee, the running of the limitation period is interrupted. Moreover,
The Turkish Perspective

The initiative of proceedings by the obligee by filing a claim in a bankruptcy has the same effects (TCO, article 154). With the interruption, the limitation period starts anew. If the obligation has been acknowledged by the issuance of a document or confirmed by a court’s judgment, the new limitation period is 10 years (TCO, article 156).

Suspensions of the Running of the Limitation Period

Under the Principles, the running of the limitation period is suspended in several situations.

Suspension by judicial process and by arbitral proceedings

In the following situations, the running of the limitation period is suspended: (a) when the obligee performs any act, by commencing judicial proceedings; (b) in the case of the obligor’s insolvency, when the obligee has asserted its rights in the insolvency proceedings; (c) in the case of proceedings for dissolution of the entity that is the obligor, when the obligee has asserted its rights in the dissolution proceedings (Principles, article 10.5(1)); or (d) when the obligee performs any act, by commencing arbitral proceedings (Principles, article 10.6(1)).

Suspension lasts until a final decision or binding award has been issued or until the proceedings have been otherwise terminated (Principles, articles 10.5(2) and 10.6(2)).

The TCO lays down similar solutions (TCO, article 153).

Suspension in case of force majeure, death, or incapacity

Under the Principles, force majeure is a ground of suspension because force majeure prevents the pursuance of a right. Moreover, incapacity and death of the obligee or obligor constitute impediments to an effective pursuit of the obligee’s right and therefore are grounds for suspension (Principles, article 10.8).

The solutions of Turkish law on the grounds of suspension of the running of limitation period are different. Under Turkish law, in the following situations, the running of limitation period is suspended: (a) for claims of children against their parents, (b) for claims of wards against their guardians, (c) for claims of spouses against each other for the duration of the marriage, (d) for claims of employees

88 Ibid., 613 et seq.
who live in the same household of their employers, and (e) as long as a claim cannot be asserted before the Turkish courts (TCO, article 153).\textsuperscript{89}

*Effects of expiration of limitation period*

Under the Principles, the expiration of the limitation period does not extinguish the right, but only bars its enforcement. The effects of the expiration of the limitation period do not occur automatically. They occur only if the obligor raises the expiration as a defense (Principles, article 10.9).

The same solution prevails in Turkish law. The judge cannot take into account ex officio the limitation period (TCO, article 161).\textsuperscript{90}

*Right of setoff*

According to the Principles, the obligee may exercise the right of setoff until the obligor has asserted the expiration of the limitation period (Principles, article 10.10).

Under Turkish law, the same rule prevails.\textsuperscript{91}

*Provisions Dealing with Plurality of Obligors and Obligees*

*Plurality of Obligors*

According to the Principles, two kinds of situations can be distinguished for the “plurality of obligors.” The first is where each obligor is bound for the whole obligation, which means that the obligee may require performance from any one of them. Such obligations are called *joint and several*. The second is where each obligor is bound only for its share, which entitles the obligee to claim only that much from each of the obligors. The obligations are separate when each obligor is bound for its share (Principles, article 10.1.1).

The same situations relating to plurality of obligors exist in Turkish law (TCO, article 162 et seq.).

\textsuperscript{89} Ibid., 610 et seq. See also Tekinay et al., *Borçlar Hukuku: Genel Hükümler*, 1049 et seq.

\textsuperscript{90} See also Code of Civil Procedure, No. 6100 of January 12, 2011, article 25 (Official Gazette, No. 27836 of February 4, 2011); compare articles 116, 142.

\textsuperscript{91} Oğuzman and Öz, *Borçlar Hukuku: Genel Hükümler*, vol. 2, 607 et seq.
Presumption of joint and several obligations

Under the Principles, when several obligors are bound by the same obligation toward an obligee, they are presumed to be jointly and severally bound unless the circumstances indicate otherwise (Principles, article 11.1.2).

The TCO lays down the same principle (TCO, article 162.1).

Obligee’s rights against joint and several obligors

According to the Principles, when obligors are jointly and severally bound, the obligee may require performance from any one of them until full performance has been received (Principles, article 11.1.3).

This solution prevails also in Turkish law (TCO, article 163).

Availability of defenses and rights of setoff

According to the Principles, a joint and several obligor against whom a claim is made by the obligee may assert all the defenses and rights of setoff that are personal to it or that are common to all co-obligors. However, it may not assert defenses or rights of setoff that are personal to one or several of the other co-obligors (Principles, article 11.1.4).

The TCO lays down the same defenses regarding the obligors (TCO, article 164).

Effects of performance or setoff

Under the Principles, performance or setoff by a joint and several obligor or setoff by the obligee against one joint and several obligor discharges the other obligors in relation to the obligee to the extent of the performance or setoff (Principles, article 11.1.5).

The same solution can be found in the TCO under article 166.

Effect of release or settlement

According to the Principles, “release of one joint and several obligor, or settlement with one joint and several obligor, discharges all the other obligors for the share of the released or settling obligor, unless the circumstances indicate otherwise” (Principles, article 11.1.6(1)).

Turkish law has adopted the same solution (TCO, articles 166.2 and 166.3).
Effect of expiration or suspension of limitation period

According to the Principles, expiration of the limitation period of the obligee’s rights against one joint and several obligor does not affect (a) the obligations to the obligee of the other joint and several obligors or (b) the rights of recourse between the joint and several obligors (Principles, article 11.1.7).

Turkish law has laid down a different solution. According to article 155 of the TCO, the interruption of the running of the limitation period against a joint and several obligor or co-obligor of an indivisible performance is also effective against others.

Apportionment among joint and several obligors

Under the Principles, as among themselves, joint and several obligors are bound in equal shares unless the circumstances indicate otherwise (Principles, article 11.1.9).

Article 167.1 of the TCO lays down the same rule.

Extent of contributory claim

According to the Principles, a joint and several obligor who has performed more than its share may claim the excess from any of the other obligors to the extent of each obligor’s unperformed share (Principles, article 11.1.10).

The same rule can be found in article 167.2 of the TCO.

Subrogation in the obligee’s rights

Under the Principles, a joint and several obligor who has paid more than its share to the obligee has a “contributory claim” against the other obligors (Principles, article 11.1.11).

The principle of subrogation in the obligee’s rights prevails also in Turkish law (TCO, article 168.1).

Provisions Dealing with Defenses in Contributory Claims

Under the Principles, a joint and several obligor against which a claim is made by the co-obligor that has performed the obligation may (a) raise any common defenses and rights of setoff that were available to be asserted by the co-obligor against the oblige, (b) assert defenses that are personal to itself, or (c) assert de-
fenses and rights of setoff that are personal to one or several of the co-obligors (Principles, article 11.1.12).

A partially similar solution can be found in the TCO under article 167.2.

**Plurality of Obligees**

Under the Principles, plurality of obligees occurs in different situations. Three main types of claims are available when several obligees can claim performance of the same obligation from an obligor. First, the claims can be separate. Each obligee can then claim only its share. Second, the claims can be joint and several, which means that each obligee can claim full performance, subject to subsequent allocation between the different obligees. Third, the claims are joint, in which case all obligees have to claim together; consequently, the obligor must perform in favor all of them together (Principles, article 11.2.1).

Similar situations can be found in Turkish law (TCO, article 169.1).

**Effects of joint and several claims**

According to the Principles, full performance of an obligation in favor of one of the joint and several obligees discharges the obligor toward the other obligees.

The TCO has the same rule (TCO, article 169.2). The obligor has the discretion to decide which joint obligee it must pay as long as none of the obligees has taken legal action against the obligor (“obligor’s choice”) (TCO, article 169.3).

**Availability of defenses against joint and several obligees**

Under the Principles, the obligor may assert against any of the joint and several obligees all the defenses and rights of setoff that are personal to its relationship to that obligee or that it can assert against all the co-obligees, but it may not assert defenses and rights of setoff that are personal to its relationship to one or several of the other co-obligees (Principles, article 11.2.3).

The TCO has adopted a similar solution (TCO, article 164).

**Allocation between joint and several obligees**

Under the Principles, joint and several obligees may each claim full performance of the whole obligation. However, among themselves they are entitled to only their respective shares. These shares are presumed to be equal. An obligee
that has received more than its share must transfer the excess to the other obligees to the extent of their respective shares (Principles, article 11.2.4).

The TCO has adopted the same solution (TCO, articles 169.4 and 169.5).

Conclusion

As this article illustrates, Turkish law is, in principle, in harmony with the UNIDROIT Principles. Therefore, the Principles may serve as a guide for drafting contracts and may be used to interpret and supplement domestic law. Moreover, the contracting parties may agree to use the UNIDROIT Principles as applicable law governing the contracts and settlement of commercial disputes. They can be inserted into arbitration clauses in contracts and can easily be applied by Turkish courts or arbitral tribunals.\footnote{See UNIDROIT, “Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts” UNIDROIT, Rome, 2013.}
How We Monetarily Restore Trafficked Victims and Accurately Calculate Their Stolen Wages

*Benjamin Thomas Greer*

Human trafficking is an atrocity that decimates the lives of the trafficked, fractures their families, and exploits their bodies and labor. In cases involving human trafficking, law enforcement agencies primarily focus on attaining a criminal sentence while all too often marginalizing or overlooking monetary restoration for the victim. Prosecutors often focus more on their case file than on a vigorous pursuit of victim restitution, feeling that they have a mandate, first and foremost, to convict. Although the victim may be heartened by his or her abuser’s conviction, without an appropriately formulated monetary recovery for damages, the victim may never truly be made monetarily whole, and the perpetrator is, therefore, not held fully responsible. A recent focus on victims’ rights should garner greater attention by prosecutors and victim’s rights groups on ensuring proper calculation and acquisition of restitution for victims.

Heightened Awareness of Forced Labor Human Trafficking in the United States

Human trafficking is a crime that is extremely broad in scope and has polluted entire sectors of the world’s economies. Although trafficking may manifest itself in many forms, all such forms share the same central characteristic: the unscrupulous exploitation of another person for profit. Trafficking is a highly dynamic and fluid phenomenon that reacts remarkably well to market demands and underregulated economic sectors and can easily adapt to exploit weaknesses in the prevailing laws.¹ Traditionally, law enforcement has employed a myopic view on trafficking,

---


* Staff Counsel, California Department of State Hospitals. The views and opinions expressed here are solely the author’s and do not necessarily reflect the official position, if any, of the Attorney General’s Office, California District Attorneys Association, San Joaquin College of Law, or Coalition to Abolish Slavery & Trafficking. He would like to give special thanks to his research assistant Scott Dyle, legal intern at the Department of Justice, Human Trafficking Special Projects Team.
focusing on the sexual exploitation trade (e.g., prostitution). However, federal and state governments, heavily influenced by advocacy groups, have begun to expand their understanding of trafficking to include other forms of forced labor.

*Forced labor* is generally defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” In its June 2010 *Trafficking in Persons Report*, the U.S. State Department reported, “More people are trafficked for forced labor than commercial sex.” Additionally, the International Labour Organization estimates that nine times as many trafficked victims are subjugated into forced labor than into the sex trade, and the profits are in the billions. Textile manufacturing shops, domestic labor providers, construction sites, agricultural employment roles, and technology manufacturing are garnering new societal and regulatory scrutiny for their sources of labor. Although slavery and involuntary servitude have been outlawed for generations, state and federal governments are modernizing their laws to specifically address exposed legislative failings to combat this newly developing pattern of exploitation.

On October 28, 2000, Congress passed the Trafficking Victims Protection Act of 2000 (TVPA). In its “Purpose and Findings,” the TVPA stated, “Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.” A 2004 study conducted by the University

---


4 Convention Concerning Forced or Compulsory Labour, article 2(1). See also Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, articles 3(a)–3(d).


6 Ibid., 7.


9 California Department of Justice, *State of Human Trafficking in California 2012*.

10 The 13th amendment to the U.S. Constitution states, “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”


12 22 U.S.C., Section 7101(a)(3).
of California, Berkley, found that five main economic sectors of the U.S. economy that are primarily affected: prostitution and sex services (46 percent), domestic services (27 percent), agricultural (10 percent), textile sweatshops and factories (5 percent), and the restaurant and hotel industry (4 percent).\textsuperscript{13}

According to the State Department, more than 12 million adults and children are in forced labor, bonded labor, and forced prostitution worldwide.\textsuperscript{14} Recent federal statistical analysis revealed the largest concentrations of trafficked victims were located in California, Oklahoma, Texas, and New York.\textsuperscript{15} According to a 2009 study,

Eighty-two percent of foreign adult victims were labor trafficking victims, of which 58 percent were men and 42 percent were women; 15 percent were adult sex trafficking victims, all of whom were women; and three percent were victims of both forms. Fifty-six percent of foreign child victims were labor trafficking victims, of which half were boys and half were girls; 38 percent were sex trafficking victims, of which 16 percent were boys; and six percent were victims of both.\textsuperscript{16}

In 2009, with a newly honed focus, jurisdictions within the United States secured 335 successful forced labor prosecutions, with 49,105 identifiable victims.\textsuperscript{17} The Human Trafficking Prosecution Unit, a specialized anti–human trafficking unit of the Department of Justice’s Civil Rights Division, in partnership with the U.S. Attorney’s Office, charged 114 individuals and obtained 47 convictions in 43 human trafficking prosecutions (21 related to labor trafficking and 22 related to sex trafficking).\textsuperscript{18}

In 2013, Wyoming became the final U.S. State to pass anti–human trafficking legislation. However, a common hurdle to uniform enforcement exists because the states have codified varying definitions of human trafficking and different mone-

\textsuperscript{14} U.S. Department of State, Trafficking in Person Report, 6.
\textsuperscript{15} U.S. Department of Justice, Report to Congress from Attorney General John Ashcroft on U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2003 (Washington, DC: U.S. Department of Justice), http://www.justice.gov/archive/ag/annualreports/tr2003/050104agreporttocongressvprav10.pdf. In fiscal year 2002, the Office of Refugee Resettlement issued letters to benefit offices in 14 states, of which the largest concentrations were to Texas (31 percent), Florida (19 percent), and California (14 percent). Note that these concentrations reflect where victims were living after victimization and do not necessarily reflect where they were victimized.
\textsuperscript{16} U.S. Department of State, Trafficking in Persons Report, 341.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid., 338.
tary and incarceration penalties. Such discrepancies lead to a disjointed application of the law and confusion for the public.

In 2012, California’s Attorney General, Kamala Harris, formed a new Human Trafficking Work Group. The work group comprised a comprehensive multidisciplinary cross-section of federally funded local law enforcement human trafficking task forces, human trafficking victim services organizations, domestic violence and sexual assault service providers, immigrant rights groups, legal services providers, academia, and technology companies. The work group discussed numerous pressing issues, such as (a) ways to collect and organize data on the current nature and extent of human trafficking in California, (b) law enforcement investigative and prosecutorial challenges, (c) victim services issues and challenges, (d) further legislative efforts, (e) law enforcement and community training, and (f) technology solutions and proposals. The meeting culminated in an updated statewide report in which the work group revealed its findings:

- From mid-2010 to mid-2012, California’s nine regional human trafficking task forces identified 1,277 victims, initiated 2,552 investigations, and arrested 1,798 individuals.

- In the same two-year period, California’s task forces provided training to 25,591 law enforcement personnel, prosecutors, victim service providers, and other first responders. Several nongovernmental organizations also trained judicial officers, airport personnel, social service providers, pro bono attorneys, and retail businesses, among others. The variety of individuals who were trained underscores the pervasiveness of human trafficking and the important role that governmental and nongovernmental actors play in detecting trafficking and assisting victims.

- Of human trafficking victims whose country of origin was identified by California’s task forces, 72 percent were American. The public perception is that human trafficking victims are from other countries, but data from California’s task forces indicate that the vast majority are Americans.

- Labor trafficking is under-reported and under-investigated compared to sex trafficking. 56 percent of victims who received services through California’s task forces were sex trafficking victims. However, data from other sources indicate that labor trafficking is three and one-half times as prevalent as sex trafficking worldwide.

---

Transnational gangs are increasingly trafficking in human beings because it is a low-risk crime with high, renewable profits. It is critical for federal, state, and local law enforcement and labor regulators to collaborate across jurisdictions to disrupt and dismantle these increasingly sophisticated organized criminal networks.

A vertical prosecution model run outside routine vice operations can help law enforcement better protect victims and improve prosecutions. Fostering expertise about human trafficking within a law enforcement agency and handling these cases outside routine vice operations can prevent erroneously viewing trafficking victims as perpetrators.

Early and frequent collaboration between law enforcement and victim service providers helps victims and prosecutors. Victims who receive immediate and comprehensive assistance are more likely to help bring their traffickers to justice.

Traffickers are reaching more victims and customers by recruiting and advertising online. Traffickers use online advertising and Internet-enabled cell phones to access a larger client base and create a greater sense of anonymity. Law enforcement needs the training and tools to investigate trafficking online.

Technology is available to better identify, reach, and serve victims. Tools like search term–triggered messages, website widgets, and text short codes enable groups to find victims online, connect them with services, and encourage the general public to report human trafficking.

Alert consumers need more tools to leverage their purchasing power to reduce the demand for trafficking. Public and private organizations are just beginning to create Web-based and mobile tools to increase public awareness and educate consumers about how to help combat human trafficking.

With an extensive border, major shipping ports, and a powerful economy, California is an enticing and fertile terminal for traffickers to sell their victims. Understanding its role as a major market for trafficking, California has aggressively

20 California Department of Justice, State of Human Trafficking in California 2012, 4–5.
updated its criminal and civil codes to confront trafficking within its borders. The California Legislature has amended three important sections of its code to help fight trafficking and to give victims legal protections that ensure comprehensive penal redress. In 2005, the Legislature added California Penal Code sections 236.1 and 1202.4(q). Penal Code section 236.1 was the first state statute to specifically make human trafficking not only a federal crime but also a state felony.23

Reconceptualizing the crime of human trafficking requires a critical analysis of not only the criminal act but also the scope of injury sustained by the victim. To complement the newly codified crime, California legislators revised the restitution calculations available to trafficked victims, adding Penal Code section 1202.4(q). This new section directs trial courts to calculate human trafficking restitution orders in the light most beneficial to the victim, demanding the optimal calculation for the maximum recovery. The new provision reflects a nuanced understanding that trafficking manifests itself in many different facets and that restitution orders should follow by degree.

An individual’s labor has long been understood as personal property.24 If such property is not valued correctly, the true and fundamental worth of the individual is offended. Human trafficking and forced labor are not only the theft of one’s time and energy but also a fundamental attack on another’s spirit and freedom. California has a long history of valuing stolen labor.25 Forced and stolen labor share similar injurious monetary characteristics. However, the method of extracting the labor is different, and the remedial calculation should reflect this imbalance. The California Legislature codified a series of four calculations that the court could apply. The four options provide the court an extraordinary ability to select or create any method of calculation it deems proper and in the interest of justice.26 This directive, coupled with the authoritative framework, supplies an atmosphere for the court to create a meaningful order, one that (a) best benefits the victim, (b)

23 California Alliance to Combat Trafficking and Slavery Task Force, *Human Trafficking in California*.

\[
[E]very \text{ Man has a } \text{Property in his own Person}. \text{ This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whate\text{ever} then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. … For this Labour being the unquestionable Property of the Labour, no Man but he can have a right to what that is once joyned to … and as good left in common for others.}
\]

25 California Penal Code, section 484.
26 Ibid, section 1202.4(q).
uniquely addresses the type and severity of trafficking used by the trafficker, and (c) ensures that the trafficker does not monetarily benefit from the crime.

Approaching the crime of trafficking holistically, the Legislature also included Civil Code section 52.5, which gives victims a specific and unique civil remedy. This statute not only clearly enumerates and authorizes all forms of traditionally recoverable damages—actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief—but also provides for the recovery of attorney’s fees, costs, and treble damages or US$10,000, whichever is greater. While Civil Code section 52.5 may appear to provide a monetarily superior method of recovery, Penal Code section 1204.2(q) may prove to be the most efficient and advantageous conduit for appraising the proper value of the victim’s stolen labor.

Need for an Authoritative Restitution Order

A key component in a criminal disposition is the penal redress and interdict. Victim restitution is mandated by the California constitution, Penal Code, and case law. A sentence will be considered invalid if the court fails to specifically address a victim’s restitution. In its 2010 Trafficking in Persons Report, the U.S. State Department posed the question, “What makes a good trafficking in persons’s law?” Its answer: “Explicit provisions ensuring identified victims have access to legal redress to obtain financial compensation for the trafficking crimes committed against them.”

A fundamental tenet of restitution is that it should be “broadly and liberally construed” so that a victim may be made as monetarily whole as possible. Restitution orders can be imposed for all crimes, including crimes containing pure economic losses, and the date for measuring the loss is generally the date of con-

27 Black’s Law Dictionary, 9th ed., defines treble damages as “damages that, by statute, are three times the amount that the fact finder determines is owed—also termed triple damages.” See Bryan A. Garner, ed., Black’s Law Dictionary (Eagan, MN: West, 2009).
28 California Constitution, Article I, Section 28(b).
29 California Penal Code, section 1202.4(q).
31 U.S. Department of State, Trafficking in Persons Report, 1.
32 Ibid.
version. The desired effect of any order is to sufficiently and fully reimburse the victim for every determinable economic loss incurred as a result of the defendant’s criminal conduct. The court is given great latitude when finding the boundaries of the economic harm sustained by the victim. Restitution may even exceed the actual loss caused by the defendant, provided that the order is not arbitrarily or capriciously calculated. If a reviewing court finds a factual and rational basis for the amount of restitution ordered, a challenge for abuse of discretion will not survive. These guidelines provide ample room for a well-informed court to aggressively evaluate and formulate restitution.

The timing of the formulation is crucial and should not be overlooked. The issue of restitution is customarily and most appropriately addressed at the time of criminal sentencing. This timing provides the reviewing court an opportunity to take into account the totality of circumstances of the underlying offense before issuing its decision. It also provides an adversarial setting for a truthful computation, in which any effort by the defendant to dispute the scope of restitution may illustrate lack of remorse or contrite capitulation. Constructing restitution during sentencing is also advantageous because the court continues to possess jurisdiction over the defendant, leaving the court with the power to compel the defendant to complete California Restitution Form CR-115. This form demands complete and full disclosure of assets and liabilities. Providing false information is a misdemeanor and could constitute perjury. In addition, there is no requirement for a separate hearing to impose the statutorily mandated restitution fines, thus expediting the process.

Once restitution has been set, the defendant’s due process rights are truncated, and the victim’s order is constitutionally protected against other creditors. If the

35 Restatement (First) of Restitution, section 151 (1937), defines the measure of recovery when benefits are acquired by consciously tortuous conduct as the value at the date of acquisition, but a different date may be used to avoid injustice.
36 California Penal Code, section 1202.4(f)(3).
37 People v. Carbajal, 899 P.2d 67, 70 (Cal. 1995).
38 Ibid. See also Broussard, 856 P.2d 1134 and Valdez, 30 Cal. 2d 4.
39 California Penal Code, section 1202.4(d).
41 Ibid. See also California Penal Code, sections 1202.4(f)(5)–(11), which require that the defendant file a statement of assets with the clerk no later than his or her sentencing date, unless otherwise directed by the court.
43 California Penal Code, section 1202.4(d).
44 California Constitution, article I, sections 28(b)(13)(A)–(C).
defendant challenges an amount, then he or she bears the burden of establishing that the amount as erroneous.\textsuperscript{45} This provision represents a shift from the state’s burden to prove criminal culpability beyond a reasonable doubt and restitution by a “preponderance of the evidence.”\textsuperscript{46}

In addition to the defendant shouldering the burden of proof in refuting the stated amount of restitution, the challenger’s due process rights do not provide for the ability to cross-examine the victim or persons who provided services to the victim as a result of the crime.\textsuperscript{47} Once a restitution order has been entered, it is extremely difficult to overturn or reduce. Even the defendant’s inability to afford restitution does not constitute “compelling and extraordinary” grounds to modify or vacate an order.\textsuperscript{48}

Although a defendant convicted under the federal TVPA may be subject to restitution,\textsuperscript{49} many states have taken the affirmative act of making restitution a mandatory component of the disposition process.\textsuperscript{50} Although the option of restitution and methods of calculation vary, California has codified the most forward-thinking and flexible statute, mandating direct restitution, statutory penalties, or both. Because human trafficking is a complex crime, a “one-size-fits-all” restitution calculation could potentially fail to make the victim whole. Therefore, the California Legislature presented the court with a series of options from which to choose.

**Attempt to Maximize Victim Recovery under Penal Code Section 1202.4(q)**

The statutory scheme and spirit of Penal Code 1202.4(q) command that the court select a restitution calculation that maximizes the recovery for the victim.

Penal Code 1202.4(q) states:

> In determining restitution pursuant to this section, \textit{the court shall base its order upon the greater of the following:} the gross value of the victim’s labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim’s labor as guaranteed under California law, or the actual income

\textsuperscript{45} People v. Thygesen, 81 Cal. 2d 886, 889 (Cal. Ct. App. 1999); People v. Foster, 18 Cal. 2d 1, 5 (Cal. Ct. App. 1993).

\textsuperscript{46} People v. Gemelli 74 Cal. 3d 901, 904 (2008).


\textsuperscript{48} \textit{California Constitution, article I, section 1202.4(f), (g).}

\textsuperscript{49} 18 U.S.C., section 1593.

\textsuperscript{50} See \textit{California Penal Code, section 1202.4}. See also \textit{New Jersey Statutes Annotated S 2C:13–18, which specifies “greater of the gross income or value of the victim’s labor or services.”}
derived by the defendant from the victim’s labor or services or any other appropriate means to provide reparations to the victim.\textsuperscript{51}

The legislative intent outlined in Penal Code section 1202.4(q) clearly gives the trial court abundant flexibility to fashion restitution from a myriad of calculations, and it commands the court to choose the recovery that best mitigates the injury. The Legislature chose to use the term \textit{reparations} to describe the victim’s injuries. This multifaceted term addresses not only monetary loss but also the conduct and nature of the wrongdoing.\textsuperscript{52} The court should appreciate that a trafficked victim’s injury is not limited to lost wages and should also factor in how the labor was extracted—through force, fraud, or coercion. Although varying forms of trafficking may benefit from varied calculations, courts should not be reluctant to follow the directive and spirit creatively constructed by the Legislature, which provides an avenue for a nuanced restitution order. As long as the method used is rationally based and not arbitrary, it will stand.\textsuperscript{53}

Victims of human labor trafficking should be allowed to assert a wage valuation that is more advantageous and worker dominant to remedy the past disparity in negotiating power. When a court selects or constructs a framework that is designed to maximize forced labor recovery, the court should select a wage valuation that compensates the victim for this disparity in negotiating power. Such a determination is clearly within the definitional scope of the term \textit{reparation}. Since the trafficker–victim relationship had been wholly weighed in favor of the trafficker, a restitution order should be created to address this past disparity. The court should be guided by wages that have been negotiated by workers on the same or a similar footing as the employer with significant negotiating control and power (e.g., collective bargaining wages).\textsuperscript{54} In the creation of a collective bargaining agreement, labor unions have significant influence in the prevailing wage and contracted

\textsuperscript{51} \textsc{California Penal Code, section 1202.4(q)} (emphasis added).


terms. Unlike a fair market value calculation, in which business interests and labor interests often collide, the primary goal of collective bargaining is to garner the most advantageous terms possible to improve the wages and working conditions for union members.\textsuperscript{55} Selecting a prevailing union wage that can be easily accessed and verified would not grind to a halt the wheels of justice.\textsuperscript{56}

For forms of labor that may not have a specified or easily verifiable prevailing collective bargaining wage, the court should look to alternate forms of worker-favorable valuations. In family law quantum meruit cases, caretakers with a family relationship to their patient can expect a premium rate for the care provided. The court’s rationale is that a patient would rather have a family member care for them; therefore, the care has a higher intrinsic value. This form of enhancement could be a guiding example of how to value domestic servitude labor. After all potential wage rates have been assessed, if a traditional fair market value calculation provides a maximum recovery, then a trafficked victim ought to receive the benefit of that calculation.

**Variation between Criminal and Civil Recovery for Trafficked Victims**

Although investigation and prosecution are the primary focus of law enforcement, civil court remedies provide unique legal features that the victim may tactically use to achieve more favorable monetary evaluations. In a criminal proceeding, the prosecution may seek the victim’s input, but definitive case management decisions regarding plea agreements and trial strategies, including sentencing arrangements, are at the discretion of the prosecuting attorney. Many of these decisions may be in direct conflict with the victim’s wishes. Unlike a criminal case, where the state is the complaining party, a civil case is completely within the victim’s control. Having the ultimate authority to assess and decide what strategic course of action to take can be empowering for the victim, thus providing him or her a greater chance to achieve some semblance of closure.


\textsuperscript{56} Ibid. Prevailing wage rates became common with the passage of the federal Davis-Bacon Act of 1931, 29 C.F.R., section 1.5–1.6(b). This legislation required federally funded projects to pay all workers a pre-specified wage rate, which allowed union and non-union shops to compete for federal contracts and ensure quality tradesmen. In a collaborative effort by the Office of Management and Budget, Department of Labor, Department of Defense, General Services Administration, Department of Energy, and Department of Commerce, the federal government has compiled a database of prevailing union wages for numerous locations in a myriad of professions. The prevailing union wage for a specified locale and trade can be accessed at Wage Determinations OnLine.gov, available at http://www.wdol.gov/dba.aspx#0. Not all labor services are included.
**California Claims**

In a California human trafficking civil action, the victim may potentially assert a myriad of claims, ranging from claims under section 52.5 of the Civil Code, tort-based claims, quasi-contract or quantum meruit claims, or any combination therein. All these claims provide very different remedies and involve very different methods of calculating damages. A victim, with the assistance of legal counsel, would need to carefully examine the specific facts of the case before choosing which claims to advance. Although a quasi-contract or quantum meruit claim may be easier to prove, it generally does not provide grounds for secondary or punitive damages. Navigating and assessing this hedgerow maze of claims and associated remedies are likely to frustrate and confuse a seasoned attorney, let alone a victimized, novice civilian.

In September of 2010, California achieved one of its first major convictions for forced labor trafficking. Mabelle de la Rosa Dann was sentenced to five years in prison and ordered to pay US$123,740.34 in restitution for forced labor and associated crimes.\(^{57}\)

In the case *Canal v. Dann*,\(^{58}\) Peña Canal worked for Dann for 15 hours a day, seven days a week. She cared for Dann’s three young children and performed cooking and cleaning for the household. Peña Canal was promised US$600 per month, plus free room and board, in exchange for working five days per week during regular business hours. Dann had no intention of ever paying Peña Canal for her work and her promises of reasonable work accommodations were false. Peña Canal moved to the United States in 2006, living with Dann, her three children, and the children’s grandmother in Dann’s Walnut Creek, California, apartment. She was immediately put to work as a full-time nanny, maid, and cook for the children. Peña Canal’s typical workday began at 6:00 a.m., when she cooked breakfast for the family, and ended around 9:00 p.m., when she finished washing the dishes for the meals she had cooked. According to the court, “[r]ather than pay Peña Canal, Dann told Peña Canal that she owed Dann money and needed to continue to work for free to pay off this debt.”\(^{59}\) At one time, Dann told Peña Canal that she had accumulated debt and owed Dann more than US$13,000. Dann controlled every aspect of Peña Canal’s life and even held her visa, passport, and Peruvian identification card. Whenever Dann left the apartment, she took Peña Canal’s passport with her.


\(^{59}\) Ibid., 3.
To set restitution, the court based Peña Canal’s labor value on the federal government’s valuation,\textsuperscript{60} derived from the Foreign Labor Certification Program.\textsuperscript{61} According to the evidence submitted, Peña Canal had worked for one year, nine months, and one day (641 days total), 15 hours per day without break, constituting 9,615 forced labor hours.\textsuperscript{62} The federal district court awarded Peña Canal US$123,740.43 in criminal restitution. At a straight hourly wage, the court valued her work at US$12.87 an hour. Although the valuation may appear to represent a reasonable hourly wage, this calculation fails to account for any wage adjustments (e.g., holiday pay or overtime). When adjusted for overtime, the rate drops to approximately US$9.95 an hour.\textsuperscript{63}

However, when Peña Canal sought civil damages, the outcome was much more favorable. Having determined that Peña Canal was entitled to entry of default judgment on her claim, the civil court determined the amount of damages she was entitled to was a fair hourly wage for her work: US$23.70.\textsuperscript{64} With this hourly wage, plus the applicable penalties under the California Labor Code, Dann owed Peña Canal US$340,746.75.\textsuperscript{65} The court also awarded US$92,400 in compensatory damages for the emotional distress and other tort damages caused by Dann; the court had little doubt that Dann’s conduct would have lasting emotional and mental health effects on Peña Canal.

The disparity in wage valuation in the two courts underscores the criminal court’s need to better understand the totality of the injury and the directive that the Legislature codified. By not maximizing the value of stolen wages, the court forces victims to continue the legal process into civil court and prolongs the process until they can recover what is legally owed them.

\textsuperscript{60} Ibid., 4.
\textsuperscript{62} Canal, No. 09-03366, 1.
\textsuperscript{63} This number was calculated by multiplying the weekly hours worked (40 hours valued at 1.0 base unit each and 65 overtime hours valued at 1.5 base units, equaling 137.5), by 4.333 (the average weeks in a month, equaling 595.79), times the 21 months worked (equalling 12,511.54), plus the one remaining day (valued at 8 base hours at 1.0 base unit each plus 7 overtime hours valued at 1.5 base units each). Thus, a grand total of 12,530.04 base unit hours was calculated.
\textsuperscript{64} Canal, No. 09-03366, 3.
\textsuperscript{65} Peña Canal sought US$340,746.75 in restitution. However, an award of US$340,746.75 in restitution, in addition to US$433,146.75 in compensatory damages (US$340,746.75 in wages plus US$92,400 for emotional distress), would have constituted a double recovery. Because of Dann’s US$123,740.34 criminal restitution order, the compensatory damages were reduced by that amount.
Federal Claims

Three of the more common federal sources of monetary liability for forced labor can be found in the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the Fair Labor and Standards Act (FLSA), and the TVPA. These laws generally mandate that a worker get paid at least minimum wage as well as the appropriate overtime wages for their stolen labor. However, courts are in disagreement as to whether secondary damages, such as punitive damages, are available. Also, depending on the facts presented, the court may require a showing of one or more of these grounds for a victim to recover monetarily.

In 2010, a district court in California took up an FLSA evaluation claim within a human trafficking forced (fraudulent) marriage case. Natalya and Joe met through a computer dating service in October 2005. At the time, Natalya lived in Russia and Joe lived in California. They began a two-year relationship involving frequent e-mails and phone calls, as well as two joint vacations. In October 2005, Joe proposed to Natalya, promising to provide a loving home to her and her daughter Liza. Natalya and Liza arrived in the United States in February 2008 and began living with Joe. In May of the same year, Joe and Natalya were married. Within weeks of Natalya and Liza’s arrival, Joe began physically and verbally threatening both of them. Joe threatened Natalya with serious physical harm, including death, and even asked Liza to help him “[get] rid of her mother.” Joe threw furniture, plates, and cups at Natalya. He kept guns and large knives around the house, of-
ten grabbing them during his bouts of rage, and threatened Natalya and Liza with physical violence if they disobeyed him or told anyone about their situation. He enforced his threats by grabbing and violently shaking Natalya. Natalya and her daughter were forced to engage in heavy manual labor on the rural property. Natalya was locked out of the house and made “to move around earth, large rocks and stones, [and] remove brush and debris.” She was forced to labor for 8 to 10 hours a day or more, usually seven days per week. Joe did not permit her to rest or drink water. Joe also forced Liza to engage in the same work for hours each day.

Joe forbade Natalya and Liza from making any outside contact. He prevented them from leaving the house for most of the seven months they lived with him. Joe prevented Liza from receiving treatment for an ear infection until it developed into an emergency. Instead, he physically restrained her and forced a homemade treatment into her ear. Joe also forced Liza to engage in unwanted physical contact and made sexual references about her body. He forced Liza to massage his naked body several times a week. He routinely grabbed, forcibly kissed, and fondled her. He would come into Liza’s bedroom and remain without her consent while she was dressing and would enter the bathroom while she was showering.

The Trafficking Victims Protection Reauthorization Act (TVPRA) expressly provides that victims shall be compensated, at a minimum, for the value of their services and labor “as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act.” Consequently, courts have relied on the FLSA’s provisions to calculate restitution for TVPRA violations. In Natalya and Liza’s case, whereas the court accepted a FLSA claim within a TVPA action, the court did not accept an FLSA claim independent of their forced labor allegations.

The court summarized the facts as follows:

Plaintiffs contend that Joe was an “employer” because he fraudulently lured them into living at the Clearlake property. Although Joe and Natalya married, plaintiffs argue in their Opposition that she and her daughter were “not in a true familial relationship with Joe,” because of this fraud. Thus, plaintiffs apparently seek application of the FLSA based on whether labor was “truly” performed for the family or not. Plaintiffs ad-

---

71 Ibid.

72 See California Penal Code, section 262(a)(1), which provides grounds for rape of a spouse that is “accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.”.

73 See https://cal-employment.com/2011/01/05/hello-world/.

74 18 U.S.C., section 1593(b)(3).

75 See, e.g., United States v. Sabbhuni, 599 F.3d 215, 254–57 (2d Cir. 2010) (which reviews the district court’s calculation of restitution after criminal conviction under the TVPRA).

vance no authority, however, for the proposition that fraud is a sufficient basis for finding an employer-employee relationship among household members under the FLSA. 77

Although the court did not find an employer–employee relationship existed between Joe and Natalya on the basis of Joe’s fraudulent representations, victims and advocates must continue to advance creative and novel legal arguments if they are to hold traffickers monetarily accountable.

Conclusion

In a world where predators continue to disregard the human rights and physical well-being of their fellow men, the innocent and vulnerable will continue to be at risk of subjugation for the monetary benefit of others. Our legislatures and legal systems have begun to formulate and structure the required responses to protect those who have been trafficked. 78 California had the foresight to understand that human trafficking is an immensely complex scenario and chose to construct a criminal restitution statute flexible enough to achieve the greatest good for the victim. 79 The state crafted and delivered the foundation of a restitution order to the courts that allows for a just evaluation to be constructed.

California is seen worldwide as a leader in the fight against human trafficking. Its law enforcement and judicial system is at a critical juncture. It is starting to build foundational case law and judicial reasoning through which future perpetrators of this pernicious crime will be held monetarily accountable. In these early stages, approaching this new criminal dynamic with an insightful and nuanced understanding of the damage that the victims incur is imperative. A traditional framework of remedies may not properly redress the extent of the damage inflicted.

California Penal Code section 1202.4(q), with its insightful, alternative methods for calculating restitution, ought to be used to achieve the maximum benefit for the victim—a benefit that will fully and accurately encompass the entire scope of victimization. By continuing to challenge and refine our legal and criminal justice systems, we will be better situated to fully redress and calculate a proper restitution decree with the hope that it will help survivors rebuild their fractured lives.

77 Ibid., 4.
78 California Department of Justice, State of Human Trafficking in California 2012.
79 Ibid.
English for Human Rights
The Power of Language to Enhance Knowledge, Skills, and Values
An Interview with Irene Lee Kiebert and Stephen Guy Dillon-Weston

Conducted by Dr. Mohamed Mattar and Olga Shchepina

**DR. MATTAR:** I am delighted to be here in Istanbul with my colleague, Olga Shchepina, attending a special program conducted by The Protection Project (TPP). As you know, TPP has conducted many programs over a period of 15 years that focus on the three main pillars of human rights: human rights education, human rights advocacy, and human rights reform. In other words, these programs are designed to enhance the three main components—mainly knowledge, skills, and values. Having said that, I would like to welcome two very special friends and partners of TPP: Irene Kiebert and Stephen Dillon-Weston. I will let them introduce themselves.

**MS. KIEBERT:** It’s an honor to be working with TPP, which has been doing such good work for so many years. In my career as a lawyer in the United States, I worked primarily in criminal defense and specifically on appeals in death penalty cases. So I am admitted to practice at the state level and also admitted to the U.S. Supreme Court bar, but they never agreed to hear any of my cases. I think my professional experience is directly related to human rights work because it also focused on fundamental principles of fairness, equality before the law, etc. And before I became a lawyer, I worked in social work with families and children and also with deaf people. After I retired, I took courses at the University of California, Berkeley, and obtained a certificate in teaching English as a foreign language.

**MR. DILLON-WESTON:** My background is really in languages. I have been teaching English as a foreign language for 20 years. My degree is in Italian and French. I taught in Italy and Germany. I also have a degree in law from City University in London, and after finishing that I wanted to continue teaching. Because I enjoyed teaching very much, I thought I would combine the two disciplines and set up a business that specialized in legal English, and I have been doing that for
15 years. I met Irene about seven years ago. Since then, we have collaborated on several projects, one of them being The Protection Project. It has been quite an honor to work for The Protection Project, which does this important work. Communication is so important in terms of the exchange and spread of ideas, and I hope we are contributing to that objective.

**DR. MATTAR:** I believe that both of you have solid backgrounds both in law and in teaching English. I have a set of questions that I would like to ask you, but before I do that, my understanding is that you offer these courses in English all over the world. Could you please tell me a little bit about where you have been teaching, in which countries, and how do they differ from one another?

**MS. KIEBERT:** Steve has been teaching longer than I have been. In the past seven years, we have taught for the Academy of European Law in Brussels and in Trier. In those classes, there are students from all over Europe, including Moldova, Germany, France, Italy, Belgium, Holland—everywhere. We have also taught at the Council of the European Union in Brussels, and we did a course on legal drafting for a private company in Copenhagen.

**MR. DILLON-WESTON:** In the past, I have taught around the United Kingdom, mostly with young people from around the world. I have taught general English in addition to legal English.

**MS. KIEBERT:** And I’ve taught at ELS, a language school in Berkeley; at the University of California, Berkeley; and at San Diego State University. And I have had some private students. So my students have been from Europe, China, Taiwan, Japan, Austria, Chile, Mexico, and Colombia.

**DR. MATTAR:** A while ago, we decided to add a language component to our work, and since our work focuses on human rights, we thought, why not have a course called English for Human Rights? Do you remember how we started all of this?

**MR. DILLON-WESTON:** In the beginning, I remember receiving an e-mail from Dr. Mattar. Irene and I had begun to work together, and I thought this would be up your street, Irene, so I forwarded the e-mail to you. You spoke to Dr. Mattar on the phone, and Dr. Mattar explained about TPP and asked us to submit a proposal for what we would do with the course, which is what we did.

**MS. KIEBERT:** Yes, Dr. Mattar, you called me, and we had a long conversation. We sent you a basic proposal of what our approach would be—that it would include reading, writing, and listening and speaking skills and that it would be participatory, not just lectures.
**DR. MATTAR:** How did you design the course?

**MS. KIEBERT:** You had told me you were teaching a course on international human rights online, and I used that to begin to educate myself. I looked at the content of that course and read a lot of the materials and then modeled the curriculum on the units of that course. It was not exactly the same, but your course served as a basic approach. Then we used authentic materials and documents that are used in the real world of human rights and extracted language from them to create our curriculum.

**DR. MATTAR:** You have been teaching legal English for a while. How is it different from English for human rights?

**MR. DILLON-WESTON:** The field of human rights has its own language and terms of art. What we are trying to do is to design language activities and tasks that aim to get the students themselves to engage, to discover the language. It’s the best way for people to learn.

**DR. MATTAR:** So when we think, for example, of diplomacy, and you are asked to design a course on English for diplomacy, would that be different, or would you be using similar techniques but different concepts?

**MS. KIEBERT:** I would say yes and no. Teaching a language is not just teaching the vocabulary. For legal English, English for diplomats, English for human rights, the terminology would be different—the language conventions would be different—and those things can be taught. What’s important to understand is that these are not the kinds of things that you are able to get from a general English course, because in each field there is specialized language.

**DR. MATTAR:** How can you convince me that a course that is offered in two weeks or so can be effective?

**MR. DILLON-WESTON:** Over the period of two weeks, we cannot claim that we can teach English. But it is enough time to teach the specialized words and phrases in that field. This is the lexis that the participants will use over and over again and that they will need to talk about international agreements and human rights generally. And, of course, part of what it means to be a teacher is to make sure that your students have assimilated the target language and are able to use it accurately.

**DR. MATTAR:** I am a big believer in motivating people to start a project, and I believe that if you have the right person and the ability to connect, you can have real impact.

**MS. KIEBERT:** I believe it’s enough time to introduce the basic language concepts and to build confidence in using the language.
**DR. MATTAR:** In the past 7 to 10 years, you had this experience, and I think you had an impact. Did you keep in touch with your students?

**MR. DILLON-WESTON:** When I started teaching English, I worked with people who were beginners, and that gave me the opportunity to see them making progress and building their knowledge and skills. That is what being a teacher is all about. That is what gives me a lot of satisfaction.

**DR. MATTAR:** In your work with TPP, you have taught once in Ireland and once in Australia. Do you think the choice and the location of the country makes a difference?

**MS. KIEBERT:** I think it does make a difference. For the students, it’s helpful to have a language immersion experience, which means being in a place where English is the dominant language even though it’s spoken with different accents. It helps students have the courage to use the language, and it encourages them to use new vocabulary. In Ireland, in a place with a human rights center, the students had an opportunity to ask questions and talk with people who were knowledgeable, which is always inspiring.

**DR. MATTAR:** In the past, when we had a course, we always tried to invite a keynote speaker who came and taught about a subject. Do you think this was a distraction, or do you think it helped those trying to learn English for human rights?

**MR. DILLON-WESTON:** I can see it only as complementary. But, of course, it is important that the students are able to understand the speaker! Clearly, the better the students’ listening skills, the more they can gain from hearing guest speakers. It’s also helpful to give the students some preparatory exercises before they listen to a speaker.

**MS. KIEBERT:** I agree. I think these kinds of things can be integrated into the course like any listening activity. It works best if we can teach key vocabulary first and if the speaker focuses on some aspect of the subject matter that we are covering in our human rights course. Having an expert speaker can be inspiring and motivating and can show the students that they are learning language that is actually used in the real world.

**DR. MATTAR:** How does the English course accomplish any of the goals of furthering human rights knowledge, skills, and values?

**MS. KIEBERT:** We make it very clear that we are not teaching our own values. Rather, we are hoping to enable class participants to express their own ideas, so they can participate in a wider context outside the classroom. Our goal is not to create an atmosphere where everyone agrees but to help someone state a point of
view. We hope to teach respectful communication, which is a step toward international dialogue.

**DR. MATTAR:** How unique is this course, and could you please describe the essence of the course? What are the basic units of the course?

**MR. DILLON-WESTON:** We teach the only course like this as far as we know. There really isn’t another one.

**MS. KIEBERT:** It is the only course on the language of human rights. To tell you the truth, Berkeley started offering a summer course, but it does not focus on language skills like our course. We have units on the International Bill of Rights, women’s and children’s rights, human trafficking, humanitarian aid, nongovernmental organizations, and monitoring and enforcement issues. The students in the class here now know what the UDHR, CEDAW and CRC are, and they have done written exercises, composed their own sentences, and listened to interviews with United Nations officials.

**DR. MATTAR:** I want to end by saying I believe in what you are doing. You have a success story to tell. Those students that you taught in the beginning and the students you are teaching now—initially, they were not able to present their ideas in conferences because they had total reliance on translation. I saw them changing and benefiting from the courses you are offering. They would go back to their county of origin and read more and continue learning more in the area of human rights. Many of them are legal scholars, and many of them are now able to use sources in the English language. Additionally, I would like to express gratitude that you are working with advocates from all over the world. They can use this common language that can benefit all of us.

**MS. KIEBERT:** That’s wonderful.

**MR. DILLON-WESTON:** It’s gratifying to hear that. It’s what makes this work so rewarding.
An Action Plan to Preserve the Human Dignity of Victims of Human Trafficking

Book Review: Human Dignity and the Future of Global Institutions, Edited by Mark P. Lagon and Anthony Clark Arend

Mohamed Y. Mattar

Human Dignity and the Future of Global Institutions attempts to provide a working definition of human dignity. In their introduction, the editors, Mark Lagon and Anthony Arend, offer the following definition:

Human dignity is the fundamental agency of human beings to apply their gifts to thrive. As such, it requires social recognition of each person’s inherent value and claim to equal access to opportunity. To be meaningful, human dignity must be institutionalized in practice and governance.

They do not explain to us how this definition applies to human trafficking victims. Instead, in a later chapter titled “Fighting Human Trafficking,” Lagon provides us with a comprehensive strategy to address the crime itself by focusing on what are called the four Ps: prosecution of traffickers, protection of victims, prevention of the offense, and partnerships (i.e., alliance between the government and civil society). A successful implementation of this action plan, Lagon argues, would “reduce and ultimately marginalize trafficking as an obstacle to the realization of dignity.”

To start with, Lagon argues that “to address the problem of human trafficking and to tangibly advance the dignity of its actual and potential victims, institutional partnerships need qualitative and quantitative information about the phenomenon.” Existing efforts of mapping the problem have proved inadequate. Hence, our own law, the U.S. Trafficking Victims Protection Act (TVPA) was amended in 2003 to add what I call “the research section” of the law, section 112, which calls on the different agencies of the United States to “carry out research … [that] furthers the purposes of this division and provides data to address the problems identified in the findings of this division.”
In such research, the TVPA should include

1. The economic causes and consequences of trafficking in persons;
2. The effectiveness of programs and initiatives funded or administered by federal agencies to prevent trafficking in persons and to protect and assist victims of trafficking;
3. The interrelationship between trafficking in persons and global health risks.

In 2005, the research areas outlined in section 112 were expanded to include (a) the interrelationship between trafficking in persons and terrorism, (b) the abduction and enslavement of children for use as soldiers, and (c) an effective mechanism for quantifying the number of victims of trafficking on a national, regional, and international basis, a goal that is still unrealized, as *Human Dignity and the Future of Global Institutions* illustrates.

Related to quantifying the numbers of victims of trafficking is the problem of finding and identifying victims. Unfortunately, the United Nations (UN) Protocol to Prevent, Suppress, and Punish Trafficking of Persons, Especially Women and Children, was silent as to the necessary efforts that must be taken in the area of victim identification. The protocol was also silent as to any definition of a victim or the principle of nonpunishment of the victim. Lagon makes clear that “partnerships for victim identification need government will, the understanding of and training on the nature of who is a victim, and actors outside the public sector extending beyond law enforcement, whose officers are sometimes intimidating victims.”

Lagon offers a list of best and promising practices in victim protection, care, and assistance, a list that includes not only basic services such as providing shelters to victims and offering them medical, psychological, and social care, but also reempowering and reintegrating them into society. He argues that “a key aspect of helping trafficking survivors retain their dignity is to bring to justice [through prosecution] those who sought to rob that dignity.” He also argues that any preventive efforts to combat trafficking must include fighting demand, whether for cheap labor or for sexual services. One may claim, however, that preventive antidemand efforts, though necessary, are not sufficient and that prosecution of demand is imperative.

A number of regional and national legislative bodies are working to eliminate demand. For instance, article 19 of the Council of Europe Convention on Action against Trafficking in Human Beings calls on state parties to consider criminalizing the use of services provided by victims of trafficking. Laws of Macedonia,
Syria, Greece and the Philippines exemplify national legislation that makes such users responsible for the offense of human trafficking.

Lagon concludes by referring to what he calls the four *Ms*—market mechanisms, metrics, matching missions, and motives—which “advance the agency and social recognition that victims or potential victims of human trafficking enjoy.” In his words, “A partnership that is attentive to market forces, takes metrics seriously, has matching missions, and exhibits sound motives, is more likely to be transformative—to help survivors reclaim dignity and actually reduce or abolish the ongoing threat to potential victims.”

Lagon skillfully and thoughtfully addresses the remedies that may be considered in advancing the dignity of victims of human trafficking. Lagon might also have examined how human trafficking infringes on the human dignity of a victim of trafficking. In fact, one might argue that the essence of the concept of human trafficking or human exploitation is a wrongful act that causes harm (whether physical, psychological, or economic) to the victim of trafficking, thus offending his or her human dignity to the benefit of the perpetrator of the crime.

The UN protocol on trafficking avoids any such conceptual definition. Instead, it resorts to a broad definition of the category of human trafficking by referring to different forms of human trafficking. The preamble to the Pakistani Prevention and Control of Human Trafficking Ordinance of 2002 describes the crimes of human trafficking as offenses that are “incompatible with the dignity and worth of human beings.” Similarly, the French Penal Code (as amended in 2013) defines exploitation in the context of human trafficking as the act of putting the victim in a condition contrary to his or her human dignity.

By reading court decisions in cases of human trafficking, one may conclude that, in many cases, courts are concerned about how the offense of trafficking affects the human dignity of the victim, because the crime places the victim in a condition incompatible with his or her integrity, morale, and human rights. In the chapter on human trafficking, Mark Lagon helps us to understand how we can eliminate human trafficking and thus preserve the human dignity of its victims.
Trafficking in Persons
An Annotated Legal Bibliography Covering Five Years of Scholarly Work
2010-2014
Mohamed Y. Mattar

Introduction

The Concept of Trafficking in Persons


Trafficking in Persons as a Form of Slavery


Trafficking in Persons and Globalization


Trafficking in Persons and Organized Crime


Trafficking in Persons and the Prostitution Debate: Criminalization, Legalization, and Decriminalization


**Trafficking in Persons for the Purpose of Prostitution**


35. Maffai, Margaret. “Accountability For Private Military and Security Company Employees That Engage In Sex Trafficking and Related Abuses While


### Trafficking in Persons for the Purpose of Marriage


Trafficking and Peacekeeping Missions


Trafficking in Children for the Purpose of Child Sex Tourism


Trafficking in Children for the Purpose of Illicit Inter-Country Adoption


**Trafficking in Children and Child Soldiers**


**Labor Trafficking**


### Organ Trafficking


### Trafficking in Persons: Addressing the Issue of Demand


87. Gustafson, Jennifer. “Bronze, Silver, Or Gold: Does the International Olympic Committee Deserve a Medal For Combating Human Trafficking in Connection With the Olympic Games? California Western International Law


### Health Effects of Trafficking: HIV/AIDS and Psychological Coercion


**Trafficking in Persons: Economic and Social Perspectives**


108. Wheaton, Elizabeth M., Edward J. Schauer, and Thomas V. Galli. “‘Eco-
nomics of Human Trafficking’ in International Migration.” In International
Migration, Special Issue: Special Issue On Human Trafficking 48, Issue 4

109. Yi, John S. “Human Trafficking and the Church of Scientology: Why the
Legislature Should Clarify and Expand the TVPA and the Impact It Would
Have on the Church.” University of Pennsylvania Journal of Law and Social

Trafficking in Persons and the Internet


Criminal Culpability on Digital Facilitators.” University Of Memphis Law
Review 43 (Summer, 2013): 1097.

Trafficking in Children: Perspectives on Protection and
Prevention of Trafficking

Sexually Exploited Minors as Victims of Human Trafficking?.” Seton Hall

113. Ooi, Maura M.. “Unaccompanied Should not Mean Unprotected: The In-
adequacies of Relief for Unaccompanied Immigrant Minors.” Georgetown

114. Marcus, Anthony, Amber Horning, and Ric Curtis “Conflict and Agency
among Sex Workers and Pimps: A Closer Look at Domestic Minor Sex Traf-

115. Mckee, Kathleen A. “It’s 10:00 P.M. Do You Know Where Your Children

Sexually Exploited Minors As Victims of Human Trafficking? Seton Hall


**Trafficking in Persons and Human Security**


**Trafficking in Persons and State Corruption**


**Trafficking in Persons in Business or Corporate Cases**


## Trafficking in Persons and the Role of Civil Society


**Trafficking in Persons and Law Enforcement**


**The Trafficking Victim: A Victim-Centred Approach**


**Trafficking in Children and International Law**


**Trafficking in Persons and International Law**


Trafficking in Persons under United States Federal Law


**Trafficking in Persons under United States State Law**


230. Li, May. “Did Indiana Deliver in Its Fight Against Human Trafficking? A 
Comparative Analysis Between Indiana’s Human Trafficking Laws and the 
International Legal Framework. S. Law on Immigration and Human Traff- 
icking: Lifting the Lamp to Victims.” *Indiana International & Comparative 

For Good in Utah’s Human Trafficking Cases.” *The Scholar St Mary’s Law 

232. Mccormick, Lisette M. “Halting Human Trafficking in Pittsburgh.” *Intercul- 

233. Medige, Patricia, and Catherine Griebel Bowman. “U.S. Anti-Trafficking 
Policy and The J-1 Visa Program: The State Department’S Challenge From 

171.

235. Nguyen, Jennifer. “The Three Ps of the Trafficking Victims Protection Act: 
Unaccompanied Undocumented Minors and the Forgotten P in the William Wilberforce Trafficking Prevention Reauthorization Act.” Washington and 

236. Ozalp, Jessica E. “Halting Modern Slavery in the Midwest: the Potential of 

61.

238. Rocha, Priscila A.. “Our Backyard Slave Trade: The Result Of Ohio’S Fail- 
ure To Enact Comprehensive State-Level Human-Sex-Trafficking Legisla-

Fail To Protect Minor Victims Of Sex Trafficking.” *New England Journal 


**Country and Regional Case Studies on Trafficking in Persons**


**Books**


