THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: AN OVERVIEW OF THEIR UTILITY AND THE ROLE THEY HAVE PLAYED IN REFORMING DOMESTIC CONTRACT LAW AROUND THE WORLD

Christine M. Whited

I. UNIDROIT: AN OVERVIEW OF ITS FUNCTION AND PURPOSE

Efforts to promote the unification of private substantive law took off in the latter part of the 20th century due to globalization, which rapidly increased the volume of international trade.[1] The increase in international trade brought a tremendous potential for economic growth, but with it came greater risks to the contracting parties, primarily due to new legal challenges that are unique to international transactions.[2] Parties to international contracts had to consider what law to apply in the event of a dispute. However, choosing one party's national laws over another's gave one party a clear advantage for linguistic reasons, availability of in-house

1. Salvatore Mancuso, *Trends on the Harmonization of Contract Law in Africa*, 13 ANN. SURV. INT'L & COMP. L. 157, 158 (2007).

2. *Id.*

counsel, and overall easier access to counsel.[3] For these reasons, the growth in international trade created a unique demand for a legal framework that could transcend national boarders and provide security for international players, irrespective of the nations they came from.[4] Such an autonomous body of international law could foster trade in all regions of the globe, each with unique legal, economic, and political systems: those with planned market economies and free market economies, those with civil law systems and common law systems, third world countries as well as highly industrialized nations.[5] It was at this point that international private law was in its infancy, and work began to be done to provide legal solutions that would meet the needs of the modern market—an international market. Uniform commercial law tailored to international commercial transactions surfaced as one of the best solutions available due to its inherent neutrality.[6]

The advantages offered by a uniform system of international commercial law have created demand for such a system and has led to the creation of a number of substantive law conventions, such as the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG), the Uniform Commercial Code (UCC), and United Nations Commission on International Trade Law (UNCITRAL).[7] One organization at the forefront of this movement whose work is specialized in the area of harmonizing international private law is the independent intergovernmental organization that goes by the French acronym UNIDROIT—the International Institution for the Unification of Private Law.[8] UNIDROIT was originally established as an auxiliary organ of the League of Nations in 1926 and was later re-established in 1940 due to the dismantlement of the League of Nations by a multilateral agreement—the UNIDROIT statute.[9] UNIDROIT's purpose is to identify the needs and methods for harmonization and modernization of commercial law as applied between parties of different states and to promote coordination of commercial law between states by formulating uniform law instruments, principles, and guidelines to achieve these objectives.[10] One of UNIDROIT's most notable and widely recognized accomplishments is the creation of the UNIDROIT

---

3. Mancuso, *supra* note 1, at 158.

4. Franco Ferrari, *The Relationship Between International Uniform Contract Law Conventions* 22 J. L. & COM. 57, 58 (2003).

5. THE PRACTICE OF TRANSNATIONAL LAW 1, 14 (Klaus Peter Berger ed. 2001).

6. Mancuso, *supra* note 1, at 158.

7. *Id.*

8. UNIDROIT, *UNIDROIT: An Overview*, http://www.unidroit.org/dynasite.cfm?dsmid+103284 (last visited Oct. 24, 2011).

9. *Id.*

10. *Id.*

Principles of International Commercial Contracts, which will be the focus of this article.[11]

In 1994, the first draft of the UNIDRIOT Principles of International Contracts was published.[12] The draft reflected many years of research and debate in the area of comparative and international law. These principles were negotiated and drafted by a working group composed of representatives from different regions of the world with diverse legal systems and backgrounds.[13] The UNIDROIT Principles are a codification of the main tenants of contract law, covering areas such as formation, validity, interpretation, performance, non-performance, termination, and remedies and were created with a view of establishing a model code of international contract law.[14] Furthermore, each provision has commentary and illustrations that demonstrate how the provisions are intended to apply.[15] National laws, arbitral case law, comparative law, and international instruments, such as the CISG, all inspired the UNIDROIT Principles.[16]

The UNIDROIT Principles have been commonly referred to as an "International Restatement of Contracts," but it is important to note that the goal of the Principles was not to simply codify contract principles that prevailed in the majority of states, but rather to select solutions that have the most utility for the international commercial community.[17] As a consequence of using this approach, there are some provisions that stray from the general rules or practices in the international commercial community.[18] For example, the provisions on fairness under Article 3.2.7 of the third edition of the UNIDROIT Principles, which is the rule governing gross disparity, allow a party to avoid a contract or individual terms of a contract when, at the time of concluding the contract, one party had an unjustifiable excessive disadvantage over the other.[19] While the idea

---

11. Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purpose?*, 1996 UNIF. L. REV. 229, 229 (1996) [hereinafter *Similar Rules for the Same Purpose*].

12. *Id.*

13. *Id.* at 230.

14. International Institute for the Unification of Private Law [UNIDROIT] 1994 Principles of International Commercial Contracts; Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG—Alternatives or Complementary Instruments?*, 1996 UNIF. L. REV. 26, 29 (1996).

15. *Id.*

16. *Similar Rules for the Same Purpose*, *supra* note 11, at 230.

17. Fabio Bortolotti, *The UNIDROIT Principles and the Arbitral Tribunals* 2000 UNIF. L. REV. 141, 142—43 (2000).

18. *Id.* at 143.

19. *Id.*

that a contract may be avoided in the case of excessive advantage is one that has legal roots in many legal systems, this provision's applicability is much more expansive than similar provisions seen in most domestic laws.[20] Thus, the UNIDROIT Principles, in large part, reflect accepted international trade practices but cannot be regarded simply as a codification of generally recognized tenants of international commercial transactions because some of the provisions adopt a minority view.[21]

Following the first publication of the UNIDROIT Principles, the worldwide recognition and success prompted UNIDROIT to continue work on the Principles as early as 1997 with a view of creating a more comprehensive and expansive second edition.[22] A new working group was selected, which included seventeen members who represented all major legal systems around the world, as well as representatives from influential international and arbitration organizations, such as UNCITRAL, the International Court of Arbitration, the Milan Chamber of National and International Arbitration, and the Swiss Arbitration Association.[23] The second edition was published in 2004 and included additional provisions in the area of agency, assignment of rights, obligations, set-off, and limitation periods.[24] When approving the second edition of UNIDROIT Principles, the Governing Council determined that these principles should be a long-term project and that a new working party shall be appointed to prepare the third edition.[25] Work on the third edition was commenced in 2005 and was formally approved in May of 2011.[26] Additional provisions include restitution, illegality, plurality of obligors and of obligees, conditions, and termination of long-term contracts for just cause.[27]

---

20. *See* Michael Joachim Bonell, *Policing the International Commercial Contract Against Unfairness Under the UNIDROIT Principles* 3 TUL. J. INT'L & COMP. L. 73 (1995).

21. *See* Bartolotti, *supra* note 17, at 142—43.

22. Michael Joachim Bonell, *UNIDROIT Principles 2004 – The New Edition of the Principle of International Commercial Contracts Adopted by the International Institute for the Unifaction of Private Law*, 2004 UNIF. L. REV. 5, 5 (2004) (hereinafter *New Edition of the Principles 2004*).

23. *Id.* at 5—6.

24. *New Edition of the Principles 2004*, *supra* note 22, at 6; SWISS INSTITUTE OF COMPARATIVE LAW, THE UNIDROIT PRINCIPLES 2004 THEIR IMPACT ON CONTRACTUAL PRACTICE, JURISPRUDENCE, AND CODIFICATION 18-19 (Elanor Cashin Ritaine & Eva Lein eds., 2006).

25. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 263.

26. International Institute for the Unification of Private Law [UNIDROIT], Working Group for the Preparation of the Principles of International Commercial Contracts (3rd), Fifth Session (May 26, 2010) *available at* http://www.unidroit.org/english/workprogramme/study050/wg03/wg-2010.htm (last visited Oct. 31, 2011).

27. *Id.*

II. HARMONIZATION DEFINED

One of the main objectives of UNIDROIT is to harmonize private international law, but what does harmonization mean? The harmonization of law refers to a process of legal integration, which aims to encourage legal cooperation between countries and reduce differences between national laws or provide supranational legal instruments that can be used to govern specific areas of law.[28] The process of harmonization can take many different forms and as such, many different methods have been used to harmonize laws at the domestic, international, and multilateral level.[29] For example, harmonization has been accomplished by the reformation of national laws, which correspond with international legal trends, the establishment of binding international codes, such as the CISG, the creation of non-binding international legal instruments, such as the UNIDROIT Principles, the ratification of regional choice of law Conventions, such as the Rome Convention on the Law Applicable to Contractual Obligations, or the creation of Uniform Acts, such as the U.S. Model Penal Code, which states can adopt as national law or simply use as inspiration in reforming national law.[30]

III. THE ARGUMENT IN FAVOR OF HARMONIZING INTERNATIONAL CONTRACT LAW

I have briefly discussed some of the reasons why a uniform system of law is particularly appealing to international traders, but this section will lay out, in greater detail, the arguments in favor of harmonizing international contract law. In the modern course of business, corporations frequently engage in international commercial transactions. For example, a Canadian manufacturer contracts with a Chinese corporation for the supply of labeling materials; a German Corporation retains an Indian Consultancy firm to assist with the integration of a complex IT system; an Australian Company purchases trucks from a New Zealand Company for use in Australia; or a U.S. investor funds a start-up company in Brazil. Various risks are attached when engaging in these types of cross-border transactions that are not generally problematic with domestic transactions.[31]

Fabio Bortolotti, a lawyer and an Italian Professor of International Commercial Law, eloquently explains some of the challenges lawyers are faced with when representing a client who is engaged in an international transaction:

---

28. Mancuso, *supra* note 1, at 160.

29. *Id.*

30. *See id.*

31. Bortolotti, *supra* note 17, at 141.

> [D]omestic rules on contracts, and particularly those rules dealing with the general aspects of contract law, are, in most countries, the fruit of a long evolution. Such rules are often complicated, not only because the matters covered are complex but also because they reflect long years (if not centuries) of legal thinking, which sometimes complicates even simple things. It is very difficult therefore for a lawyer negotiating an international contract (or who must make up his mind about a dispute relating to such a contract) really to understand a foreign country's rules on contracts: he may, of course, be able to locate the text of these rules (if codified, which is not always the case, and if available in an accessible language), but in most cases he will not be able to assess their actual content with any certainty.[32]

Professor Bortolotti goes on to explain that these problems can be addressed by retaining a foreign attorney, but in many cases, particularly during contract negotiation, there is no time to obtain legal advice and as stated,

> [T]here are usually considerable problems of communication between lawyers from different countries (probably because most of them are used to reasoning within the confines of their domestic law), so that often the local lawyer will fail to grasp the substance of the problem he is required to answer, while the requesting lawyer will have trouble understanding . . . advice base on legal reasoning unfamiliar to him.[33]

As such, even simple legal questions for a local lawyer will be difficult for a foreign lawyer to resolve or even communicate to a lawyer from a different country, and hiring foreign council is not always an option due to tight time frames inherent in contract negotiation.

Another risk that parties to international contracts must bear is the uncertainty of the outcome in the face of a legal dispute. In an ideal world, a contract should eliminate surprises by setting forth the parties obligations and laying out the course of action and the remedies available if one of the parties fails to perform. The need for such predictability is even more essential to international traders, in light of the fact that parties are usually not dealing at arms length and have a higher frequency of misunderstanding

---

32. Bortolotti, *supra* note 17, at 141.

33. *Id.* at 141—42.

due to communication barriers. Unfortunately, it can be very difficult to predict the outcome of a dispute for your client involved in a cross-border transaction. A contract interpreted by a California court under California law may have a very different outcome than the very same contract interpreted by a Bavarian court in accordance with German law. This could happen for a number of different reasons: the laws governing contract interpretation from jurisdiction-to-jurisdiction are not universal, the law applied when there is no choice of law clause could vary, a jurisdiction may not recognize a choice of law clause choosing another country's laws or the law applied in the case of a gap in the chosen body of law may be different. What is more, a company may be forced to absorb unexpected costs for things such as travel and retaining foreign counsel. Thus, a reliable and predictable contract between two or more parties engaged in an international business transaction is essential to the success of the deal.

Now let us take a moment to think about the various solutions that are available to minimize these impacts for clients. Of course, the contract could be drafted to include a choice of law provision selecting one party's domestic law in the event of a dispute. On a basic level, it may be difficult for the parties to agree on the application of one party's domestic law over the other's, because a party that is not familiar with the other party's domestic contract law is not likely to be comfortable agreeing to be bound by an unfamiliar foreign legal system to resolve potential disputes. If one party is willing to agree to apply another party's domestic law, it will be difficult to predict the outcome of the dispute for the party whose domestic law does not apply because a foreign lawyer will not have an intimate understanding of the other nation's laws. Moreover, assuming there is time for the lawyer to retain a foreign lawyer during contract negotiations, there could be communication barriers amongst the two lawyers due to language or differences in legal reasoning. These factors will make it difficult for a lawyer to understand how a contract will be interpreted by a foreign court or arbitration panel applying foreign law and will make it difficult for a lawyer to draft a contract giving the client maximum legal protection and sound legal advice.

To clearly illustrate the risk associated with international transactions and the potential for uncertain outcomes, let us consider a potential scenario. Two companies from different countries contract for the sale of widgets and choose Florida law as the governing law and Miami as the forum. The first thing to consider is that in choosing Florida law, the parties would have to have been aware that there is no such thing as American contract law. Parties must choose the law of a specific state, a concept that is not often recognized by non-American lawyers. Additionally, if both parties were signatories of the CISG—where the

contract is for the sale of goods—and the contract provided that Florida law would apply, the applicable law would be the CISG and only the procedural law of Florida would apply. However, if the contract stated that Florida contract law is to apply and specifically excluded the application of the CISG, then Florida contract law would apply and the CISG would not. To complicate matters even more, if the contract had no connection to the State of Florida, then a Florida court *may* hold that jurisdiction is not appropriate in the state based on *forum non conveniens*, in which case the contract would be subject to some other law in America or elsewhere.[34] In this case, the result of the dispute would be anyone's guess. For the purpose of this example, let us assume that the parties choose Florida law, to the exclusion of the CISG, and the contract was signed in Florida and there were sufficient contacts in the state for the court to accept jurisdiction. The foreign lawyer would then have to determine what Florida state contract law is and how those laws affect the rights and obligations of the parties to the contract. This is not a simple task, even for American-trained lawyers. The legal teams will need to determine if the state in question has adopted the Restatement of Contracts in full or in part, and if so, which provisions of which edition of the Restatement of Contracts it has adopted. The lawyers will also be required to read through endless cases, which requires paying top dollar for access to such information on legal databases, such as Westlaw or LexisNexis. The foreign lawyer will need to Shepardize the relevant case law to ensure the holdings coming out of the cases are good law, a concept that is not generally understood by lawyers coming from civil law jurisdictions. The time spent researching unfamiliar law is not only extremely costly, but could also result in ethical violations for lack of competency. Most importantly, crucial mistakes are more likely to occur which will disadvantage the client. Alternatively, paying to retain a foreign lawyer will also be a costly endeavor.

So what is the alternative? The logical alternative is to create a legal framework that is neutral and does not put one party at an unfair advantage. International legal instruments, such as the UNIDROIT Principles, have made great progress in establishing a neutral legal framework to provide international business actors with a viable legal alternative. Another point worth noting is that international legal instruments, such as the CISG or the UNIDROIT Principles, are not only translated in many different languages, but they also are written simply to be easily understood by foreign actors.[35] Furthermore, with regard to the UNIDROIT Principles, each provision has comprehensive commentary as well as illustrations that show how the

34. *Gulf Oil Corp. v. Gilbert*, 330 US 501, 506-07 (1947).

35. *Similar Rules for the Same Purpose*, *supra* note 11, at 229.

provisions were intended to operate.[36] International case law and arbitrary decisions are also provided free of charge on UNIDROIT's website, substantially reducing the cost of research.[37]

Harmonizing international contract law can also promote economic growth in third world countries or countries with underdeveloped legal systems.[38] The availability of a trusted transnational legal system helps to promote investment in foreign markets, particularly third world countries, where investors often do not have the confidence in the protection provided by a third world legal system.[39] An international legal system in the field of private international law gives investors a sense of security, helping underdeveloped countries attract investment and build their economies.[40] Following a single set of international rules encourages economic activity in all parts of the world because it is more predictable and reduces transaction costs.[41] Rather than having to apply a set of law coming from various nations, a transnational system allows for the application of one set of neutral rules.[42]

On the other hand, one major criticism of uniform sources of international law is that they increase the amount of sources that a court will apply.[43] Thus, two distinct legal regimes would exist side by side: one for domestic obligations that would reflect the national system and one for the international system that would reflect the international nature of the contract.[44] This could be confusing for lawyers and judges alike, forced to apply two independent sets of rules depending on the nature of the contract. In a federal system, where courts are often required to apply another state's law, this does not seem so far-fetched, but in a jurisdiction where the law is uniform throughout, this multilayered system may seem to cause more confusion than is necessary. Another risk, in some jurisdictions more than others, is a country's willingness to apply an international set of laws over domestic laws.[45] Some jurisdictions have been adverse to the application of international instruments, such as the UNIDROIT Principles, and have refused to apply these principles in favor of applying their own national

36. International Institute for the Unification of Private Law [UNIDROIT], *Principles of International Commercial Contracts* (2010).

37. *See* Unilex, http://www.unilex.info/ (last visited Oct. 31, 2011).

38. *See* Mancuso, *supra* note 1, at 158.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See generally* John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343 (2011).

44. *Id.*

45. *Id.*

laws.[46] The consequence of this is severe because the parties likely believed to have put themselves in a situation of neutrality and probably did not account for the additional expense of retaining foreign counsel. Now the parties are subject to the laws of whatever jurisdiction the court decides to apply.

IV. UNIDROIT PRINCIPLES IN ACTION

Of course the creation of uniform law serves no purpose if it is not applied in practice. The end goal in creating uniform legal instruments is not for them to remain dead letter law, but for them to be applied in practice and to be used as a harmonization tool.[47] The UNIDROIT Principles have made steady progress since their initial publication in 1994, but how has this come to be? After all, the Principles are simply non-binding rules placed at the parties' disposal. While the UNIDROIT Principles do not have binding force, as do many Conventions, the Principles have become an important source of non-binding soft law, and their application has been used in a variety of different ways. The following section will explain the principal ways in which the UNIDROIT Principles have been applied in practice and how they have affected the harmonization of international contract law.

The most obvious way in which the UNIDROIT Principles may be used is as the sole law governing a contract through their incorporation into the contract by the parties.[48] Here, the parties must intend for the UNIDROIT Principles to apply, rather than having a set of national laws apply.[49] The Preamble provides that the Principles "shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like."[50] Furthermore, when the Principles are applied as the governing law and there are gaps left by the Principles, a solution should, to the extent possible, be found within the Principles themselves.[51] Additionally, the parties may opt to have the Principles apply as the applicable law, but refer to a national legal system that shall act as a supplement to matters that are not covered by the Principles.[52] For example, lack of capacity is not dealt with by the

46. *Id.* (explaining that Brazil frequently rejects choice-of-law provisions in contracts applying foreign law).

47. *New Edition of the Principles 2004*, *supra* note 22, at 6.

48. *Id.* at 9.

49. *Id.*

50. *Principles of International Commercial Contracts*, *supra* note 36.

51. *Id.* at art. 1.6.

52. *Id.*

Principles, thus, if a conflict were to arise dealing with a question of validity due to a lack of capacity, the national law selected as a gap-filler would apply.[53]

A second manner in which the Principles may be applied to a contract is through incorporation of the Principles into the contract as a contractual provision.[54] This option is exercised when the parties choose a national legal system or the CISG as their choice of law, and also when they make reference to the Principles, showing that the parties intend for the Principles to apply within the body of law that they have selected to govern the contract.[55] What this means is that if there seem to be conflicts within the contract itself, the contract will be construed in accordance with the Principles.[56]

Pursuant to Section 5 of the Preamble, the UNIDROIT Principles can be applied as a gap-filler to "interpret or supplement international uniform law instruments."[57] In fact, the parties do not necessarily have to refer to the UNIDROIT Principles for them to be used as a gap-filler. In a recent case before the Supreme Court of Belgium, the Court rejected the use of domestic law as a gap-filler, in favor of the UNIDROIT Principles in a contractual dispute governed by the CISG.[58] The Court held that with regard to a contract governed by the CISG that has an international

---

53. *Principles of International Commercial Contracts*, *supra* note 36, at art. 3.1.1.

54. Bortolotti, *supra* note 17, at 147.

55. *Id.*

56. *Id.*

57. *.Principles of International Commercial Contracts*, *supra* note 36, at pmbl. *See also* Elonora Finazzi-Agrò, L'effettiva, Incidenza dei Principi UNIDROIT nella Risoluzione delle Controversie Internazionali: Un'indagine Empirica, Diritto del Commerico Internazionale [The Actual Incidence of the UNIDROIT Principles in International Dispute Resolution: An Empirical Investigation, International Law of Commerce] 577 (2009) (discussing many cases around the world that have cited the UNIDROIT Principles in order to provide additional support for their holding); Anna Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to the Belgian Supreme Court*, 2010 Unif. L. Rev. 137, 137 (2010) (citing decisions from the UNILEX database that use UNIDROIT principles to interpret national laws:

> 1) Federal Court of Australia, Oct. 30, 2009, Austl. Medic-Care Co. Ltd. v. Hamilton Pharm. Pty. Ltd. (interpretation of contracts);
> 2) Tribunale di Catania (Italy), Feb. 6, 2009 (restitution);
> 3) Audencia Provincial de Valencia (Spain), Mar. 6, 2009 (fundamental breach);
> 4) High Court of Delhi (India), Aug. 20, 2008, Hansalaya Properties and Anr. v. Dalmia Cement (Bharat) Ltd. (contract interpretation);
> 5) Commercial Court of Brest Region (Belarus), Nov. 8, 2006 (rate of interest); and
> 6) Polish Supreme Court, Nov. 6, 2003 (penalty clause)).

58. Anna Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to the Belgian Supreme Court*, 2010 UNIF. L. REV. 137, 137 (2010).

character, gaps should be filled uniformly and thus not through the application of domestic law.[59] As such, the Court applied the UNIDROIT Principles, over domestic law, in order to interpret a gap left by the CISG.[60] Pursuant to Section 6 of the Preamble, the UNIDROIT Principles may also be used as a means "to interpret or supplement domestic law."[61] The official commentary describes that "where the dispute relates to an international commercial contract, it may be advisable to resort to the Principles as a source of inspiration" where there is a lack of authority on the issue.[62] Reference to the Principles under these circumstances would not have binding effect, but may be used to provide persuasive support. Many courts have used the UNIDROIT Principles to bolster their arguments as to issues that are unclear under the national law.[63]

The UNIDROIT Principles have arguably made the largest impact in conflicts that have been resolved through means of Alternative Dispute Resolution. To illustrate their impact, the UNILEX database contains cases and arbitral awards from jurisdictions across the world that have applied the UNIDROIT Principles or the CISG. The database also contains 156 arbitral awards that either generally cite to the UNIDROIT Principles as persuasive support, use the Principles to interpret uniform or domestic law, or apply the Principles as the applicable law governing the contract.[64] One common way in which the Principles are applied during arbitration is when the parties choose to have the Principles govern the contract after the contract has been concluded.[65] For example, when parties have agreed to resolve a dispute through arbitration and the contract at issue is silent as to the choice of law, the parties may agree to have the contract interpreted in accordance with the Principles. This option is viewed as neutral because it does not favor one party over the other.

An arbitration panel may also choose to apply the UNIDROIT Principles when hearing a dispute over an international contract, regardless of whether the parties have included a choice of law provision in the contract.[66] To cite an example, in an arbitration before the International Chamber of Commerce which involved a contract that did not explicitly contain a choice of law clause, but provided that the contract should be

---

59. *Id.* at 137—38.

60. *Id.*

61. *Principles of International Commercial Contracts*, *supra* note 36.

62. *Id.*

63. *See generally* Finazzi-Agrò, *supra* note 55.

64. UNIDROIT, UNILEX database (International Principles of International Commercial Contracts) http://www.unilex.info/dynasite.cfm?dsside=2377&dsmid=14311 (last visited Oct. 31, 2011).

65. Bortolotti, *supra* note 17, at 150.

66. *Id.*

guided by "natural justice," the panel held that the parties intended for the contract to be governed by "general legal rules and principles."[67] In so holding, the panel determined that the general legal rules and principles were largely reflected in the UNIDROIT Principles and relied on them to resolve the dispute.[68] In another case resolved before an arbitral panel involving a dispute between an English company and an Iranian governmental agency, the arbitrators applied the Principles even though the contract did not call for their use. The arbitrators reasoned,

> General legal rules and principles enjoying wide international consensus, applicable to international contractual obligations and relevant to Contracts are primarily reflected by the Principles of International Commercial Contracts adopted by UNIDROIT. . . .[69] In consequence, without prejudice to taking into account the provisions of the Contract and relevant trade usages, this Tribunal finds that the Contracts are governed by, and shall be interpreted in accordance to, the UNIDROIT Principles with respect to all matters falling within the scope of such Principles. . . .[70]

Due to the availability of the Principles in many languages of the world, they can be used to help parties draft contracts when negotiating international deals.[71] While it is difficult to quantify the extent to which the Principles have been utilized as a guide for negotiating contracts, some studies have shown the increase in utilization in this area.[72] UNIDROIT conducted a questionnaire in 1996, and out of those who responded, two-thirds claimed that they used the Principles when negotiating and drafting cross-border commercial contracts.[73] In 1999, a study was conducted by the Center for Transnational Law, targeting 1000 business professionals, lawyers, in-house counsel, and arbitrators from all over the world on the use of Transnational Law in International Contract Law and Arbitration.[74] One of the questions asked was if they had used the Principles as guidelines in contract negotiations, and 59% responded that they had.[75]

---

67. *Id.* at 151.
68. *Id.*
69. *Similar Rules for the Same Purpose*, *supra* note 11 at 242.
70. *Id.*
71. *New Edition of the Principles 2004*, *supra* note 22, at 9.
72. *Id.*
73. *Id.*
74. BERGER, *supra* note 5, at 93.
75. *Id.* at 107.

The drafters of the Principles also contemplated the idea that the Principles could apply on their own, without the parties selecting them as the choice of governing law, by way of becoming part of *lex mercatoria*. In order for the Principles to be deemed part of *lex mercatoria*, the relevant principles would have to be consistent with the prevailing standards of international trade.[76] Thus, to the extent that the individual provisions are consistent with the general practices in international trade, the Principles may be applied as part of *lex mercatoria*.[77]

A U.S. Federal court upheld an award issued by a foreign arbitral tribunal that referenced the UNIDROIT Principle's provisions on good faith and fair dealing as general principles of international law, or in other words, as a part of *lex mercatoria*.[78] In that case, the Respondent moved to vacate a foreign arbitral award on the grounds that it violated Article V(I)(c) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards.[79] Article V(I)(c) provides that a Tribunal must not decide an issue based on legal principles that "deals with a difference not contemplated by or not falling within the terms of the submission to the arbitration" or "contains decisions beyond the scope of the submission to the arbitration."[80] The Respondent claimed that the Tribunal's reference to the Principles as international equitable principles is in violation of Article V(I)(c) because the application exceeds the scope of the terms of reference provided for in the contract.[81] The court rejected this argument, holding that one of the issues before the Tribunal was whether general principles of international law could be applied. The Tribunal held that such principles could be applied.[82] The court reasoned that the Tribunal's reference to the UNIDROIT Principles does not violate Article V(I)(c) because "the tribunal applied these principles to differences contemplated by, and falling within the terms of the submission to arbitration."[83]

Lastly, the UNIDROIT Principles have gained recognition by national lawmakers and have been used as a source of inspiration when reforming contract law on a domestic level. To this end, the UNIDROIT Principles have a function similar to the function of the Model Penal Code in America. The Model Penal Code is a statutory criminal code that was developed by

---

76. Bortolotti, *supra* note 16, at 148—49.

77. *Id.*

78. *See* Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys. Inc., 29 F. Supp. 1168 (S.D. Cal. 1998); *see also Similar Rules for the Same Purpose*, *supra* note 11 at 242.

79. Ministry of Def., *supra* note 76 at 1170.

80. *Id.* at 1172.

81. *Id.* at 1173.

82. *Id.*

83. *Id.* at 1173.

the American Law Institute with the goal of standardizing criminal law among states.[84] Legislators are able to adopt the code in full or in part or simply use it as a source of inspiration when reforming state criminal law.[85] Since its inception, the Model Penal Code has had the effect of harmonizing criminal law among states, as over two-thirds of states have adopted the code in full or in part.[86] Much like the Model Penal Code, the UNIDROIT Principles have been used as a model code by legislators, and parts of the Principles have found their way into domestic provisions on contract law. In the subsequent section, this article will outline examples of states such as Russia, China, and Spain that have used the UNIDROIT Principles as a resource in their national reform of contract law.[87] Bear in mind that the examples provided are not meant to be an exhaustive list of all the countries that have relied on the Principles to affect domestic private law reform.

V. THE UNIDROIT PRINCIPLES AS A MODEL FOR NATIONAL LAWMAKERS

As stated before, the UNIDROIT Principles have been characterized as a soft body of law. However, one purpose of creating soft law is to use it as a means to produce hard law. To this end, one of the purposes of the UNIDROIT Principles is to develop an instrument that serves "as a model for national and international legislators."[88] When national lawmakers use the Principles to reform domestic laws, this soft law instrument has the effect of creating hard law on a domestic level. As stated in a letter sent in 1993 by the Australian Government to the Secretary General of UNIDROIT

> The Principles could be a timely additional resource for the authorities of those and other countries in their efforts in drafting an important and difficult area of commercial

84. Markus Dirk Dubber, *Penal Panoticon: The Idea of a Modern Penal Code*, 4 Buff. Crim. L. Rev. 53, 53 (2000).

85. *Id.*

86. Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 297 (1998) (commenting on the persuasive force of the original Model Penal Code and noting that "[i]n the first two decades after its completion in 1962, more than two-thirds of the states undertook to enact new codifications of their criminal law, and virtually all of those used the Model Penal Code as a starting point" (citing Herbert Wechsler, Foreword to Model Penal Code and Commentaries xi (1985))).

87. *New Edition of the Principles 2004*, *supra* note 22, at 8 (discussing how the UNIDROIT Principles have been used as a Model in the reform of national laws in Lithuanian, Estonia, Hungary, China, Germany and in the Middle East by the Economic Cooperation Organization set up by Pakistan, Iran, and Turkey; *see also Similar Rules for the Same Purpose*, *supra* note 11 at 242 (noting the UNIDROIT Principles have played a role in reforming domestic laws in New Zealand, Spain, Russia, Israel, and Argentina).

88. Principles on International Commercial Contracts, *supra* note 35.

> law. In that respect those authorities may derive confidence from the fact that the Principles [. . .] have been drafted in an atmosphere free from any particular political or ideological persuasion and by some of the most eminent world experts in this area of law.[89]

It can be confidently confirmed that the goal of the UNIDROIT Principles to serve as a model body of law has been realized, as a number of national legislators, Public Organizations, and Multilateral Organizations have used the Principles as inspiration or as a model code when reforming or creating domestic law.[90] The following section will outline some examples of how the UNIDROIT Principles have been used to affect domestic reform.

A. The 1995 Civil Code of the Russian Federation

Before the first draft of the UNIDROIT Principles were even published, they played an important role in harmonizing international contract law, as the draft of the 1994 UNIDROIT Principles was used by Russian lawmakers in the drafting of the Russian Civil Code of 1995.[91] While it has been difficult to quantify the extent to which the Principles influenced the Russian Civil Code, it has gone undisputed that Russian legislators relied on them as a point of reference during the drafting stages.[92] As evidence, the Russian President of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry and member of the UNIDROIT governing council stated that "in relation to the new Russian Civil Code the Principles have already played the role indicated for them in the Preamble . . . in the sense that they have served as a model for national legislation."[93]

One provision of the code that was clearly influenced by the Principles is the rules on change in circumstances and hardship contained in Article 451 of the Russian Civil Code of 1995. More specifically, the language of Articles 6.2.1–6.2.3 of the 1994 UNIDROIT Principles along with their comments, were used in drafting Article 451, which previously had no

---

89. *Similar Rules for the Same Purpose*, *supra* note 11 at 242.

90. Pierre Meyer, *The Harmonization of Contract Law within OHADA General Report on Ouagadougou Colloquium 15-17 November 2007*, 2008 UNIF. L. REV. 393, 401 (2008).

91. Alexander S. Komarov, *The UNIDROIT Principles of International Commercial Contracts: A Russian View*, 1996 UNIF. L. REV. 247, 249 (1996) [hereinafter Komarov].

92. *See generally id.*

93. *Id.*

precedent in Russian law.[94] The Russian Civil Code of 1995 permits a contract to be modified, with court approval, in the event of a material change in circumstances.[95] Similarly, Articles 6.2.1-6.2.3 of the 1994 UNIDROIT Principles impose a duty on the parties to renegotiate the contract in the event of a change in circumstances.[96] In the event the parties are not able to reach an agreement the parties are entitled to bring the dispute before a court.[97]

B. Estonia Republic

The Minister of Justice for Estonia sent a letter dated June 8, 1995 to UNIDROIT stating that at the "present time we're elaborating a new draft law of obligations of the Estonian Republic. The UNIDROIT Principles of International Commercial Contracts is certainly one of the most important and authoritative sources for drafters of the new law of obligations because . . . it contains a positive experience of different States."[98] The new draft law of obligations entered into force in 2001.[99]

C. The Lithuanian Civil Code

The Lithuanian Civil Code is arguably the national body of law that most closely reflects the UNIDROIT Principles. This can be largely attributed to the fact that after the Republic of Lithuania gained their independence, national lawmakers were faced with the task of formulating an entirely new body of private law that reflected the new economic and political state of the country, but they had limited resources at their disposal.[100] To provide a clearer understanding of how the UNIDROIT

---

94. Komarov, *supra* note 89, at 249; *see also* Joseph Skala, *The UNIDROIT Principles of International Commercial Contracts: A Russian Perspective* found in SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 119—33 (for a discussion of the historical development of the Russian Civil Code and the role the UNIDROIT Principles have played).

95. CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION (Kluwer Law International, the Hague, 2009) 490.

96. International Institute for the Unification of Private Law [UNIDROIT], *Principles of International Commercial Contracts* (1994), art. 6.2.1—6.2.3.

97. *Id.*

98. Michael Joachim Bonell, *The UNIDROIT Principles in Practice, the Experience of the First Two Years*, 1997 UNIF. L. REV. 34, 37 (1997).

99. Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 19 (2008) (citing information sent by the Estonian Minister of Justice to the Secretary General of UNIDROIT on June 8, 1995) [hereinafter *Development of a World Contract Law*].

100. *See* SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 231—32.

Principles were essential to the creation of the Lithuanian Civil Code, it will be helpful to briefly explain key historical events and obstacles that Lithuania had to overcome in creating the Lithuanian Civil Code.

The Republic of Lithuania regained its independence in May of 1990 and was officially recognized as a state upon the collapse of the former Soviet Union in 1991.[101] Although Lithuania gained its independence in relatively recent history, it is not a newly independent nation, as it gained its independence in 1918.[102] However, from 1940–1991, the country was under Soviet rule, and during this period in Lithuanian history, the development of its legal system halted because many of the country's elite legal minds were imprisoned by Soviet leaders, died as a result of Soviet imprisonment, or managed to flee the country.[103] Upon regaining independence, one of the main priorities of the Lithuanian legislators was to modernize the contract law to support the switch from a programmed economy to a free market economy.[104]

In the redrafting of the Lithuanian Civil Code, the legislators decided to incorporate "as many provisions of the UNIDROIT Principles of International Commercial Contracts as possible, taking into account social and economic realities in Lithuania."[105] As a result of this strict adherence to the UNIDROIT Principles in the redrafting of the Civil Code, it can be said that Lithuania is, to date, the clearest example of a nation incorporating the Principles into its own domestic law, because the majority of the Principles have been incorporated into the Lithuanian Civil Code.[106] The differences in legal terminology required the wording of the Lithuanian Code to vary from the terminology used in the Principles, but the drafters of the Lithuanian code did not change the underlying content of the Principles.[107] The drafters of the Lithuanian Civil Code even used the commentary of the UNIDROIT Principles to develop commentary of the Lithuanian Civil Code, in order to ensure that the interpretation of the two bodies of law would be in sync with one another.[108]

---

101. Valentinas Mikelenas, *Unification and Harmonization of Law at the Turn of the Millenium: The Lithuanian Experience*, 2000 UNIF. L. REV. 243, 244 (2000) [hereinafter Mikelenas].

102. *Id.*

103. *Id.* at 246.

104. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 232.

105. Mikelenas, *supra* note 96, at 251.

106. *See id.*

107. *Id.* at 252.

108. Mikelenas, *supra* note 96, at 252; Tadas Zukas in his article entitled *Reception of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law in Lithuania* found in the SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 231—43 provides an in depth analysis of the impact of the UNIDROIT Principles on the Lithuanian Civil Code. Art. 6.156 of the Lithuanian Civil Code Corresponds to Art. 1.1 of the UNIDROIT Principles. Art.

D. Law on Obligations in the German Civil Code

A more subtle impact can be traced in the German law on obligations, which entered into force in 2002.[109] The Final Report of the Commission for the Revision of the German Law on Obligations within the German Civil Code—*Bürgerliches Gesetzbuch*, which is abbreviated as BGB—made reference to individual provisions of the UNIDROIT Principles.[110] While the provisions may not have been directly modeled after the UNIDROIT Principles, German lawmakers found support in the Principles.

E. The Spanish Commercial Code

In 2004, the Spanish Ministry of Justice published its proposal to reform the Spanish Commercial Code in order to bring the laws up-to-date with modern markets.[111] The draft of the Commercial Code incorporates solutions from the UNIDROIT Principles and the Principles of European Contract Law.[112] The references to the UNIDROIT Principles by the drafting Commission marked the first time that the Principles were so much as cited in Spanish Law.[113] Martínez Cañellas sheds light as to the motivations of the Spanish General Commission in opting to rely on the Principles as a model for effectuating their domestic commercial law reform.

> It has done this because its objective was to unify the International and domestic rules of commercial law. Today, the CISG is in force in Spain, but it only covers international sales contracts. In order to extend this to a general regulation of commercial contracts, the UNIDROIT Principles seem to be the most accepted expression of international commercial contract law.[114]

6.157 par. 1 of the Civil Code mimics Art. 1.4 of the Principles. The UNIDROIT Principles are referenced in the comments of Art. 6.158, 6.162 par. 1, 6.153, 6.164, 6.166, 6.167 par. 1, 6.168, 6.169, 6.170, 6.173, 6.174, 6.175, 6.176, 6.153, 6.164, 6.166, 6.167 par. 1, 6.168, 6.169, 6.170, 6.173, 6.174, 6.175, 6.176, 6.177, 6.178, 6.179, 6.180, 6.181 par. 3, 6.182, 6.185 par. 1, 6.186, 6.187, 6.193, 6.194, 6.195, 6.196, 6.197, 6.198, 6.199, 6.202, 6.203, 6.204, 6.205, 6.206, 6.207, 6.208, 6.209, 6.211, 6.212, 6.213 of the Lithuanian Commercial Code.

109. *Development of a World Contract Law*, *supra* note 94, at 19; *see also* Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt [BGBI] 43, § 280; *see also* Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt [BGBI] 64, § 346.

110. *Id.* (referencing Reinhard Zimmerman, *The New German Law on Obligations*, 41 (2005)).

111. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 215.

112. *Id.* at 220.

113. *Id.*

114. *Id.*

In order to provide some examples of how the UNIDROIT Principles have been used as a model for reform of the Spanish Commercial Code, we can look directly to the draft reform.[115] Article 51 of the draft models the language of Article 1.7 of the UNIDROIT Principles, a rule handling good faith.[116] The general principle of good faith is codified in Article 7 of the Spanish Civil Code and incorporates the abuse of rights doctrine, utilizing the terms in the commentary of the 2004 edition of the Principles.[117] Additionally, while pre-contractual liability in cases of bad faith was accepted in Spanish case law, it was never codified as part of the Civil Code.[118] The new draft mimics article 2.15 and 2.16 of the Principles, covering pre-contractual liability.[119] Finally, the section on formation of a contract in the Spanish Civil Code adopts the terminology of articles 2.1.1–2.1.7 and 2.1.11 of the Principles almost verbatim.[120] The Spanish Commercial Code also closely follows the UNIDROIT provisions on contractual interpretation. The provisions on interpretation in the draft of the Spanish Commercial Code are drafted following articles 4.1–4.7 of the UNIDROIT Principles.[121] The only derivation is the exclusion of the term "reasonable person," and the omission of Article 4.5 of the Principles requiring "all terms to be given effect."[122]

---

115. Anslemo Martínez Cañellas provides a complete overview of the similarities between the draft of the Spanish Commercial Code and the UNIDROIT Principles in his article *The Influence of the UNIDROIT Principles on the Proposal of the Reform of the Spanish Commercial Code* found in the SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 215—29. The article explains how the following provisions in the Spanish Commercial Code were influenced by the UNIDROIT Principles: Pre-contractual Liability, Formation of Contract, Interpretation of Contract, Content of Contract, Performance of Contract, Termination of Indefinite Terms Contracts and Hardship, Breach of Contract, Late Payment, Assignment of Debts, Presumption of Joint Liability for the Performance of Commercial Obligations, and Limitations of Actions on Voidness.

116. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 222; *See generally* International Institute for the Unification of Private Law [UNIDROIT], *Principles of International Commercial Contracts* (2004), art. 1.7.

117. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 222 (noting that the Spanish draft does not mimic the principles verbatim but the intentions are the same. The Spanish draft provides: "Each of the parties must keep secret the confidential information given by the other party during negotiations. The party who breaches the duty of confidentiality will be responsible for the damage caused to the other party by the breach of its duty.").

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 222.

F. The Danish & Dutch Systems

Countries that rely heavily on statutory bodies of law rather than case law are more likely to use the Principles as a tool to reform domestic law.[123] It is important to note that reform can happen within countries that depend more on case law through interpretation of national laws using the Principles. This type of interpretation has the effect of changing national laws, however, it is a little more difficult to trace. Professor Lookofsky of the University of Copenhagen Law Faculty discusses his take on the incorporation of the UNIDROIT Principles into the Danish system, a jurisdiction where a large portion of contract law is not codified.

> [The] source-of-law function (purpose) of the Principles seems particularly important in systems where great reliance is placed on uncodified essentially judge-made rules of law. In Denmark, for example, where the bulk of our existing law is not to be found in statutes, it seems unlikely that our Parliament would make use of the Principles as a model for future legislation: Our Contracts Act . . . is not currently up for revision and in the absence of any European commandment Denmark would hardly elect to codify the rest of its Contract law, let alone enact a Civil Code. What does, however, seem very likely is that some UNIDROIT Principles will rub off on, and thus become part of our judge-made contract law. We in Denmark predict, for example, that our domestic rules on liability will drift towards the international formulations in UNIDROIT and CISG.[124]

Professor Lookofsky's prediction has, to some extent, been accurate in the neighboring country, the Netherlands. In a case before the Supreme Court of the Netherlands, the judge strengthens his support of the interpretation of the applicable Dutch Civil Code by explicitly referencing Article 7.1.4 of the UNIDROIT Principles. In another 2008 case before the Dutch Supreme Court, the issue before the Court was whether or not an exemption clause is valid under Dutch law.[125] The Court held that exemption clauses are valid, reasoning that this was consistent with the

123. SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 149.

124. Joseph Lookofosky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT "Restatement" and Danish Law*, 46 AM. J. COMP. L. 485, 488 (1998).

125. HR 11 July 2008, NJ 2008, 546 m.nt. (Eisers/Atria Water Management B.V.) (Neth.), *available at* http://www.unilex.info/case.cfm?pid=2&do=case&id=1547&step=Abstract (last visited Oct. 25, 2011).

prevailing international practice, citing to Article 7.1.6 of the UNIDROIT Principles for support.[126]

G. The New Contract Law of the People's Republic of China

The UNIDROIT Principles largely inspired the 1999 reformation of Chinese Contract Law adopted by the Second Session of the People's Congress of the People's Republic of China.[127] In developing the new legislation, Chinese lawmakers heavily referenced the UNIDROIT Principles, particularly the Chapter laying out the general provisions.[128] In fact, former head of the Department of Treaty Law of the Chinese Ministry of Commerce, Professor Zhang Yuqing, stated "the broad scope of application of the UNIDROIT Principles has no doubt had an impact on the new [Chinese] Contract Law."[129] Thus, the drafters of Chinese Contract Law relied heavily on the UNIDROIT Principles and adopted various provisions when reforming their existing domestic contract law. The following section will provide some, but not all, examples of how the Chinese Contract Law and the UNIDROIT Principles are closely related.

Prior to China's reformation of its body of contract law, there was no provision on contract formation.[130] Chinese contract law, as it currently stands, adopted the offer and acceptance model used by the Principles and the CISG.[131] Articles 3–7 of the Chinese Contract Law embody basic contractual principles, such as equality, party autonomy, fairness, good faith, and public interest.[132] These basic principles are similarly provided for by the UNIDROIT Principles. Article 1.1 of the UNIDROIT Principles is similar to Article 4 of the Chinese Contract Law, which protects party autonomy by emphasizing that the parties are free to contract.[133] Article 1.7 of the UNIDROIT Principles requires that the parties must act in good faith, as does Article 6 of the Chinese Contract Law. There are also similar provisions with regard to the effectiveness of a contract. Article 8 of the Chinese Contract Law provides

---

126. *Id.*

127. *Development of a World Contract Law*, *supra* note 94, at 19; *see also* Huang Danhan, *The UNIDROIT Principles and their Influence in the Modernisation of Contract Law in the People's Republic of China*, 2003 UNIF. L. REV. 107 (2003); Zhang Yuqing & Huang Danhan, *The New Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: A Brief Comparison*, 2000 UNIF. L. REV. 429, 430 (2000) [hereinafter Yuqing & Danhan].

128. Yuqing & Danhan, *supra* note 122, at 430.

129. Chi Manjiao, *Application of the UNIDROIT Principles in China: Successes, Shortcomings, and Implications*, 2010 UNIF. L. REV. 5, 14 (2010).

130. *Id.* at 13.

131. *Id.*

132. Yuqing & Danhan, *supra* note 122, at 431.

133. *Id.*

> [A] contract established in accordance with the law shall be legally binding on the parties. The parties shall perform their respective obligations in accordance with the terms of the contract. Neither party may unilaterally modify or rescind the contract. The contract established according to law shall be under the protection of the law.[134]

In contrast, Article 1.3 of the UNIDROIT Principles reads that "a contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles."[135] Here, the terminology used in the respective articles is not identical, but the underlying concept is the same.

Prior to the reformation of Chinese Contract Law, contracts generally had to be in writing. This was contrary to the trend in international commercial law that allows for greater flexibility in order to accommodate the modern market, particularly in regards to electronic commerce. Article 10 of the Chinese Contract Law provides that contracts may be written, oral, or in some other form.[136] Similarly, the UNIDROIT Principles do not require that a contract be concluded in a written form. The existence of the contract may be proved by any means including by witnesses.[137]

H. The Organization for the Harmonization of Business Law in Africa

Let us turn to Africa, one of the clearest and unique examples of how the UNIDROIT Principles may be used to reform domestic law. The Organization for the Harmonization of Business Law in Africa—known by the French acronym OHADA—was instituted on October 17, 1993 by a Treaty signed in Port-Louis, Mauritius and is comprised of sixteen member states: Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo, and the Union of the Comoros. The purpose behind creating the Organization was to "promote regional integration and economic growth and to ensure a secure legal environment

134. Yuqing & Danhan, *supra* note 122, at 431; SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 114.

135. Yuqing & Danhan, *supra* note 122, at 431.

136. *Id.* at 432.

137. *Id.*

through harmonization of business law," which was considered indispensable to the economic development of the region.[138]

In furtherance of the goal of creating a secure legal framework that would promote investment and economic growth among member countries, OHADA decided to undergo an ambitious harmonization project in the field of commercial law and called on UNIDROIT to assist the organization in creating a Uniform Act on Commercial Law.[139] In 2004, Marcel Fontaine, a member of the UNIDROIT working group from Belgium, was appointed the expert responsible for the project and worked directly with OHADA officials in creating the draft and providing commentary.[140] The Organization's Uniform Law not only drew inspiration from the UNIDROIT Principles, but more importantly, used the Principles as a model, adopting many principles almost verbatim.[141] In fact, the drafters of the Uniform Act only strayed from the Principles when it was absolutely necessary, due to the availability of a large amount of scholarly work, which had the ability to aid arbitral tribunals and courts in interpreting the new code.[142] The Uniform Act, however, diverges from the Principles in order to fill gaps left by the principles, with the view of creating a more comprehensive body of law. More specifically, the Uniform Act has strayed from the Principles in the area of illegality, nullity, privity of contracts, promise for another, performance to the detriment of a seizing creditor, third party performance, merger, conditional, joint and several, and alternative obligations, protection of obligees and third parties, paulian action, and simulation, because at the time the draft was created, the UNIDROIT Principles did not cover these areas of the law.[143]

How does this Uniform Act relate to the discussion of this section? That is, how are the UNIDROIT Principles being used as a tool to reform domestic laws? Like a self-executing treaty that applies directly to the states upon ratification, OHADA Uniform Acts will immediately come into force in all OHADA member states, once adopted, pursuant to Article 10 of

---

138. *In Brief—The Treaty,* OHADA, *http://www.ohada.com/plaquette_english.pdf* (last visited Oct. 25, 2011). For an in depth look at the harmonization process of commercial law in Africa *see generally* BORIS MARTOR ET AL., BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS (2d ed. 2007).

139. *See generally* Marcel Fontaine, *The Draft of OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts*, 2004 UNIF. L. REV. 573 (2004); *see also* SWISS INSTITUTE OF COMPARATIVE LAW, *supra* note 24, at 95 an article by Marcel Fontaine entitled *Un Project d'harmonisation du Droit des Contracts en Afrique.*

140. *Development of a World Contract Law*, *supra* note 94, at 20.

141. *See id.*

142. Meyer, *supra* note 88, at 400.

143. *Id.*

the Treaty.[144] This means that the Uniform Acts automatically become domestic law without requiring the legislator to adopt the Act as law. The provisions of the Uniform Act supersede previous national legislation that covers the same subject matter.[145] The implications of the collaboration of OHADA and UNIDROIT are tremendous. The Uniform Act of OHADA, which has drawn its inspiration directly from the UNIDROIT Principles, will become the domestic law governing commercial contracts in sixteen Western African Countries when it is adopted.

VI. CONCLUSION

A major achievement in the area of international harmonization of private law has been the adoption of the UNIDROIT Principles. The UNIDROIT Principles have made tremendous progress since their first publication in 1994. Arbitral tribunals have applied the Principles as the law governing contracts, and national courts have used the Principles to support interpretation of national laws. They have been selected by parties as governing law or simply to fill the gaps of national laws or treaties, such as the CISG. The Principles have been used as a reference when negotiating international contracts, and they have been used as a tool to create hard law in many countries around the world that used the Principles as a model or simply as inspiration in making domestic reforms. Turning to supranational law reform, the UNIDROIT Principles may make their most substantial impact in West and Central Africa if and when the OHADA Uniform Act on Contracts is ratified. UNIDROIT should be recognized for their contribution to the legal system in the field of private international law, as the Principles have provided an important solution for international traders looking for security and neutrality when choosing to trade internationally and for countries who are looking to bring their contract law up-to-date with the modern markets and international commercial law trends.

144. MARTOR, *supra* note 133, at 18.

145. *Id.*