

**RESPECTING THE RULES OF LAW: THE UNIDROIT PRINCIPLES IN
NATIONAL COURTS AND INTERNATIONAL ARBITRATION**

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1 INTRODUCTION

The trend of closed economy, which became dominant after World War II, commenced changing in 1980s. Around fifty states were members of the United Nations in 1950s and by the 1990s this membership had increased to one hundred ninety two.¹ Meanwhile, the restrictions on international trade started to loosen. As a result of the fall of the Berlin Wall and the collapse of the Eastern Bloc, trade between East and West started to increase in volume. In addition, as a result of the improvement of industry and technology, international relations blossomed and along with that international trade evolved further. Both developed and developing economies cannot limit themselves any more with their own countries, local products or capital.²

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¹ A listing of the UN member states is available at: <<http://www.un.org/en/members>>.

² Shapiro, M., "The Globalization of Law" (1993) 1 *International Journal of Global Legal Studies* 37; Walker and Fox, "Globalization: An Analytical Framework" (1996) 3 *International Journal of Global Legal Studies* 375; Wiener, J., *Globalization and the Harmonization of Law*, 1999, Continuum International Publishing Group at pp. 9-10; Mistelis, L., "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform - Some Fundamental Observations" (2000) 34(3) *International Law* 1055; Mistelis, L., "Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law" in Ian Fletcher / Loukas Mistelis / Marise Cremona (Eds.), *Foundations and Perspectives of International Trade Law*, 2001, Sweet and Maxwell, at pp. 3-8; Yesilirmak, A., *Provisional Measures in International Commercial Arbitration*, 2005, Kluwer Law International, at pp. 21, 45.

As a result of this process of trade liberalisation, the significance of conflict of laws problems has increased in the resolution of disputes related to international commercial contracts. The expectation of businesses is that the law will, in the event of a dispute, be applied with certainty and predictability. Certainty of law avoids unexpected results and harmonises dispute resolution outcomes. In order to meet the above expectations, international and professional institutions have conducted studies with the purpose of unifying the substantial law rules for international agreements.³ For example, along with international conventions such as the *United Nations Convention on Contracts for the International Sale of Goods*⁴ (CISG), *Convention on the Contract for the International Carriage of Goods by Road*⁵ (CMR), international institutions such as International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL) have prepared model laws and model contracts, e.g. *UNCITRAL Model Law on International Commercial Arbitration*⁶, *UNCITRAL Model Law on International Credit Transfers*⁷, *UNCITRAL Model Law on Cross-Border Insolvency*⁸. These conventions and model laws have become an important source of international commercial and private international law. In addition to those instruments, the International Institute for the Unification of Private Law⁹ (UNIDROIT) prepared UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles).

The purpose of UNIDROIT Principles is to provide a set of rules which can be applied to all types of international commercial contracts. These rules are intended to create an equal and fair situation for both parties, and are suitable for the needs and fast progress of international commercial relations.¹⁰ The UNIDROIT Principles were prepared by a study group consisting of lawyers, judges and other officers who are experts in the fields of contract and international commercial law, and who represent different systems of law and socio-economy.¹¹ The UNIDROIT Principles include fair

³ Berger, K. P., *The Creeping Codification of the Lex Mercatoria*, 1999, Kluwer Law International, at p. 144.

⁴ *Convention of International Sale of Goods*; available at <<http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>>

⁵ *Convention on the Contract for the International Carriage of Goods by Road*; available at <<http://treaties.un.org/doc/Publication/UNTS/Volume%20399/volume-399-I-5742-English.pdf>>.

⁶ *UNCITRAL Model Law on International Commercial Arbitration*; available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

⁷ *UNCITRAL Model Law on International Credit Transfers*; available at <http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1992Model_credit_transfers.html>.

⁸ *UNCITRAL Model Law on Cross-Border Insolvency*; available at <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html>.

⁹ The main aim of UNIDROIT is to search for methods in order to unify and coordinate the private laws of states and prepare for the development of a unified private law.

¹⁰ Viscasillas, M. P. P., "UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions" (1996) 13(2) *Arizona Journal of International and Comparative Law* at pp. 389 & 392; Bonell, M. J., "Do We Need a Global Commercial Code?" (2001-2002) 106 (1) *Dickinson Law Review* 98.

¹¹ Viscasillas, *supra* fn 10, at p. 389.

provisions which balance the rights and obligations of both parties to the contract since they were not prepared to protect the interests of a certain sector.¹² The UNIDROIT Principles abstained from using terminology which is unique to a certain system of law and thus, ensure that the parties are placed at an equal legal level.¹³ Similarly, the UNIDROIT Principles were not prepared only for a certain type of contract, but aim to regulate the law of contracts in general.¹⁴ Thus, the UNIDROIT Principles are flexible in nature and adaptable to the special circumstances of the contractual relationship and the various interests of the parties. This flexibility also ensures that the UNIDROIT Principles can be easily adapted to the constant and fast technical and economic changes that occur in the field of international commerce.¹⁵ The UNIDROIT Principles did not adopt the solutions accepted by most of the countries (*common core approach*); but adopted more suitable solutions for cross border commercial relations (*better rule approach*).¹⁶ This is also in line with the constantly changing character of international commerce.¹⁷ In sum, it was thought by the drafters that it would be in the interests of international business that the UNIDROIT Principles be applicable to agreements concerning commercial relations generally.

However, the incorporation of the UNIDROIT Principles into international commercial contracts, or choice of them as the applicable law to a contract, is not very widespread among the international business community. The reason for this is probably the scepticism concerning the application of the UNIDROIT Principles by national courts, and even by the arbitral tribunals. In other words, as traditional judges refrain from respecting the choice of UNIDROIT Principles and rather apply a certain

¹² Van Houtte, H., "UNIDROIT Principles of International Commercial Contracts" (1996) 2 *International Trade and Business Law* 2.

¹³ Berger, K. P., "The Lex Mercatoria Doctrine and UNIDROIT Principles of International Commercial Contracts" (1997) 28 *Law & Policy in International Business* 944; Bonell, M.J., "UNIDROIT Principles and the Lex Mercatoria" in Thomas E. Carbonneau (Ed.), *Lex Mercatoria and Arbitration*, 1998, Juris Net, at p. 252.

¹⁴ Garro, A. M., "The Gap-Filling Role of UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG" (1994-1995) 69 *Tulane Law Review* 1152.

¹⁵ Berger, *supra* fn 13, at p. 944.

¹⁶ Bonell, M. J., "UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments" (1996) 1 *Uniform Law Review* 30; Bonell, *supra* fn 13, at p. 250; Berger, *supra* fn 3, at p. 154; Basedow, J., "Germany" in Michael Joachim Bonell (Ed.), *A New Approach to International Commercial Contracts UNIDROIT Principles of International Commercial Contracts, XVth International Congress of Comparative Law*, 1999, Kluwer Law International, at p. 127; Basedow, J., "Uniform Law Conventions and UNIDROIT Principles of International Commercial Contracts" (2000) 1 *Uniform Law Review* 130; Bonell, M. J., "UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law" (2002) 36 *Revue Juridique Themis* 34; Mistelis, L., "UNIDROIT Principles Applied as 'Most Appropriate Rules of Law' in a Swedish Arbitral Award" (2003) 3 *Uniform Law Review* 633; Bonell, M. J., *An International Restatement of Contract Law, UNIDROIT Principles of International Commercial Contracts*, 2005, Brill, at pp. 47 & 264.

¹⁷ Berger, *supra* fn 3, at p. 154.

national law to the resolution of a dispute arising out of a contract, members of the business community are generally discouraged from selecting the UNIDROIT Principles as the applicable law for their agreement.

This study considers whether or not, and in what circumstances, UNIDROIT Principles would be applied to international commercial contracts before the national courts pursuant to the *Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention)*¹⁸, the *Rome I Regulation on the Law Applicable to Contractual Obligations (Rome I Regulation)*¹⁹, Turkish law and before arbitral tribunals pursuant to various domestic statutes and institutional arbitration rules.

The aim of this study is to explore the limits of existing EU legislation which are considered not to permit the application of a-national rules of law or the UNIDROIT Principles; and to support the conclusion that the EU legislation allows such application. On the other hand, the *Turkish Private International Law Act 2007 (PILA)* is a piece of recent legislation inspired by the EU legislation. Although PILA does not expressly permit the application of a-national rules of law, it allows for possible different interpretations, which can be considered as a step forward as compared to EU legislation. However, the influence of the differing views, approaches and pieces of legislation in the EU upon the Turkish law cannot be ignored, and this study also seeks to emphasise such influence.

The subject is examined in two parts: the first part examines the application of the UNIDROIT Principles where they are explicitly chosen as applicable law by the parties in their agreements. The second part deals with the issue of whether or not the UNIDROIT Principles could be used as applicable law where the parties have not made any express choice of law in their agreement.

2 APPLICATION OF UNIDROIT PRINCIPLES AS THE APPLICABLE LAW CHOSEN BY PARTIES

Paragraph 2 of the Preamble of the Principles sets out that the parties may agree that their contract is governed by UNIDROIT Principles.

2.1 ROME CONVENTION & ROME I REGULATION

Article 3 of the Rome Convention provides that a contract shall be governed by the ‘law’ chosen by the parties. Article 1.1 of the Rome Convention states that the rules of the Convention shall apply in any situation “involving a choice between the *laws of different countries*”. Thus, when the meaning of ‘law’ is interpreted in the light of the said article it is arguable that the Rome Convention does not permit choice of law other than national laws.

¹⁸ Official Journal C 027, 26/01/1998 P. 0034 – 0046.

¹⁹ Official Journal L 177, 04/07/2008 P. 0006 - 0016.

There are two views, however, on how the ‘law’ within the meaning of Art. 3 should be interpreted: According to the traditional view, national courts can only apply national laws and the parties must agree upon the application of a national law to the substance of the dispute.²⁰ The UNIDROIT Principles do not form a ‘law’ as they only partly codify the law of contracts and obligations, and they do not exhaustively determine the content of *lex mercatoria*. The priority given to the mandatory rules of the applicable national law in Art. 1.4 of the UNIDROIT Principles demonstrates that the UNIDROIT Principles do not form a ‘law’ by themselves. In addition, as the UNIDROIT Principles are prepared by an international institution, the sovereign power of a state needed to introduce any set of rules as ‘law’ is lacking.²¹ Consequently, although the choice of a-national rules of law by the parties can be interpreted as an incorporation of such rules of law to the contract; they can be respected as contract terms but they will be binding only to the extent they do not contradict with the mandatory provisions of the applicable national law.²²

²⁰ Dicey/Morris, *Dicey and Morris on the Conflict of Laws*, V. 2, 2000, Sweet and Maxwell, at p. 1223; Cheshire/North, *Cheshire and North’s Private International Law*, 2004, Oxford University Press, at p. 560; Bonell, M. J., “Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts” (1992) 40 *American Journal of Comparative Law* 630; Tiryakioglu, B., *Taşınır Mallara İlişkin Milletlerarası Unsurlu Satım Akitlerine Uygulanacak Hukuk* (The Applicable Law to the International Sales Agreements concerning Movable Goods), 1996, Ankara Üniversitesi Hukuk Fakültesi Yayınları, at p. 24; Maniruzzaman, A. F. M., “Choice of Law in International Contracts – Some Fundamental Conflict of Laws Issues” (1999) 16 *Journal of International Arbitration* 143; Gillies and Moens, *International Trade and Business: Law, Policy and Ethics*, 2000, Routledge-Cavendish, at p. 83; Bonell, M. J., “UNIDROIT Principles and Transnational Law” (2000) 2 *Uniform Law Review* 201; Briggs, A., *The Conflict of Laws*, 2002 Oxford University Press, at p. 159; Bonell, M. J., “Soft Law and Party Autonomy: The Case of UNIDROIT Principles” 51 *Loyola Law Review* (2005) 236; Carr and Stone, *International Trade Law* 2005, Cavendish, at p. 571; Bonell (2005), *supra* fn 16, at p. 181.

²¹ Van Houtte, *supra* fn 12, at p. 9; Drobnig, U., “UNIDROIT Principles in the Conflict of Laws” (1998) 2 (3) *Uniform Law Review* 388; Gillies/Moens, *supra* fn 20, at p. 83.

²² Bonell (1992), *supra* fn 20, at p. 630; Bonell, M. J., “UNIDROIT Principles of International Commercial Contracts: Why? What? How?” (1994-1995) 69 *Tulane Law Review* 1144; Ferrari, F., “Defining the Sphere of Application of the 1994 “UNIDROIT Principles of International Commercial Contracts” (1994-1995) 69 *Tulane Law Review* 1229; Parra-Aranguren, G., “Conflict of Law Aspects of UNIDROIT Principles of International Commercial Contracts” (1994-1995) 69 *Tulane Law Review* 1245; Van Houtte, H., *UNIDROIT Principles for International Commercial Contracts – A New Lex Mercatoria? Les Principes UNIDROIT et l’Arbitrage Commercial International*, 1995, ICC Publishing, at p. 183; Lando, O., “Assessing the Role of UNIDROIT Principles in the Harmonization of Arbitration Law” (1995) 3 *Tulane Journal of International and Comparative Law* 141; Garro, A. M., “The Contribution of UNIDROIT Principles to the Advancement of International Commercial Arbitration” (1995) 3 *Tulane Journal of International and Comparative Law* 103; Viscasillas, *supra* fn 10, at p. 397; Goode, R., “Usage and its Reception in Transnational Commercial Law” (1997) 46 *International and Comparative Law Quarterly* 26; Goode, R., “International Restatements of Contract and English Contract Law” (1997) 2 *Uniform Law Review* 245; Ramberg, J., “The Creativity of Arbitrators in the Context of UNIDROIT Principles of International Commercial Contracts” (1998) 2(3) *Uniform Law Review* 655; Bortolotti, F., “UNIDROIT Principles and the Arbitral Tribunals” (2000) 1 *Uniform Law Review* 148; Goode, R., “Rule, Practice, and Pragmatism in Transnational Commercial Law” (2005) 54 *International and Comparative Law Quarterly* 546; Bonell (2005), *supra* fn 20, at p. 237; Bonell (2005), *supra* fn 16, at p. 181.

In contrast, the contemporary view is that the UNIDROIT Principles should be applied by the national courts in the event that they are chosen as the applicable law to the contract by the parties. According to *Boele-Woelki*²³, the ‘law’ chosen by the parties (within the meaning of Art. 3 of the Rome Convention) should not be interpreted narrowly. Numerous independent uniform sets of rules of law have emerged since the conclusion of the Rome Convention. Thus, it is unreasonable to limit the freedom of choice of law to national laws proper. Bearing in mind that the parties are free to choose any national law even if it does not have any connection with the relevant dispute, granting parties the right to choose a-national rules of law would not make much difference. In both cases, the relevant national law cannot be completely put aside according to Art. 7 of the Rome Convention, which prescribes that effect, shall be given to the mandatory rules of the law of the country with which the situation has a close connection.²⁴ *Dutoit* follows the views of *Boele-Woelki*.²⁵ In addition, interpreting the Rome Convention narrowly so as to exclude the application of a-national rules of law to the substance of the dispute increases the difference between the decisions of the courts and arbitral tribunals.²⁶ *Hartkamp* agrees that the notion of ‘a-national rules of law’ did not exist when the Rome Convention was prepared and the Convention should not be interpreted narrowly as to exclude contemporary developments.²⁷ *Juenger* also believes that interpreting the Rome Convention as restricting the freedom of will of the parties is incompatible with modern commercial and legal developments.²⁸ *Berger* draws attention to the different terminology used by Arts. 3 and 4 of the Rome Convention²⁹. Article 4 provides the applicable law in the absence of choice of law, uses the term ‘law of the country’; whereas, Art. 3 makes reference to ‘law’. Thus, in my opinion, a contractual choice of a-national rules of law such as the UNIDROIT Principles should be respected as it is possible to interpret the Rome Convention widely so as to permit choice of a-national rules of law.

There are only two European court decisions concerning the application of the UNIDROIT Principles.³⁰ However, these decisions illustrate that a-national rules are

²³ Boele-Woelki, K., “Principles and Private International Law” (1996) 4 *Uniform Law Review* at pp. 666 & 675; Boele-Woelki, K., “European and UNIDROIT Principles of Contract Law” in Bernd von Hoffmann (Ed.), *European Private International Law*, 1998, Cambridge University Press, at p. 81.

²⁴ *Ibid.*

²⁵ Dutoit, B., “The Rome Convention on the Choice of Law for Contracts” in Bernd von Hoffmann (Ed.), *European Private International Law*, 1998, Cambridge University Press, at p. 45.

²⁶ Boele-Woelki (1996), *supra* fn 23 at pp. 666 & 675.

²⁷ Hartkamp, A. P., “Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope” (2003) 1(2) *Uniform Law Review* 87.

²⁸ Juenger, F. K., “The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons” (1994) 42 *American Journal of Comparative Law* 384.

²⁹ Berger, *supra* fn 3, at p. 179; Basedow (2000), *supra* fn 16, at p. 146.

³⁰ The St. Gallen Commercial Court, in its decision of 12 November 2004 (Bonell, M. J., *UNIDROIT Principles in Practice*, 2006, Hotei Publishing, at p. 1084 [English Abstract]), applied the FIFA rules instead of the Swiss law stating that they are an international, sufficient and balanced set of rules as

not accepted as applicable law by the national courts. The first decision was rendered by a Dutch court. In this case, the Advocate General Hartkamp strengthens its interpretation of the Dutch Civil Code concerning the termination of a contract and its conclusion on the dispute with Art. 7.1.4 of the UNIDROIT Principles. However, although the Dutch High Court³¹ adheres to the conclusions of its Advocate General, it does not make any reference to the UNIDROIT Principles. Thus, the court rejected to apply UNIDROIT Principles as applicable law.

In line with the Dutch decision, an Italian court at Padova, in its decision of 11 January 2005³² stated:

According to Italian conflict of law rules parties are free to choose the applicable law but in so doing they must choose a particular national law. A reference by the parties to non-State rules of supranational or transnational character such as the lex mercatoria, UNIDROIT Principles or CISG in cases where the Convention as such is not applicable cannot be considered a veritable choice of law by the parties but amounts to an incorporation of such rules into the contract with the consequence that they will bind the parties only to the extent that they do not conflict with the mandatory rules of the applicable domestic law.

The Green Paper on the Conversion of the 1980 Rome Convention on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation outlines the need for the revision of Art. 3 in order to grant the parties the right to choose a-national rules of law as the law applicable to their contract. The rationale of this revision is that, in practice, parties widely accept and use instruments such as the CISG, general principles of law, *lex mercatoria* and the UNIDROIT Principles as the applicable law in international transactions.³³ The Commission proposed on 15 December 2005 the addition of the following to Art. 3:

The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in

UNIDROIT Principles; however, this decision was annulled by the *Bundesgericht* at 20 December 2005 (Bonell, *Ibid*, 1126 [English Abstract]).

³¹ Nederlandse Jurisprudentie 1996, No. 706, 4078-4092. For the English Abstract see, Bonell, *supra* fn 30, at p. 593. This decision has been criticised by the Dutch doctrine due to the strict approach taken and the ignorance of UNIDROIT Principles and the related developments in the other states (De Ly, F., "Netherlands" in Michael Joachim Bonell (Ed.), *A New Approach to International Commercial Contracts UNIDROIT Principles of International Commercial Contracts, XVth International Congress of Comparative Law*, 1999, Kluwer Law International, at p. 215.

³² Available at: <<http://www.unilex.info/case.cfm?pid=2&do=case&id=1004&step=Abstract>>.

³³ Green Paper on the Conversion of the 1980 Rome Convention on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation of 14 January 2003 (COM (2002) 654), 3.2.3.

*accordance with the law applicable in the absence of a choice under this Regulation.*³⁴

The purpose of the proposal, as explained by the Commission, is to further boost the impact of the will of the parties by authorising them to choose a-national rules of law such as the UNIDROIT Principles and the Principles of European Contract Law as the law applicable to their contracts³⁵. However, the provision proposed by the Commission to authorise the parties to choose a-national rules of law was not adopted in the final text of the Rome I Regulation.³⁶ In Recital 13 of the Rome I Regulation, it is provided that the Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention. Recital 14 prescribes that should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules. Differing from the wording of Art. 4 (applicable law in case of absence of choice of law by the parties) which refers to the ‘law of a country’, Art. 3 refers only to ‘law’. Furthermore, the provisions of the Rome Convention and the Rome I Regulation regarding their scope (in Art. 1.1 at each text) are different. The Rome Convention shall apply in cases “involving a choice between the laws of different countries”, whereas the Rome I Regulation shall apply in cases “involving a conflict of laws’.”

The Rome I Regulation does not provide a solid solution. Thus, this Regulation does not settle the conflict between the contemporary view (not restricting the freedom of will of the parties with national laws) and the traditional view (allowing national courts to apply national laws only). It would have been preferable for the Rome I Regulation to reconcile the matter in line with the modern view, and in a way that respects the will of the parties pertaining to the choice of a-national rules of law.

2.2 *TURKISH LAW*

According to Art. 24 of the PILA, a contract shall be governed by the ‘law’ chosen by the parties. The question of whether a-national rules of law may be chosen as the applicable law by the parties has not been discussed in detail by Turkish scholars.

³⁴ Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final.

³⁵ See also, Discussion Paper for the Expert Meeting on the Conversion of the Rome Convention of 1980 into a Community Instrument and its Modernisation (Rome I), Brussels, 17 February 2005.

³⁶ The Rome I Regulation was published in the Official Gazette on 4 July 2008 and entered into force on the 20th day following its publication. However, according to Art. 28, it shall apply to contracts concluded after 17 December 2009. Converting the Rome Convention into a Community instrument has a number of advantages, the first of which would be greater consistency in Community legislation on private international law based on Art. 67 of the Treaty on the Functioning of the European Union (Ex-Art. 61(c) of the Treaty Establishing the European Community). It, in addition, entails conferring on the Court of Justice the jurisdiction to interpret it in the best conditions and facilitates the application of the standardized conflict rules in the new Member States (Green Paper on the Conversion of the 1980 Rome Convention on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation of 14 January 2003 (COM (2002) 654), 2).

According to *Sargin*, the ‘law’ shall be interpreted widely as to cover *lex mercatoria* and the freedom of choice of law shall not be restricted to national laws.³⁷ On the other hand, *Nomer/Şanlı* stated that the ‘law’ does not refer to a-national rules of law such as *lex mercatoria* or the UNIDROIT Principles; and a choice of law shall only be valid if it selects a national law.³⁸

It is submitted however, that there is nothing that limits the broad interpretation of ‘law’ to include a-national rules of law if the requirements of international commerce and the fair resolution of the relevant dispute deem it necessary. The existing rules should be interpreted widely to adapt to the needs of international trade. There is no reasonable ground for restricting the freedom of will of the parties when they enter into international commercial contracts. The real progress of international commercial law will be advanced only when the parties have the freedom to choose standards and rules of law prepared by international institutions active in international commercial law, and when the courts respect such choices of law and apply these rules. The international institutions that are active in international commerce are effective in determining and codifying rules of law that are in compliance with the needs of the merchants who are active in contemporary cross-border trade. Such merchants protect their own interests by subjecting their contracts to these rules of law and by using these rules in their contracts. They do not need to be protected by national laws; rather merchants prefer to balance their own interests in their contracts. Thus, the parties should not be prevented from choosing internationally accepted rules and principles.³⁹ However, this is only possible if the existing laws are amended and/or are interpreted in compliance with contemporary commercial needs.

2.3 ARBITRATION

In arbitral proceedings, it is usually accepted that parties may choose a-national rules of law to be applicable to their contracts.⁴⁰ The provisions of national arbitration laws and institutional arbitration rules regarding the law applicable to the substance of the dispute usually authorise the parties to choose UNIDROIT Principles. In *ad hoc* arbitrations, the parties may select the law applicable to the *ad hoc* procedure. In such cases, the law applicable to the substance of the dispute must be determined according

³⁷ Sargin, F., *Milletlerarası Unsurlu Patent ve Ticari Marka Lisansı Sözleşmelerine Uygulanacak Hukuk* (The Applicable Law to International Patent and Commercial Trademark License Agreements), 2002, Turhan Yaymevi, at p. 194.

³⁸ Nomer and Şanlı, *Devletler Hususi Hukuku* (Private International Law), 2008, Beta Basım Yayın, at p. 307.

³⁹ Burman, H. S., “International Conflict of Laws, the 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990s” (1995) 28 *Vanderbilt Journal of Transnational Law* 387; Berger, K. P., “The Relationship between UNIDROIT Principles of International Commercial Contracts and the New Lex Mercatoria” (2000) 1 *Uniform Law Review* 168.

⁴⁰ Juenger, F. K., “The Need for a Comparative Approach to Choice-of-Law Problems” (1999) 73 *Tulane Law Review* 1329; Bonell (1992), *supra* fn 20, at p. 630; Baptista, L. O., “UNIDROIT Principles for International Commercial Law Project: Aspects of International Private Law” (1994-1995) 69 *Tulane Law Review* 1223; Gillies and Moens, *supra* fn 20, at p. 83; Bonell (2005), *supra* fn 20, at p. 193.

to the relevant provision of the arbitration rules chosen by the parties. If the parties have not chosen which law will apply to the *ad hoc* arbitration procedure, then the law applicable to the substance will be determined according to the law of the place of arbitration.

According to Art. 28 of the UNCITRAL Model Law, the arbitral tribunal shall decide the dispute in accordance with such ‘rules of law’ as are chosen by the parties. Failing any designation by the parties, the arbitral tribunal shall apply the ‘law’ determined by the conflict of laws rules which it considers applicable. Due to this difference in the terminology, it is accepted that the parties may choose UNIDROIT Principles as applicable ‘rules of law’ and the UNIDROIT Principles can be applied independently from any national law.⁴¹

Consequently, it may be concluded that provisions of arbitration laws and rules which do not limit the choice of law of the parties with the term ‘law’, but rather use the term ‘rules of law’, permit the application of UNIDROIT Principles if chosen by the parties. The use of the term ‘rules of law’ aims to authorise the parties to choose a-national rules of law as well as national laws as applicable law to their contracts.

For instance, Art. 46(1) of the *English Arbitration Act 1996*⁴², Art. 1051(1) of the *German Arbitration Act*, Art. 1496 of the *French Civil Procedure Act* and Art. 1054 of the *Dutch Civil Procedure Act* provide that the arbitral tribunal shall decide the dispute according to the ‘rules of law’ chosen by the parties.

In Turkish law, according to Art. 12C of the *International Arbitration Act*⁴³ (which applies to international arbitrations where the place of arbitration is in Turkey) the arbitral tribunal shall decide according to the provisions of the contract between the parties and the ‘rules of law’ chosen by the parties as applicable law to the substance of the dispute. Thus, in international arbitrations where the place of arbitration is Turkey, the reference of the parties to a-national rules of law, UNIDROIT Principles, model contracts, international usage or general principles of law shall be taken into

⁴¹ Bonell (1992), *supra* fn 20, at p. 630; Lando, *supra* fn 22, at p. 135; Booyesen, H., *International Transactions and the International Law Merchant*, 1995, Interlegal, at p. 374; Berger, *supra* fn 13, at p. 981; Drobnig, *supra* fn 21, at p. 390; Bonell (2000), *supra* fn 20, at p. 203; Oguz, A., “Hukuk Tarihi ve Karşılaştırmalı Hukuk Açısından Uluslararası Ticaret Hukuku (Lex Mercatoria) – UNIDROIT İlkeleri’nin Lex Mercatoria Niteliği (International Commercial Law from the Perspective of History of Law and Comparative Law [Lex Mercatoria] – The Lex Mercatoria Character of UNIDROIT Principles)”, (2001) 50/3 *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 42; Hartkamp, *supra* fn 27, at p. 86; Lew/Mistelis/Kroll, *Comparative International Commercial Arbitration*, 2003, Kluwer Law International, at p. 452; Oguz, A., *Lex Mercatoria*, 2004, Yetkin Basım Yayın, at p. 120; Bonell (2005), *supra* fn 20, at p. 241.

⁴² “The arbitral tribunal shall decide the dispute (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such *other considerations* as are agreed by them or determined by the tribunal.”

⁴³ Law No. 4686 of 21 June 2001; published in Official Gazette No. 24453 of 6 July 2001.

consideration; and the arbitrators are obliged to apply these a-national rules of law to the substance of the dispute.⁴⁴

In institutional arbitration, the arbitration rules of the institution are the primary point of reference for the determination of the law applicable to the substance. According to Art. 17(1) of the International Chamber of Commerce Arbitration Rules:

The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute.

Similarly, Art. 22.3 of the London Court of International Arbitration Rules⁴⁵, Art. 22(1) of the Stockholm Chamber of Commerce Arbitration Rules⁴⁶ and Art. 24(1) of the Austrian Federal Economic Chamber Arbitration Rules⁴⁷ refer to ‘rules of law’ chosen by the parties. Thus, it can be concluded that arbitration rules of the leading arbitral institutions permit the choice of a-national rules of law by the parties.

There are a number of arbitral awards based on the UNIDROIT Principles. An arbitral tribunal formed under the auspices of Milan National and International Arbitration Chamber, in its award of 1 December 1996⁴⁸, applied a number of individual articles of the UNIDROIT Principles. In this case, the contract between the parties did not contain a choice of law clause, but at the outset of the arbitral proceedings the parties agreed that the dispute would be settled in conformity with UNIDROIT Principles. Similarly, in the dispute subject to the award of the arbitral tribunal formed under the auspices of the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation of 20 January 1997⁴⁹, the sales contract between the parties did not contain a choice of law clause, but when the dispute arose, the parties agreed that the arbitral tribunal should apply UNIDROIT Principles to resolve any problem not expressly regulated in the contract. The arbitral tribunal applied a number of individual articles of the UNIDROIT Principles. In another case, the arbitral tribunal formed under the auspices of the ICC International Court of Arbitration, in its award of March 2000 (ICC Case No. 10.114)⁵⁰, based its decision on Chinese law and on international practices including UNIDROIT Principles. In this case, both parties agreed that Chinese law was the law governing the merits of the dispute, but at the same time requested the arbitral tribunal to also apply UNIDROIT Principles as an expression of international practices. In line with those decisions, the

⁴⁴ Kalpsuz, T., *Türkiye’de Milletlerarası Tahkim* (International Arbitration in Turkey), 2007, Banka ve Ticaret Hukuku Araştırma Enstitüsü, at p. 74.

⁴⁵ “The Arbitral Tribunal shall decide the parties’ dispute in accordance with the laws or *rules of law* chosen by the parties as applicable to the merits of their dispute”.

⁴⁶ “The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law or *rules of law* agreed upon by the parties”.

⁴⁷ “The sole arbitrator (arbitral tribunal) shall decide the dispute in accordance with such legislation or *rules of law* as are chosen by the parties as applicable”.

⁴⁸ Bonell, *supra* fn 30, at pp. 662-663 (English Abstract).

⁴⁹ Bonell, *supra* fn 30, at p. 670 (English Abstract).

⁵⁰ ICC International Court of Arbitration Bulletin, V. 12, No. 2, Fall 2001, at pp. 82-84.

arbitral tribunal formed under the auspices of Mexican Arbitration Centre, in its award of 30 November 2006⁵¹, confirmed the validity of the parties' choice of the UNIDROIT Principles as the law applicable to the substance of their dispute, in view of the fact that according to Art. 1445 of the *Mexican Commercial Code* the Arbitral Tribunal shall decide the dispute according to the 'rules of law' chosen by the parties and the fact that UNIDROIT Principles have been applied in a number of international arbitration proceedings.

3 APPLICATION OF UNIDROIT PRINCIPLES IN THE ABSENCE OF CHOICE OF LAW BY PARTIES

According to paragraph 4 of the Preamble to the UNIDROIT Principles, when the parties have not made a choice of law in their contract, the UNIDROIT Principles may be applied.

3.1 ROME CONVENTION & ROME 1 REGULATION

As per Art. 4 of the Rome Convention, to the extent that the law applicable to the contract has not been chosen by the parties, the contract shall be governed by the 'law of the country' with which the contract is most closely connected. The Rome Convention Art. 4(2) presumes that the contract is most closely connected with the 'country' where the party who is to affect the performance which is characteristic of the contract has its habitual place of residence. Along with its restrictive wording of 'country', this presumption requires a geographical connection between the applicable law and the contract. Article 4(5) provides that the presumption shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another 'country'. Consequently, the text of the Rome Convention and the criteria it uses to determine the most closely connected law do not allow for the application of UNIDROIT Principles in the absence of choice of law by the parties.

According to the Commission proposal regarding the revision of the Rome Convention, contracts should be governed by the 'law of the country' in which the party who is required to perform the service characterising the contract has his or her habitual place of residence. In the commentary of the relevant provision, it is stated that since the cornerstone of the instrument is freedom of choice, the rules applicable in the absence of a choice should be as precise and foreseeable as possible so that the parties can decide whether or not to exercise their choice.⁵²

Article 4 of the Rome I Regulation listed the applicable 'law of the country' for certain types of contracts.⁵³ Other types of contracts, which are not listed, shall be

⁵¹ Available at: <<http://www.unilex.info/case.cfm?pid=2&do=case&id=1149&step=Abstract>>.

⁵² Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final, 4.2.

⁵³ These are a contract for the sale of goods; a contract for the provision of services; a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property; a franchise contract; a distribution contract; a contract for the sale of goods by auction; a contract concluded within a

governed by the 'law of the country' where the party required to effect the characteristic performance of the contract has his or her habitual place of residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a 'country' other than that indicated therein, the law of that other country shall apply. Where the law applicable cannot be determined pursuant to these presumptions, the contract shall be governed by the 'law of the country' with which it is most closely connected. The Rome I Regulation, like the Rome Convention, refers to the 'law of a country'. Therefore, the application of a-national rules of law is prohibited for the European courts in the absence of choice of law by the parties.

3.2 *TURKISH LAW*

PILA reflects Art. 4 of the Rome Convention. Pursuant to Art. 24(4) of PILA, if the parties have not chosen an applicable law, the contract shall be governed by the 'law' with which it is most closely connected. PILA provides for a presumption in order to determine the most closely connected law: it shall be presumed that the contract is most closely connected with the 'law' where the party who is to effect the characteristic performance has, at the time of conclusion of the contract, his or her habitual place of residence; if the contract is entered into in the course of that party's trade or profession, the place in which his or her place of business is situated; in the absence of place of business his or her habitual residence. However, the presumption may be rebutted: if it appears from the circumstances as a whole that the contract is more closely connected with another law, then that 'law' shall be applied.

Article 24(4) of PILA is a step ahead as compared to the Rome Convention and Rome I Regulation. Unlike the Rome Convention and the Rome Regulation, Art. 24(4) of PILA does not refer to a 'law of a country'. Thus, there is no express prohibition, under PILA against interpreting the term 'law' to include a-national rules of law.

However, there are still supporters of the traditional view in Turkey. Some scholars remain doubtful in respect to the application of a-national rules of law even when they are chosen by the parties.⁵⁴ There is no doubt that these scholars have been influenced by the fact that European judges are not authorised to apply a-national rules of law in the absence of choice of law, and there is no proposal for amendment in the near future. Furthermore, the presumption within Art. 24(4) of PILA requires a geographical connection. Consequently, it would be unrealistic to say that Turkish courts would apply UNIDROIT Principles or other a-national rules of law as applicable law in the absence of choice of law by the parties.

On the other hand, it must be admitted that, generally speaking, most Turkish judges are not sufficiently equipped with the experience to efficiently apply international

multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Art. 4(1), point (17) of Directive 2004/39/EC.

⁵⁴ See *Nomer and Şanlı*, *supra* fn 38.

sources of law. Unfortunately, lawyers educated in Turkey have not historically been trained with an international perspective in mind and while some are gaining such experience in practice, those that are not may not even be aware of the existence of harmonisation efforts throughout the world. However, this lack of experience should not form an impediment to the progress of international commercial law practice in Turkey. The modern interpretation of existing legislation should enlighten the way to the improvement of the Turkish legal actors in practice.

3.3 ARBITRATION

According to Art. 28 of the UNCITRAL Model Law on International Commercial Arbitration, the arbitral tribunal shall decide the dispute in accordance with such ‘rules of law’ as are chosen by the parties, failing any designation by the parties, the arbitral tribunal shall apply the ‘law’ determined by the conflict of laws rules which it considers applicable. According to the prevailing view in the doctrine⁵⁵, it is not fortuitous that the arbitrators shall decide according to the ‘law’ in the absence of choice of law by the parties. The purpose of this wording is to ensure the application of national laws by the arbitrators.

There is a similar distinction made between ‘rules of law’ and ‘law’ in some international and national legislation concerning arbitration, illustrated per examples below:

Article VII(1) of the 1961 *European Convention on International Commercial Arbitration*⁵⁶:

Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable.

Article 46(3) of the 1996 *English Arbitration Act*:

If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

⁵⁵ Mustill, M., “The New Lex Mercatoria: The First Twenty-five Years” (1988) 4/2 *Arbitration International* 96; Bonell, *supra* fn 22, at p. 1145; Goode (1997), *supra* fn 22, at p. 32; Boele-Woelki (1998), *supra* fn 23, at p. 82; Drobniig, *supra* fn 21, at p. 394; Crawford, Sinclair, “UNIDROIT Principles and Their Application to State Contracts” (2002) *UNIDROIT Principles of International Commercial Contracts Reflections on Their Use in International Arbitration, Special Supplement – ICC International Court of Arbitration Bulletin* 58; Bernardini, P., “International Arbitration and A-National Rules of Law” (2004) 15/2 *ICC International Court of Arbitration Bulletin* 65; Bonell (2005), *supra* fn 16, at p. 212.

⁵⁶ United Nations, Treaty Series, vol. 484, p. 364 No. 7041 (1963-1964)

Article 1052(2) of the 1998 *German Arbitration Act*:

Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected.

According to the *Turkish International Arbitration Act* Art. 12C, much like the above national arbitration laws, in the absence of choice of law, the arbitrators shall decide according to the ‘law of the country’ with which the dispute is most closely connected. As per these pieces of national legislation, it is not possible to apply general principles of international law, international conventions or UNIDROIT Principles as the applicable law. I believe that the relevant provision of the *Turkish International Arbitration Act* falls behind modern theory and forms an impediment to the progress of contemporary international arbitration culture and practice. Thus, the relevant provision should be revised to bring it in line with modern views.

On the other hand, on other national arbitration laws there is no such distinction as set out in the UNCITRAL Model Law. For example, Art. 1496 of the *French Civil Procedure Act*, Art. 1054 of the *Dutch Civil Procedure Act* and Art. 187 of the *Swiss International Private Law Act* provide that the arbitrators may apply the appropriate ‘rules of law’ in the absence of choice of law by the parties.

The most widely used institutional arbitration rules also provide that the arbitrators may apply the ‘rules of law’ as applicable law. Article 17(1) of the ICC Arbitration Rules, in the absence of choice of law by the parties, “*the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate*”.

In accordance with Art. 22.3 of the LCIA Arbitration Rules, in the absence of choice of law by the parties, “the Arbitral Tribunal shall apply the laws or rules of law which it considers appropriate”. Article 22(1) of the SCC Arbitration Rules states that in the absence of choice of law by the parties, “the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate”. With regards to the above arbitration rules, which authorise arbitrators to apply a-national rules of law to the substance of the dispute in the absence of choice of law by the parties, the arbitrators may decide according to UNIDROIT Principles, on the basis that they are the ‘most appropriate law’.

The arbitrators should choose as the most appropriate law the law which ensures equity between the parties and which includes the most sophisticated and detailed provisions concerning the subject matter of the dispute.⁵⁷ The application of the UNIDROIT Principles will require less time and effort compared to the determination of the most closely connected national law and will ensure a fair resolution. National laws are prepared taking into consideration national relations, thus they may be insufficient to comply with the needs of international trade. As there are detailed provisions in the UNIDROIT Principles, it is highly likely that a clear solution to the

⁵⁷ Mistelis, *supra* fn 16, at pp. 635-636, 638, 640.

dispute is provided by them.⁵⁸ Furthermore, the application of the UNIDROIT Principles will put the arbitrators, with different legal and educational backgrounds, on an equal footing. Otherwise, if the domestic law of the place of origin or training of one arbitrator is applied, that arbitrator will be more influential over the other arbitrators. The application of the UNIDROIT Principles would avoid such a possibility.⁵⁹

There are a number of arbitral awards based on the UNIDROIT Principles, in circumstances where, although the Principles were not chosen by the parties, the arbitrators applied them as the applicable law. For instance, the arbitral tribunal formed under the auspices of Arbitration Institute of the Stockholm Chamber of Commerce, in its award numbered 117/1999⁶⁰, concluded that in deciding the dispute it would be guided primarily by the UNIDROIT Principles even though the agreement between the parties was silent as to the law of the contract. The arbitral tribunal stated that the UNIDROIT Principles have wide recognition and set out principles that offer protections for contracting parties that adequately reflect the basic principles of commercial relations in most if not all developed countries.

Similarly, the arbitral tribunal formed under the auspices of ICC International Court of Arbitration, in its award of 28 July 2000 (ICC Case No. 9797)⁶¹, after declaring that the Arts. and By-laws of the respondent company fail to provide guidelines for its decision held that the UNIDROIT Principles are a reliable source of international commercial law in international arbitration for they contain in essence a restatement of *principes directeurs* that have enjoyed universal acceptance. Moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice. Likewise, the arbitral tribunal formed under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce, in its award dated 29 March 2005⁶²; awarded interest which it held should be calculated on the basis of international rather than national rules and referred to Art. 7.4.9 of UNIDROIT Principles which, with no further explanation, it considered to be an appropriate basis for determining the interest.

⁵⁸ Lando, *supra* fn 22, at p. 140; Garro, *supra* fn 22, at pp. 119-120; Vischer, F., “The Relevance of UNIDROIT Principles for Judges and Arbitrators in Disputes Arising out of International Contracts” (1999) 1 (3) *European Journal of Law Reform* 208.

⁵⁹ Lando, *supra* fn 22, at p. 140; Garro, *supra* fn 22, at p. 110; Bortolotti, *supra* fn 22, at p. 142; Farnsworth, E. A., “The Role of UNIDROIT Principles in International Commercial Arbitration (2): A US Perspective on Their Aims and Application” (2002) *UNIDROIT Principles of International Commercial Contracts Reflections on Their Use in International Arbitration, Special Supplement – ICC International Court of Arbitration Bulletin* 24.

⁶⁰ Stockholm Arbitration Report, 2002:1, 59 *et seq.*

⁶¹ ICC Case No. 9797, 15 Mealey’s International Arbitration Report, 2000, Issue 8, A1-A45.

⁶² Available at <<http://www.investmentclaimp.com/decisions/Petrobart-kyrgyz-rep-Award.pdf>>.

4 CONCLUSION

International commercial contracts should be governed by the most closely connected law, in other words, this ought to be the law that is accepted as the rules of law and principles which would lead to the most fair and most appropriate solution to the circumstances of the dispute and the expectations of the parties ('better law'). The better law for international commercial contracts is the body of general rules and principles upon which there is an international consensus. The localisation of complex international contractual relations by connection to a certain national law determined by reference to characteristic performance or other presumptions is artificial.⁶³ The presumptions which define the most closely connected law with the contract by geographical connections restrict the application of a-national rules of law. The classical conflict of laws method depending on geographical connections should be left aside to provide space for resolutions depending on quantitative connections. The law whose content is appropriate to the needs of international commerce and which promotes the validity of the contract between the parties, and that recognises the legal concepts used by the parties in their contracts, instead of necessarily having a geographical connection to the dispute, should be the most closely connected law with the contract.

The application of the UNIDROIT Principles is generally accepted in arbitral proceedings either when the parties have chosen them as the applicable rules of law to the merits of their dispute or, in the absence of such choice of law, as the most appropriate law. However, further time is still necessary for the European or Turkish courts to respect the choice of a-national rules of law by the parties; let alone their application as the most closely connected law of contract.

It should not be forgotten that the courts are not only obliged to apply their own national laws, they are also expected to serve for the preservation of the integrity of international commerce. Although national judges are obliged to apply their own national laws, they are also expected to decide the international disputes with an international perspective.⁶⁴ This is expressly accepted by Art. 7 of the CISG. It is acknowledged by the 74 contracting states that in the interpretation of CISG, "regard is to be had to its international character and to the need to promote uniformity in its application". In other words, it is set forth that national judges applying the CISG to disputes arising out of international relations shall consider the international character

⁶³ De Ly, F., *International Business Law and Lex Mercatoria*, 1992, North Holland, at p. 58; Glenn, P. H., "An International Private Law of Contract" in Patrick J. Borchers/Joachim Zekoll (Eds.) *International Conflict of Laws for the Third Millennium Essays in Honor of Friedrich K. Juenger*, 2001, Hotei Publishing, at p. 63; Sono, K., "The Rise of A National Contract Law in the Age of Globalisation" (2000-2001) 75 *Tulane Law Review* 1192.

⁶⁴ Juenger, F. K., "The Lex Mercatoria and the Conflict of Laws" in Thomas E. Carbonneau (Ed.) *Lex Mercatoria and Arbitration*, 1998, Juris Net, at p. 276.

of the dispute. This indeed extends the role of national judges in resolving international disputes; in that not only do they need to ensure correct application of national law but must also have an international perspective when international relations are at issue.

It is expected that the application of uniform international rules of law will become more widespread as there are voices defending them and it will be seen that their application will ensure fairer, faster and less costly resolutions compatible with the expectations of modern merchants and the needs of international trade. It is hoped that this will be achieved in the near rather than far future.