



UNIDROIT

International Institute for the Unification of Private Law
Institut international pour l'unification du droit privé

**The UNIDROIT Principles of International
Commercial Contracts:
Potential for greater impact in the MENA region**

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20 June 2023

Today's Discussion

- Review the **applications** of the UNIDROIT Principles of International Commercial Contracts – the UPICC
- Examine **data on the use** of the UPICC in MENA
- Discuss possible **reasons** for lower use of the UPICC across MENA
- Analyze the **permissibility** of applying the UPICC in MENA
- Consider the **potential** for increasing use of the UPICC in MENA

PREAMBLE

(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

They 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.

They may be applied when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments.

They may be used to interpret or supplement domestic law.

They may serve as a model for national and international legislators.

تمهيد

(الغرض من هذه المبادئ)

تضع المبادئ التالية قواعد عامة خاصة بالعقود التجارية الدولية، تطبق عندما يتفق الأطراف على إخضاع عقدهم لها.

ويمكن تطبيقها عندما يتفق الأطراف على إخضاع عقدهم للمبادئ العامة للقانون أو قانون التجار أو ما شابه ذلك.

ويمكن تطبيقها عندما لا يختار الأطراف قانوناً بعينه ليحكم عقدهم.

ويمكن استخدامها في تفسير أو تكميل وثائق أخرى للقانون الدولي الموحد.

ويمكن استخدامها في تفسير أو تكميل القانون الوطني.

ويمكن أن تفيد باعتبارها قانوناً نموذجياً للمشرعين الوطنيين والدوليين.

The UPICC can support a range of applications

1

Choice of Law

As directly indicated by the parties...

E.g. 16 cases in national courts that used UPICC for choice of law*

... and/or later selected by courts or arbitral tribunals

E.g. 96 cases in arbitral courts that used UPICC for choice of law*

2

Interpretation and understanding of Governing Law

Interpret international uniform law, domestic law

E.g. 322 cases used the UPICC to interpret other laws*

Inform legal education via moot courts, curricula

E.g. more than 50 university syllabi; INS and VIS moot courts

3

Drafting Guide

Support international and national legislators

E.g. OHADA; national laws in China, Estonia, the Netherlands, Spain, Paraguay

Draft commercial contracts between private parties

E.g. Adoption of Model Clauses

*Data from UNILEX as of December 2017.

The UPICC can serve as governing law to a contract...

- Parties may wish to choose the UPICC as the law governing their contract because they:
 - Provide a **comprehensive set** of rules that govern the most important areas of contract law
 - Offer a **clear and non-technical** terminology, which may be more accessible than foreign law
 - Supply a **neutral instrument** where the parties cannot agree to, or do not wish to use, the domestic law of a third country



HCCH Principles on Choice of Law in Int'l Commercial Contracts (2015)

Article 3



ICC Rules of Arbitration (2012)

Article 21



UNCITRAL Model Law on Arbitration (2006)

Article 28

Example: HCCH Principles on Choice of Law in International Commercial Contracts (2015)

Article 3 Rules of law

The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

- 3.6 Another source of “rules of law” that would satisfy this first criterion may come from non-binding instruments formulated by established international bodies. One example is UNIDROIT, an inter-governmental organisation responsible solely to its Member States, which operates on the basis of consensus. The UNIDROIT Principles are an example of “rules of law” that are “generally accepted on an international level”. Moreover, the UNIDROIT Principles expressly provide that parties may designate them to govern their contract and suggest choice of law clauses to that end (see the footnote to the UNIDROIT Principles’ Preamble and the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts).

...or applied in the absence of an express choice

National courts and arbitral tribunals have applied the UNIDROIT Principles as the law governing the contract because:

- The court or tribunal considered the UNIDROIT Principles as an expression of “**general principles of law**” or “**lex mercatoria**”
- The court or tribunal considered the UNIDROIT Principles to be **more appropriate** than any domestic law

Tribunal de Recurso Rio Grande do Sul



To interpret or supplement international uniform or domestic law

International Centre for the Settlement of Disputes (ICSID) Award of 23 July 2008:

A U.S. company and Congolese companies submitted a request for arbitration to the ICSID, invoking the violation by the Government of the DR Congo of the 1984 Treaty between the U.S. and the DR Congo on the mutual promotion and protection of investments.

In deciding the merits of the case, the Arbitral Tribunal referred on a number of occasions to individual provisions of the UNIDROIT Principles to corroborate solutions found under Congolese law.

(see abstract of ICSID Award of 23 July 2008 in UNILEX at <http://www.unilex.info/case.cfm?id=1349>)

As a model used by legislators...

- China
- Denmark
- Estonia
- Lithuania
- Netherlands
- Russia
- Spain
- OHADA

...or by contracting parties

ARTICLE 1.5

(Exclusion or modification by the parties)

The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.

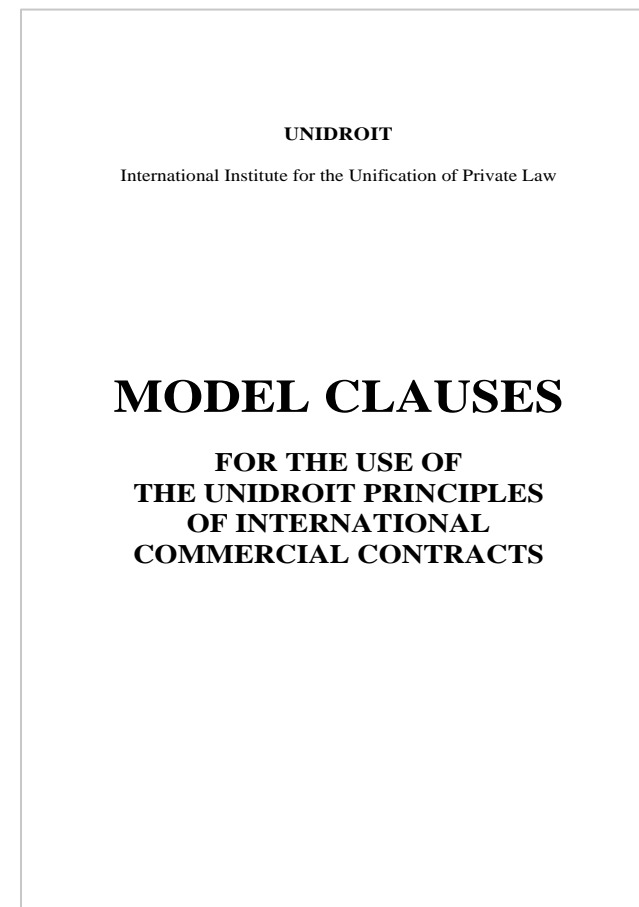
مادة 5-1

(الاستبعاد أو التعديل بواسطة الأطراف)

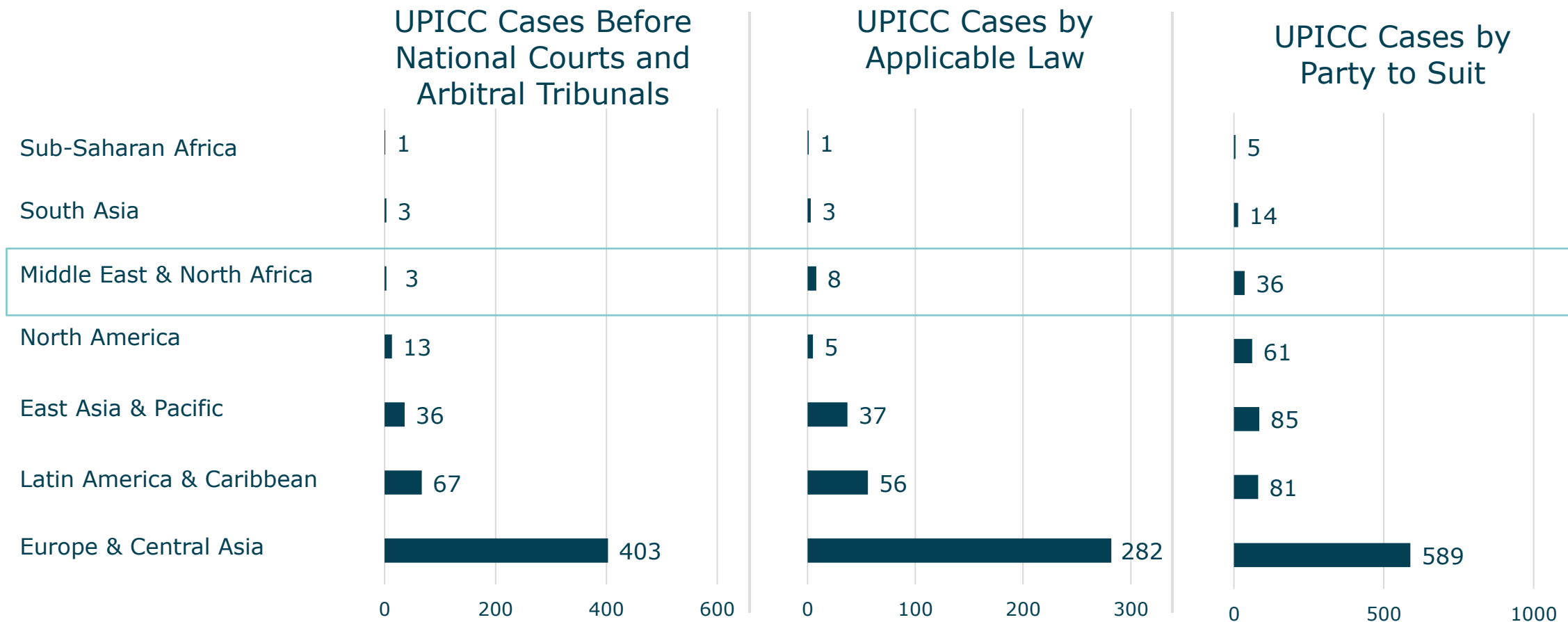
يجوز للأطراف استبعاد تطبيق هذه المبادئ أو مخالفتها أو تعديل آثار أي حكم من أحكامها، ما لم يرد في المبادئ نص مخالف.

The UPICC Model Clauses

- Approved in 2013
- Contain a set of **Model Clauses together with Commentary**
- Can be used for both **contract drafting and dispute resolution**
- Based on the use of the UPICC in transnational contract and dispute resolution practice: they illustrate **various ways to use the UPICC** and/or to combine them with domestic law
- Available in English, French and Spanish



Case law: UNILEX data through January 2023



Data on UNILEX cases from 1994 to November 2022, as of March 2023.
Regions as designated by the World Bank.

European countries apply the UPICC regularly

UPICC Cases Before National Courts and Arbitral Tribunals

Of **526 cases** in national courts and arbitral tribunals citing the UPICC:



were in national courts in Europe & Central Asia

UPICC Cases by Applicable Law

Of **392 countries** whose laws were invoked in decisions citing the UPICC:



used the UPICC to interpret the laws of Europe & Central Asian countries

UPICC Cases by Party to Suit

Of **871 total parties** to decisions citing the UPICC:



were citizens of Europe & Central Asia countries

MENA countries use the UPICC very infrequently

UPICC Cases Before National Courts and Arbitral Tribunals

Of **526 cases** in national courts and arbitral tribunals citing the UPICC:



were in national courts in MENA

UPICC Cases by Applicable Law

Of **392 countries** whose laws were invoked in decisions citing the UPICC:



used the UPICC to interpret laws of MENA countries

UPICC Cases by Party to Suit

Of **871 total parties** to decisions citing the UPICC:



were citizens of MENA countries

The UPICC have been used as a model by regulators



Qatar Financial Centre (QFC) Contract Regulation, 2005

- Established in 2005 within a Special Economic Zone
- Based **QFC Contract Regulation** on the UPICC, subject to interpretation via common law judgements and English statutes

QFC Article 11 - Usage and practices

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage is excluded by the contract or would be unreasonable."

UPICC Article 1.9 - Usages and practices

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable."



Why is the UPICC used less across the MENA?

Involvement of MENA practitioners and representatives



Less MENA representation across UNIDROIT initiatives



MENA countries comprise 11% of **UNIDROIT membership**, against 12% of the world's nations (European UNIDROIT membership comprises 52%, against 34%) ➤ UNIDROIT MS accounted for 240 (81%) of the 322 cases brought before domestic courts that cited the UPICC

Less **involvement in the design and implementation** of the UPICC when compared to most other regions



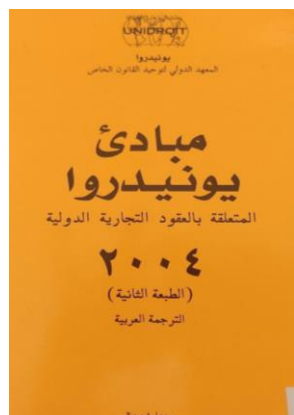
Less presence of UPICC in academic settings across MENA



Of 50 universities covering the UPICC soon after publication, only 1 MENA

Why is the UPICC used less across the MENA? (cont'd)

Involvement of MENA practitioners and scholars



Linguistic availability;
less support for translations by
MENA stakeholders



2016 edition of UPICC + 2013 Model
Clauses not available in the Arabic
language (2004 + 2010 editions
available in Arabic)

Lack of case law and scholarship in
Arabic language

Why is the UPICC used less across MENA? (cont'd)

Possible other causes, for further research



Less use of arbitration (the most common UPICC application) in MENA



Arbitrators preferred MENA tribunals only 6.3% of the time, per ICC data (2021)



Potential preference for national law in resource extraction contracts given impact on national GDP



UPICC cases in "extractive" industries were 1/2 as common as those in "services", 1/3 as "manufacturing"

Why is the UPICC used less across MENA? (cont'd)

Possible other causes, for further research



Questions around whether the UPICC aligns with Sharia law principles and MENA civil and commercial codes



Commonly discussed issues: remedies (including interest) and choice of law



Higher ranking of Islamic Sharia than UPICC (as a reflection of global 'custom' or 'customary practice') in the hierarchy of sources of law to supplement gaps in MENA legislation



Potentially less opportunities for UPICC application to supplement domestic law

Permissibility of applying the UPICC in MENA courts

- By national courts, the UPICC are principally used
 1. to interpret and supplement the law (392 of 551 cases in UNILEX),
 2. to serve as part of the *lex mercatoria*, or
 - 3. as the applicable law.**
- Application of UPICC as the applicable law is dependent on:
 1. the extent to which countries' domestic law recognises **party autonomy** with regard to choice of non-state rules as the applicable law, and
 2. the Principles' **compatibility** with national legal rules, depending on the particular country
 - E.g. Art. 28 Omani Civil Transactions Law (2013) allows the application of foreign legal provisions only so far as they are consistent with the Islamic Sharia)

Party autonomy regarding choice of Law

- In most MENA countries, party autonomy is explicitly applied as the **primary rule** when considering choice of law in a transaction containing a foreign element
 - E.g. [Algeria] Art 18(1) Civil Code (2005); [Bahrain] Art 17 Law No 6 of 2015 on Conflict of Laws in Civil and Commercial Matters with a Foreign Element; [Egypt] Art 19 Civil Code (1948); [Iran] Art 968 Civil Code (1928); [Iraq] Art 25 Civil Code (1951)
- Only in a few MENA countries, the law explicitly refers to **international trade law and practices** including its customs as an eligible source of law
 - E.g. [Bahrain] Art 4 Private International Law Act; [Egypt] Art 88(2) Commercial Law no 17 (1999)
- Only a few countries have case law assessing **non-state law** as an acceptable choice (in other countries this remains under debate)
 - E.g. Tunisia; Qatar

Substantive conformity of the UPICC with MENA domestic legislation

- Legal systems of most MENA countries are either Sharia-based or contain **Sharia** elements
- **General compatibility** between UPICC and MENA domestic laws of contracts and commercial rules, which codify many of the same fundamental principles
 - E.g. compatibility confirmed in *Mohamed Abdulmohsen Al-Kharafi & Sons Co v Libya and others* (2013), ad hoc arbitral tribunal Cairo; *Amit Dattani and others v Damac Park Towers Company Limited* (2014), Dubai International Financial Centre (DIFC) Court; *Jerusalem Vehicle Agency and District Car Repair 1998 LTD v Karas Motors LTD* (2014), Jerusalem District Court
- **Potential incompatibilities**, under debate:
 1. UPICC Art 7.4.9 on interest vs Sharia prohibition on interest (*riba*)
 2. UPICC Art 5.3.1 on types of condition and Art 9.1.5 on future rights vs Sharia prohibitions on uncertainty (*gharar*) and speculation (*maysir*)
 3. UPICC Art 7.4.2(1) and 7.4.3(2) for payment of damages for lost profits vs Sharia prohibitions on uncertainty (*gharar*) and interest (*riba*)

Potential for increasing use of the UPICC in MENA

Potential advantages of more frequent application

- Promoting **fair and harmonised contract practices**, as well as stability of the significant and accelerating international trade relations through unified rules which help clarify the rights and obligations of parties to international commercial contracts
- Facilitating the **resolution of cross-border legal conflicts**
- Providing a model and reference for **legal harmonisation** in the region and beyond, which could be of special value in MENA given the relative lack of regional legal harmonisation. Notable harmonisation efforts to date, yet with little practical application:
 - 1996 Model Arab Civil Law of the Arab League
 - GCC harmonisation initiatives
- Providing a model and reference for the **modernisation of legislations**

Potential for increasing use of the UPICC in MENA (cont'd)

Possible strategies to raise awareness of the UPICC



Broader availability of Arabic language texts



Eliminates existing language barriers, as well as boosting awareness of, and familiarity with, the UPICC



E.g.: UNIDROIT/UNCITRAL/HCCH Legal Guide to Uniform Instruments in the Area of International Commercial Contracts (2020), available in Arabic



Provides a tool to strengthen awareness of the UPICC and promote progressive harmonisation of international commercial contract law

Potential for increasing use of the UPICC in MENA (cont'd)

Possible strategies to raise awareness of the UPICC



Institutional collaboration between UNIDROIT and MENA universities, bar associations, and other professional associations; encourage incorporation of the UPICC in MENA syllabi and moot courts



Increases involvement of MENA practitioners and scholars in the implementation of the UPICC; increases awareness and knowledge of the UPICC across the region



Promotion activities to raise awareness about the adaptability of the UPICC to any MENA jurisdiction's legal context, taking account of potential compatibility requirements with Sharia principles



Eliminates doubts as to the UPICC's incompatibility with Sharia principles

Potential for increasing use of the UPICC in MENA (cont'd)

Potential drivers for more frequent application



Recent developments fostering a more arbitration-friendly environment in parts of MENA (e.g., reforms of arbitration legislation in Qatar, Dubai, Egypt)



Flexibility regarding UPICC application in arbitration increases opportunities for UPICC use

Conclusions

- UPICC have helped shape international commercial contracts, dispute settlements, national legal reforms, and legal education for almost 30 years
- Compared to their use worldwide, the UPICC are invoked rarely in MENA courts
- UPICC use is largely permissible under MENA domestic legislation, and significant and accelerating international trade involvement provides opportunities for them to be applied productively
- Possible reasons for lower use might be overcome to facilitate the application of the UPICC:
 - Lower use of arbitration ► recent trend promoting the use of arbitration in MENA can facilitate UPICC use
 - Potential incompatibilities between MENA domestic legislation and the UPICC ► UPICC can be adapted to prevailing legal tradition
 - Lower institutional representation of MENA in the UPICC's implementation, low representation of UNIDROIT across MENA academic settings, and language-related obstacles ► greater partnership between UNIDROIT and MENA practitioners and academia to facilitate the UPICC's future impact in the region

Questions, comments?

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