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## Enhancing the Draft African Principles on the Law Applicable to International Commercial Contracts

### Innovations for the African Context

This article examines the draft African Principles on the Law Applicable to International Commercial Contracts, evaluating current and proposed choice of law rules in numerous African countries and incorporating global comparative perspectives. It argues that the African Principles should not only largely echo regional/supranational and international instruments like the Rome I Regulation and the Hague Principles on the Law Applicable to Commercial Contracts but should innovate to address the specific needs of the African context. The article suggests reforms in several areas: the scope of the African Principles, protection of weaker parties such as consumers and employees, government contracts, non-state law, and in provisions for the law applicable in the absence of choice.

**Vorschläge zum Entwurf Afrikanischer Grundregeln für das auf internationale Handelsverträge anwendbare Recht. Innovationen für den afrikanischen Kontext.** Dieser Artikel untersucht den aktuellen Entwurf von „African Principles on the Law Applicable to International Commercial Contracts“ unter Berücksichtigung geltender sowie vorgeschlagener Rechtswahlregeln in zahlreichen afrikanischen Ländern und aus einer global vergleichenden Perspektive. Er argumentiert, dass die „African Principles“ nicht nur weitgehend an regionale/supranationale und internationale Instrumente wie die Rom I-Verordnung und die Haager Grundsätze über das auf Handelsverträge anwendbare Recht angelehnt werden sollten, sondern auch Innovationen aufweisen sollten, die den spezifischen Bedürfnissen im afrikanischen Kontext gerecht werden. Der Artikel schlägt Reformen auf verschiedenen Gebieten vor: beim Anwendungsbereich der African Principles, beim Schutz schwächerer Parteien wie Verbraucher und Arbeitnehmer, bei staatlichen Verträgen, beim nichtstaatlichen Recht und in Bezug auf die Bestimmungen über das anwendbare Recht bei fehlender Rechtswahl.

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## I. Introduction

In recent times, Africa has been pushing the discussion of economic integration on the continent with no small degree of seriousness. For example, it recently adopted an Agreement establishing the African Continental Free Trade Area (AfCFTA) and its protocols.<sup>1</sup> The African Union also has a 2063 Agenda<sup>2</sup> for an integrated and prosperous continent. In this light, a developed private international law regime would contribute to Africa's socio-economic development and give effect to the continent's goals of economic integration. However, as international commerce increases between legal and natural persons in African states, disputes are bound to arise. A developed private international law regime in Africa would address cross-border issues such as the choice of court for dispute resolution, the applicable law, and how judgments could be recognised and enforced.

Likewise in recent times, Professor Jan Neels<sup>3</sup> has led the drafting of the African Principles on the Law Applicable to International Commercial Contracts (the Afri-

1 African Union, Agreement Establishing the African Continental Free Trade Area of 21 March 2018, <<https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>> (28 March 2024).

2 African Union, Constitutive Act of the African Union of 11 July 2000, <<https://au.int/en/treaties/constitutiveact-african-union>> (28 March 2024).

3 *Jan L. Neels*, Novel Aspects of the Proposed African Principles on the Law Applicable to International Commercial Contracts, (2024) *Journal of South African Law (JSAL)* 247–257; *idem*, African Principles on the Law Applicable to International Commercial Contracts (2023); *idem* / *Eesa A. Fredericks*, The African Principles of Commercial Private International Law and the Hague Principles, in: *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles*, ed. by Daniel Girsberger/Thomas Kadner Graziano/Jan L. Neels (2021) 239–247; *idem*, The African Principles on the Law Applicable to International Commercial Contracts – A First Drafting Experiment, (2020) 25 *Uniform Law Review (Unif.L.Rev.)* 426–436; *idem* / *Eesa A. Fredericks*, An Introduction to the African Principles of Commercial Private International Law, (2018) 29 *Stellenbosch Law Review*

can Principles). The preamble to these African Principles states their aim of serving as a model law that African countries, regional blocs in Africa, or even the African Union could adopt for the purpose of determining the governing law in international commercial contracts. Article 2 of the African Principles provides that any law may be applied, irrespective of whether it is the law of a member state of the African Union. This is widely referred to as the universality principle in choice of law, which is applied globally.

Although Neels claims that the African Principles were influenced by a speech by Professor Andre Thomashausen on African private international law in early 2000, the thought of drafting the African Principles officially took shape in 2018.<sup>4</sup> A first draft was produced in 2020.<sup>5</sup> This laudable objective inspired a pan-African conference from 31 May–2 June 2023 at the University of Johannesburg's Research Centre for Private International Law in Emerging Countries. Numerous African scholars and one South African government official at this conference engaged thoroughly with the African Principles. In late 2023, the most current draft of the African Principles, incorporating some of the views expressed by African scholars during the conference, was produced in booklet form in English, French, and Portuguese and is available online.<sup>6</sup> During the conference, Neels invited the publication of scholarly works on the draft African Principles to enhance their contents. In response, Coleman advocated in an article for the inclusion of traditional African values in the African Principles but did not substantively engage with its specific provisions.<sup>7</sup> Earlier this year, Neels defended in an article the novel aspects of the African Principles.<sup>8</sup>

The African Principles mainly draw upon the Rome I Regulation (Rome I)<sup>9</sup> and on the Hague Principles on Choice of Law in International Commercial Contracts (the Hague Principles).<sup>10</sup> Indeed, Neels was a Member of the Working Group on the Hague Principles, and he principally drafted the preamble and Articles 4 and 5 of the Hague Principles together with Professor Dieter Martiny.

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347–356. See also *Theophilus E. Coleman*, Re-Assessing the African Principles on the Law Applicable to International Commercial Contracts through the Prism of African Traditional Values, (2024) JSAL 75–95.

4 *Neels/Fredericks*, Introduction to the African Principles of Commercial PIL (n. 3).

5 *Neels*, First Drafting Experiment (n. 3).

6 *Neels*, African Principles on the Law Applicable to International Commercial Contracts (2023), available at <<https://doi.org/10.36615/9781776447411>> (9 September 2024).

7 *Coleman*, Re-Assessing the African Principles (n. 3).

8 *Neels*, Novel Aspects (n. 3).

9 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), OJ 2008 L 177/6.

10 The Hague Principles on Choice of Law in International Commercial Contracts 2015; the text and commentaries of the Hague Principles are available at <<https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-law-principles>> (9 September 2024).

The final draft of the African Principles will likely be published once it has received sufficient scholarly attention over several years. This article provides the first substantive and thorough critique of specific provisions of the African Principles. Our central argument is that while there is nothing wrong with the African Principles largely echoing other instruments, African choice of law rules should not ignore the nuances of the African continent. Moreover, Africa must develop innovative choice of law rules that can be exported to other parts of the world. Therefore, this article reflects on the scope of the African Principles, on the protection of weaker parties such as consumers and employees, and on government contracts, non-state law, and the applicable law in the absence of choice.

## II. Scope

Article 1 of the African Principles merely provides for the scope of application by stating what falls outside the scope of these Principles. However, the African Principles do not explicitly state the consequences of a matter falling outside their scope of application. The natural interpretation of this is that the law of the forum should be applied to determine the applicable law in matters that do not fall within the scope of the African Principles.

The African Principles only apply “in situations involving a conflict of laws, to international contractual obligations in civil and commercial matters, where each party is acting in the exercise of its trade or profession” (Article 1(1)). This formulation is inspired by Article 6(1) of Rome I,<sup>11</sup> which defines a consumer as a natural person acting for a purpose that may be regarded as falling outside their trade or profession.<sup>12</sup> The African Principles explicitly exclude consumer, employment, and insurance contracts (Article 1(2)(a), (c), and (d)), which are regarded as contracts involving weaker parties by some African bodies like OHADA,<sup>13</sup> and by countries such as Ethiopia,<sup>14</sup> Morocco,<sup>15</sup>

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11 Previously the Convention on the Law Applicable to Contractual Obligations (The Rome Convention), OJ 1980 L 266.

12 See Commentary 1.6 of the Hague Principles.

13 The Organisation for Harmonisation of Business Law in Africa (OHADA) adopts the European Union (EU) approach, *inter alia*, as in Articles 6 and 8 of Rome I. See Articles 578 and 580 of the OHADA Preliminary Draft of the Uniform Act on the Law of Obligations 2015 (OHADA Preliminary Draft).

14 *CAS Consulting Engineers Salzigitre GmbH v. Mr Kassahun Teweldebirhan*, [2010] Federal Supreme Court 54121. Cf. *Mr Bezabih Eshete v. Salini Construction*, [2011] Federal Supreme Court 60885. See also Federal Democratic Republic of Ethiopia Justice and Legal System Research Institute in 2004 (FDRE Draft), ss. 74–78. All cited in: *Fikadu P. Gebremeskel*, Ethiopia: Ethiopian Perspectives on the Hague Principles, in: *Girsberger / Graziano / Neels* (n. 3) no. 14.07 fn. 10.

15 Dahir no. 1-03-194 of 11 September 2003 concerning the promulgation of Law no. 65-99 relating to the Labour Code, Official Bulletin, no. 5210 of 6 May 2004; Dahir no. 1-11-03 of 18

Mozambique,<sup>16</sup> South Africa,<sup>17</sup> Ghana,<sup>18</sup> Kenya,<sup>19</sup> Uganda,<sup>20</sup> Tunisia,<sup>21</sup> and Congo.<sup>22</sup> The exclusion of consumer and employment contracts under the African Principles is also consistent with global and supranational/regional approaches under the Hague Principles (Article 1), the Asian Principles on Private International Law of 2018 (the Asian Principles) (Article 3.1), and under the Guide of the Organisation of American States on the Law Applicable to International Commercial Contracts of 2019 (the OAS Guide) (Part 5).

From the Hague Principles:

“This exclusion is justified by the fact that the substantive law of many States subjects consumer and employment contracts to special protective rules from which the parties may not derogate by contract. These rules are aimed at protecting the weaker party – consumer or employee – from an abuse of the freedom of contract and this protection extends to private international law where it appears as an exclusion or limitation on party autonomy. However, the exclusion of consumer and employment contracts under Article 1(1) is merely illustrative of the type of non-commercial contracts to which the Principles do not apply. Other non-com-

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February 2011 promulgating Law no. 31-08 enacting measures of protection of the consumer, Official Bulletin, no. 5932 of 7 April 2011. All cited in: *Khalid Zaher*, Morocco: Moroccan Perspectives on the Hague Principles, in: Girsberger/Graziano/Neels (n. 3) no. 16.54 fn. 52 and 53.

- 16 Mozambican Commercial Code, Decree-Law no. 2-2005, of 25 June 2006, amendments introduced by Decree-Law no. 1-2018, cited in: *Rui Dias/Carl Friedrich Nordmeier*, Angola and Mozambique: Angolan and Mozambican Perspectives on the Hague Principles, in: Girsberger/Graziano/Neels (n. 3) no. 10.24 fn. 19.
- 17 Section 4(1) of the National Credit Act 34 of 2005 and Section 5(1)(a) of the Consumer Protection Act 68 of 2008; *Monare v. South African Tourism & others*, (2016) 37 Industrial Law Journal 394; *Kleinhans v. Parmalat SA (Pty) Ltd*, [2000] Butterworths Labour Law Reports 879 LC. See generally *Elisa Rinaldi*, Private International Law in the Labour Court: Re-visiting Jurisdiction and Choice of Law in a Cross-Border Employment Dispute, (2022) 34 South African Mercantile Law Journal (SAMLJ) 181–211; *Eesa A. Fredericks*, The Proper Law of the International Contract of Employment: Interpreting the Kleinhans Decision, (2006) 18 SAMLJ 75–82; *Letlhokwa G. Mpedi*, The Proper Law of the Individual Labour Contract: Some Perspectives from Southern African Private International Law, (2010) 26 International Journal of Comparative Labour Law and Industrial Relations 321–329; *Jan L. Neels*, Consumer Protection Legislation and Private International Law, (2010) 31 *Obiter* 122–133; *idem*, South Africa, in: *Consumer Protection in International Private Relationships*, ed. by Diego P. Fernández Arroyo (2010) 415–436.
- 18 Section 54 of the Electronic Transactions Act No. 772, 2008.
- 19 Sections 30 and 41 of the Kenyan Constitution 2010.
- 20 Section 28 of the Electronic Transactions Act No. 8, 2011; Section 4 of the Employment Act No. 6, 2006.
- 21 Article 67 of the Tunisian Code of Private International Law of 1998; Articles 62 and 67 on a Preliminary Draft (2019) Choice of Law Rule. All cited in: *Bélig Elbalti*, Tunisia: Tunisian Perspectives on the Hague Principles, in: Girsberger/Graziano/Neels (n. 3) no. 18.66 fn. 148.
- 22 Articles 5 and 6 of the Preliminary Draft Legislation on the Law Applicable to Contractual Obligations in Congo (2019). Hereinafter referred to as the Congolese Preliminary Draft.

mercial contracts, such as a contract concluded between two consumers, are also outside the scope of application of the Principles.”<sup>23</sup>

This justification provided in the Hague Principles for the protection of weaker parties was also adopted by the drafters of the OAS Guide.<sup>24</sup> Additionally, in the Asian Principles, the exclusion of consumer and individual employment contracts was “justified by the fact that finding an appropriate rule acceptable to all Asian jurisdictions would be time and effort consuming”.<sup>25</sup>

However, in the African context we argue that some uniform rules should be created to protect employees and consumers in the context of choice of law, as the OHADA Preliminary Draft (Articles 578 and 580), the Economic and Monetary Community of Central Africa Directive on Consumer Protection,<sup>26</sup> and Rome I (Articles 6 and 8 of Rome I) all do. In our opinion, this is what the African Principles should do. Consequently, we address this point in the next section.

The African Principles also exclude contracts of carriage (Article 1(2)(b)). However, it is a matter of debate whether contracts for the carriage of goods and persons should be classified as contracts for the protection for weaker parties. These contracts for the carriage of goods and persons could be regarded as a type of consumer contract, or at least as similar to consumer contracts. In contracts of carriage, it is common for one of the parties not to be acting in the exercise of a trade or profession. Moreover, the United Nations Convention on Contract of Carriage of Goods by Sea (of 1975) and the Hague-Visby Rules (of 1924), each of which contains rules that cannot be derogated from by agreement, have already been ratified or enacted as domestic legislation by some African countries, for example Botswana, Burkina Faso, Burundi, Cameroon, Egypt, Gambia, Kenya, Lesotho, Malawi, Morocco, Nigeria, Sierra Leone, Tanzania, Tunisia, Uganda, and Zambia.<sup>27</sup> This explains why Justice Adekeye of the Nigerian Supreme Court in *JFS Investment Ltd v. Brawal Line Ltd*<sup>28</sup> held that “[i]n any transaction where the Carriage of Goods by Sea Act and the Hague Rules apply, it is not permitted to contract out of the obligations imposed”.<sup>29</sup>

23 Commentary 1.10 of the Hague Principles. Nevertheless, Commentary 1.11 provides: “The fact that the Principles, by their terms, apply only to contracts in which each party is acting in the exercise of its trade or profession should not lead to a negative inference that party autonomy is not available in non-commercial contracts. The Principles do not provide private international law rules for such contracts”.

24 José A. Moreno Rodriguez, Organization of American States: The OAS Guide and the Hague Principles, in: Girsberger / Graziano / Neels (n. 3) no. 53.35.

25 Naoshi Takasugi / Bélig Elbalti, Asian Principles of Private International Law: The Asian Principles of Private International Law and the Hague Principles, in: Girsberger / Graziano / Neels (n. 3) no. 19.10.

26 Directive No.2/19-UEAC-639-CM-33 (the CEMAC Directive).

27 See generally <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XI-D-3&chapter=11&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XI-D-3&chapter=11&clang=_en)> (28 March 2024).

28 *JFS Investment Ltd v. Brawal Line Ltd*, (2010) 18 Nigerian Weekly Law Reports (NWLR) 495, 531.

29 *JFS Investment Ltd v. Brawal Line Ltd* (n. 28) 530 (Adekeye JSC).

Against this background, it is open to question how far another uniform choice of law provision on the contract of carriage of goods would be useful in Africa.

Here, it should be considered that OHADA has a Uniform Act on Contracts of Carriage of Goods by Road,<sup>30</sup> which applies to

“any agreement on road freight when the place of collection of the goods and the place designated for delivery, as specified in the agreement, are situated either within the territory of an OHADA member State, or within the territory of two different States, of which at least one is a member of OHADA.”

This law applies irrespective of the agreement of the parties on a choice of law.<sup>31</sup>

It should also be considered that Article 4 of the Congolese Preliminary Draft makes a provision for the law applicable to contracts of carriage of goods and persons.

The exclusion of contracts of carriage from the African Principles is inconsistent with global and supranational/regional approaches in the Hague Principles, the Mexico City Convention,<sup>32</sup> the Asian Principles, or in the OAS Guide, as these laws do not explicitly exclude contracts of carriage from their scope. Moreover, Article 5 of Rome I treats contracts of carriage as commercial contracts and not generally as contracts for the protection of weaker parties.

Furthermore, the African Principles do not address the law governing arbitration agreements or choice of court agreements (Article 1(3)). This is consistent with global and supranational/regional approaches under the Hague Principles (Article 1(3) (b)), OHADA (Article 575(5)), Rome I (Article 1(2)(e)), the Asian Principles (Article 3.1(3)(b)), and the OAS Guide (Part 5(V)(D)). The principle of separability of arbitration agreements and choice of court agreements is well-recognised in the jurisprudence of many African countries and in their national legislation on arbitration. Nevertheless, there appears to be little case law and no legislation dealing with the law that applies to arbitration agreements or choice of court agreements. Many African countries bluntly apply the *lex fori* without considering the choice of law governing the jurisdiction or arbitration agreement. South Africa is the exception, as it applies the English common law approach of the law governing the main contract being the law of the choice of court agreement.<sup>33</sup> The extent to which Africa's common law countries – insofar as these often find English authorities persuasive – will follow English jurisprudence<sup>34</sup> on the subject remains to be seen. This is an area where the African Principles could make a unique contribution to the development

<sup>30</sup> Act of 22 March 2003, J.O. OHADA no. 13 of 31 July 2003, 3 ff.

<sup>31</sup> *Justin Monsenepwo*, OHADA: The Organization for the Harmonization of Business Law in Africa and the Hague Principles, in: Girsberger / Graziano / Neels (n. 3) no. 9.29.

<sup>32</sup> Inter-American Convention on the Law Applicable to International Contracts 1994, available at <<http://www.oas.org/juridico/english/Treaties/b-56.html>> (9 September 2024).

<sup>33</sup> *Blanchard, Krasner & French v. Evans*, 2002 (4) South African Law Reports (SA) 144 (T) at [9] (Cloete J); *MV Spartan-Runner v. Jotun-Henry Clark Ltd*, 1991 (3) SA 803 (N) (Shearer J).

<sup>34</sup> *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*, [2020] United Kingdom Supreme Court (UKSC) 38; *Vizcaya Partners Ltd v. Picard*, [2016] United Kingdom Privy

of private international law in Africa while at the same time setting themselves apart from the extant instruments.

In addition to the above, the African Principles do not address the following topics: the capacity of natural persons, companies or other collective bodies and trusts; evidence and procedure; insolvency; the issue of whether an agent is able to bind a principal to a third party; negotiable instruments; the proprietary effects of contracts; and revenue, customs or administrative matters (Article 1(4)(a)–(f)). This is similar to global and supranational/regional approaches under the Hague Principles (Article 1(3)(a)–(f)), the OHADA Preliminary Draft (Article 567), Rome I,<sup>35</sup> the Asian Principles (Article 3.1(3)), and the OAS Guide (Part V). In both the Asian Principles and the Hague Principles, “the exclusion was justified by the fact that those matters would raise difficult question[s] of characterization” (Article 1(2)(a)–(j)).<sup>36</sup> In the OAS Guide, these matters “were excluded because of divergences in comparative law regarding their contractual or non-contractual character, and because they are subject to specific regulations”.<sup>37</sup>

Overall, it is our view that given the relatively underdeveloped state of the law in many African countries regarding issues that have been customarily excluded from the scope of the relevant international/supranational/regional instruments, the failure to address them in the African Principles represents a missed opportunity. It is arguable that such an underdeveloped state of law implies the absence of entrenched positions in national law, which may be difficult to overcome in international negotiations. Furthermore, the African Principles do not constitute hard law. Therefore, states can legislate according to those aspects of the Principles that they deem appropriate. In other words, there is no need for a long list of prior exclusions when this can take place when states are legislating based on the African Principles.

### III. Weaker parties

To the fullest extent possible, Articles 3 and 5 of the African Principles allow commercial parties to make an express or tacit choice of law. Conversely, the African Principles do not directly address the protection of weaker parties (such as consumers and employees) who may be affected by abuses of party autonomy. These issues

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Council (UKPC) 5. The impact of this decision is currently under review in proposed amendments to the UK Arbitration Act of 1996.

35 See generally *Michael McParland*, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) at Chapters 6–8; *Richard Plender / Michael Wilderspin*, *European Private International Law of Obligations*<sup>6</sup> (2023) at Chapters 4–5; *Alfonso-Luis Calvo Caravaca / Javier Carrascosa González*, *Scope*: in: *Magnus / Mankowski*, *European Commentaries on Private International Law*, vol. II: *Rome I Regulation* (2017) 52–86.

36 *Takasugi / Elbalti*, *Asian Principles* (n. 25) no. 19.10.

37 *Moreno Rodriguez*, *Organization of American States* (n. 24) no. 53.34.

are left to the States to decide under their conflict of laws rules, which could result in a lack of uniformity in this important area. Under the African Principles, the issue of protecting consumers and employees as weaker parties can only be achieved through the exceptional device of overriding mandatory rules and public policy. The African Principles do not address the matter of rules that cannot be derogated from by agreement (also referred to as ordinary or simple mandatory rules) as devices for protecting employees and consumers who are weaker parties.

Article 11(1) of the African Principles defines overriding mandatory rules

“as rules of law which are regarded as crucial by a country for safeguarding its public interests (including its political, social or economic organisation) to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this instrument.”

This definition is consistent with the laws of some African countries like the Democratic Republic of the Congo,<sup>38</sup> Ethiopia,<sup>39</sup> South Africa,<sup>40</sup> and Tunisia.<sup>41</sup> It is also consistent with other regional and supranational instruments like the Hague Principles (Article 11), Rome I (Article 9 and Recital 37), the Asian Principles (Article 2.8), and the OAS Guide (Part 17). Overriding mandatory rules in the African Principles could either be the law of the forum (Article 11(3)(a)), the law of the place of substantial performance (Article 11(3)(b)) or, in exceptional cases, the law of a third/foreign country (which is not the forum or place of substantial performance) that has a manifestly close connection to the situation (Article 11(4)).

<sup>38</sup> Article 14 Title II of the Civil Code Book, Democratic Republic of the Congo, cited in: *Justin Monsenepwo*, Democratic Republic of the Congo: Congolese Perspectives on the Hague Principles, in: Girsberger/Graziano/Neels (n. 3) no. 12.32; Article 18 of the Congolese Preliminary Draft.

<sup>39</sup> Article 38 of the FDRE Draft, cited in: *Gebreemeskel*, Ethiopia (n. 14) no. 14.36.

<sup>40</sup> *Parry v. Astral Operations* (LC190/04, C190/04), [2005] South Africa Labour Court (ZALC) 15, at [46], [57]–[59], [62] and [72] (in the context of employment contracts); *Representative of Lloyd's v. Classic Sailing*, 2010 (5) SA 90 (SCA) (critically discussed by *Christopher Forsyth*, *Private International Law* (2012) 15 fn. 75 and 321); *Jason Mitchell*, *To Override, and When? – A Comparative Evaluation of the Doctrine of Mandatory Rules in South African Private International Law*, (2013) 130 *South African Law Journal* 757–777; *Kerstin Ann-Susann Schäfer*, *Application of Mandatory Rules in the Private International Law of Contracts: A Critical Analysis of Approaches in Selected Continental and Common Law Jurisdictions, with a View to the Development of South African Law* (2010). See also *Jan Neels/Eesa Fredericks*, *Covid-19 Regulations as Overriding Mandatory Provisions in Private International Law – A Comparison of Regional, Supranational and International Instruments with the Proposed African Principles on the Law Applicable to International Commercial Contracts*, in: *The Impact of COVID-19 on the Future of Law and Related Disciplines*, ed. by Murdoch Watney (2022) 1–25; *Prince Obiri-Korang*, *Overriding Mandatory Rules Applicable to International Sales of Goods: Evidence from South Africa*, (2023) 9(1) *Lex Portus* 7–19.

<sup>41</sup> Article 38 of the Tunisian Code on Private International Law, cited in: *Elbalti*, Tunisia (n. 21) no. 18.54.

An important source of overriding mandatory laws in African countries will most likely include their constitutional law. For instance, Section 34 of the Constitution of Nigeria of 1999 and Section 30 of the Kenyan Constitution of 2010 guarantee every individual the right to dignity. Accordingly, “no person shall be held in slavery or servitude” and “no person shall be required to perform forced or compulsory labour”. These Nigerian and Kenyan constitutional provisions may also be used to protect employees against unconscionable terms in their contracts that contravene the right to dignity.

Section 41 of the Kenyan Constitution is even more developed as an overriding mandatory rule for employees. It provides that every person has the right to fair labour practices such as fair remuneration, reasonable working conditions, the right to join or participate in the activities and programmes of trade unions, and the right to go on strike. This means that foreign law cannot be used to evade these rules under Kenyan law.

Another interesting example is Section 46 of the Constitution of Kenya, which grants consumers some very specific rights, including the right to goods and services of reasonable quality, the right to information to gain the full benefit of goods and services, the right to the protection of their economic interests, and the right to compensation for any loss arising from defects in goods or services. Again, it may be argued that Kenyan law will apply as an overriding mandatory rule to protect consumers in this context.

Meanwhile, in South Africa, Chapter 7 of the Electronic Communications and Transactions Act<sup>42</sup> contains a number of consumer protection measures, with Section 47 determining that the protection provided to consumers in Chapter 7 shall apply, irrespective of the legal system that relates to the agreement in question (Section 47 bears the heading: “Applicability of Foreign Law”).<sup>43</sup> Sections 53 and 54 of Ghana’s Electronic Transaction Act<sup>44</sup> and Section 28 of Uganda’s Electronic Transactions Act<sup>45</sup> also contain a similar provision.

Similarly, Article 12 of the African Principles provides that the “application of a provision of the law applicable in terms of this instrument may be refused only if such application would be manifestly incompatible with fundamental notions of the public policy of the forum”. However, a difficulty that may be encountered would be distinguishing between overriding mandatory rules and public policy for employees and consumers as the weaker parties, since both mandatory rules and public policy protect public interests. It is suggested that this distinction consists of overriding mandatory rules being positively and immediately applicable without the need to

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42 Act no. 25 of 2002.

43 See also Section 4(1) of the National Credit Act 34 of 2005 and Section 5(1)(a) of the Consumer Protection Act 68 of 2008. All noted in: *Neels*, Consumer Protection Legislation and PIL (n. 17); *idem*, South Africa (n. 17).

44 2008 (Act 772).

45 Act no. 8 of 2011.

consider the usual choice of law rules, whereas public policy operates to negate the application of the usual choice of law rules. In the context of the African Principles, overriding mandatory rules entail the court being *required* to apply a particular law (either the law of the forum or third country), regardless of the usual choice of law rules, whilst public policy entails the court being *required not* to apply a particular law that has been designated by the usual choice of law rules.

It is recommended that a uniform choice of law rule for employees and consumers in the African Principles should also include provisions that cannot be derogated from by agreement.<sup>46</sup> These are otherwise referred to as simple mandatory rules, allowing a limited form of party autonomy. However, these rules also offer the employee and consumer the freedom to choose between the chosen law and the applicable law in the absence of choice, which cannot be derogated from by agreement. It is important to note that this is a more favourable approach for consumers and employees because the law of the forum does not always offer better protection. This is the right approach, one that is applied in judicial decisions in Kenya,<sup>47</sup> has been considered in one South African case<sup>48</sup> and in one Zimbabwean Supreme Court case,<sup>49</sup> and that is emerging in Democratic Republic of the Congo.<sup>50</sup> Indeed, this is the weakness of the laws in certain other African countries that restrict the protection offered to the employee and consumer by relying on the law of the forum. Interestingly, in South Africa, Neels has previously advocated for “the principle of preferential treatment in private international law, which provides extra protection for the socio-economically weaker party in the context of alternative reference rules”.<sup>51</sup> In our view, this should be a uniform rule in Africa.

If this is done, the new title should be: “African Principles on the Law Applicable to International Contracts”. The word “commercial” would thus be deleted to expand its scope.

## 1. Consumer contracts

Consumers are generally regarded as weaker parties because they are not as sophisticated as professionals when entering into a cross-border contract. Moreover, many consumers will be unable to hire lawyers who can advise them on the implications of a choice of law agreement in respect of goods or services that they have purchased

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<sup>46</sup> See Recital 37 to Rome I.

<sup>47</sup> *Dorcas Kemunto Wainaina v. IPAS*, [2018] Electronic Kenyan Law Review (eKLR) at [66]–[70]; *Fredrick Otieno Oluoch v. Oryx Energies (K) Limited & another*, [2020] Employment and Labour Relations Court No. 128 of 2017 at [79].

<sup>48</sup> *Parry v. Astral Operations Limited* (n. 40) at [70]–[72].

<sup>49</sup> *Delta Beverages (Private) Limited v. Blakely Investments (Private) Limited* (59 of 2022), [2022] Zimbabwe Supreme Court (ZWSC) 59.

<sup>50</sup> Articles 5 and 6 of the Congolese Preliminary Draft.

<sup>51</sup> *Neels*, Consumer Protection Legislation and PIL (n. 17) 124.

in a cross-border transaction. Moreover, the choice of law governing consumer contracts is typically included as a standard terms clause. This is even more challenging from the perspective of on-line transactions, where consumers agree to the terms and conditions of purchasing goods or services without being aware of the dispute resolution agreement (including the choice of law). In fact, the chosen law might not offer any protection to the consumer in cases of unfair contract terms relating to distance-selling and exemption clauses.

In response, some legal systems in Africa, such as those of Uganda,<sup>52</sup> Ghana,<sup>53</sup> Morocco,<sup>54</sup> Ethiopia,<sup>55</sup> and South Africa,<sup>56</sup> limit parties' freedom to choose the applicable law in consumer contracts, especially to the extent that such choice fails to provide the consumer with the protections afforded by the law of the forum. However, this is unsatisfactory, because the law of the forum might not always offer the consumer sufficient protection in cross-border transactions.

In the context of rules that cannot be derogated from by agreement, we favour the Tunisian solution. Tunisia has a preliminary draft which provides that "a consumer contract shall be governed by the law that is more protective to the consumer from among the law of the consumer's habitual residence, the law of the professional's place of business and the law of the place of performance of the contract".<sup>57</sup> This solution is better than that of Article 6 of Rome I,<sup>58</sup> Article 578 of the OHADA Preliminary Draft, Article 5 of the Congolese Preliminary Draft or Article 48 of the OHADAC Draft.<sup>59</sup> This is because these laws restrict the consumer's protection to only the law of their habitual residence if the chosen law does not offer protection. For example, the CJEU has consistently held that reliance on the law of the habitual residence as a mandatory rule for a consumer is exhaustive, and that "it is not possible to derogate from that provision for the benefit of legislation allegedly more

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52 Sections 53 and 54 of the Electronic Transactions Act of 2008.

53 Section 28 of the Electronic Transactions Act of 2011.

54 Dahir no. 1-11-03 of 18 February 2011 promulgating Law no. 31-08 Enacting Measures of Protection of the Consumer, Official Bulletin, no. 5932 of 7 April 2011, cited in: *Zaher*, Morocco (n. 15).

55 Article 75 of the FDRE Draft, cited in: *Gebremeskel*, Ethiopia (n. 14).

56 All citations in n. 17.

57 Articles 62 and 67 of the Preliminary Draft, cited in: *Elbalti*, Tunisia (n. 21).

58 See generally *McParland*, Rome I Regulation (n. 35) at Chapter 12; *Plender/Wilderspin*, European PIL of Obligations (n. 35) at Chapter 9; *Michael Wilderspin*, Article 6: Consumer Contracts, in: *Magnus/Mankowski*, European Commentaries on Private International Law, vol. II: Rome I Regulation (2017) at 453–489; *Lord Lawrence Collins/Jonathan Harris*, Dicey, Morris & Collins, *The Conflict of Laws*<sup>16</sup> (2022) at Chapter 33, Section 8.

59 The Organisation for the Harmonisation of Business Law in the Caribbean (OHADAC) has a Draft Model Law Relating to Private International Law (the OHADAC Draft), available at <<https://www.ohadac.com/textes/5/draft-ohadac-model-law-relating-to-private-international-law.html>> (9 September 2024).

favourable to the consumer.<sup>60</sup> In cross-border matters where the legal system of the consumer's habitual residence offers little or no protection, this could be potentially discriminatory to their interests. In other words, the European Union approach does not hold professionals to a uniform standard, as it relates to consumers in cross-border contracts.

However, the Tunisian approach does not permit party autonomy,<sup>61</sup> and it is suggested that the Tunisian provision should be amended to suit the African context by allowing the parties to choose the applicable law. Nevertheless, the chosen law will not be applied if it offers less protection than the law of the consumer's habitual residence, the law of the professional's place of business, or the law of the place of performance. We refer to this as the revised Tunisian solution. It implies that consumers will also enjoy the benefit of the chosen law if it offers more protection. To further the aims of legal certainty, it is proposed that the consumer should only be able to rely on either the chosen law, the law of (the consumer's) habitual residence, the law of the professional's place of business, or the law of the place of performance. In other words, the consumer will only be free to choose one of these laws for protection. The consumer will bear the cost of investigating which law is most favourable to their case.

If this proposal is implemented in numerous English-speaking-law African countries, it is unlikely to cause problems. This is because proving foreign law is a factual matter that must be established to the court's satisfaction.<sup>62</sup> This is established in decided cases in the highest courts of Nigeria,<sup>63</sup> Ghana,<sup>64</sup> South Africa,<sup>65</sup> Seychel-

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60 CJEU 14 September 2023 – Case C-821/21 (*NM v. Club La Costa (UK) plc and Others*), ECLI:EU:C:2023:672, at [78], [85]; CJEU 14 September 2023 – Case C-632/21 (*Diamond Resorts Europe and Others*), ECLI:EU:C:2023:671, at [76]; CJEU 20 October 2022 – Case C-604/20 (*ROI Land Investments*), EU:C:2022:807, at [40]–[41].

61 *Elbalti*, Tunisia (n. 21) no. 18.66.

62 *Richard Frimpong Opong*, *Commonwealth Africa: Foreign Law in Commonwealth African Courts*, in: *Treatment of Foreign Law: Dynamics towards Convergence?*, ed. by Yuko Nishitani (2017) 601–611; *FS Cairo (Nile Plaza) LLC v. Lady Brownlie*, [2021] UKSC 45 at [112]–[158].

63 *Sonnar (Nigeria) Ltd v. Partenreedri MS Norwind FS Cairo*, (1987) 4 NWLR 520(SC); *Murmansk State Steamship Line v. Kano Oil Millers Ltd*, (1974) 3 African Law Reports, Commercial Series (ALR Comm) 192; *Ogunro v. Ogedengbe*, (1960) 5 Federal Supreme Court Reports (FSC) 137, 138–139.

64 *Serwa v. Hashimu and Another*, [2021] Ghana Supreme Court (GHASC) 3, 47; *C. C. W. Ltd v. Accra Metropolitan Assembly*, [2021] GHASC 15, 46–47.

65 *Windrush Intercontinental SA and Another v. UACC Bergshav Tankers AS* (556 of 2015), [2016] South Africa Supreme Court of Appeal (ZASCA) 199 at [31]; *Imperial Marine Company v. Motor Vessel Pasquale della Gatta and Another and Imperial Marine Company v. Motor Vessel Filippo Lembo and Another* (638/2010), [2011] ZASCA 131 (15 September 2011) at [27]; *International Marine Transport v. MV Le Cong and Another* (80/2005), [2005] ZASCA 106 (23 November 2005) at [12]; *Belfry Marine Ltd v. Palm Base Maritime SDN BHD Name of Ship: mv 'Heavy Metal'* (323/1998), [1999] ZASCA 44 (31 May 1999) at [8]; *Caterham Car*

les,<sup>66</sup> and other courts in Kenya,<sup>67</sup> Namibia,<sup>68</sup> eSwatini,<sup>69</sup> Botswana,<sup>70</sup> Lesotho,<sup>71</sup> Malawi,<sup>72</sup> and Tanzania.<sup>73</sup> Therefore, the burden is on the consumer to demonstrate that the foreign law is more favourable than the chosen law. If the consumer fails to plead and sufficiently prove the foreign law, the law of the forum will generally be applied.

In civil-law African countries like the Democratic Republic of the Congo (DRC),<sup>74</sup> Tunisia,<sup>75</sup> and Angola and Mozambique,<sup>76</sup> if both parties base their arguments on the *lex fori*, then in the absence of other elements indicating a proper choice of law the courts must inform the parties of the potential application of a foreign law indicated by a national conflicts rule. In these jurisdictions, the judge may investigate the content of foreign law. Under our proposal, judges will only investigate the content of a foreign law that the consumer relies on and considers favourable. In other words, judges are not required to investigate the content of all potential foreign laws.

It is likewise suggested that the terms “consumer”, “habitual residence”, “place of performance”, and “professional’s place of business”, and the conditions for applying this revised Tunisian solution, be clearly explained in order to contribute to legal certainty and predictability.

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*Sales and Coachworks Ltd v. Birkin Cars (Pty) Ltd and Another* (393/1995), [1998] ZASCA 44 (27 May 1998) at [34].

- 66 *Lukas Raida v. Montego Bay Financial Limited* (CC 09/2016), [2018] Supreme Court Seychelles (SCSC) 8229 (19 July 2018) at [19].
- 67 *Intrasoft International S A v. Verve K O Limited*, [2020] eKLR [9].
- 68 *Von Schaurath v. Von Schaurath* (4073 of 2009), [2013] Namibia High Court Main Division (NAHCMMD) 257 (16 September 2013) at [67].
- 69 *Southern Textiles (Pty) Limited v. Taga Investments (Pty) Limited and Another* (4223 of 2007), [2009] SZHC 101 (12 March 2009) at [9].
- 70 *Mtui v. Mtui*, 2000 (1) Botswana Law Reports (BLR) 406, 413; *Point Trading (Pty) Ltd. v. The Attorney General*, 2004 (1) BLR 75.
- 71 *Serobanyane v. Serobanyane*, CIV\APN\290\91 (High Court, Lesotho, 1991); *Weng v. Weng*, CIV/T/351/99 (High Court, Lesotho, 1999); *Ndlovu v. Employment Bureau of Africa Ltd.*, CIV/APN/142/98 (High Court, Lesotho, 2002); *Mutua v. Matholoane*, CIV/APN/183/94 (High Court, Lesotho, 1994).
- 72 *Maseko v. Maseko*, [1973–1974] 7 Malawi Law Reports 310.
- 73 *Auto Garage Ltd. v. Motokov*, [1972] 1 ALR Comm. 17.
- 74 Under Article 33 of the DRC’s Decree of 30 July 1888, the judge is compelled to enforce the choice of law made by the parties. See the Cases of Supreme Court of Justice, 3 April 1976, BA 1977, 65; Supreme Court of Justice, 20 January 1982, RJZ 1982, 53; Court of Appeal of Lubumbashi, 21 April 1972, RJZ 1973, 70. All cited in: *Monsenepwo*, Democratic Republic of the Congo (n. 38) no. 12.18.
- 75 Article 28 of the Tunisian 1988 Code of Private International Law; TSC no. 1875 of 21 September 2004; TSC no. 5289 of 23 November 2004; TSC no. 8611 of 17 March 2014; all cited in: *Elbalti*, Tunisia (n. 21) no. 18.35 with accompanying fn. 101.
- 76 Article 348(2) of the Portuguese Civil Code sets down a court’s duty to *ex officio* determine the normative contents of foreign law, even if none of the parties pleaded it, cited in: Dias/Nordmeier, Angola and Mozambique (n. 16) no. 10.21.

A consumer contract is defined as one involving the purchase of goods or service from a professional primarily for personal, family or household purposes.<sup>77</sup> This definition is comprehensive because it focuses on the intent and purpose behind the purchase, emphasizing that the goods or services are not for commercial, business or professional use but rather for personal use.

The alternative definition provided by Article 6 of Rome I – someone acting outside their trade or profession – is also valid but can be seen as somewhat narrower and more focused on what the individual is not doing rather than what they are doing. It might be less clear in situations where the lines between personal and professional use are blurred.<sup>78</sup>

Overall, the definition that emphasizes the purpose of the purchase as being for personal, family or household use is the more precise definition of a consumer contract.

Additionally, there is no international instrument of civil and commercial conflict of laws that defines the habitual residence of a natural person not acting in the course of business. Habitual residence refers to the centre of interests, which should be defined based on the individual facts as having a predominant degree of permanence (stability) in a particular state or country. For example, the place where a consumer spends most of their time, works, pays taxes, or acquires health insurance are all factors that may be considered. This implies that a consumer's habitual residence can be established without the need for an intention to remain, or any formal authorization or registration at that location

Meanwhile, the place of performance should be understood to mean the main place where the professional fulfils their obligation to the consumer. For a contract of sale, for example, this will be the principal destination country or the state where goods are supplied unless the parties have agreed to a different place. In the case of service contracts, the place of performance is the main place where the services are delivered.

Article 15 of the African Principles borrows its definition of habitual residence (or place of business) from Article 19 of Rome I. Article 15(1) of the African Principles defines the professional's habitual residence as the place of a corporate or non-natural person's centre of administration. The place of central administration is where the company concerned, through its constitutional organs, makes its essential company decisions. It is therefore the place where the company makes its entrepreneurial decisions.<sup>79</sup> However, Article 15(3) provides that where the contract is concluded

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<sup>77</sup> Article 2(1)(a) of the Hague Convention on Choice of Court Agreements (concluded on 30 June 2005); Article 5(2) of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (concluded on 2 July 2019).

<sup>78</sup> Cf. CJEU 10 January 2005 – Case C-464/01 (*Johann Gruber v. Bay Wa AG*), ECLI:EU:C:2005:32, at [36]; CJEU 25 January 2018 – Case C-498/16 (*Maximilian Schrems v. Facebook Ireland Ltd*), ECLI:EU:C:2018:37, at [41].

<sup>79</sup> *Young v. Anglo American South Africa Limited*, [2014] England and Wales Court of Appeal (EWCA) Civ 1130; German Federal Court of Justice (Bundesgerichtshof, BGH) 27 June

in the course of operations of a branch, agency or any other establishment, or if contractual performance is the responsibility of such a branch, agency or establishment, the country in which the branch, agency or any other establishment is located must be treated as the country of habitual residence. In the case of a natural person undertaking business, Article 15(2) provides that the place of business shall be the principal place of business. Thus, the principal place of business is the place where the professional transacts most of their business, as opposed to any other place. This may be determined by factors such as the amount of time spent or the value of the transactions conducted in that place.

Regarding the conditions for applying special conflict of laws rules to consumers, Article 6(1)(a) and (b) of Rome I may be utilised. First, consumers will only be protected if the professional pursues their commercial or professional activities in the country of the consumer's habitual residence,<sup>80</sup> or second, if by any means the professional directs such activities to the country of the consumer's habitual residence, or to several countries, including the country where the consumer habitually resides.<sup>81</sup> It is therefore recommended that the approach in Article 6(1)(a) and (b) of Rome I should strike an appropriate balance between the interests of the professional and the consumer.

## 2. Individual employment contracts

An individual contract of employment involves three key elements: subordination, service, and remuneration.<sup>82</sup> Employees are generally regarded as weaker parties in cross-border employment contracts. One situation worth mentioning here – perhaps the most pernicious – is where a “purely” domestic employment contract contains a foreign choice of law rule. By way of illustration, a Chinese-owned business incorporated in Ghana, doing business in Ghana, and employing Ghanaians working in Ghana could include a choice of law clause in its contract stipulating that disputes should be governed by, say, Chinese law.

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2007 – XII ZB 114/06, *Neue Juristische Wochenschrift – Rechtsprechungs-Report* (NJW-RR) 2008, 551 = IPRspr. 2007 no. 176; German Federal Labour Court (Bundesarbeitsgericht, BAG) 23 January 2008 – 5 AZR 60/07, NJW 2008, 2797 = IPRspr. 2008 no. 116; German District Court for Frankfurt (LG Frankfurt am Main) 3 March 2010 – 2-08 S 25/09, BeckRS 2011, 11312. See also *Chukwuma S.A. Okoli*, AASA: Locating the Central Administration of a Subsidiary Company Which is Part of a Group of Companies under Article 60 of Brussels I Regulation, *European Company Law* 12 (2015) 13–18.

<sup>80</sup> See also joined cases CJEU 7 December 2010 – Case C-585/08 (*Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG*) and C-144/09 (*Hotel Alpenhof GesmbH./Oliver Heller*), ECLI:EU:C:2010:740; *Khalifeh v. Blom Bank SAL*, [2021] England and Wales High Court (EWHC) 3399 (QB).

<sup>81</sup> CJEU 7 December 2010 – *Pammer and Hotel Alpenhof* (n. 80).

<sup>82</sup> CJEU 3 July 1986 – Case C-66/85 (*Deborah Lawrie-Blum v. Land Baden-Württemberg*), ECLI:EU:C:1986:284.

It is usually the employer who dictates the terms and conditions of an employment contract, including contents of the dispute resolution clause like a choice of law agreement. An employee will be at the mercy of the employer if the chosen law does not offer that employee sufficient protection. For example, the chosen law may fail to protect the employee from issues of minimum wage, prolonged notice periods, unfair dismissal, lack of proper paid leave, unjustified deductions from pay, discrimination, or unequal treatment. In response, some legal systems in Africa, such as those of Uganda<sup>83</sup> and Ethiopia,<sup>84</sup> have limited the chosen law to that of the forum in the case of employment contracts being performed within their jurisdiction. However, this is unsatisfactory, because the law of the forum might not always offer the employee sufficient protection in a cross-border transaction.

South African courts have previously utilised the presumed intention or closest connection test for choice of law rules in cross-border employment contracts.<sup>85</sup> It is commendable that a South African judge has held that in evaluating objective connections, the courts will consider applying the international labour and human rights standards of the law of the forum.<sup>86</sup> Nevertheless, it is unclear how this rule will be applied and whether it will be decisive. In other words, will a South African judge be bound to apply the law of the forum, which has a slight connection to the employment contract because of its protection of the employee's international human rights? Moreover, the case considered no reference to other laws that may be relied on by the employee (such as that of the place of the employer's central administration, the habitual place of work, and the place where the employee was engaged).

To date, it has been held that a South African labour court with jurisdiction in employment contracts can only apply South African law.<sup>87</sup> In other words, foreign law cannot be applied in cross-border employment contracts. However, as stated earlier, this choice of law rule is inadequate, because the law of the forum will not always offer better protection in cross-border employment contracts.

Some other African legal systems apply weak choice of law rules to cross-border employment contracts. For example, Egypt applies the law of the state in which the employer's place of business is located unless the contract was concluded in Egypt by a branch or a subsidiary, whereupon it would be governed by Egyptian law. This approach is problematic because employees may lack knowledge of the law of the employer's place of business, especially if this is not the place of performance. The

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<sup>83</sup> Section 4 of the Employment Act of 2006.

<sup>84</sup> *CAS Consulting Engineers Salzigtre GmbH v. Mr Kassahun Teweldebirhan* (n. 14); see also *Bezabih Eshete v. Salini Construction* (n. 14).

<sup>85</sup> *Kleinhans v. Parmalat SA (Pty) Ltd* (n. 17), noted in: *Fredericks*, *The Proper Law* (n. 17); *Mpedi*, *The Proper Law of the Individual Labour Contract* (n. 17); *Rinaldi*, *PIL in the Labour Court* (n. 17).

<sup>86</sup> *Kleinhans v. Parmalat SA (Pty) Ltd* (n. 17) at [85].

<sup>87</sup> *Monare v. South African Tourism & others* (n. 17) at [5], [15]. See generally *Rinaldi*, *PIL in the Labour Court* (n. 17).

default rule of the place of contracting is also weak, as the place of engagement and the place of concluding the contract are not strong connecting factors in cross-border employment contracts, primarily because they are often merely fortuitous. Some scholars have even proposed abolishing these connecting factors in cross-border employment contracts.<sup>88</sup>

Tanzania also has a problematic choice of law rule for individual employment contracts. In the recent case of *Ezekiel Hosea v. Tanzania Zambia Railway Authority*,<sup>89</sup> the Tanzanian court held that:

“Under private international law, the principle of *lexi contractus* comes in to decide any dispute relating to employer/employee relationship [...]

Without prejudice to the above observation, through the principle of *lexi contractus*, when a contract is made in one State and it is to be carried out in another State, the law of the place where it was signed is applicable in the construction of the contract, interpretation of the terms and in deciding the validity of the contract. But with regard to execution of the contract, the law of the State where it is to be carried out applies.”

Again, this approach is highly problematic due to the typically weak connection between the place of contracting and cross-border employment contracts. Additionally, allowing the law of the place of performance (*lex loci laboris*) to govern the execution of the employment contract while applying the *lex loci contractus* to all other issues can undermine legal certainty and simplicity due to the potential for conflicting results; it may increase transaction costs for the parties involved. This is particularly burdensome for employees, who may need to hire multiple legal advisers to understand the different applicable laws. Furthermore, the judgment fails to address the issue of protecting the weaker party, namely the employees.

Tunisian law,<sup>90</sup> Kenyan law,<sup>91</sup> the Congolese Preliminary Draft (Article 6), OHADA Preliminary Draft (Article 580), and Article 47 of the OHADAC Draft contain provisions similar to those of Article 8(1)–(3) of Rome I.<sup>92</sup> In this choice of law rule,

88 Uglješa Grušić, Should the Connecting Factor of the “Engaging Place of Business” Be Abolished in European Private International Law?, (2013) 62 International and Comparative Law Quarterly (ICLQ) 173–192.

89 Revision Application no. 353 of 2022.

90 Article 67 of the Civil Procedure Code of Private International Law of 1998, cited in: *Elbalti*, Tunisia (n. 21).

91 *Dorcas Kemunto Wainaina v. IPAS* (n. 47) at [66]–[70]; *Fredrick Otieno Oluoch v. Oryx Energies (K) Limited & another* (n. 47) at [79]. It is important to note that when looking at the applicable law in the absence of choice, Kenyan judges give considerable weight to the place of performance of the employment contract (*lex loci laboris*). See *Shadrack Wachira Gikonyo v. Abt Associates Inc.*, [2017] eKLR [29]–[30]; *Dede Esi Annie Amanor-Wilks v. Action Aid International*, [2014] eKLR [90].

92 See generally *McParland*, Rome I Regulation (n. 35) at Chapter 14; *Plender/Wilderspin*, European PIL of Obligations (n. 35) at Chapter 11; *Guillermo P. Moreno*, Article 8: Individual Employment Contracts, in: Magnus/Mankowski, European Commentaries on Private In-

party autonomy is permitted for employment contracts<sup>93</sup> (except in Tunisia, which omits party autonomy),<sup>94</sup> but the chosen law cannot deprive the employee of any of the protection offered by the applicable law in the absence of choice. In this regard, there is a hierarchy of three choice of law rules for determining the applicable law. First is the employee's habitual place of work. Second, if the employee's habitual place of work cannot be identified (as in the case of persons working on the high seas or in a place that is not a country or state), the law of the place where the employee was engaged or hired shall apply by default. Third, the law of the habitual place of work and place of engagement of an employee can be displaced in favour of the law of another country with the closest connection to the contract. Therefore, the applicable law in the absence of choice is strictly based on the principle of closest connection or proximity rather than on substantive justice principles.<sup>95</sup> It is in this respect that we depart from the solution that limits the employee's protection to the country of closest connection. Instead, we propose a more liberal choice of law rule for employees under the African Principles.

In the context of choice of law rules for cross-border employment contracts that cannot be derogated from by agreement, our proposal is that an individual employment contract shall be governed by the law chosen by the parties. Such a law must not, however, have the result of depriving the employee of the protection afforded to them by provisions that cannot be derogated from by agreement, which may be found in either (a) the law of the country in which or, failing that, from which the employee habitually carries out their work in performance of the contract. Where the employee habitually carries out their work in more than one country, the habitual place of work should be the place where they principally discharge their obligations to their employer.<sup>96</sup> The country where the work is habitually carried out shall not be deemed to have changed if they are temporarily employed in another country; or (b) the law of the country where the place of business through which the worker was engaged is located;<sup>97</sup> or (c) the law of the country where the place of central administration of the employer is located.

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ternational Law, vol. II: Rome I Regulation (2017) at 453–489; *Collins/Harris*, Conflict of Laws (n. 58) at Chapter 33, Section 11.

93 This is especially the case in Kenya: *Kamurasi v. Absa Bank Kenya PLC & another* (Employment and Labour Relations Cause E612 of 2021), [2023] Kenya Employment and Labour Relations Court (KEELRC) 3229 (KLR) at [54]; *Dorcas Kemunto Wainaina v. IPAS* (n. 47) at [67]. See also *Kenya Union of Employees of Voluntary and Charitable Organisations v. Sudan Catholic Bishops Regional Conference*, [2013] eKLR.

94 *Elbalti*, Tunisia (n. 21) no. 18.11.

95 CJEU 12 September 2013 – Case C-64/12 (*Anton Schlecker v. Melitta Josefa Boedeker*), ECLI:EU:C:2013:551.

96 See generally CJEU 15 March 2011 – Case C-29/10 (*Heiko Koelzsch v. État du Grand Duchy of Luxembourg*), ECLI:EU:C:2011:151.

97 See generally CJEU 15 December 2011 – Case C-384/10 (*Jan Voogsgeerd v. Navimer SA*), ECLI:EU:C:2011:842.

This proposed draft provides an employee with four different laws to choose from: the chosen law, the place where the employee habitually carries out their work, the place of business through which the employee was engaged, and the employer's place of central administration. This is more generous to the employee than the provisions of Article 8 of Rome I, Article 580 of the OHADA Preliminary Draft, Kenyan law, Article 67 of the Tunisian Code of Private International Law or Article 6 of the Congolese Preliminary Draft. In addition, unlike Article 8(4) of Rome I, Article 580(4) of the OHADA Preliminary Draft, Article 67 of the Tunisian Code of Private International Law, or Article 6 of the Congolese Preliminary Draft, the proposed draft does not contain an escape clause. In cross-border transactions, it will also likely hold an employer to a uniform standard for their employees located in different places. As suggested to further the aims of legal certainty in consumer contracts, again the employee can only choose one of these laws for protection. The employee will bear the cost of investigating which law is most favourable to their case. The comments made regarding proof of foreign law in consumer contracts apply with equal force to individual employment contracts.<sup>98</sup>

An example of an employee not being protected by Article 6 of the Rome Convention (now Article 8 of Rome I) can be seen in the case of *Boedeker v. Schlecker*<sup>99</sup> decided by the European Court of Justice. The claimant, a German national who had worked for the defendant German company in Germany for 15 years, had a contract that did not contain a choice of law clause. She was subsequently appointed to a role in the Netherlands, where she worked for a further 11 years without interruption. But she continued to live in Germany, where she paid taxes and contributed to national insurance. A dispute arose between the parties, and the Court was required to determine the law applicable to the claimant's employment contract. The employee sought to rely on the law of the Netherlands, where she had habitually carried out her work for the last 11 years without interruption, because it was more favourable to her than German law.

The Supreme Court of the Netherlands referred the following questions to the European Court of Justice: (i) If an employee has performed a contract habitually and without interruption in the same country, should the law of that country be applied in all cases, even if all other circumstances point to a close connection between the employment contract and another country? (ii) Would an affirmative answer to the first question require that, when concluding the employment contract or commencing the work, the parties should have intended that the work be carried out over a long period and without interruption in the same country?

The European Court of Justice held that if Germany had a closer connection to the contract, then German law should apply, irrespective of the long and uninter-

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<sup>98</sup> See the comments accompanying fn. 62–76.

<sup>99</sup> CJEU 12 September 2013 – *Schlecker* (n. 95).

rupted duration of the claimant's habitual work in the Netherlands. According to the Court

“[i]n so far as the objective of Article 6 of the Rome Convention [now Article 8 of Rome I] is to guarantee adequate protection for the employee, that provision must ensure that the law applied to the employment contract is the law of the country with which that contract is most closely connected. However, [...] that interpretation must not automatically result in the application, in all cases, of the law most favourable to the worker.”<sup>100</sup>

In contrast, if our proposal is applied to the European Court of Justice's decision in *Boedeker v. Schlecker*, the employee could, *inter alia*, also rely on the law of her habitual place of work without worrying about applying the escape clause that might lead to application of a law that offers less protection.

#### IV. Government contracts

The African Principles do not contain any provisions to regulate government contracts. A government contract is a contract between a state and a private commercial entity. Furthermore, given our focus on commercial conflict of laws, the interest here is in government contracts with foreign elements.

To some extent, a government contract differs from an ordinary commercial contract. However, at the same time, it shares many characteristics of an ordinary commercial contract. As far back as 1959, Alan W. Mewett noted:

“At common law, whilst government contracts are contracts in the fullest sense of the word, there are too many peculiar features to these contracts to make a complete assimilation between them and the ordinary contract between private persons. The character of the government as a party to such contracts results in different contractual incidents. Confusion will inevitably arise if the features of government contracts are explained and applied according to the principles and terminology of private law.”<sup>101</sup>

A government contract differs from an ordinary private contract in several respects. For example, the needs for institutional approvals, to protect the public interest, and not to unduly constrain the government's regulatory capacity and discretionary powers by means of contractual terms are all features that are either absent or attenuated in private contracts.

It is arguable that scholarship, both on the applicable law in commercial contracts in Africa and on the defence of party autonomy, has omitted to consider in full the unique features of government contracts and the issues raised by these contracts. The African Principles present an ideal instrument by which to remedy this omis-

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<sup>100</sup> CJEU 12 September 2013 – *Schlecker* (n. 95) at [34].

<sup>101</sup> Alan W. Mewett, *The Theory of Government Contracts*, (1959) 5 McGill Law Journal 222–246, 246.

sion. In particular, Article 1(1) of the African Principles applies “in situations involving a conflict of laws, to international contractual obligations in civil and commercial matters, where each party is acting in the exercise of its trade or profession”. It is arguable that “acting in the exercise of its trade” is broad enough to include at least some contracts concluded by governments. Indeed, whether a party “[...] is acting in the exercise of its trade or profession” will depend on the circumstances of the contract, not merely on the status of the parties.

However, there is a need to clarify the applicability of the African Principles to government contracts, because the governments of African countries tend to assume more commercial obligations than the governments of other countries. One of the reasons for this is the continued presence of numerous state enterprises in Africa despite many years of privatisation initiatives on the continent. It is estimated that African nations spend an average of 17% of GDP on the procurement of public goods, works, and service contracts. If other government contracts not necessarily related to “procurement” are added, the vast scope of the contracts we are dealing with becomes immediately evident.

What should also be considered is that a state is not subject to its internal laws alone. Sometimes it is also subject to the internal laws of other states, and it is not uncommon for contracts involving states and foreign private persons to be subject to relevant principles of public international law, which are intended to complement the chosen national law.<sup>102</sup> This raises its own problems, although these fall outside the scope of this paper.

In a dispute relating to a contract between a state and a private entity such as a foreign investor or commercial enterprise, it may become necessary to determine the law that applies to the contract regardless of whether the dispute is being resolved before a court or an arbitral tribunal. In the 19<sup>th</sup> century, it was generally accepted that because of the doctrine of absolute immunity from the jurisdiction of a foreign court, a state could only be sued in its own courts and under its own national laws. Thus, in *Smith v. Weguelin*,<sup>103</sup> it was held that when the government of a state contracts for a loan in another country, the contract is governed by the law of the state whose government contracted for the loan, not by the law of the country in which the contract was made. With time, this hard-line position was relaxed, and the rebuttable presumption was accepted that a contract involving a state party is governed by that state’s national laws. In other words, there was a move from an absolute rule to a rebuttable presumption when deciding the applicable law in government contracts. The current view is that to determine the applicable law, a contract involving a state is treated no differently from a contract involving two private parties. For example, in the common law tradition, this means that in the absence of

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<sup>102</sup> Frederick A. Mann, *The Proper Law of Contracts Concluded by International Persons*, (1959) 35 *British Yearbook of International Law* 34–57, 41–56.

<sup>103</sup> *Smith v. Weguelin*, [1869] LR 8 Eq 198.

an express or implied choice of the applicable law of a contract, the governing law shall be the law of the country with which the contract has its closest and most substantial connection.<sup>104</sup>

As far back as 1979, the Institute for International Law adopted a resolution entitled “The Proper Law of the Contract in Agreements Between a State and a Foreign Private Person” concerning contracts concluded by states.<sup>105</sup> Article 1 of the resolution provides that contracts between a state and a foreign private person ‘shall be subjected to the rules of law chosen by the parties or, failing such a choice, to the rules of law with which the contract has its closest link’, and Article 5 provides that “in the absence of any choice by the parties, the proper law of the contract shall be derived from indications of the closest connection of the contract”.

Under the current law in many African countries, as well as in the Hague Principles and in the African Principles (to the extent that they apply to government contracts), a government contract is treated no differently from a commercial contract between two private persons when determining the applicable law. But should it really be treated that way?

In the context of Ghana, it has been argued that the applicable law for contracts involving the Ghanaian government and foreign private persons need not always be Ghanaian law;<sup>106</sup> the parties are therefore free to choose a foreign law. However, we argue that no government contract – and certainly not commercial contracts concluded by African governments – should be governed by foreign law.

Recent statutes in several African countries have already pointed in this direction. For example, some African countries have enacted legislation to ensure that certain government contracts are governed only by national law and not foreign law. Section 71(1) of Kenya’s Public Private Partnerships Act<sup>107</sup> provides that “[p]roject agreements under this Act shall be subject to the provisions of the Laws of Kenya and any provision in a project agreement to the contrary shall be void”. Section 26(7) of Uganda’s Public Private Partnerships Act<sup>108</sup> provides that “[t]he agreement entered into by a contracting authority under this Act shall be subject to the provisions of the Laws of Uganda”. Section 6(3) of the Mauritius Public Private Partnership Act<sup>109</sup> provides that “[e]very agreement shall be governed by and construed in accordance with the laws of Mauritius”. Meanwhile, section 62(1) of Ghana’s Public

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**104** *Bonython v. Australia*, [1951] AC 201, 219–220; *Richard Frimpong Oppong*, Common Law Africa: Common Law African Perspectives on the Hague Principles, in: Girsberger / Graziano / Neels (n. 3) no. 11.14.

**105** See <<https://www.idi-iiil.org/app/uploads/2019/06/Annexe-1bis-Compilation-Resolutions-EN.pdf>> (27 March 2024).

**106** *Richard Frimpong Oppong*, *The Government of Ghana and International Arbitration* (2017) at Chapter 5.

**107** Act no. 14 of 2021.

**108** Act no. 13 of 2015.

**109** Act no. 37 of 2004.

Private Partnerships Act<sup>110</sup> provides that “[t]he governing law of a partnership agreement is the law of Ghana”, and section 11(5) of Tanzania’s Public Private Partnership Act<sup>111</sup> stipulates that “Every agreement entered into under this Act shall be governed and construed in accordance with the laws of Mainland Tanzania”. Also worth mentioning is Tanzania’s Natural Wealth and Resources Permanent Sovereignty Act,<sup>112</sup> wherein section 11 provides that disputes arising from the use of natural wealth and resources shall be adjudicated by judicial bodies established in Tanzania and in accordance with the laws of Tanzania.

In contrast, other statutes allow contracting parties to agree on foreign law as the applicable law even though the legislation presumes national law as the applicable law. Section 35(1) of Malawi’s Public Private Partnership Act<sup>113</sup> states that “[e]very PPP contract entered into under this Act shall, unless agreed otherwise between the parties, be governed by the Laws of Malawi”. Similarly, section 5 of Sierra Leone’s Public Private Partnership Act of 2014<sup>114</sup> stipulates that “[a] PPP Agreement shall be governed by and construed in accordance with the laws of Sierra Leone, unless otherwise provided in the PPP Agreement”.

In fact, we believe that there should be no exception to the general principle that a government contract with foreign elements is governed by the laws of the relevant state. This may come as a surprise to some, although we suggest that it should not: the idea of a UK government contract being governed by Ghanaian law would sound immediately ridiculous, and we should be equally concerned that Ghanaian government contracts are sometimes governed by English law. We argue that it is entirely inappropriate for a government contract to be governed by foreign law. Consequently, the African Principles need to explicitly deal with government contracts, recognising their unique characteristics as well as the public policy and regulatory issues such contracts raise. In particular, the African Principles should provide that contracts of this nature are governed by the law of the affected government’s country, with no carve-outs.

In expanding the scope of the African Principles to government contracts in this way, we see the following advantages. First, it would set the instrument apart from the Hague Principles and other international instruments for determining the applicable law in contracts. However, it would not replicate the Institute for International Law’s 1979 resolution on “The Proper Law of the Contract in Agreements Between a State and a Foreign Private Person”, because that resolution’s *raison d’être* was party autonomy. With respect to government contracts, the *raison d’être* of the African Principles, on the contrary, is state autonomy and national law.

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110 Act no. 1039 of 2020.

111 G.N. No. 156A of 2011. This provision was not changed in (Amendment) Act no. 4 of 2023.

112 Act no. 5 of 2017.

113 Act no. 23 of 2022.

114 Act no. 11 of 2014. This provision was not changed in the amendments brought by the National Investment Board Act (no. 11 of 2022).

Second, for governments, the fact that the African Principles expressly deal with government contracts would increase this instrument's appeal, enhancing its chances of adoption by the Pan-African Parliament and African Union. To date, we are unaware of any instrument adopted by the African Union or Pan-African Parliament that deals solely with private commercial relations.

Third, government contracts are so important to the development of African countries that they are dealt with by constitutional provisions. For instance, Article 217(1) of South Africa's constitution provides that

"[w]hen an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

Similarly, Article 181(5) of Ghana's constitution subjects "an international business or economic transaction to which the Government is a party" to parliamentary approval. The Supreme Court of Ghana has held that without such approval, the contract underlying the transaction shall be void and unconstitutional.<sup>115</sup> While these constitutional provisions have stopped short of constitutionalising the applicable law for government contracts, the African Principles deal with government contracts in a way that could serve as a model for national legislation. As such, they would include constitutional provisions to deal with government contracts.

Fourth, the fact that the African Principles deal with government contracts could spur greater interest in such contracts among African private international law scholars. To date, our extant scholarship has not addressed the potentially unique private international law questions government contracts generate. Apart from the customary discussion on sovereign immunity, we have treated governments as just another legal person and any contracts involving governments as ordinary commercial contracts. We argue that they should not be treated as such.

## V. Non-state law

Globally, there has been significant debate on non-state law in the literature.<sup>116</sup> There are two central, opposing arguments in this debate. Some African scholars strongly

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115 *Attorney General v. Faroe Atlantic Ltd.*, [2005–2006] Supreme Court of Ghana Law Reports (SCGLR) 271; *Attorney General v. Balkan Energy (Ghana) Ltd.*, [2012] 2 SCGLR 998; *Amidu v. Attorney General, Waterville Holdings (BVI) & Woyome (No. 1)*, [2013–2014] 1 SCGLR 112.

116 See for example *Symeon C. Symeonides*, *Contracts Subject to Non-State Norms*, 54 *American Journal of Comparative Law* (Am.J.Comp.L.) 209–231 (2006); *Peter Mankowski*, *Article 3 of the Hague Principles: The Final Breakthrough for the Choice of Non-state Law?*, (2017) 22 *Unif.L.Rev.* 369–394; *Brooke A. Marshall*, *The Hague Choice of Law Principles: A Hard Look at a Choice of Soft Law*, 66 *Am.J.Comp.L.* 175–217 (2018).

argue in favour of non-state law because it enhances principles of party autonomy.<sup>117</sup> If the parties can choose a neutral law to govern their contract, then they should also be able to choose non-state law. Neels and Fredericks submit that:

“The advantage would be that the parties are allowed to directly choose industry- or transaction-specific rules, which might better serve the commercial needs of the parties, and offer them a balanced contractual relationship. The requirements for incorporation by reference and the mandatory rules of the objective proper law of the contract will no longer be applicable.”<sup>118</sup>

Similarly, other African scholars argue that non-state law “allow[s] parties to select legal rules that comply with the level of specificity they need for their particular contract”.<sup>119</sup> This can render the commercial contract more effective by insulating it from the risk of a law that is hostile to the transaction. Article 4 of the African Principles significantly supports this line of thought.

The principal arguments against non-state law challenge its legitimacy and authority to govern international contracts compared with the law of a country or state. Non-state law might not protect weaker parties; moreover, it may be difficult to identify its precise content, leading to uncertainty. By way of global comparison, this could explain why Article 3 and Recital 13 of Rome I<sup>120</sup> as well as Article 575(1) of the OHADA Preliminary Draft exclude the direct choice of non-state law but permit its incorporation by reference, especially to interpret contractual terms. Likewise, the Hague Sales Convention of 1955 (Article 2) and the Hague Sales Convention of 1986 (Article 7 read in conjunction with Article 1) make no provision for the choice of non-state law. Similarly, Article 7 of the Mexico City Convention fails to offer explicit guidance in this regard; it merely states that the contract shall be governed by “the law” chosen by the parties. However, according to Juenger<sup>121</sup> and to other jurists in Latin America,<sup>122</sup> the drafters of the Mexico City Convention clearly intended parties to be able to choose non-state law to govern their contract, as Ar-

117 *Jan L. Neels/Eesa Fredericks*, Revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): Perspectives from International Commercial and Financial Law, *Revue Européenne de Droit Bancaire et Financier* 2004, 173–179, 176; *idem*, The Proper Law of a Documentary Letter of Credit (Part 1), (2003) 15 *SAMLJ* 63–73, 64–66.

118 *Neels/Fredericks*, The African Principles of Commercial PIL (n. 3) para 8.07.

119 *Faadhil Adams/Thalia Kruger*, Private International Law and Choice of Law Clauses, in: *Hutchison/Myburgh*, Research Handbook on International Commercial Contracts (2020) 110–131, 120–122, 130–131.

120 See generally *McParland*, Rome I Regulation (n. 35) at no. 4.32–4.93; *Plender/Wilderspin*, European PIL of Obligations (n. 35) at no. 6-008–6-012; *Peter Mankowski*, Article 3: Freedom of Choice, in: *Magnus/Mankowski*, European Commentaries on Private International Law, vol. II: Rome I Regulation (2017) at 185–209; *Collins/Harris*, Conflict of Laws (n. 58) at no. 32-075 – 32-081.

121 *Friedrich K. Juenger*, The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons, 42 *Am.J.Comp.L.* 381–393, 392 (1994).

122 *Moreno Rodriguez*, Organization of American States (n. 24) no. 53.46, citing others.

Article 9 permits courts to apply such law even in the absence of a choice of law by the parties.

On the choice of non-state law, Article 4 of the African Principles provides as follows:

“1. A choice of one or more of the following instruments is recognised on the same level as the choice of the law of a country:

- a. the UNIDROIT Principles of International Commercial Contracts;
- b. treaty, as defined in the United Nations Convention on the Law of Treaties;
- c. the Uniform Customs and Practice for Documentary Credits;
- d. any instrument issued under the auspices of a regional economic integration organisation or an intergovernmental organisation.

2. If the parties choose an instrument in terms of paragraph (1)(b), (c) or (d), the UNIDROIT Principles of International Commercial Contracts may be used in its interpretation and supplementation.

3. If the parties choose the general principles of law, the *lex mercatoria*, international commercial law or the like to govern their contract, the following instruments may be applied, where relevant –

- a. the UNIDROIT Principles of International Commercial Contracts
- b. the United Nations Convention on the International Sale of Goods, as interpreted and supplemented by the UNIDROIT Principles of International Commercial Contracts;
- c. the Uniform Customs and Practice for Documentary Credits.

4. The law applicable to the contract in terms of this instrument determines whether the parties may incorporate by reference any set of rules or standard terms not listed in paragraph (1).”

Article 2 of the Congolese Preliminary Draft contains a provision similar to Article 4 of the African Principles. To an extent, Article 4 of the African Principles echoes the earlier position of a Kenyan judge (Nyamu J) who held, *obiter*, that the parties may choose “transactional law including general principles of law, international development law, the *lex mercatoria*, codified terms and practices and trade usages”.<sup>123</sup> Many African countries permit the choice of non-state law in commercial arbitration proceedings, which is the position under OHADA<sup>124</sup> as well as in Egypt,<sup>125</sup> Ethiopia,<sup>126</sup> Mauritius,<sup>127</sup>

<sup>123</sup> *Nedermar Technology BV Ltd v. Kenya Anti-corruption Commission*, [2008] Kenya Law Reports 476, 499.

<sup>124</sup> Article 15(1) of the Uniform Act on Arbitration Law of 2017.

<sup>125</sup> Article 39 of the Egyptian Arbitration Code no. 27/1994, cited in: *Yehya I. Badr*, Egypt: Egyptian Perspectives on the Hague Principles, in: Girsberger/Graziano/Neels (n. 3) no. 13.29.

<sup>126</sup> Article 3325(1) of the Civil Code of 1960, cited in: *Gebremeskel*, Ethiopia (n. 14) no. 14.19.

<sup>127</sup> Section 32(1) of the International Arbitration Act of 2008, cited in: *Robin Cupido*, Mauritius: Mauritian Perspectives on the Hague Principles, in: Girsberger/Graziano/Neels (n. 3) no. 15.15.

Morocco,<sup>128</sup> and Nigeria.<sup>129</sup> However, unlike Article 4 of the African Principles, the above-mentioned African laws do not qualify the types of non-state law that may be relied on in arbitration proceedings. But conversely, Article 4 of the African Principles is not restricted to arbitration proceedings. Also, many South African scholars<sup>130</sup> have previously advocated for the South African courts to permit the choice of a well-known, developed non-state law like the CISG<sup>131</sup> or the UCP.<sup>132</sup>

In this light, Article 4 of the African Principles may be regarded as an improvement on the approach other legal systems have adopted, wherein the parties can only choose the law of a state or country to govern their contract, while non-state law can only be incorporated into a contract to interpret its terms.<sup>133</sup> On the applicability of the International Chamber of Commerce (ICC) Uniform Customs and Practice for Documentary Credits (UCP) as a choice of law for international commercial contracts, the Nigerian Supreme Court held that

“until a convention acquires the force of law by incorporation into the body of laws of this country or is shown to be a custom or usage which has regularly been recognised and upheld by the superior courts in Nigeria as to acquire general acceptance, a party in a civil suit wishing to rely on it must prove its existence, and the fact that the parties have agreed to their contract to let such convention or custom or protocol govern their relationship. A party relying on terms of an international convention must show proof that Nigeria has subscribed to such convention.”<sup>134</sup>

The Nigerian position is similar to what is applied in other African countries like Egypt,<sup>135</sup> Congo,<sup>136</sup> and Mauritius<sup>137</sup>, where the choice of non-state law for commercial contracts is not permitted in judicial proceedings. Conversely, in countries like

**128** Articles 327–344 of the Civil Procedure Code, cited in: *Zaher*, Morocco (n. 15) no. 16.18.

**129** Article 15(1) of the Arbitration and Mediation Act of 2023.

**130** *Neels/Fredericks*, Revision of the Rome Convention (n. 117); *idem*, The Proper Law of a Documentary Letter of Credit (n. 117); *Marlene Wethmar-Lemmer*, When Could a South African Court be Expected to Apply the United Nations Convention on Contracts for the International Sale of Goods (CISG)?, (2008) 41 De Jure 419–429, 421–424; *idem*, The Impact of the Article 95 Reservation on the Sphere of Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG), (2010) 46 De Jure 362–379, 378–379; *Faadhil Adams*, The UCP as a Choice of Non-State Law in International Commercial Contracts, (2022) 25(1) Potchefstroom Electronic Law Journal (PELJ) 1–26.

**131** United Nations Convention on Contracts for the International Sale of Goods.

**132** Uniform Customs and Practice for Documentary Credits.

**133** See generally *Daniel Girsberger/Thomas Kadner Graziano/Jan L. Neels*, General Comparative Report: Global Perspectives on the Hague Principles, in: *Girsberger/Graziano/Neels* (n. 3) no. 1.169–1.215.

**134** *Eagle Super Pack (Nig) Ltd v. African Continental Bank Plc* (2006) 19 NWLR (Pt 1013) 21, 47.

**135** Egyptian Court of Cassation, Case no. 615/72 of 27 March 2009 and Case no. 621/79 of 25 June 2009; cited in: *Badr*, Egypt (n. 125) no. 13.28.

**136** *Monsenepwo*, Democratic Republic of the Congo (n. 38), no. 12.14.

**137** *Cupido*, Mauritius (n. 127) no. 15.22 and 15.33.

Angola<sup>138</sup> and Mozambique,<sup>139</sup> there is no clear guidance on the permissibility of non-state law to govern international commercial contracts in judicial proceedings.

Nevertheless, the decision of the Nigerian Supreme Court<sup>140</sup> directly conflicts with Moroccan judicial decisions, wherein it has been held that “with regard to the ICC’s Uniform Customs and Practice for Documentary Credits (the UCP), the situation is different: the rules of the UCP in Morocco have the status of usage since their application is admitted by the majority of Moroccan banks”.<sup>141</sup> The Nigerian Supreme Court decision also conflicts with South African judicial decisions that “seem to accept a choice of the Uniform Customs and Practice for Documentary Credits on the same level as a choice of law, as they do not refer to the requirements of incorporation by reference in terms of the proper law of the relevant contract”.<sup>142</sup> In addition, the Nigerian Supreme Court’s decision conflicts with the position in the Tunisian courts, which allow the choice of the UCP to govern international commercial contracts.<sup>143</sup> In other words, unlike the Nigerian courts, the Moroccan, Tunisian and South African courts apply the UCP as non-state law.

The Hague Principles comprise the first international instrument that permits parties to choose non-state law to govern their international contracts in any adjudication. Article 3 of the Hague Principles provides that “[t]he 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”. In Part 6 of the OAS Guide, Latin America adopts the same position as Article 3 of the Hague Principles. Similarly, Article 3.4 of the Asian Principles echoes the Hague Principles by stating that non-state law chosen by the parties is generally accepted on an international, supranational, or regional level. However, unlike Article 3 of the Hague Principles, Article 3.4 of the Asian Principles of International Law of 2018 does not require that the chosen rules be neutral or balanced.<sup>144</sup>

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138 *Dias/Nordmeier*, Angola and Mozambique (n. 16) no. 10.18.

139 *Dias/Nordmeier*, Angola and Mozambique (n. 16) no. 10.18.

140 Above n. 134.

141 *Zaher*, Morocco (n. 15) no. 16.17, citing (at fn.18): Moroccan Supreme Court, Judgment of 22 April 1992, no. 090/01/92, in: *Arrêts de la Cour de cassation en matière commerciale 1970–1997* (1997) 111 (in Arabic); Judgment of 13 November 1996, no. 6752, [1992] 46 *Revue jurisprudence de la Cour suprême* 134. Also citing *Casablanca Commercial Court of Appeal*, Judgment of 9 January 2007, no. 92/2007 (unpublished) and the *Casablanca Commercial Tribunal Order* of 8 June 2015, no. 2159 (unpublished).

142 *Loomcraft Fabrics CC v. Nedbank Ltd*, 1996 (1) SA 812 (SCA); *Casey v. Firstrand Bank Ltd*, 2014 (2) SA 374 (SCA), cited in: *Jan L. Neels*, South Africa: South African Perspectives on the Hague Principles, in: *Girsberger / Graziano / Neels* (n. 3) no. 17.13.

143 CA Tunis no. 48119 of 9 April 2001, RTD (2005) 441; TSC no. 2692 of 15 November 2006, cited in: *Elbalti*, Tunisia (n. 21) no. 18.24 fn. 71 and 73.

144 *Takasugi/Elbalti* (n. 25), no. 19.15.

Article 4 of the African Principles improves on the approach of the Hague Principles in two ways. First, it clearly specifies the kind of instruments that parties can choose as non-state law. Second, it does not allow forum law to decide if the parties can choose non-state law, as Article 3 of the Hague Principles does. However, a counterargument for the utility of Article 4 of the African Principles is that it restricts the type of non-state law the parties can choose. This approach may be difficult to justify when compared with Article 3 of the Hague Principles.

Moreover, customary law and Islamic law are not on the list of non-state laws the parties can choose, which is surprising for an African instrument, given the importance of both bodies of law in the African context. The implication is that if Article 4 of the African Principles is endorsed in Africa, numerous African courts will likely hold that the parties cannot choose Islamic and/or customary law to govern their international commercial contracts. Conversely, a Kenyan judge, (Nyamu J) in an *obiter dictum* rightly included Islamic law and customary law as examples of laws the parties can choose in their contractual relations.<sup>145</sup>

Thus, it is recommended that the customary law of one or more African countries, as well as Islamic law, be added to this list, given the important role of customary and Islamic law in some contractual obligations in African countries. For example, customary arbitration governed by the customary law of African countries like Nigeria and Ghana is still significant in conflict of laws disputes.<sup>146</sup> Islamic law is also significant in international commercial transactions in finance and banking among numerous African countries.<sup>147</sup>

## VI. Applicable law in the absence of choice

Parties may fail to specify a choice of law for their contract out of ignorance or inexperience, or be unable to agree on the governing law, or the law they have chosen may be invalid. This is likely to be common in the African context, where knowledge of the conflict of laws is limited among legal professionals since the subject is rarely offered as an elective in law schools.<sup>148</sup>

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<sup>145</sup> *Nedermar Technology BV Ltd v. Kenya Anti-corruption* (n. 123).

<sup>146</sup> *Enyinna S. Nwauche*, State Response to Outcomes of Traditional Justice Resolution Mechanisms in Commonwealth Africa: Customary Arbitration in Nigeria and Ghana, (2022) 4 *Journal of Commonwealth Law* 73–105. See also *Eghosa O. Ekhaton / Newman U. Richards*, The Continuing Relevance of Customary Arbitration in Nigeria: Critical Evaluation of Contemporary Developments, (2024) 32 *African Journal of International and Comparative Law* 165–184; and Ghana, Alternative Dispute Resolution Act of 2010 (Act 798) ss. 89–113.

<sup>147</sup> *Faadhil Adams*, Choice of Islamic Law in the Context of the Wider *Lex Mercatoria*: An Express Choice of Non-State Law in Contract, (2021) *JSAL* 59–74; *Mmaphuti D. Tuba*, *Lodhi 5 Properties Investments CC v FirstRand Bank Limited* [2015] 3 All SA 32 (SCA) and the Enforcement of Islamic Banking Law in South Africa, (2017) 20 *PELJ* 1–29.

<sup>148</sup> *Abubakri Yekini / Chukwuma S.A. Okoli*, Private International Law and Teaching Metho-

The determination of the applicable law in the absence of choice is of considerable significance. Globally, different approaches exist, ranging from those that emphasise certainty on one end to those that emphasise flexibility on the other.<sup>149</sup> Certain rules can lead to predictability and uniformity, but they may be rigid and result in injustice. Meanwhile, flexible rules can lead to justice in individual cases but result in uncertainty and a lack of uniformity. A perennial problem has been how to reconcile these conflicting goals effectively. In Africa, the approach to determining the applicable law in the absence of choice varies a great deal from state to state.

In Tunisia, only the domicile of the party required to undertake the characteristic performance is used to determine the applicable law in the absence of choice in commercial contracts,<sup>150</sup> which is similar to the European Commission's proposal for revising the Rome Convention to alleviate the uncertainty generated by the escape clause on the closer connection in Article 4(5).<sup>151</sup> However, several European scholars rightly attacked this proposal for its inflexibility and inattention to commercial realities.<sup>152</sup> For example, back-to-back commercial contracts like letters of credit do not usually have a governing-law clause, because they are concluded in a hurry in cross-border transactions.<sup>153</sup> Moreover, a letter of credit contract "is not susceptible of such treatment"<sup>154</sup> of the blanket presumption of the doctrine of characteristic performance, because it "is the source of a number of autonomous bilateral contracts arising successively between the parties and/or banks involved, each of which, considered separately, has a separate characteristic performance".<sup>155</sup> Interestingly, Tunisia has now proposed a choice of law rule that provides for some exceptions, similar to Article 4 of Rome I.<sup>156</sup>

Generally, in the absence of a choice of law for a commercial contract, the law of the common habitual residence (or common domicile) of the parties is the deter-

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dology: A Nigerian Perspective, in: *Research Methods in Private International Law – A Handbook on Regulation, Research and Teaching*, ed. by Xandra Kramer / Laura Carballo Piñeiro (2024) 313–335.

149 See generally *Symeon C. Symeonides*, *Codifying Choice of Law Around the World: An International Comparative Analysis* (2014) at Chapter 4.

150 Article 62 of the Code of Private International Law, cited in: *Elbalti*, Tunisia (n. 21) no. 18.62.

151 Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), 15 December 2005, COM(2005) 650 final, 6.

152 *Paul Lagarde*, *Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)*, *Revue Critique de Droit International Privé* (Rev.crit. DIP) 95 (2006) 331–349, 338; *Stuart Dutson*, *A Dangerous Proposal: The European Commission's Attempt to Amend the law Applicable to Contractual Obligations*, (2006) *Journal of Business Law* 608–618, 610–614.

153 *Dutson*, *A Dangerous Proposal* (n. 152) 610–614.

154 *Marconi Communications International v. PT Pan Indonesia Bank Ltd*, [2005] EWCA 422 at [61].

155 *Marconi Communications International v. PT Pan Indonesia Bank Ltd* (n. 154) at [61].

156 Article 62 of the Tunisian Preliminary Draft, cited in: *Elbalti*, Tunisia (n. 21) no. 18.65.

mining factor in Egypt,<sup>157</sup> Morocco,<sup>158</sup> Angola and Mozambique.<sup>159</sup> For all other commercial contracts, the *lex loci contractus* applies. In Egypt,

“the contract is deemed to be concluded in the country where the parties met in person. If the parties did not meet physically, and the contract was concluded by the exchange of correspondence between them, the contract shall be deemed to be concluded at the place where the offeror becomes aware of the acceptance of his offer.”<sup>160</sup>

Morocco goes one step further by requiring the common nationality of the parties to apply if there is no common habitual place of residence. The difference between the Moroccan approach and that of Egypt, Angola, and Mozambique is that a three-stage test is applied in Morocco to determine the applicable law in the absence of choice, according to the following hierarchy: common domicile, common nationality, and *lex loci contractus*. In contrast, Angola, Mozambique and Egypt only apply a two-stage test: common domicile (or common habitual residence) and *lex loci contractus*. By way of comparison, in determining the applicable law in the absence of choice, the extant law of the Democratic Republic of the Congo applies the *lex loci contractus* as a general rule to contractual obligations.<sup>161</sup>

However, the approach in Angola, Mozambique, Egypt and Morocco is consistent with certainty and with the rule of closest connection where the parties have a common habitual residence (or common domicile) or common nationality. The critique of this approach is that it does not provide for any exceptions, such as where other connections in the commercial contract substantially point to another country. In addition, the residual rule of the place of contracting is an unsuitable connecting factor, because the place of contracting has limited practical significance in modern commercial transactions. For technological and commercial reasons, it has also been held that the place of contracting is of less importance because it is “essentially a matter of business convenience, and not a contractual connection.”<sup>162</sup> In other words, the place of contracting could simply be fortuitous, a matter of chance rather than one that holds any importance for the commercial transaction in question.<sup>163</sup>

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157 Article 19 of the Egyptian Civil Code of 1948, cited in: *Badr*, Egypt (n. 125), no. 13.51.

158 Article 13(2) of the Dahir of 12 August 1913 on the civil status of foreigners in Morocco, cited in: *Zaher*, Morocco (n. 15) no. 16.50.

159 Article 42(1) and (2) of the Angolan and Mozambican Civil Code of 1968, cited in: *Dias/Nordmeier*, Angola and Mozambique (n. 16) no. 10.36.

160 Article 97(1) of the Egyptian Civil Code of 1948, cited in: *Badr*, Egypt (n. 125) no. 13.52.

161 Article 11(2) of Title II of the Civil Code Book, cited in: *Monsenepwo*, Democratic Republic of the Congo (n. 38) no. 12.37.

162 *Marconi Communications International v. PT Pan Indonesia Bank Ltd* (n. 154) at [62].

163 “The fact that seven of the contracts were made in London is accounted for by the fact that it was in London that Mr Mirchandani usually met Mr Somaia but that does not make the resulting contracts more closely connected with England. The meeting might just as well have taken place in Dubai, the US or Mauritius.” – *Mirchandani and Others v. Ketan Somaia and Others*, 2001 WL 239782 Chancery Division at [25].

These days, contracting can take place on a flight, on the high seas, or even in Antarctica. The place of contracting could also be difficult to identify if contracting takes place in different countries,<sup>164</sup> thereby leading to uncertainty.

In common-law African countries<sup>165</sup> and in others like South Africa,<sup>166</sup> eSwatini,<sup>167</sup> and Seychelles,<sup>168</sup> and the countries of Francophone sub-Saharan Africa that follow the traditional French approach,<sup>169</sup> if the parties have not made a choice of law for their commercial contract, the proper law shall be the law of the place with which the contract has its closest connection. Ethiopia<sup>170</sup> and Mauritius<sup>171</sup> currently have draft laws that mirror this position. The courts in common-law African countries, South Africa, eSwatini, and Seychelles have emphasised the objective, highly factual nature of their enquiries into the applicable law in the absence of choice.

All factors demonstrating a connection between the transaction and the parties within a particular system of law have been held to be relevant. These include the place of performance, the place where the contract was made or concluded, the currency and place of payment, the place where the parties reside, the language of negotiation and of the contract, the nature and purpose of the transaction, the presence of a choice of forum clause, the agreed place of arbitration, the use of particular forms of agreement, and references to national legislation in the contract. However, the decisions evidently give very considerable weight to the place of performance.

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164 *Apple Corps Limited v. Apple Computers Incorporated*, [2004] EWHC 768 (Ch) at [49], [56]–[64].

165 See *Ackerman v. Société Générale de Compensation*, [1967] Ghana Law Reports (GLR) 212; *Godka Group of Companies v. PS International Ltd*, [1999–2000] 1 GLR 409; *Fattal v. Fattal*, [1999–2000] 1 GLR 331; *Sysben Shadrawy v. Nana Boatemaa Owusu*, CA/No H1/332/2005 (Court of Appeal, Ghana, 2006); *Karachi Gas Co Ltd v. Issaq*, [1965] EA 42; *M.G Radia v. Transocean (Uganda) Ltd*, [1975] eKLR; *Roberta Macclendon Fonville v. James Otis Kelly III & 3 Other*, [2002] eKLR.

166 *Improvair (Cape) (Pty) Ltd v. Establissemments NEU*, 1983 (2) SA 138 (C) at 145FH; *Ex Parte Spinazze*, 1985 (3) SA 650, 665; *Society of Lloyd's v. Romahn*, 2006 (4) SA 23 (C) at [82]; *Society of Lloyd's v. Price*, *Society of Lloyd's v. Lee*, 2006 (5) SA 393 (SCA) at [28]; *Ziphakamise Capitol Caterers (Pty) Ltd v. Wolmarans* (J537/04), [2008] ZALC 82 (20 June 2008) at [38] and [40]; *Lass v. Lubamba and Another* (60923/16), [2019] North Gauteng High Court Pretoria (ZAGPPHC) 307 (17 July 2019) at [40]; *Weissensee v. Stone-Bird Investments (PTY) Ltd and Others* (2020/19821), [2022] 4 All South African Law Reports (All SA) 905 (GJ) at [53]–[57].

167 *USA Distillers (Propriety) Ltd v. Umcebo* (89/2017), [2018] Supreme Court of eSwatini (SZSC) 28 at [36].

168 *Lukas Raida v. Montego Bay Financial Limited* (n. 66) at [19]; *Biancardi v. Tabberer Travel Agency Ltd* (1975) Seychelles Law Reports (SLR) 9 (Sauzier J).

169 As in Paris Court of Appeal 27 January 1955, Rev.crit. DIP 44 (1955) 330 (*Soc. Jansen v. Soc. Heurtey*).

170 Article 73 of the FDRE Draft, cited in: *Gebremeskel*, Ethiopia (n. 14) no. 14.45 fn. 58.

171 Article 232 of Law Reform Commission of Mauritius, cited in: *Cupido*, Mauritius (n. 127) no. 15.55.

This approach of closest connection is highly flexible and provides a better basis for identifying the country with closest proximity to the contract. However, the critique of this approach is that it can lead to uncertainty, because parties might not be able to predict the law that will govern their commercial contract easily without using fixed guides or presumptions. In addition, although common-law courts give considerable weight to the place of performance, there is no clear definition of the type of obligation referred to, nor is there guidance on how the courts should address situations where contractual performance takes place in more than one country.

Interestingly, some South African judges have taken the approach that “the *lex loci contractus* (the law of the place where the contract was concluded) governs the contract unless the contract is to be performed elsewhere in which case the *lex loci solutionis* (the law of the place where performance takes place) applies.”<sup>172</sup> This idea was originally advocated by the American scholar Joseph Story in the 19<sup>th</sup> century<sup>173</sup> and was influential in the 19<sup>th</sup> and early 20<sup>th</sup> centuries in English-speaking countries. Ultimately, this rule can be seen as a combination of both the *lex loci contractus* and *lex loci solutionis* principles, but it leans towards being a *lex loci solutionis* rule. This is because it defaults to the law of the place where the contract was concluded (*lex loci contractus*) but ultimately defers to the law of the place of performance (*lex loci solutionis*) if the contract specifies a different location for performance. However, South African<sup>174</sup> judges and eSwatini supreme court justices<sup>175</sup> in recent cases have confirmed that this rule originally advocated by Story is no longer the prevailing position in English-speaking southern Africa. Therefore, we do not recommend this approach for African judges and legislators to adopt.<sup>176</sup>

Unlike the Hague Principles, the Asian Principles or the OAS Guide, the African Principles deal with the applicable law in the absence of choice. This is commendable, given the frequency of the issue and (as discussed above) the lack of uniformity in approaches on the African continent. In this regard, the approach under the African Principles is similar to those of the Tunisian Preliminary Draft (Article 62),<sup>177</sup> the OHADA Preliminary Draft (Article 576), the Congolese Preliminary Draft (Article 3), the OHADAC Draft (Article 46) and Article 4 of Rome I.<sup>178</sup> Specifically, Article 6 of the African Principles provides that:

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<sup>172</sup> *Standard Bank of South Africa Limited v. Efroiken and Newman*, 1924 Appellate Division Reports (AD) 171 at 185; *Guggenheim v. Rosenbaum*, 1961 (4) SA 21 at 31AB; *Maschinen Frommer GMBH & co kg v. Trisave Engineering & Machinery Supplies (PTY) limited* (415/02), [2003] 1 All SA 453 (C) (10 October 2002).

<sup>173</sup> *Joseph Story*, Commentaries on the Conflict of Laws, Foreign and Domestic (1834) no. 283.

<sup>174</sup> *Lass v. Lubamba and another* (n. 166) at [38]–[40].

<sup>175</sup> *USA Distillers (Propriety) Ltd v. Umcebo* (n. 167) at [29]–[36].

<sup>176</sup> See also the comments accompanying fn. 89.

<sup>177</sup> Cited in: *Elbalti*, Tunisia (n. 21) no. 18.65.

<sup>178</sup> See generally *McParland*, Rome I Regulation (n. 35) at Chapter 10; *Plender/Wilderspin*,

“1. To the extent that the law applicable to the contract has not been chosen by the parties, the law governing the contract is to be determined as follows:

a. a contract for the sale of goods is governed by the law of the country of the habitual residence of the seller;

b. a contract for the provision of services is governed by the law of the country of the habitual residence of the service provider;

c. a contract relating to a right in rem in immovable property or to a tenancy of immovable property is governed by the law of the country where the property is situated;

d. a franchise contract is governed by the law of the country of the habitual residence of the franchisee;

e. a distribution contract is governed by the law of the country of the habitual residence of the distributor;

f. a contract for the sale of goods by auction or on a stock exchange is governed by the law of the country where the auction takes place or the law of the country where the stock exchange is situated.

2. Where the contract is not covered by paragraph (1) or where the elements of the contract would be covered by more than one of points (a) to (f) of paragraph (1), the contract is governed by the law of the country of the habitual residence of the party required to effect the performance which is most characteristic of the contract.

3. 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 in paragraphs (1) or (2), the contract is governed by the law of that other country.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract is governed by the law of the country with which it is most closely connected.”

The advantage of the African Principles is the preference for legal certainty and predictability in determining the applicable law in the absence of choice. This is likely to lead to a uniform approach in courts across Africa if the African Principles are applied. Via an escape or exception clause in Article 6(3), it also offers a minimum degree of flexibility to identify the country with the manifestly closer connection to the commercial contract. Some (but not all) of the important factors that may be considered in interpreting Article 6(3) are the object of the contract, the place of performance,<sup>179</sup> and application of a single law to very closely related contracts.<sup>180</sup>

Conversely, one of the main criticisms of the African Principles is that they principally utilise the habitual residence of the characteristic performer to determine the

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European PIL of Obligations (n. 35) at Chapter 7; *Ulrich Magnus*, Article 4: Applicable Law in the Absence of Choice, in: *Magnus/Mankowski*, *European Commentaries on Private International Law*, vol. II: Rome I Regulation (2017) at 263–440; *Collins/Harris*, *Conflict of Laws* (n. 58) at no. 32-114–32-132.

179 See generally *Chukwuma S.A. Okoli*, *Place of Performance: A Comparative Analysis* (2020).

180 See generally *Chukwuma S.A. Okoli*, *The Significance of the Doctrine of Accessory Allocation as a Connecting Factor under Article 4 of Rome I Regulation*, (2013) 9 *Journal of Private International Law* 449–497.

applicable law in the absence of choice for commercial contracts under Article 6(1) and (2). This provision is evaluated below, whereby it is suggested that the principal connecting factor should be the law of the place where the characteristic obligation is mainly performed, and not the habitual residence of the person performing it.

## VII. Habitual residence of the characteristic performer rule

The doctrine of the habitual residence of the characteristic performer is historically a Swiss doctrine.<sup>181</sup> This principle developed due to the problems of applying the law of the place of performance, which was especially problematic in the courts of Germany and Switzerland due to the difficulty of classifying the obligations in a contract.<sup>182</sup> For example, a simple contract could contain an obligation for payment and sale, making it difficult to state which of these obligations governed the contract. If both laws were applied, a contradictory result might occur. Another problem was that the place of performance could be in different countries.

Thus, the habitual residence of the characteristic performer was intended to introduce more certainty by allocating the legal relationship to the obligation of the person doing the job that gives the contract its name, both under the contract and through that person's habitual residence. For example, the purpose of a loan agreement is lending, and so it is the lender who gives the contract its name. Therefore, the law of the lender's habitual place of residence is applied. Apart from simplicity, this doctrine has also been promoted to advance the triumph of the law of the true professional.<sup>183</sup> The professional/characteristic performer is regarded as the person performing the complex work of the contract. Consequently, it is the law of the professional that should be uniformly applied to clients in several countries, so that there is no language barrier or dislocation of the commercial transaction through the application of multiple laws. It is arguable that this leads to economic efficiency and reduced transaction costs.<sup>184</sup>

Irrespective of these efforts, there are numerous criticisms of the doctrine of the habitual residence of the characteristic performer as applied in the African context. First, numerous common-law African countries have yet to adopt it in their jurisprudence, and so it would need to be clearly defined in the African context. Only a

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**181** See generally *Adolf F. Schnitzer*, *Handbuch des Internationalen Privatrechts*<sup>2</sup>, vol. II (1944) 514–517; *Hans Ulrich Jessurun d'Oliveira*, "Characteristic Obligation" in the Draft EEC Obligation Convention, 25 *Am.J.Comp.L* 303–331 (1977).

**182** *Okoli*, *Place of Performance* (n. 179) at Chapter 2.

**183** *Ole Lando*, *The Proper Law of the Contract*, (1964) 8 *Scandinavian Studies in Law* 105–201, 177–178; *Anthony J.E. Jaffey*, *The English Proper Law Doctrine and the EEC Convention*, (1984) 22 *ICLQ* 531–557, 541–544; *Peter Mankowski*, *The Principle of Characteristic Performance Visited Yet Again*, in: *Liber Amicorum Kurt Siehr* (2010) 433–462.

**184** See previous footnote.

few civil law African countries (like Tunisia, Angola, Mozambique, and Egypt) have utilised it, some using the term “domicile” interchangeably with “habitual residence”.

Second, it is unlikely that applying the law of the habitual residence of the characteristic performer favours the interests of Africans. Instead, this doctrine favours export-oriented economies, whereas it is evident that numerous African countries are import-oriented. For example, Nigeria’s biggest trading partners are China, the US, Belgium, and the Netherlands, which usually export goods and provide services to Nigeria. In situations where there is no express choice of law between commercial parties, the laws of these export-oriented countries will apply under this doctrine, even where the transaction is to be (or is) essentially performed in Nigeria.

Third, the doctrine is difficult to reconcile with the principle of proximity, which is the driving force of Article 6(3) and (4) in the African Principles and in the current laws of numerous African countries. It is open to debate why, in the absence of a choice of law, a person from England who comes to deliver services in Nigeria should generally have their law applied; in other words, without the corroboration of other connecting factors, the doctrine of the habitual residence of the characteristic performer is very weak. The logic in Article 6 of the draft African Principles is therefore shaky, because it takes the weak connecting factor of the habitual residence of the characteristic performer as its starting point to determine proximity. If the habitual residence of the characteristic performer always coincides with the place in which the obligations are carried out, it will not create much of a problem. However, in many cross-border transactions, the habitual residence of the characteristic performer may not coincide with the place of performance.

Fourth, in a system of conflict rules that should be objective, the doctrine is arbitrary in that it favours the habitual residence of one party over another. Applying the habitual residence of the characteristic performer rule gifts a commercial advantage to one of the commercial parties, since that party will be very familiar with their own law and will be better equipped to dominate the transaction. From a practical perspective, one of the commercial parties will be more capable of managing their transaction costs and will know how to reduce the accompanying risks because they are likely to have their law applied.

Fifth, it is open to question why one commercial party should be given double protection in international commercial contracts. Most of the time, the seller, service provider, and other characteristic performers will dictate what law the parties choose, so why should they be given favourable treatment in the determination of the applicable law in the absence of choice? Moreover, the seller, service provider or other characteristic performer is the relatively stronger party; hence, Article 6 of the draft African Principles supports a form of unbridled capitalism reminiscent of Article 4 of Rome I.

Performance is the most important element of a contract because contracts are geared towards it. This demonstrates that the most important connecting factor in a

commercial contract is the main place where the essential obligation is performed. We therefore recommend that the principal connecting factor under Article 6 of the Draft African Principles should be the main place of characteristic performance.<sup>185</sup> This factor more clearly defines the place of performance and reduces the problem of having more than one law apply to a commercial contract. For instance, the place of characteristic performance is a better connecting factor than the habitual residence of the characteristic performer, because it effectively combines the principles of proximity and certainty. The main place of characteristic performance is also more effective than the common-law rule of the real and most substantial connection because it provides a more useful guide to determining the country of closest connection. Moreover, the characteristic obligation identifies the essential or most important obligation defining the contract. It thereby reduces the problem of classifying what the obligation actually *is*, because without adopting the doctrine of characteristic obligation, there may be more than one obligation in a contract, such as payment, services, or a sale. The doctrine of place of characteristic performance also avoids this problem by identifying a single law – the law of the place where the characteristic obligation is performed. Utilising the *main place* of characteristic obligation is aimed at locating the principal place of performance, especially where performance occurs in several countries.

Moreover, in numerous African countries, the place of performance is assigned considerable significance as a connecting factor in determining the applicable law in the absence of choice. African stakeholders are likely to be offended that a foreign businessperson can have their law applied in transactions that are mainly performed in an African country. This is particularly important from a regulatory perspective and in relation to state interests, where the place of substantial performance plays a central role. Local laws in African states usually have regulatory standards that apply to contracts performed in their country. Therefore, having the rule on the choice of the applicable law coincide as much as possible with the law of the place in which such regulatory standards are imposed (usually the place of performance) is a good thing.

A useful compromise for instances in which the main place of characteristic performance cannot be readily identified would be to resort to the doctrine of the habitual residence of the characteristic performer. This would provide better clarity and certainty. Articles 6(3) and (4) of the African Principles could therefore be retained to ensure some flexibility.

Therefore, our proposal will read as follows:<sup>186</sup>

“1. To the extent that the law applicable to the contract has not been chosen, the law governing the contract shall be determined as follows:

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<sup>185</sup> See generally *Okoli*, Place of Performance (n. 179).

<sup>186</sup> *Okoli*, Place of Performance (n. 179) 233–238.

(a) a contract for the sale of goods shall be governed by the law of the country where the seller mainly delivers the goods. Where the main place of delivery of the goods cannot be identified, the law of the country where the seller has their habitual residence shall apply;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider mainly provides services. Where the main place of provision of services cannot be identified, the law of the country where the service provider has their habitual residence shall apply;

(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has their habitual residence, provided that the tenant is a natural person and has their habitual residence in the same country;

(e) a franchise contract shall be governed by the law of the country or legal system where the franchisee mainly promotes the business of the franchisor. Where the main place the franchisee promotes the business of the franchisor cannot be identified, the law of the country where the franchisee is habitually resident shall apply;

(f) a distribution contract shall be governed by the law of the country where the distributor mainly distributes goods for the grantor or manufacturer. Where the main place where the distributor distributes goods for the grantor or manufacturer cannot be identified, the law of the country where the distributor is habitually resident shall apply;

(g) a contract of letter of credit shall be governed by the law of the country where the seller mainly receives payment against compliant documents;

(h) a contract of intellectual property shall be governed by the law of the country where the intellectual property right is mainly granted. Where the main place where the intellectual property is mainly granted cannot be identified, the law of the country where the right holder has their habitual residence shall apply;

(i) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(j) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, shall be governed by a single applicable law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the characteristic performance is mainly effected. Where the main place of characteristic performance cannot be identified, the law of the country of the habitual residence of the party required to effect the characteristic performance shall apply.

3. 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 in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.”

## VIII. Conclusion

The African Principles represent a laudable project that can facilitate the quest for Africa's socio-economic development. For the purposes of reform, they provide an opportunity to take stock of the extant and proposed choice of law rules in international contracts in numerous African countries. In relying on other choice of law instruments in international commercial contracts as models, one should be mindful of the African context, including the state of development of African private international law. Africa's choice of law rules should harness the advantages of other international and regional/supranational choice of law instruments by selectively replicating their strengths, while simultaneously discarding the aspects of those instruments that represent weaknesses or undermine Africa's interests.

In this article, we have suggested that the scope of the African instrument should not be unduly restricted as other international or regional/supranational instruments are. In particular, the African Principles need to make specific provisions for the protection of weaker parties like consumers and employees. The African Principles must also significantly limit the scope of application of party autonomy in African government contracts. The African Principles should include African customary law and Islamic law as examples of non-state law parties can choose. Finally, we recommend that the African Principles make the main place of performing the characteristic obligation the principal connecting factor for determining the applicable law in the absence of choice.

We call for work on the African Principles to be expedited, including through greater engagement with stakeholders such as national legislators and policymakers, the secretariates of the various regional economic communities, and national chambers of commerce and trade associations. Discussions leading to the finalisation of the African Principles should not be limited to academic corridors and forums. These steps will ensure that, once finalised, the African Principles would be adopted and given the force of law in African countries.