

Tacit Choice of Law in International Commercial Contracts. An Analysis of Future Instruments of Developmental Organisations

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Abstract

This article examines the various regional and supranational organisations of emerging countries that could benefit from a codification of private international law rules. They include the Organisation for the Harmonisation of Business Law in Africa (OHADA), the African Union (AU) and the Association of Southeast Asian Nations (ASEAN). In addition, the article analyses the envisaged instruments that may be especially relevant in the context of the abovementioned organisations. These include the Preliminary Draft Uniform Act on the Law of Obligations in the OHADA Region, the proposed African Principles on the Law Applicable to International Commercial Contracts and the Asian Principles of Private International Law. More specifically, the article focusses on the provisions regarding the determination of the law applicable, particularly those rules relating to a tacit choice of law in international commercial contracts.

Keywords

International commercial law; private international law; choice of law; tacit choice of law; African Union; OHADA; ASEAN; Asian Principles of Private International Law.

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1 Introduction

Regional and supranational organisations, particularly those of emerging countries, must realise how important it is for their members to cooperate and unite to compete in the context of the world's increasingly globalised economy and foreign relations.¹ The harmonisation of aspects of private international law may play a significant part in the integration of the Member States of these organisations in international commerce. In this article the various regional and supranational organisations of emerging countries which could particularly benefit from a codification of private international law rules will be examined. They include the Organisation for the Harmonisation of Business Law in Africa, the African Union and the Association of Southeast Asian Nations. The article also analyses the envisaged instruments that may be especially relevant in the framework of the abovementioned organisations. More specifically, the article focusses on the provisions regarding the determination of the applicable law, particularly those rules relating to a tacit choice of law in international commercial contracts. All relevant issues are examined, including an analysis of the level of strictness for the criterion for a tacit choice of law and the factors that are relied upon. Special attention is given to the role of forum clauses in determining the existence of an implied choice of law since "the relationship between a choice of forum and a tacit choice of law is a contentious issue in private international law."²

Although most legal systems recognise the possibility of a tacit choice of law, the concept remains confusing and is not clearly perceived.³ Most aspects relating to its determination are approached differently, leading to the unpredictability of decisions and legal uncertainty.⁴ The current author believes that the proposed instruments would be a welcome addition in addressing the uncertainties in determining the existence of a tacit choice of law while providing courts and legislators on various levels with guidance regarding this problematic aspect of private international law.

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¹ See Schulz 2019 <https://www.thoughtco.com/african-union-definition-1434325>.

² Bouwers *Tacit Choice of Law in International Commercial Contracts* 6.

³ Bouwers *Tacit Choice of Law in International Commercial Contracts* 5-6. See, generally, Bouwers *Tacit Choice of Law in International Commercial Contracts*.

⁴ See, generally, Bouwers *Tacit Choice of Law in International Commercial Contracts*.

2 The Organisation for the Harmonisation of Business Law in Africa (OHADA)

2.1 Introduction

The *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (the Organisation for the Harmonisation of Business Law in Africa) (OHADA), was established by the *Treaty on the Harmonisation of Business Law in Africa* of 17 October 1993.⁵ OHADA is a supranational organisation, comprising of seventeen Member States.⁶ Its mission is to "harmonize business Law in Africa in order to guarantee legal and judicial security for investors and companies in its Member States."⁷

2.2 Party autonomy

Since its inception OHADA has adopted uniform acts⁸ on wide ranging topics.⁹ In 2015 the *Projet de Texte Uniforme Portant Droit Général des*

⁵ See the history of OHADA at OHADA date unknown <https://www.ohada.org/en/history/>. See, also, Neels 2018 *THRHR* 467: "[T]he treaty was amended by the Treaty to Amend the Treaty for the Harmonization of Business Law in Africa (2008)." (Unofficial translation per www.ohada.org.) See, also, Mouloul *Understanding OHADA* 17-18.

⁶ Member States of OHADA include Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, the Comoros, Congo, Côte d'Ivoire, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo. See OHADA date unknown <https://www.ohada.org/en/history/> for the timeline of ratification and entry into force of the OHADA Treaty in Member States. Also see Neels 2018 *THRHR* 466; Mouloul *Understanding OHADA* 28.

⁷ OHADA date unknown <https://www.ohada.org/en/general-overview/>: "Harmonizing economic laws and improving the functioning of judicial systems in Member States were ... necessary to restore investor confidence, facilitate trade between countries and develop a vibrant private sector." Also see Mouloul *Understanding OHADA* 8-17, 21-22; Neels 2018 *THRHR* 466.

⁸ See Neels 2018 *THRHR* 466-477: "The Council of Ministers, consisting of the ministers of justice and finance of all the member states, may adopt uniform acts by unanimous decision of the member states present and voting ..., which are then directly applicable in member states ... The Permanent Secretariat, the executive body of OHADA (located in Yaoundé, Cameroon), prepares the text of uniform acts for adoption by the Council of Ministers." See, for example, the *Treaty to Amend the Treaty for the Harmonisation of Business Law in Africa* (2008) arts 8 and 10. See, also, the *Treaty to Amend the Treaty for the Harmonisation of Business Law in Africa* (2008) art 20: "Judgments of the Common Court of Justice and Arbitration shall have the force of res judicata and shall be enforceable. On the territory of the States Parties, they shall be enforced under the same conditions as the decisions of national courts. In the same case, no decision inconsistent with the judgment of the Common Court of Justice and Arbitration may be subject to enforcement on the territory of the State Party." Also see Mouloul *Understanding OHADA* 26-28.

⁹ See OHADA date unknown <https://www.ohada.org/en/>. These include the *Uniform Act Organising Simplified Recovery Procedures and Measures of Execution* (1998); the *Uniform Act on Contracts for the Carriage of Goods by Road* (2003); the *Uniform*

Obligations Dans L'espace OHADA (Preliminary Draft Uniform Act on the Law of Obligations in the OHADA Region) was concluded.¹⁰ Title IV of the OHADA Preliminary Draft Uniform Act regulates matters relating to private international law.¹¹ In this regard Chapter 1 of Title IV contains general provisions,¹² while Chapter 2 regulates the law applicable to contractual obligations.¹³ Article 566 of the OHADA Preliminary Draft Uniform Act provides: "This Title applies, in situations involving a conflict of laws, to contractual and non-contractual obligations relating to civil and commercial matters." The OHADA Preliminary Draft Uniform Act is intended to be of universal application. According to article 571, "[t]he law designated by this Title applies even if this law is not that of a State in the OHADA area." Subject to certain limitations¹⁴ the OHADA Preliminary Draft Uniform Act recognises the principle of party autonomy. Article 575 sets out the basic provision on choice of law. Article 575(1) determines that a contract is governed by the law chosen by the parties. According to the third sentence of this article, "the parties may designate the law applicable to the whole or only a part of their contract."¹⁵ Article 575(2) provides maximum freedom to the parties as to the time at which they can make their choice. It also allows the parties to vary the choice of the applicable law previously made, provided that the variation of a choice of law does not prejudice its formal validity under article 583 or adversely affect the rights of third parties.¹⁶ However, it is unclear whether a particular legal system that bears no

Act on Cooperatives (2010); the *Uniform Act Organising Securities* (2011); the *Uniform Act on General Commercial Law* (2011); the *Uniform Law on Commercial Companies and Economic Interest Groupings* (2014); the *Uniform Act on Bankruptcy Proceedings* (2015); the *Uniform Act on Arbitration Law* (2017); the *Uniform Act on Mediation* (2017).

¹⁰ *Projet de Texte Uniforme Portant Droit Général des Obligations Dans L'espace OHADA* (2015) referred to as "the OHADA Preliminary Draft Uniform Act". Also see Neels 2018 *THRHR* 465, 467.

¹¹ OHADA Preliminary Draft Uniform Act Title IV: "Conflict of laws in regard to obligations". See, also, Neels 2018 *THRHR* 467.

¹² Articles 566-574 of the OHADA Preliminary Draft Uniform Act. Also see Neels 2018 *THRHR* 467.

¹³ Articles 575-586 of the OHADA Preliminary Draft Uniform Act. Also see Neels 2018 *THRHR* 467.

¹⁴ The only limitation in art 575 of the OHADA Preliminary Draft Uniform Act (the basic provision on choice of law) is contained in art 575(3), which provides: "When the other elements relevant to the situation are localized, at the time of this choice, in a country other than the country whose law is chosen, the choice of the parties shall not affect the application of the provisions of the law of that country which cannot be derogated from by agreement." See, for example, art 568 (overriding mandatory provisions) and art 569 (public policy of the forum) of the OHADA Preliminary Draft Uniform Act.

¹⁵ See Neels 2018 *THRHR* 468: "This formulation perhaps implies that the parties may choose different laws for different parts of the contract ..."

¹⁶ See art 575(2) of the OHADA Preliminary Draft Uniform Act.

connection to the parties or the contract may be chosen.¹⁷ The OHADA Preliminary Draft Uniform Act is also silent in respect of the choice of a non-State law.¹⁸

Article 575(1) of the OHADA Preliminary Draft Uniform Act provides that the choice of law by the parties "shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case." Therefore the OHADA Preliminary Draft Uniform Act allows for an express choice, as well as a tacit choice of law.¹⁹

2.3 Level of strictness of the criterion for a tacit choice of law

The level of strictness of the criterion under the OHADA Preliminary Draft Uniform Act requires the tacit choice to be "clearly demonstrated".²⁰ Neels²¹ is of the opinion that "[t]he word 'demonstrated' implies a procedural context which is not justified in a conflicts rule." Nevertheless, it appears that the OHADA Preliminary Draft Uniform Act sets a stringent test for an implied choice of law.²²

2.4 Indicators of a tacit choice

The OHADA Preliminary Draft Uniform Act allows a tacit choice to be inferred by "the terms of the contract" or "the circumstances of the case".²³ This means that a court, in deciding whether the parties have made a tacit choice law, is not confined to the written agreement but may take account of considerations surrounding the contract.

The OHADA Preliminary Draft Uniform Act does not provide any examples from which a tacit choice of law may be inferred. Furthermore, there is also

¹⁷ See Neels 2018 *THRHR* 468.

¹⁸ See Neels 2018 *THRHR* 469.

¹⁹ See Neels 2018 *THRHR* 469.

²⁰ Article 575(1) of the OHADA Preliminary Draft Uniform Act: "The contract is governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or circumstances of the case."

²¹ Neels 2018 *THRHR* 469. See Gama 2017 *Unif L Rev* 344. Also see Neels and Fredericks 2011 *De Jure* 106: "It is therefore suggested that the word 'demonstrated' be avoided. One should rather use the phrases 'evident from', 'appear clearly from' or 'manifestly clear from'."

²² Nygh *Autonomy in International Contracts* 110: "[T]he words 'clearly demonstrated' still set a fairly high degree of satisfaction." See Mandery *Party Autonomy* 48-49; Neels and Fredericks 2011 *De Jure* 105.

²³ Article 575(1) of the OHADA Preliminary Draft Uniform Act. Also see Neels 2018 *THRHR* 470.

a lack of clarity in respect of the relationship between a choice of forum and a choice of law.²⁴

3 The African Union

3.1 Introduction

The Organisation of African Unity (OAU) was established on 25 May 1963, on the signature of the OAU Charter by delegates from 32 African countries.²⁵ A further 21 States have gradually joined the ranks of the OAU.²⁶ The primary objectives of the OAU were, *inter alia*, to eradicate the remaining remnants of colonialism from Africa, to promote the unity and solidarity of African States, to promote international cooperation in the framework of the United Nations, and to coordinate and intensify cooperation for the development of African States.²⁷ The OAU achieved some success in this regard, particularly in providing much-needed aid to liberation movements²⁸ and encouraging the development of regional economic communities.²⁹ However, the OAU was not always successful in

²⁴ See Neels 2018 *THRHR* 470.

²⁵ See AU date unknown <https://au.int/en/overview>; AU date unknown <https://au.int/en/au-nutshell>; SAHO 2019 <https://sahistory.org.za/article/african-union-au>; SAHO 2019 <https://sahistory.org.za/-topic/organi-sation-african-unity-oau>. The 32 countries include Algeria, Benin, Burkina Faso, Burundi, Cameroon, the Central African Republic, Chad, Congo, Côte d'Ivoire; Democratic Republic of the Congo, Egypt, Ethiopia, Gabon, Ghana, Guinea, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco (withdrew in 1984, protesting the membership of Western Sahara, but rejoined the African Union in 2017), Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Tunisia and Uganda.

²⁶ See, for example, AU date unknown <https://au.int/en/overview>; SAHO 2019 <https://sahistory.org.za/-topic/organi-sation-african-unity-oau>. The 22 countries (in order of admission) are Kenya, Malawi, Zambia, Gambia, Botswana, Lesotho, Mauritius, Swaziland (officially the Kingdom of Eswatini), Equatorial Guinea, Guinea-Bissau, Angola, Cape Verde, the Comoros, Mozambique, São Tomé and Príncipe, Seychelles, Djibouti, Zimbabwe, Western Sahara (disputed territory), Namibia, Eritria and South Africa.

²⁷ See AU date unknown <https://au.int/en/overview>; AU date unknown <https://au.int/en/au-nutshell>. Also see SAHO 2019 <https://sahistory.org.za/-topic/organi-sation-african-unity-oau>.

²⁸ See Wikipedia 2023 https://en.wikipedia.org/wiki/Organisation_of_African_Unity: "It gave weapons, training and military bases to rebel groups fighting white minority and colonial rule. Groups such as the ANC and PAC, fighting apartheid, and ZANU and ZAPU, fighting to topple the government of Rhodesia, were aided in their endeavours by the OAU." See, generally, AU date unknown <https://au.int/en/au-nutshell>; SAHO 2019 <https://sahistory.org.za/-topic/organi-sation-african-unity-oau>.

²⁹ See SAHO 2019 <https://sahistory.org.za/-topic/organi-sation-african-unity-oau>. These include "the Economic Community of West African States (ECOWAS), the South African Development Coordinating Commission (SADCC) [the forerunner of the Southern African Development Community or SADC], the North Africa-Greater Area Free Trade Area and the Central Africa-Economic Community of the Great

addressing important matters in post-colonial Africa.³⁰ A lack of available resources or capabilities to facilitate cooperation in Africa's economic problems, deficiencies in respect of institutional infrastructure, corruption and political instability were some of the glaring challenges to the *raison d'être* of the OAU.³¹ As a result the OAU was forced to recognise its own ineffectiveness, "not only in terms of facilitating economic development, but also with respect to addressing Africa's continual and seemingly intractable conflicts, for which its own Charter was to blame."³²

In 1999 an Extraordinary Summit of Heads of State and Government of the OAU was held in Sirte, Libya.³³ During the Summit the Sirte Declaration was issued, "calling for the establishment of an African Union, with a view, *inter alia*, to accelerating the process of integration [of] the continent to enable it to play its rightful role in the global economy while addressing multifaceted

Lakes Countries. Eventually, attempts at creating a continental body for economic development led to the establishment of the African Economic Commission through a treaty signed in Abuja, Nigeria in 1991. The Abuja Treaty contained a blueprint for full continental economic integration." For a further discussion of the various initiatives and achievements of the OAU, see AU date unknown <https://au.int/en/au-nutshell>.

³⁰ Exploring Africa date unknown <http://exploringafrica.matrix.msu.edu/?s=african+union&submit=Search>.

³¹ See, generally, SAHO 2019 <https://sahistory.org.za/-topic/organisation-african-unity-oau>. See, also, SAHO 2019 <https://sahistory.org.za/article/african-union-au>. For a further discussion of the failings of the OAU, see Wikipedia 2023 https://en.wikipedia.org/wiki/Organisation_of_African_Unity; Exploring Africa date unknown <http://exploringafrica.matrix.msu.edu/?s=african+union&submit=Search>.

³² SAHO 2019 <https://sahistory.org.za/-topic/organisation-african-unity-oau>: In addition to the many challenges faced by the OAU "was the fact that its deference to state sovereignty affected the Organisation's efficacy in preventing and stemming conflict in its member states. The OAU's impenetrable respect for sovereignty and territorial integrity came at a cost; emerging dictatorships, coups and counter coups exacerbated political instability, and while Haile Selassie, Kwame Nkrumah, Abubakar Balewa and Sekou Toure – former founding fathers of the OAU – were overthrown (and murdered, in the case of Selassie), the OAU sat back and folded its hands." See Exploring Africa date unknown <http://exploringafrica.matrix.msu.edu/?s=african+union&submit=Search>: the OAU Charter established principles that impeded the prospect of unity. For example, the principle of the inviolability of inherited boundaries and the principle of non-interference in domestic affairs placed great obstacles to the idea of unity and Pan Africanism. Also see AU date unknown <https://au.int/en/au-nutshell>; SAHO 2019 <https://sahistory.org.za/-topic/organisation-african-unity-oau>. Since the inception of the OAU in 1963 one of its most important goals was the eradication of all colonial powers on the continent. However, by the mid-1990s, "the majority of the African states had shed their colonial administrations ... [T]he factors binding African states against a common external enemy were no longer present ..."

³³ See AU date unknown <https://au.int/en/au-nutshell>; SAHO 2019 <https://sahistory.org.za/-topic/organisation-african-unity-oau>; AU date unknown <https://au.int/en/overview>.

social, economic and political problems."³⁴ The AU was officially established in 2002 by the Member States of the former OAU, with more comprehensive powers to promote African economic, social and political integration.³⁵

The objectives of the AU are contained in article 3 of its Constitutive Act.³⁶ The AU *inter alia* aims to achieve greater unity and solidarity among African countries; to accelerate the political and socio-economic integration of the continent; to promote and defend African common positions on issues of interest; to establish the necessary conditions that enable the continent to participate in the global economy; and to promote sustainable development at the economic, social and cultural levels, as well as the integration of African economies.³⁷ Agenda 2063 further emphasises the AU's vision for the continent:

[Agenda 2063] is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development... [Its priorities include] social and economic development, continental and regional integration, democratic governance and peace and security amongst other issues aimed at repositioning Africa to becoming a dominant player in the global arena.³⁸

Against the backdrop of the AU's stated objectives, it is argued that:

[t]he existence of a reliable transnational legal infrastructure in respect of international commercial law, including commercial private international law,

³⁴ AU date unknown <https://au.int/en/au-nutshell>. See AU date unknown <https://au.int/en/overview>; SAHO 2019 <https://sahistory.org.za/-topic/organisation-african-unity-oau>.

³⁵ Infoplease 2023 <https://www.infoplease.com/encyclopedia/social-science/government/intl-orgs/african-union>. Also see AU date unknown <https://au.int/en/au-nutshell>; SAHO 2019 <https://sahistory.org.za/-topic/organisation-african-unity-oau>; SAHO 2019 <https://sahistory.org.za/article/african-union-au>.

³⁶ The *Constitutive Act of the African Union* (2000) refers to the fact that it was "inspired by the noble ideals which guided the founding fathers ... and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States."

³⁷ See the *Constitutive Act of the African Union* (2000) art 3. Also see AU date unknown <https://au.int/en/au-nutshell>; AU date unknown <https://au.int/en/overview>; SAHO 2019 <https://sahistory.org.za/-topic/organisation-african-unity-oau>: "Established as a means to correct the flaws in its predecessor, the AU has reconsidered its objectives to reflect the concerns of postcolonial Africa. Among those concerns was the imperative to counter low economic growth brought about by over-reliance on neocolonial trade with America and Europe through establishing intra-continental trade which would, theoretically, strengthen Africa's entry into the global economic system. The AU has thus shifted its focus paradigmatically from state-centric economic control towards the goal of inter-African trade with the inclusion of the private sector."

³⁸ AU date unknown <https://au.int/en/agenda2063/overview>.

is a prerequisite for investor confidence, inclusive economic growth and sustainable development.³⁹

The Research Centre for Private International Law in Emerging Countries at the University of Johannesburg has as its principal project the drafting of the following proposed model laws: the African Principles on Jurisdiction in International Civil and Commercial Cases, the African Principles on the Law Applicable to International Commercial Contracts, and the African Principles on the Law Applicable to Non-Contractual Obligations.⁴⁰ The proposed African Principles of Commercial Private International law may facilitate sustainable economic growth on the continent, thereby contributing to the realisation of the objectives of the AU.⁴¹ The African Principles on the Law Applicable to International Commercial Contracts is discussed below. The first draft of the African Principles was published in 2021, and is used for the purposes of the current study.

3.1.1 The African Principles on the Law Applicable to International Commercial Contracts

3.1.1.1 Introduction

The purpose of the African Principles on the Law Applicable to International Commercial Contracts may be understood from the preamble, which provides that the "instrument sets forth general principles for determining the law applicable to international commercial contracts."⁴² As previously mentioned, the Principles are intended as a model law, suitable for national, regional and supranational legislative instruments in Africa.⁴³ They are also intended to be used "by African courts in the interpretation, supplementation and development of the rules of private international law of contract."⁴⁴

³⁹ Neels and Fredericks 2018 *Stell LR* 348.

⁴⁰ See Neels and Fredericks 2018 *Stell LR* 348-349: "A few years ago, interest in the project was expressed by the African Union. The Office of the Chief State Law Advisor (International Law) at the South African Department of International Relations and Cooperation ('DIRCO') has always been highly supportive of the project. We therefore approached DIRCO with the request to facilitate the formal recognition of the project by the African Union. DIRCO and the research centre remain in contact in this regard." Also see Neels 2021 *Unif L Rev* 426; Fredericks *Contractual Capacity* 190. See, generally, Neels and Fredericks 2018 *Stell LR* 347-356.

⁴¹ See Neels and Fredericks 2018 *Stell LR* 348. Also see Neels 2021 *Unif L Rev* 427.

⁴² See para 1 of the preamble in Neels 2021 *Unif L Rev* 428 (hereinafter referred to as "the Principles").

⁴³ See para 2 of the preamble in Neels 2021 *Unif L Rev* 428.

⁴⁴ See para 3 of the preamble in Neels 2021 *Unif L Rev* 429. Also see para 4 of the preamble in Neels 2021 *Unif L Rev* 429: "They may be used by arbitral tribunals in

3.1.1.2 Party autonomy

Subject to certain limitations under the Principles,⁴⁵ the parties have a wide discretion in selecting a law to govern their agreement.⁴⁶ Article 3 of the Principles establishes the parties' freedom to choose the law applicable to their contract.⁴⁷ The parties may choose "the law applicable to the whole contract or to one or more aspects of parts thereof"⁴⁸ and "different laws for different aspects or parts of the contract."⁴⁹ Furthermore, the parties are permitted to choose a law that does not have any connection to the parties or their transaction⁵⁰ and the parties may subsequently modify a choice of law.⁵¹ The Principles also authorise a direct choice of non-State law.⁵² Therefore, maximum freedom is provided to the contracting parties in selecting a law to govern their agreement.

Article 5(1) of the Principles provides: "A choice of law, or any modification of a choice of law, can be made expressly or tacitly."⁵³ Therefore, parties may exercise their choice by means of an express choice of law, or a choice of law may be inferred.

the interpretation, supplementation and development of the rules of private international law, whenever appropriate and whether the tribunal is seated in Africa or elsewhere."

⁴⁵ See, for example, arts 8 and 14 in Neels 2021 *Unif L Rev* 433, 436. Overriding mandatory provisions and public policy considerations may limit the parties' choice of law.

⁴⁶ Neels and Fredericks 2018 *Stell LR* 350-351: "The section on choice of law (properly so-called) in the two relevant sets of African Principles will strongly be influenced by the Hague Principles on Choice of law in International Commercial Contracts." Also see Neels 2021 *Unif L Rev* 430.

⁴⁷ See art 3(1) in Neels 2021 *Unif L Rev* 430: "A contract is governed by the law chosen by the parties."

⁴⁸ See art 3(2)(a) in Neels 2021 *Unif L Rev* 430.

⁴⁹ See art 3(2)(b) in Neels 2021 *Unif L Rev* 430.

⁵⁰ See art 3(3) in Neels 2021 *Unif L Rev* 430.

⁵¹ See art 3(4) in Neels 2021 *Unif L Rev* 430: "The choice may be made or modified at any time. A choice or modification made after the contract has been concluded does not prejudice its formal validity or the rights of third parties."

⁵² See arts 4, 6 and 7 in Neels 2021 *Unif L Rev* 430, 432-433. Also see Neels and Fredericks 2018 *Stell LR* 351. Art 4(1) provides: "A choice of one or more of the 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) a 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 international, supranational or regional intergovernmental organisation."

⁵³ See art 5(1) in Neels 2021 *Unif L Rev* 431.

3.1.1.3 Level of strictness of the criterion for a tacit choice of law

The level of strictness of the criterion under the Principles entails that the tacit choice "must be manifestly clear from the provisions of the contract, the circumstances of the case, or both."⁵⁴ The Principles therefore support a strict test in this regard.⁵⁵

3.1.1.4 Indicators of a tacit choice

The Principles allow a tacit choice of law to be inferred from "the provisions of the contract, the circumstances of the case, or both."⁵⁶ This means that one is not confined to the written agreement, but may take account of considerations surrounding the contract in deciding whether the parties have made a tacit choice of law.⁵⁷ Furthermore, the Principles make it clear that either the provisions or the circumstances may conclusively indicate a tacit choice of law.⁵⁸

The Principles do not mention the factors from which a tacit choice of law may be inferred. However, given that the Principles require that the tacit choice "must be manifestly clear", a single factor would probably not be sufficient to determine that the parties designated a law to govern the contract. Article 5(3) of the Principles reaffirms this by providing that "[a]n agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law."⁵⁹ The Principles therefore clearly provide that a choice of forum will not automatically indicate a choice of the law of that forum. According to article 5(4), "[a]n agreement between the parties to confer jurisdiction on a court or a localised arbitral tribunal may be taken into account in the determination of a tacit choice of law."

⁵⁴ See art 5(2) in Neels 2021 *Unif L Rev* 431.

⁵⁵ See Neels and Fredericks 2011 *De Jure* 106: "A strict test for the existence of tacit or implied agreements is supported – to allow readily deduced tacit or implied agreements leads to unpredictability of decision and legal uncertainty and undermines the conflicts rule that applies in the absence of a choice of law. It may therefore be considered to use an even stricter formulation than these in the examples cited, namely that the tacit or implied agreement must be 'manifestly clear'." Also see Neels and Fredericks 2011 *De Jure* 108-109.

⁵⁶ See art 5(2) in Neels 2021 *Unif L Rev* 431.

⁵⁷ Also see Neels and Fredericks 2011 *De Jure* 107-108.

⁵⁸ Also see Neels and Fredericks 2011 *De Jure* 107.

⁵⁹ See art 5(3) in Neels 2021 *Unif L Rev* 431.

4 ASEAN

4.1 Introduction

The Association of Southeast Asian Nations (ASEAN) was established in Bangkok, Thailand, on 8 August 1967, with the signing of the ASEAN Declaration.⁶⁰ The ASEAN Declaration was signed by the "founding fathers" of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand.⁶¹ In subsequent years Brunei Darussalam, Cambodia, Lao DPR, Myanmar and Vietnam have joined the organisation, which now stands at ten Member States.⁶² The ASEAN Declaration refers to the fact that the existence of mutual interests among countries of Southeast Asia necessitates the need to strengthen regional solidarity; that regional cooperation would contribute towards peace, progress and prosperity in the region; and that economic well-being is best attained by fostering good understanding and meaningful cooperation among the countries in the region.⁶³ Echoing this view, the aims and purposes of the organisation, as set out in the ASEAN Declaration, are as follows:

- (1) To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;
- (2) To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;
- (3) To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;

⁶⁰ See ASEAN date unknown <https://asean.org/asean/about-asean>. Also see Aziz 2012 *AsianJIL* 356; Hardjowahono *Unification of Private International Law* 146.

⁶¹ See the *ASEAN Declaration* (1967): delegates included the Presidium Minister for Political Affairs/Minister for Foreign Affairs of Indonesia, the Deputy Prime Minister of Malaysia, the Secretary of Foreign Affairs of the Philippines, the Minister of Foreign Affairs of Singapore and the Minister of Foreign Affairs of Thailand. Also see ASEAN date unknown <https://asean.org/asean/about-asean>; Hardjowahono *Unification of Private International Law* 146.

⁶² See ASEAN date unknown <https://asean.org/asean/about-asean>: "Brunei Darussalam ... joined on 7 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999 ..." Also see Hardjowahono *Unification of Private International Law* 146.

⁶³ See the *ASEAN Declaration* (1967).

(4) To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres;

(5) To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples;

(6) To promote South-East Asian studies;

(7) To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.⁶⁴

The first meaningful development to the organisation's economic aspirations came in the form of the ASEAN Free Trade Area (AFTA).⁶⁵ Established in 1992 AFTA aims to increase the region's competitive advantage through the "free flow of goods in the region resulting to less trade barriers and deeper economic linkages among Member States."⁶⁶ On 15 December 2008 the ASEAN Charter was approved, becoming a legally binding agreement among the Member States of the organisation.⁶⁷ The ASEAN Charter served as the basis for "achieving the ASEAN Community by providing legal status and [the] institutional framework for ASEAN. It also codifies ASEAN norms, rules and values; sets clear targets for ASEAN; and presents accountability and compliance."⁶⁸ The ASEAN Economic Community (AEC), which represents one of the pillars of the ASEAN Community,⁶⁹ was established in 2015.⁷⁰ This is seen as "a major milestone

⁶⁴ See the *ASEAN Declaration* (1967). Also see ASEAN date unknown <https://asean.org/asean/about-asean>.

⁶⁵ See Hardjowahono *Unification of Private International Law* 147.

⁶⁶ See Invest in ASEAN date unknown <https://investasean.asean.org/asean-free-trade-area-agreements/view/757/newsid/872/asean-trade-in-goods-agreement.html>. Also see Davidson 2004 *SYBIL* 170; Hardjowahono *Unification of Private International Law* 147.

⁶⁷ Amadeo 2021 <https://www.thebalance.com/what-is-asean-3305810>. See ASEAN date unknown <https://asean.org/asean/about-asean>. Also see Aziz 2012 *AsianJIL* 356.

⁶⁸ ASEAN date unknown <https://asean.org/book/the-asean-charter/>. See, generally, NTI date unknown <https://www.nti.org/learn/treaties-and-regimes/association-southeast-asian-nations-asean>. See, also, Aziz 2012 *AsianJIL* 356.

⁶⁹ See ASEAN date unknown <https://asean.org/asean/about-asean>: "The ASEAN Community is comprised of three pillars, namely the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community ..."

⁷⁰ See ASEAN 2015 <https://asean.org/asean-economic-community>.

in the regional economic integration agenda in ASEAN."⁷¹ The AEC Blueprint 2025, which consists of five interrelated characteristics,⁷² further reinforces ASEAN's vision of an integrated region.

ASEAN has experienced significant economic growth in recent times.⁷³ According to the ASEAN Key Figures 2021:

In 2020, the total combined GDP of the ten [ASEAN Member States] was US\$3.0 trillion, resulting in ASEAN to, collectively, become the fifth largest economy in the world, after the United States (US\$20.9 trillion), China (US\$14.7 trillion), Japan (US\$5.5 trillion), and Germany (US\$3.8 trillion) ... The region's total GDP in 2020 was almost fivefold the value in 2000 (US\$0.6 trillion). [A] similar trend was observed for the ASEAN's GDP per capita, which reached US\$4.533 in 2020, almost one and a half times its value in 2010 (US\$3.299), and more than four times of its value in 2000 (US\$1.200).⁷⁴

Closer cooperation in the legal field, especially in private international law, would undoubtedly strengthen the transformative process of developing the region into a solid regional community.⁷⁵ As will be discussed below, the Asian Principles of Private International Law "are the first attempt made by private international law scholars of the 10 participating East and Southeast Asian countries and regions ... with the purpose of harmonizing the region's private international law rules and principles."⁷⁶ Five of the ten participating jurisdictions are also Member States of ASEAN.⁷⁷ Therefore, the Asian Principles of Private International Law may prove particularly relevant in the context of ASEAN.

⁷¹ See ASEAN 2015 <https://asean.org/asean-economic-community>.

⁷² See ASEAN 2015 <https://asean.org/asean-economic-community>: the AEC Blueprint 2025 consists of five characteristics, namely a highly integrated and cohesive economy; a competitive, innovative, and dynamic ASEAN; enhanced connectivity and sectoral cooperation; a resilient, inclusive, people-oriented, and people-centred ASEAN; and a global ASEAN. See, generally, the ASEAN 2015 <https://asean.org/asean-economic-community-blueprint-2025/>.

⁷³ See Bouwers 2019 *CILSA* 109.

⁷⁴ See ASEAN 2021 <https://asean.org/book/asean-key-figures-2021/> 31-33.

⁷⁵ See, generally, Hardjowahono *Unification of Private International Law*. Also see Davidson 2004 *SYBIL* 166: "The members of ASEAN have been reluctant to be too legalistic in their relations with each other ... However, with economic expansion in the region and closer economic cooperation among members of ASEAN, it is arguable that they too have developed the need for more of a rules-based system to regulate their economic activity *inter se*."

⁷⁶ Chen and Goldstein 2017 *J Priv Int L* 411-412.

⁷⁷ These jurisdictions include Indonesia, Philippines, Singapore, Thailand and Vietnam.

4.1.1 *The Asian Principles of Private International Law*

4.1.1.1 Introduction

The inspiration behind the Asian Principles of Private International Law (APPIL) dates back to 1997, when the late Japanese private international law scholar, Hiroshi Matsuoka, launched a bilateral research project among private international law scholars of Japan and Korea.⁷⁸ The purpose of the research project was the harmonisation of private international law between the two countries.⁷⁹ In 2012 the project received support from the Japan Science Foundation and subsequently transformed into a "multilateral research project among the private international law scholars from Japan, the Republic of Korea, Mainland China, the Hong Kong Special Administrative Region, Taiwan, Vietnam, Indonesia, the Philippines, Thailand and Singapore."⁸⁰ In 2013 the Commission on the Asian Principles of Private International Law (CAPPIL) was created.⁸¹ Members of CAPPIL completed the drafting process of the APPIL between 2015 and 2017.⁸² At present the APPIL is in the finalisation process and its publication is imminent.⁸³

The APPIL is intended to be a non-binding instrument, which includes principles on choice of law, international jurisdiction, the recognition and enforcement of foreign judgements in civil and commercial matters and judicial support to international arbitration.⁸⁴ Chen and Goldstein state the following:

[T]he APPIL may serve as a model for national and regional instruments. They may also be used by the private international law legislators of Asian jurisdictions to interpret, supplement and enact their own private international

⁷⁸ The discussion on the APPIL is based in part on Bouwers 2021 *Unif L Rev* 14, 37-40. Also see Chen and Goldstein 2017 *J Priv Int L* 416; Takasugi and Elbalti "Asian Principles of Private International Law" para 19.03.

⁷⁹ Takasugi and Elbalti "Asian Principles of Private International Law" para 19.03.

⁸⁰ Chen and Goldstein 2017 *J Priv Int L* 416. Also see Takasugi and Elbalti "Asian Principles of Private International Law" note 9.

⁸¹ See Takasugi and Elbalti "Asian Principles of Private International Law" para 19.04: the CAPPIL consisted of a representative of each of the different Asian jurisdictions as members in addition to a president and a secretary.

⁸² Chen and Goldstein 2017 *J Priv Int L* 416-417; Takasugi and Elbalti "Asian Principles of Private International Law" para 19.04.

⁸³ See Takasugi and Elbalti "Asian Principles of Private International Law" para 19.04: the APPIL is expected to be released soon under the title "APPIL-2018".

⁸⁴ Chen and Goldstein 2017 *J Priv Int L* 419; Takasugi and Elbalti "Asian Principles of Private International Law" para 19.07.

law statutes, and may even be applied by state courts and arbitral tribunals, albeit not as legally binding instruments but as 'soft law'.⁸⁵

In respect of the principles on choice of law, the APPIL was greatly inspired by the Hague Principles on Choice of Law in International Commercial Contracts.⁸⁶ Takasugi and Elbalti⁸⁷ emphasise:

It was indeed clearly indicated the 'Hague Principles', as reflecting the most recent developments in the field of choice of law for contracts, would be adopted in cases where a common solution among the participating Asian jurisdictions cannot be found.

4.1.1.2 Party autonomy

The APPIL recognises party autonomy as a commonly accepted principle among all participating jurisdictions.⁸⁸ Subject to certain limitations⁸⁹ the parties have a wide freedom in selecting a law applicable to their agreement.⁹⁰ The first paragraph of article 3(2) establishes the parties' freedom to choose the law applicable to their contract.⁹¹ The parties may choose "the law applicable to the whole contract or to only part of it"⁹² and "different laws for different parts of the contract",⁹³ and may modify a choice of law at any time.⁹⁴ The APPIL also authorises a direct choice of non-State law.⁹⁵ However, there was some debate during the drafting process on

⁸⁵ Chen and Goldstein 2017 *J Priv Int L* 434. Also see Takasugi and Elbalti "Asian Principles of Private International Law" para 19.01: "The main purpose of the APPIL is to provide guidance to possible future harmonization of PIL rules and principles in Asia ... [They] are also expected to serve as a model law or guidelines destined to Asian legislators, national courts, practitioners and academics."

⁸⁶ Chen and Goldstein 2017 *J Priv Int L* 418-419; Takasugi and Elbalti "Asian Principles of Private International Law" para 19.09.

⁸⁷ Takasugi and Elbalti "Asian Principles of Private International Law" para 19.09.

⁸⁸ See Takasugi and Elbalti "Asian Principles of Private International Law" para 19.10.

⁸⁹ Overriding mandatory provisions and public policy considerations may limit the parties' choice of law. See, for example, Takasugi and Elbalti "Asian Principles of Private International Law" arts 2.5 and 2.8. See, generally, Takasugi and Elbalti "Asian Principles of Private International Law" paras 19.32-19.34.

⁹⁰ See Takasugi and Elbalti "Asian Principles of Private International Law" para 19.10.

⁹¹ See art 3(2) of the APPIL: "A contract is governed by the law chosen by the parties." See, generally, Takasugi and Elbalti "Asian Principles of Private International Law" para 19.15.

⁹² See art 3(2)(2)(a) of the APPIL; Takasugi and Elbalti "Asian Principles of Private International Law" para 19.15; also see para 19.13.

⁹³ Article 3(2)(2)(b); Takasugi and Elbalti "Asian Principles of Private International Law" paras 19.15 and 19.13.

⁹⁴ See art 3(2)(3): "The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties." Also see Takasugi and Elbalti "Asian Principles of Private International Law" para 19.15 and note 43.

⁹⁵ See art 3(4): "The parties may choose rules of law that are generally accepted on an international, supranational or regional level unless the law of the forum provides

whether the APPIL should allow the parties to choose a law that bore no connection to the parties or their transaction.⁹⁶ The final text appears to be a compromise in this regard. Paragraph 4 of article 3(2) provides: "No connection is required between the law chosen and the parties or their transaction unless the law of the forum provides otherwise."⁹⁷

Paragraph 1 of article 3(3) provides: "A choice of law, or any modification of a choice of law, can be made expressly or appear clearly ...".⁹⁸ Therefore, the APPIL permits the parties to exercise their choice by means of an express choice of law, or a tacit choice of law may be inferred.

4.1.1.3 Level of strictness of the criterion for a tacit choice of law

In respect of the level of strictness, the criterion under the Asian Principles of Private International Law requires the tacit choice to "appear clearly".⁹⁹ The APPIL therefore advocates a strict test in determining the existence of a tacit choice of law.

4.1.1.4 Indicators of a tacit choice

The APPIL allows a tacit choice of law to be inferred by "the provisions of the contract or the circumstances".¹⁰⁰ This means that one is not confined to the written agreement but may take account of considerations surrounding the contract in deciding whether the parties have made a tacit choice of law.

The APPIL is silent in respect of the factors from which a tacit choice of law may be inferred. However, in the light of the strict threshold in the APPIL the

otherwise." Also see Takasugi and Elbalti "Asian Principles of Private International Law" para 19.15.

⁹⁶ See Takasugi and Elbalti "Asian Principles of Private International Law" para 19.13: "[S]ome representatives voiced their concern as to whether a general rule allowing the parties to choose a law with no objective ties with the contract would be accepted in certain Asian jurisdictions. It was also argued that the rule to be adopted should reflect the reality of the practice in those jurisdictions where such a connection is required."

⁹⁷ See art 3(2)(4). Also see Takasugi and Elbalti "Asian Principles of Private International Law" para 19.14.

⁹⁸ See art 3(3)(1). Also see Takasugi and Elbalti "Asian Principles of Private International Law" para 19.17 and note 43.

⁹⁹ See art 3(3)(1): "A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances." Also see Takasugi and Elbalti "Asian Principles of Private International Law" note 43.

¹⁰⁰ See art 3(3)(1). Also see Takasugi and Elbalti "Asian Principles of Private International Law" note 43.

current author is of the opinion that a single factor would probably not be sufficient to determine that the parties designated a law to govern the contract. Paragraph 2 of article 3(3) substantiates this view by providing that "[a]n agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law."¹⁰¹ The APPIL therefore clearly provides that a choice of forum will not automatically indicate a choice of the law of that forum.

5 Concluding remarks

The abovementioned envisaged instruments of developmental organisations provide sufficient clarity regarding the law applicable to an international commercial contract, specifically those provisions dealing with a controversial and often confusing aspect of choice-of-law, namely the determination of a tacit choice of law.

The instruments generally recognise the principle of party autonomy in international commercial contracts. In giving effect to this important doctrine, all three instruments provide the parties with broad freedom in selecting the law applicable to their agreement. In the absence of an express choice of law, the instruments allow for the determination of a tacit choice of law.

Regarding the level of strictness of the criterion for inferring such a choice of law, the OHADA Preliminary Draft Uniform Act requires the tacit choice of law to be "clearly demonstrated". The proposed African Principles provide that the tacit choice of law "must be manifestly clear", while the APPIL requires the choice to "appear clearly". Although the African Principles contain perhaps the highest threshold in this regard, all instruments provide for a sufficiently high level of strictness. The current author supports a strict test for the determination of a tacit choice of law, as this "will limit the court's discretion in determining the existence of a tacit choice of law, thereby promoting legal certainty and predictability of decision."¹⁰²

The position in all instruments is that a court must examine the terms of the contract and the circumstances of the case in searching for a tacit choice of law. None of the instruments provides a list of factors to be considered in inferring a choice of law. However, it may be argued that the stringent

¹⁰¹ See art 3(3)(2). Also see Takasugi and Elbalti "Asian Principles of Private International Law" para 19.18 and note 43. The APPIL copies verbatim the wording of the Hague Principles in this regard.

¹⁰² Bouwers *Tacit Choice of Law in International Commercial Contracts* 228.

thresholds would not permit a court to conclude the existence of a tacit choice of law from the presence of a single factor. The current author supports this position, as a court must be sure as to the existence of the real intentions of the parties (albeit a tacit intention).

The OHADA Preliminary Draft Uniform Act does not address the role of forum clauses and a tacit choice of law. However, the proposed African Principles and the APPIL are rather clear on the matter. Both instruments provide that a forum clause "is not in itself equivalent to a choice of law". Therefore, the presence of a forum clause will not automatically indicate a choice of law of that forum. The current author supports this view and recommends that the OHADA Preliminary Draft Uniform Act incorporates a similar provision.¹⁰³

The introduction of the proposed international instruments (whether binding or in the form of a soft law instrument) would go a long way in contributing to legal certainty and the predictability of decisions in the Member States of the organisations where these instruments may find application. Neels¹⁰⁴ correctly holds that:

The existence of a reliable transnational legal infrastructure in respect of international commercial law, including commercial private international law, is a prerequisite for investor confidence, inclusive economic growth [and] sustainable development....

The adoption of these instruments, or their use in the interpretation, supplementation or development of the rules of private international law will provide an opportunity for these organisations to compete in the context of the globalised economy. Member States of these emerging organisations will undoubtedly benefit from a codification of this nature, which will

¹⁰³ Bouwers *Tacit Choice of Law in International Commercial Contracts* 245: "A choice of forum or arbitral tribunal for dispute resolution and the choice of law applicable to the contract should be distinguished. This is justified on the ground that the parties may have chosen a particular forum because of its neutrality, experience, convenience, or expertise and not necessarily for the application of its domestic law. In any event, the forum will determine the law of the contract in terms of the applicable rules of private international law. Parties who submit to a court or tribunal's jurisdiction do not intend thereby that the forum should abandon its choice of law process and mechanically apply the *lex fori*. Although it is a relevant factor in the determination of a tacit choice of law, the inference that a court draws in a particular case should depend on all the circumstances surrounding the agreement. A choice of court or localised arbitral tribunal should therefore not on its own be taken to indicate a choice of law by the parties."

¹⁰⁴ Neels 2021 *Unif L Rev* 426.

contribute to strengthening economic growth and bolstering trade in the respective regions.

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List of Abbreviations

AEC	ASEAN Economic Community
AFTA	ASEAN Free Trade Area
APPIL	Asian Principles of Private International Law
ASEAN	Association of Southeast Asian Nations
AsianJIL	Asian Journal of International Law
AU	African Union
CAPPIL	Commission on the Asian Principles of Private International Law
CILSA	Comparative and International Law Journal of Southern Africa
J Priv Int L	Journal of Private International Law
NTI	Nuclear Threat Initiative
OHADA	<i>Organisation pour l'Harmonisation en Afrique du Droit des Affaires</i> / Organisation for the Harmonisation of Business Law in Africa
OAU	Organisation of African Unity
SAHO	South African History Online
Stell LR	Stellenbosch Law Review
SYBIL	Singapore Yearbook of International Law and Contributions
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Unif L Rev	Uniform Law Review

