



**Articolo 1322.
Autonomia contrattuale.**

Le parti possono liberamente determinare il contenuto del contratto nei limiti imposti dalla legge.

Le parti possono anche concludere contratti che non appartengano ai tipi aventi una disciplina particolare, purché siano diretti a realizzare interessi meritevoli di tutela secondo l'ordinamento giuridico.

Cfr. Cassazione Civile, sez. I, sentenza 11 febbraio 2008, n. 3179, Cassazione Civile, sez. II, sentenza 21 febbraio 2008, n. 4446, Cassazione Civile, SS.UU., sentenza 27 marzo 2008, n. 7930 e Cassazione Civile, sez. I, sentenza 22 settembre 2008, n. 23949.

**Article 1322.
Freedom of Contract.**

The parties are free to establish the content of the contract within the limits imposed by law.

The parties may also enter into contracts that do not belong to classes falling within a specific discipline, provided they are designed to create interests that deserve protection according to the legal system.

1. England and Wales

English law values the stability of the market and the facilitation of commercial activity above all else. Consequently, the courts have long sought to protect the freedom of parties to contract as they choose.

As long ago as 1875 the courts were recognising this freedom and that "...men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when freely and voluntarily entered into shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider - that you are not to lightly interfere with this freedom of contract..."¹.

2. America

The concept of freedom of contract is not particularly revolutionary nor is it proprietary to the United States. The concept itself spans legal, economic and social theory² and touches upon the private rights of individuals, protectionism and liberalization of relations.

¹ Printing and Numerical Registering Co v Sampson 1875 (19 L.R. Eq 462, 465 (M.R. 1875).

² See Smith, Adam and Edwin Cannan, *The Wealth of Nations*. New York, New York. Bantam Press, 2003.

On a federal level in the U.S., Article I Section 10 of the US Constitution prohibits any state law that impairs the obligation of contract. The Due Process Clause of the Fourteenth Amendment sets forth the protection of “liberty”, which has been interpreted as including the liberty of contract³. This idea of liberty of contract has been interpreted as freedom of contract, which has in turn become one of the cornerstones of US contract law and “rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements. In general, therefore, parties are free to make such agreements as they wish, and the courts will enforce them without passing on their substance”⁴.

The UCC uses language that allows parties freedom of contract and flexibility such as “unless otherwise agreed”⁵ and specifically addresses the concept of freedom of contract under UCC §1-302 Variation by Agreement Official Comment 1, which states, “[s]ubsection (a) states affirmatively at the outset that freedom of contract is a principle of the Uniform Commercial Code”⁶.

3. UNIDROIT Principles

Article 1.1, Freedom of Contract, sets forth that, “parties are free to enter into a contract and determine its content”. Comment 1, Freedom of contract as a basic principle in the context of international trade states, “[t]he principle of freedom of contract is of paramount importance in the context of international trade. The right of businesspeople to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order”⁷. The comments further discuss exceptions to this freedom of contract relating to some States’ economic sectors that exclude open competition. Fur-

³ *Allgeyer v. Louisiana*, 165 U.S. 587, 589 (1897) stating, “[t]he ‘liberty’ mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned”.

⁴ Farnsworth, E. Allan, *Contracts* 4th Edition, Aspen Publishers, 2004, p. 313.

⁵ UCC 1-302(c) Variation by Agreement and Official Comment 3.

⁶ *Id.* at Official Comment 1.

⁷ UNIDROIT Principles Article 1.1. Comment 1.

thermore, the comments note that the Principles do have mandatory provisions which may not be opted out of.

Additionally, Article 1.4, Mandatory Rules states, “nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law”⁸. Comment 2 further explains the broad nature of the mandatory rules by setting forth, “[t]he mandatory rules referred to in this Article are predominantly laid down by specific legislation, and their mandatory nature, may either be expressly stated or inferred by way of interpretation. However, in the various national legal systems restrictions on freedom of contract may also derive from general principles of public policy, whether of national, international or supranational origin (e.g. prohibition of commission or inducement of crime; prohibition of corruption and collusive bidding; protection of human dignity; prohibition of discrimination on the basis of gender, race or religion; prohibition of undue restraint of trade; etc.). For the purpose of this Article the notion of “mandatory rules” is to be understood in a broad sense, so as to cover both specific statutory provisions and general principles of public policy”⁹.

4. CISG

Under Article 6, the CISG allows parties, upon agreement, to exclude its application specifically, “[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions”¹⁰. The net effect of this provision, which allows parties to opt out of the CISG, follows the tradition of freedom of contract.

⁸ UNIDROIT Principles, Article 1.4, Mandatory Rules.

⁹ Id. at Comment 2, Broad Notion of Mandatory Rules.

¹⁰ CISG Article 6; see also *Travelers Property Casualty Company of America et. al. v. Saint Gobain Technical Frabrics Canada Limited*, 474 F.Supp. 2d 1075, 1981 (D. Minn. 2007) stating, “[t]he Court finds, however, that the CISG applies in this case. The CISG ‘applies to contracts of sale of goods between parties whose places of business are in different States ... [w]hen the States are Contracting States’. The CISG ‘governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular ... it is not concerned with ... the validity of the contract or of any of its provisions or of any usage. The parties may exclude the application of this Convention....”

**Articolo 1323.
Norme regolatrici dei contratti.**

Tutti i contratti ancorché non appartengano ai tipi che hanno una disciplina particolare, sono sottoposti alle norme generali contenute in questo titolo.

**Article 1323.
Governing Rules for Contracts.**

All contracts, even if they do not belong to classes falling within a specific discipline, are subject to the general rules set forth in this title.

1. England and Wales

Contracts between private parties are fundamentally governed by the common law as developed over time by case law and to the extent not tempered by legislation and regulation¹.

English law has not created a series of “classes” of contract in the same way that most civil law jurisdictions have. Parties are generally free to establish the form and content of their agreements as they choose, subject of course to the presence of the fundamental elements for the formation of any contract² and the “deal” being lawful. Only in very limited circumstances are there rules regarding form or that the contract be in writing³.

Contracts are essentially subject to the common law though in certain cases (such as the sale of goods or consumer contracts) there are specific requirements that have to be observed. Amongst the most important of these being the Unfair Contract Terms Act 1979⁴.

2. America

Contracts between private parties are governed by code law, case law, regulations and rules at the state level. While freedom of contract exists between contracting parties who come to an agreement, our body of law provides parameters or confines within which a contract is measured in formation, performance

¹ E.g. Unfair Contracts Terms Act 1977; Contracts (Rights of Third Parties) Act 1999.

² i.e. offer, acceptance, consideration, intention to create legal relations and certainty of terms.

³ Common examples being assignments of contractual rights (s 136 Law of Property Act 1925); sale of land (s 2 Law of Property (Miscellaneous Provisions) Act 1959).

⁴ Though the role and impact of the Act is profound, the courts attitude towards its use in contracts involving businesses of equal standing is being brought into question see *Goodlife Foods v Hall Fire* EWHC/TCC/2017 167; *Granville Oil & Chemical Ltd v Davis Turner & Co Ltd* EWCA Civ 2003 570.

and discharge. These confines are the general rules of contract and may be categorized as either the governing law or the essential elements of contracting.

Regarding governing law, contracts for services, construction and real estate are governed by case law, i.e., the common law. Contracts for the sale of goods are governed by Uniform Commercial Code Article 2 Sales⁵. The Restatement (Second) of Contracts provides explanatory authority, which is non-binding but plays an important role in informing judicial decisions. Promulgated by the American Law Institute⁶, the Restatement (Second) of Contracts is the leading treatise on general contract principles in the US today⁷. In fact, the Restatements, both the first and second editions, set forth the broad strokes of the principles or essential elements of contract law that practitioners and jurists rely upon for contract formation, discharge and interpretation.

Furthermore, the concept of party autonomy in contracts is based on the precept that contracting parties have the right to choose how to govern their contract within certain limits⁸. This concept dovetails with the previous section relating to freedom of contract.

3. UNIDROIT Principles

Principle Article 1.4, Mandatory Rules, states, “[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law”⁹. The comments to this Article set forth an explanation regarding which mandatory rules prevail; what the notion of “mandatory rules” means; what mandatory rules mean in the event that parties to a contract choose to apply the Principles to their agreement; and what role private international law plays in such event.

⁵ The Uniform Commercial Code found at <http://www.cornell.edu/ucc>.

⁶ The American Law Institute at <http://www.ali.org/>.

⁷ The Restatement of Contracts is in its second edition today.

⁸ Party autonomy cases in contract law often involve choice of law and conflict of law issues; see Sarah Laval, *A Comparative Study of Party Autonomy and Its Limitations in International Contracts, American and European Law, With Reference to the Hague Principles 2015*, 25 *Cardozo J. Int'l & Comp. L.* 29.

⁹ UNIDROIT Principles, Article 1.4, Mandatory Rules.

4. CISG

The CISG only governs contracts for the sale of goods between, “parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention”¹⁰.

Article 6, the CISG allows the parties, upon agreement, to exclude its application specifically, “[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions”¹¹.

¹⁰ CISG Article 1.

¹¹ CISG Article 6; see also *Travelers Property Casualty Company of America et. al. v. Saint Gobain Technical Fabrics Canada Limited*, 474 F.Supp. 2d 1075, 1981 (D. Minn. 2007) stating, “[t]he Court finds, however, that the CISG applies in this case. The CISG ‘applies to contracts of sale of goods between parties whose places of business are in different States ... [w]hen the States are Contracting States.’ The CISG ‘governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular ... it is not concerned with ... the validity of the contract or of any of its provisions or of any usage. The parties may exclude the application of this Convention....’”.

