

2014

Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts

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Marta Pertegas & Brooke Adele Marshall, *Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts*, 39 Brook. J. Int'l L. (2014).

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PARTY AUTONOMY AND ITS LIMITS: CONVERGENCE THROUGH THE NEW HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS

Marta Pertegás & Brooke Adele Marshall†*

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INTRODUCTION

In a cross-border contract, courts and arbitral tribunals are required to determine the applicable law—also known

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as the governing law—to resolve disputes arising out of it. The ability of the parties to choose the applicable law is justified by reference to the classical principle of party autonomy.

Inspired by Kant, party autonomy is the bedrock of the modern law of contract. In the early twentieth century, however, the use of party autonomy in an international context was a highly contentious issue on both sides of the Atlantic.¹ Scholars and judges alike were divided as to the ability of contracting parties to exalt themselves above the otherwise applicable law by exercising their liberty and preferring another law. Scholars such as Mancini and Rabel were joined by courts in France, England, and the United States of America in their support for the principle. Among its skeptics were Beale on one side of the Atlantic, and Batiffol and Niboyet on the other.

Over the course of the twentieth century, as international trade increased, and indeed in the twenty-first century with the rise of globalization, the principle of party autonomy in conflict of laws has garnered greater support. Party autonomy is considered to be the most practical solution for conflict of laws in international contracts² and reigns, or ought to reign, subject to certain clearly defined limits. Although many jurisdictions commit in principle to party autonomy, this commitment does not often translate into practice.³ Many jurisdictions also call

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1. See generally JEAN-PAULIN NIBOYET, *La Théorie de l'Autonomie de la Volonté* (1927) 16 Recueil des Cours 1; PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 8–13 (1999); Gisella Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, in CONFLICT OF LAWS IN A GLOBALIZED WORLD (Eckart Gottschalk, et al. eds., 2007).

2. Andrew Dickinson, *Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?*, 3 J. PRIVATE INT'L L. 53, 59 (2007).

3. Jürgen Basedow, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts*, 75 RABELSZ 33 (2011); MARY KEYES, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW (Oxford University Press (forthcoming)); Compare Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 241–47 (2013) [hereinafter 2012 Survey], with Symeon C. Symeonides,

for different approaches to choice of law where parties have chosen to submit disputes to arbitration, as opposed to litigation, both in terms of the law that the parties may choose and the limits of that choice. Moreover, the approaches that State courts and legislators take to party autonomy often diverge.

Differences in approach may lead, in practice, to two fora, confronted by the same dispute over the same contract, recognizing and circumscribing the parties' choice to different degrees. This naturally affects the outcome of the dispute and incentivizes parties to "shop around" for the best result by selecting a forum that the parties anticipate will apply its conflict of laws rules favorably.⁴

Given the importance of this issue for international commerce, the Hague Conference on Private International Law ("Hague Conference") has sought to create some consistency in approach to choice of law in international contracts. The draft Hague Principles on International Commercial Contracts⁵ (the

Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey, 62 AM. J. COMP. L. (forthcoming 2014) [hereinafter 2013 Survey].

4. ANDREW S. BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 15 (2003).

5. It is anticipated that the Council on General Affairs and Policy of the Hague Conference will approve the Principles and their accompanying Commentary, in their final form, in 2014 or at its meeting in 2015. The Council on General Affairs and Policy of the Hague Conference of April 2014 decided as follows

2. The Council welcomed the work completed by the Working Group. The Council welcomed the text of the Hague Principles and the draft Commentary. The Council requested the Working Group to undertake the editorial finalisation of the Principles in the two official languages of the Hague Conference. Members are invited to submit comments on the changes introduced in the draft Commentary after January 2014, bearing in mind the explanatory nature of the Commentary. Any comments should be submitted in writing to the Permanent Bureau by 31 August 2014. The Working Group will then review those comments and finalise the Principles and the draft Commentary in both languages, where after the final version of the texts will be submitted to Members for approval in a written procedure. The Principles and draft Commentary will be approved if no objection is raised within 60 days.

Hague Conference on Private International Law, COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, *Conclusions and Recommendations*

“Hague Principles”) and their accompanying Commentary, developed principally by a Working Group, seek to harmonize certain rules of private international law applicable to international⁶ commercial⁷ contracts.

The Hague Principles reinforce party autonomy and espouse a principle according to which the law chosen by the parties will govern the contract to the greatest possible extent, subject to clearly defined limits. Consistent with this principle, under

adopted by the Council, April 8-10, 2014, para. 2 (2014), available at http://www.hcch.net/upload/wop/genaff2014concl_en.pdf.

6. Article 1(2) of the Hague Principles contains a negative definition to the effect that a contract is international unless “the parties have their establishments in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State.” Hague Conference on Private International Law, PERMANENT BUREAU, *The Draft Hague Principles on Choice of Law in International Commercial Contracts*, Prel. Doc. No. 6, art. 1(2) (Mar. 2014), available at http://www.hcch.net/upload/wop/gap2014pd06_en.pdf; Hague Conference on Private International Law, SPECIAL COMMISSION ON CHOICE OF LAW IN INT'L CONTRACTS, *Draft Hague Principles as Approved by November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations For Commentary*, Nov. 12-16, art.1(2) (2012) [hereinafter 2012 Draft Hague Principles], available at http://www.hcch.net/upload/wop/contracts2012principles_e.pdf; see also Hague Conference on Private International Law, *Convention on Choice of Court Agreements*, June 30, 2005 [hereinafter 2005 Hague Choice of Court Convention], available at <http://www.hcch.net/upload/conventions/txt37en.pdf>, which contains a similar definition.

7. Article 1(1) of the Hague Principles makes it clear that they apply to contracts “where each party is acting in the exercise of its trade or profession.” Article 1(1) also contains an express exclusion for consumer and employment contracts. The rationale for the decision to confine the Principles to business-to-business contracts was considered to be a sufficient counterbalance to the promotion of party autonomy. The rationale is to enhance and establish party autonomy in international contracts, but only where both parties are professionals and therefore the risks from an abuse of party autonomy are viewed as remote. See Hague Conference on Private International Law, COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, *Conclusions and Recommendations Adopted by the Council*, April 1-3, 2008, 1 (2008), available at http://www.hcch.net/upload/wop/genaff_concl08e.pdf; see also, Hague Conference on Private International Law, COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, *Conclusions and General Recommendations Adopted by the Council*, Mar. 31- April 3, 2009, 2 (2009) [hereinafter 2009 Conclusions and Recommendations], available at http://www.hcch.net/upload/wop/genaff_concl09e.pdf.

the Hague Principles, the parties may choose the law of a State, non-State rules of law, or a combination of these as the law governing their contract.

The Hague Principles seek to harmonize approaches to choice of law in international contracts in two ways. First, they provide a universal model that lawmakers can use to create, supplement, or develop their existing choice of law rules. Complemented by their explanatory Commentary, the Hague Principles seek to serve as an international code of current “best practice” with respect to the recognition and limits of party autonomy. Some provisions cement an internationally accepted approach. Other provisions reflect an approach that the Hague Conference considers to be the best practice for issues that often lack consensus, and novel solutions are occasionally introduced. One of the best practice provisions is Article 2(4), which allows for the choice of a law that bears no connection to the parties or their transaction. The law of several jurisdictions in which the Hague Principles may have particular influence requires that the chosen law be objectively connected to the transaction or to the parties. One of the Hague Principles’ innovative provisions is Article 6, which seeks to provide a practical solution to the widely recognized problem of “the battle of the forms,” where parties exchange standard forms, each containing a choice of law clause (Article 6).

Secondly, the Hague Principles seek to “level the playing field” between arbitration and litigation. Indeed, many jurisdictions call for different approaches depending on the chosen dispute settlement mechanism, both in terms of the law that the parties may choose and the limits of that choice. The Hague Principles allow parties, within the parameters set out by Article 3, to choose not only State law but also rules of law—non-State law—whether their eventual contractual disputes are subject to litigation or arbitration. The Hague Principles also ensure that the choice of the law by parties does not have the effect of excluding overriding mandatory rules or *ordre public* where applicable.

Before exploring each of these aspects of the Hague Principles, and offering points of comparison with the conflict of laws rules applicable in the United States, the European Union, and China, this article traces the development of the Hague Principles.

I. DEVELOPMENT OF THE HAGUE PRINCIPLES

A. *History*

In 2006, the Hague Conference conducted a series of feasibility studies concerning the development of an instrument relating to choice of law in international commercial contracts. These surveyed, existing rules and practices regarding choice of law agreements in the judicial⁸ and arbitral⁹ arenas. In addition, the Permanent Bureau—the Hague Conference’s Secretariat—sent a questionnaire to members of the organization, the International Chamber of Commerce, and a large number of international arbitral centers and entities. The purpose of the questionnaire was to explore the use of choice of law agreements in current practice and the extent to which such agreements are respected, as well as to ascertain what provisions would be required in a future instrument.¹⁰

In 2009, following the outcome of and recommendations flowing from the studies, the Council of General Affairs and Policy, the Hague Conference’s Governing Organ, mandated that the Permanent Bureau set up a Working Group to draft a nonbinding international instrument for conflict rules applicable to international contracts, which would later become the draft Hague Principles.¹¹ The group consisted of specialists in pri-

8. See Hague Conference on Private International Law, Thalia Kruger, PERMANENT BUREAU, *Feasibility Study on the Choice of Law in International Contracts – Overview and Analysis of Existing Instruments*, Prel. Doc. No 22 B (Mar. 2007) [hereinafter Prel. Doc. No 22 B], available at http://www.hcch.net/upload/wop/genaff_pd22b2007e.pdf.

9. Hague Conference on Private International Law, Ivana Radic, *Feasibility Study on the Choice of Law in International Contracts – Special Focus on International Arbitration*, ¶ 3, Prel. Doc. No 22 C (Mar. 2007) [hereinafter Arbitration Focus], available at http://www.hcch.net/upload/wop/genaff_pd22b2007e.pdf.

10. Hague Conference on Private International Law, PERMANENT BUREAU, *Feasibility Study on the Choice of Law in International Contracts – Report on Work Carried Out and Preliminary Conclusions*, ¶ 3, Prel. Doc. No 22 A (Mar. 2007), available at http://www.hcch.net/upload/wop/genaff_pd22a2007e.pdf; Hague Conference on Private International Law, PERMANENT BUREAU, *Feasibility Study on the Choice of Law in International Contracts – Report on Work Carried Out and Conclusions (Follow-up Note)*, ¶3, Prel. Doc. No 5 (Feb. 2008) [hereinafter Follow-up Note], available at http://www.hcch.net/upload/wop/genaff_pd05e2008.pdf.

11. See *2009 Conclusions and Recommendations*, *supra* note 7.

vate international law and international arbitration law drawn from different legal systems from all corners of the globe. In successive years, the Working Group, chaired by Professor Daniel Girsberger of Switzerland, met on various occasions.

A Special Commission¹² met in The Hague from November 12–16, 2012, in order to examine the version of the Hague Principles submitted by the Working Group in 2011. The Special Commission unanimously approved a revised form of the Hague Principles and made a number of recommendations relating to the completion of the Hague Principles and their accompanying Commentary. In line with these recommendations, in April 2013 the Council on General Affairs and Policy of the Conference approved the Hague Principles, marking a significant milestone in their development. The Council also gave a mandate to the Working Group to prepare a commentary. The Commentary accompanies each article of the Hague Principles and serves as an interpretative and explanatory tool for a better understanding of the Hague Principles. Practical examples and scenarios are also provided to illustrate the application of the black letter rules.

The Permanent Bureau consolidated the Commentary in November 2013 and circulated it to the Members and Observers of the Hague Conference for consultation. Several Members submitted suggested changes to the Commentary, which informed the discussions of the Working Group at its meeting in January 2014. During this meeting, the Working Group established an Editorial Committee charged with finalizing the text of the Commentary with the assistance of the Permanent Bureau.

12. In 2012, the Council decided to establish a Special Commission to discuss the proposals of the Working Group and make recommendations as to future steps to be undertaken, including the decision to be taken on the form of the nonbinding instrument and the process through which the Commentary would be completed. The Special Commission met from November 12–16, 2012. *Conclusion of the First Meeting of the Special Commission on Choice of Law in International Contracts*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Nov. 16, 2012), http://www.hcch.net/index_en.php?act=events.details&year=2012&varevent=292.

B. Form of the Hague Principles

As a concise body of general principles that can be universally applied, the Hague Principles differ from other instruments developed by the Hague Conference. They do not constitute a binding convention that States, once signatory thereto, are obliged to incorporate into their domestic law. Although this nonbinding model is the first of its kind for the Hague Conference, its member states first approved it as a working method in 1980.¹³

As a nonbinding instrument, the Hague Principles are suitably adapted to their envisaged use.¹⁴ The Hague Principles are designed to assist lawmakers—whether legislators or courts—in reforming the conflict of laws rules applicable to choice of law in international contracts. In particular, they may serve as a guide to States that do not sufficiently recognize party autonomy, refine the principle of party autonomy for those that do, and fill in the gaps for States that have only a partial set of established conflict of laws rules governing international contracts. The Hague Principles also provide guidance to contracting parties and lawyers as to the relevant considerations and limits of a choice of law, the law and rules of law that they may choose, and the drafting of an effective choice of law agree-

13.

Recognizing that the use of certain methods of less binding effect than international conventions is in certain cases of a kind to promote the easier adoption and more wide-spread diffusion of common solutions, grants that the Conference, while maintaining as its principal purpose the preparation of international conventions, may nevertheless use other procedures of less binding effect, such as recommendations or model laws, where, having regard to the circumstances, such procedures appear to be particularly appropriate.

Hague Conference on Private International Law: Final Act, 19 INT'L LEGAL MATERIALS 1501, 1502 (1980). See also Georges Droz, *La Conférence de La Haye de Droit International Privé et Les Méthodes d'Unification du Droit: Traités Internationaux ou Lois Modèles*, 13 REVUE INTERNATIONALE DE DROIT COMPARÉ 507, 507–21 (1961); “Conférence de La Haye de droit international Privé”, *Répertoire international Dalloz*, 1998, No 15.

14. The responses to questionnaires conducted as part of the Feasibility Study revealed that two-thirds of those member states that responded considered that a new instrument in this field would benefit contracting parties, courts, and arbitral tribunals. See *Follow-up Note*, *supra* note 10, ¶11.

ment.¹⁵ Courts and arbitral tribunals, within the parameters of their legal frameworks, may also be guided by the Hague Principles when considering the validity and effects of a choice of law agreement and adjudicating a choice of law dispute.¹⁶

The nonbinding nature of the instrument offers considerable advantages. One of the objectives of the current instrument is the acceptance of its principles in private international law codes, on all levels, and eventually a substantial degree of harmonization of what are currently disparate sets of national or regional rules in choice of law in international contracts. The nonbinding nature of the instrument, however, avoids any immediate risk of conflict of standards, either with regional instruments such as the Rome I Regulation in the European Union or the Mexico Convention,¹⁷ or of any interference with the 1955 Hague Sales Convention, the Hague Convention on the Law Applicable to Agency, or the 1986 Hague Sales Convention.¹⁸

While the promulgation of a nonbinding instrument is novel for the Hague Conference, such instruments are relatively common. Indeed, the Hague Principles add to a growing number of nonbinding instruments of other organizations that have achieved particular success in developing and harmonizing law. See, for example, the influence of the United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts on the respective development of sales and contract law.

15. Preliminary Document 6, March 2014, *supra* note 6.

16. *Id.*

17. See José Antonio Moreno Rodríguez & María Mercedes Albornoz, *Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts*, 7 J. PRIVATE INT'L L. 491, 493 (2011).

18. See generally Hague Conference on Private International Law, *Convention on the Law Applicable to International Sales of Goods* (June 15, 1955), available at http://www.hcch.net/index_en.php?act=conventions.text&cid=31; Hague Conference on Private International Law, *Convention on the Law Applicable to Agency* (Mar. 14, 1978) [hereinafter *1978 Convention*], available at <http://www.hcch.net/upload/conventions/txt27en.pdf>; Hague Conference on Private International Law, *Convention on the Law Applicable to Contracts for the International Sale of Goods* (Dec. 22, 1986) [hereinafter *1986 Convention*], available at <http://www.hcch.net/upload/conventions/txt31en.pdf>.

II. TOWARD A SOUND INTERNATIONAL STANDARD

The Hague Principles seek to serve as a universal model in providing a uniform approach to the recognition and limits of the principle of party autonomy in choice of law for international contracts. Part II analyzes various best practice and innovative provisions of the Hague Principles that are the subject of divergent approaches among legal systems.

A. Express Choice v. Express and Tacit Choice

The Hague Principles, underpinned by the principle of party autonomy, allow the parties to choose the law applicable to their contract. This is said to ensure certainty and predictability within the context of the parties' arrangement for several reasons. By designating the applicable law, parties know the legal regime according to which they perform their obligations,¹⁹ thus facilitating their intended transaction. By designating this law in advance of a dispute, parties are able to predict the way in which an eventual dispute will be resolved. This helps to achieve efficiency by reducing the costs of dispute resolution.²⁰

One of the issues discussed at length during the development of the Hague Principles related to the manner in which parties could make a choice of law. Specifically, the question was whether an implicit choice of the applicable law would be admissible or whether an explicit choice was necessary. Some instruments, such as the Chinese Law on the Application of Law to Foreign-Related Civil Relations, appear to limit party choice to an explicit choice of law.²¹

19. *Amin Rasheed Shipping Corp v. Kuwait Insurance Co* [1984] AC 50 (U.K.). Lord Diplock relevantly said at 67 that contracts must be "made with reference to some system of private law which defines the obligations assumed by the parties."

20. Nygh, *supra* note 1, at 2–3; see also ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 140–42 (2008) (explaining how courts use choice of law clauses to determine which law to apply during dispute resolution).

21. Brooke Adele Marshall, *Reconsidering the Proper Law of the Contract*, 13 MELB. J. INT'L L. 505, 526 (2013); Zhonghua Yenming Gongheguo Shewai Minshi Guanxi Falu Shiyong Fa (中华人民共和国涉外民事关系法律适用法) [Law on the Application of Law to Foreign-Related Civil Relations of the People's Republic of China] (Promulgated by the Standing Comm. Nat'l People's

A comparative review shows that most legal systems recognize an implicit choice of applicable law, albeit to varying degrees. Under some instruments, an implicit choice is construed restrictively. For instance, the Inter-American Convention on the Law Applicable to International Contracts²² provides that “[t]he parties’ agreement on this selection [of applicable law] must be express or, in the event that there is no express agreement, must be evident from the parties’ behavior and from the clauses of the contract, considered as a whole.”²³ That phrasing invites a twofold analysis: subjective (behavior of the parties) and objective (clauses of the contract).

Other instruments adopt a more flexible approach to the admission of an implicit choice. The Rome I Regulation requires that the choice be clearly demonstrated by the provisions of the contract or the circumstances of the case.²⁴ The Civil Code of Quebec, for its part, requires only that the designation of the applicable law be inferred with certainty from the terms of the contract, without recourse to the circumstances surrounding the deed.²⁵ Likewise, those twenty-three American states that follow the Restatement (Second) on the Conflict of Laws²⁶ consider that a reference to legal expressions or doctrines peculiar

Cong., Oct. 28, 2010), arts 2-3. See also Guangjian Tu & Muchi Xu, *Contractual Conflicts in the People’s Republic of China: The Applicable Law in the Absence of Choice*, 7 J. PRIVATE INT’L L. 179, 182–83 (2011).

22. Inter-American Convention on the Law Applicable to International Contracts art. 7, Mar. 17, 1994, O.A.S.T.S. no. 78 [hereinafter *The Mexico Convention*].

23. *Id.*

24. For a description of the background to adoption of the Rome I Regulation, see Regulation 593/2008, art. 3(1), 2008 O.J. (L 177/6) (EC); compare with the Rome Convention, which is phrased more restrictively: “The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case,” Convention on the Law Applicable to Contractual Relations art. 3, 1980 O.J. (L 266) [hereinafter Rome I Regulation]. For a description of the background to the adoption of the Rome I Regulation, see R. Wagner, *op. cit.* note 36, p. 378.

25. “A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or the designation of which may be inferred with certainty from the terms of the act,” Civil Code of Québec, S.Q. 1991, c. 64, art. 3111 (Can.).

26. 2013 Survey, *supra* note 3, at 63–64.

to the law of a particular State is a valid implied choice.²⁷ The Restatement (Second) requires courts to construe this rule narrowly, so as to avoid admitting hypothetical choices of law.²⁸

The Supreme Court of Texas's judgment in *Sonat Exploration Co. v. Cudd Pressure Control Inc.*²⁹ is an example of this narrow approach to construction. This case concerned a dispute over a master service agreement contemplating operations in multiple locations. The agreement specified that where operations were performed on navigable waters, maritime law would apply, and where operations were performed in Texas or New Mexico, Texas law would apply. A dispute concerning indemnity provisions arose in relation to an operation in Louisiana. The appellant argued before the Supreme Court of Texas that the parties had impliedly chosen Louisiana law to apply to operations in Louisiana by virtue of (1) the use of the term "statutory employer," a legal term peculiar to the state of Louisiana, and (2) the inclusion of an additional insured provision in the agreement.

The court rejected this argument on the basis that it was the indemnity provisions, not workers' compensation, that were in issue. The court reasoned, first, that the indemnity provisions were printed in capital letters, a form peculiar to the state of Texas, indicating Texas law. Secondly, the additional insured provision was inserted as a means of avoiding the effect of Louisiana's indemnity law and could not be treated as "an affirmative election of that law." Thirdly, the court reasoned that it could not surmise from these implied references to Louisiana law that the parties intended Louisiana law to apply to the entire master service agreement.

The narrow approach to implied choice in *Sonat* accords with the approach to tacit choice envisaged by the Hague Principles.

27. Restatement, (Second) of Conflict of Laws § 187(2) cmt. a (1971) [hereinafter *Restatement*]. See also *Burchett v. MasTec North America Inc.*, 93 P.3d 1247 (Mont. 2004); PETER HAY ET AL., *CONFLICT OF LAWS* 1131–32 (5th ed. 2010).

28. Restatement, *supra* note 27, at 63-64. The U.S. Supreme Court has long recognized the possibility of an implied choice of law. *Wayman v. Southard*, 23 U.S. 1, 1 (1825); SYMEON C. SYMEONIDES, *AMERICAN PRIVATE INTERNATIONAL LAW* 197 (2008).

29. *Sonat Exploration Co. v. Cudd Pressure Control, Inc.*, 271 S.W.3d 228 (Tex. 2008).

Article 4 of the Hague Principles requires that the parties' choice "be made expressly or appear clearly from the provisions of the contract or the circumstances." An express choice of law is usually included in the main contract and takes the form of an explicit reference to the law to which any disputes between the parties should be subject. An express choice of law can also be made orally. A tacit choice of law by the parties is one that is not expressly stated in the contract but is nonetheless a real choice of law. It must be clear that there is a real intention on the part of the parties that a certain law be applicable. A hypothetical choice or presumed intention imputed to the parties is insufficient.³⁰

This approach acknowledges a tacit choice made by reference to elements of the contract or other relevant circumstances.³¹ Generally, the terms of the contract are given priority. However, either the terms of the contract or the circumstances of the case may conclusively indicate a tacit choice of law. As to relevant terms of the contract, a choice of court clause or an arbitration clause may, along with other factors, indicate that the parties intended the contract to be governed by the law of that forum. Article 4 clarifies that such a choice is not *in itself* equivalent to a choice of law. This express clarification avoids a common point of confusion in practice: the parties' decision to choose a particular court or arbitral tribunal as the forum in which to resolve disputes does not automatically mean that the parties have selected the law of that forum as the law governing the contract.³² The particular circumstances of the case that may indicate the intention of the parties as to the applicable law may include their conduct and other factors surrounding the conclusion of the contract. Previous or related contracts between the parties containing an express choice of law clause

30. For arguments in favor of express choice only, see PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Choice of Law in International Commercial Contracts: Hague Principles?*, 15 UNIFORM L. REV. 883, 895 (2010), *but cf.* Jan L. Neels & Eesa A. Fredericks, *Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts*, 44 DE JURE L. J. 101,101–10 (2011), *and* Marshall, *supra* note 21 at 517.

31. *See* Nygh *supra* note 1, at 113–20 (providing a survey of the indicators of tacit choice).

32. *Cf.* The former presumption under English law of *qui elegit iudicem elegit jus*. *Tzortzis v. Monark Line A/B*, (1968) 1 W.L.R. 406, 413 (CA).

in favor of the same law may also indicate that the parties intended to have that law apply to all of their contractual relations.

B. Absence of a Connection Between the Contract or the Parties and the Designated Law

Article 2(4) of the Hague Principles establishing that the parties' freedom to choose the applicable law is not circumscribed by the requirement of a connection, be it geographical or otherwise, between the contract or the parties and the chosen law. This provision is designed to reflect the reality of largely delocalized commercial transactions brought about by globalization. The provision also reflects the fact that parties may choose a particular law for a number of reasons: its neutrality *inter se*,³³ because it is highly developed in the type of transaction or transactions contemplated by the contract, or because it is most familiar to their legal advisors on whose advice the parties rely.

In allowing the parties to choose the law applicable to their contract, without requiring a particular connection, the Hague Principles' methodology is consistent with many modern instruments relating to the law applicable to contracts.³⁴ For example, Article 7(1) of the 1955 Hague Convention on the Law Applicable to International Sales of Goods (the "1955 Hague Sales Convention") promotes the parties' freedom without requiring any connection between the chosen law and the parties' transaction. A similar provision exists for choice of court agreements in the 2005 Hague Choice of Court Convention. Furthermore, neither the Rome I Regulation nor the Mexico Convention requires a connection between the chosen law and the contractual situation.

The Hague Principles differ, however, from the choice of law rules in some legal systems that accept party autonomy, but which require an objective, substantial connection between the

33. Selecting a neutral forum is what game theory labels the second best strategy. Choosing the law and forum of an unfamiliar State imposes an additional cost on both parties and ensures that neither party has an informational advantage. See Stefan Voegenauer, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 1 EUR. REV. PRIVATE L. 13, 24–25 (2013).

34. Nygh, *supra* note 1, at 58–60.

transaction and the chosen law.³⁵ For example, the Restatement (Second) methodology, which is followed in the majority of American states,³⁶ calls for a substantial relationship between the law chosen and the parties or the transaction in a case where there is no other reasonable basis for the parties' choice, but only for issues which the parties could not have resolved by an explicit provision in their contract directed to that issue.³⁷ The Restatement (Second) subjects issues within the contractual power of the parties to the chosen law irrespective of whether that law is connected to the parties or their transaction.³⁸

35. It was recommended, following the Special Commission, that this requirement be referred to in the Commentary. *See* 2012 Draft Hague Principles, *supra* note 6. The Restatement (Second)'s substantial relationship requirement restricts party autonomy in an instrument which applies to a broad range of contracts, including those involving presumptively vulnerable parties such as consumers and employees. The Hague Principles, which do not call for a substantial connection, arguably can afford to be more liberal because these sorts of vulnerable parties are excluded from the scope of the instrument. The Hague Principles only apply to commercial contracts. *See generally*, SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD 164 – 65 (2014).

36. The Uniform Commercial Code (“U.C.C.”) has been adopted in all American states and takes precedence over the Restatement (Second) for contracts falling within its scope. Courts, however, have tended to equate Section 1–105 of the former version of the U.C.C. with the Restatement (Second), viewing the two as interchangeable. Symeonides, *supra* note 28, at 216. Considering Section 1-301 of the Revised U.C.C. adopts the language of the former Section 1-105 (The American Law Institute, 85th Annual Meeting Program, 19-21 May 2008, p. 8, No 3; Keith A. Rowley, *The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1*, Nev. L.J. 1, 8 (2011), available at <http://www.law.unlv.edu/faculty/rowley/RA1.081511.pdf>), there is nothing to suggest that Section 1-301 of the Revised U.C.C. will change the methodology that courts employ in those states.

37. Restatement, *supra* note 27, § 187(2) provides that

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by explicit provision in their agreement directed to that issue, unless ... (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice ...

For a breakdown of those states that employ the Restatement (Second) methodology, see 2013 Survey, *supra* note 3, at 62-64.

38. Restatement, *supra* note 27, § 187(1).

A number of states have abandoned the substantial connection requirement of the Restatement (Second).³⁹ In other states, the requirement's interpretation has been relaxed over time. One commentator has suggested that the cases premised upon it are so few that they ought to be regarded as exceptions.⁴⁰ A very recent case that applied a strict interpretation to the requirement is *Contour Design, Inc. v. Chance Mold Steel Co., Ltd.*⁴¹ This case concerned a dispute over a nondisclosure agreement ("NDA"), drafted by a lawyer in Colorado, containing a choice of law clause selecting the law of Colorado. The Taiwanese respondent was the manufacturer of the goods of the appellant, a New Hampshire corporation. Under New Hampshire's choice of law rules, the methodology of the Restatement (Second) applied to the dispute.⁴² The Court set aside the parties' choice, holding that there was an insignificant relationship between the NDA and the law of Colorado, the only alleged connection being the location of the drafting lawyer, and instead applied New Hampshire law.⁴³ Presumably, the Court did not see the familiarity of the drafting lawyer with Colorado law to be a "reasonable basis" for the parties' choice in accordance with §187(2)(a).

39. See for example, Louisiana Civil Code Art. 3540 and Oregon Revised Statutes § 81.120. See also Texas Business & Commerce Code § 35.51 (c), New York General Obligations Law § 5-1401.735, California Civil Code § 1646.5 and Illinois Compiled Statute 105/5-5, which apply to choice of law in transactions above a monetary threshold.

40. See RÜHL, *supra* note 1, at 14 n.50.

41. *Contour Design, Inc. v. Chance Mold Steel Co., Ltd.*, 693 F.3d 102 (1st Cir. 2012).

42. As the United States Federal Court of Appeals for the Second Circuit was sitting in diversity jurisdiction, it applied the choice of law rules of the forum state, New Hampshire. New Hampshire follows the Restatement (Second) choice of law methodology. See 2013 Survey, *supra* note 3, at 63. "Under New Hampshire law, '[w]here parties to a contract select the law of a particular jurisdiction to govern their affairs, that choice will be honored if the contract bears any significant relationship to that jurisdiction.'" *In re Scott*, 160 N.H. 354, 999 A.2d 229, 237-38 (2010) (alteration in original) (quoting *Hobin v. Coldwell Banker Residential Affiliates*, 144 N.H. 626, 744 A.2d 1134, 1137 (2000)); See also *Contour Design, Inc.*, 693 F.3d 102.

43. *Contour Design, Inc.*, 693 F.3d 102. It is unclear on the face of the reasons for judgment whether the Court applied New Hampshire as the law most closely connected to the contract in accordance with § 188 of the Restatement Second or as the law of the forum.

While a “significant minority” of American states continue, in theory, to employ the Restatement (First) methodology⁴⁴—which does not allow parties to choose the law applicable to their contract⁴⁵—a number of modern Restatement (First) courts have seemingly broken with the traditional methodology. Instead, they have applied loosely a §187 Restatement (Second) type analysis to choice of law clauses referring to the law of the place with the most significant relationship to the contract.⁴⁶

The requirement that the chosen law have a significant, objective connection to the parties or their contract can be likened to the theory of localization in a civil law context, which was fervently defended by Batiffol during the early nineteenth century.⁴⁷ According to this theory, the chosen law is excluded when it is unrelated to the objective center of gravity of the contract. The rationale behind the approach, under which a connection with the chosen law is required, is to police party autonomy so as to prevent *fraude à la loi*. As it is known in French, *fraude à la loi* focuses on the motives of the party who,

44. Symeonides, *supra* note 3, at 63.

45. The principal objection to the ability of the parties to choose the law applicable to their contract is that it “practically creates a legislative body from any two persons who choose to get together and contract.” JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1079–80 (1935). This is based on Beale’s and Dicey’s vested rights theory according to which, a particular contract is the trigger for the vesting of a right in a given location. A.V. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 17–25 (5th ed. 1932); William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1197–98 (1997). The law of the place where the right vests then controls the content of the right. In the case of contracts, Restatement (First) courts traditionally applied the law of the place where the contract was formed to control the content of contractual rights. *Id.* at 1206–13.

46. Richman, *supra* note 45, at 1206-13.

47. HENRI BATIFFOL, ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ 83 (1956); HENRI BATIFFOL, LES CONFLITS DE LOIS EN MATIÈRE DE CONTRATS 38 (1938). For a discussion of this theory in English, see HORACIO A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL ARBITRATION, 155–57 (1992).

by its choice of law, seeks to avoid the application of another law that is objectively applicable to the contract.⁴⁸

The Hague Principles address, to a large extent, the concerns attending *fraude à la loi* through application of the exceptions of *ordre public* and overriding mandatory laws provided for in Article 11, which limit party autonomy. The exceptions were considered to be a sufficient counterbalance to the ability of the parties to choose an unconnected law to apply to their contract. This is especially so considering parties are likely to choose a neutral law because they have not been able to agree on the application of either of their own legal systems.⁴⁹

C. *The Battle of the Forms*

A significant development at the November 2012 Special Commission meeting was the adoption of a provision on the vexed problem of the “the battle of the forms” or, more specifically, the question of the prevailing law—if any—when both parties make choices of law via the exchange of “standard form” contracts.⁵⁰

At a national level, there are at least four different approaches to the battle of the forms.⁵¹ Under Dutch law, the standard terms first used prevail (“first shot rule”); whereas under English law and the Contract Law of the People’s Republic of China,⁵² the standard terms referred to last prevail (“last shot rule”). In other jurisdictions, such as France and Germany, conflicting terms are to be ignored entirely (“knock out rule”). The United States’ Uniform Commercial Code applies a hybrid so-

48. HENRI BATIFFOL & PAUL LAGARDE, *TRAITÉ DE DROIT INTERNATIONAL PRIVÉ* 596 (8th ed. 1993).

49. See D. MARTINY, *MÜNCHENER KOMMENTAR ZUM BGB* Art. 27, No., 28 (4th ed. 2006).

50. This problem, which is not canvassed here, is also experienced in a jurisdictional context. For a discussion of the problem concerning conflicting jurisdiction clauses, see Richard Garnett, *Co-existing and Conflicting Jurisdiction and Arbitration Clauses*, 9 *J. OF PRIVATE INT'L L.* 361 (2013).

51. Thomas Kadner Graziano, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution*, 14 *Y.B. PRIVATE INT'L L.* 71, 74 (2012/2013).

52. Zhonghua Yenming Gongheguo Hetong Fa (中华人民共和国合同法) [*Contract Law of the People’s Republic of China*] (Promulgated by the Standing Comm. Nat’l People’s Cong., 15 Mar. 1999, effective Oct. 1, 1999), Art. 19.

lution, adopting aspects of the first shot rule, last shot rule, and knock out rule.⁵³ Other jurisdictions do not yet have a solution for the issue of conflicting standard terms.⁵⁴

A special drafting group, led by the delegation of Switzerland, in consultation with the Drafting Committee, considered this matter. Two drafting options, one more concise than the other, were set out and presented to the Special Commission. The shorter text was preferred and was widely considered by the experts present at the Special Commission to be an elegant and comprehensive solution to the problem of conflicting choice of law clauses.

Article 6 of the Hague Principles provides that whether or not the parties have agreed to a choice of law is to be determined by the law that was purportedly agreed to. If both parties' standard terms designate the same applicable law, or if only one party's standard terms contain a choice of law clause, Article 6, paragraph 1(a) applies and "the law that was purportedly agreed to" resolves the question of whether the parties "agreed" on the applicable law. Where standard terms used by the parties contain conflicting choice of law clauses, Article 6, paragraph 1(b) applies and the law that was purportedly agreed to resolves the question of whether the parties agreed on the applicable law.⁵⁵ If under these laws the same standard terms prevail, then the law designated in the prevailing standard terms governs the contract as the applicable law.

This provision attempts to bring clarity to the divergent approaches that exist under national law. Complemented by the Commentary, which contains illustrations of potential instances of a battle of the forms and how these situations would be resolved by the Hague Principles, Article 6 of the Hague Principles may prove to be a significant contribution to the development of an international standard for a highly complicated legal issue.

53. U.C.C. § 2-207 (1958); Graziano, *supra* note 51, at 79.

54. Graziano, *supra* note 51, at 74-82.

55. For an analysis of how the provisions of Article 6 of the Hague Principles might apply where the parties have chosen rules of law as the applicable law under Article 3, see Brooke Adele Marshall, *The UNIDROIT Principles: A Dash of Pragmatism in the Non-State Law Pudding?*, (unpublished manuscript) (on file with the authors).

D. Partial and Multiple Choice of Law

The process of separating the elements comprising a legal relationship so as to subject them to the laws of several different legal systems is known as *dépeçage*.⁵⁶ Some commentators argue that *dépeçage* ought to be used restrictively in a contractual setting, asserting that it should only apply to contractual transactions that are clearly severable.⁵⁷ Notwithstanding, several instruments,⁵⁸ including the Resolution of the Institute of International Law on “The Autonomy of the Parties in International Contracts between Private Persons or Entities,”⁵⁹ the Rome I Regulation,⁶⁰ and the Restatement (Second),⁶¹ permit *dépeçage* of a single contract.⁶² Article 2(2) of the Hague Principles adopts a similar approach, allowing the parties to choose different laws to apply to separate elements of their contract or to choose a body of law to apply to only part of their contract. The Hague Principles reserve to the parties the option to use this process as a means of giving the greatest scope to party autonomy.⁶³ The Commentary, however, notes the risk of con-

56. Paul Lagarde, *Le Dépeçage en Droit International Privé des Contrats*, 1 RIV. DI DIR. INT. PRIV E PROC., 649, 649 (1975) (It.).

57. Jean-Michel Jacquet, *Contrats*, in RÉPERTOIRE DE DROIT INTERNATIONAL, 1, 13, ¶ 57, (Dominique Carreau et al. eds., Dalloz 2011). According to Professor Bernard Audit, this restrictive view is inspired by the concern to observe the statutory establishments and the fear of imbalance between the parties. BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 685 (5th ed. 2008).

58. In relation to arbitration, see Arbitration Focus, *supra* note 9, at 15.

59. Institute of International Law, The Autonomy of Private Parties in International Contracts between Private Persons or Entities, Sess. of Basel, art. 7 (Aug. 31, 1991) (providing that “the parties may choose the law to be applied to the whole or one or more parts of the contract.”).

60. Rome I Regulation, *supra* note 24, at 10 (“The parties can select the law applicable to the whole or a part only of the contract.”).

61. Restatement, *supra* note 27, § 187(2) cmt 1.

62. Regarding the discussions of this matter in connection with the 1986 Convention, see Hague Conference on Private International Law, *Convention on the Law Applicable to Contracts for the International Sale of Goods* (Dec. 22, 1986), available at <http://www.hcch.net/upload/conventions/txt31en.pdf>.

63. *Dépeçage* is a “form of accomplishment of contractual intent.” Lagarde, *supra* note 48, at 652; RICHARD PLENDER & MICHAEL WILDERSPIN, THE EUROPEAN CONTRACTS CONVENTION: THE ROME CONVENTION ON THE CHOICE OF LAW FOR CONTRACTS 100-01 (2d ed. 2001) (stating that “*dépeçage* is simply a manifestation (or the logical conclusion) of the principle of party autonomy.”);

tradition or inconsistency that may result from *dépeçage* in the determination of the parties' rights and obligations. Parties should ensure that their choices "are logically consistent."⁶⁴

The parties may also make a partial choice of law in accordance with Article 2(2)(i). Where the parties choose a law to apply to only part of their contract, the remainder of the contract—in default of a choice of law applicable to it—is governed by the law that would be applicable in the absence of a choice. As the Hague Principles do not provide rules for identifying the applicable law in the absence of a choice by the parties, this issue is left to be determined by the law of the forum. The parties may also choose several bodies of law to govern different aspects of their contract pursuant to Article 2(2)(ii). Partial or multiple choices of law may relate to, for example, the currency applicable to the contract, or clauses relating to specific obligations, such as obtaining governmental authorizations.

These are but a few illustrations of the solutions proposed by the Hague Principles. This Article now addresses the way in which the Hague Principles harmonize the approach to choice of law from the angle of the different dispute resolution mechanisms available to the parties.

III. LEVELING THE PLAYING FIELD BETWEEN COURTS AND ARBITRATION: EXPANDING DISPUTE RESOLUTION OPTIONS FOR PARTIES TO INTERNATIONAL CONTRACTS

In recent years, there has been a global trend, commercially, judicially, and legislatively, to favor arbitration.⁶⁵ This phenomenon has led some jurisdictions to a tacit or overt policy preference for arbitration, and a trend to craft legislation ac-

Marc. Ekelmans, *Le Dépeçage du Contrat dans la Convention de Rome du 19 Juin 1980 sur la Loi Applicable aux Obligations Contractuelles*, in MÉLANGES OFFERTS À RAYMOND VANDER ELST 247, 247 (1986).

64. JAMES FAWCETT & JANEEN M. CARRUTHERS, CHESHIRE, NORTH AND FAWCETT: PRIVATE INTERNATIONAL LAW 691 (14th ed. 2008) (“[C]hoices must be logically consistent”). Cf. Jacquet, *supra* note 57 (“the only limit of *dépeçage* is one of practice: the application of several laws to a single contract should not rupture its consistency.”). Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 282) 1, 17 (E.C.) (by Mario Giuliano and Paul Lagarde).

65. Stavros Brekoulakis, *The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements*, 24 J. INT'L ARB. 341, 341 (2007).

cordingly.⁶⁶ Domestic legislation implementing the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1985 UNCITRAL Model Law on International Commercial Arbitration has in turn “reinforced the legal status and position of arbitration,”⁶⁷ and enhanced its desirability as a dispute resolution mechanism in the eyes of commercial parties. Other commentators suggest that a preference for arbitration on the part of commercial actors is misplaced and that many are still attracted to the transparency, speed, and impartiality offered by judicial processes.⁶⁸

With a view to subordinating any judicial or legislative preference in favor of arbitration to the will of the parties, the Hague Principles seek to harmonize the approach to choice of law between litigation and arbitration, while nonetheless acknowledging the different normative spaces in which State courts and arbitral tribunals operate. Below are several examples of how these differences converge under the Hague Principles.

A. Choice of Non-State Rules of Law

Where a dispute is to be resolved by litigation before a State court, most regimes of private international law require that the parties’ choice of law clause designate a State system of law. Choice of norms or rules of law emanating from non-State sources has typically only been contemplated in an arbitral context. The phrase “rules of law” is derived from existing arbitration sources including State arbitration legislation, model arbitration laws, and private institutional arbitration rules.⁶⁹ Article 3 of the Hague Principles widens the scope of the party autonomy to allow parties to choose non-State rules of law to govern their contract in circumstances where their dispute is subject to litigation. Where the law of the forum restricts party

66. Garnett, *supra* note 50, at 361-62.

67. *Id.* at 362.

68. TREVOR HARTLEY, CHOICE OF COURT AGREEMENTS UNDER THE EUROPEAN AND INTERNATIONAL INSTRUMENTS 5 (2013).

69. See U.N. Comm. On Int'l Trade L. [“UNCITRAL”], UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, U.N. Doc. A/40/17 (1985); International Chamber of Commerce, *ICC Rules of Arbitration*, art. 21(1), 28(1) (2012).

choice to systems of State law, however, a choice of non-State rules of law will be set aside.

An earlier version of the draft Hague Principles, as originally proposed by the Working Group, extended party choice to non-State rules of law through a “bright-line” rule which provided that “a reference [in these Principles] to law includes rules of law.”⁷⁰ This broad, open ended formulation was criticized by some experts at the Special Commission on the basis that it might lead to a proliferation of unfair, unilateral rules of law dictated by the party with the greatest bargaining power.⁷¹ This could have adverse effects on weaker or unsuspecting parties. There was also a concern that allowing parties to employ any rules of law could make the judicial resolution of disputes more time consuming and complex, given the array of potential rules of law that could be applicable.

On the other hand, the experts who favored retaining the formulation suggested by the Working Group stressed that the fundamental purpose of the Hague Principles—the promotion of party autonomy—ought to extend to the freedom to choose rules of law. Several experts noted, in response to the concern about vulnerable parties, that many State laws already contained substantive provisions that prevent the application of unfair terms, and that parties transacting internationally in a commercial context should be considered capable of choosing the law or rules of law applicable to their transaction. Furthermore, if the Hague Principles disallowed the designation of rules of law, or remained silent as to whether parties could designate them, this would conflict with the promotion of uniform and harmonized choice of law principles.

After significant discussion and various constructive proposals, the experts reached a compromise. Article 3 of the Hague Principles, in its current form that allows parties to choose only rules of law that are “neutral and balanced,” seeks to address the concern of unequal bargaining power leading to the application of unfair or inequitable rules of law. Moreover, the requirement that parties select a “set of rules” that are

70. See 2012 Draft Hague Principles, *supra* note 6.

71. Cecilia Fresnedo de Aguirre, *Party Autonomy – a Blank Cheque?*, 17 UNIFORM L. REV. 655, 680 (2012).

“generally accepted” seeks to dissuade parties from choosing vague or uncertain categories of rules of law.

The Commentary elaborates on the elements comprising Article 3. As to the first (a “set of rules” that are “generally accepted”), the Commentary provides several examples—including the UNIDROIT Principles on International Commercial Contracts and the substantive rules of the United Nations Convention on Contracts for the International Sale of Goods (1980, Vienna) (“CISG”)—as a free standing set of contract rules and not as a nationalized version of the CISG contained in the law of a CISG Contracting State. Second, the Commentary explains that the requirement of “neutrality” calls for a body of rules that are capable of resolving problems commonly encountered in transnational contracts. Finally, the requirement that the rules be “balanced” reflects the presumption that the parties exercise the same negotiating power. Accordingly, rules of law that are drafted to confer an advantage on one of the contracting parties are excluded under Article 3.

To ensure that all aspects of the parties’ contract are governed by an applicable law, the Commentary urges parties to supplement their chosen rules of law by the choice of a body of State law. This “gap filling” law applies to those aspects of the contract to which the applicable rules do not extend.⁷²

B. Overriding Mandatory Laws and ordre public

1. Definitions

The Hague Principles acknowledge that certain qualifications to party autonomy are necessary in the field of international commercial contracts, whether the parties’ dispute is being resolved by arbitration or litigation. The most important qualifications to the application of parties’ chosen law are those contained in Article 11. The purpose of Article 11 is to ensure that the choice of the law by parties to an international commercial contract does not have the effect of excluding overriding mandatory laws or the rules of *ordre public*. It is clear that overriding mandatory laws and public policy are “closely connected” and are united in the result that they achieve, namely, a setting aside of the chosen law to the extent of an inconsistency

72. See generally Marshall, *supra* note 55.

with the law against which it is being assessed. These exceptions affect the applicable law differently, however, and as such call for distinct inquiries.

Ordre public concerns situations in which application of the chosen law is displaced because its application in a particular case offends the fundamental policies of the forum or another State whose law would apply to the contract, absent the parties' choice. The exception concentrates on the content of the foreign, chosen law, which is otherwise properly applicable, to set that law aside. The chosen law is only displaced *to the extent* of the incompatibility with the fundamental policies of the forum or of the State whose law would apply in the absence of choice.⁷³ The threshold is high in that the application of the chosen law must violate a fundamental policy of the forum. The chosen law cannot be displaced simply because it implements a different legislative policy and adopts an approach different from that of the law of the forum.

Overriding mandatory provisions are those positive rules of the *lex fori*, or of a third legal system, that are essential to safeguard the public interests of the relevant legal system. The relevant inquiry, when one talks about overriding mandatory laws of the forum, is on those provisions themselves; that is, provisions which, on their proper construction, take priority over the chosen law, although the chosen law is still applied as far as possible consistently with the overriding mandatory provision.⁷⁴ The law of the forum determines whether and when the overriding mandatory provisions of a third legal system are to be taken into account.

Interestingly, the Hague Principles address public policy and overriding mandatory provisions in a single article. This approach is a departure from the Hague Conference's traditional approach, which has been to separate those two concepts.⁷⁵ It is

73. See Preliminary Document 6, March 2014, *supra* note 6.

74. *Id.*

75. *E.g.*, 1978 Convention, *supra* note 18, art. 16-17 and 1986 Convention, *supra* note 18, art. 17-18. See also Hague Convention on Private International Law, *Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*, art. 11 (July 5, 2006).

also a departure from the prevailing approach to the treatment of these issues in the European Union.⁷⁶

2. In an Arbitral Setting

Article 11(5) deals with the qualifications to the application of parties' chosen law in circumstances where the parties have agreed to submit disputes to arbitration. It envisages that the Hague Principles shall not prevent the tribunal from applying or taking into account both overriding mandatory provisions and *ordre public* of any law other than the law chosen by the parties if the tribunal is required to do so.⁷⁷ While the formulation in paragraph 5 may seem repetitive, it clearly conveys the intended meaning: that the first and second limbs, relating to overriding mandatory provisions and public policy, respectively, are to be treated separately.

The Hague Principles do not comment on the circumstances under which an arbitral tribunal might be required to have regard toward such matters, for this is a fraught issue.⁷⁸ From a contractualist perspective,⁷⁹ arbitral tribunals operate within their own normative space and are therefore not required to vindicate the mandatory laws or protect the *ordre public* of a particular State, other than those forming part of the law chosen by the parties. Within the paradigm of jurisdictional theory, however, arbitration is still very much tied to the Westphalian model, the nation-state being the source of legitimacy for the exercise of the tribunal's powers and the enforcement of an award, which the tribunal renders.⁸⁰ In accordance with this theory, arbitrators are required to have regard to the mandatory laws of both the seat where the arbitral powers are exer-

76. See Monika Pauknerová, *Mandatory Rules and Public Policy in International Contract Law*, 11 ERA F. 29, 29-43 (2010).

77. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 635-37 (1985).

78. See generally, Andrew Barraclough & Jeff Waincymer, *Mandatory Rules in International Commercial Arbitration*, 6 MELB. J. INT'L L. 205, 208 (2005).

79. *Id.*

80. See P A Keane, C.J., Fed. Court of Austl., *The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House Our Rules* (Sept. 25, 2012), available at <http://www.amtac.org.au/assets/media/Papers/AMAMTACAddressKeaneCJ25September-2012.pdf>.

cised⁸¹ and the place of enforcement where the award will take effect. Somewhere in the middle of these two theories is a hybridized conception of arbitration.⁸²

Without equivocating on any one of these theories, or on any hybrid conception, the Commentary to the Hague Principles cites as an example the situation where a tribunal is acting in accordance with arbitral rules that require it to make every reasonable effort to render an “enforceable award.”⁸³ This may entail recourse to the overriding mandatory provisions of the State in which the award creditor is likely to seek enforcement. A further example might be where arbitrators are called upon to decide the enforceability of a contract for the payment of corrupt funds. In such a case, the arbitrators may have regard to the overriding mandatory laws of the place of performance of the contract.⁸⁴

Article 11 does not *compel* arbitrators to apply overriding mandatory laws of the forum or rules of *ordre public*. Rather, it calls on arbitrators to exercise their discretion as to whether and in what circumstances they ought to do so. This is distinguishable from the provisions of Article 11 applying to State courts (paragraphs 1 to 4) that do compel State courts to have regard to such rules.

3. In Litigation

The first two paragraphs of Article 11 deal with overriding mandatory laws, which qualify the application of parties’ chosen law in circumstances where the parties’ dispute is being litigated before a State court. Article 11(1) and Article 11(2) deal respectively with the application of the “overriding mandatory provisions of the law of the forum” and the “overriding mandatory provisions of another law.” It was suggested during the meeting of the Special Commission that the first two para-

81. Barraclough, *supra* note 78, at 210-11. Although the powers may, in reality, be exercised in the venue, which may differ from the seat of the arbitration.

82. *See id.* at 210.

83. *See, e.g.*, The Rules of Arbitration of the International Chamber of Commerce, art. 41 (2012).

84. *See generally*, S Z Tang, *Corruption in International Commercial Arbitration*, Presentation at the Journal of Private International Law Conference, (Sept. 12 – 13, 2013) (attended by the authors).

graphs of Article 11 be amalgamated to preserve the brevity and succinctness of the Hague Principles. The Special Commission, however, agreed to retain the two separate paragraphs, principally on the basis that where the Hague Principles are used as a model, legislators may wish to make separate reference to the role of overriding mandatory provisions of the forum and of a third country. Under the Hague Principles, it is for the law of the forum to determine whether and when the overriding mandatory provisions of a third legal system are taken into account. This provision should prompt policymakers to enumerate expressly the circumstances in which the overriding mandatory provisions should displace the law chosen by the parties.

The third and fourth paragraphs of Article 11 deal with rules of *ordre public*, which similarly qualify the application of parties' chosen law in circumstances where the parties' dispute is being litigated before a State court. Article 11(3) requires State courts to apply the *ordre public* of the forum, and Article 11(4) leaves it to the law of the forum to determine the relevance, if any, of the *ordre public* of the State whose law would be applicable in the absence of a choice of law.

CONCLUSION

The Hague Principles reflect the overarching mandate of the Hague Conference: “[T]he progressive unification of the rules of private international law.”⁸⁵ When implemented at the national or regional level, the Hague Principles will contribute to providing greater cohesion between approaches to choice of law rules relating to international contracts. The implementation of the Hague Principles should also alert parties to the issue of the law applicable to their contract, prompting them to plan their cross-border transactions more effectively. Whether these objectives will be met remains to be seen. It will be interesting to monitor the possible implementation and subsequent impact of such common international standards around the world.⁸⁶

85. *Statute of the Hague Conference on Private International Law* art. 1, July 15, 1955, COLLECTION OF CONVENTIONS (1951-2009) 2 (Hague Conference on Private International Law ed. 2009).

86. To our knowledge, the first State to formally consider implementing the Hague Principles on Choice of Law in International Contracts is Para-

For now, academic debate generated by symposia, such as the Brooklyn Law School Symposium, “What Law Governs International Commercial Contracts? Divergent Doctrines and the New Hague Principles,” is indispensable to ensuring that the future instrument is rigorously reviewed by those who may be its ultimate users.

guay. Legislation is currently before the Paraguayan Congress. *See Paraguayan draft legislation implementing Draft Hague Principles on Choice of Law in International Contracts, Hague Conference on Private International Law* (April. 22, 2014, 4:09 p.m.), http://www.hcch.net/index_en.php?act=events.details&year=2013&varevent=336.