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HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

Principles on Choice of Law in International Commercial Contracts

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Foreword

I am delighted to preface this publication of the Principles on Choice of Law in International Commercial Contracts (the "Hague Principles"), the first normative soft-law instrument developed and approved by the Hague Conference on Private International Law.

In addition to the 12 articles of the Hague Principles and their Preamble, this publication includes the Introduction to the Principles, which describes the general framework, nature, purpose, structure, and scope of the Hague Principles. This publication also includes the article-by-article Commentary, an interpretative and explanatory tool for the better understanding of the Hague Principles.

At their core, the Hague Principles are designed to promote party autonomy in international commercial contracts. By acknowledging that parties to a contract may be best positioned to determine which set of legal norms is most suitable for their transaction, party autonomy enhances predictability and legal certainty – important conditions for effective cross-border trade and commerce. At the same time, the Hague Principles also set balanced boundaries to party autonomy and thus may provide a refinement of the concept where it is already accepted. In essence, the Hague Principles may be considered to be an international code of current best practice in relation to party autonomy in international commercial contracts.

Work on the Hague Principles started in 2006, when the Council on General Affairs and Policy of the Hague Conference invited the Permanent Bureau to prepare a feasibility study on the development of an instrument concerning choice of law in international contracts (a succinct overview of the development of the Hague Principles follows below at p. 9). In 2009, the Council invited the Permanent Bureau to set up a Working Group, composed of experts in the fields of private international law, international commercial law and international arbitration law, with a view to developing a draft non-binding instrument on choice of law in international commercial contracts. Under the excellent chairmanship of Mr Daniel Girsberger (Switzerland), the Working Group met at regular intervals between 2010 and 2012 and developed the 12 articles of the future instrument. Then, in November 2012, a Special Commission meeting was held to review the draft articles. The Commission approved them and tasked the Working Group with also developing a commentary. Thanks to the efforts of several experts who took on the primary drafting of different parts of the Commentary, and to further discussions within the Working Group, work on the full "package" (Introduction, Preamble, Articles, Commentary) was completed in 2014. On 19 March 2015, the Members of the Hague Conference formally approved the Hague Principles.

The Hague Principles are not formally binding; they provide a comprehensive blueprint to guide users in the creation, reform, or interpretation of choice of law regimes at the national, regional, or international level. The Hague Principles have already proven their usefulness in early 2015, when they served as a model to the legislator of Paraguay in promulgating a law on the Law Applicable to International Contracts.

The Permanent Bureau hopes that other jurisdictions will follow this pioneering initiative, reaffirming the usefulness of the Hague Principles as an inspiring international standard, which has, as a further most encouraging sign of their approval by the international legal community, received UNCITRAL's endorsement in July 2015.

The development of the Hague Principles represents a truly collective effort. The extraordinary commitment, dedication, and sheer hard work of each member of the Working Group and of the experts who participated in the 2012 Special Commission meeting was instrumental to seeing this project come to fruition. The active participation of a select group of Observers enriched and contextualised the drafting process over the years (a list of participating experts can be found below on p. 13). Above all, Mr Daniel Girsberger played a key role as the Chair of both the Working Group and the 2012 Special Commission meeting. His wise guidance throughout the years, with the assistance of Ms Marta Pertegás as the lawyer with primary responsibility for this project at the Permanent Bureau, was essential to the completion of this important Hague instrument.

On behalf of the Permanent Bureau, and personally, I wish to extend my sincere and deep appreciation to all the members of the Working Group and all other experts who were involved in the development of the Hague Principles. Thanks should also go to the many colleagues and interns of the Permanent Bureau for their important contributions to this project. While they are too numerous to be listed here, they all know they belong to the growing community of "Hague Principles Ambassadors" from around the world.

I am confident that this publication will help with promoting, disseminating, and applying the Hague Principles around the world.

Christophe Bernasconi | *Secretary General*

Hague Conference on Private International Law

Development of the Principles on Choice of Law in International Commercial Contracts

June 2006

The Special Commission on General Affairs and Policy of the Conference decides to invite the Permanent Bureau to prepare a feasibility study on the development of an instrument concerning choice of law in international contracts. The study should consider in particular whether there is a practical need for the development of such an instrument.[1]

January 2007

The Permanent Bureau circulates questionnaires addressed to Member States and stakeholders in the field of international commercial arbitration to examine the practical need for the development of an instrument concerning choice of law in international contracts.[2]

March 2007

On the basis of the responses of the different target groups, the Permanent Bureau conducts a series of feasibility studies. Their purpose is not only to provide an overview and an analysis of existing instruments,[3] with a special focus on international arbitration,[4] but also to foreshadow any problems or shortfalls of a future instrument relating to choice of law in international commercial contracts.[5]

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1 *Conclusions adopted by the Special Commission on General Affairs and Policy of the Conference (3-5 April 2006)*, Prel. Doc. No 11 of June 2006, point 2.

2 *Questionnaire addressed to Member States to examine the practical need for the development of an instrument concerning choice of law in international contracts*, prepared by the Permanent Bureau, January 2007; *Questionnaire addressed to stakeholders in the field of international commercial arbitration to examine the practical need for the development of an instrument concerning choice of law in international contracts*, prepared by the Permanent Bureau, January 2007.

3 T. KRUGER, *Feasibility study on the choice of law in international contracts - overview and analysis of existing instruments*, Prel. Doc. No 22 B of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference.

4 I. RADIC, *Feasibility study on the choice of law in international contracts - special focus on international arbitration*, Prel. Doc. No 22 C of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference.

5 *Feasibility study on the choice of law in international contracts - report on work carried out and preliminary conclusions*, prepared by the Permanent Bureau, Prel. Doc. No 22 A of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference.

April 2008

The Council invites the Permanent Bureau to continue its exploration of this topic concerning international business-to-business contracts with a view to promoting party autonomy. The Permanent Bureau is asked to explore, in co-operation with relevant international organisations and interested experts, the feasibility of drafting a non-binding instrument, including the specific form that such an instrument might take.[6]

March 2009

The Permanent Bureau issues a Report on Work Carried Out and Suggested Work Programme for the Development of a Future Instrument, in which a possible work programme for the development of a non-binding instrument on the law applicable to international contracts is proposed.[7]

March – April 2009

The Council invites the Permanent Bureau to continue its work on promoting party autonomy in the field of international commercial contracts. In particular, the Permanent Bureau is invited to form a working group consisting of experts in the fields of private international law, international commercial law and international arbitration law and to facilitate the development of a draft non-binding instrument within this working group.[8]

January 2010

The Working Group on Choice of Law in International Contracts (Working Group) meets in The Hague for the first time. It sketches the scope of the future instrument.[9]

April 2010

The Council invites the Working Group to continue its work for the progressive development of a draft instrument of a non-binding nature.[10]

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6 *Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008)*, specifically under "Choice of law in international contracts".

7 *Report on work carried out and suggested work programme for the development of a future instrument*, prepared by the Permanent Bureau, Prel. Doc. No 7 of March 2009 for the attention of the Council of March / April 2009 on General Affairs and Policy of the Conference.

8 *Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009)*, specifically under "Choice of law in international contracts".

9 *Report of the First Meeting of the Working Group on Choice of Law in International Contracts (21-22 January 2010)*.

10 *Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (7-9 April 2010)*, specifically under "Choice of law in international contracts".

November 2010

The Working Group holds a second meeting in The Hague. The participating experts tentatively agree on the text of certain provisions of the draft instrument.[11]

April 2011

The Council decides that the draft articles and the commentary prepared by the Working Group should be reviewed by a Special Commission at a later stage.[12]

June 2011

The Working Group holds a meeting in The Hague for the third time. The participating experts finalise the text of the draft articles of the future instrument and identify relevant issues which will either be referred to in a document as requested by the Council indicating the policy choices involved and/or elaborated in greater detail in the commentary.[13]

April 2012

The Council decides 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 non-binding instrument and the process through which the commentary shall be completed.[14]

November 2012

A Special Commission meeting is convened in The Hague to review the work carried out by the Working Group. The Special Commission is tasked with the in-depth review of the draft Principles. It unanimously approves a revised form of the Principles, and makes a number of recommendations to the Council relating to the completion of the instrument.[15]

April 2013

The Council gives its preliminary endorsement of the Draft Hague Principles on Choice of Law in International Contracts and mandates the Working Group to complete the Commentary. The Council will then be invited to either give its final endorsement of the

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11 *Report of the Second Meeting of the Working Group on Choice of Law in International Contracts (15-17 November 2010).*

12 *Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011)*, specifically under "Choice of law in international contracts".

13 *Report of the Third Meeting of the Working Group on Choice of Law in International Contracts (28-30 June 2011).*

14 *Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17-20 April 2012)*, specifically under "Choice of law in international contracts".

15 *Draft Hague Principles as approved by the November 2012 Special Commission meeting on choice of law in international contracts and Recommendations for the commentary.*

complete package of the Principles and the Commentary, or if necessary submit the package to the Special Commission.[16]

June 2013

The Working Group holds a fourth meeting in The Hague, which focuses on the formulation of the draft Commentary.[17]

January 2014

The Working Group meets in The Hague for the fifth time. The participating experts continue and complete their discussions on the wording of the Commentary accompanying the Draft Hague Principles. An Editorial Committee is established within the Working Group. This Committee is charged with finalising the text of the draft Commentary.[18]

April 2014

Further to the April 2014 Council meeting, a written consultation procedure on the draft instrument is organised, where Members are invited to submit comments. The instrument is to be approved if no objection is raised within 60 days.[19]

March 2015

Upon completion of the written procedure without objection, the Principles on Choice of Law in International Commercial Contracts are formally approved on 19 March 2015.

16 *Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (9-11 April 2013)*.

17 *Report of the Fourth Meeting of the Working Group (24-26 June 2013)*.

18 *Report of the Fifth Meeting of the Working Group on Choice of Law in International Contracts (27-28 January 2014)*; *The draft Hague Principles on Choice of Law in International Commercial Contracts*, Prel. Doc. No 6 of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference.

19 *Conclusions and Recommendations adopted by the Council on General Affairs and Policy (8-10 April 2014)*, specifically under "Choice of law in international contracts".

List of Participating Experts

Members of the Working Group (certain experts had primary drafting responsibility for particular Articles of the Commentary and this is indicated with an * below)

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Principles on Choice of Law in International Commercial Contracts

(approved on 19 March 2015)

Preamble

1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.

2. They may be used as a model for national, regional, supranational or international instruments.

3. They may be used to interpret, supplement and develop rules of private international law.

4. They may be applied by courts and by arbitral tribunals.

Article 1
Scope of the Principles

1. These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.

2. For the purposes of these Principles, a contract is international unless each party has its establishment 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.

3. These Principles do not address the law governing –

   (a) the capacity of natural persons;

   (b) arbitration agreements and agreements on choice of court;

   (c) companies or other collective bodies and trusts;

   (d) insolvency;

   (e) the proprietary effects of contracts;

   (f) the issue of whether an agent is able to bind a principal to a third party.

Article 2
Freedom of choice

1. A contract is governed by the law chosen by the parties.

2. The parties may choose –

   (a) the law applicable to the whole contract or to only part of it; and

   (b) different laws for different parts of the contract.

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.

4. No connection is required between the law chosen and the parties or their transaction.

Article 3
Rules of law

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

Article 4
Express and tacit choice

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. An 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.

Article 5
Formal validity of the choice of law

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Article 6
Agreement on the choice of law and battle of forms

1. Subject to paragraph 2 –

   (a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to;

(b) if the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law.

2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.

Article 7
Severability

A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.

Article 8
Exclusion of *renvoi*

A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.

Article 9
Scope of the chosen law

1. The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to –

(a) interpretation;

(b) rights and obligations arising from the contract;

(c) performance and the consequences of non-performance, including the assessment of damages;

(d) the various ways of extinguishing obligations, and prescription and limitation periods;

(e) validity and the consequences of invalidity of the contract;

(f) burden of proof and legal presumptions;

(g) pre-contractual obligations.

2. Paragraph 1(e) does not preclude the application of any other governing law supporting the formal validity of the contract.

Article 10
Assignment

In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor –

(a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs mutual rights and obligations of the creditor and the assignee arising from their contract;

(b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs –

  (i) whether the assignment can be invoked against the debtor;

  (ii) the rights of the assignee against the debtor; and

  (iii) whether the obligations of the debtor have been discharged.

Article 11
Overriding mandatory rules and public policy (*ordre public*)

1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.

5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

Article 12
Establishment

If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion.

List of abbreviated sources

ABBREVIATION	NAME OF INSTRUMENT
1978 Hague Agency Convention	Hague Convention of 14 March 1978 on the Law Applicable to Agency
1978 Hague Matrimonial Property Convention	Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes
1986 Hague Sales Convention	Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods
1989 Hague Succession Convention	Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons
2005 Hague Choice of Court Convention	Hague Convention of 30 June 2005 on Choice of Court Agreements
2006 Hague Securities Convention	Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary
2007 Hague Protocol	Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
ICC Rules	International Chamber of Commerce Rules of Arbitration (2012)
LCIA Rules	London Court of International Arbitration Rules (2014)

Mexico City Convention	Inter-American Convention of 17 March 1994 on the Law Applicable to International Contracts
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
PECL	The Principles of European Contract Law (2002)
Rome Convention	Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules (as revised in 2010)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNCITRAL Secured Transactions Guide	UNCITRAL Legislative Guide on Secured Transactions (2007)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)
UN Receivables Convention	United Nations Convention on the Assignment of Receivables in International Trade (2001)
Vienna Convention	Vienna Convention on the Law of Treaties (1969)

Introduction

I.1 When parties enter into a contract that has connections with more than one State, the question of which set of legal rules governs the transaction necessarily arises. The answer to this question is obviously important to a court or arbitral tribunal that must resolve a dispute between the parties but it is also important for the parties themselves, in planning the transaction and performing the contract, to know the set of rules that governs their obligations.

I.2 Determination of the law applicable to a contract without taking into account the expressed will of the parties to the contract can lead to unhelpful uncertainty because of differences between solutions from State to State. For this reason, among others, the concept of "party autonomy" to determine the applicable law has developed and thrived.

I.3 Party autonomy, which refers to the power of parties to a contract to choose the law that governs that contract, enhances certainty and predictability within the parties' primary contractual arrangement and recognises that parties to a contract may be in the best position to determine which set of legal principles is most suitable for their transaction. Many States have reached this conclusion and, as a result, giving effect to party autonomy is the predominant view today. However, this concept is not yet applied everywhere.

I.4 The Hague Conference on Private International Law ("**the Hague Conference**") believes that the advantages of party autonomy are significant and encourages the spread of this concept to States that have not yet adopted it, or have done so with significant restrictions, as well as the continued development and refinement of the concept where it is already accepted.

I.5 Accordingly, the Hague Conference has promulgated the Hague Principles on Choice of Law in International Commercial Contracts ("**the Principles**"). The Principles can be seen both as an illustration of how a comprehensive choice of law regime for giving effect to party autonomy may be constructed and as a guide to "best practices" in establishing and refining such a regime.

Choice of law agreements

I.6 The parties' choice of law must be distinguished from the terms of the parties' primary contractual arrangement ("**main contract**"). The main contract could be, for example, a sales contract, services contract or loan contract. Parties may either choose the applicable law in their main contract or by making a separate agreement on choice of law (hereinafter each referred to as a "**choice of law agreement**").

I.7 Choice of law agreements should also be distinguished from "jurisdiction clauses" (or agreements), "forum selection clauses" (or agreements) or "choice of court clauses" (or agreements), all of which are synonyms for the parties' agreement on the forum (usually a court) that will decide their dispute. Choice of law agreements

should also be distinguished from "arbitration clauses" (or agreements), that denote the parties' agreement to submit their dispute to an arbitral tribunal. While these clauses or agreements (collectively referred to as "**dispute resolution agreements**") are often combined in practice with choice of law agreements, they serve different purposes. The Principles deal only with choice of law agreements and not with dispute resolution agreements or other matters commonly considered to be procedural issues.

Nature of the Principles

I.8 As their title suggests, the Principles do not constitute a formally binding instrument such as a Convention that States are obliged to directly apply or incorporate into their domestic law. Nor is this instrument a model law that States are encouraged to enact. Rather, it is a non-binding set of *principles*, which the Hague Conference encourages States to incorporate into their domestic choice of law regimes in a manner appropriate for the circumstances of each State. In this way, the Principles can guide the reform of domestic law on choice of law and operate alongside existing instruments on the subject (see Rome I Regulation and Mexico City Convention both of which embrace and apply the concept of party autonomy).

I.9 As a non-binding instrument, the Principles differ from other instruments developed by the Hague Conference. While the Hague Conference does not exclude the possibility of developing a binding instrument in the future, it considers that an advisory set of non-binding principles is more appropriate at the present time in promoting the acceptance of the principle of party autonomy for choice of law in international contracts and the development of well-crafted legal regimes that apply that principle in a balanced and workable manner. As the Principles influence law reform, they should encourage continuing harmonisation among States in their treatment of this topic and, perhaps, bring about circumstances in which a binding instrument would be appropriate.

I.10 While the promulgation of non-binding principles is novel for the Hague Conference, such instruments are relatively common. Indeed, the Principles add to a growing number of non-binding instruments of other organisations that have achieved success in developing and harmonising law. See, *e.g.*, the influence of the UNIDROIT Principles and the PECL on the development of contract law.

Purpose and scope of the Principles

I.11 The overarching aim of the Principles is to reinforce party autonomy and to ensure that the law chosen by the parties has the widest scope of application, subject to clearly defined limits (Preamble, para. 1).

I.12 In order for the Principles to apply, two criteria must be satisfied. First, the contract in question must be "international". A contract is "international" within the meaning given to that term in the Principles 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 (see Art. 1(2)). The second criterion is that each party to the contract must be acting in the exercise of its trade or profession (see Art. 1(1)). The Principles expressly exclude from their scope certain specific categories of contracts in which the bargaining power of one party – a consumer or employee – is presumptively weaker (see Art. 1(1)).

I.13 While the aim of the Principles is to promote the acceptance of party autonomy for choice of law, the principles also provide for limitations on that autonomy. The most important limitations to party autonomy, and thus the application of the parties' chosen law, are contained in Article 11. Article 11 addresses limitations resulting from overriding mandatory rules and public policy (*ordre public*). The purpose of those limitations is to ensure that, in certain circumstances, the parties' choice of law does not have the effect of excluding certain rules and policies that are of fundamental importance to States.

I.14 The Principles provide rules only for situations in which the parties have made a choice of law (express or tacit) by agreement. The Principles do not provide rules for determining the applicable law in the absence of party choice. The reasons for this exclusion are twofold. First, the goal of the Principles is to further party autonomy rather than provide a comprehensive body of principles for determining the law applicable to international commercial contracts. Secondly, a consensus with respect to the rules that determine the applicable law in the absence of choice is currently lacking. The limitation of the scope of the Principles does not, however, preclude the Hague Conference from developing rules at a later date for the determination of the law applicable to contracts in the absence of a choice of law agreement.

Content of the Principles

I.15 The Preamble and 12 articles comprising the instrument may be considered to be an international code of current best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts, with certain innovative provisions as appropriate.

I.16 Some provisions reflect an approach that is the subject of wide, international consensus. These include the fundamental ability of the parties to choose the applicable law (Preamble, para. 1 and Art. 2(1)) and appropriate limitations on the application of the parties' chosen law (see Art. 11). It is to be expected that a State that adopts a regime that supports party autonomy would necessarily adopt rules consistent with these provisions.

I.17 Other provisions reflect the view of the Hague Conference as to best practice and provide helpful clarifications for those States that accept party autonomy. These include provisions addressing the ability of parties to choose different laws to apply to different parts of their contract (see Art. 2(2)), to tacitly choose the applicable law (see Art. 4) and to modify their choice of law (see Art. 2(3)), as well as the lack of a required connection between the chosen law and the transaction or the parties (see Art. 2(4)). Also, in line with many national regimes and regional instruments, Article 7 provides for the separate treatment of the validity of a choice of law agreement from the validity of the main contract; and Article 9 describes the scope of the applicable law. Other best practice provisions provide guidance as to how to determine the scope of the application of the chosen law in the context of a triangular relationship of assignment (see Art. 10) and how to deal with parties that have establishments in more than one State (see Art. 12). Such best practice provisions provide important advice to States in adopting or modernising a regime that supports party autonomy. However, the Hague Conference recognises that a State can have a well-functioning party autonomy regime that does not accept all of these best practices.

I.18 Certain provisions of the Principles reflect novel solutions. One of the salient features is found in Article 3, which allows the parties to choose not only the law of a State but also "rules of law", emanating from non-State sources, within certain parameters. Historically, choice of norms or "rules of law" has typically been contemplated only in an arbitral context. Where a dispute is subject to litigation before a State court, private international law regimes have traditionally required that the parties' choice of law agreement designate a State system of law. Some regimes have allowed parties to incorporate by reference in their contract "rules of law" or trade usages. Incorporation by reference, however, is different from allowing parties to choose "rules of law" as the law applicable to their contract.

I.19 Other innovative provisions are contained in Articles 5, 6 and 8. Article 5 provides a substantive rule of private international law that no particular form is required for a choice of law agreement to be valid, unless otherwise agreed by the parties. Article 6 provides, *inter alia*, a solution to the vexed problem of the "battle of forms" or, more specifically, the outcome when both parties make choices of law via the exchange of "standard terms". Article 8 provides for the exclusion of *renvoi* but, unlike many other instruments, allows the parties to expressly agree otherwise.

Envisaged users of the Principles

I.20 The envisaged users of the Principles include lawmakers, courts and arbitral tribunals, and parties and their legal advisors.

a. For *lawmakers (whether legislators or courts)*, the Principles constitute a model that can be used to create new, or supplement and further develop, existing rules on choice of law (Preamble, paras 2-3). Because of their non-binding nature, lawmakers at a national, regional, supranational or international level can implement the Principles in whole or in part. Lawmakers also retain the possibility of making policy decisions where the Principles defer to the law of the forum (see Arts 3, 11(2) and 11(4)).

b. For *courts and arbitral tribunals*, the Principles provide guidance as to how to approach questions concerning the validity and effects of a choice of law agreement, and resolve choice of law disputes within the prevailing legal framework (Preamble, paras 3-4). The Principles may be useful, in particular, for addressing novel situations.

c. For *parties and their legal advisors*, the Principles provide guidance as to the law or "rules of law" that the parties may legitimately be able to choose, and the relevant parameters and considerations when making a choice of law, including important issues as to the validity and effects of their choice, and the drafting of an enforceable choice of law agreement.

I.21 Users of the Principles are encouraged to read the articles in conjunction with the Preamble and Commentary. The Commentary accompanies each article and serves as an explanatory and interpretative tool. The Commentary includes many practical examples illustrating the application of the Principles. The structure and length of each commentary and illustration varies depending on the level of detail required to understand each article. The Commentary also includes comparative references to regional, supranational, or international instruments and to drafting history, where such references assist with interpretation. Users may also wish to consult the bibliography and materials accessible on the Hague Conference website.

Preamble

P.1 The Preamble introduces the nature (Preamble, para. 1), objective (Preamble, para. 1) and intended purposes (Preamble, paras 2-4) of the Principles as a non-binding instrument.

P.2 The provisions of the instrument are "general principles"; a term that reflects their character as part of a non-binding instrument. The Principles address party autonomy in choice of law in international commercial contracts, as described in Article 1(1)-(2); they do not apply to consumer or employment contracts (see Art. 1(1)). The instrument may be considered as a code of current best practice with respect to choice of law in international commercial contracts, as recognised at an international level, with certain innovative provisions where appropriate.

P.3 The objective of the Principles is to encourage the spread of party autonomy to States that have not yet adopted it, or have done so with significant restrictions, as well as the continued development and refinement of the concept where it is already accepted. Party autonomy meets the legitimate expectations of the parties in this environment and, as such, advances foreseeability and legal certainty. Certainty is enhanced, in particular, as the law to be applied in the absence of a choice of law by the parties depends on the forum in which a dispute is heard. Party autonomy enables the parties to choose a neutral law or the law they consider most appropriate for the specific contract. The Principles therefore affirm the freedom of parties to an international commercial contract (see Art. 1(1)-(2)) to choose the law applicable thereto (see Arts 2-3). The Principles, however, provide limited exceptions to party autonomy in Article 11 (overriding mandatory rules and public policy).

P.4 One of the objectives of the instrument is the acceptance of its principles in present and future private international law instruments, producing a substantial degree of harmonisation of law, on a national, regional, supranational and international level, giving effect to party autonomy in choice of law in international commercial contracts.

P.5 The Principles may be used by courts and arbitral tribunals (Preamble, para. 4) to interpret, supplement and develop rules of private international law. These rules may exist on a national (including state and provincial), regional, supranational or international level and may be found in, for instance, conventions, regulations, legislation or case law. *Interpretation* here refers to the process of explaining, clarifying or construing the meaning of existing rules of private international law. *Supplementation* in this context refers to the refinement of an existing rule of private international law that does not sufficiently or appropriately provide for a particular type of situation. Although the *development* of rules of private international law may include their constructive interpretation or supplementation, the concept in the context of this paragraph particularly refers to the addition by legislatures or, in certain systems, by courts, of new rules where none existed before or effecting fundamental changes to pre-existing ones. Of course, the interpretation, supplementation and development of rules of private international law must take place within the boundaries of binding law (for instance, the Vienna Convention).

P.6 Both courts and arbitral tribunals are invited to apply the Principles. All articles have been drafted for use by courts and arbitral tribunals and, with only two exceptions, the articles do not differentiate between courts and arbitral tribunals. The last portion of Article 3 ("unless the law of the forum provides otherwise") applies exclusively to courts, while Article 11 differentiates between courts (see Art. 11(1)-(4)) and arbitral tribunals (see Art. 11(5)).

Article 1 Scope of the Principles

Introduction

1.1 The purpose of Article 1 is to determine the scope of application of the Principles. This scope is defined by three criteria: the Principles apply to choice of law agreements (i) in contractual matters when the contract is (ii) international (see paras 1.13-1.21) and (iii) commercial (see paras 1.5-1.12).

1.2 Article 1(1) delimits the scope of application of the Principles and describes the types of contracts to which the Principles apply. Article 1(2), together with Article 12, contains a definition of international contracts. Article 1(3) contains a list of issues or matters excluded from the scope of the Principles.

Rationale

1.3 The Principles apply to choice of law agreements in international contracts in which each party is acting in the exercise of its trade or profession. An explicit clarification is included confirming that the Principles do not apply to consumer or employment contracts.

1.4 The scope of application of the Principles is confined to commercial contracts because in these contracts party autonomy is widely accepted. In 2008, "the Council invited the Permanent Bureau to continue its exploration of this topic concerning international business-to-business contracts with a view to promoting party autonomy" (Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008), p. 1), and in 2009, "the Council invited the Permanent Bureau to continue its work on promoting party autonomy in the field of international commercial contracts" (Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009), p. 2). The rationale is to establish and enhance party autonomy in international contracts, but only in those situations in which both parties act in their professional capacity, and the risks of an abuse of party autonomy are therefore minimised.

Limitation to commercial contracts

1.5 As indicated in the Preamble (para. 1), the Principles address only "commercial contracts", a term that is used, among other instruments, by the UNIDROIT Principles. Article 1(1) more precisely delineates this aspect of the scope of the Principles by (i) describing the types of contracts to which the Principles apply, and (ii) expressly excluding consumer and employment contracts.

1.6 Unlike the Preamble, however, Article 1 does not use "commercial contracts" and therefore does not formally define this term. Rather, Article 1(1) describes as falling within the scope of the Principles those contracts in which "... *each party* is acting in the exercise of its trade or profession". For the Principles to be applied, both (or all) parties must be acting in the course of their respective trade or profession. This formulation is inspired by the Rome I Regulation (Art. 6(1)), which defines a consumer as a natural person acting for a purpose which can be regarded as being outside his or her trade or profession. Article 1(1) is the converse, in the sense that it affirmatively describes commercial contracts as those in which each party is acting in the exercise of its trade or profession. Article 1(1) is important because it introduces an autonomous concept for determining when the Principles apply; it does not use the term "commercial contracts", which may have different connotations in different States. For example, this formulation does not necessarily mirror the traditional distinction in some States between civil and commercial transactions and it does not follow the practice in some other States where contracts between businesses and consumers are considered to be "commercial".

1.7 As used in Article 1(1) and throughout the Principles, the term "party" includes any natural or legal person; for example: independent contractors, companies, foundations, partnerships, unincorporated bodies or publicly owned entities. Parties are not required to have extensive experience or skill in their specific trade or profession. Moreover, the use of the terms "trade or profession" makes it clear that the definition includes both commercial activities of merchants, manufacturers or craftsmen (trade transactions) and commercial activities of professionals, such as lawyers or architects (professional services). Insurance contracts and contracts transferring or licensing intellectual property rights between professionals fall within the scope of the Principles, as do agency or franchise contracts.

1.8 Whether a party "... is acting in the exercise of its trade or profession" depends on the circumstances of the contract, not on the mere status of the parties. Hence, the same person may act as a trader or professional in relation to certain transactions and as a consumer in relation to others.

Illustration 1-1

Party A is a practising lawyer. When Party A concludes a legal service contract with Party B, a company, Party A is acting in the exercise of his or her profession. However, when Party A concludes a rental contract for an apartment in which to spend his or her vacation, Party A is acting outside the exercise of his or her profession.

1.9 If the contract comes within the scope of Article 1, the Principles apply irrespective of the means through which it was concluded. Thus, the Principles apply, for example, to e-commerce transactions and any type of contract concluded by electronic means, as long as the parties are acting in the exercise of their trade or profession.

Exclusion of consumer and employment contracts

1.10 Non-commercial contracts are excluded from the scope of application of the Principles. In particular, and to avoid any doubt, Article 1(1) explicitly excludes consumer and employment contracts. This exclusion encompasses both individual and collective contracts of employment. This exclusion is justified by the fact that the substantive law of many States subjects consumer and employment contracts to special protective rules from which the parties may not derogate by contract. These rules are aimed at protecting the weaker party – consumer or employee – from an abuse of the freedom of contract and this protection extends to private international law where it appears as an exclusion or limitation on party autonomy. However, the exclusion of consumer and employment contracts under Article 1(1) is merely illustrative of the type of non-commercial contracts to which the Principles do not apply. Other non-commercial contracts, such as a contract concluded between two consumers, are also outside the scope of application of the Principles.

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

1.12 Article 1(1) describes the contracts to which the Principles apply in general terms, in keeping with the nature of the instrument as a set of non-binding general principles. With regard, in particular, to consumer contracts, the Principles do not explicitly address the characterisation of the so-called "dual-purpose contracts", *i.e.*, contracts intended for purposes that fall partially within and partially outside a party's trade or profession. Likewise, the Principles are silent with regard to the perspective from which the purpose of the contract is to be evaluated, *i.e.*, whether it is necessary for the professional to have been aware of the purpose of the contract (see Art. 2(a) CISG).

Internationality

1.13 To fall within the scope of the Principles, the contract must qualify as an "international" contract. This requirement is consistent with the traditional understanding that private international law applies only to international cases. The definition of "internationality" varies considerably among national and international instruments (see para. 1.15).

1.14 For the purpose of the Principles, the notion of an international contract is defined in Article 1(2). Pursuant to this provision, the only contracts that are excluded as lacking internationality are those in which "each party has its establishment 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". This negative definition excludes only purely domestic situations, aiming to confer the broadest possible scope of interpretation to the term "international". This provision is primarily inspired by the 2005 Hague Choice of Court Convention (Art. 1(2)).

1.15 Article 1(2) of the Principles does not adopt a positive definition of internationality of the contract as found in some other instruments (see, *e.g.*, Art. 1(a)-(b) 1986 Hague Sales Convention). Nor does Article 1(2) take a broader approach of referring to all cases involving a "conflict of laws", or a "choice between the laws of different States" whereby the parties' choice of law alone may constitute a relevant element (see, *e.g.*, Art. 3 2006 Hague Securities Convention).

Ascertainment of internationality

1.16 The ascertainment of internationality of the contract proceeds from the following two steps.

1.17 First, Article 1(2) refers to the establishments of the parties as a relevant element. When the parties' establishments are located in different States, the contract is international and the Principles apply. This is a simple test that facilitates the ascertainment of internationality without having to refer to other relevant factors. If a party has more than one establishment, the relevant establishment is the one that has the closest relationship to the contract at the time of its conclusion (see Art. 12).

Illustration 1-2

Party A (which has its main establishment in State X but whose establishment that has the closest connection to the contract in the sense of Article 12 is in State Y) signs a contract through its establishment in State Y with Party B, which also has its main establishment in State X and is acting through its main establishment in State X. Because the parties acted through establishments located in different States (State Y for Party A and State X for Party B), the contract is international and thus is governed by the Principles.

1.18 Second, even if the first test does not apply, a contract still qualifies as international unless "all other relevant elements" are located in the same State. These relevant elements may be, for example, the place of conclusion of the contract, the place of performance, a party's nationality, and a party's place of incorporation or establishment. If a party has more than one establishment involved in the transaction, subordinate establishments that have been disregarded in the first step pursuant to Article 12 (see para. 1.17) may still be taken into consideration.

1.19 The ascertainment of internationality may require a careful case-by-case analysis. For example, the sale of land located in State X between parties who have their establishments in State Y satisfies the requirement of internationality of the contract because of the location of the land abroad. However, the same considerations do not apply with regard to a domestic sale of tangible goods in State X that are produced abroad, *i.e.*, in State Y (or several States). This is because, at all times germane to the sale, all relevant elements are located in State X. Similarly, the fact that pre-contractual negotiations took place abroad, or that a particular language is used in the contract, without more does not fulfill the requirement of internationality.

1.20 The contract qualifies as international and falls within the scope of the Principles unless there is no relevant element establishing internationality. This interpretation derives from the negative definition of internationality provided in Article 1(2).

Irrelevant factors

1.21 The phrase "regardless of the chosen law" in Article 1(2) means that the parties' choice of law is not a relevant element for determining internationality. In other words, the parties may not establish internationality of the contract solely by selecting a foreign law, even if the choice is accompanied by a foreign choice of court or arbitral tribunal, when all the relevant objective elements are centred in one State (see Art. 1(b) 1986 Hague Sales Convention). This definition of internationality differs from that of the 2006 Hague Securities Convention (Art. 3) and the Rome I Regulation (Art. 1(1)).

1.22 The Principles do not address conflicts of laws among different territorial units within one State, for example, within Australia, Canada, Nigeria, Spain, the United Kingdom or the United States of America. Hence, the fact that one of the relevant elements is located in a different territorial unit within one State does not constitute internationality of the contract in the sense of Article 1(2). However, the Principles do not prevent lawmakers or other users from extending the scope of application of the Principles to intra-State conflicts of laws.

1.23 The Principles apply to choice of law agreements for *contracts*. Following the approach of other international instruments, the Principles do not provide a definition of the term "contract". Nevertheless, in order to facilitate the application of the Principles, Article 1(3) excludes from their scope certain matters for which there is no wide consensus on (a) whether they qualify as contractual, or (b) whether, in any event, they should be subject to party autonomy. The list of exclusions includes six items: (i) capacity of natural persons; (ii) arbitration agreements and agreements on choice of court; (iii) companies or other collective bodies and trusts; (iv) insolvency; (v) proprietary effects of contracts; and (vi) the issue of whether an agent is able to bind a principal to a third party. This list is inspired by, among others, the 1986 Hague Sales Convention (Art. 5), the Rome I Regulation (Art. 1(2)) and the Mexico City Convention (Art. 5).

1.24 The reasons for Article 1(3) are twofold: the legal nature of the enumerated issues, and the lack of consensus on whether to characterise them as contractual issues or on whether to subject them to party autonomy. However, the existence of a list of exclusions should not be interpreted as a policy decision against party autonomy in respect of the matters excluded. The Principles are neutral on this point and, therefore, do not preclude lawmakers or other users from extending party autonomy to some or all of the excluded matters.

1.25 *First*, the Principles do not address the law governing *the capacity of natural persons*. In this context, capacity means the ability of natural persons to act and enter into contracts independently. It does not include the authority of agents or organs to represent a principal or entity (see Art. 5(b) 1986 Hague Sales Convention). Capacity is a matter that may appear as an incidental question to the validity of the contract, including the choice of law agreement itself. The lack of capacity entails a restriction

on party autonomy because of the need to protect the person due to, for example, his or her age (a minor) or mental state. In some States, legal capacity is regarded as a matter of status and does not qualify as contractual. The determination of the law applicable to this question is excluded from the scope of the Principles. The exclusion means that the Principles determine neither the law governing the capacity of natural persons, nor the legal or judicial mechanisms of authorisation, nor the effects of a lack of capacity on the validity of the choice of law agreement (see paras 39-40 Explanatory Report to the 1986 Hague Sales Convention).

1.26 *Secondly*, the Principles do not address the law governing *arbitration agreements and agreements on choice of court*. This exception mainly refers to the *material validity* of such agreements, *i.e.*, to the contractual aspects of those jurisdictional clauses, and includes questions such as fraud, mistake, misrepresentation or duress (see also para. 126 Explanatory Report to the 2005 Hague Choice of Court Convention). In some States, these questions are considered procedural and are therefore governed by the *lex fori* or *lex arbitri*. In other States, these questions are characterised as substantive issues to be governed by the law applicable to the arbitration or choice of court agreement itself. The Principles do not take a stance among these different views. Rather, Article 1(3)(b) excludes these issues from the scope of the Principles.

1.27 *Thirdly*, the Principles do not address the law governing *companies or other collective bodies and trusts*. The term "collective bodies" is used in a broad sense so as to encompass both corporate and unincorporated bodies, such as partnerships or associations.

1.28 The exclusion under Article 1(3)(c) encompasses the constitution and organisation of companies or other collective bodies and trusts. The excluded issues are, in general, the creation, membership, legal capacity, internal organisation, decision-making processes, dissolution and winding-up of companies and other collective bodies. The same exclusion applies to issues concerning the internal administration of trusts. In many States, these issues are subject to specific private international law rules pointing to the law of companies (in general, the law of the place of incorporation or central administration) or the law of other collective bodies or trusts.

1.29 The exclusion in Article 1(3)(c) is confined to matters involving the internal organisation and administration of companies or other collective bodies and trusts and does not extend to contracts that they conclude with third parties. The Principles also apply to commercial contracts entered into between the members of a company (shareholder agreements).

1.30 *Fourthly*, the Principles do not address the law governing *insolvency*. This exclusion refers to the effects that the opening of insolvency proceedings may have on contracts. Insolvency proceedings may interfere with the general principles of contract law, for example, by invalidating a contract pursuant to claw-back rules, staying a termination right of the party *in bonis*, or giving the insolvency administrator the power to reject the performance of a pending contract or to assign it to a third party. The exclusion of insolvency in Article 1(3)(d) relates to these

questions. In general, the Principles do not determine the law applicable to the question of how contracts are to be treated in insolvency; nor do they address the legal capacity of the insolvency administrator to enter into new contracts on behalf of the insolvent estate. The term insolvency is used here in a broad sense, encompassing liquidation, reorganisation, restructuring or administration proceedings.

1.31 *Fifthly*, the Principles do not address the law governing *the proprietary effects of contracts*. The Principles allow the parties to choose the law applicable to their contractual obligations, but they do not address the establishment and effects of rights *in rem* created by the contract. In other words, the Principles only determine the law governing the mutual rights and obligations of the parties, but not the law governing rights *in rem*. For example, in a contract for the sale of an asset, movable or immovable, tangible or intangible, the Principles apply to the seller's personal obligation to transfer and the buyer's personal obligation to pay, but not to questions such as whether the transfer actually conveys property rights without further action, or whether the buyer acquires ownership free of the rights or claims of third parties.

1.32 Finally, the Principles do not address the law governing the issue of *whether an agent is able to bind a principal to a third party*. This exclusion refers to the external aspects of the agency relationship, *i.e.*, to issues such as whether the principal is bound on the grounds of an implied or apparent authority or on the grounds of negligence, or whether and to what extent the principal can *ex post* ratify an *ultra vires* act of the agent (see Art. 11 1978 Hague Agency Convention). By contrast, the Principles apply to the internal aspects of an agency, *i.e.*, the agency or mandate relationship between the principal and the agent, if it otherwise qualifies as a commercial contract.

Article 2 Freedom of choice

Introduction

2.1 Article 2 establishes the parties' freedom to choose the law governing their contract. In addition, it provides that this choice may apply to only part of the contract, it may be exercised at any time, and that no connection between the law chosen and the parties or their transaction is required. This Article should be read in conjunction with Article 3, which allows parties the freedom to choose "rules of law" to govern their contract.

2.2 The Principles do not provide for the method of determining the law applicable to an international commercial contract in the absence of a choice of law (express or tacit) by the parties.

Rationale

2.3 Article 2 reflects the Principles' primary and fundamental purpose of providing for and delineating party autonomy in the designation of the law governing international commercial contracts (defined in Art. 1). Of particular importance is the fact that under the Principles the freedom of parties to choose the law or "rules of law" to govern their contract is not dependent on the method of dispute resolution involved, whether before a court or arbitral tribunal.

2.4 The Principles acknowledge that certain restrictions on party autonomy are necessary, even in the field of international commercial contracts. Thus the effect of the parties' choice of law is expressly limited by overriding mandatory rules and public policy as provided for in Article 11. The scope of party autonomy under the Principles is further defined by Articles 1(3) and 9.

Freedom of choice

2.5 Article 2(1) provides that "a contract is governed by the law chosen by the parties". Under the Principles, parties are free to choose the law of any State (see para. 1.22 for different territorial units within one State). Parties may also designate "rules of law" as provided in Article 3. Article 2(1) imposes no other limitations or conditions on the selection of the chosen law.

Illustration 2-1

A contract for the sale of equipment contains a provision according to which the law of State X, where the seller has its principal place of business, shall govern all aspects related to the formation and validity of the contract, the obligations of the seller and the buyer, breach of contract and damages. If a dispute arises between the parties, the court or arbitral tribunal will give effect to the choice made by the parties and apply the law of State X.

Partial or multiple choice of law

2.6 The Principles permit partial or multiple choice of law; that is, subjecting separate parts of the contract to different laws (also known as *dépeçage*). Considering that such partial or multiple choice is by its very nature one of the forms of exercise of party autonomy, the Principles reserve to the parties the option to use that process. However, the use of *dépeçage* carries with it the risk of contradiction or inconsistency in the determination of the parties' rights and obligations.

2.7 Under Article 2(2)(a), parties may choose the law applicable to only part of the contract. When the parties make such a partial choice of law, the remainder of the contract is governed by the law otherwise applicable in the absence of choice. As noted above in paragraph 2.2, the Principles do not provide rules for identifying the applicable law in the absence of choice by the parties. Consequently, a partial choice of law under Article 2(2)(a) means that the law applicable to the remainder of the contract will be determined by the court or arbitral tribunal under the rules that are applicable in the absence of choice.

2.8 Under Article 2(2)(b), parties may also choose the law applicable to different parts of their contract with the effect that the contract will be governed by more than one chosen law.

2.9 In practice, such partial or multiple choices may concern, for example, the contract's currency denomination, special clauses relating to performance of certain obligations, such as obtaining governmental authorisations, and indemnity / liability clauses.

Illustration 2-2

In a contract for the supply and installation of a special production line in States X, Y and Z, the parties have chosen the law of State W to govern all aspects related to the formation and validity of the agreement. In such a case, the remainder of the contract will be governed by the law applicable in the absence of choice by the parties.

Illustration 2-3

Buyer and Seller have concluded a share purchase contract regarding the control of company D (the target company). Party C, a third party, has guaranteed Buyer's payment obligations under the contract. The contract between Buyer and Seller stipulates that, for the purpose of price determination, the financial statements of the target company must conform to the law of State X, which is the place of the target company's establishment. The contract also stipulates that the rights and obligations of Buyer and Seller are governed by the law of State Y and that the personal guarantee given by Party C is governed by the law of State Z, where Buyer has its establishment. In this case, by virtue of the parties´ choices, the laws of States X, Y, and Z, will govern different aspects of this contractual relationship.

Illustration 2-4

In an international sales contract, the parties have expressly agreed that all aspects of the contract are to be governed by the law of State X, except that the conditions under which the seller must obtain inspection certificates will be governed by the law of the various States of final destination of the goods. In this case, as in the previous illustration, the result is that the contract will be governed by more than one law.

Timing and modification of the choice of law

2.10 Party autonomy includes the parties' freedom to make or modify their choice of law at any time. It is generally accepted, therefore, that the conditions for, and the effects of, a change in the choice of law are governed by party autonomy, with certain limitations with respect to the formal validity of the contract and pre-existing rights of third parties.

2.11 The Principles provide that the law chosen by the parties governs the validity of the contract (see Art. 9(1)(e)). As a result, any contractual change in the law governing the contract after its conclusion could affect the formal validity of the contract. To avoid the retroactive invalidation of the contract, Article 2(3) specifies that any change in the applicable law as a result of a choice or modification of a choice by the parties shall not prejudice a contract that was formally valid under the previously applicable law. The formulation of the rule makes it clear that it applies whether or not the law initially governing the contract was chosen by the parties.

2.12 In addition, Article 2(3) is a reminder that the change in the law applicable to the contract affects not only the parties' rights, but could in some cases have an impact on the rights of third parties. There is a broad consensus to the effect that a modification of the choice of law should not adversely affect the rights of third parties (see Art. 3(2) Rome I Regulation). The significance of this potential consequence of party autonomy requires that it be directly addressed in the Principles rather than relying on expected equivalent protection under the applicable substantive law. Accordingly, where the applicable law changes as a result of a contractual choice or modification of a choice, any pre-existing rights of third parties that arise from the contract should be preserved.

Illustration 2-5

Party A and Party B conclude a contract and agree that it is governed by the law of State X. Party C guarantees the obligations of Party A. Subsequently, Party A and Party B modify their contract to change its governing law to the law of State Y. Under the law of State Y, Party A has greater liability to Party B than Party A would have had under the law of State X. While this modification is effective as between Party A and Party B, it may not adversely affect the rights and obligations of Party C. Those rights and obligations continue to be governed by the law of State X.

2.13 The Principles do not limit the timing of the choice or of the modification of the choice of law by the parties. As noted in the Introduction, the Principles do not generally seek to resolve what are commonly considered to be procedural issues before courts or arbitral tribunals. As a result, if the choice or modification of the choice of law occurs during the dispute resolution proceedings, the effect of the choice or modification may depend on the *lex fori* or the rules governing the arbitral proceedings. Similarly, the Principles are neutral regarding the issue of proof of foreign law.

Illustration 2-6

Party A and Party B conclude a contract which states that it is governed by the law of State X. A dispute arises and is brought before the courts of State Y. In the course of the proceedings, both parties frame their arguments in terms of the substantive contract law of State Y. While these facts may be evidence of a tacit modification of the choice of law under Article 4, the characterisation and effect of such a change in the course of proceedings may depend on the law of State Y.

No connection required

2.14 Under the Principles, party autonomy is not limited by any requirement of a connection, whether geographical or otherwise, between the chosen law and the contract or the parties. Accordingly, the parties may choose the law of a State with which the parties or their transaction bears no relation. This provision is in line with the increasing delocalisation of commercial transactions. Parties may choose a particular law because it is neutral as between the parties or because it is particularly well-developed for the type of transaction contemplated (*e.g.*, a State law renowned for maritime transport or international banking transactions).

2.15 By not requiring a connection between the chosen law and the parties or their transaction, the Principles adopt a more expansive concept of party autonomy than some States which require such a connection or another reasonable basis for the parties' choice of law.

2.16 Contracts governed by "rules of law", as defined in Article 3, do not raise this issue, since such "rules of law" are usually not connected to any national legal order.

Article 3 Rules of law

Introduction

3.1 Arbitration statutes and arbitration rules commonly allow for the parties' choice of "rules of law" (see Art. 28(1) UNCITRAL Model Law; Art. 21(1) ICC Rules). In those instruments, the term "rules of law" is used to describe rules that do not emanate from State sources. The opportunity to choose "rules of law" has not typically been afforded to parties litigating before national courts. Article 3 broadens the scope of party autonomy in Article 2(1) by providing that the parties may designate not only State law but also "rules of law" to govern their contract, regardless of the mode of dispute resolution chosen.

3.2 Article 3 establishes certain criteria for "rules of law" that are intended to afford greater certainty as to what the parties may choose as "rules of law". The criteria refer to the admissible sources and the attributes of those "rules of law" recognised under Article 3. In addition, Article 3 recognises that the forum State retains the prerogative to disallow the choice of "rules of law".

3.3 The criteria established in Article 3 relate to the source and attributes of "rules of law". The criteria should assist parties in identifying which "rules of law" they can choose and decision-makers in determining the "rules of law" applicable to the dispute. While the criteria will be examined separately below, they should be understood in relation to one another because Article 3 admits only those "rules of law" that are generally accepted as a neutral and balanced set of rules.

Generally accepted on an international, supranational or regional level

3.4 This criterion stipulates that the "rules of law" chosen by the parties must have garnered general recognition beyond a national level. In other words, the "rules of law" cannot refer to a set of rules contained in the contract itself, or to one party's standard terms and conditions, or to a set of local industry-specific terms.

3.5 International treaties and conventions may be considered a generally accepted source of "rules of law" when those instruments apply solely as a result of the parties' choice of law. For example, the CISG may be designated by the parties as "rules of law" governing their contract in situations where the CISG would not otherwise

apply according to its own terms (see Art. 1 CISG). In other words, the parties may designate the substantive rules of the CISG as a free-standing set of contract rules and not as a nationalised version of the CISG attached to the law of a CISG Contracting State. Following such a choice, the CISG applies as "rules of law", without consideration of any State declarations or reservations that might otherwise intervene if the CISG were applied as a ratified treaty or as part of State law. Model choice of law clauses proposing a designation of the CISG as "rules of law" are available (see, *e.g.*, the model clause suggested by the Chinese European Arbitration Centre (CEAC)).

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

3.7 As for possible supranational or regional sources, an example might be the PECL, which have been developed by an independent group of experts.

3.8 The dynamic and evolving nature of international commercial law suggests that sources of "rules of law" that are becoming, or will become, generally accepted at an international, supranational or regional level are likely to grow in number. Accordingly, the examples provided above should not be considered exhaustive.

A neutral and balanced set of rules

3.9 Article 3 requires that "rules of law" be generally accepted as possessing three attributes: there must be *a set of rules*, the set must be *neutral* and it must be *balanced*. Each of these three attributes has a distinct meaning.

3.10 First, the "rules of law" must be *a set of rules* and not merely a small number of provisions. While comprehensiveness is not required, the chosen "rules of law" must be such as to allow for the resolution of common contract problems in the international context.

3.11 The second attribute is the *neutrality* of the set of rules. This aspect may be satisfied by the fact that the source of the "rules of law" is generally recognised as a neutral, impartial body, that is, one that represents diverse legal, political and economic perspectives.

3.12 The third attribute – that the set of "rules of law" be generally accepted as balanced – is justified by: (i) the assumption underlying party autonomy in commercial contracts according to which parties have relatively equal bargaining power; and (ii) the fact that the presumption that State laws are balanced is not necessarily transferrable to "rules of law". This requirement would likely preclude the choice of a set of rules that benefit one side of transactions in a particular regional or global industry.

Trade usages

3.13 The Principles are silent regarding the application of trade usages. The effect of trade usages on the parties' rights and obligations is typically determined either under the chosen law itself or by other rules governing the dispute (see Art. 9 CISG; Art. 1.9 UNIDROIT Principles; Art. 28(4) UNCITRAL Model Law; Art. 21(2) ICC Rules)

Unless the law of the forum provides otherwise

3.14 As noted in paragraph 3.1, arbitration statutes and arbitration rules commonly allow for the contractual choice of "rules of law". However, national laws have not allowed the same choice in disputes brought before courts. The Principles recognise this in Article 3 by deferring to the law of the forum if that law confines the parties' freedom to a choice of State law.

Gap-filling

3.15 Where parties have designated "rules of law" to govern their contracts, there may be matters which these "rules of law" do not cover. For example, the UNIDROIT Principles' provisions on the authority of agents do not deal with the relationship between principal and agent (see, *e.g.*, Art. 2.2.1 UNIDROIT Principles); similarly the CISG in Article 4 states that it does not regulate the validity of contracts for the sale of goods except as otherwise expressly provided in that Convention. While these instruments may address gap-filling (see, *e.g.*, Art. 7(2) CISG and Art. 1.6 UNIDROIT Principles), the Principles do not provide gap-filling rules. Parties designating "rules of law" to govern their contract should therefore be mindful of the potential need for gap-filling and may wish to address it in their choice of law. The following illustrations may be used as a point of reference.

Illustration 3-1

A choice of law agreement provides that: "This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) without regard to the provisions of any national law, except provisions of the law of State X which apply to those matters not governed by the CISG."

Illustration 3-2

A choice of law agreement provides that: "This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts and, with respect to issues not covered by those principles, by the law of State X."

Article 4 Express and tacit choice

Introduction

4.1 Article 4 states the different ways in which a choice of law in the sense of Article 2(1) can be made. By limiting tacit choice of law to situations in which the choice appears clearly, Article 4 promotes predictability of results by lessening the likelihood of disputes as to whether there has been a choice of law.

Choice of law generally

4.2 Article 4 provides that the parties may choose a law to govern their contract either expressly or tacitly. Article 4 is in line with similar provisions in other instruments (see Art. 7 Mexico City Convention; Art. 3 Rome I Regulation). The parties may also expressly or tacitly choose "rules of law" as provided in Article 3.

Express choice of law

4.3 The parties may expressly choose a law to govern their contract. An express choice of law agreement may be made before, at the same time as, or after the conclusion of the main contract (see Art. 2(3)). The term "main contract" refers to the contract for which the choice of law is made. Choice of law agreements are usually included as an express clause in the main contract. The use of particular words or phrases is not necessary. Phrases such as the contract is "governed by" or "subject to" a particular law meet the requirements of an express choice. While Article 4 allows a tacit choice, the parties are advised to identify explicitly the law governing the contract.

Illustration 4-1

Party A and Party B conclude a contract. The choice of law agreement provides that: "This contract shall be governed by the law of State X." This is sufficient to constitute a choice of law by the parties. Therefore, as stated in Article 2, the law of State X governs the contract.

Illustration 4-2

Party A and Party B conclude a contract. The choice of law agreement provides that: "This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts." The UNIDROIT Principles therefore govern the contract, unless, as stated in Article 3, the law of the forum provides otherwise.

4.4 An express choice can also be made by reference to some external factor, for instance the place of establishment of one of the parties.

> ***Illustration 4-3***
>
> Seller and Buyer conclude a contract of sale. The choice of law agreement provides that: "This contract shall be governed by the law of the State of the establishment of the seller." Seller has its establishment in State X at the time of the conclusion of the contract. The law of State X therefore governs the contract.

4.5 Article 4 does not require a choice of law agreement to be in writing. Therefore, an express choice of law may also be made orally (see Art. 5 and para. 5.2).

Tacit choice of law

4.6 A choice of law may also be made tacitly. To qualify as an effective choice of law under Article 4, the choice must be a real one although not expressly stated in the contract. There must be a real intention of both parties that a certain law shall be applicable. A presumed intention imputed to the parties does not suffice.

4.7 A tacit choice of law must appear clearly from the provisions of the contract or the circumstances. One has to take into account both the terms of the contract and the circumstances of the case. However, either the provisions of the contract or the circumstances of the case may conclusively indicate a tacit choice of law.

Tacit choice of law appearing clearly from the provisions of the contract

4.8 A choice of law is found to appear clearly from the provisions of the contract only when the inference drawn from those provisions, that the parties intended to choose a certain law, is strong. There is no fixed list of criteria that determines the circumstances under which such an inference is strong enough to satisfy the standard that a tacit choice must "appear clearly"; rather, the determination is made on a case-by-case basis.

4.9 A widely accepted example of a tacit choice that appears clearly from the provisions of the contract arises in the context of the use of a standard form by the parties. Where the contract is in a standard form which is generally used in the context of a particular system of law, this may indicate that the parties intended the contract to be governed by that law, even though there is no express statement to this effect.

Illustration 4-4

Party A and Party B conclude a marine insurance contract in the form of a Lloyd's policy of marine insurance. Because this contract form is based on English law, its use by the parties may indicate that the parties intend to subject the contract to English law.

4.10 The same is true when the contract contains terminology characteristic of a particular legal system or references to national provisions that make it clear that the parties were thinking in terms of, and intended to subject their contract to, that law.

Illustration 4-5

Party A and Party B conclude a contract that uses the legal language characteristic of the law of State X. This may indicate that the parties intend their obligations to be determined according to the law of State X.

Choice of court clause and tacit choice of law

4.11 The choice of law applicable to a contract and the choice of a forum for dispute resolution should be distinguished. According to the second sentence of Article 4, an agreement between the parties to confer jurisdiction on a court to determine disputes under the contract (a choice of court agreement) is not in itself equivalent to a choice of law (see Art. 7(2) Mexico City Convention). For example, the parties may have chosen a particular forum because of its neutrality or experience. The fact that the chosen court, under the applicable private international law rules, may apply a foreign law also demonstrates the distinction between choice of law and choice of court. Nevertheless, a choice of court agreement between the parties to confer jurisdiction on a court may be one of the factors to be taken into account in determining whether the parties intended the contract to be governed by the law of that forum.

Illustration 4-6

Party A and Party B conclude a contract and include a choice of court agreement designating the courts of State X. In the absence of other relevant provisions in the contract or particular circumstances suggesting otherwise, this will be insufficient to indicate a tacit choice of the law of State X.

Arbitration clause and tacit choice of law

4.12 While there are important differences between choice of court clauses and arbitration clauses, Article 4 adopts a unified general rule as to whether a choice of forum or arbitral tribunal necessarily entails a choice of law. An agreement between the parties to confer jurisdiction on a specified arbitral tribunal to resolve disputes under the contract is not the same as a choice of law. According to the second sentence of Article 4, the choice of such an arbitral tribunal is also not a sufficient indicator, in itself, of the parties' tacit choice of law. The parties may have chosen a tribunal because of its neutrality or expertise. The tribunal may also apply a foreign law pursuant to applicable rules of private international law or the chosen arbitration rules. However, an arbitration agreement that refers disputes to a clearly specified seat may be one of the factors in determining the existence of a tacit choice of law.

Illustration 4-7

Party A and Party B conclude a contract under which they agree that all disputes arising out of, or in connection with, the contract are to be submitted exclusively to arbitration in State X under the rules of the ABC Chamber of Commerce. In the absence of other relevant provisions in the contract or particular circumstances suggesting otherwise, this will be insufficient to indicate a tacit choice of the law of State X.

Circumstances indicating a tacit choice of law

4.13 The particular circumstances of the case may indicate the intention of the parties in respect of a choice of law. The conduct of the parties and other factors surrounding the conclusion of the contract may be particularly relevant. This principle may also apply in the context of related contracts.

Illustration 4-8

In the course of their previous dealings, Party A and Party B have consistently made an express choice of the law of State X to govern their contract. If the circumstances do not indicate that they intended to change that practice in the current contract, a court or arbitral tribunal could conclude from these circumstances that the parties clearly intended to have the current contract governed by the law of State X even though such an express choice does not appear in that particular contract.

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

4.14 A tacit choice of law must appear clearly from the provisions of the contract or the circumstances. This means that the choice must be evident as a result of the existence of strong indications for such a choice.

> ***Illustration 4-9***
>
> Party A and Party B conclude a contract drafted in the language of a certain State. The contract, however, does not use legal terminology characteristic of that State's legal system. In the absence of other circumstances, the use of the particular language would not be sufficient to establish a tacit choice of law.

4.15 The Principles do not take a position as to procedural issues, in particular, the taking of evidence and the standard and mode of proving a tacit choice of law (but see Art. 9(1)(f) on the burden or onus of proof).

Modification of a choice of law

4.16 A modification of a choice of law must be made expressly or appear clearly from the provisions of the contract or the circumstances. A modification occurs when the parties agree (expressly or tacitly) to subject their contract to a law other than the one previously applicable (see Art. 2(3)).

No choice of law

4.17 If the parties' intentions are neither expressed explicitly nor appear clearly from the provisions of the contract or from the particular circumstances of the case, there is no choice of law agreement. In such a case, the Principles do not determine the law governing the contract.

Article 5 Formal validity of the choice of law

Introduction

5.1 The purpose of Article 5 is to determine the formal validity of a choice of law. Article 5 is motivated by a policy of upholding the parties' intention unimpeded by formalistic requirements (see Preamble, para. 1).

No requirements as to form of choice of law

5.2 A choice of law need not comply with any formal requirements; for instance, it does not need to be in writing, drafted in a particular language or attested by witnesses. The same applies to a modification of a choice of law (see Art. 2(3)). Article 5 applies to both an express and a tacit choice of law (see Art. 4).

Illustration 5-1

Party A and Party B conclude a contract and agree orally that the law of State X will govern the contract. The choice of the law of State X is formally valid.

Illustration 5-2

Party A and Party B conclude an oral contract without expressly agreeing on the applicable law. However, a tacit choice of the law of State X appears clearly from the terms of the oral contract or the surrounding circumstances. The choice of the law of State X is formally valid.

Illustration 5-3

Party A (established in State W) and Party B (established in State X) conclude a contract and agree that it is governed by the law of State Y. The contract is drafted in the official language of State Z and no witnesses are present at its conclusion. The choice of the law of State Y is formally valid.

Substantive rule of private international law

5.3 Unlike other provisions of the Principles, Article 5 is not a conflict of laws rule (which refers to a national legal system) but, rather, a substantive rule of private international law. This rule can be justified on several grounds. First, the principle of party autonomy indicates that, in order to facilitate international trade, a choice of law by the parties should not be restricted by formal requirements. Secondly, most legal systems do not prescribe any specific form for the majority of international commercial contracts, including choice of law provisions (see Art. 11 CISG; Art. 1(2) (first sentence) UNIDROIT Principles and Art. 3.1.2 UNIDROIT Principles). Thirdly, many private international law codifications employ comprehensive result-oriented alternative connecting factors in respect of the formal validity of a contract (including choice of law provisions), based on an underlying policy of favouring the validity of contracts (*favor negotii*) (see, *e.g.*, Art. 13 Mexico City Convention; Art. 11(1) Rome I Regulation).

5.4 The fact that the Principles are designed only for commercial contracts (Preamble, para. 1; Art. 1(1)) obviates the need to subject the choice of law to any formal requirements or other similar restrictions for the protection of presumptively weaker parties, such as consumers or employees.

Relationship with other provisions dealing with formal validity

5.5 Article 5 concerns only the formal validity of a choice of law. The remainder of the contract (the main contract) must comply with the formal requirements of at least one law whose application is authorised by the applicable private international law rule (see Art. 9(2)). On the other hand, the law chosen by the parties also governs the formal (as well as the substantive) validity of the main contract (see Art. 9(1)(e)). The examples below attempt to illustrate the relationship between Articles 5, 9(1)(e) and 9(2) and the applicable binding rules of private international law in respect of the formal validity of a contract.

Illustration 5-4

Party A and Party B conclude a contract which states that it is governed by the law of State X. The main contract is formally valid in terms of the law of State X. The contract is formally valid.

Illustration 5-5

Party A and Party B conclude a contract. A tacit choice of the law of State X appears clearly on the basis of certain provisions in the contract or the circumstances of the case. The main contract would be formally valid in terms of the law of State X. The contract is formally valid.

Illustration 5-6

Party A and Party B conclude a contract, including a choice of the law of State X. The contract is formally invalid in terms of the law of State X. The contract will nonetheless be formally valid if it complies with the requirements in respect of formal validity of any one of the other laws whose application is authorised by the applicable rule of private international law.

Illustration 5-7

Party A and Party B conclude a contract which states that it is governed by the law of State X. The main contract is formally invalid if it does not comply with the requirements as to form in terms of the law of State X and also does not comply with the formal requirements of any of the other laws whose application is authorised by the applicable rule of private international law.

5.6 The principle in Article 5 – no formal requirements for a choice of law – is consistent with Article 7, which provides that a choice of law may not be contested solely on the ground that the contract to which it applies is not valid.

5.7 Article 2(3) provides that a choice of law or a modification made after the contract has been concluded shall not prejudice the formal validity of the contract.

Agreement to the contrary

5.8 If the parties agree (for instance, in a letter of intent or a memorandum of understanding) that a choice of law clause between them will only come into existence when certain formalities are met, their agreement in this regard must be respected. Also, if the parties agree that a choice of law clause cannot be changed except when certain formalities are met (for instance, a no-oral modification clause), this agreement must be respected (see Arts 2.1.13, 2.1.17 and 2.1.18 UNIDROIT Principles).

Article 6 Agreement on the choice of law and battle of forms

Introduction

6.1 Article 6 addresses the question of which law determines whether the parties have agreed on the applicable law. Paragraph 1 differentiates between two situations: those in which the parties have used "standard terms" designating different applicable laws (see Art. 6(1)(b)); and all other situations (see Art. 6(1)(a)). Paragraph 2 introduces an exception applicable in principle to both situations.

6.2 Article 6(1)(a) follows a private international law rule that is well established in international, supranational or regional instruments, such as in the Rome I Regulation (Art. 10(1)) and the Mexico City Convention (Art. 12(1)).

6.3 Article 6(1)(b) introduces a new sub-rule that implements the rule of Article 6(1)(a) by identifying the purportedly agreed law in situations in which the parties have used standard terms designating different applicable laws. The new sub-rule promotes much needed legal certainty by providing a clear solution to a recurring problem that legislators have left unaddressed and courts have been unable to resolve in a consistent and predictable manner. The provision seeks to maximise party autonomy while, at the same time, avoiding needless complexities.

6.4 Article 6(2) provides a limited exception clause similar to provisions found in other international, supranational or regional instruments, such as the Rome I Regulation (Art. 10(2)) and the Mexico City Convention (Art. 12(2)).

Application of the law purportedly agreed to

6.5 In line with other international and regional instruments, Article 6(1)(a) provides that the law purportedly chosen by the parties determines whether they have reached an agreement on the applicable law. If that law confirms the existence of a choice of law, then that law applies to the main contract, unless the opposing party can show a lack of agreement under the limited exception of Article 6(2) (see paras 6.28-6.29).

6.6 Article 6 avoids the use of the phrase "existence and material validity of the choice of law", which is used in some codifications. These technical terms may have different meanings from one State to another, and may encourage wider grounds of challenge to the chosen law, thereby jeopardising the legal certainty that the Principles seek to provide. Instead, Article 6 uses the non-technical term "agreement", which is intended to encompass all issues as to whether the parties have effectively made a choice of law.

6.7 Duress, misrepresentation, mistake and other defects of consent are among the grounds that a party may invoke to demonstrate the absence of "agreement" if they specifically affect the parties' agreement on the choice of law, which is to be considered independently from the main contract (see Art. 7). The existence and effect of these defects of consent is to be determined under the putatively chosen law, or, if the exception appearing in Article 6(2) is applicable, under the law designated in that paragraph.

Choice of law in standard terms

6.8 In international contract negotiations, parties that enter into a number of similar contracts frequently prepare standard forms or general conditions for use in those contracts. According to a widely accepted definition provided in the PECL (Art. 2:209, para. 3), "general conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties". According to the UNIDROIT Principles (Art. 2.1.19, para. 2), "standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party". One common method for parties to negotiate transactions is by the exchange of documents containing transaction-specific terms as well as pre-formulated standard forms containing their respective standard terms.

6.9 In international contracts, the parties often include choice of law clauses in their standard forms. The Principles do not require a particular form for the parties' agreement on choice of the applicable law (see Arts 4 and 5). Hence, the choice of law can very well be made in standard forms. If both parties designate the same law in their standard terms, or if only one party uses a choice of law clause, Article 6(1)(a) applies and the designated law determines whether there was indeed an "agreement" with respect to the applicable law. If, under this law, an agreement on the applicable law is established (see paras 6.5-6.7), the chosen law then governs the main contract as the applicable law.

Choice of law in conflicting standard forms (battle of forms)

6.10 However, the terms in the standard forms used by one party often differ from the terms used by the other. The scenario of conflicting standard forms is commonly referred to as the "battle of forms". At the substantive law level, the rules applied in national jurisdictions to resolve the battle of forms mostly fall within one of the four following categories: (1) the "first-shot rule", according to which the forms first used between the parties prevail; (2) the "last-shot rule", according to which the forms last used between the parties prevail; (3) the "knock-out rule", according to which both standard forms are disregarded; and (4) hybrid solutions that combine elements of the above solutions.

6.11 The standard forms used by parties to international contracts frequently contain conflicting choice of law clauses. In such cases, one of the rules described in paragraph 6.10 must be applied to resolve the inconsistency with respect to the choice of law clause. If the standard forms used by the parties contain choice of law clauses designating different laws, a difficult question arises as to which law should be applied to resolve the resulting "battle of forms". The existing international, supranational or regional instruments and most national private international law statutes have not yet addressed the question of the law applicable in situations involving conflicting choice of law clauses in standard forms. Commentators are divided as to which law should govern, and different solutions, some of considerable complexity, have been suggested. The courts often avoid the issue, circumvent it, or simply apply the *lex fori*. Consequently, parties to international contracts both using their standard forms are unable to reliably predict which law will ultimately govern their contract, which will usually become important when a dispute arises.

6.12 If the standard forms of each party contain a choice of law clause, but those clauses designate different laws, resolution of the conflict is challenging inasmuch as those laws may resolve the battle of the forms in different ways. This challenge, and its solution, are addressed in Article 6(1)(b). Article 6(1)(b) sets forth a novel rule that is intended to produce clear and predictable solutions to this complex problem. The following scenarios illustrate these solutions in various situations.

a) Situations presenting a false conflict: Article 6(1)(b), 1st part

6.13 The first scenario involves situations in which both of the laws designated by the parties provide a last-shot rule for solving the battle of forms:

> ***Scenario 1:*** Party A makes an offer and refers to its standard terms, which contain a clause designating the law of State X as the law applicable to the contract. Party B expresses acceptance of the offer and refers to its own standard terms, which designate the law of State Y as the applicable law. With respect to battle of forms scenarios, the domestic laws of State X and of State Y both provide that the standard terms last referred to prevail (last-shot rule).

6.14 Scenario 1 falls within the scope of Article 6(1)(b), 1st part. It provides that "if the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies". In Scenario 1, the parties have indeed designated different laws (the laws of States X and Y), but both of those laws follow the last-shot rule under which

the standard terms last referred to prevail, including the choice of law clause in these terms. Because both laws designated by the parties solve the battle of forms in favour of the same standard terms, the apparent conflict is in fact a false conflict. Pursuant to Article 6(1)(b), 1st part, the choice of law clause in the standard terms last referred to (*i.e.*, the choice of the law of State Y) is deemed to have been agreed upon.

6.15 The same solution applies if both parties designate in their standard terms the laws of States that follow the first-shot rule. In Scenario 1, this means that the law of State X would be deemed to have been agreed upon.

b) Situations presenting a true conflict: Article 6(1)(b), 2nd part

6.16 The second scenario involves situations in which the laws designated by the parties provide different solutions to the battle of forms:

> ***Scenario 2:*** Party A, the offeror, designates in its standard terms the law of State X, and Party B, the offeree, designates the law of State Y. One of the designated laws follows the first-shot rule, while the other law follows the last-shot rule.

6.17 Scenario 2 presents a *true conflict* situation because the parties have designated different laws which resolve the battle of forms differently. This scenario falls within the scope of Article 6(1)(b), 2nd part: "if the parties have used standard terms designating two different laws and [...] if under these laws different standard terms prevail, [...] there is no choice of law". This means that, in Scenario 2, the choice of law clauses in both standard terms are to be disregarded and that the applicable law is to be identified through the application of the rules that apply in the absence of contractual choice. Thus, Article 6(1)(b), 2nd part, establishes a knock-out rule at the private international law level.

6.18 The third scenario involves situations in which one or both of the laws designated by the parties apply a knock-out rule to the battle of forms:

> ***Scenario 3:*** Party A designates in its standard terms the law of State X, while Party B designates the law of State Y. State X follows a knock-out rule, while State Y follows a different rule, such as the first-shot rule, or the last-shot rule.

6.19 This case also presents a *true conflict* which falls within the scope of Article 6(1)(b): "the parties have used standard terms designating different laws and under one or both of these laws no standard terms prevail". Because at least one of the designated laws applies a knock-out rule, "no standard terms prevail", and thus both standard terms must be disregarded. The outcome then is that "there is no choice of law". As with Scenario 2, the applicable law is to be identified through the use of the rules that apply in the absence of contractual choice – rules which are not provided by the Principles.

General issues

6.20 At the substantive law level, some systems apply one rule to battle of forms scenarios under some circumstances and another rule under different circumstances. In cases involving those systems, the determination of which standard terms "prevail" under Article 6(1)(b) must be based on the relevant circumstances not in general but *in the specific case under examination*.

6.21 At times it may be difficult to accurately determine a foreign law's precise rule and position on the battle of forms. This can be particularly problematic in those systems in which the burden of ascertaining the content of foreign law rests with the court rather than the parties. When adopting the Principles, national or international legislators may thus consider imposing a duty on the parties to assist, or co-operate with, the court in identifying the relevant foreign rule or position, if such a duty is not already imposed under their procedural laws. In an arbitral context, the parties are obliged to co-operate in the resolution of their dispute given the contractual nature of the arbitral agreement. The parties may be subject to an additional obligation to co-operate where the applicable arbitral rules so provide.

6.22 Some systems have not yet taken a position with respect to conflicting standard terms. In a case involving at least one of those systems, it will be impossible to establish whether "under both of [the designated] laws" either (a) "the same standard terms prevail", or (b) "different standard terms prevail" (see Art. 6(1)(b)). This case should be treated as one in which "no standard terms prevail", and consequently as a case in which "there is no choice of law" (see Art. 6(1)(b), *in fine*).

The Principles and the CISG

6.23 Contracts for the sale of goods are a particularly frequent type of international contract that involves the exchange of standard terms. With respect to such contracts, the CISG may enter into consideration. The CISG is in force in more than 80 States worldwide. Given the practical importance of the CISG, it seems appropriate to comment on the relationship between the Principles and the CISG. The interpretations of the CISG in this Commentary do not purport to be exclusive or authoritative interpretations of the CISG by the Hague Conference or its Members.

6.24 In many cases, a party to an international sale designates in its standard terms the law of a CISG Contracting State as the applicable law, without further specification regarding this law. According to the prevailing judicial practice and academic opinion, a choice of the law of a CISG Contracting State includes the choice of the CISG. It is also common for a party to designate the law of a CISG Contracting State in its standard terms, but expressly exclude the CISG; Art. 6 of the CISG allows this possibility.

Scenario 4 combines these two frequent practices of parties to international sales contracts:

> ***Scenario 4:*** Party A to a transborder sales contract designates in its standard terms the law of State X, which is a CISG Contracting State, as the law applicable to the contract. Party B designates in its standard terms the law of State Y, which is also a CISG Contracting State, but explicitly excludes the CISG. The general contract law of State Y follows a knock-out rule. The case is brought before a court in a CISG Contracting State.

6.25 If the conditions for the application of the CISG under its Articles 1 *et seq.* are met, the court in a CISG Contracting State will be treaty-bound to apply the CISG. However, according to Article 6 of the CISG, the parties may exclude its application. If the parties enter into a choice of law agreement excluding the CISG, the CISG will not apply.

6.26 Article 7 of the Principles adopts the principle of severability, according to which the choice of law agreement is a separate contract that is distinguished from the main contract (*e.g.*, the sales contract). This means that in Scenario 4, the Principles govern the choice of law agreement, whereas the CISG governs the sales contract (*i.e.*, the main contract).

6.27 Under the Principles, the battle of forms concerning the choice of law agreement in Scenario 4 falls within the scope of Article 6(1)(b). The reason is that: (a) Party A's standard terms designated the law of State X, including the CISG, and Article 19 of the CISG (as interpreted by judicial practice and academic opinion) provides either the last-shot or the knock-out rule; and (b) Party B's standard terms excluded the CISG and designated the law of State Y, which provides (in its general contract law) a knock-out rule. In this situation, under one (or, depending on the interpretation of the CISG, both) of the designated laws the knock-out rule applies and "no standard terms prevail", thus leading to the conclusion that "there is no choice of law". Consequently, under the Principles, the choice of law clauses in both Party A and Party B's standard terms, as well as the exclusion of the CISG in Party B's standard terms, could be disregarded. The choice of law clauses in the parties' standard terms would thus not apply, and the sales contract in Scenario 4 would be governed by the CISG.

Limited exception clause

6.28 It is widely accepted that, in certain circumstances, the determination of whether a party has consented to a choice of law should not be made on the basis of the purportedly chosen law, as provided in Article 6(1) (see Art. 10(2) Rome I Regulation). To this end, Article 6(2) introduces an exception clause. It applies subject to two concurrent conditions; first, "under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1"; and, second, no valid agreement on the choice of law can be established under the law of the State in which a party invoking this provision has its establishment (*e.g.*, for reasons of duress or fraud or the consequences of silence in the process of contract formation).

Illustration 6-1

Party A, established in State X, sends an offer to Party B, established in State Y. The offer contains a choice of law clause designating the law of State X. Under the law of State X, silence of the offeree is regarded as acceptance. Under the law of State Y, silence does not constitute acceptance. Party B may invoke the law of State Y in order to establish that it did not consent to the choice of law. The court or arbitral tribunal will apply the law of State Y if it concludes that "under the circumstances", it would "not be reasonable" to decide B's consent to the choice of law agreement under the law of State X.

Illustration 6-2

Party A, established in State X, sends to Party B, established in State Y, an offer to enter into a contract; the proposed contract designates the law of State X as the applicable law. Party B communicates acceptance of that offer under circumstances of economic duress. Such economic duress does not vitiate consent under the law of State X. Under the law of State Y, however, such economic duress would render ineffective Party B's consent to the choice of law. Party B may invoke the law of State Y in order to establish lack of consent. The court or arbitral tribunal will apply the law of State Y if it concludes that under the circumstances, it would "not be reasonable" to decide the issue of B's consent to the choice of law under the law of State X.

6.29 Article 6(2) is an exception from Article 6(1)(a). It should apply only very rarely in cases falling within the scope of Article 6(1)(b), 1st part. Article 6(2) is inapplicable to situations falling under Article 6(1)(b), 2nd part, because in those situations the Principles apply a knock-out rule and thus "there is no choice of law".

Article 7 Severability

Introduction

7.1 Article 7 introduces the principle of severability. This means that a choice of law agreement is autonomous and independent from the contract that contains it or the contract to which it applies. Accordingly, the invalidity of the contract does not necessarily render invalid the choice of law. Rather, the law chosen by the parties applies to the issues to be decided following the invalidity of the main contract, unless the choice of law agreement, assessed independently, is also invalid. When the parties' choice of applicable law is not affected, the claim of invalidity, non-existence or ineffectiveness of the main contract is assessed according to the applicable law chosen by the parties.

Parties' choice of law treated as separate from the contract to which it applies

7.2 A choice of law is based upon agreement of the parties. Such an agreement has a distinct subject matter and possesses an autonomous character from the contract to which it applies. This is consistent with the approach followed in international and European instruments, such as Article 10 of the Rome I Regulation, according to which the parties' choice of law should be subject to an independent assessment that is not automatically tied to the validity of the main contract.

Illustration 7-1

A contract is judged to be invalid on the grounds of mistake under the law of State X. The validity of a choice of law agreement remains unaffected unless the same mistake affects the choice of law agreement.

Illustration 7-2

Party A and Party B conclude a contract containing a choice of the law of State X. Party A claims performance under the contract. Party B takes the position that the contract should be regarded as a major transaction and should therefore have been subject to shareholder approval at a shareholders' meeting which had not taken place. Party B asserts that the contract is therefore invalid according to the corporate law of State X. If the contract is found to be invalid, this does not automatically invalidate the parties' choice of law agreement. The validity of the choice of law agreement should be raised and considered separately.

Scope of the rule

7.3 The choice of law agreement is usually contained in the main contract, but sometimes the agreement may be inferred from the surrounding circumstances, or it may be contained in a separate document executed prior to, contemporaneously with, or subsequent to, the contract to which it applies (see Art. 4). The crux of Article 7 is that, even when the agreement is part of the contract, the agreement must be judged separately from the main contract. This means that the choice of law agreement is not affected by a claim that the main contract is invalid, non-existent or ineffective. However, where it is alleged that the parties did not enter into a contract, the severability doctrine may apply only if a valid choice of law agreement is shown to exist. Its existence and validity is assessed according to the provisions of the Principles, notably Articles 4-6 and 9.

7.4 The Principles do not address the law governing certain issues listed in Article 1(3). Some of these issues (in particular those dealt with in Art. 1(3)(a) concerning the capacity of natural persons and Art. 1(3)(c) concerning companies or other collective bodies and trusts) might also bear relation to the determination of the validity of a choice of law agreement.

Severability / separability as a widely recognised rule

7.5 The term "severability" has a well-understood meaning in the literature, where it is used to describe the "survival" of the choice of law clause if the underlying contract is found to be invalid. It is an accepted technical term and this is the reason why it has been chosen. In languages other than English, "severability" has no specific corresponding term and is translated into "separability". The words "separable", "independent" "autonomous" are employed in the literature dealing with arbitration and choice of forum clauses.

7.6 Severability of an agreement on choice of court is the rule adopted by the 2005 Hague Choice of Court Convention, in its Article 3(d). The severability rule of Article 7 of the Principles is also consistent with the solutions adopted by many States as well as by regional and international instruments.

7.7 In arbitration, the principle of "separability", "independence" or "autonomy" is relied upon by courts to dismiss objections to arbitral jurisdiction asserting the invalidity of the contract. This principle is widely accepted in States party to the New York Convention, and is also expressly adopted by the UNCITRAL Model Law (Art. 16(1)) as well as many international or institutional arbitral rules.

Parties' choice of applicable law not "contested *solely* on the ground that the contract to which it applies is not valid"

7.8 The adverb "solely" means that the formal or material invalidity of the main contract does not automatically lead to the invalidity of the choice of law agreement. The choice of law agreement may be declared invalid only on grounds specifically affecting it.

7.9 Whether or not the parties' choice of the applicable law is affected by the invalidity of the main contract depends on the particular circumstances. For example, arguments that seek to impugn the parties' consent to the main contract do not necessarily undermine their consent to the choice of law agreement, unless the circumstances are such as to demonstrate lack of consent to *both* the main contract and the choice of law agreement.

Illustration 7-3

Party A and Party B conclude a contract which contains an agreement that it is governed by the law of State X. Party A has performed the contract. Under the law of State X, the contract is invalid for lack of consent. In the circumstances of the case, the lack of consent cannot be said to extend to the choice of the law of State X. As a result, that law applies to determine the consequences of invalidity, notably the entitlement to restitution when the contract has been performed, in whole or in part.

Defect affecting both the parties' choice of law agreement and the main contract

7.10 In some situations, the parties' choice of law agreement is affected by a defect that applies to both the agreement and the contract to which the agreement applies. This is notably the case where both the contract and the choice of law agreement, even if separate, are tainted by the same fraud or where a party lacks capacity to contract (a minor who may not enter the contract is also prevented from entering into a choice of law agreement). It should be recalled, however, that the Principles do not address the law governing the capacity of natural persons (see Art. 1(3)).

Illustration 7-4

A contract is judged to be invalid because Party A bribed Party B or because Party A lacked capacity. The choice of law agreement contained in the contract, or affected by the same defect when concluded, is also invalid.

7.11 The choice of law clause is affected when the defect causing the invalidity of the main contract necessarily extends, by its very nature, to this clause. In such a situation, the invalidity will also have consequences for other clauses, such as an agreement on choice of court or an arbitration agreement in the same contract.

Article 8 Exclusion of *renvoi*

Introduction

8.1 The Principles provide for party autonomy and allow the parties to choose the law that will govern their contract. Article 8 addresses the question of whether the parties' choice of the law of a State includes that State's rules of private international law. In some cases, the application of the private international law rules of another State (in this case the chosen State) may refer back to the law of the forum State or to the law of a third State. This phenomenon is known as "*renvoi*".

8.2 Article 8 begins with the rule providing that a choice of law by the parties is to be interpreted as excluding the application of the private international rules of the chosen law. The general rule of Article 8 avoids the possibility of an unintentional *renvoi* and thereby conforms to the parties' likely intentions.

8.3 Nevertheless, in keeping with the notion of party autonomy, Article 8 allows the parties, as an exception, to include in their choice of law the private international law rules of the chosen law, provided they do so *expressly*.

8.4 As used in Article 8, the phrase "rules of private international law" is confined to the rules determining the applicable law. It does not encompass rules of international jurisdiction, procedure or recognition of foreign judgments.

Exclusion of *renvoi*

8.5 Article 8 provides that, generally, the choice of law does not include the private international law rules of the chosen law unless the parties expressly provide otherwise. This principle accords with those Hague Conventions which exclude the possibility of *renvoi* by stating that "the term 'law' means the law in force in a State

other than its choice of law rules" (see, *e.g.*, Art. 12 2007 Hague Protocol). Other international or regional instruments generally also exclude the possibility of *renvoi* (see Art. 17 Mexico City Convention; Art. 20 Rome I Regulation). A minor exception in favour of *renvoi* exists only where the instrument extends its operation to non-Contracting States (see Arts 4 and 17 1989 Hague Succession Convention; Art. 4(2)(b) 1978 Hague Matrimonial Property Convention).

Illustration 8-1

Party A and Party B conclude a contract which states that "the parties agree that the law of State X will govern their contract". This provision is interpreted as referring solely to the substantive law of State X, to the exclusion of its private international law rules.

8.6 Aspiring to serve as a model and to promote international uniformity in private international law, the Principles similarly exclude the possibility of *renvoi*, except where the parties expressly provide otherwise. This exclusion honours the parties' likely intent by preventing the application of a law different from the parties' expectations, and also avoids uncertainty and unpredictability. One of the reasons parties enter into a choice of law agreement is to avoid the uncertainty of having to determine the applicable substantive law through the rules of private international law. This uncertainty would not be avoided if a standard choice of law clause were to be interpreted as encompassing the private international law of the chosen State. The idea underlying the rule in Article 8 accords with those Hague Conventions that grant (limited) party autonomy (see Arts 7, 8 and 12 2007 Hague Protocol; Arts 5, 6 and 17 1989 Hague Succession Convention; Arts 7 and 15 1986 Hague Sales Convention; Arts 3-5 1978 Hague Matrimonial Property Convention).

8.7 The rule of Article 8 does not prevent the parties from choosing an international, supranational or regional uniform law instrument, such as the CISG, to govern a contract that falls outside the territorial or substantive scope of the instrument (Arts 1(1)(a) and (b), 2 and 3 CISG) (see Commentary on Art. 3). The territorial or substantive scope of such instruments is indeed to be distinguished from the private international law rules of the chosen law in the sense of the rule of Article 8.

8.8 On the other hand, if an instrument or non-State law (see Art. 3) that has been chosen by the parties contains a reference to the law of a certain place or to the *lex fori*, this reference should be followed.

Illustration 8-2

Party A and Party B conclude a contract that contains the following clause: "This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts." According to the UNIDROIT Principles, the interest rate in case of failure to pay money is, under certain circumstances, the applicable rate fixed by the law of the State of the currency of payment (Art. 7.4.9(2) UNIDROIT Principles). Pursuant to this reference, the law of the State of the currency of payment is to be applied.

Express inclusion of private international law rules

8.9 Notwithstanding the general rule of interpretation described above, Article 8 provides that the parties may expressly choose a law including its private international law rules. This provision is consistent with party autonomy because it honours the parties' express agreement to indirectly choose the applicable substantive law via private international law rules. This principle, established in arbitration (see Art. 28(1) UNCITRAL Model Law), has also been extended to court proceedings. It deviates from the existing Hague Conventions and other instruments that allow (limited) party autonomy without granting the possibility of including the private international law rules (see paras 8.5 and 8.6).

Illustration 8-3

A contract provides that "it shall be governed by the law of State X, including its private international law rules". In such a case, the applicable substantive law will be determined under the private international law rules of State X.

Article 9 Scope of the chosen law

Introduction

9.1 The purpose of Article 9 is to describe the scope of the law chosen by the parties. Its structure is the following. First, it lays down the general rule that the law chosen by the parties governs *all aspects* of their contractual relationship. Secondly, it includes *a non-exhaustive list* of issues governed by such law. And thirdly, it makes clear that States may add connecting factors supporting the *formal validity* of the contract.

9.2 Article 9 is based on the principle that, unless the parties agree otherwise, the law chosen shall govern *all aspects of the contract*. The contract should be governed by the law chosen by the parties from its formation until its end. This approach ensures legal certainty, and uniformity of results and, in doing so, reduces the incentive for *forum shopping*: the law applicable to any aspect of the contractual relationship will be the law chosen by the parties, irrespective of the court or arbitral tribunal that decides the dispute.

9.3 Naturally, the reference to "all aspects" does not prevent the parties from choosing different laws for different parts of the contract, in accordance with Article 2(2)(b), or even from choosing a law only for one or more of the aspects listed in Article 9(1), for example, the interpretation of the contract.

9.4 Article 9(1) includes a list of seven issues governed by the law chosen by the parties. The terms "... including but not limited to ..." indicate that the list is illustrative rather than exhaustive. The reason for mentioning those seven particular issues is twofold. First, the list includes many of the most important aspects of any contract. This is the case, for example, for issues (a) and (b): interpretation, and rights and obligations arising from the contract. Second, the list clarifies that, in applying the Principles, certain issues are to be characterised as contractual, and thus they will be governed by the chosen law rather than another law, such as the *lex fori* or the *lex loci damni*. This is the case, for example, for prescription and limitation periods (see Art. 9(1)(d)), the burden of proof and legal presumptions (see Art. 9(1)(f)) and pre-contractual liability (see Art. 9(1)(g)). This ensures a uniform characterisation of these issues and, accordingly, promotes uniformity of results.

Particular areas

9.5 The issues mentioned in Article 9(1)(a), *interpretation*, and Article 9(1)(b), *rights and obligations arising from the contract*, are probably the most relevant in practice and constitute the core of the issues governed by the law chosen by the parties. The chosen law determines what meaning is to be attributed to the words and terms used in the contract. Where the meaning of a word in a contract is ambiguous, the meaning must be ascertained using the canons of interpretation and construction of the law chosen by the parties. That law also determines the parties' rights and obligations, especially when they are not explicitly defined by the contract. Because the Principles apply only to contracts, the concept of *rights and obligations* should be understood as referring to *contractual rights and obligations*, and not to non-contractual issues that may occur or arise between the contracting parties (but see para. 9.12).

9.6 Article 9(1)(c) refers to the *performance and the consequences of non-performance, including the assessment of damages*. The law chosen by the parties governs the conditions for the fulfillment of the obligations resulting from that law or from the contract, for example, the standard of diligence, the place and time of performance or the extent to which the obligation can be performed by a person other than the party liable (see M. Giuliano and P. Lagarde, "Report on the Convention on the Law Applicable to Contractual Obligations", [1980] OJ C282, p. 32 ("Giuliano-Lagarde Report")). The chosen law also governs the consequences of a total or partial failure to perform those obligations, including the excuses for non-performance, and the assessment of damages.

9.7 The reference to *the consequences of non-performance, including the assessment of damages* is a reference to the substantive rules, *i.e.*, those aspects are included to the extent that they are governed by substantive law rules and lie within the powers conferred upon the court by the *lex fori* or *lex arbitri* (see Explanatory Report to the 1986 Hague Sales Convention, pp. 42-43; Giuliano-Lagarde Report, p. 32). Thus, questions such as the remedies for non-performance, for example, compensation and the determination of its amount, specific performance, restitution, reduction for failure to mitigate a loss or the validity of penalty clauses, are subject to the law chosen by the parties.

9.8 Article 9(1)(d) refers to *the various ways of extinguishing obligations, prescription and limitations periods*. The law chosen by the parties governs all ways of extinguishing obligations, including prescription or limitation of actions by the passage of time. Thus, the chosen law determines the commencement, computation and extension of prescription and limitation, and their effects, *i.e.*, whether they provide a defence for the debtor or they extinguish the creditor's rights and actions. The law chosen by the parties governs these issues irrespective of their legal characterisation under the *lex fori*. This ensures harmony of results and legal certainty (see Art. 12(g) 1986 Hague Sales Convention; Art. 12(1)(d) Rome I Regulation).

9.9 Article 9(1)(e) refers to the *validity and the consequences of invalidity of the contract*, regardless of whether this result is described by words such as "null", "void" or "invalid". The law chosen by the parties determines the formation of the contract, the conditions for its validity and the grounds for avoidance. If according to that law the contract is null or invalid, the resulting consequences, for example, the obligation of restitution or payment of damages, are also governed by that law. See also paragraph 5.5.

9.10 Article 9(1)(e) is closely linked to Article 7 (severability of the choice of law clause). According to Article 7, it may be the case that the choice of law clause is valid, whereas the main contract to which it applies is not valid. Article 9(1)(e) makes clear that, in such a case, the consequences of the nullity of the contract are still governed by the law chosen by the parties.

9.11 Article 9(1)(f) refers to the *burden of proof and legal presumptions*. The Principles do not apply to evidence and procedural questions. However, the law chosen by the parties does apply to legal presumptions and the burden of proof. Like other international instruments, the Principles follow a substantive characterisation of these issues, not a procedural one (see Art. 12(g) 1986 Hague Sales Convention; Art. 18(1) Rome I Regulation). Legal presumptions and rules determining the burden of proof contribute to clarifying the parties' obligations and thus are inextricably linked to the law governing the contract. Furthermore, a uniform characterisation of these issues ensures harmony of results and legal certainty. Conversely, procedural presumptions, *i.e.*, those based on procedural elements, such as the effect of a failure to appear in court or the failure to deliver certain documents in the possession of one party, are excluded from the scope of the chosen law. The standard and mode of proof are also excluded.

9.12 Finally, Article 9(1)(g) refers to *pre-contractual obligations*. According to the Principles, the law chosen by the parties governs the rights and obligations of the parties during the formation period of the contract and the liability that may arise therefrom, for example, the information or undertakings given by the parties during that period. Therefore, once a contract is concluded between the parties, the obligations that arose out of dealings prior to its conclusion are also subject to the law applicable to the contract. However, even before the contract is concluded, the parties may choose the law applicable to the contractual negotiations and therefore to the pre-contractual liability based, for example, on an unexpected breakdown of such negotiations.

Formal validity

9.13 Article 9(2) provides that Article 9(1)(e), which provides that the chosen law governs the formal validity of the contract, does not prevent the application of any "other governing law" that supports the formal validity of the contract. The "other governing law" is determined under the private international law rules followed in the forum State or applied by an arbitral tribunal. Thus, Article 9(2) is motivated by, and seeks to promote, the policy of *favor negotii*, which is prevalent in most private international law codifications and conventions. This policy is reflected in choice of law rules designed to favour the formal validity of contracts by authorising the application of whichever one of several listed laws would uphold the contract as to form (alternative connecting factors). The listed laws usually include the laws of the State of the making of the contract, and the State in which the parties were domiciled or in which they or their respective agents were present at the conclusion of the contract. Article 9(2) enables courts or arbitral tribunals to take advantage of these rules when the form of the contract is not valid under the chosen law. Nevertheless, once the law applicable to the contract is determined, any change of choice of law is without prejudice to the contract's formal validity (see Art. 2(3)). See also paragraph 5.5.

Article 10 Assignment

Introduction

10.1 Article 10 determines the law applicable to important issues in assignment transactions, where the rights and duties of the parties are defined by two (or more) contracts that are entered into by different combinations of parties, and those contracts include different choice of law agreements.

10.2 Even when party autonomy is fully effectuated by the Principles, difficult questions arise in determining the law applicable to particular issues in transactions such as assignments in which the rights and duties of the parties are determined by two or more related contracts that are entered into by different combinations of parties and those contracts include different choice of law agreements. This may occur in the

context of assignment (in which the contract creating the assigned obligation is governed by the law of one State while the contract of assignment is governed by the law of a different State) as well as other contexts such as subrogation or delegation. Among such complex situations, the Principles focus on assignment because assignments are important and recurring transactions in international commercial practice.

10.3 Assignments and similar complex transactions involving overlapping contracts do not present unique issues with respect to the determination of the law governing each of the contracts when considered separately. There are, however, difficult issues in determining the law governing matters that relate to the intersection of those contracts, particularly when they are governed by different laws. After all, the claim of an assignee against the debtor on the assigned contract is created by a combination of the assigned contract and the contract of assignment, and the parties to those two contracts may have chosen to have them governed by different laws.

Scenario: Pursuant to a contract between Debtor and Creditor (Contract 1), Creditor has a claim against Debtor for a monetary sum. Contract 1 is stated to be governed by the law of State X and, under the Principles, that designation of applicable law is given effect. Pursuant to a contract between Creditor and Assignee (Contract 2), Creditor has assigned its claims against Debtor under Contract 1 to Assignee. Contract 2 is stated to be governed by the law of State Y and, under the Principles, that designation of governing law is given effect. The result of these two contracts, when considered together, may be to create a right of Assignee against Debtor.

10.4 In the Scenario, Assignee was not a party to Contract 1 and did not participate in the choice of law in that contract. Similarly, Debtor was not a party to Contract 2 and did not participate in that contract's choice of law. Thus, it cannot be said that the law applicable to the relationship among the parties created by the confluence of the two contracts can be determined simply by giving effect to the choice of law by the parties. Accordingly, it is useful to examine how choice of law operates in assignment transactions in light of the potential for confusion as to which law governs which aspects of the relationship among the debtor, assignor and assignee when the contract between the debtor and the creditor / assignor is governed by a law different than the law governing the contract between the creditor / assignor and the assignee.

10.5 Although the Principles, in recognition of party autonomy, allow the parties to choose the law governing a contract, so that Contract 1 in the Scenario is governed by the law of State X (as chosen by the parties to that contract) and Contract 2 is similarly governed by the law of State Y, the Principles' deference to party autonomy tells us little about the law governing matters that affect the relationship between

parties who have not contracted with each other (such as Debtor and Assignee) and, thus, have not exercised their autonomy to choose the law governing those matters. While Creditor and Assignee have chosen to have their contract governed by the law of State Y, Debtor has not agreed to the application of State Y's law. Similarly, while Debtor and Creditor have chosen to have their contract governed by the law of State X, Assignee has not agreed to the application of State X's law. As a result, applying either the law of State X or the law of State Y to the relationship between Debtor and Assignee created by the interaction of the two contracts cannot be said to be merely an application of party autonomy.

10.6 Accordingly, while the Principles generally defer to party autonomy for selection of the law governing the relationship between parties who have contracted with each other, rules are needed to determine which law applies when deference to the joint choice of the parties has no real meaning because the parties have not contracted with each other. Article 10 provides these rules.

Identification and application of the Principles to resolve issues raised by assignments

10.7 Article 10 is based on two principles: (i) rights and obligations as between two parties, created by a contract between them, should be governed by the law governing that contract; and (ii) a contractual obligation should continue to be governed by the law applicable to the contract that created the obligation, even after the creditor with respect to that obligation assigns its rights to a third party. Applying these two principles to the relationship created by assignment leads to the rules set out in Article 10(a) and (b).

10.8 First, under the rule set out in Article 10(a), the law chosen by the assignor and the assignee in the contract of assignment governs their mutual rights and obligations arising from that contract. This is an application of the principle that rights and obligations as between two parties, created by a contract between them, should be governed by the law governing that contract.

Illustration 10-1

Under the facts of the Scenario, the contractual obligations created between Creditor and Assignee under Contract 2, and the determination of whether, as between Creditor and Assignee, Contract 2 effectively transfers Creditor's rights under Contract 1 to Assignee, are governed by the law of State Y.

10.9 Secondly, under the rule set out in Article 10(b)(i), the law chosen by the debtor and creditor in the contract creating the debt determines whether the assignment can be invoked against the debtor. This is an application of the principle that a contractual obligation should continue to be subject to the law governing the contract that created it even after the creditor with respect to that obligation assigns its rights to a third party (see Art. 2).

Illustration 10-2

Under the facts of the Scenario, the question of whether Assignee can invoke against Debtor the assignment of Creditor's rights under Contract 1 to Assignee (including determination of the effect of any anti-assignment clauses in Contract 1) is governed by the law of State X.

10.10 Thirdly, under the rule set out in Article 10(b)(ii), the law chosen by the debtor and creditor in the contract creating the debt governs the rights of the assignee against the debtor that result from the assignment. This, too, is an application of the principle that a contractual obligation should continue to be subject to the law governing the contract that created it even after the creditor with respect to that obligation assigns its rights to a third party.

Illustration 10-3

Under the facts of the Scenario and assuming that Assignee can invoke the assignment against Debtor, the nature and extent of Debtor's obligation to Assignee (including determination of the effect of any legal doctrines pursuant to which a debtor may not set up against an assignee certain defences that the debtor may have been able to set up against its creditor) are governed by the law of State X.

10.11 Fourthly, under the rule set out Article 10(b)(iii), the law chosen by the debtor and creditor in the contract creating the debt governs whether the obligations of the debtor have been discharged. This, too, is an application of the principle that a contractual obligation should continue to be governed by the law governing the contract that created it even after the creditor with respect to that obligation assigns its rights to a third party.

Illustration 10-4

Under the facts of the Scenario and assuming that Assignee can invoke the assignment against Debtor, the question of whether Debtor's obligation to Assignee resulting from the assignment has been discharged (whether by performance by Debtor or otherwise) is governed by the law of State X.

International precedents

10.12 The matter of the law governing assigned obligations is addressed in the UN Receivables Convention. The matter is also addressed in the Rome I Regulation and in the UNCITRAL Secured Transactions Guide. Article 10 is consistent with these precedents. The UN Receivables Convention (Art. 28(1)) (recommendation 216 of the UNCITRAL Secured Transactions Guide) refers issues between the assignor and the assignee to the law governing the assignment, and defers to party autonomy for choosing that law: "The mutual rights and obligations of the assignor and the assignee arising from their agreement are governed by the law chosen by them." The UN Receivables Convention (Art. 29) (recommendation 217 of the UNCITRAL Secured Transactions Guide) addresses the law applicable to the relationship between the debtor on the assigned contract and the assignee: "The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged."

Related issues

10.13 Other contexts in which rights are determined by reference to two or more contracts between different sets of parties include subrogation and delegation. While Article 10 does not provide rules for determining which law governs the various issues that may arise in those contexts, the rules of Article 10 may be applied to those situations by analogy.

Article 11 Overriding mandatory rules and public policy (*ordre public*)

Introduction

11.1 Party autonomy, as recognised by the Principles, is not absolute. Rather, in the Principles, as in all States that recognise party autonomy, it operates within limits. This Article sets out the limits on the general autonomy principle recognised in Article 2. Paragraphs 11.4 to 11.32 of this Commentary describe in detail the operation of those limits and the policies underlying them. These are the only limitations upon the application of the law chosen by the parties within the framework of the Principles.

11.2 While Article 11 consists of five paragraphs, it embodies one basic point – party autonomy to select the governing law can be limited, in the exceptional circumstances identified in the Article, when the effect of its use would be to contravene certain fundamental norms. Article 11 sets out the contours of that point by identifying the two situations in which a forum may, consistent with the

Principles, decline to give full effect to the law chosen by the parties. First, notwithstanding the law chosen by the parties, the forum may apply or take into account "overriding mandatory provisions" of law. Second, the forum may decline to apply the law chosen by the parties to the extent that the result would be "manifestly incompatible with fundamental notions of public policy (*ordre public*)". Of course, in order to apply those limits, one must know which State's overriding mandatory provisions of law or fundamental notions of public policy (*ordre public*) are to be taken into account. While the Principles primarily look to the law of the forum for those limits, they also provide rules under which the forum may look to the law of a different State.

11.3 These twin tasks – delineating the limits on party autonomy and identifying the State whose law provides the reference point for these limits – are accomplished in Article 11 as follows: paragraphs (1) and (2) address overriding mandatory provisions of law, with paragraph (1) establishing the basic power of the forum to apply its overriding mandatory provisions and paragraph (2) indicating the circumstances in which the forum may apply or take into account mandatory provisions of another State; paragraphs (3) and (4) address fundamental notions of public policy (*ordre public*), with paragraph (3) establishing the basic power of the forum to exclude application of the chosen law if it contravenes the forum's fundamental notions of public policy and paragraph (4) indicating the circumstances in which the forum may take into account the fundamental notions of public policy of another State; and paragraph (5) addresses application of these principles by arbitral tribunals.

11.4 These limitations apply only with regard to rules and policies that are of fundamental importance within the legal systems in which they operate (see paras 11.15 and 11.23). Indeed, if the limitations are not circumscribed in this manner, the principle of party autonomy would be undermined.

11.5 The law of the forum plays a central role in Article 11. It is by reference to the law of the forum that a court will determine whether a provision or policy of that law displays the characteristics necessary to constitute an "overriding mandatory provision" or whether a public policy is of a sufficiently fundamental nature as to be capable under the Principles of overriding the law chosen by the parties (see Art. 11(1) and (3); see paras 11.1 and 11.22). It is also the private international law of the forum which determines whether and, if so to what extent, a court will apply or take into account the overriding mandatory laws or the public policy of another State (see Art. 11(2) and (4); see paras 11.20 and 11.28). On the other hand, the overriding mandatory character or public policy of another law is determined according to that law and not the law of the forum.

11.6 The categories of limitation recognised by Article 11 qualify the applicable law to a certain extent, but they do not invalidate the parties' choice. In the case of overriding mandatory provisions, the applicability of the chosen law is supplemented or displaced by the application of the mandatory provision of another law. In the case of public policy, the applicability of the chosen law is limited only to the extent that its application is manifestly incompatible with fundamental notions of public policy (*ordre public*). Unless, therefore, its non-application is necessary to give effect to the overriding mandatory provision or public policy, the chosen law will be applied, as provided elsewhere in the Principles.

11.7 Article 11(5) stands apart from the rest of the Article. As the Commentary on the provision (see paras 11.29-11.31) makes clear, it recognises that arbitral tribunals and national courts operate in different contexts in their treatment of overriding mandatory rules and public policy. Article 11(5) provides, therefore, for an arbitral tribunal to take into account public policy or overriding mandatory provisions of a law other than that chosen by the parties, if it is entitled or required to so. Indeed, that possibility is an important control mechanism which protects the integrity of arbitration as a dispute resolution mechanism.

The relationship of Article 11 to the principle of party autonomy

11.8 Rules that provide for the application by a court or arbitral tribunal of overriding mandatory provisions or public policy (whether of the forum or of another law) to qualify the law that would otherwise apply in a particular case are of fundamental importance in private international law. Those rules provide an essential "safety valve" without which national lawmakers might be reluctant to allow the application of the chosen law or "rules of law" (*Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958: ICJ Reports 1958, p. 55).

11.9 In the present context, although the qualifications in Article 11 do restrict the application of the law chosen by the parties, they are intended to buttress the principle of party autonomy. By acknowledging and defining the exceptional circumstances in which a national court or arbitral tribunal may legitimately override the parties' choice in the exercise of the power conferred on them by Article 2(1), the provisions described in the following paragraphs serve as important control mechanisms, which should serve to reinforce the confidence that a legal system reposes in the parties by allowing them that choice. Without provisions of this kind, which protect the integrity of a legal system and the society that it represents, the freedom of the parties to choose the law applicable to a contract might not be accepted at all and, if recognised, would be at risk of being undermined or negated on insubstantial or spurious grounds.

The relationship between overriding mandatory provisions and public policy (*ordre public*)

11.10 Article 11 permits the application, on an exceptional basis, of two categories of restrictions on the application of the law chosen by the parties: overriding mandatory provisions and public policy (*ordre public*). These two categories are commonly dealt with in separate provisions in national and international instruments, including all of the Hague Conference's Conventions dealing with choice of law issues over the past 50 years (see, *e.g.*, Arts 16-17 1978 Hague Agency Convention; Arts 17-18 1986 Hague Sales Convention; Art. 11 2006 Hague Securities Convention).

11.11 There is no doubt that the categories of overriding mandatory provisions and public policy are "closely connected". They may be considered to share the same doctrinal basis and, in effect, to be two sides of the same coin. Nevertheless, their separate treatment in the Principles has the advantage, in particular, of not only consistency with the majority of existing international instruments but also of allowing a clear distinction to be drawn between (a) situations in which application of the chosen law is displaced because a specific, positive rule of the *lex fori* or another legal system takes priority and is applied instead (application of an overriding mandatory provision), and (b) situations in which application of the chosen law is blocked because its application in a particular case is repugnant to the fundamental policies of the forum or another legal system whose law would apply to the contract absent the parties' choice (application of *ordre public*).

11.12 In order to give due weight to the principle of party autonomy, any limit on the application of the law chosen by the parties must be justifiable, clearly defined and no wider than necessary to serve the objective pursued. In line with this restrictive approach, the Principles emphasise the exceptional character of public policy and overriding mandatory provisions.

11.13 Article 11 distinguishes between the role of overriding mandatory provisions and public policy in court proceedings (see Art. 11(1)-(4)) and their role in proceedings before an arbitral tribunal (see Art. 11(5)). In relation to court proceedings, Article 11 also distinguishes between the effect of rules and policies of the forum (see Art. 11(1) and (3)) and that of rules and policies of legal systems other than that of the forum or that chosen by the parties (see Art. 11(2) and (4)).

11.14 Article 11 does not address the application of mandatory provisions and public policy of the law chosen by the parties. That is because a choice of law within Article 2 carries with it (subject only to the limits set out in the present Article) the application of *the whole* of the chosen substantive law, whether or not falling within one or other of these two categories. Article 2 permits the parties to choose the law applicable to only part of a contract (*i.e.*, to some provisions, but not others) and to choose different laws to govern different parts (see para. 2.9). It does not, however, allow the parties to "pick and choose" within the applicable substantive law so as to exclude the application of certain rules, while applying others. For example, the Principles would not enable the parties to choose all of the law of State X, except for a particular (mandatory) statute governing unfair contract terms. For the most part, therefore, it will be a matter for the chosen law to determine whether a particular legal provision is one from which the parties are free to depart by the terms of their contract or is one which has mandatory effect.

Overriding mandatory provisions of the law of the forum

11.15 Article 11(1) provides that the law chosen by the parties may be qualified by the overriding mandatory provisions of the law of the forum. Such overriding mandatory provisions continue to have effect notwithstanding the parties' choice of a different law, and will prevail in the event that they are irreconcilable with provisions of the chosen law.

11.16 The Principles do not define the term "overriding mandatory provisions" (compare Art. 9(1) Rome I Regulation). The term, found in several regional and national instruments, is generally understood to refer to provisions of law (in Art. 11(1), the law of the forum) that must, according to their proper construction, be applied to the determination of a dispute between contracting parties irrespective of the law chosen to govern the contract. They are *mandatory* provisions in the sense that it is not open to the parties to derogate from them by the terms of their contract or otherwise. They are *overriding* provisions in the sense that a court must apply them even if the parties have chosen a law other than that of the forum to govern their contractual relationship. The presence of these two characteristics serves to emphasise the importance of the provision within the relevant legal system, and to narrow the category of provisions to which the Principles will apply. Overriding mandatory provisions are likely to be limited to those that are regarded as important for safeguarding the public interests of the forum (see Art. 9(1) Rome I Regulation).

11.17 It is not necessary that an overriding mandatory provision should take a particular form (*i.e.*, it need not be a provision of a constitutional instrument or statute), or that its overriding, mandatory character should be expressly stated. In every case, the law of the forum must be applied to determine (a) whether a particular provision is capable of having the effects described, and (b) whether, having regard to its terms (including its territorial application) and any relevant surrounding circumstances, it actually has those effects in the case in question. Nevertheless, the exceptional nature of the Article 11 qualifications to party autonomy should caution against the conclusion that a particular provision is an overriding mandatory provision in the absence of words or other indications to that effect.

Illustration 11-1

A statutory provision of State Z such as the following (Art. X) would bring the substantive provision to which it refers (for example, Art. Y on unfair contract terms) within the scope of Article 11(1) of the Principles:

> Article X
> (1) Article Y applies notwithstanding any agreement or waiver to the contrary.
>
> (2) Article Y applies notwithstanding any provision which designates or purports to designate the law of a State other than Z.

Illustration 11-2

Party A and Party B conclude a contract under which Party A is appointed Party B's commercial agent in State X. The contract states that it is governed by the law of State Y. Upon termination of the contract, Party A sues Party B in State X, claiming compensation under the law of State X. A statute of State X regulating commercial agency arrangements provides for an indemnity upon the termination of the agency contract and also includes a provision to the effect that "the parties may not derogate from the indemnity provisions to the detriment of the commercial agent before the agency contract expires". The court in State X may (or may not) interpret those words as justifying the conclusion that the indemnity provisions provided by the statute are overriding mandatory rules, displacing the otherwise relevant rules of the chosen law of State Y regarding indemnity. In order to reach that conclusion, the court must be satisfied not only that the provision, if it applies, is one from which the parties are not free to derogate but also that the provision must be applied notwithstanding that the parties have chosen the law of State Y to govern their relationship.

11.18 The impact of Article 11(1) is also limited in the following way: it controls the application of the chosen law *only to the extent* that such application is incompatible with the concurrent application to the parties' relationship of the relevant overriding mandatory provision and the chosen law. Importantly, the conclusion that the chosen law is, in one or more respects, incompatible with an overriding mandatory provision of the law of the forum does not invalidate the parties' choice or, save to the extent of any incompatibility, negate the consequences of that choice under Articles 2 and following. The chosen law must be applied to the greatest possible extent consistently with the overriding mandatory provision.

Overriding mandatory provisions of another law

11.19 Whereas Article 11(1) is concerned with the application of overriding mandatory provisions of the law of the forum, Article 11(2) deals with the possible application of the overriding mandatory provisions "of another law", *i.e.*, the law of a State other than that of the forum or of the law chosen by the parties. In contrast with Article 11(4) (see para. 11.28), which refers only to the law applicable to a contract in the absence of choice, Article 11(2) does not limit the connections which may be deployed to identify a State whose overriding mandatory provisions will or may be applied. Consequently, that State may be the State whose law would have been applicable in the absence of a choice of law agreement or a State with another connection. The definition of the category of overriding mandatory provisions, and the relationship between those provisions and provisions of the chosen law, are to be understood in the same way as for Article 11(1) (see paras 11.14-11.17).

Illustration 11-3

Party A and Party B conclude a contract for the rental by Party B of a commercial goods vehicle, knowing that it is to be used to smuggle historical artifacts from State Y to State X. The contract states that it is governed by the law of State Z. Under the cultural objects law of State Y, the export of historical artifacts without a licence is a criminal offence and all contracts whose purpose is to facilitate smuggling are illegal and unenforceable. Party A fails to provide the vehicle, and Party B sues Party A in State X. Assuming that the contract is valid and enforceable under the law chosen by the parties (i.e., the law of State Z), the private international law of State X will determine whether and, if so, to what extent overriding mandatory provisions of the law of State Y are to be applied or taken into account. If, under the law of State X, the overriding mandatory provisions of the law of State Y ought to be applied or taken into account, the law of State Y must then be considered to determine whether the provisions of the cultural objects law have the status of overriding mandatory provisions for this purpose.

11.20 Certain international instruments, such as the 1978 Hague Agency Convention and the Rome Convention, contain provisions allowing the courts to give effect, on a discretionary basis and subject to certain conditions, to the overriding mandatory provisions of another law. Other instruments, such as the Rome I Regulation, Article 9(3), contain more narrowly defined principles. Current State practice and opinion as to the utility of provisions of this kind, however, diverges widely. Article 11(2) seeks to accommodate this diversity within the Principles by delegating to the private international law of the forum the question of whether and under which circumstances overriding mandatory provisions of another law may or must be applied or taken into account. A similar solution is found in Article 11(2) of the Mexico City Convention.

11.21 Given the central role that the law of the forum plays in Article 11(1) and 11(2) (see para. 11.4), that law must be applied to resolve any apparent conflict between an overriding mandatory provision of the law of the forum and an applicable overriding mandatory provision of another State.

11.22 Article 11(2) does not preclude the application of provisions of the chosen law that permit or require a court to take account of the law of a third State as a circumstance relevant to their application on the facts of a particular case (*e.g.*, a rule of contract law suspending or terminating performance which has become illegal under the law of the place of chosen performance).

Public policy (*ordre public*) of the forum

11.23 Under Article 11(3), application of a provision of the chosen law may be excluded only if the result of such application is manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum. Three requirements must be met in order for Article 11(3) to apply: first, there must be a policy of the forum State of sufficient importance to justify its application to the case in question ("fundamental notions of public policy" or "*ordre public*"); secondly, the chosen law must be obviously inconsistent with that policy ("manifestly incompatible"); and thirdly, the manifest incompatibility must arise in the application of the chosen law to the dispute before the court. These requirements reflect the *leitmotiv* of the Principles, *i.e.*, facilitating party autonomy as much as possible, and serve to control the use of public policy arguments to deny the efficacy of the chosen law.

11.24 As to the first requirement, the use of the words "fundamental notions of public policy" and the internationally accepted expression "*ordre public*" emphasise that Article 11(3) is concerned with policies of the legal system of the forum (in whatever form) that are so important that they extend to contracts of an international character, notwithstanding that the parties are empowered to choose (and have, in the case in question, chosen) another law to govern those contracts. Accordingly, the category is much narrower than the concept of "public policy" as it may apply to domestic contracts. It is, of course, not sufficient that the chosen law adopts an approach different from that of the law of the forum. It is necessary that the application of the chosen law would violate a fundamental policy of the forum of the kind described.

11.25 As to the second requirement, the words "manifestly incompatible" (used, *e.g.*, in Art. 17 1978 Hague Agency Convention and in Art. 21 Rome I Regulation) serve to emphasise that any doubt as to whether application of the chosen law would be incompatible with the forum's fundamental policies must be resolved in favour of the application of the former.

11.26 Article 11(3) emphasises the third requirement, namely, that it is the result of *applying* the chosen law in a particular case rather than the chosen law in the abstract that must be assessed for compliance with public policy. The court is not, however, restricted to considering the outcome of the dispute between the parties, but may have regard to wider considerations of public interest. For example, a court may refuse on public policy grounds to enforce a contract, valid under the law chosen by the parties, based on a finding that the choice was designed to evade sanctions imposed by a United Nations Security Council resolution, even if non-enforcement would benefit financially a person targeted by those sanctions and even if the other party was not party to the evasion.

Illustration 11-4

Party A, a professional gambler resident in State X, visits Party B's casino in State Y. During the visit, the parties conclude a wagering contract, governed by the law of State Y. Party A fails to pay and Party B sues Party A in State X. Wagering contracts are considered to be against public policy in State X, but are legal, binding and enforceable under the law of State Y. Whether or not the court in State X will refuse to apply the rules upholding enforceability of the contract under the law chosen by the parties will depend on whether or not (i) the public policy of State X is regarded as a fundamental policy of that State which extends to all wagering contracts, even those concluded outside the State with a non-resident party (Party B) and stipulated to be subject to a law that does not prohibit such contracts; and (ii) whether the enforcement of the contract in Party B's favour would be manifestly incompatible with that policy.

11.27 The law chosen by the parties may only be excluded "to the extent" that its application would be incompatible with the forum's public policy. Thus, as in the case of overriding mandatory provisions, the existence of an incompatibility of this kind does not deprive the parties' choice of law of any effect. Instead, the chosen law must be applied to the greatest possible extent consistently with the public policy of the forum. Such application may produce an outcome that is both coherent and consistent with the forum's public policy. If, however, the non-application of a provision of the chosen law produces an outcome that is incomplete or incoherent, the law of the forum should normally be applied to identify any gap-filling rule. It is, however, possible that the parties may themselves have provided for the consequences of a conflict with the public policy of the forum and, if they have done this and their choice can be given effect consistently with public policy, that expression of their autonomy should prevail.

Illustration 11-5

Party A sues Party B in the courts of State X for breach of contract. Party A seeks compensatory and punitive damages in accordance with the law of State Y chosen by the parties to govern the contract and any disputes to which it gives rise. Under the law of State X, it is considered a fundamental principle of law that punitive damages are not available in relation to contractual claims. Under Article 11(3), the court in State X could exclude the application of the law of State Y with respect to the punitive damages claim, but the law of State Y must still be applied to determine Party A's claim for compensatory damages.

Public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law

11.28 Article 11(4) recognises that in certain legal systems, the State whose public policy serves as a limitation to the chosen law is not, or not only, the forum State but also the State whose law would have been applicable in the absence of choice.

11.29 Article 11(4), like Article 11(2), defers to the law of the forum, including its rules of private international law, to determine the role (if any) to be played by the public policy (*ordre public*) of a State other than the forum or the State whose law is chosen by the parties. Article 11(4) operates independently of Article 11(2). Accordingly, the forum State's private international law rules may require or permit reference to the overriding mandatory provisions of another State's law, but not that State's public policy, or vice versa. Unlike Article 11(2), however, Article 11(4) permits reference only to the law of the State which would be applicable to the contract in the absence of a choice of law by the parties, as determined by the forum's own private international law rules. Subject to any further restrictions imposed by the law of the forum, the category of public policy (*ordre public*) to which reference may be made and the limits on its application are to be understood as being subject to the same requirements and restrictions as the exclusionary principle in Article 11(3) (see para. 11.26).

Illustration 11-6

Bank, incorporated in State Y but acting through a branch in State X, and Borrower (a small business owner), resident in State X, enter into a commercial loan agreement, expressed to be governed by the law of State Z. When Bank refuses to advance funds to Borrower, Borrower sues Bank in the courts of State Y. Under the contract laws of State Y and State Z, Bank is entitled to rely on a condition in the agreement to refuse to advance funds to a borrower which it considers to be in financial difficulty. However, under the public policy of State X, which has been held by its courts to apply to all contracts with a significant connection to that State, that condition would not be upheld on the ground that it constituted an unfair abuse by Bank of the economic imbalance between the parties. The law of State Y, including its rules of private international law, will determine (1) whether the public policy of the State whose law would have governed the contract but for the parties' choice may or must be applied and, if so, under what conditions, and (2) if so, whether, in the absence of a choice of the law of State Z, the contract between the parties would have been governed by the law of State X. Subject to this point, the law of State Z (as chosen by the parties) will apply to the contract.

Arbitral tribunals and public policy (*ordre public*) and overriding mandatory provisions

11.30 Article 11(5) reflects the different state of affairs facing arbitral tribunals as opposed to State courts in relation to mandatory rules and public policy. Arbitral tribunals, unlike courts, do not operate as part of the judicial infrastructure of a single legal system, and are subject to a range of legal influences. Moreover, the Principles, by their very nature as a non-binding instrument, do not (and cannot) grant an arbitral tribunal any authority beyond that which it already has pursuant to its mandate and cannot predict the exact circumstances in which an arbitral tribunal will be constituted and called upon to reach a decision.

11.31 Consequently, Article 11(5) does not confer any additional powers on arbitral tribunals and does not purport to give those tribunals an unlimited and unfettered discretion to depart from the law chosen by the parties. Quite to the contrary, the Principles recognise that an arbitral tribunal might be required to take into account public policy or overriding mandatory provisions of another law, and must otherwise be satisfied that it is entitled to do so. The wording of the Article requires the tribunal to consider the legal framework within which its decision-making processes are conducted, having regard (in particular) to the agreement of the parties, the designated or deemed seat of the arbitration, any institutional rules applicable to the arbitration, and the potentially controlling influence of State courts applying local arbitration legislation.

11.32 For example, arbitral tribunals may be subject to an express duty to endeavour to render an "enforceable award" (see, *e.g.*, Art. 41 ICC Rules and Art. 32.2 LCIA Rules; see also Art. 34(2) UNCITRAL Arbitration Rules requiring that the award be "final and binding"). It is a controversial question whether a duty of this kind requires the tribunal to have regard to the overriding mandatory provisions and policies of the seat, however identified, or of the places where enforcement of any award would be likely to take place. Article 11(5) does not express any view on this controversy. It does, however, emphasise that (at least in the first instance) it is for the tribunal to form a view as to the existence and scope of the duties imposed on it (and the powers granted to it), and to apply or take into account the provisions or policies of a law other than that chosen by the parties to govern their contract only if it considers that it is under a legal obligation, or is otherwise entitled, to do so.

Article 12 Establishment

Introduction

12.1 Article 12 determines the relevant establishment of a party for the purpose of ascertaining internationality under Articles 1(2) and 6(2), in circumstances where a party has more than one establishment. Article 12 points to the establishment that has the closest relationship to the contract at the time of its conclusion.

Rationale

12.2 In determining the relevant establishment in the case of multiple business locations, Article 12 has primarily followed the model of the CISG (Art. 10(a)). For the purpose of the Principles, the main establishment or a subordinate establishment other than the central administration of the party is considered to be sufficiently meaningful to determine the internationality of the contract under Article 1(2), or the law governing the consent to the choice of law under Article 6(2).

The notion of establishment

12.3 For the sake of legal certainty, Article 12 uses the term "establishment" rather than "place of business". The Principles do not provide a definition of establishment, but, in broad terms, an establishment means a business location in which the party has more than a fleeting presence. It encompasses a centre of administration or management, headquarters, principal and secondary places of business, a branch, an agency and any other constant and continuous business location. The physical presence of the party, with a minimum degree of economic organisation and permanence in time, is required to constitute an establishment. Hence, the statutory seat of a company without more does not fall within the notion of establishment. Similarly, a party that has its main establishment in State X and directs its business activities to State Y solely via the Internet is not deemed to have an establishment in State Y.

12.4 Because the Principles apply only to international contracts in which each party is acting in the exercise of its trade or profession (see Art. 1(1)), Article 12 does not use the expression "habitual residence" to include natural persons acting within their private sphere, especially consumers and employees. Thus, in the case of a natural person engaging in a trade or business, the relevant establishment is determined in the same way as it is determined for a company.

Time at which a company's "establishment" is to be determined

12.5 Pursuant to Article 12, the location of a company's establishment is determined as of the time of the conclusion of the contract (see Art. 19(3) Rome I Regulation). Thus, in most cases, the relevant establishment will be determined by looking at the centre of operations through which the contract was negotiated and concluded. This respects the legitimate expectations of the parties and provides legal certainty.

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