Asia-Pacific
Economic Cooperation

2017/SOM1/EC/SEM/004
Session 10

Principles on Choice of Law in International Commercial Contracts - Introduction

Submitted by: HCCH

APEC VIET NAM 2017

Seminar on Use of International Instruments to Strengthen Contract Enforcement in Supply Chain Finance for Global Businesses Including Micro, Small, and Medium Enterprises
Nha Trang, Viet Nam
24-25 February 2017

PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS

(approved on 19 March 2015)

Introduction | Text and Commentary

Introduction
to the Hague Principles on Choice of Law in International Commercial Contracts

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.