I. Introduction

The traditional method of conflict of laws or private international law in civil law countries originates in Savigny's doctrine. It designates out of several conflicting laws the law with which the category of the relevant legal relationship has the closest connection ("seat").¹ This value-neutral, multilateral method consists in localizing the legal relationship concerned in a certain jurisdiction on the basis of the equality and interchangeability of domestic and foreign private law. It presupposes the territoriality of the relevant laws deriving from the state and a strict divide between public law and private law.² This reflects the clear distinction between the state and the society, where value-neutral, abstract private law seeks corrective justice. This positivist idea corresponded to the Westphalian public international law system grounded on the juxtaposition of equal and independent sovereign states. It was taken for granted that sovereign states had, externally, the exclusive power of constituting public international law by signing treaties or giving effect to state practices in relation to other states, and, internally, the monopoly of

¹ Friedrich Karl von Savigny, System des heutigen römischen Rechts, Vol. 8 (Berlin 1849), pp. 2 ff.
constituting domestic law by enacting statutes or creating case law.\(^3\)

In today’s globalized world with rapidly increasing cross-border movement of people, goods, services and information, various new legal problems are coming to light, which cannot be dealt with by a single state. These problems concern, in particular, global environmental protection, global financial crisis, tax base erosion and profit shifting and corporate conduct and human rights violations. To tackle problems with a global dimension, regional organisations or international judicial bodies gradually constitute “hard law”, whereas “soft law” is nowadays frequently employed to implement governance tailored to the actual circumstances of individual states or to create autonomous norms to accommodate various needs of markets.\(^4\) For global financial and securities regulation, for example, “Basel III” (2010) adopted by the Basel Committee\(^5\) and the “Objectives and Principles of Securities Regulation” (2010) provided by the IOSCO\(^6\) play an important role.\(^7\) Furthermore, through the activities of non-state actors — such as individuals, companies, banks, entities for sport or domain names, NGOs, international organizations and other bodies — various norms are created and cooperate with or complement state law, or even function as independent norms outside the realm of the state. These norms are characterized by a fiction of autonomous transnational legal order.\(^8\)

With the increasing importance of non-state or anational law, the strict divide between public law and private law starts blurring in various areas and a plurality of norms is observed.\(^9\) Needless to say, the state remains the most important stakeholder for the enforcement of rules and regulation. However, with the gradual erosion of state powers and functions, other methods of governance are being sought. The interconnectedness of varied actors and the limitations of

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\(^3\) Hironobu Sakai et al., *Kokusaihô* [International Law] (Tokyo 2011), pp. 15 ff.


\(^5\) “Basel III: International Regulatory Framework for Banks” (2010) was adopted by the Basel Committee on Banking Supervision (for further detail, see <http://www.bis.org/>).

\(^6\) “Objectives and Principles of Securities Regulation” (2010) were adopted by the International Organisation of Securities Commissions (IOSCO) (for further detail, see <https://www.iosco.org/>).


state regulatory power necessitate alternative schemes aiming at the proper functioning of the global economy. It is, therefore, worth considering what role private international law can play in dealing with cross-border cases today.\(^{10}\)

Against this background, this paper examines the significance of the “Hague Principles on Choice of Law in International Commercial Contracts” (the “Hague Principles” or “Principles” [HP]), which were adopted by the Hague Conference on Private International Law (HCCH) on 19 March 2015.\(^{11}\) The Hague Principles provide for party autonomy and its modalities as the cardinal principle in determining the law governing cross-border commercial contracts, including the possibility of choosing non-state law (Art. 3 HP). The meaning and possible impact of this instrument will be assessed from the viewpoint of East Asian countries, particularly Japan, the Republic of Korea (“Korea”) and the People’s Republic of China (“China”), in addition to Hong Kong, Macau and the Republic of China (“Taiwan”).

In the following, after briefly showing the background of the Hague Principles (II), this paper examines the concept and justifications of party autonomy (III). Second, this study demonstrates that party autonomy has widely been established in litigation and arbitration\(^{12}\) throughout various jurisdictions, even though some jurisdictions still take a restrictive position toward the choice of law by the parties (IV). Third, this paper explores the possible impact of the Hague Principles in establishing and implementing party autonomy in East Asian jurisdictions (V). Some final remarks conclude this paper (VI).

II. The Hague Principles

The Hague Principles is the first non-binding instrument of its kind adopted by the HCCH, which has traditionally sought to unify private international law by legally binding conventions or protocols for over 100 years. The Hague Principles consist of the Preamble and Article 1-12, accompanied by the Commentary. The Principles set forth cardinal conflicts rules on party autonomy, \textit{i.e.}, the freedom to choose the law governing commercial contracts, without addressing conflicts rules that would apply in the absence of choice of law.\(^{13}\)
The Hague Principles were conceptualized and prepared by the Working Group mandated by the Council on General Affairs and Policy of the HCCH (“Council”) in 2009 on the basis of the preliminary work including feasibility studies conducted by the Permanent Bureau of the HCCH. The Working Group was formed by 21 academics specialized in private international law or international arbitration law drawn from different legal systems and 8 observers from the UNIDROIT, the UNCITRAL, the International Chamber of Commerce (ICC) and other related entities. The broad participation of academics and practitioners from various jurisdictions as well as international organizations and private entities provided invaluable expertise on various cutting-edge issues and insight into practice. The Working Group elaborated on the 2011 draft Hague Principles, which was approved with several important amendments by the Special Commission in November 2012. Following a decision of the Council to further mandate the Working Group to prepare a draft Commentary by consulting all Members and Observers of the HCCH, the Principles were ultimately adopted along with the Commentary on 19 March 2015.

The purpose of the Hague Principles is to promote party autonomy by stipulating essential rules on choice of law in international commercial contracts. After delineating the substantive and territorial scope of application (Art. 1 HP), the instrument declares the freedom of choice of the governing law including dépeçage, subsequent modification of the governing law and an unlimited range of eligible laws that can be selected by the parties (Art. 2 HP). Granting the choice of non-state law for litigation is a remarkable novelty of the Hague Principles (Art. 3 HP). The designation of applicable law may also include its private international law (Art. 8 HP). Further, the Hague Principles accept both explicit and tacit choice of law without any formalities (Art. 4 and 5 HP) and establish criteria to determine the existence of the parties’ agreement on


15 An overview of the preparatory work is available at <https://www.hcch.net/en/instruments/contracts-preparatory-work>.
16 Commentary, p. ii.
choice of law (Art. 6 and 7 HP). As for the scope of the application of the governing law, an exemplary enumeration of relevant issues is provided (Art. 9 HP), whereas the assignment of claims has a separate rule (Art. 10 HP). Finally, the limitation of the parties’ choice of law is set by overriding mandatory rules and public policy (Art. 11 HP).

As a non-binding instrument, the Hague Principles are expected to serve as a model of legislation or law reform de lege ferenda, as well as to help interpret, supplement and develop rules in implementing party autonomy de lege lata, eventually producing a substantial degree of harmonization of contractual conflicts rules in respect of choice of law.\(^{21}\) It is not specified in the Hague Principles whether and under which circumstances they could be substituted for the otherwise applicable conflicts rules. Unlike the Preamble of the UNIDROIT Principles (UPICC)\(^{22}\), the Hague Principles are not declared an “opt-in” instrument.\(^{23}\) Yet, such a general provision would have been superfluous due to the mandatory nature of private international law, at least in litigation.\(^{24}\) By legislative act, the Hague Principles have been implemented in Paraguay\(^ {25}\) and their implementation is envisaged in Australia also.\(^ {26}\)

While conflicts rules for court proceedings and arbitration used to be provided separately throughout various jurisdictions, the Hague Principles decided to address both dispute resolution methods uniformly,\(^ {27}\) except for some specific provisions in Article 3 and 11 of the HP. By unifying the relevant conflicts rules, the Hague Principles envisage legal certainty and international harmony of decisions independent of the method and venue of dispute resolution. This is particularly meaningful, given that some jurisdictions have started providing, in international commercial cases, new dispute resolution mechanisms that transcend the conventional threshold between litigation and arbitration, such as the Singapore International Commercial Court (SICC),\(^ {28}\) and the Dubai International Financial Centre (DIFC) Courts and


\(^{22}\) See infra note 65.


\(^{27}\) Preamble 4 HP.

the DIFC-LCIA Arbitration Centre. The DIFC Courts may convert DIFC-LCIA arbitral awards into DIFC decisions to facilitate their enforcement in the United Arab Emirates. In 2015, the DIFC Courts even introduced a mechanism to convert their judgment into an arbitral award upon agreement of the parties, with a view to guaranteeing its enforcement outside the United Arab Emirates by relying on the 1958 New York Convention.

III. Representations of Party Autonomy

1. General Remarks

In light of the objective of the Hague Principles to promote party autonomy in international commercial contracts, it would be reasonable to look for the concept and justifications of the freedom of choice of law at the outset. Party autonomy is arguably the most enigmatic principle in private international law. Unlike other conflicts rules grounded in objective connecting factors, party autonomy points to the parties’ intent to determine the applicable law. The parties are entitled to select the law which governs the legal relationship concerned, including the mandatory rules of the chosen law. As a corollary, mandatory rules of the lex fori, the law which would otherwise govern the legal relationship or any other law, are excluded by the parties’ simple designation of the applicable law in principle.

2. History

A number of authors advocate that Dumoulin from the 16th century was the origin of party autonomy. Nevertheless, Gamillscheg, who provided a detailed and comprehensive analysis, has convincingly posited that Dumoulin solely referred to hypothetical parties’ intent based on their “voluntary submission” to justify the deviation from the lex loci contractus, without authorizing the parties to designate the applicable law. Also, Savigny himself relied on the parties’ voluntary submission in looking for the “seat” of contracts and pointed objectively to the place of performance or to the locus contractus and, under certain circumstances, to the domicile of the debtor. Thus, the possibility for the parties to select a different law to govern their contractual relationship was excluded.

29 The DIFC Courts were established by the law of the United Arab Emirates (UAE) (see http://difccourts.ae/). As a joint-venture between the DIFC and the London Court of International Arbitration (LCIA), the DIFC-LCIA Arbitration Centre was established in 2008 (see http://www.difc-lcia.org/).
34 Savigny, supra note 1, pp. 246 ff.
35 Arguably, Savigny solely allowed the parties to freely constitute the facts underlying the objective connecting factors. Yoshiaki Sakurada, “Savigny ni okeru junkyohô-kettei no arikata ni tsuite” [Methods of Determining the
The initial form of party autonomy was founded by Mancini in the mid-19th century and adopted in the legislation of Italy (1865) and Japan (1898) followed by several other countries. Mancini, however, failed to provide a logical and theoretical basis for party autonomy, as he did not strictly distinguish between freedom of contract in substantive law and freedom of choice of law in private international law. In other words, the parties’ freedom to select the lex contractus was solely justified by the parties’ substantive freedom to sign a contract, dispose of their rights and incur obligations. It is, therefore, understandable that renowned authors at the turn of the 20th century—such as Pillet, Niboyet, Anzilotti, von Bar and Zitelmann—were rigorously opposed to party autonomy. The principal bipartite arguments of these authors against party autonomy can be summarized as follows:

First, the parties’ freedom of contract cannot go beyond the dispositive norms of the relevant substantive law, as otherwise the parties would have excessive power to circumvent any kind of mandatory rules. The parties could not have as much power and discretion as a legislature. Second, the existence and validity of the parties’ consent as to the choice of the applicable law ought to be judged by a certain law. Yet, this law cannot be the law chosen by the parties due to a petitio principii, nor the lex fori due to its contingent determination. If the only alternative is to rely on the objective connecting factor, granting party autonomy would be pointless and superfluous.

It was not until the 1930s that the objection against party autonomy was overcome in

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Note: The page contains references to various legal and academic sources, including specific articles, books, and legal codes. These references are cited throughout the text to support the arguments and discussions presented.
Germany. Haudek, among others,\(^{42}\) duly provided theoretical justifications by qualifying party autonomy as a specific conflict of laws policy to refer to the parties’ intent as a connecting factor, independently of any substantive laws. The first criticism was rightly refuted for having confused the restrictions of substantive freedom of contract with those of party autonomy in private international law. With regard to the second criticism, the application of the putatively chosen law to the existence and validity of the parties’ consent as to choice of law is no longer held as a *petitio principi*, because it solely refers, as a matter of conflict of laws policy, to the parties’ likely intent as the criterion for determining the law governing the parties’ consent as to choice of law.\(^{43}\) Today, the Hague Principles (Art. 6 HP) and other instruments generally adhere to this solution, although the traditional view in Japan used to advocate a different solution proper to the forum’s private international law.\(^{44}\)

After party autonomy gained theoretical foundation as a conflicts rule independently of the substantive freedom of contract, the parties’ intent was no longer held as a mere indication of the closest connection, but became itself the decisive connecting factor in designating the applicable law. The emancipation of party autonomy from the fetters of substantive freedom of contract ultimately enabled the ambit of party autonomy to be extended from contracts to non-contractual obligations, property rights, family relations and succession.\(^{45}\)

### 3. Justifications

How can party autonomy be justified in contemporary private international law? As an independent conflict of laws principle, party autonomy authorizes the parties to select the applicable law. Thus, party autonomy cannot be represented by the old statute theory\(^{46}\) or pursuant to the “governmental interests” analysis of Currie\(^{47}\), which take “law” instead of “legal relationship” as the starting point. Nor can party autonomy be aligned with other U.S. “revolutionary” theories,\(^{48}\) such as the *lex fori* approach of Ehrenzweig\(^{49}\) that gives priority to the application of the law of the forum, or the “better-law” approach of Leflar\(^{50}\) that is grounded on the substantive value. Rather, party autonomy takes the “legal relationship” as the starting


\(^{44}\) See *infra* V 2 4 a).

\(^{45}\) See *infra* IV 2.


point for designating the appropriate applicable law. Yet, the parties’ intent is no longer solely considered as one of the relevant objective factors in searching for the closest connection in the sense of the “localization theory” of Anzilotti and Batiffol\(^\text{51}\) or the “proper law theory” of Westlake\(^\text{52}\). Rather, the parties’ intent determines the applicable law. As a corollary, party autonomy does not necessarily lead to the law that has objectively the closest connection with the legal relationship concerned.\(^\text{53}\)

Despite its inconsistency with the traditional conflict of laws method, a number of authors support party autonomy with Kegel as a “stopgap” solution (“Verlegenheitslösung”) in the absence of feasible alternatives.\(^\text{54}\) In fact, one can hardly identify a single objective connecting factor that leads to the closest connection for all categories of contracts that are no longer subject to the numerus clausus as under Roman law. Nor is a general reference to the “closest connection” or “most significant relationship”\(^\text{55}\) a viable solution, as it would only serve to shift the burden of detecting the adequate connecting factor from the legislature to the judiciary.

More positive grounds of party autonomy have been provided in light of its utility. The parties’ choice of law ensures legal certainty and predictability.\(^\text{56}\) Further, party autonomy enables parties to make risk calculations by selecting the law governing the contract in combination with a choice of court or arbitration agreement, even though in practice such is not frequently taken advantage of.\(^\text{57}\) From the viewpoint of legal order, the parties’ choice of law facilitates the application of the law for judges and arbitrators. It also enhances uniformity of transactions in some sectors (e.g., maritime, insurance or financial sectors), where English law, Swiss law or New York law dominates as an international standard.\(^\text{58}\)

Some authors justify party autonomy as a means of self-assignment of the individual to a legal system, considering that the parties are in the best position to assess their needs and the

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55 Cf. § 6 and § 188 of the Restatement (Second) of Conflict of Laws (1971).

56 Commentary, para. I.3.


interests at stake.⁵⁹ Mansel points out that in Europe the individual has evolved into being the subject, instead of the object, of conflict of laws.⁶⁰ From a similar anthropocentric perspective, Basedow rationalizes party autonomy as a pre-state, fundamental right of the parties to subject their transactions to a legal system ad libitum. This right is considered as emanating from the individual’s freedom and innate dignity along the ideas of Rousseau and Kant.⁶¹ This argument principally coincides with the view in Germany that party autonomy belongs to the fundamental right to “free development of the personality” under Article 2 (1) of the German Constitution. This is supported by quite a few authors like Jayme,⁶² although others take a reserved position toward the steering function of fundamental rights in constituting conflicts rules.⁶³

Unlike these positions embedded in the traditional value-neutral conflicts method, recent authors like Muir Watt and Wai transcend the conventional scheme and envisage a new paradigm for the sake of global governance. While these authors recognize party autonomy as a guiding principle in contemporary private international law, they seek the constitutionalization of global society and the adoption of alternative conflicts methods grounded on substantive values, networks or other tools in order to safeguard the public interest and to counter the decline of the regulatory function of nation-states.⁶⁴

In the face of globalization, the state monopoly of legislative power is being gradually

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⁶⁰ Mansel, supra note 59, p. 145.


⁶³ Dagmar Coester-Waltjen, “Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsberührung – familien- und erbrechtlicher Bereich –”, Bericht der dt. Gesellschaft für Völkerrecht, Vol. 38 (1997), pp. 15 ff.; Christian von Bar, “Menschenrechte im Kollisionsrecht”, Ibid., Vol. 33 (1994), pp. 194 ff.; also Neuhaus, supra note 59 (2nd ed.), p. 256. One should be careful in characterizing the objective determination of the applicable law to the exclusion of party autonomy — as has been the case in Brazil and Uruguay — as violating the personality right of individuals, given that the parties can mostly achieve the same result by incorporating another law into their contract. As for party autonomy in family relations and succession, additional functions are pointed out, such as respect for the individual’s cultural identity, an adjustment of the principle of nationality and the principle of habitual residence, the equality of people living in the forum state and the extension of the applicability of the lex fori. See Heinz-Peter Mansel, “Die kulturelle Identität im Internationalen Privatrecht”, Bericht der Deutschen Gesellschaft für Völkerrecht 43 (2008), pp. 174 ff.; Yuko Nishitani, “Global Citizens and Family Relations”, Erasmus Law Review, Vol. 7 (3) (2014), pp. 134 ff.

eroded and conceded to private ordering by non-state actors. Through activities of various non-state actors, autonomous norms are being created that are apt to govern cross-border transactions. In particular, the 2010 UNIDROIT Principles on International Commercial Contracts (UPICC) serves as a model of national legislation and is referred to for the purpose of interpreting or filling gaps in domestic law or uniform law, such as the UN Convention on Contracts for the International Sale of Goods (CISG). The UPICC has occasionally been applied as the law governing the contract in arbitration. The Principles of European Contract Law (PECL) or the Draft Common Frame of Reference (DCFR) developed by academics in Europe play a comparable role. Moreover, the Uniform Rules for Documentary Credits (UCP) and the INCOTERMS adopted by the International Chamber of Commerce (ICC) function as autonomous commercial norms in the relevant sectors to govern international transactions uniformly and effectively. A Japanese court decision once held that referring to the UCP has become a commercial custom in letter of credit transactions, so that the plaintiff company was bound by the instrument without the managing director being informed of it.

As a consequence, non-state norms not only cooperate with and complement state law, but also function, to some extent, as self-regulatory norms independently of state law. It is not yet predictable whether the denationalization and juxtaposition of various norms lead to legal

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70 2007 Uniform Customs and Practice for Documentary Credits (UCP 600).
71 2010 Rules for the Use of Domestic and International Trade Terms (INCOTERMS 2010).
73 Kansaku, supra note 7, pp. 71 ff.
fragmentation without a fixed hierarchy of norms or focal point, resulting in the supremacy of private regimes over public regimes, as Teubner observes. It is though safe to assume that conflict of norms in a broader sense can occur between state law and non-state law, or among various non-state norms in today’s pluralistic communities.

The question is whether the conflict of laws system ought to qualify non-state law as the law governing the contract, instead of merely allowing its incorporation into the contract. According to the traditional view, judges as state representatives exercise judicial power to render and enforce a judgment against the party who would not perform his or her obligation voluntarily, so that legal sources of court decisions must be limited to those emanating from the state. It ought to be considered, however, that party autonomy is a particular conflicts rule to subjectively designate the applicable law by relying on the parties’ intent. Once the legislature takes a policy decision to qualify non-state law as eligible applicable law, there is no preemptive argument against it.

The choice of non-state law used to be criticized for authorizing “private legislation” or creating “contrats sans loi”, as it would allow the parties to circumvent any mandatory rules to govern their contract. In international contracts, however, there is no predetermined single applicable law indicating their center of gravity so that a fraus legis cannot be an issue, even though appropriate regulation ought to be ensured by other means. Even under the current conflict of laws system, the parties can select any law without inquiring as to its completeness, modernity, legitimacy or constitutionality, and exclude de facto a number of mandatory rules by dépeçage. The choice of non-state law does not create a legal vacuum, but provides non-state law with legally binding force by the mandate of conflict of laws. Thus, the parties’ intent no longer merely qualifies as a factor connecting the legal relationship with a legal system, but the

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77 Tameike, supra note 32, p. 367.


foundation for non-state norms to become “applicable”.

Arguably, the possibility of choice of non-state law established in arbitration\(^{81}\) could be extended without much ado to litigation as regards commercial contracts, where extensive freedom of contract applies in substantive law throughout various jurisdictions. This will avoid an elusive position of non-state law depending on the dispute resolution mechanism. The choice of non-state law also serves to accommodate the parties’ needs and expectations in cross-border transactions with respect to its neutrality, predictability and suitability in the relevant sectors,\(^{82}\) which will ultimately reduce the transaction cost.\(^{83}\) Rendering pluralistic non-state norms eligible may enhance normative competition, possibly resulting in a convergence of concurring norms over the longer term.\(^{84}\) Arguably, party autonomy is an appropriate method to cope with the plurality of norms that govern cross-border business transactions, even though the state reserves the regulatory authority whenever it appears necessary by reference to public policy, overriding mandatory rules, *lois de police*, public international law or using any other means.\(^{85}\)

Against this background, we now turn to the question of how far party autonomy has been established as a conflicts rule throughout various jurisdictions and what impact the Hague Principles can have in implementing party autonomy.

IV. Establishing Party Autonomy

1. Arbitration

Arbitration is a method of dispute resolution conducted by private entities or individuals on the basis of the parties’ agreement to arbitrate. To honor the autonomous dispute resolution mechanism, the state exercises limited control only to support arbitration, or to enforce or set aside an arbitral award under strict conditions. The private nature of arbitration based on the agreement of the parties justifies the arbitral tribunal rendering an award on the basis of the law chosen by the parties. Thus, extensive party autonomy has been granted in arbitration early on throughout various jurisdictions.\(^{86}\)

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\(^{81}\) See infra IV 1.


\(^{85}\) For an excellent analysis of the interaction between party autonomy and regulation, see Stéphanie Francq, “Party Autonomy and Regulation — Public Interests in Private International Law” (in this volume).

Article 28 (1) of the UNCITRAL Model Law (1985) (“Model Law”) provides for party autonomy as a guiding principle to determine the law applicable to a dispute in international arbitration, whereby the freedom of choice of law includes the choice of non-state law (“rules of law”), as well as the choice of state law including its private international law. The Model Law has so far been adopted in 72 countries (102 jurisdictions). Also the ICC Rules of Arbitration (2012) and other arbitration rules stipulate party autonomy in a comparable way. Thus, the freedom of choice of law is an established principle as regards international commercial contracts in arbitration.

2. Litigation

Comparatively speaking, international or regional instruments on contractual conflicts rules are generally based on party autonomy in litigation. These instruments include the Hague Sales Convention (1986), as well as the Rome Convention (1980) and the Rome I Regulation (2008) of the EU, and the Mexico Convention (1994) of the OAS. These instruments allow the parties to choose at any time any law, including those laws unconnected with the contract and more than one law as governing the contract (dépeçage). Notably in the EU, party autonomy is considered a fundamental principle of contemporary private international law, now that the scope of party autonomy has been extended from contracts (Rome I) to non-contractual
obligations (Rome II),
96 divorce (Rome III),
97 maintenance obligations,
98 succession,
99 matrimonial property regimes
100 as well as property consequences of registered partnerships,
101 and in certain respects, to corporate law.
102 The extension of party autonomy to property rights
103 is also being discussed.
104 The scope of party autonomy is even broader in Switzerland, which
105 includes the assignment of claims, movable property rights, security and the name.
106
The freedom of choice of law in international contracts has also been established in
Russia105 and Turkey106. In addition, South Africa,
107 Ghana,
108 as well as Canada, Australia
109 and other Commonwealth jurisdictions generally grant party autonomy pursuant to the
traditional “proper law” doctrine of English common law, giving effect to the law explicitly or
implicitly chosen by the parties.
109 While Latin American countries used to deny party
109 autonomy, on the grounds that the parties cannot delineate the scope of the legislative or judicial

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the law applicable to non-contractual obligations (Rome II), O.J. 2007, L 199/40.
97 Art. 5 (1) of the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced
cooperation in the area of the law applicable to divorce and legal separation, O.J. 2010, L 343/10.
98 Art. 15 of the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law,
recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, O.J. 2009,
jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic
100 Art. 22 (1) of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in
the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial
property regimes, O.J. 2016, L 183/1.
101 Art. 22 (1) of the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in
the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property
102 The theory of incorporation indirectly guarantees the choice of law applicable to companies and other entities.
See CJEU, 9.3.1999, Case C-212/97 [Centros], Rep. 1999, I-1459; CJEU, 5.11.2002, Case C-208/00 [Übersening],
CJEU, 29.11.2011, Case C-371/10 [National Grid], Rep. 2011, I-12273; CJEU, 12.7.2012, Case C-378/10 [Vale],
103 See Axel Flessner, “Rechtswahl im internationalen Sachenrecht — neue Anstöße aus Europa”, in Festschrift für
Helmut Kozolz (Wien 2010), pp. 125 ff.; Eva-Maria Kieninger, ‘Rechtswahlfreiheit im Sachenrecht?’, in Festschrift für
Dieter Martiny (Tübingen 2014), pp. 391 ff.
104 Art. 37 (2) (name), Art. 52 (matrimonial property regimes), Art. 90 (2) and 91 (2) (succession), Art. 104 (1) and
105 (1) (property rights and security), Art. 116, 119 (2), 121 (3), 122 (2) and 163c (contacts), Art. 128 (2), 132, 135
(1) and 139 (1) (non-contractual obligations), Art. 145 (1) (assignment of claims) of the Swiss PIL Act (1987)
107 Christopher F. Forsyth, Private International Law: The modern Roman-Dutch Law including the Jurisdiction of
London 2012), para. 32-004 ff. The influence of English common law catered for the uniformity of case law and
mutual citation of authorities: for Canada, Vita Foods Products Inc v Unus Shipping Co. [1939] A.C. 277; for
K.B. 482; see Law Reform Sub-Committee of the Singapore Academy of Law, infra note 135, p. 5.
The power of the sovereign state, the Mexico Convention (1994) grounded on party autonomy has been ratified and has entered into force in Mexico and Venezuela. Other Latin American countries — Brazil, Uruguay, Peru and Bolivia — also envisage introducing party autonomy in their future statutory reform. In January 2015, Paraguay has remarkably adopted the Hague Principles with some modifications in its “Statute on the Law Applicable to International Contracts”, establishing the freedom of choice of law including non-state law.

The U.S. accepts the parties’ freedom of choice of law, restricting in principle the scope of eligible laws to the laws that have a substantial relationship with the contract, pursuant to the Restatement Second (1971) approach. This is also the case with § 1-301 UCC amended in 2008, after the 2001 amendment abandoning the substantial relationship requirement was ultimately rejected by the states. Nonetheless, the State of New York as a hub of cross-border business transactions authorizes the parties to designate New York law wholly or partly for a commercial contract that has a value of more than $250,000, regardless of whether the contract has any territorial connection with New York. Comparable rules have also been adopted in some other states including Texas and California. Louisiana and Oregon entirely dispense with the territorial connection requirement and the value threshold, allowing the parties to select any appropriate applicable law, including its conflict of laws. Oregon even accepts choice of non-state law.

In the Middle East, Tunisia, Morocco and Israel allow party autonomy as the primary rule, without requiring any connection between the chosen law and the transaction. Other countries in the region refer to objective connecting factors in principle, while allowing certain deviations grounded on the parties’ intent. The Iranian conflicts rules point to the law of the place of conclusion of the contract, while authorizing an explicit or tacit choice of foreign law.

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110 Art. 9 of the Brazilian Decreto-Lei n° 4.657 (1942) designates the law of the place where the contract has been concluded, whereas Art. 2399 of the Uruguayan Civil Code points to the law of the place of performance.  
112 See Basedow, supra note 61, para. 190 f.  
113 See supra note 25; for further detail, see infra note 250.  
114 § 187 of the Restatement (Second) of Conflict of Laws (1971).  
116 New York General Obligations (Title 14), § 5-1401 Choice of Law.  
117 Texas Business & Commerce Code § 35.51 (for transactions over the value of one million dollars); California Civil Code § 1646.5 (for transactions over the value of $250,000); see Pertegás/Marshall, Hague Principles, supra note 20, p. 990.  
120 Art. 13 (1) of the Dahir (9 ramadan 1331) sur la condition civile des Français et des étrangers dans le Protectorat français du Maroc (1913).  
121 Talia Einhorn, Private International Law in Israel (2nd ed., Alphen aan den Rijn 2012), pp. 78 ff.
law when both contracting parties are foreign nationals transacting in Iran.\textsuperscript{122} Egypt, Libya, Syria, Jordan, Yemen, Oman, Bahrain, Qatar, Kuwait and Iraq\textsuperscript{123} principally designate the law of the parties’ common domicile and, in its absence, the law of the place where the contract was concluded. Yet, the parties’ explicit or tacit choice of law is honored, even though the majority view seems to restrict the range of eligible laws to those that have a certain territorial connection with the contract.\textsuperscript{124} By the same token, Algeria has explicitly provided for party autonomy since 2005, under the condition that the choice is made in good faith and the selected law has a substantial connection with the parties or the contract.\textsuperscript{125} As a proviso, all these countries subject contracts concerning immovables to the \textit{lex rei sitae}. 

Among jurisdictions in East Asia, party autonomy is an established conflicts rule in international contracts in Japan, Korea, China, Macau, Hong Kong and Taiwan. However, the choice of law is limited to an explicit choice in China and Taiwan, and the eligible laws to be chosen by the parties are limited in Macau, as will be further elaborated below.\textsuperscript{126} It is notable that party autonomy is extended beyond contractual obligations to non-contractual obligations and matrimonial property regimes in Japan, Korea, China and Taiwan,\textsuperscript{127} and even to

\begin{itemize}
  \item \textsuperscript{122} Art. 968 Iranian Civil Code; \textit{see} Najima Yassari, “Das internationale Vertragsrecht des Irans”, IPRax 2009, pp. 451 ff.
  \textit{Ägyptisches internationales Vertragsrecht} (Tübingen 1999), pp. 14 ff.
  \item \textsuperscript{125} Art. 18 (1) Algerian Civil Code (2005). According to Mr. Elbalti, the good faith requirement is mentioned at: Taieb Zarouati, \textit{Al-qanoun ad-douwali al-khas al-jaza ‘iri ‘ilmian wa ‘amalan} [Algerian Private International Law: Theory and Practice] (1\textsuperscript{st} ed., Algeria, 2010), pp. 25 ff. In the absence of the parties’ choice of law, the law of the parties’ common domicile or common nationality applies, and in its absence, the \textit{lex loci contractus} applies, while contracts concerning immovable are always governed by the \textit{lex rei sitae} (Art. 18 (2)-(4)).
  \item \textsuperscript{126} \textit{See infra} V 2.
  \item \textsuperscript{127} For non-contractual obligations, Art. 16 and 21 AGRAL; Art. 33 Korean PIL Act; Art. 44, 47 and 50 Chinese PIL Act; Art. 31 Taiwanese PIL Act (choice of \textit{lex fori}); for matrimonial property regimes, Art. 26 (2) AGRAL; Art. 38 (2) Korean PIL Act; Art. 24 Chinese PIL Act; Art. 48 (1) Taiwanese PIL Act.
\end{itemize}
consensual divorce and movable property in China. Among South-East Asian countries, Indonesia, Malaysia, the Philippines, Thailand and Vietnam authorize the parties to designate the applicable law, without further defining the modalities of choice of law. Following the tradition of English common law, freedom of choice of law is widely accepted in Singapore, Australia and India, as in Hong Kong.

3. Result

As examined above, in most jurisdictions party autonomy is an established principle in international commercial contracts both in arbitration and litigation, with a limited exception of some remaining Latin American countries. For litigation, however, some jurisdictions like the individual states in the U.S., Macau and countries in the Middle East still restrict the parties’ selection to the laws that are geographically related to the transaction. Some other jurisdictions like China and Taiwan limit the choice of law to an explicit choice. Furthermore, implementing party autonomy requires detailed provisions to interpret and fill gaps in existing rules and develop new rules, which are still missing in a number of jurisdictions. In this respect, the Hague Principles may well serve as a model for adopting extensive party autonomy, provide solutions for interpretation and filling gaps, and potentially impact on future statutory reform.

How should we then assess the possible impact of the Hague Principles in implementing party autonomy in East Asia?

134 An implicit choice of law is held admissible at least in the Philippines and Thailand. Aguiling-Pangalangan, supra note 131, p. 167; Thongpackdee et al., supra note 132, p. 238.
V. Implementing Party Autonomy in East Asia

1. Arbitration

Arbitration as a method of private ordering in dispute resolution is gaining importance in international business transactions in Asia. Particularly with rapid economic growth in the region, arbitration is increasingly taking place in Hong Kong and Singapore.\(^{138}\) According to statistics from 2015 prepared by White & Case and Queen Mary University of London, while the most used arbitration seats outside Mainland China remained London (45%) and Paris (37%), Hong Kong (22%) and Singapore (19%) were catching up by being ranked as the third and fourth most used seats. In addition, Singapore and Hong Kong belong to the most improved arbitration seats over the past five years, with improvement scores of 24% and 22% respectively, owing chiefly to the improvement of hearing facilities and local arbitral institutions, as well as the availability of quality arbitrators.\(^{139}\)

It goes without saying that arbitration has various advantages, such as efficiency, expertise, confidentiality and the absence of language barriers. Arbitration is also the best way to ensure the subsequent enforcement of an arbitral award in a foreign country by relying on the 1958 New York Convention, which has gained 158 Contracting States so far.\(^{140}\) This is particularly the case with the Sino-Japanese and Sino-Korean relationship, because court decisions in commercial cases rendered in Mainland China and Japan or Korea are not enforced in the other country for lack of reciprocity (Art. 281 and 282 Chinese CCP; Art. 118 No. 4 Japanese CCP; Art. 217 No. 4 Korean CCP).\(^{141}\) In contrast, Korean or Hong Kong and Japanese courts readily

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\(^{140}\) For the status table, see http://www.uncitral.org/.

\(^{141}\) China only grants reciprocity on the basis of an international agreement or mutual welfare. Reciprocity has been denied in relation to Japan by the Dalian Intermediate People’s Court decision of 5 November 1994 pursuant to the opinion of the Supreme People’s Court provided on 26 June 1994. Following these developments, the Osaka High Court denied reciprocity with China on its decision of 9 April 2003 (*Hanrei Jihô* 1841, 111); also Tokyo High Court, 25 November 2015 (appeal from Tokyo District Court, 20 March 2015 (2015WLJPCA03208001)). However, the Tokyo High Court decision of 30 Oct. 2006 (*Hanrei Jihô* 1965, 70) granted *exequatur* to a Chinese maintenance order, without examining the reciprocity requirement. For further reference, see Satoshi Watanabe, “A Study on a Series of Cases Caused Non-Recognition of a Judicial Judgment between Japan and Mainland China — A Cross-border Garnishment Order of the Japanese Court Issued to a Chinese Company as a Third-party Debtor —”, *Japanese Yearbook of International Law*, Vol. 57 (2014), pp. 287 ff.; from the perspective of China, Wenli Zhang, “Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the ‘Due Service Requirement’ and the ‘Principle of Reciprocity’”, *Chinese Journal of International Law* 2013, pp. 152 ff. Shenzhen People’s Middle Court, 30 Sept. 2011, also denied the recognition of a Korean judgment ordering the payment of damages, although Korea had recognized a Chinese decision. The author sincerely thanks Prof. Kwang Hyun Suk at Seoul National University for providing this invaluable information.
enforce judgments rendered in each other’s jurisdiction on a reciprocal basis. While China has signed bilateral treaties with about 30 countries to ensure mutual enforcement of judgments, this has not been the case with China’s important business partners like Japan, Korea, the U.S., the U.K. or Germany. Although a recent Chinese court recognized a German judgment, on the grounds that a German court had recognized a Chinese judgment, it still leaves considerable uncertainty as to the scope and conditions of granting reciprocity in China. Thus, for business transactions taking place between China and these countries, referral to arbitration is usually the only way to guarantee international effectiveness of dispute resolution. In fact, Chinese arbitral awards have frequently been enforced in Japan pursuant to the 1958 New York Convention and the 1974 China-Japan Trade Agreement.

In view of the importance of international arbitration in East Asia, clear-cut rules for determining the law governing disputes would be desirable. Article 28 (1) of the Model Law, which grants extensive party autonomy, has been transformed into domestic law in Japan, Korea, Hong Kong and Macao. Mainland China and Taiwan also provide for the freedom of choice of law without adopting the Model Law. Moreover, rules of arbitration institutions provide for party autonomy, such as the JCAA Rules of Arbitration (Japan), the CIETAC Arbitration

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142 For the enforcement of Korean judgments in Japan, see, e.g., Tokyo District Court, 12 Feb. 2009, Hanrei Jihô 2068, 95; Tokyo District Court, 13 Dec. 2013 (2013WLJPCA12138015); for the enforcement of Hong Kong judgments in Japan, see Supreme Court, 28 April 1998, Minshû 52-3, 853.

143 China has signed a number of bilateral treaties. The counterparts include EU countries (France, Poland, Romania, Spain, Italy, Bulgaria, Greece, Cyprus, Hungary and Lithuania), socialist countries (Cuba, Vietnam, Laos and North Korea), former republics of the Soviet Union (Russia, Ukraine, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan) and others (Argentina, Mongolia, Egypt, Turkey, Morocco, Tunisia, UAE, Kuwait and Peru). See Graeme Johnston/Han Yun, “Cross-Border Enforcement of Commercial Judgments and Awards within China”, in Michael J. Moser ed., Business Disputes in China (2nd ed., New York 2009), pp. 179 ff. (note 14 ff.); Qisheng He, “The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of Sanlian v Robinson”, Tsinghua China Law Review 6 (2013), pp. 32 f. (note 48).

144 Wuhan People’s Middle Court, 26 Nov. 2013 (File 2012, No. 00016) recognized a German decision to appoint an insolvency practitioner, on the grounds that Kammergericht Berlin, 18 May 2006 (File No. 20 Sch 13/04) had recognized a Chinese judgment. The UK and Israel have recognized a Chinese judgment, though it is uncertain whether English or Israeli judgments can be recognized in China: High Court of England and Wales, Splitthoff’s Bevrachtingskantoor BV v Bank of China Limited [2015] EWHC 999 (Comm); District Court of Tel Aviv, 6 Oct. 2015, Jiangsu Overseas Group Co. Ltd. v Reitman (File No. 48946-11-12). The author sincerely thanks the Permanent Bureau of the HCCH and Mr. Elbalti for providing this invaluable information.


146 Art. 8 (4) of the Trade Agreement between the Government of Japan and the Government of the People’s Republic of China of 5 January 1974. It refers to Article 45 and 46 of the JAA and the 1958 New York Convention. There is no unanimous view as to whether the 1974 China-Japan Trade Agreement, which entered into force after the 1958 New York Convention (18 September 1961) but prior to it for China (22 April 1987), has priority over the latter multilateral treaty. For further detail, see, e.g., Akira Takakuwa, Kokusai Shôji Chûsaihô no Kenkyû [Studies on International Commercial Arbitration] (Tokyo 2000), pp. 163 ff.

147 See infra note 158-160.

Rules (China), the HKIAC Administered Arbitration Rules (Hong Kong), the SIAC Rules (Singapore), and the KCAB International Arbitration Rules (Korea).

In implementing party autonomy, however, quite a few issues are left open. In Japan, Article 36 (1) of the JAA adopts Article 28 (1) of the Model Law and stipulates that the parties are free to choose the applicable law including non-state law (“rules of law”) or state law with its private international law. Given its broad scope, Article 36 (1) of the JAA is understood as allowing the choice of unconnected law and dépeçage. Yet, it leaves unanswered the criteria of determining the internationality of the case, tacit choice of law and the law governing the parties’ consent, as well as the applicability of conflicts rules of the situs. In China, conflicts rules of the situs is held applicable in arbitration, so choice of law is granted pursuant to Article 3 and 41 of the Chinese PIL Act (2010) (“CPIL”), but limited to an explicit choice. Further details of the modality of choice of law are not stipulated explicitly. Taiwan also provides for party autonomy, although the majority of contracts, particularly those signed by the government, are said to be subject to Taiwanese law. The admissibility and scope of applying or referring to public policy or overriding mandatory rules has not yet found an unanimous solution among various jurisdictions.

In light of the obvious lack of clear-cut rules in various jurisdictions, the Hague Principles

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153 Chûsaihô [Japanese Arbitration Act (JAA)], Law No. 138 of 1 August 2003 (last amended by Law No. 147 of 1 December 2004); for an English translation with commentary, see Masaaki Kondo et al. eds., Arbitration Law of Japan (Tokyo 2004).
158 See infra V 2.
159 Qi Xiong/Yong Shang, “International Arbitration in China”, in Stephan Balthasar ed., International Commercial Arbitration (München et al. 2016), § 7, para. 56 ff. This is a plausible interpretation, as Art. 19 of the CPIL contains a conflicts rule for arbitration agreement.
160 Wei-ming Liao, Die Schiedsgerichtsbarkeit in Taiwan (Frankfurt am Main 2003), pp. 86 ff.
161 In Japan, there have not yet been notable cases or academic discussions in this respect. For the state of discussion in other jurisdictions in Asia, see Born, Arbitration, supra note 24, Vol. 2, p. 2693 (note 431). Courts in many developed jurisdictions are said to have taken restrictive views in characterizing overriding mandatory rules. Born, Ibid., pp. 2691 ff. (esp. p. 2694); see U.S. Supreme Court, 2 July 1985, 473 U.S. 614 [Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.]; CJEJ, 1 June 1999, Case C-126/97 [Eco Swiss China Time Ltd. v Benetton International Nv].
may well serve to give guidance with respect to interpretation and gap-filling in implementing party autonomy in international arbitration.

2. Litigation

1) General Remarks

As for litigation, most jurisdictions in East Asia enacted statutory rules to adopt party autonomy in international contracts. In Japan, Article 7 (1) of the Hôrei enacted in 1898 was one of the earliest conflicts legislation to grant the parties’ freedom of choice of law. The Japanese legislature took this decision on the grounds that most contemporary Western countries adhered to party autonomy. Actually, this argument was grounded on a misunderstanding of the state of discussion at the turn of the 20th century. In fact, Belgium and Germany failed to codify party autonomy for contracts and the prevailing academic opinion in Europe was turning against party autonomy. This fortunate incidence enabled Article 7 (1) of the Hôrei to adjust to subsequent developments of cross-border transactions and maintain its functionality for over 100 years. In reforming Hôrei in 2006, the Japanese legislature upheld the same provision in Article 7 of the AGRAL but refrained from adopting other provisions on modalities of choice of law except for subsequent modification of the applicable law in Article 9 of the AGRAL. Thus, other questions are left to further developments of case law and academic discussion.


164 Art. 11 (1) of the first and the second Draft of Gebhard (1881/87) denied party autonomy in contracts and pointed objectively to the domicile of the debtor, subsidiarily to the place which the parties had in mind. Due to discordances in the legislative committees, the provision was eventually not adopted in the EGBGB (1896). Oscar Hartwieg/Friedrich Korkisch eds., Die geheimen Materialien zur Kodifikation des deutschen Internationalen Privatrechts 1881-1896 (Tübingen 1973), pp. 326, 337; Nishitani, supra note 35, pp. 254 ff.

165 See supra III.


169 For discussions on the AGRAL, see Kunio Koide et al. “Kokusaishihihô no Gendaika ni kansuru Yôkô’ no Gaiyô”
In Korea, Article 25 (1)-(5) of the Korean PIL Act (2001) (“KPIL”) has much more detailed contractual conflicts rules than Japan, which are modelled on the 1980 Rome Convention and the 1994 Mexico Convention. These provisions grant tacit choice of law, dépeçage, subsequent modification of choice of law and eligibility of unconnected laws, and adopt the *lex causae* solution to determine the parties’ agreement on choice of law. Choice of law is also admissible in cases that are geographically connected only with the one country, but does not prejudice the application of its mandatory rules. These rules differ from the foregoing Article 9 (1) of the PIL Act (1962) that solely declared the parties’ freedom of choice of law in contracts.\(^{170}\)

In China, Article 5 of the 1985 Law on Economic Contracts Involving Foreign Interests provided for the freedom of choice of law for contractual disputes arising out of transactions between Chinese enterprises or other organizations and foreign business partners. Similar provisions were adopted in several other statutes, such as the General Principles of Civil Law (1986), the Civil Aviation Law (1995) and the Maritime Law (1992). Article 126 of the 1999 Contract Law upheld the same conflicts rule as the 1985 statute and extended permission to Chinese citizens to become party to cross-border contracts.\(^{171}\) General conflicts rules for contracts have eventually been introduced in Article 3 and 41 of the CPIL,\(^{172}\) which are now supplemented by the Interpretation of the Supreme People’s Court of China (“SPC Interpretation”) (2012).\(^{173}\) While these norms accept a subsequent modification of choice of law and choice of unconnected law,\(^{174}\) they only allow, in principle, an express choice of law in disregard of the parties’ implicit intent (Art. 3 CPIL).\(^{175}\)

By the same token, Article 20 (1) and (2) of the Taiwanese PIL Act (2010) (“TPIL”)...
provides for party autonomy limited to an express choice without specifying further modalities of choice of law. Macau follows the Portuguese model and provides for the freedom of choice of law in contracts in principle, but the parties may only select a law which satisfies a material interest of the parties or has some connection with one of the relevant elements of the transaction (Art. 40 (1)(2) Macau CC). Hong Kong in turn follows the tradition of English common law and grants extensive party autonomy without restricting the eligible laws.

In sum, party autonomy is established as a contractual conflicts rule in East Asia, even if it be with several remarkable deviations. Implementing and applying party autonomy in these countries require further consideration, wherein the Hague Principles can arguably provide valuable clues and input.

2) Threshold Requirement

As a guiding principle, the Hague Principles set the internationality of the case as the threshold requirement (Art. 1 (2) HP) in addition to specifying their substantive scope of application (Art. 1 (1) and (3) HP). This is consistent with the traditional notion that private international law deals exclusively with cross-border cases. Pursuant to Article 1 (2) of the HP, the case is international, unless each party has its establishment in the same State and all relevant objective elements — such as the place of conclusion of the contract, the place of performance, a party’s nationality, a party’s place of incorporation or other establishments, and the location of the subject matter — relate only to one state. Unlike under Article 25 (4) of the KPIL, the parties’ intent to refer to foreign law alone does not suffice to open the scope of application of the Hague Principles.

It is notable that in Japan Okamoto asserts employing qualified and functional criteria for establishing the internationality of a case. He envisages restricting the scope of private international law and satisfying the regulatory interests of Japanese law, though he fails to

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179 Commentary, para. 1.13.

180 Commentary, para. 1.16 ff.


182 Commentary, para. 1.21.

provide concrete, workable criteria. As a contrasting view, Dogauchi advocates applying private international law in contracts to all legal relationships, including purely domestic cases, for the sake of uniformity and practicality, while guaranteeing the application of mandatory rules of Japan when the parties designate foreign law in contracts that are related solely to Japan.\footnote{Masato Dogauchi, \textit{Point Kokusaishihô: Sôron} [Point Private International Law: General Part] (2nd ed., Tokyo 2007), pp. 1 f.; idem, \textit{Kokusai Keiyaku Jitsumu no tameno Yobô Hôgaku: Junkyo-hô, Saiban-kankatsu, Chûsai-jôkô} [Fundamentals of Drafting Boilerplate Clauses in International Contracts] (Tokyo 2012), p. 22.} However, in the absence of a clear-cut written rule in this sense as per Article 25 (4) of the KPIL, this construction would contradict the legislature’s intent and hardly be justifiable. As the majority of Japanese authors hold, private international law ought to be solely applicable to cases having at least one objective foreign element,\footnote{Tameike, supra note 32, pp. 16 ff.} as under Article 1 (2) of the HP.

3) Modalities of Choice of Law

\textit{a) Scope of Choice of Law}

While the general principle of party autonomy in international commercial contracts as declared in Art. 2 (1) HP is undisputed in East Asian jurisdictions, the modalities of choice of law largely differ.

As for \textit{dépeçage} (Art. 2 (2) HP), Korea (Art. 25 (2) KPIL) as well as China\footnote{Huang, \textit{supra} note 171, pp. 166 f.} and Japan\footnote{Koide ed., \textit{supra} note 169, pp. 82 f.; Tameike, \textit{supra} note 32, pp. 364 f.; Yasushi Nakanishi, “Article 7” [Art. 7 AGRAL], in Yoshiaki Sakurada, Masato Dogauchi eds., \textit{Chûshaku Kokusaishihô} [Commentary on Private International Law], Vol. 1 (Tokyo 2011), pp. 188 ff.; Jun Yokoyama, \textit{Kokusaishihô} [Private International Law] (Tokyo 2012), pp. 164 ff.; \textit{cf.} for a refusal of \textit{dépeçage}, see Yutaka Orimo, \textit{Kokusaishihô Kakuron} (2nd ed., Tokyo 1972), pp. 148 ff.; for a restrictive view, see Junko Fujikawa, “Keiyaku Junkyohô no Bundatsu-shitei ni tsuite”, \textit{Kokusaishihô Kôyôseisaku Kenkyû}, Vol. 1 (1) (1997), pp. 87 ff.; for court decisions supporting \textit{dépeçage}, see Tokyo District Court, 30 May 1977, \textit{Hanrei Jihô} 880, 79; Tokyo High Court, 9 Feb. 2000, \textit{Hanrei Jihô} 1749, 157; Tokyo District Court, 26 Feb. 2002 (TKC No. 28028189); \textit{cf.} for a restrictive position, see Tokyo District Court, 28 May 2001 (Hanrei Times 1093, 174).} are becoming responsive to it, with a view to honoring the parties’ intent and enhancing cross-border transactions. \textit{Dépeçage} is relevant particularly in insurance contracts to give effect to the commonly used clause that “insurance is understood and agreed to be subject to English law and usage as to liability for and settlement of any and all claims”. In Japan, this clause is interpreted as designating English law as to the risk and sum covered by the insurance, limitation period, default interests and obligation to minimize loss, whereas the other issues — such as the validity of the contract and the insuree’s duty to disclose — are governed by another law applicable to the contract.\footnote{See, \textit{inter alia}, Tokyo District Court, 26 Feb. 2002 (\textit{supra} note 185); also for Korea, see Suk, New Act, \textit{supra} note 170, p. 122.}

Subsequent modification of choice of law (Art. 2 (3) HP) is admissible also in East Asian jurisdictions. However, while Korea (Art. 25 (3) KPIL) rightly reserves, despite the subsequent modification of applicable law, the formal validity of the contract and rights of third parties to
accommodate the parties’ alleged intent and third parties’ interests as under Article 2 (3) of the HP, China does not provide for a comparable reservation, which causes uncertainties as to the consequence of the modification of applicable law. Japan only reserves rights of third parties (Art. 9 AGRAL), on the grounds that the formal validity ought to be governed unchangeably by the initially applicable law. The legislature holds that the form formalizing the parties’ intent externally needs to be fixed at the time of conclusion (Art. 10 (1) AGRAL), although the modification of the choice of law has ex tunc effects otherwise. As a result, even if parties to a transaction discover defects of formality subsequently, they are unduly prevented from fulfilling the formal requirements by simply altering the applicable law, but obliged to sign another contract afresh. In this respect, Article 2 (3) of the HP may be a useful model both for China and Japan de lege ferenda.

The choice of unconnected law (Art. 2 (4) HP) is granted in Korea (Art. 25 (4) KPIL), as well as China, Hong Kong and Japan, whereas Macau requires that the chosen law satisfy a material interest of the parties or has some connection with one of the relevant elements of the transaction (Art. 40 (2) CC). Article 2 (4) of the HP may encourage the removal of these restrictions, enabling the parties to select a neutral law or developed law in certain sectors, such as English law in insurance contracts. This would reflect the reality of largely delocalized cross-border transactions today.

As a further modality of choice of law, Article 8 of the HP authorizes the parties to designate the applicable law including its conflict of laws, extending the principle established in arbitration to litigation. This policy has generally been rejected in Japan on the grounds of the mandatory nature of conflicts rules, as under the Rome I Regulation and other instruments of civil law tradition. In reality, however, the parties do not thwart the functioning of conflicts rules of the forum by indirectly designating the applicable law via foreign conflicts rules. It is only a way of exercising party autonomy. Considering that the parties may have legitimate interests in only agreeing on the application of the conflicts rules of a certain forum instead of directly designating the substantive applicable law, the policy of Article 8 of the HP deserves to be adopted de lege lata.

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189 2012 SPC Interpretation; Huang, supra note 171, pp. 166 f.; He, supra note 171, pp. 166 f.
191 He, supra note 171, p. 167.
192 Commentary, para. 2.5 ff.; Pertegás/ Marshall, Hague Principles, supra note 20, pp. 988 ff.
193 Commentary, para. 8.5 ff.; also Art. 9 (2) of the Czech PIL Act.
b) Explicit and Implicit Choice

A specific kind of restriction of party autonomy exists in China (Art. 3 CPIL) and Taiwan (Art. 20 (1) TPIL) by solely granting an explicit choice of law. This aims to honor the parties’ real intent and legitimate expectation.196 China exceptionally accepts a tacit choice of law when the parties argue or defend themselves before the court based on the same law without explicitly excluding a choice of law.197 These rules are in contrast to the practice in Japan, where the determination of the applicable law is frequently justified by the parties’ implicit intent as under Article 4 of the HP.

In 1978, the Japanese Supreme Court held that Article 7 (1) of the Hôrei included also tacit choice of law,198 without though defining the criteria for ascertaining such tacit choice. A certain court decision found a tacit choice of Japanese law on the sole ground that the U.S. company was registered in Japan.199 Other judgments often relied on the overall circumstances of the transaction,200 which could de facto amount to inferring “hypothetical intent”.201 In a case from 1998, for example, Plaintiff X (a French national) sought to sell his shares in Z (a French company) that owned hotels in France to Defendant Y1 (a Japanese company), relying on a promise made by its manager Defendant Y2 to pay a guarantee deposit to an escrow agent. The judge assumed the parties’ tacit choice of French law by enumerating various factors: (a) the sales contract was signed in France, (b) Z was incorporated and the hotels were located in France, (c) the contract terms were drafted by a French agent of X in France, (d) the price was set in Francs, (e) the sale required the permission of the French authority, and (f) the use of the escrow agent was based on French custom.202 The search for the parties’ “implicit intent” could yield an appropriate result in individual cases, but jeopardizes legal certainty and predictability.

Under Article 7 (1) of the Hôrei, the parties’ implicit intent is generously assumed to avoid falling to the fortuitous objective connecting factor, i.e., the place of conclusion of the contract (Art. 7 (2) Hôrei). After Article 8 of the AGRAL (2006) adopted appropriate objective connecting factors based on the “closest connection” with the characteristic performance test, the scope of Article 7 of the AGRAL ought to be restricted to “real intent” that shows a concordance of the parties’ intent based on their conscious conduct.203 In this respect, Article 4

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196 This accords with the constant position of the SPC and the majority of Chinese authors. The opinion of some Chinese authors, who reportedly contended to seek also the parties’ tacit intent, was no longer followed. See Huang, supra note 171, p. 206 (note 7).
197 Art. 8 (2) of the 2012 SPC Interpretation. Huang, supra note 171, pp. 166 f.
198 Supreme Court, 20 April 1978, Minshû 32-3, 616.
200 Tameike, supra note 32, pp. 367 f.
201 For the state of discussions under Article 7 (1) of the Hôrei, see Sakurada, supra note 166, pp. 13 ff.
203 Yoshiaki Sakurada et al., “Hô no tekiyô ni kansuru tsûsoku-hô no seiritsu wo megutte” [The Codification of Act
of the HP and its Commentary may provide helpful guidance on interpretation, including the relevance of the choice of court or arbitration agreement. Since the parties may well choose a forum or situs due to its expertise, neutrality, location or language, this factor alone should not suffice to constitute the parties’ tacit intent with respect to selection of the applicable law.

4) Agreement on Choice of Law

a) Existence of the Agreement

The determination of the existence and validity of the parties’ agreement on a choice of law is a difficult issue. Korea (Art. 25 (5) and 29 KPIL) takes the *lex causae* solution as Article 6 (1)(2) of the HP by pointing to the purportedly chosen law, unless the circumstances require that the law of one party’s habitual residence be applied instead. A court decision in China is reported to have applied the *lex fori*, though there is not yet established case law or academic opinion.

The majority of Japanese authors traditionally adhere to a solution proper to Japanese private international law by asserting, for example, nullity of agreement for mistake or revocation of agreement for duress. This “substantive law solution of private international law”, however, relies *de facto* on the fortuitous *lex fori*, which does not guarantee foreseeability or international uniformity. For the sake of legal certainty and consistency with the main contract, recent authors in Japan support the *lex causae* solution pursuant to the international tendency, after the criticism of its logical untenability was overcome. Article 6 (1)(2) of the HP can provide a helpful guidance in determining the existence and validity of the agreement on choice of law.

Notably, Article 6 (1)(b) of the HP contains an innovative rule for the “battle of forms” by specifying the purportedly chosen law in the sense of Article 6 (1)(a) of the HP. Suppose standard terms used by the offeror indicates the law of State A and standard terms used by the offeree the law of State B. Pursuant to Article 6 (1)(b) of the HP, if both the law of State A and State B follow the “first-shot rule” to incorporate into the contract the standard terms first used, the law...
of State A becomes applicable. If the law of State A and State B adhere to the “last-shot rule” to incorporate into the contract the standard terms last used, the law of State B becomes applicable. If the law of State A and State B give priority to different standard terms or are both grounded on the “knock-out rule” to solely incorporate into contracts the terms which the parties reached agreement upon, there is no agreement on choice of law.

While Article 6 (1)(b) of the HP certainly gives important guidance for interpretation as to the _lex causae_ solution in the “battle of forms” situation, certain reservations would be required, because this solution is only workable when the relevant substantive law provides for a clear-cut solution for the “battle of forms”. For the sake of simplicity, one Japanese author puts forth a “substantive law solution of private international law” by simply canceling out and disregarding contradicting choice of law clauses employed in standard terms. This solution, which amounts to a substantive “knock-out” solution, may be worth contemplating as an alternative way out.

**b) Formal Requirements**

Insofar as the relevant conflict of laws system accepts tacit choice of law as under Article 4 of the HP, it would be contradictory to set formal requirements for the parties’ choice of law agreement. Thus, the parties’ choice of law agreement should be exempt from any formalities in principle. Yet, this does not rule out the parties deciding to subject their (subsequent) choice of law to a certain form, especially by way of a non-oral modification clause. Article 5 of the HP stipulates in this sense, correcting the flaw of Article 3 (5) and 11 of Rome I that subject the parties’ agreement on choice of law to the formal requirements of the _lex causae_ or _lex loci actus_ by definition, in the same manner as the main contract. While Japan and China have not taken a clear position, Korea (Art. 25 and 29 KPIL) has rightly excluded formal requirements with respect to the agreement on choice of law.

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212 There are scarcely written rules on the “battle of forms” in various countries. See Kadner Graziano, *supra* note 211, 74 ff.

213 Matsunaga, *supra* note 211, pp. 115 f.

214 Commentary, para. 5.3 ff.


216 Koide ed., *supra* note 169, pp. 91 f. The state of discussion in China is not clear. See Huang, *supra* note 171, pp. 167 f.
5) Choice of Non-State Law

The most remarkable rule in the Hague Principles is certainly Article 3 of the HP, which allows the choice of non-state law. Article 3 of the HP enables “rules of law”, which do not emanate from the legitimate legislative power of the state, to govern the contract as the lex contractus, instead of merely being incorporated into the contract. This rule has been established for arbitration and extended to litigation by Article 3 of the HP, along with a proviso that the private international law of the forum does not prohibit it.

At the time when the Hague Principles were adopted, there was only a limited number of jurisdictions that qualified non-state law as applicable law in litigation. The State of Oregon in the U.S. constitutes an exception by clearly granting the choice of non-state law since 2001. Although a number of scholars understand the 1994 Mexico Convention as allowing the designation of non-state law per se, a considerable number of others clearly deny it. In enacting Rome I, the European Commission proposed in 2005 that the parties be entitled to also choose “the principles and rules of the substantive law of contract recognised internationally or in the Community”, which included the UPICC and PECL in addition to the envisaged optional instrument of the EU. Yet, because this proposal was ultimately discarded due to the objection of the Council, European authors see no room left for the choice of non-state law under Rome I.

In Japan, academics are gradually becoming responsive to the eligibility of non-state

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222 Cf. Recital 13 Rome I; see Dicey/Morris/Collins, supra note 109, para. 32-039 ff., 049 ff.; Plender/Wilderspin, supra note 204, para. 6-011 ff.; Mayer/Heuzé, supra note 78, para. 740 ff.; Dominique Bureau/Horatia Muir Watt,
law, but this has not been followed up by case law. Nor does China presumably accept the choice of non-state law. In bill of lading transactions, the parties are said to frequently refer to the Hague-Visby Rules, of which China is not a Contracting State. For the sake of clarification, however, Article 9 of the 2012 SPC Interpretation has provided that the reference to treaties not in force in China ought to be understood as a mere incorporation into the contract. Throughout various jurisdictions, court decisions generally restrict the eligible law to state law, except some limited exceptions, such as in Tunisia and Switzerland. In light of this state of discussion, it is remarkable that Article 3 of the HP accepted the eligibility of non-state law for litigation, which was implemented by Paraguay in 2015.

As mentioned above, although the traditional view asserted that the legal sources of court decisions as an exercise of judicial power ought to be limited to state law emanating from legitimate legislative authority, there is no theoretical hindrance to accepting the choice of non-state law to govern a contract, insofar as private international law entitles the parties to do so. This possibility may accommodate conflicts of state law and non-state law at different levels by meeting the needs of cross-border business transactions and enhancing normative competition.

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225 Huang, supra note 171, p. 173; He, supra note 171, p. 165; see also Xiao/Long, supra note 172, p. 196 ff., 200 ff.


228 See supra note 25 and 113, infra note 250.
in today’s globalized world.229

While Goldman230 and Schmitthoff231 discussed in the 1960s the eligibility of *lex mercatoria* as commercial customs to govern contracts, it had inherent limitations due to the absence of legitimacy, comprehensiveness and transparency.232 After the UPICC was adopted in 1994 and the PECL in 1995, the core of the discussion turned to non-state law that comprises a systematic body of rules comparable to state law.233 Also Article 3 of the HP restricts the eligible instruments to rules of law that are “generally accepted on an international, supranational or regional level as a neutral and balanced set of rules”.234 Notably, these qualifiers did not exist in the preliminary draft235 and were added as a compromise solution at the 2012 Special Commission, with a view to responding to concerns about choice of non-state law in litigation.236

The legal instruments that meet the threshold requirements of Article 3 of the HP are, first of all, uniform law conventions like the CISG for contracts to which these instruments would otherwise not apply. The CISG contains detailed rules on rights and obligations of the parties in international sales contracts and qualifies as an internationally recognized instrument having attracted 85 Contracting States so far.237 Further, the general principles of contract law that are adopted by regional or international organizations or academic groups, constituting a “generally accepted set of rules” — such as the UPICC, PECL and DCFR — also qualify as the *lex contractus*.238 The choice of an abrogated state law should also be admissible, thus validating the “stabilization clause” that is frequently used in state-investor contracts. On the other hand, rules of law that do not constitute a complete, systematic set of rules are not eligible pursuant to Article 3 of the HP. This is particularly the case with “*lex mercatoria*” in the narrow sense (e.g., commercial customs, trade usage or standard terms) and abstract contractual principles (e.g.,

229 See supra I.
232 These elements are usually pointed out as the drawbacks or limitations of soft law. See Kansaku, *supra* note 7, p. 69.
236 Minutes No. 8 of the 2012 Special Commission.
237 Commentary, para. 3.5. This is the case when, for example, the CISG is chosen by the parties who have their respective places of business in Non-Contracting States (cf. Art. 1 (1)(a) CISG). See the status table, available at <https://www.uncitral.org/>.
238 Commentary, para. 3.6 ff.
“pacta sunt servanda”), and arguably also with religious law (e.g., Jewish or Islamic law). A border-line case may be uniform commercial rules such as INCOTERMS and UCP. Given that these instruments are regularly invoked and provide detailed norms on rights and obligations of the parties on the specific subject-matter in question, they could qualify as the lex contractus in the respective area of cross-border transactions. Non-state law that fulfills the conditions of Article 3 of the HP is supposed to be a comprehensive, normative set of rules that can principally be equated with state law. The eligibility of non-state law ought to be decided on a case-by-case basis pursuant to these criteria, bearing in mind that sources of non-state law which qualify as the lex contractus are likely to grow in number owing to the dynamic and evolving nature of international commercial law.239

Yet, with a view to incorporating the choice of non-state law into the private international system, some issues still need to be addressed. First, the majority of Japanese academics understand the case law as regarding the ascertainment and application of foreign law as the duty of a judge.240 Arguably, the same principle cannot apply to non-state law in light of procedural effectiveness and the appropriate division of duties between judges and the parties. As the parties are most knowledgeable of the relevant non-state law, they ought to be requested to prove its content, insofar as such treatment is consistent with the relevant civil procedure law. Second, non-state law is usually not a closed system by nature, so one should think about the appropriate methods for interpreting and filling the gaps in non-state law. The UPICC refers to state law where necessary. In the case of mandatory rules, the UPICC refers to the applicable law designated by the relevant conflicts rules (Art. 1.4), beside stipulating good faith and fair dealing itself (Art. 1.7). To determine the rate of interest, the UPICC points to the law of the place of payment or the state of the relevant currency (Art. 7.4.9). Once the UPICC is designated by the parties as the lex contractus, the judge ought to follow these instructions and refer to state law with a view to filling the gaps.

Even if the eligibility of non-state law is accepted, the parties that are adverse to the risk of deviating from the present practice or wary of unpredictable results may not immediately decide to choose non-state law, as has been the case with arbitration where choice of non-state law has already been permitted.241 Yet, this does not refute the advantages of choosing non-state law, as the practice may gradually evolve in the future. The UPICC, in particular, consists of advanced contract rules tailored to international business transactions. Established non-state law like the UPICC represents general principles and commercial customs, provides appropriate

239 Commentary, para. 3.8; Nishitani, Hague Principles, supra note 11, p. 21.
interpretation and complements state law or fills gaps.\(^{242}\) It is, therefore, arguably apt to be selected to govern international commercial contracts.

6) Mandatory Rules and Public Policy

As a counter-balance to the broad scope of party autonomy, the traditional conflict of laws system provides certain restrictions via the instrument of public policy and overriding mandatory rules to ensure the state’s intervention. Beside public policy of the forum state, Korea and China have an explicit provision on the unilateral application of overriding mandatory rules of the forum state, but are silent on those of foreign states (Art. 7 and 10 KPIIL; Art. 4 and 5 CPIL).\(^{243}\) While Japan also provides for public policy of the forum state (Art. 42 AGRAL), the legislature has refrained from any stipulation of overriding mandatory rules, although the applicability of overriding mandatory rules of the forum state has been undisputed in case law and academic opinion.\(^{244}\) The reasoning of the legislature was that the notion of overriding mandatory rules can hardly be defined in a precise way, and that stipulating only the application of overriding mandatory rules of the forum state could unduly be interpreted "a contrario" as excluding the application of or reference to those of foreign states.\(^{245}\)

The Hague Principles provide for the general principles of overriding mandatory rules and public policy of the forum state (Art. 11 (1)(3) HP), while leaving the decision of whether to apply or refer to overriding mandatory rules of foreign states, and public policy of the law that would otherwise apply in the absence of choice of law, to the private international law of the forum state (Art. 11 (2)(4) HP), considering different approaches taken by various existing instruments.\(^{246}\) Among these rules, Article 11 (4) of the HP was added at the 2012 Special Commission, aiming to accommodate divergent notions of public policy among states.\(^{247}\) Yet, for traditional civil law countries like Japan, Korea and China, this provision may be superfluous, as the function of “positive public policy” is already fulfilled by Article 11 (2) of the HP in accordance with overriding mandatory rules of foreign states, and the function of “passive public


\(^{243}\) For Korean case law and the state of discussion, see Pertegás/Marshall, East Asia, *supra* note 20, pp. 413 ff.


\(^{246}\) Commentary, para. 11.2 ff.; see, *inter alia*, Art. 9 (3) Rome I, Art. 7 (1) Rome Convention and Art. 11 (2) Mexico Convention.

\(^{247}\) Minutes No. 8 and 9 (*supra* note 237).
VI. Conclusions

Party autonomy has become the leading principle in contemporary private international law, allowing private ordering and self-assignment in cross-border commercial contracts. The Hague Principles can serve to promote party autonomy by suggesting that unnecessary restrictions be removed and providing model rules in this respect. Even in jurisdictions where party autonomy is established, there are questions of interpretation left open and there is a need to refine and develop the existing conflicts rules. The Hague Principles can also provide useful guidance in this respect.

For Japan, Korea and China, it will certainly be useful to refer to the Hague Principles in determining the modalities of choice of law (Arts. 2 and 8 HP), accepting or defining the tacit intent of the parties (Art. 4 HP), determining the existence of the parties’ agreement on choice of law (Art. 6 HP) and its exemption of formality (Art. 5 HP). While the Hague Principles grant the choice of non-state law as an innovative principle for litigation (Art. 3 HP), the restrictions of party autonomy may rightly intervene as regards the internationality of the case (Art. 1 HP) and by reference to overriding mandatory rules and public policy (Art. 11 HP). As a whole, the Hague Principles can serve as a model and encourage countries to move forward in East Asia.

Arguably, some caution may be required in implementing the Hague Principles. The qualifiers under Article 3 of the HP were introduced at the Special Commission to respond to concerns about choice of non-state law in litigation. As for arbitration, however, the existing instruments like Article 28 (1) of the Model Law do not have such restrictions. Thus, a deviating and broader interpretation of Article 3 of the HP for arbitration may well be expedient to avoid the qualifiers having the effect of unduly narrowing down the scope of eligible non-state law. Moreover, should Japan, Korea or China adopt the Hague Principles, it would be desirable that Article 11 (4) of the HP be integrated into Article 11 (2) of the HP to prevent a divergent notion of party autonomy being used within the same instrument.

Notably, the Hague Principles have the advantage of being soft law, leaving countries the necessary leeway whether and to what extent they adhere to the provided principles. Paraguay indeed amended a couple of rules when implementing the Hague Principles and removed, in particular, the qualifiers of the eligible non-state law under Article 3 of the HP. Further, the

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249 See Michaels, Non-State Law, supra note 217, p. 61.

250 The provisions of the Paraguayan statute (supra note 25) modified the Hague Principles to the following extent: (a) the substantive and territorial scope of application (Art. 1 (1)-(3) HP), (b) removal of the requirements of the eligibility of non-state law (Art. 3 HP), (c) removal of the applicability of foreign public policy (Art. 11 (4) HP), and (d) the reference to the closest connection in the absence of choice of law.
Hague Principles rightly refrain from taking a position and simply refer to the applicable private international law for issues where it is difficult to achieve unanimity, i.e., the proviso as to choice of non-state law in litigation (Art. 3 HP), the determination of formal requirements of the contract (Art. 9 (2) HP), as well as the treatment of foreign overriding mandatory rules and public policy (Art. 11 (2)(4) HP). This will presumably raise acceptance and facilitate the implementation of the Hague Principles in different legal systems.

Among the various instruments adopted by the HCCH, the applicable law conventions in general seem to have attracted more civil law jurisdictions than common law jurisdictions, compared with the other conventions grounded on administrative cooperation or judicial assistance. The obvious advantage of the Hague Principles is in their simplicity, flexibility, functionality and adaptability as a model. As soft law, the Hague Principles will be able to accommodate the different needs of civil law and common law jurisdictions and allow for necessary adjustments to fit into the domestic conflict of laws system. Owing to their non-binding nature, the Hague Principles have also been able to adopt certain innovative rules, such as the choice of non-state law (Art. 3 HP) and the law including its private international law for litigation (Art. 8 HP), as well as the determination of the agreement on choice of law in the “battle of forms” situation (Art. 6 (1)(b) HP). It may be worth contemplating turning more toward non-binding instruments including principles, model laws or legislative guides in the field of private international law, as has been the case with the substantive law instruments adopted by the UNICITRAL and UNIDROIT. Hopefully, the Hague Principles mark the first successful step in this direction.


\(^{252}\) E.g., 1980 Child Abduction Convention, 1993 Adoption Convention and 1996 Child Protection Convention (see supra note 251).

\(^{253}\) E.g., 1965 Service Convention and 1970 Evidence Convention (see supra note 251).

\(^{254}\) Fauvarque-Cosson, supra note 24, pp. 2185 ff.; Girsberger, supra note 13, p. 551.