Party Autonomy in Contemporary Private International Law

— The Hague Principles on Choice of Law and East Asia —

*Yuko Nishitani**

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

* Professor at Kyoto University Graduate School of Law. The author was a member of the Working Group for the Hague Principles on Choice of Law in International Commercial Contracts and represented the Japanese government at the Special Commission of the Hague Conference on Private International Law in November 2012. This paper, however, solely reflects the author's own view independent of any position taken by the Japanese government.

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*** Abbreviations: AGRAL = Japanese Act on General Rules for Application of Laws; CC = Civil Code; CCP = Code of Civil Procedure; CIETAC = China International Economic and Trade Arbitration Commission; CJEU = Court of Justice of the European Union; DCFR = Draft Common Frame of Reference; DIFC = Dubai International Financial Centre; EU = European Union; HCCH = Hague Conference on Private International Law; HKIAC = Hong Kong International Arbitration Centre; HP = Hague Principles; ICC = International Chamber of Commerce; IPRax = Praxis des Internationalen Privat- und Verfahrensrechts; JAA = Japanese Arbitration Act; JCAA = Japan Commercial Arbitration Association; KCAB = Korean Commercial Arbitration Board; LCIA = London Court of International Arbitration; OAS = Organization of American States; PECL = Principles of European Contract Law; PIL = Private International Law; SIAC = Singapore International Arbitration Centre; SICC = Singapore International Commercial Court; SPC = Supreme People's Court of China; UNCITRAL = United Nations Commission on International Trade Law; UNIDROIT = International Institute for the Unification of Private Law; UPICC = UNIDROIT Principles on International Commercial Contracts.

[1] Friedrich Karl von Savigny, *System des heutigen römischen Rechts*, Vol. 8 (Berlin 1849), pp. 2 ff.

[2] Horatia Muir Watt, "Les modèles familiaux à l'épreuve de la monidialisation (aspects de droit international privé)", *Archives de philosohie du droit*, Vol. 45 (2001), p. 272.

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.

[4] Akira Kotera, "Gendai kokusaihôgaku to 'soft law' ― Tokushoku to kadai" [Contemporary Public International Law and 'Soft Law' ― Characteristics and Challenges], in Akira Kotera, Masato Dogauchi eds., *Kokusaishakai to Soft Law ―* [International Community and Soft Law] (Tokyo 2008), pp. 18 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/>).

[7] Hiroyuki Kansaku, "Global na shihonshijô ni okeru soft law to nihonhô heno eikyô" [Soft Law in the Global Capital Market and its Influence on Japanese Law], in Hiroto Dogauchi ed., *Gendaihô no Dôtai* [Dynamics of Contemporary Law], Vol. 4: *Kokusaishakai no Hendô to Hô* [Changes in the International Community and the Law] (Tokyo 2015), pp. 75 ff.

[8] Horatia Muir Watt, "Party Autonomy in Global Context: The Political Economy of a Self-Constituting Regime", *Japanese Yearbook of International Law* 58 (2015), pp 175 ff.

[9] *See, inter alia*, Yuki Asano, "Hôriron ni okeru global hô-tagenshugi no ichizuke" [The Position of Global Legal Pluralism in the Legal Theory], in Yuki Asano *et al.* eds., *Global-ka to kôhô/shihô-kankei no saihen* [Globalisation and Restructuring of the Relationship between Public Law and Private Law] (Tokyo 2015), pp. 110 ff.; idem, "Shihôriron kara hô-tagenshugi he ― Hô no global-ka ni okeru kôhô/shihô no kubun no saihensei" [From Private Law Theory to Legal Pluralism ― Restructuring of the Divide between Public Law and Private Law in the face of Globalisation of Law], Ibid., pp. 305 ff.; Dai Yokomizo, "Teishokuhô no taishô to naru 'hô' ni kansuru jakkan no kôsatsu ― Josetsu-teki kentô" [Some Reflections on the 'Law' as the Object of Conflict of Laws ― Preliminary Considerations], *Tsukuba Law Journal*, Vol. 6 (2009), pp. 8 ff.; Ralf Michaels, "The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism", *Wayne Law Review*, Vol. 51 (2005), pp. 1210 ff.

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, *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]

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[10] *See* Horatia Muir Watt and Diego Fernandez Arroyo (eds.), *Private International Law and Global Governance* (Oxford 2014).

[11] *Available at* <http://www.hcch.net/index_en.php?act=conventions.text&cid=135>; for a detailed analysis, *see* Yuko Nishitani, "Kokusai Shôji-keiyaku no Junkyohô-sentaku ni kansuru Hague Gensoku" [The Hague Principles on Choice of Law in International Commercial Contracts], *New Business Law,* Vol. 1072 (2016), pp. 23 ff.; idem, "Tôjisha-jichi no Gendaiteki Igi – 'Kokusai Kokusai Shôji-keiyaku no Junkyohô-sentaku ni kansuru Hague Gensoku' wo megutte" [The Contemporary Meaning of Party Autonomy – An Analysis in light of the 'Hague Principles on Choice of Law in International Commercial Contracts'] (*hereinafter* "Hague Principles"), *Kokusai-shihô Nenpô* [Yearbook of Private International Law], Vol. 17 (2015), pp. 2 ff.

[12] In this paper, arbitration solely concerns commercial arbitration between private parties and does not encompass investment arbitration due to its particular characteristics.

[13] This is due tothe lack of mandate from the Council and the expected difficulty of reaching a consensus among different jurisdictions, such as the detailed connecting factors under Art. 4, 5 and 7 of Rome I and the case-by-case approach in the U.S. It is, however, not ruled out that the HCCH envisages a further set of principles on the law

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[14] on the basis of the preliminary work including feasibility studies conducted by the Permanent Bureau of the HCCH.[15] 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.[16] 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.[17] 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,[18] the Principles were ultimately adopted along with the Commentary[19] on 19 March 2015.[20]

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

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applicable to commercial contracts in the absence of a choice of law. Commentary, para. I.14; Daniel Girsberger, "Die Haager Prinzipien über die Rechtswahl in internationalen kommerziellen Verträgen", *Swiss Review of International and European Law* 2014, p. 547.

[14] *Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference* (31 March – 2 April 2009), *available at* <http://www.hcch.net/upload/wop/genaff_concl09e.pdf>.

[15] An overview of the preparatory work is *available at* <https://www.hcch.net/en/instruments/contracts-preparatory-work>.

[16] Commentary, p. ii.

[17] *See Draft Hague Principles as approved by the November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations for the Commentary, available at* <http://www.hcch.net/upload/wop/contracts2012principles_e.pdf>.

[18] *Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference* (9-11 April 2013), *available at* <http://www.hcch.net/upload/wop/gap2013concl_e.pdf>.

[19] *Commentary of the Hague Principles on Choice of Law in International Commercial Contracts* (*hereinafter* "Commentary"), *available at* <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.

[20] *See* Marta Pertegás/Brooke Adele Marshall, "Harmonization through the Draft Hague Principles on Choice of Law in International Contracts" (*hereinafter* "Hague Principles"), *Brooklyn Journal of International Law*, Vol. 39 (2014), pp. 980 ff.; idem, "Intra-regional reform in East Asia and the new Hague Principles on Choice of Law in International Commercial Contracts" (*hereinafter* "East Asia"), *Korean Private International Law Journal*, Vol. 20, No. 1 (2014), pp. 395 ff.

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

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[21] Preamble 1-3; Commentary, para. I.4 f., P.3; Jan L. Neels, "The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Contracts", *Yearbook of International Law*, Vol. 15 (2013/14), pp. 48 ff.

[22] *See infra* note 65.

[23] For a criticism, Ole Lando, "The Draft Hague Principles on the Choice of Law in International Contracts and Rome I", in *Mélanges en l'honneur de Hans van Loon* (Cambridge *et al*. 2013), pp. 304, 310.

[24] Bénédicte Fauvarque-Cosson, "Un nouvel instrument du droit souple international — Le 'projet de Principes de la Haye sur le choix de la loi applicable en matière de contrats internationaux'—", *Dalloz* 2013, p. 2189. In arbitration, the Hague Principles could be referred to by arbitrators as "appropriate" or "international" conflicts rules. *See* Gary Born, *International Commercial Arbitration* (*hereinafter* "Arbitration"), Vol. 2 (2nd ed., Alphen aan den Rijn 2014), pp. 2643 ff.; idem, *International Arbitration: Cases and Materials* (New York 2011), pp. 916 ff.

[25] Paraguay Ley nº 5393-2015 sobre derecho aplicable a los contratos internacionales, *Gaceta Oficial* nº 13, 20 January 2015.

[26] Australia envisages enacting the "International Civil Law Act" to implement the Hague Principles and the 2005 Hague Choice of Court Convention when ratified. National Interest Analysis [2016] ATNIA 7: Australia's Accession to the Convention on Choice of Court Agreements (The Hague, 30 June 2005) [2016] ATNIF 23, *available at*: <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/15_March_2016/Treaty_being_considered>. According to the information from the Permanent Bureau of the HCCH, they will first be implemented in the form of court rules.

[27] Preamble 4 HP.

[28] Singapore International Commercial Court (SICC), *available at* <http://www.sicc.gov.sg/>.

the DIFC-LCIA Arbitration Centre.[29] 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,[30] with a view to guaranteeing its enforcement outside the United Arab Emirates by relying on the 1958 New York Convention[31].

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.[32] 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.[33] 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.[34] Thus, the possibility for the parties to select a different law to govern their contractual relationship was excluded.[35]

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[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/).

[30] *See* DIFC Courts Practice Direction No. 2 of 2015 ("Referral of Judgment Payment Disputes to Arbitration"), *available at* <http://difccourts.ae/>.

[31] United Nations Convention on the Enforcement of Foreign Arbitral Awards of 10 June 1958, New York.

[32] *See* Yoshio Tameike, *Kokusaishihô Kôgi* (3rd ed., Tokyo 2005), p. 351.

[33] Franz Gamillscheg, *Der Einfluss Dumoulins auf die Entwicklung des Kollisionsrechts* (Berlin *et al.* 1955), p. 112 ff.; *also* Symeon C. Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (New York 2014), p. 112.

[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* mid-19th century and adopted in the legislation of Italy (1865)[36] and Japan (1898)[37] followed by several other countries.[38] *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.[39] It is, therefore, understandable that renowned authors at the turn of the 20th century — such as *Pillet*, *Niboyet*, *Anzilotti*, *von Bar* and *Zitelmann*[40] — 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.[41]

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

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Applicable Law by Savigny], *Hôgaku Ronsô*, Vol. 126-4/5/6 (1990), pp. 230 ff.; Yuko Nishitani, *Mancini und die Parteiautonomie im Internationalen Privatrecht – Eine Untersuchung auf der Grundlage der neu zutage gekommenen kollisionsrechtlichen Vorlesungen Mancinis* – (Heidelberg 2000), pp. 190 ff. On the other hand, *Kidana* advocates that Savigny's "voluntary submission" amounted to the freedom of choice of law. Shoichi Kidana, "Savigny no hôritsu-kankei no honkyo-setsu to sono keiju no tokuchô — Tôjisha-ishi no ichizuke ni kanren shite" [Savigny's Theory on the Seat of Legal Relationship and Characteristics of its Transplant in Japan — around the Meaning of the Parties' Intent], in *Nagoya Gakuin Daigaku Hôgakubu Kaisetsu Kinen Ronbun-shû* [Collection of Contributions Celebrating the Establishment of the Faculty of Law at Nagoya Gakuin University] (Nagoya 2014), p. 106; idem, "Kokusaishihô ni okeru tôjisha-ishi no ichizuke ni tsuite — Savigny no hôritsukankei no honkyo-setsu kara gendai kokusaishihô-riron heno tenkai" [About the Position of Party Autonomy in Private International Law — Developments from Savigyn's Theory on the Seat of Legal Relationship to Modern Private International Law Theories], *Kokusaishihô Nenpô* [Yearbook of Private International Law], Vol. 16 (2014), pp. 179 ff.

[36] Art. 9 (2) of the Preliminary Dispositions of Civil Code (1865).

[37] Art. 7 (1) *Hôrei* (1898).

[38] *See* Nishitani, *supra* note 35, pp. 246 ff.

[39] Nishitani, *supra* note 35, pp. 206 ff.

[40] Antoine Pillet, *Traité pratique de droit international privé*, Vol. 2 (Grenoble *et al.* 1924), pp. 164 ff., 188 ff.; Jean Paulin Niboyet, "La théorie de l'autonomie de la volonté", *Recueil des Cours*, Vol. 16 (1927-I), pp. 53 ff.; Dionisio Anzilotti, "Il principio dell'autonomia dei contraenti nei rapporti fra l'art. 9 delle disposizioni preliminari al codice civile e l'art. 58 del codice di commercio", *Scritti di diritto internazionale privato*, Vol. 3 (Padova 1960), pp. 633 ff.; Ludwig von Bar, *Theorie und Praxis des internationalen Privatrechts*, Vol. 1 (Hannover 1889), pp. 3 ff.; Ernst Zitelmann, *Internationales Privatrecht* (Leipzig 1897), Vol. 1, pp. 276 ff., Vol. 2, pp. 373 ff.

[41] For further detail, *see* Nishitani, *supra* note 35, pp. 261 ff.; idem, "Party Autonomy and Its Restrictions by Mandatory Rules in Japanese Private International Law - Contractual Conflicts Rules -" in Jürgen Basedow, Harald Baum, Yuko Nishitani eds., *Japanese and European Private International Law in Comparative Perspective* (Tübingen 2008), pp. 81 f.

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

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[42] Wilhelm Haudek, *Die Bedeutung des Parteiwillens im internationalen Privatrecht* (Berlin 1931), p. 35; for further detail, *see* Nishitani, *supra* note 35, pp. 270 ff.; idem, *supra* note 41, pp. 82 f.; André Aloys Wicki, *Zur Dogmengeschichte der Parteiautonomie im Internationalen Privatrecht* (Winterthur 1965), pp. 79 ff.

[43] *See* Jan Kropholler, *Internationales Privatrecht* (6th ed., Tübingen 2006), pp. 295 f.

[44] *See infra* V 2 4) a).

[45] *See infra* IV 2.

[46] Christian von Bar/Peter Mankowski, *Internationales Privatrecht*, Vol. 1 (2nd ed., München 2003), pp. 481 ff.

[47] Brainerd Currie, "The Constitution and the Choice of Law: Governmental Interests and the Judicial Function", in *Selected Essays on the Conflict of Laws* (Durham/NC 1963), pp. 188 ff.

[48] Symeon C. Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (Leiden 2006), pp. 9 ff.

[49] Albert Armin Ehrenzweig, *Private International Law. A Comparative Treatise on American International Conflicts Law*, Vol. 1: General Part (Leyden/NY 1967), pp. 91 ff.

[50] Robert Allen Leflar, *American Conflicts Law* (3rd ed., Indianapolis/NY *et al.* 1977), pp. 212 ff.

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*[51] or the "proper law theory" of *Westlake*[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.[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.[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"[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.[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.[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.[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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[51] Anzilotti, *supra* note 40, pp. 633 ff., 639 ff.; Henri Batiffol, *Les conflits de lois en matière de contrats: Étude de droit international privé comparé* (Paris 1938), pp. 39 ff.

[52] John Westlake, *A Treatise on Private International Law with Principal Reference to its Practice in England* (7th ed., London 1925), pp. 299 ff.

[53] Shunichiro Nakano, "Tôjishajichi-gensoku no seitôka konkyo", *Ritsumeikan Hôgaku* 339/340 (2011), pp. 301 ff.; *see also* Ralf Michaels, "Party Autonomy – A New Paradigm without a Foundation?", pp. 2 f. (presentation at the Japanese Association of Private International Law on 2 June 2013, *available at*: <http://www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf>).

[54] Gehard Kegel, *Internationales Privatrecht* (1st ed., München 1960), p. 208; Gerhard Kegel/Klaus Schurig, *Internationales Privatrecht* (9th ed., München 2004), p. 653. This position has also been supported by Japanese authors. *See, inter alia,* Tameike, *supra* note 32, pp. 351 ff.; Koji Deguchi, *Ronten-kôgi Kokusaihishô* [Lecture on Issues of Private International Law] (Tokyo 2015), p. 230.

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

[56] Commentary, para. I.3.

[57] Stefan Vogenauer, "Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence", *European Review of Private Law* 2013, pp. 36 ff., 53 ff.

[58] For further detail, *see* Nakano, *supra* note 53, pp. 318 ff.; Nishitani, *supra* note 32, pp. 316 ff.; Stefan Leible, "Parteiautonomie im IPR – Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung", in *Festschrift für Erik Jayme,* Vol. 1 (München 2004), pp. 495 ff.; Kathrin Kroll-Ludwig, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht* (Tübingen 2013), pp. 288 ff.

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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[59] Heinz-Peter Mansel, "Party Autonomy, Legal Doctrine on Choice of Law, and the General Section of the European Conflict of Laws", in Stefan Leible ed., *General Principles of European Private International Law* (Alphen aan den Rijn 2016), p. 145; *see also* Paul Heinrich Neuhaus, *Die Grundbegriffe des internationalen Privatrechts* (1st ed., Tübingen 1962), p. 172; idem, *Die Grundbegriffe des internationalen Privatrechts* (2nd ed., Tübingen 1976), p. 257.

[60] Mansel, *supra* note 59, p. 145.

[61] Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Leiden 2015), para. 239 ff. (in particular 254 ff.)

[62] Erik Jayme, "L'autonomie de la volonté des parties dans les contrats internationaux entre personnes privées", *Annuaire de l'Institut de Droit International*, Vol. 64 (1), Session de Bâle (1991), pp. 65 f.; idem, "Identité culturelle et intégration: Le droit international privé postmoderne", *Recueil des Cours*, Vol. 251 (1995), pp. 147 f.; *also* Günter Beitzke, *Grundgesetz und Internationalprivatrecht* (Berlin 1961), pp. 16 f.

[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.

[64] Horatia Muir Watt, *supra* note 8, pp. 176 ff.; idem, "Private International Law beyond the Schism" (*hereinafter* "Schism"), *Transnational Legal Theory*, Vol. 2 (3) (2011), pp. 354 ff.; idem, "The Relevance of Private International Law to the Global Governance Debate", in Horatia Muir Watt and Diego Fernandez Arroyo eds., *Private International Law and Global Governance* (Oxford 2014), pp. 1 ff.; Robert Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization", *Columbia Journal of Transnational Law*, Vol. 40 (2002), pp. 219 ff.; *also* Stéphanie Francq, *infra* note 85.

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)[65] 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)[66]. The UPICC has occasionally been applied as the law governing the contract in arbitration.[67] The Principles of European Contract Law (PECL)[68] or the Draft Common Frame of Reference (DCFR)[69] developed by academics in Europe play a comparable role. Moreover, the Uniform Rules for Documentary Credits (UCP)[70] and the INCOTERMS[71] 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.[72]

As a consequence, non-state norms not only cooperate with and complement state law,[73] 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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[65] 2010 UNIDROIT Principles on International Commercial Contracts (UPICC), *available at* <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

[66] United Nations Convention on Contracts for the International Sale of Goods (CISG), signed at Vienna on 11 April 1980.

[67] Michael Joachim Bonell, "The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the Future", *Australian International Law Journal*, Vol. 17 (2010), pp. 178 ff.; Ralf Michaels, "The UNIDROIT Principles as Global Background Law", *Uniform Law Review* 19 (2014), pp. 643 ff. Also the Official Comments of the U.S. Uniform Commercial Code (U.C.C.) mentions the possibility of incorporating the UPICC into the contract. *See* U.C.C. § 1-302. Variation by Agreement - Official Comments, para. 2.

[68] Ole Lando/Hugh Beale (eds.), *Principles of European Contract Law, Parts I & II* (2000); Ole Lando/Eric Clive/André Prüm/Reinhard Zimmermann (eds.), *Principles of European Contract Law, Part III* (2003) (Kluwer Law International).

[69] Christian von Bar/Eric Clive/Hans Schulte-Nölke et al. (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Munich 2009), *available at* <http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf>. The CESL (European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11.10.2011, COM(2011) 635 final), which has been withdrawn, will not be eligible for lack of acceptance under Art. 3 HP. For revised proposals of the European Commission for directives, *see* Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, 9.12.2015, COM(2015) 634 final; Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, 9.12.2015, COM(2015) 635 final.

[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).

[72] Tokyo District Court, 29 May 1987, *Kin-yû Shôji Hanrei* 781, 38 = *Kinyû Hômu Jijô* 1186, 84; *see also* Yuko Nishitani, "Kokusai Shiharai to Soft Law: Shin-yôjô Tôitsukisoku no Igi to Hôteki Seishitsu" [International Payment and Soft Law: The Meaning and Legal Nature of 'Uniform Customs and Practice for Documentary Credits'], in Akira Kotera & Masato Dogauchi eds., *Kokusai Shakai to Soft Law* [International Community and Soft Law] (Tokyo 2008), pp. 215 ff.

[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.[74] 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.[75]

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.[76] 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.[77]

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.[78] 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,[79] 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.[80] 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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[74] Gunther Teubner, "Global-ka jidai ni okeru hô no yakuwari-henka: Kakushu no global na hô-regime no bunritsuka, minkan-kenpôka, netto-ka" [The Change of the Role of Law in the Era of Globalization: Fragmentation, Constitutionalization and Networking of Global Law Regimes], in Hans Peter Marutschke and Junichi Murakami eds., *Global-ka to Hô* [Globalisation and Law] (Tokyo 2006), p. 15; Andreas Fischer-Lescano/Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Suhrkamp, Frankfurt a.M. 2006), p. 57 ff.

[75] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge *et al.* 2012), pp. 41 ff.; Muir Watt, Scism, *supra* note 64, pp. 390 ff.; Dai Yokomizo, "Global-ka jidai no Teishokuhô" [Conflict of Laws in the Era of Globalization], in Yuki Asano *et al.* eds., *Global-ka to kôhô/shihô-kankei no saihen* [Globalisation and Restructuring of the Relationship between Public Law and Private Law] (Tokyo 2015), pp. 111 ff.

[76] *See* Pierre Mayer, "Le phénomène de la coordination des ordres juridiques étatiques en droit privé", *Recueil des cours*, Vol. 327 (2007), pp. 9 ff.; Yokomizo, *supra* note 9, pp. 19 ff.; *cf.* Nishitani, *supra* note 72, pp. 238 ff. (reflecting the author's previous view).

[77] Tameike, *supra* note 32, p. 367.

[78] Pierre Mayer/Vincent Heuzé, *Droit international privé* (11th ed., Paris 2014), para. 740.

[79] *Cf.* Ralf Michaels, "Die Struktur der kollisionsrechtlichen Durchsetzung einfach zwingender Normen", in *Liber Amicorum Claus Schurig zum 70. Geburtstag* (München 2012), pp. 191 ff.

[80] Luca G. Radicati di Brozolo, "Non-National Rules and Conflicts of Laws: Reflections in Light of the UNIDROIT and Hague Principles", *Rivista di diritto internazionale privato e processuale*, Vol. 48 (2012), p. 858; Geneviève Saumier, "Designating the UNIDROIT Principles in International Dispute Resolution", *Uniform Law Review*, Vol. 17 (2012), pp. 542 f.

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.

[82] Lando, *supra* note 23, p. 306; Fauvarque-Cosson, *supra* note 24, p. 2187.

[83] Peer Zumbansen, "Lex mercatoria: Zum Geltungsanspruch transnationalen Rechts", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 67 (2003), p. 673; Jürgen Basedow, "*Lex Mercatoria* and the Private International Law of Contracts in Economic Perspective", in Jürgen Basedow and Toshiyuki Kono eds., *An Economic Analysis of Private International Law* (Tübingen 2006), pp. 60 ff.

[84] *See* Gisela Rühl, "The Choice of Law Framework for Efficient Regulatory Competition in Contract Law", in Horst Eidenmüller ed., *Regulatory Competition in Contract Law and Dispute Resolution* (München *et al*. 2013), pp. 291 ff. However, *Vogenauer* indicates that such regulatory competition is not occurring in the field of contract law. Vogenauer, *supra* note 57, pp. 13 ff.

[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).

[86] Nigel Blackaby, Constantine Partasides *et al.* eds., *Redfern and Hunter on International Arbitration* (6th ed., Oxford et al. 2015), para. 3.99.

Article 28 (1) of the UNCITRAL Model Law (1985) ("Model Law")[87] 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).[88] Also the ICC Rules of Arbitration (2012)[89] and other arbitration rules stipulate party autonomy in a comparable way.[90] Thus, the freedom of choice of law is an established principle as regards international commercial contracts in arbitration.[91]

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),[92] as well as the Rome Convention (1980) and the Rome I Regulation (2008)[93] of the EU, and the Mexico Convention (1994)[94] 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,[95] now that the scope of party autonomy has been extended from contracts (Rome I) to non-contractual

[87] Art. 28 (1) of the UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006), *available at* <http://www.uncitral.org/>.
[88] *See* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.
[89] Art. 21 (1) of the ICC Rules of Arbitration (2012), *available at* <http://www.iccwbo.org/>.
[90] *See* Ivana Radic, "Feasibility Study on the Choice of Law in International Contracts — Special Focus on International Arbitration" (Preliminary Document No. 22 C of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the HCCH), *available at* <http://www.hcch.net/>); Lauro Gama Jr./Geneviève Saumier, "Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts", *El derecho internacional privado en los procesos de integración regional* (San José 2011), pp. 45 ff.
[91] Blackaby, Partasides *et al.* eds., *supra* note 86, para. 3.97 ff.; Stephan Balthasar ed., *International Commercial Arbitration* (München *et al.* 2016), § 1, para. 65.
[92] Art. 7 of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, concluded 22 December 1986; *see also* Art. 2 (1)(2) of the Hague Convention on the Law Applicable to International Sales of Goods, concluded 15 June 1955 and Art. 5 of the Hague Convention on the Law Applicable to Agency, concluded 14 March 1978, *available at* <http://www.hcch.net/>.
[93] Art. 3 (1)(2) of the Rome Convention on the Law Applicable to Contractual Obligations (80/934/EEC), *O.J.* 1980, L 266/1; Art. 3 (1)(2) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *O.J.* 2008, L 177/6 (*hereinafter* "Rome I").
[94] Art. 7 and 8 of the Inter-American Convention on the Law Applicable to International Contracts, signed at Mexico, D.F., Mexico, on 17 March 1994.
[95] *See supra* III 3.

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 is also being discussed.[103] The scope of party autonomy is even broader in Switzerland, which includes the assignment of claims, movable property rights, security and the name.[104]

The freedom of choice of law in international contracts has also been established in Russia[105] and Turkey[106]. In addition, South Africa,[107] Ghana,[108] as well as Canada, Australia 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 autonomy, on the grounds that the parties cannot delineate the scope of the legislative or judicial

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[96] Art. 14 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on 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, L 7/1 (reference to the 2007 Hague Maintenance Protocol).

[99] Art. 22 (1) of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *O.J.* 2012, L 201/107.

[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 consequences of registered partnerships, *O.J.* 2016, L 183/30.

[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 [*Überseering*], Rep. 2002, I-9919; CJEU, 30.9.2003, Case C-167/01 [*Inspire Art*], Rep. 2003, I-10155; CJEU, 12.12.2005, Case C-411/03 [*SEVIC Systems*], Rep. 2005, I-10805; CJEU, 16.12.2008, Case C-210/06 [*Cartesio*], Rep. 2008, I-9641; CJEU, 29.11.2011, Case C-371/10 [*National Grid*], Rep. 2011, I-12273; CJEU, 12.7.2012, Case C-378/10 [*Vale*], published in the electronic Reports of Cases, *available at* <http://curia.europa.eu/>.

[103] *See* Axel Flessner, "Rechtswahl im internationalen Sachenrecht — neue Anstöße aus Europa", in *Festschrift für Helmut Koziol* (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 (contracts), Art. 128 (2), 132, 135 (1) and 139 (1) (non-contractual obligations), Art. 145 (1) (assignment of claims) of the Swiss PIL Act (1987)

[105] Art. 1210 Russian Civil Code (2001) (*IPRax* 2002, p. 329).

[106] Art. 24 Turkish PIL (2007) (*IPRax* 2008, p. 286).

[107] Christopher F. Forsyth, *Private International Law: The modern Roman-Dutch Law including the Jurisdiction of the High Courts* (5th ed., Cape Town 2012), pp. 316 ff.

[108] Richard Oppong, *Private International Law in Commonwealth Africa* (Cambridge 2013), pp. 131 ff.

[109] For the English "proper law" doctrine, *see* Dicey/J.H.C. Morris/L. Collins, *Conflict of Laws*, Vol. 2 (15th ed., 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 Australia, *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd.R. 378; for England, *Boissevain v Weil* [1949] K.B. 482; *see* Law Reform Sub-Committee of the Singapore Academy of Law, *infra* note 135, p. 5.

power of the sovereign state,[110] the Mexico Convention (1994) grounded on party autonomy has been ratified and has entered into force in Mexico and Venezuela.[111] Other Latin American countries — Brazil, Uruguay, Peru and Bolivia — also envisage introducing party autonomy in their future statutory reform.[112] 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.[113]

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.[114] 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.[115] 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.[116] Comparable rules have also been adopted in some other states including Texas and California.[117] 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.[118]

In the Middle East, Tunisia[119], Morocco[120] and Israel[121] 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

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[110] Art. 9 of the Brazilian Decreto-Lei nº 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.

[111] *See* http://www.oas.org/juridico/english/sigs/b-56.html.

[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).

[115] *See, inter alia,* Mark Edwin Burge, "Too Clever by Half: Reflections on Perception, Legitimacy, and Choice of Law Under Revised Article 1 of the Uniform Commercial Code", *William & Mary Business Law Review,* Vol. 6 (2015), pp. 360 ff.

[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.

[118] Louisiana Civil Code Art. 3540; Oregon Revised Statutes 81.120 (2001); *see* Symeon C. Symeonides, "Codifying Choice of Law for Contracts: The Oregon Experience", *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* Vol. 67 (2003), pp. 737 ff.

[119] Art. 62 Tunisian PIL Act (1998) (*Rabels Zeitschrift für ausländisches und internationales Privatrecht,* Vol. 65 (2001), p. 102).

[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.[122] Egypt, Libya, Syria, Jordan, Yemen, Oman, Bahrain, Qatar, Kuwait and Iraq[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.[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.[125] As a proviso, all these countries subject contracts concerning immovables to the *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.[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,[127] and even to

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[122] Art. 968 Iranian Civil Code; *see* Najima Yassari, "Das internationale Vertragsrecht des Irans", *IPRax* 2009, pp. 451 ff.

[123] Art. 19 Egyptian Civil Code (1948) (*cf.* I. A. Ibrahim, "Private International Law", in Nathalie Bernard-Maugiron and Baudouin Dupret eds., *Egypt and its laws* (London *et al.* 2002), pp. 214, 218); Art. 19 Libyan Civil Code (1963); Art. 20 Syrian Civil Code (1949); Art. 20 Jordanian Civil Code (1976); Art. 30 Yemeni Civil Code (2002); Art. 20 Omani Civil Code (2013); Art. 17 Bahraini PIL Act (2015); Art. 27 Qatari Civil Code (2004) (*cf.* Marie-Claude Najm, "Codification of Private International Law in the Civil Code of Qatar", *Yearbook of Private International Law,* Vol. 8 (2006), p. 265); Art. 59 Kuwaiti Civil Code (1961); Art. 25 Iraqi Civil Code (1951).

[124] Following the information kindly provided by Mr. Elbalti, Egypt, Jordan and Kuwait require by way of interpretation that the chosen law has a connection with the contract or the parties. The sources are said to be found at: for Egypt, Hafidha Assayed Al-Haddad, *Al-qanoun Addowali al-khas – Al-kitab al-'awal: Tanazo' al-qawanin* [Private International Law, Book I: Conflict of laws] (Lebanon 2002), pp. 422 f.; Hichem Sadek/Akacha Mohamed Abd Al'Al/Hafidha Assayed Al-Haddad, *Al-qanoun Addowali al-khas: Al-Ikhtisas Al-Qadha'I, Al-Jinsiya: Al-kitab al-'awal: Tanazo' al-qawanin* [*Private International Law – Conflicts of laws, International Jurisdiction, Nationality,* Book I: Conflict of laws] (Dar al-Matbou'at al-Jami'iya) (Alexandria 2005), p. 345; for Jordan, Hasan Al-Hadawi, *Al-qanoun al-douwali al-khas – Tanazo' al-qawanin, Al-mabadi' al-'ama wal-houloul alwadh'iya fi al-qanoun al-'ordoni – dirasa moqarana qawanin* [Private International Law: Conflicts of Laws, General Principles and Positive Solutions in Jordan Law - A Comparative Study] (2nd ed., Jordan 1997), p. 150; for Kuwait, Hasan Al-Hadawi, *Tanazo' al-qawanin wa 'ahkamoho fil-qanoun ad-dowali al-khas al-kowaiti* [Conflict of Laws and Its Rules in Kuwaiti Private International Law] (2nd ed., Kuwait, 1974), p. 193. However, according to Prof. Elwan, the opinion is divided in Egpyt as to whether the eligible laws ought to be restricted based on a territorial connection. *See also* Holger Jung, *Ägyptisches internationales Vertragsrecht* (Tübingen 1999), pp. 14 ff.

[125] Art. 18 (1) Algerian Civil Code (2005). According to Mr. Elbalti, the good faith requirement is mentioned at: Taieb Zarouti, *Al-qanoun ad-douwali al-khas al-jaza'iri 'ilman wa 'amalan* [Algerian Private International Law: Theory and Practice] (1st ed., Algeria, 2010), pp. 25 f. 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 *lex loci contractus* applies, while contracts concerning immovable are always governed by the *lex rei sitae* (Art. 18 (2)-(4)).

[126] *See infra* V 2.

[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 *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.

consensual divorce and movable property in China.[128] Among South-East Asian countries, Indonesia,[129] Malaysia,[130] the Philippines,[131] Thailand[132] and Vietnam[133] authorize the parties to designate the applicable law, without further defining the modalities of choice of law.[134] Following the tradition of English common law, freedom of choice of law is widely accepted in Singapore,[135] Australia[136] and India,[137] 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?

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128 Art. 26, 37 and 38 Chinese PIL Act.

129 Sudargo Gautama, "Some Aspects of Indonesian Private International Law", *Malaya Law Review*, Vol. 32 (1990), pp. 429 ff.; Hendronoto Soesabdo *et al.*, "Indonesia", in Alejandro Carballo Leyda ed., *Asian Conflict of Laws: East and South East Asia* (Leiden 2015), pp. 58 f.

130 RH Hickling/Wu Min Aun, *Conflict of Laws in Malaysia* (Kuala Lumpur *et al.* 1995), pp. 162 ff.; Effendy Othman, "Malaysia", in Carballo Leyda ed., *supra* note 129, p. 136.

131 Elizabeth H. Aguiling-Pangalangan, "Philippines", in Carballo Leyda ed., *supra* note 129, pp. 166 f.

132 Art. 13 Thai PIL Act; *see* Chinnawat Thongpackdee *et al.*, "Thailand", in Carballo Leyda ed., *supra* note 129, p. 238.

133 Art. 759 of the Vietnamese Civil Code; Nguyen Thi Xuan Trinh *et al.*, "Vietnam", in Carballo Leyda ed., *supra* note 129, pp. 279 f.

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.

135 There was an attempt to adopt legislation akin to the 1980 Rome Convention in Singapore, which was though ultimately rejected. Law Reform Sub-Committee of the Singapore Academy of Law, *Report on Reform of the Law Concerning Choice of Law in Contract* (2003), *available at* <http://www.sal.org.sg/>; *see* Elsabe Schoeman/Adeline Chong, "A View from Australia's Regional Partners — Recent Developments in New Zealand and Singapore —", in Andrew Dickinson, Mary Keyes and Thomas John eds., *Australian Private International Law for the 21st Century. Facing Outwards* (Oxford *et al.* 2014), p. 213.

136 Martin Davies/Andrew Bell/Paul Le Gay Brereton (eds.), *Nygh's Conflict of Laws* (9th ed., Chastwood NSW 2014), para. 19.3 ff.; Richard Garnett, "Uniformity of Outcome in Australian Choice of Law", in Dickinson *et al.*, *supra* note 135, pp. 88 f.; Reid Mortensen/Richard Garnett/Mary Keyes, *Private International Law in Australia* (2nd ed., 2011), para. 17.6 ff.

137 K.B. Agrawal/Vandana Singh, *Private International Law in India* (Alphen aan den Rijn 2010), pp. 93 f.

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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[138] For Hong Kong arbitration law, *see* John Choong/Romesh Weeramantry (eds.), *The Hong Kong Arbitration Ordinance. Commentary and Annotations*, 2nd ed. (Hong Kong 2015), para. 4.00 ff.; Amy Lo, "International Arbitration in Hong Kong", in Stephan Balthasar ed., *International Commercial Arbitration* (München *et al.* 2016), § 11, para. 70 ff.

[139] White & Case and Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, *available at* <http://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations>. For a more comprehensive survey, *see* Gilles Cuniberti, "The Laws of Asian International Business Transactions", *Pacific Rim Law & Policy Journal*, Vol. 25 (2016), pp. 35 ff.

[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, Wenliang Zhang, "Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the 'Due Service Requiement' 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.[142] 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.[143] 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.[144] 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[145] pursuant to the 1958 New York Convention and the 1974 China-Japan Trade Agreement.[146]

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.[147] Moreover, rules of arbitration institutions provide for party autonomy, such as the JCAA Rules of Arbitration (Japan),[148] 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, *Spliethoff'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.

[145] Okayama District Court, 14 July 1993, *Hanrei Jihô* 1492, 125; Tokyo District Court, 20 July 1993, *Hanrei Jihô* 1494, 126; Tokyo District Court, 27 January 1994, *Hanrei Times* 853, 266; Tokyo District Court, 19 June 1995, *Hanrei Times* 919, 252; Yokohama District Court, 25 Aug. 1999, *Hanrei Jihô* 1707, 146; Osaka District Court, 25 March 2011, *Hanrei Jihô* 2122, 106.

[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 for Japan (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.

[148] Art. 60 (1) of the JCAA Commercial Arbitration Rules (2014), *available at* <http://www.jcaa.or.jp/>.

Rules (China),[149] the HKIAC Administered Arbitration Rules (Hong Kong),[150] the SIAC Rules (Singapore),[151] and the KCAB International Arbitration Rules (Korea).[152]

In implementing party autonomy, however, quite a few issues are left open. In Japan, Article 36 (1) of the JAA[153] 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.[154] Given its broad scope, Article 36 (1) of the JAA is understood as allowing the choice of unconnected law and *dépeçage*.[155] Yet, it leaves unanswered the criteria of determining the internationality of the case,[156] tacit choice of law and the law governing the parties' consent, as well as the applicability of conflicts rules of the situs.[157] 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"),[158] but limited to an explicit choice. Further details of the modality of choice of law are not stipulated explicitly.[159] 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.[160] 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.[161]

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

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[149] Art. 49 (2) of the CIETAC Arbitration Rules (2014), *available at* <http://www.cietac.org/>.

[150] Art. 35 (1) of the HKIAC Administered Arbitration Rules (2013), *available at* <http://www.hkiac.org/>.

[151] Art. 31 (1) of the SIAC Rules (2016), *available at* < http://www.siac.org.sg/>.

[152] Art. 25 (1) of the KCAB International Arbitration Rules (2011), *available at* <http://www.kcab.or.kr/>.

[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).

[154] *See* Shunichiro Nakano, "International Commercial Arbitration under the New Arbitration Law of Japan", *Japanese Annual of International Law* 47 (2005), pp. 96 ff.

[155] *See* Takeshi Kojima/Takashi Inomata, *Chûsaihô* [Law of Arbitration] (Tokyo 2014), pp. 392 ff.; Koichi Miki and Kazuhiko Yamamoto eds., *Shin-Chûsaihô no Riron to Jitsumu* [Theory and Practice of the New Arbitration Law] (Tokyo 2006), pp. 102 ff.

[156] Unlike Art. 1 (3) of the Model Law, the Japanese Arbitration Act (JAA) does not define the internationality of the case. *See* Shunichiro Nakano, "The japanese arbitration Law of 2004 and its impact on international commercial arbitration", *Zeitschrift für Zivilprozess International* (*ZZPInt*) 11 (2007) 315 ff. Yet, Art. 36 JAA always applies when the arbitral seat is located in Japan.

[157] For an academic view on applying the AGRAL to arbitration, *see* Masato Dogauchi, "Chûsai-handan no Junkyohô" [The Law Applicable to Arbitral Awards] in Takeshi Kojima, Akira Takakuwa eds., *Chûshaku to Ronten: Chûsaihô* [Commentary and Issues: Law of Arbitration] (Tokyo 2007), pp. 211 ff.

[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.[162] Actually, this argument was grounded on a misunderstanding of the state of discussion at the turn of the 20th century. In fact, Belgium[163] and Germany[164] failed to codify party autonomy for contracts and the prevailing academic opinion in Europe was turning against party autonomy.[165] 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.[166] In reforming *Hôrei* in 2006, the Japanese legislature upheld the same provision in Article 7 of the AGRAL[167] 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.[168] Thus, other questions are left to further developments of case law and academic discussion.[169]

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[162] Hôten Chôsa-kai (ed.), *Hôrei giji sokki-roku* [Minutes on the Legislation of *Hôrei*], Tokyo 1986, pp. 113 f.; *Hôrei shûseian riyû-sho* [Motives for the Revision of *Hôrei*], in: *Minpô shûsei-an riyû-sho* [Motives for the Revision of the Civil Code], Tokyo 1898.

[163] Art. 14 and 16 of the Draft of Laurant (1882), as well as Art. 7 of the Draft of the Reform Commission (1887) provided for party autonomy for contracts, but the legislation of private international law was postponed until 2004. George van Hecke, "Les projets de Titre préliminaire de Laurent et de la commission de révision", in *Liber Memorialis François Laurent 1810-1887* (Bruxelles 1989), pp. 1119 ff.; Nishitani, *supra* note 35, pp. 247 ff.

[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.

[166] For Japanese case law, *see* Yoshiaki Sakurada, "Keiyaku no Junkyohô" [The Law Applicable to International Contracts], *Kokusaishihô Nenpô* [Japanese Yearbook of Private International Law], Vol. 2 (2000), pp. 18 ff.

[167] *Hô no Tekiyô ni kansuru Tsûsoku-hô* [Act on General Rules for Application of Laws (AGRAL)], Law No. 78 of 21 June 2006. For an English translation, *see* Masato Dogauchi *et al.*, "Act on General Rules for Application of Laws", *Japanese Annual of International Law*, Vol. 50 (2007), pp. 87 ff.; Kent Anderson/Yasuhiro Okuda, "Translation of Japan's Private International Law: Act on the General Rules of Application of Laws [Hô no Tekiyô ni Kansuru Tsûsokuhô], Law No. 10 of 1898 (as newly titled and amended 21 June 2001)", *Yearbook of Private International Law,* Vol. 8 (2006), pp. 427 ff. (*reproduced also in*: *Zeitschrift für Japanisches Recht/Journal of Japanese Law,* Vol. 23 (2007), pp. 227 ff.; *Asian-Pacific Law & Policy Journal,* Vol. 8 (1) (2006), pp. 138 ff.).

[168] However, the statute has adopted special provisions concerning the protection of weaker parties in Art. 11 and 12 AGRAL. *See* Yuko Nishitani, "Act on General Rules for Application of Laws: Protection of Weaker Parties and Mandatory Rules", *Japanese Annual of International Law,* Vol. 50 (2007), pp. 40 ff.; idem, "Parteiautonomie im Internationalen Vertragsrecht Japans", in Karl Riesenhuber and Yuko Nishitani eds., *Wandlungen oder Erosion der Privatautonomie? – Deutsch-japanische Perspektiven des Vertragsrechts* – (Berlin 2007), pp. 269-293.

[169] For discussions on the AGRAL, *see* Kunio Koide *et al.* "'Kokusaishihô 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")

[Outlines of the "Summary Proposal for the Modernization of Japanese Private International Law"], in: *Hô no tekiyô ni kansuru tsûsoku-hô kankei shiryô to kaisetsu* [Materials and Commentaries on the Act on General Rules on Application of Laws] (Tokyo 2006), pp. 50 ff.; Kunio Koide ed., *Chikujô Kaisetsu: Hô no Tekiyô ni kansuru Tsûsokuhô* [Commentary: Act on General Rules on Application of Laws] (revised ed., Tokyo 2015), pp. 77 ff.

[170] Kwang Hyun Suk, "Harmonization of Private International Law Rules in Northeast Asia", *Kokusaihô Gaikô Zasshi* [The Journal of International Law and Diplomacy], Vol. 114, No. 1 (2013), p. 13; Pertegás/Marshall, East Asia, *supra* note 20, pp. 391 ff. The rules adopted in the 2001 statute deviated from the prevailing academic opinion in Korea at that time. Kwang Hyun Suk, "The New Conflict of Laws Act of the Republic of Korea" (*hereinafter* "New Act"), *Yearbook of Private International Law* 2004, pp. 122 ff.

[171] Qisheng He, "Recent Developments of New Chinese Private International Law With Regard to Contracts", in Jürgen Basedow and Knut B. Pißler eds., *Private International Law in Mainland China, Taiwan and Europe* (Tübingen 2014), p. 158 ff.; Renting Huang, *Chûgoku Kokusaishihô no Hikakuhô-teki Kenkyû* [Study on Chinese Private International Law in a Comparative Perspective] (Nara 2015), pp. 24 ff., 163 ff.

[172] *See* Jin Huang, "Creation and Perfection of China's Law Applicable to Foreign-Related Civil Relations", *Yearbook of Private International Law*, Vol. 14 (2012/13), pp. 277 ff.; Huang, *supra* note 171, p. 164; Xiao Yongping/Long Weidi, "Contractual Party Autonomy in Chinese Private International Law", *Yearbook of Private International Law*, Vol. 11 (2009), pp. 194 f.

[173] *See* Peter Leibküchler, "Erste Interpretation des Obersten Volksgerichts zum neuen Gesetz über das Internationale Privatrecht der VR China", *Zeitschrift für chinesisches Recht* 2013, pp. 89 ff. The scope of Article 41 (1) of the CPIL is "issues in contracts" in general, which modifies the previously used wording of "contractual disputes". This avoids misunderstanding that the scope is limited to the context of litigation. He, *supra* note 171, p. 164.

[174] Huang, *supra* note 171, pp. 166 f.

[175] Art. 8 (2) of the 2012 SPC Interpretation.

provides for party autonomy limited to an express choice without specifying further modalities of choice of law.[176] 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).[177] Hong Kong in turn follows the tradition of English common law and grants extensive party autonomy without restricting the eligible laws.[178]

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.[179] 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.[180] Unlike under Article 25 (4) of the KPIL,[181] the parties' intent to refer to foreign law alone does not suffice to open the scope of application of the Hague Principles.[182]

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,[183] though he fails to

[176] Previous Art. 6 (1) of the 1953 PIL Act solely provided for party autonomy in contracts without indicating objective connecting factors in the absence of choice of law. David J.W. Wang, "The Revision of Taiwan's Choice-of-Law Rules in Contracts", in Jürgen Basedow and Knut Benjamin Pißler eds., *Private International Law in Mainland China, Taiwan and Europe* (Tübingen 2014), pp. 182 ff.; Yao-Ming Hsu, "Taiwan", in Carballo Leyda ed., *supra* note 129, pp. 223 f.

[177] Rui Manuel Moura Ramos, "The Private International Law Rules of the New Special Administrative Region of Macau of the People's Republic of China", *Louisiana Law Review,* Vol. 60, No. 4 (2000), p. 1290.

[178] Graeme Johnston, *The Conflict of Laws in Hong Kong* (2nd ed., Hong Kong 2012), para. 5.003 ff.; Lutz-Christian Wolff, "Hongkong's Conflict of Contract Laws: quo vadis?", *Journal of Private International Law*, Vol. 6 (2010), pp. 466 ff.

[179] Commentary, para. 1.13.

[180] Commentary, para. 1.16 ff.

[181] Suk, New Act, *supra* note 170, pp. 122 f. The same principle applies under Art. (1) Rome I. *See* Christoph Reithmann/Dieter Martiny, *Internationales Vertragsrecht* (7th ed., Köln 2010), para. 45.

[182] Commentary, para. 1.21.

[183] *See* Zenpachi Okamoto, "Kokusaishihô no Taishô to shiteno Shôgai-kankei" [One Functional Approach to Conflicts Law], *Dôshisha Hôgaku* Vol. 23 (2) (1971), pp. 24 ff.

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.[184] 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,[185] as under Article 1 (2) of the HP.

3) Modalities of Choice of Law

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 *dépeçage* (Art. 2 (2) HP), Korea (Art. 25 (2) KPIL) as well as China[186] and Japan[187] are becoming responsive to it, with a view to honoring the parties' intent and enhancing cross-border transactions. *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.[188]

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

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[184] Masato Dogauchi, *Point Kokusaishihô: Sôron* [Point Private International Law: General Part] (2nd ed., Tokyo 2007), pp. 1 f.; idem, *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.

[185] Tameike, *supra* note 32, pp. 16 ff.

[186] Huang, *supra* note 171, pp. 166 f.

[187] Koide ed., *supra* note 169, pp. 82 f.; Tameike, *supra* note 32, pp. 364 f.; Yasushi Nakanishi, "Article 7" [Art. 7 AGRAL], in Yoshiaki Sakurada, Masato Dogauchi eds., *Chûshaku Kokusaishihô* [Commentary on Private International Law], Vol. 1 (Tokyo 2011), pp. 188 ff.; Jun Yokoyama, *Koksaishihô* [Private International Law] (Tokyo 2012), pp. 164 ff.; *cf.* for a refusal of *dépeçage*, *see* Yutaka Orimo, *Kokusaishihô Kakuron* (2nd ed., Tokyo 1972), pp. 148 ff.; for a restrictive view, *see* Junko Fujikawa, "Keiyaku Junkyohô no Bunkatsu-shitei ni tsuite", *Kokusai Kôkyôseisaku Kenkyû*, Vol. 1 (1) (1997), pp. 87 ff.; for court decisions supporting *dépeçage*, *see* Tokyo District Court, 30 May 1977, *Hanrei Jihô* 880, 79; Tokyo High Court, 9 Feb. 2000, *Hanrei Jihô* 1749, 157; Tokyo District Court, 26 Feb. 2002 (TKC No. 28082189); *cfr.* for a restrictive position, *see* Tokyo District Court, 28 May 2001 (Hanrei Times 1093, 174).

[188] *See, inter alia*, Tokyo District Court, 26 Feb. 2002 (*supra* note 185); also for Korea, *see* Suk, New Act, *supra* note 170, p. 122.

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.[189] 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.[190] 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,[191] 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.[192]

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,[193] 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.[194] 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,[195] 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.
190 Koide ed., *supra* note 169, p. 127.
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.
194 Nakanishi, *supra* note 187, pp. 190 ff.; *cf.* Art. 20 Rome I; Art. 15 of the Hague Sales Convention; Art. 17 Mexico Convention.
195 Nakano, *supra* note 53, pp. 307 ff.; *see also* Dieter Martiny, "Art. 20 Rom I", in *Münchener Kommentar*, Vol. 10 (6th ed., München 2015), para. 6.

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.

199 Tokyo High Court, 19 July 1982, *Hanrei Jihô* 1051, 149 [*Northwest Airlines* case]. Ex-Art. 479 Commercial Code (repealed by the Company Act of 2005 (*Kaishahô*, Law No. 86, 2005)); see Yuko Nishitani, "Das internationale Arbeitsvertragsrecht in Japan", *Recht in Japan*, Vol. 12 (2000), pp. 41 ff.

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.

202 Tokyo District Court, 30 March 1998, *Hanrei Jihô* 1658, 117; *cf.* Tokyo District Court, 1 Oct. 1997, *Hanrei Times* 979, 144 [*Lufthansa* case]; for further detail, Nishitani, *supra* note 41, pp. 84 f.

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.[204] 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.[205]

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.[206] 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.[207] 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,[208] after the criticism of its logical untenability was overcome.[209] 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

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on General Rules on Application of Laws (Round Table Discussion)], *Jurist*, Vol. 1325 (2006), pp. 14 ff. The Japanese legislature refrained from defining the parties' "tacit intent", in order to leave room for a flexible interpretation based on the circumstances and issues of the case at hand. *Kokusaishihô no gendai-ka ni kansuru yôkô chûkan shian* [Interim Proposal for the Modernization of Japanese Private International Law] (hereinafter "Interim Proposal"), No. 4-2 (2) A; Minutes of the 26th Session in the Advisory Commission on the Modernization of Private International Law, *available at* <http://www.moj.go.jp/>.

[204] In favor of assuming tacit choice of law, Orimo, *supra* note 187, p. 134; *contra*, Nakanishi, *supra* note 187, p. 195. *See also* Recital 12 Rome I; Art. 7 (2) Mexico Convention; *see* Dicey/Morris/Collins, *supra* note 109, para. 32-061 ff.; Richard Plender/Michael Wilderspin, *The European Private International Law of Obligations* (4th ed., London 2015), para. 6-028 ff.; Reithmann/Martiny, *supra* note 181, para. 116 ff.

[205] Commentary, para. 4.3 ff. This interpretation also accords with the recent practice in international arbitration. Born, Arbitration, *supra* note 24, Vol. 2, pp. 2638 ff.

[206] Huang, *supra* note 171, pp. 167 f.; Xiao/Long, *supra* note 172, pp. 193, 200.

[207] Tameike, *supra* note 32, pp. 352 ff.

[208] Nakanishi, *supra* note 187, pp. 195 ff.; Yokoyama, *supra* note 186, pp. 168 ff.; *see* Art. 10 of the 1986 Hague Sales Convention; Art. 3 (5) and 10 (1)(2) Rome I; Art. 12 of the Mexico Convention.

[209] *See supra* II 2.

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,[210] there is no agreement on choice of law.[211]

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".[212] 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.[213] 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.[214] 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.[215] While Japan and China have not taken a clear position,[216] Korea (Art. 25 and 29 KPIL) has rightly excluded formal requirements with respect to the agreement on choice of law.

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[210] Art. 2.1.22 UPICC; for the interpretation of the CISG, *see* Ingeborg Schwenzer (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed., Oxford 2010), Art. 19, para. 33 ff.

[211] Commentary, para. 6.10 ff.; for detailed analysis, *see* Thomas Kadner Graziano, "Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution", *Yearbook of Private International Law*, Vol. 14 (2012/13), pp. 87 ff.; for discussion in Japan, *see* Shinomi Matsunaga, *Kokusai Keiyaku ni okeru Shoshiki no Tatakai: Jisshitsuhô oyobi Kokusaishihô no Shiten kara* [Battle of Forms in International Contracts: From a Perspective of Substantive Law and Private International Law] (Nara 2009), pp. 107 ff.

[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.

[215] Gralf-Peter Calliess, "Art. 3 Rome I", in Gralf-Peter Calliess ed., *Rome Regulations* (Alphen aan den Rijn 2011), para. 30.

[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.[217] The State of Oregon in the U.S. constitutes an exception by clearly granting the choice of non-state law since 2001.[218] Although a number of scholars understand the 1994 Mexico Convention as allowing the designation of non-state law *per se*,[219] a considerable number of others clearly deny it.[220] 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.[221] 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.[222] In Japan, academics are gradually becoming responsive to the eligibility of non-state

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[217] *See* Ralf Michaels, "Preamble I: Purpose of the PICC" (*hereinafter* "PICC"), in Stefan Vogenauer ed., *Commentary on the UNIDROIT Principles of International Commercial Contracts* (2nd ed., Oxford 2009), para. 49 ff.; idem, "Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts" (*hereinafter* "Non-State Law"), in Kai Purnhagen and Peter Rott eds., *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Heidelberg *et al.* 2014), pp. 45 ff.

[218] Oregon Revised Statutes 81.120 (2001), Comments 3 to Section 7 (reprinted in: James A.R.Nafziger, "Oregon's Conflicts Law Applicable to Contracts", *Willamette Law Review*, Vol. 38 (2002), p. 421); Michaels, PICC, *supra* note 217, para. 70.

[219] *Cf.* Art. 9 (2) and 10 of the Mexico Convention; Friedrich K. Juenger, "The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons", *American Journal of Comparative Law*, Vol. 42 (1994), pp. 391 ff.; idem., "Contract Choice of Law in the Americas", *American Journal of Comparative Law*, Vol. 45 (1997), pp. 204 ff.; idem, "The lex mercatoria and private international law", *Uniform Law Review* 2000, pp. 182 ff.; Diego P. Fernández Arroyo, *Derecho internacional privado interamericano: Evolución y perspectivas* (Buenos Aires 2003), pp. 60 ff.; Lauro Gama Jr., *Contratos internacionais à luz dos Princípios do UNIDROIT 2004: soft law, arbitragem e jurisdição* (Rio de Janeiro *et al.* 2006), pp. 431 ff.; José Antonio Moreno Rodríguez, "Los contratos y La Haya: ¿ancla al pasado o puente al futuro?", in Jürgen Basedow *et al.* (eds.), *¿Cómo se codifica hoy el derecho commercial internacional?* (Asunción/Paraguay 2010), pp. 321 ff.

[220] *Cf.* Art. 17 of the Mexico Convention; Nadia de Araujo, *Contratos internacionais. Autonomia da vontage: Mercosul e convenções internationais* (3rd ed., Rio de Janeiro *et al.* 2004), pp. 192 ff.; Antonio Boggiano, *Curso de derecho internacional privado. Derecho de las relaciones privadas internacionales* (4th ed. Buenos Aires 2003), pp. 698 ff.; for further detail, *see* José Antonio Moreno Rodriguez/María Mercedes Albornoz, "Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts", *Journal of Private International Law*, Vol. 7 (2011), pp. 502 ff.

[221] Art. 3 (2) of the European Commission Proposal (Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), 15.12.2005, COM (2005) 650 final, 2005/0261 (COD)).

[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[223], 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.[224] 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.[225] Throughout various jurisdictions, court decisions generally restrict the eligible law to state law,[226] except some limited exceptions, such as in Tunisia and Switzerland.[227] 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.[228]

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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Droit international privé, Vol. 2 (3rd ed., Paris 2014), para. 896; Stefan Leible, "Art. 3 Rom I", in *NomosKommentar: Rom-Verordnungen*, Vol. 6 (Baden-Baden 2014), para. 34; Reithmann/Martiny, *supra* note 181, para. 98 ff.

223 Tetsuo Morishita, "Kokusai Shôtorihiki ni okeru Hi-Kokkahô no Kinô to Tekiyô", *Kokusaihô Gaikô Zasshi* [The Journal of International Law and Diplomacy], Vol. 107, No. 1 (2008), pp. 35 ff.; Shunichiro Nakano, "Hi-Kokkahô no Junkyohô Tekikakusei: Kokusaishihô-teki Sokumen kara mita Lex Mercatoria", CDAMS Discussion Paper (2004), pp. 6 ff., *available at* <http://www.lib.kobe-u.ac.jp/repository/80100028.pdf>; Naoshi Takasugi, "Kokusaishihô ni okeru Shin-yôjô Tôitsu-kisoku no Toriatsukai" [The Treatment of the Uniform Customs and Practice for Documentary Credits in Private International Law], *Tezukayama Hôgaku*, Vol. 5 (2001), pp. 111 ff.; idem, "Kokusai Kaihatsu Keiyaku to Kokusaishihô: Anteika-jôkô no Yûkôsei to Hi-kokkahô no Junkyohô Tekikakusei" [Cross-Border Development Contracts and Private International Law: Stabilization Clause and the Applicability of Non-State Law], *Handai Hôgaku*, Vol. 52, No. 3/4 (2002), pp. 1022 f.; Masashi Yamate, "Lex Mercatoria ni tsuite no Ichi-kôsatsu: Sono Seisei to Tenkai oyobi Tekiyô Process [A Reflection on Lex Mercatoria: Its Emergence and Developments as well as the Application Process], *Hôgaku Zasshi*, Vol. 33 (3) (1987), pp. 539 ff.; idem, "Lex Mercatoria ni tsuite: Kokusai Torihiki Keiyaku Kiseikihan no Dokuji-sei to sono Hôteki Seishitsu" [*Lex Mercatoria*: The Independency of Legal Norms Governing International Commercial Contracts and their Legal Nature], *Tôhoku Gakuin Daigaku Ronshû*, Vol. 34 (1989), pp. 131 ff.

224 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules"), and Protocol of Signature, Brussels, 25 August 1924; Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Visby Rules"), Brussels, 23 February 1968.

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

226 Particularly English case law as to Islamic law, *Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain EC* [2004] 4 All ER 1072; as to Jewish law, *Halpern v Halpern* [2006] 3 All ER 1139; *see* Thalia Kruger, "Feasibility Study on the Choice of Law in International Contracts — Overview and Analysis of Existing Instruments" (Preliminary Document No 22 B of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the HCCH), pp. 13 f., *available at* <http://www.hcch.net/>.

227 For the UCP 400, *see* Court of Appeal of Tunis, 9 April 2001 (decision no. 48119), *Journal du droit international* 2005, p. 1067, comments by Sami Bostanji, pp. 1072 ff.; for the FIFA rules, *see* Handelsgericht St Gallen, 12 November 2004, *available at* <http://www.unilex.info/case.cfm?id=1123> (this decision was though overruled by the Federal Court (*Bundesgericht*), 20 December 2005, *available at* <http://www.unilex.info/case.cfm?id=1124>).

228 *See supra* note 25 and 113, *infra* note 250.

in today's globalized world.[229]

While *Goldman*[230] and *Schmitthoff*[231] 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 draft[235] 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.*,

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229 *See supra* I.

230 Berthold Goldman, "Frontière du droit et « lex mercatoria »", *Archives de philosohie du droit*, Vol. 9 (1964), pp. 187 ff.

231 Clive Schmitthoff, "International Business Law: A New Law Merchant", in Cheng (ed.), *Selected Essays on International Trade Law* (1988), pp. 20 ff.; idem, "The Law of International Trade, Its Growth, Formulation and Operation", *Ibid.*, pp. 165 ff.

232 These elements are usually pointed out as the drawbacks or limitations of soft law. *See* Kansaku, *supra* note 7, p. 69.

233 Ralf Michaels, "The True Lex Mercatoria: Law Beyond the State", *Indiana Journal of Global Legal Study*, Vol. 14 (2007), pp. 448 ff.

234 Commentary, para. 3.4 ff.; for a criticism of this limitation, *see* Michaels, Non-State Law, *supra* note 217, pp. 56 ff.; Andrew Dickinson, "A principled approach to choice of law in contract?", *Butterworths Journal of International Banking and Financial Law* 2013, p. 152; Radicati di Brozolo, *supra* note 80, p. 860.

235 *See* Working Group on Choice of Law in International Contracts, "Policy Document Regarding Hague Principles on Choice of Law in International Commercial Contracts" (Prel. Doc. No. 4, January 2012), *available at* <http://www.hcch.net/index_en.php?act=publications.details&pid=6174>, para. 16.

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 f.

"*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.

[240] Sueo Ikehara, *Kokusaishihô Sôron* (Tokyo 1973), p. 231; Tameike, *supra* note 32, pp. 244 ff.; Yuko Nishitani, "Proof of and Information about Foreign Law", in Martin Schauer and Bea Verschraegen eds., *General Reports of the XIXth Congress of the International Academy of Comparative Law* (*forthcoming* 2016).

[241] *See, e.g.*, Morishita, *supra* note 223, pp. 18 ff.; Michaels, *supra* note 233, pp. 456, 459; idem, "Umdenken für die UNIDROIT-Prinzipien. Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts", *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* Vol. 73 (2009), pp. 870 ff.

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 KPIL; 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

[242] Michaels, *supra* note 241, pp. 875 f.
[243] For Korean case law and the state of discussion, *see* Pertegás/Marshall, East Asia, *supra* note 20, pp. 413 ff.
[244] Tokyo District Court, 26 April 1965, *Rôminshû* 16-2, 308 = *Hanrei Jihô* 408, 14 (prohibition of unfair labor practies under the Labor Union Act); Tokyo District Court, 24 February 2004, *Hanrei Jihô* 1853, 38 (*cf.* Supreme Court, 17 October 2006, *Minshû* 60-8, 2853) (remuneration for employee's invention under the Patent Act); *also* Tokyo District Court, 28 August 2007, *Hanrei Jihô* 1991, 89 (fair trade under the Anti-Trust Act); for the state of discussion, *see* Dai Yokomizo, "Kokusaishihô no Han-i" [The Scope of Private International Law], in Yoshiaki Sakurada, Masato Dogauchi eds., *Chûshaku Kokusaishihô* [Commentary on Private International Law], Vol. 1 (Tokyo 2011), pp. 34 ff.
[245] Koide ed., *supra* note 169, pp. 88 f.; Yuko Nishitani, "Kokusai Keiyaku ni okeru Jakusha-hogo" [The Protection of Weaker Parties in International Contracts], *Hôritsu no Hiroba*, Vol. 59-9 (2006), pp. 32 f.
[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).

policy" by Article 11 (3) of the HP grounded on the position of the forum state.[248]

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.[249] 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 public policy 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.[250] Further, the

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[248] Dieter Martiny, "Die Haager Principles on Choice of Law in International Commercial Contracts: Eine weitere Verankerung der Parteiautonomie", *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* Vol. 79 (2015), pp. 649 f.

[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[251] seem to have attracted more civil law jurisdictions than common law jurisdictions, compared with the other conventions grounded on administrative cooperation[252] or judicial assistance.[253] 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).[254] 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 UNCITRAL and UNIDROIT. Hopefully, the Hague Principles mark the first successful step in this direction.

[251] *E.g.*, 1971 Traffic Accident Convention, 1973 Product Liability Convention and 1986 Sales Contract Convention. For the Hague Conventions, *see* the website of the HCCH at <http://www.hcch.net>.
[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.