

# Building a Global Framework to Facilitate Trade and Investment

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University of Johannesburg



## Session II

The new Hague Principles on Choice of Law in International Contracts: a key element of a global legal framework for international commercial transactions

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# South Africa: import and export of goods, services and capital

- Direct investment

- Inflowing: 8.2 bn US\$ (2013)
- Outflowing: 5.62 bn US\$ (2013)

Source: UNCTAD World Investment Report 2014, Table II

- Import and export of goods/services

- Exports: 290.9 bn ZAR (1<sup>st</sup> quarter, 2014)
- Imports: 314.3 bn ZAR (1<sup>st</sup> quarter, 2014)

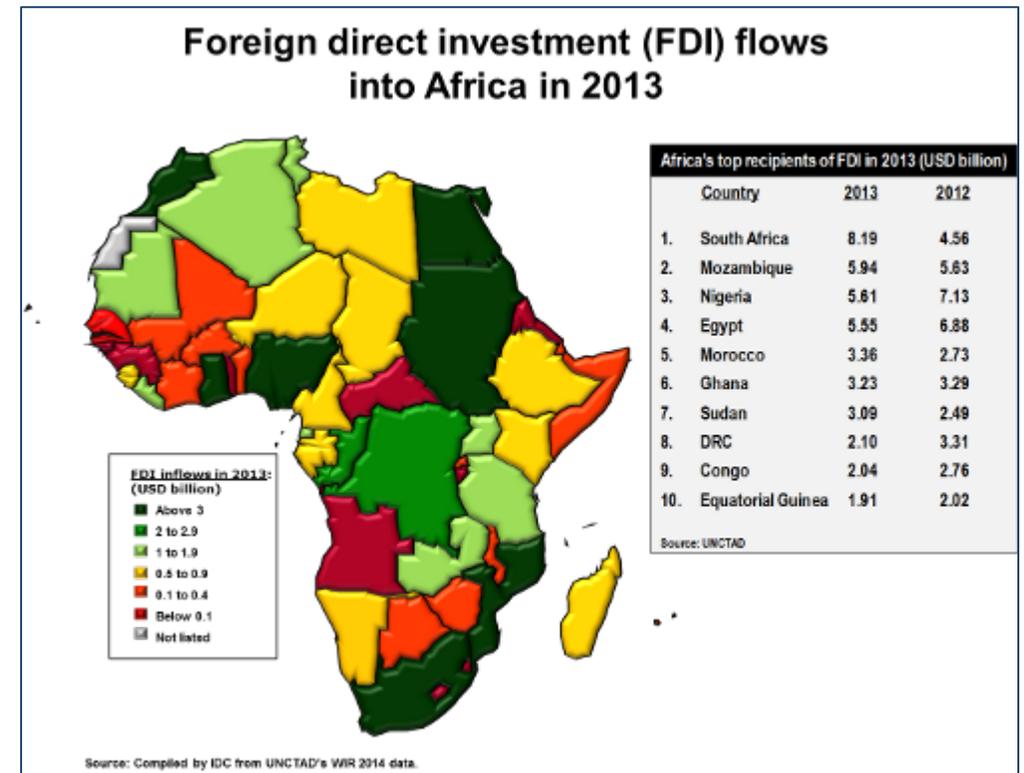
Source: OECD, *Main Economic Indicators* (2014) 8 MEI 235 ff

- Underpinning transactions:

*international commercial contracts*

“[In 2013] Southern African countries, especially South Africa, experienced high inflows [of investments].”

Source: UNCTAD, *Global Investment Trends 2014*, Chapter 1, p 3



Source: Industrial Development Corporation, SA is Africa's Top Investment Destination, <http://www.idc.co.za/media-room/articles/461-sa-is-africa-s-top-investment-destination>

# Transactional planning in international contracts

- Cross-border trade and investment requires transactional planning
  - Transactional planning include choices about preferred:
    - Dispute resolution mechanisms (mediation, arbitration, litigation or combinations)
    - Forum or seat of arbitration, and
    - Applicable law
- Choices are tactical, aimed at minimizing risks associated with cross-border trade and investment
  - Risks include:
    - Arbitration or litigation in unfavorable forum, or
    - Uncertainty as to the applicable law
- Ineffective/no choice of law increases parties' transaction and litigation risks

# Choice of law in international contracts

Choice of law is...

- ....**important**: parties can enhance legal certainty and predictability of their transaction
  - Effectiveness of the transaction
  - Costs of transactions and its economical viability
- ... **transactional risk assessment**: parties can manage risk inherent in cross-border commercial activities
- ... **complex**: multi-jurisdictional transactions require parties to consider the international dimension of the transaction

# Hague Principles on Choice of Law in International Commercial Contracts

## The Hague Principles:

- Are general principles concerning the choice of law in international commercial contracts
- Affirm the principle of party autonomy

## They may be used:

- As a model for national, regional, supranational, international instruments
  - Current legislative projects in Paraguay and South Korea
- To interpret, supplement and develop rules of private international law
- By courts and by arbitral tribunals

# Progress of the work to date

## Mandate (2006)

- Special Commission on General Affairs and Policy of the Conference invites the PB to prepare a feasibility study: to consider the need for the development of an instrument on choice of law in contracts

2006

2007-9

## Working Group Meetings

- 21-22 January, 15-17 November 2010
- 28-30 June 2011, 24-26 June 2013
- 27-28 January 2014

2010-11

2012

## Special Commission (12-16 November 2012)

- Unanimously approved a revised version of the Draft Hague Principles
- Made recommendations for the finalisation of the Draft Hague Principles and Commentary

2013

## Commentary

- Working Group meeting (June 2013)
- Revised Commentary submitted to Members for consultation (22 November 2013)
- Draft Principles and Commentary submitted to Members for approval in early March 2014

2014

2015

## Feasibility studies & establishment of a Working Group

- Research into existing instruments on choice of law in international contracts
- Comparative study on choice of law with focus on international commercial arbitration
- Feasibility study and follow-up notes
- Working Group established

## Council on General Affairs and Policy of the Conference (8-10 April 2014)

- Working Group to undertake the editorial finalisation of the Principles in the two official languages.
- Members invited to submit comments on the changes to the draft Commentary (by 31 August 2014)

## Approval

Complete instrument (including Commentary) await approval by the Conference's Council

# Hague Principles on Choice of Law in International Commercial Contracts

## Commercial contract

- Each party is acting in the exercise of its trade or profession [Article 1, Para 1]
- Principles do not apply to consumer or employment contracts
- Other excluded matters [Article 1, Para 3]

## International contract

- A contract is international unless the parties have their establishments in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State.

## Broad concept of “contract”

- Principles govern a wide range of contractual matters, including pre-contractual obligations [Article 9]

# Hague Principles on Choice of Law in International Commercial Contracts

- Underpinning principle > choice of law by the parties
  - No connection between the law chosen and the parties to the transaction needed
  - Principles allow *depeçage* (the application of different laws to different parts of a contract)
  - Parties can change the law or rule at any time (while respecting third party rights)
  - Support severability between the choice of law clause of the contract and the contract itself
  - No formal requirement except for stipulation of the parties themselves
  - Exclude the principle of *renvoi*: the reference to a substantive law is without conflicts of law rules, unless parties expressly provide otherwise

# Hague Principles on Choice of Law in International Commercial Contracts

- Support the choice of law and of “rules of law”, provided certain parameters are respected:
  - Rules of law must be
    - generally accepted on an international, supranational or regional level
    - a neutral and balanced set of rules,
  - Law of the forum does not provide otherwise > law maker to decide when implementing the Principles.

[Article 3]

# Hague Principles on Choice of Law in International Commercial Contracts

- Reinforce the parties' ability to make express or tacit choice
  - This applies with respect to a choice of law or any modification of a choice of law
  - The choice or modification must be made:
    - Expressly, or
    - appear clearly from the provisions of the contract or the circumstances
  - An agreement between parties to confer jurisdiction on a court or an arbitration agreement to determine a dispute under the contract is not in itself equivalent to a choice of law.

[Article 4]

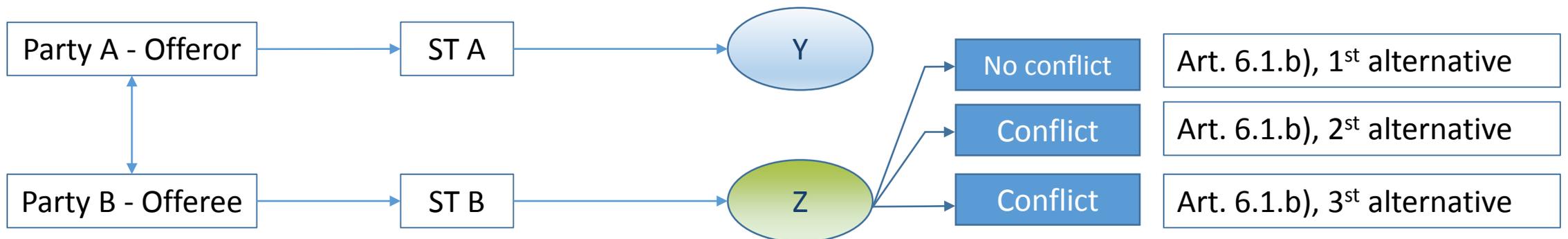
# Hague Principles on Choice of Law in International Commercial Contracts

## Consent by the parties [Article 6.1.a) and 6.2]

- The purported law of the contract decides whether parties agreed on a choice of law
- Reasonability test

## Battle of the forms [Article 6.1.b)]

- Rule to identify the purportedly agreed law where parties used standard terms (ST)



# Hague Principles on Choice of Law in International Commercial Contracts

- No interference with overriding mandatory rules and public policy
  - Article 11 sets out appropriate limitations on the application of the parties' chosen law
  - Specific rules for either adjudication by courts or arbitral tribunals
  - Distinction made between mandatory norms and public policy (*ordre public*), but no definition given.

## For courts:

- Reference to the mandatory provisions of the law of the forum [Article 11.1] and the mandatory provisions of the law of another State [Article 11.2], as well as the public policy of the forum [Article 11.3] or of a State the law of which would be applicable in the absence of a choice of law [Article 11.4].

## For arbitral tribunals:

- Status quo: referral to rules applicable in the arbitration context [Article 11.5]

[Article 11]

# Hague Principles on Choice of Law in International Commercial Contracts

... as applicable in an international commercial arbitration setting

- They do not address the law governing *arbitration agreements* [Article 1.3.b)]
- In line with contemporary arbitration rules, the contract can be governed by “rules of law” [Article 3]
- Choosing the seat of the arbitration can only be indicative of a tacit choice of the law made by the parties; it is in itself not a choice of law [Article 4]
- Public policy or overriding mandatory provisions are applicable if the tribunal is entitled or required to do so [Article 11.5]

Further information is available here>

([http://www.hcch.net/index\\_en.php?act=text.display&tid=49](http://www.hcch.net/index_en.php?act=text.display&tid=49))

Thank you

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