

## THE HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS

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**ABSTRACT:** *This paper focuses on analysing the most important provisions of the Hague Principles on Choice of Law in International Commercial Contracts<sup>3</sup>, which represent the first normative soft-law instrument developed and approved by the Hague Conference on Private International Law.<sup>4</sup> This novelty in private international law and in the field of contract law, provides significant changes in the applicable law in international commercial contracts. The paper aims to review the Hague Principles with a special focus on the principle of “party autonomy” and choice of law and the way these concepts are elaborated within the Hague Principles.*

**KEYWORDS:** Hague principles, international commercial contracts, party autonomy, choice of law.

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### INTRODUCTION

The Hague Principles on Choice of Law in International Commercial Contracts (hereinafter referred to as “The Hague Principles”) represent the set of principles which may be applicable in cross-border commercial matters and serve as a source for further legal developments in this area, or the improvement of the in force international and european legislation. The Hague Principles were approved on 19 March 2015, by the Members of the Hague Conference on Private International Law. The work started on 2016 when the Special Commission on General Affairs and Policy of the Conference decided to invite the Permanent Bureau to prepare a feasibility study on the development of an instrument concerning choice of law in international contracts<sup>5</sup> and was followed by the preparation of the draft of the feasibility studies and Draft Commentary on the Draft Hague Principles on the Choice of Law in International Contracts. The Hague Conference emphasized the importance of sectorial codification and consolidation of choice of law agreements in international contracts<sup>6</sup>.

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<sup>3</sup> The Hague Principles on Choice of Law in International Commercial Contracts were formally approved on 19 March 2015, by the Members of the Hague Conference on Private International Law.

<sup>4</sup> The Hague Conference on Private International Law Permanent Bureau, *Principles on Choice of Law in International Commercial Contracts*, (2015) p. 8, available at: <https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf>.

<sup>5</sup> Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference, *Preliminary Document no 11 of June 2006 for the Attention of the Council of April 2007 on General Affairs and Policy of the Conference*, p.3, available at: <https://assets.hcch.net/docs/b8be1cb6-e8b7-4f5b-8ecc-45a985f8276d.pdf>.

<sup>6</sup> Permanent Bureau of the Hague Conference on Private International Law, “Choice of Law in International Commercial Contracts: Hague Principles?”, (2010), *Uniform Law Review*, p.883.

The Hague Principles<sup>7</sup> aim at promoting party autonomy and legal certainty in international commercial contracts and enhancing predictability in cross-border commerce matters. The Hague Principles are the first non-binding instrument developed by the Hague Conference on Private International Law, which can also be considered as a soft law code. There are various soft law codes, not binding in any state, neither for any firm or individuals<sup>8</sup>, but the intellectual and transnational weight of these remarkable projects cannot be ignored<sup>9</sup>, such as UNIDROIT's Principles of International Commercial Contracts (2010)<sup>10</sup>. With regard to the recognition of party autonomy in choice of law in international commercial contracts, they can be considered as an international code of current best practice<sup>11</sup>.

The Preamble of the Hague Principles states that: “1. *This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.* 2. *They may be used as a model for national, regional, supranational, or international instruments.* 3. *They may be used to interpret, supplement, and develop rules of private international law.* 4. *They may be applied by courts and by arbitral tribunals*”.

From the analysis of the above-mentioned provision, it is evident that these principles do not have a binding character, they do not impose obligations for application in international contracts, but definitely represent a guide to uniform or harmonise the rules applicable to cross border commercial matters. It is important to mention that the Roma I Regulation on the law applicable to contractual obligations<sup>12</sup> remains applicable even when the European Union is one of the contracting parties, thus by not having an interference with Hague Principles, within the European Union<sup>13</sup>.

These principles do not comprise any legal instrument such as a convention, but are foreseen as a soft law in order to avoid any risk of conflict of standards with regional binding instruments<sup>14</sup>. They consist in one Preamble and 12 Articles governing issues like rules of law, express and tacit choice, formal validity of the choice of law, agreement on the choice of law and battle of forms, severability, exclusion of renvoi, scope of the chosen law, overriding mandatory rules and public policy (*ordre public*) and establishment, in order to not exclude

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<sup>7</sup> For a more comprehensive and detailed legal analysis of the Hague Principles on Choice of Law in International Commercial Contracts see: María Mercedes Albornoz & Nuria González Martín, “Towards the uniform application of party autonomy for choice of law in international commercial contracts”, (2016), *Journal of Private International Law*, 12:3, 437-465, DOI: [10.1080/17441048.2016.1234812](https://doi.org/10.1080/17441048.2016.1234812).

<sup>8</sup> Mathias Siems, “Comparative Law”, (2018), *Cambridge University Press*, p.315.

<sup>9</sup> Neil Anderws, “Contract Law”, (2011), *Cambridge University Press*, p.616.

<sup>10</sup> Available at: <https://www.unidroit.org/publications/513-unidroit-principles-of-international-commercial-contracts>. See also: S.Vogenauer and J. Kleinheisterkamp (Eds.) “Commentary on the Unidroit Principles of International Commercial Contracts (PICC)”, (2009), *Oxford University Press*.

<sup>11</sup> The Hague Conference on Private International Law Permanent Bureau, *Principles on Choice of Law in International Commercial Contracts*, (2015) p. 26, available at: <https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf>.

<sup>12</sup> 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) OJEU L 177/6, 4 July 2008.

<sup>13</sup> Permanent Bureau of the Hague Conference on Private International Law, Consolidated Version of Preparatory Work Leading to the Draft Hague Principles on the Choice of Law in International Contracts, (2016), p.2.

<sup>14</sup> Lukáš Grodl, “International Perspective on Party Autonomy in Contractual Choice of Law”, (2019), *Social Science Research Network*, p.54.

specific rules of a crucial importance, being applicable in a certain state and in certain circumstances.

Even though there are only 12 Articles of this novelty in the field of contract law, each of the Articles is explained and analysed in detail in the Commentary<sup>15</sup>. The Hague Principles represent a source of inspiration for further drafting and developing the national, regional, supranational, or international legal instruments, especially in those countries which do not recognize the party autonomy, for instance Latin America.

With regard to the scope of application of the Hague Principles, these principles are applicable in international commercial contracts, because in this type of contracts the principle of party autonomy is widely accepted and implemented. As a result, the principles are not applicable to other non-commercial contracts such as employment or consumer contracts, explicitly envisaged in the Article 1 of the Principles. The Hague Principles do not address the law governing the capacity of natural persons, arbitration agreements and agreements on choice of court, companies or other collective bodies and trusts, insolvency, the proprietary effects of contracts and the issue of whether an agent is able to bind a principal to a third party<sup>16</sup>.

It is important to mention that the aim is to enhance and establish the party autonomy in those international contracts where the contractual parties act in their professional capacity, in order to minimise or avoid matters of abuse<sup>17</sup>. This exclusion on party autonomy is justified by the need to protect the weaker contractual party in a commercial contract and by the fact that the substantive law of many states subjects consumer and employment contracts to special protective rules from which the parties may not derogate<sup>18</sup>.

### **The concept of party autonomy**

The concept of party autonomy is one of the most widely accepted principles of the private international law<sup>19</sup>. The application of “party autonomy”<sup>20</sup> is of a high importance in commercial contracts, especially in those concerning cross-border matters. It allows the contractual parties to choose the law that will govern the contract and will regulate every aspect of the contract. This concept, which is not yet applicable in all international commercial contracts, is further developed within the Hague Principles.

As far as the quality of every Private International Law system is concerned, the criteria does not depend on how much it promotes party autonomy, but rather on whether it provides the necessary safeguards to ensure the fact that the contractual parties are indeed autonomous.

<sup>15</sup> Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.

<sup>16</sup> Article 1 of the Hague Principles.

<sup>17</sup> The Hague Conference on Private International Law Permanent Bureau, *Principles on Choice of Law in International Commercial Contracts*, (2015), no. 1.4, available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.

<sup>18</sup> Ibid. no.1.10.

<sup>19</sup> See Russell J Weintraub, “Functional developments in choice of law for contracts”, (1984), *Recueil des cours (Hague Academy of International Law)*, pp. 239-306.

<sup>20</sup> For a detailed analysis of the concept of party autonomy see: Justin Monsenepwo, “Contribution of the Hague Principles on Choice of Law in International Commercial Contracts to the codification of party autonomy under OHADA Law”, (2019), *Journal of Private International Law*, 15:1, 162-185, DOI: [10.1080/17441048.2019.1593092](https://doi.org/10.1080/17441048.2019.1593092).

These safeguards may include the choice of law clauses to be in accordance with certain substantive or procedural conditions, non-violation of mandatory rules and exemption of certain matters or contract from the scope of party autonomy<sup>21</sup>.

As it was previously mentioned, the Hague Principles promote the party autonomy in the international commercial contracts. The Hague Principles itself do not provide an explicit definition of the concept of international commercial contracts, but it derives from the analysis of the preamble and the article 12 which provides that: “*If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion*”.

The Hague Principles indicate that the contract is governed by the law chosen by the parties. The parties may choose either the law applicable to the whole contract or to only part of it, or different laws for different parts of the contract. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.

It is important to mention that no connection is required between the law chosen and the parties or their transaction<sup>22</sup>. The Hague Principles promote the party autonomy as an essential principle which give the contractual parties the right to select the applicable law in accordance with their will, even though they do also provide some limited exceptions, thus by not providing the absolute character of the freedom of contract<sup>23</sup>.

### **Non-state law and choice of law**

As indicated by the Article 3 of the Hague Principles, the law chosen<sup>24</sup> by the parties may be, rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, and this will not be applied if the law of the forum provides otherwise. According to the Commentary, the rule of law chosen by the parties must have general recognition beyond a national level, thus the "rules of law" cannot refer to a set of rules contained in the contract itself, or to one party's standard terms and conditions, or to a set of local industry-specific terms<sup>25</sup>. This suggests that formal validity of a choice of law is not foreseen as a requirement within the Hague Principles<sup>26</sup>. Notably the aspect of identification the “rule of law” that will govern the contract is addressed by the Hague Principles, meanwhile the aspects related to interpretation and proof will remain a prerogative of the rules applicable to private international law<sup>27</sup>.

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<sup>21</sup> Symeon c. Symeonides, “The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments”, (2013), *The American Journal of Comparative Law*, pp. 873-899.

<sup>22</sup> Article 2 of the Hague Principles.

<sup>23</sup> Michael Douglas and Nicholas Loadsman, “The impact of the Hague Principles on Choice of Law in International Commercial Contracts”, (2018), *Melbourne Journal of International Law*, p.6.

<sup>24</sup> Generally see: Reza Beheshti, “*The absence of choice of law in commercial contracts: problems and solutions*”, (2019), *Uniform Law Review*, pp. 497 - 519.

<sup>25</sup> The Hague Conference on Private International Law Permanent Bureau, *Principles on Choice of Law in International Commercial Contracts*, (2015), no. 3.4.

<sup>26</sup> See Jan L. Neels and Eesa A. Fredericks, “Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts”, (2011), *De Jure Law Journal*, pp.101-110.

<sup>27</sup> Genevieve Saumier, “The Hague Principles and the Choice of Non-State “Rules of Law” to Govern an International Commercial Contract”, (2014), *Brooklyn Journal of International Law*, p.23.

As a generally accepted source of “rules of law” the commentary suggests the application of those instruments which are applied solely as a result of the parties` choice of law. The commentary provides three options which fulfil the first criteria, those which are developed by international bodies and serve as international, supranational or regional sources: the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>28</sup>, the UNIDROIT Principles and the Principles of European Contract Law<sup>29</sup>.

Article 3 of the Hague Principles imposes several restrictions related to its application: Firstly, the rules of law must come as a “set of rules” and this “set of rules” must be balanced and neutral. The Hague Principles require the application of the “set of rules”, and notably the contractual parties should not be allowed to pick and choose individual rules. They may choose non-state law in cases where it reflects some similarities with the state law. It is evident that for different parts of their contract, the parties can choose different laws referring to the process of dépeçage<sup>30</sup>, which is reflected in the Article 2(2) of the Hague Principles. This set of rules may be construed as a coherent array of provisions to under which extent may the contract be construed, behaved upon, and fulfilled<sup>31</sup>. Under the Hague Principles, the parties` agreement should be as predictable and as unlimited as possible, also its replacement concerning public policy and overriding should be marginal<sup>32</sup>.

With regards to the two other restrictions, that the set of rules must be neutral and balanced, the idea behind requiring these two attributes for the Hague Principles may have been that parties can choose non-state law only when it has been formulated by a neutral agency<sup>33</sup>. The broad language is consistent with the approach of some arbitration rules<sup>34</sup>. The neutrality criteria is related to the source of the “rules of law”, which is considered neutral if it consists in the one that represents diverse legal, political and economic perspectives<sup>35</sup>.

Also, another requirement is that the general acceptance must occur on a regional, supranational or international level. The problem is that regularly, party autonomy is related to

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<sup>28</sup> United Nations Convention on Contracts for the International Sale of Goods entered into force on 1 January 1988. Text available at: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

<sup>29</sup> The Principles of European Contract Law 2002 (Parts I, II, and III), available at: <https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/portrait.pdf>.

<sup>30</sup> Ralf Michaels, “Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts”, in *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Kai Purnhagen & Peter Rott eds., 2014), p.15.

<sup>31</sup> Lukáš Grodl, “International Perspective on Party Autonomy in Contractual Choice of Law”, (2019), *Social Science Research Network*, p.65.

<sup>32</sup> Andreas Schwartze, “New Trends in Parties' Options to Select the Applicable Law? The Hague Principles on Choice of Law in International Contracts in a Comparative Perspective”, (2015), *University of St.Thomas Law Journal*, p.91.

<sup>33</sup> Ralf Michaels, Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts, in *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Kai Purnhagen & Peter Rott eds., 2014), p.16.

<sup>34</sup> Michael Douglas and Nicholas Loadman, “The impact of the Hague Principles on Choice of Law in International Commercial Contracts”, (2018), *Melbourne Journal of International Law*, p.9.

<sup>35</sup> The Hague Conference on Private International Law Permanent Bureau, *Principles on Choice of Law in International Commercial Contracts*, (2015), no. 3.11.

state laws that are not accepted on a regional or general level<sup>36</sup>. Since the Hague Principles are based on non-uniform rules of interpretation, it may allow non-uniform outcomes, even if these Principles will be widely implemented<sup>37</sup>. Other limitations on the choice of law are imposed by public policy and overriding mandatory rules<sup>38</sup> reflected in the Article 11<sup>39</sup> of the Hague Principles, by indicating a discretionary standard<sup>40</sup>.

## CONCLUDING REMARKS

The Hague Principles of International Commercial Contracts provide an asset in indicating the development of the rules of the private international law. As far as the matters of choice of law are concerned, among the novelties that the Hague Principles brought we can mention the enhancement of the principle of party autonomy although with several exceptions.

Taking all of the foregoing considerations into account and the analysis of the provisions of the Hague Principles, it is obvious that, despite of the fact that these Principles aim at enhancing the party autonomy, they still do not sufficiently overcome the shortcomings related to the complex issue when the law chosen by the contractual parties invalidates the contract.

In addition, it is not all clear whose recognitions matters for the “generally accepted” requirement, imposed by the Article 3 of the Hague Principles, in what way the chosen law must be generally accepted and how much recognition is required. Thus, general acceptance on an international, supranational, or regional level, remains an interpretative problem. All of this suggests that the “generally accepted” requirement must be understood in substantive and not in a formal way. Also, there is no guarantee that the formula drawn up by the Hague Principles will secure uniformity in drafting and interpretation of the international commercial contracts.

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<sup>36</sup> Ralf Michaels, Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts, in *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Kai Purnhagen & Peter Rott eds., 2014), p.17.

<sup>37</sup> Peter Winship, “The Hague Principles, the CISG, and the “Battle of Forms”, (2015), *Penn State Journal of Law & International Affairs*, p.161.

<sup>38</sup> “Principles on Choice of Law in International Commercial Contracts (Hague Principles)”, (2015), *Workshop on Effective Enforcement of Business Contracts and Efficient Resolution of Business Disputes Through the Hague Choice of Court Agreements Convention*.

<sup>39</sup> For a detailed analysis of Article 11 of the Hague Principles see: Andrew Dickinson, “Oiling the machine: overriding mandatory provisions and public policy in the Hague Principles on Choice of Law in International Commercial Contracts”, (2017), *Uniform Law Review*, pp.402–421, <https://doi.org/10.1093/ulr/unx024>.

<sup>40</sup> Linda J. Silberman, “Lessons for the USA from the Hague Principles”, (2017), *Public Law & Legal Theory Research Paper Series Working Paper*, p.7.

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