

**DRAFT HAGUE PRINCIPLES AS APPROVED BY THE
NOVEMBER 2012 SPECIAL COMMISSION MEETING ON CHOICE OF LAW IN
INTERNATIONAL CONTRACTS AND RECOMMENDATIONS FOR THE COMMENTARY**

Draft Hague Principles on the Choice of Law in International Contracts

The Preamble

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.

Article 1 – Scope of the Principles

1. These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.
2. For the purposes of these Principles, 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.
3. These Principles do not address the law governing –
 - a) the capacity of natural persons;
 - b) arbitration agreements and agreements on choice of court;
 - c) companies or other collective bodies and trusts;
 - d) insolvency;
 - e) the proprietary effects of contracts;
 - f) the issue of whether an agent is able to bind a principal to a third party.

Article 2 – Freedom of choice

1. A contract is governed by the law chosen by the parties.
2. The parties may choose (i) the law applicable to the whole contract or to only part of it and (ii) different laws for different parts of the contract.

3. 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.
4. No connection is required between the law chosen and the parties or their transaction.

Article 3 – Rules of law

In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

Article 4 – Express and tacit choice

A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.

Article 5 – Formal validity of the choice of law

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Article 6 – Agreement on the choice of law

1. Subject to paragraph 2,
 - a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to;
 - b) if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in those terms applies; if under these laws different standard terms prevail, or if no standard terms prevail, there is no choice of law.
2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.

Article 7 – Severability

A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.

Article 8 – Exclusion of renvoi

A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.

Article 9 – Scope of the chosen law

1. The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to –
 - a) interpretation;

- b) rights and obligations arising from the contract;
- c) performance and the consequences of non-performance, including the assessment of damages;
- d) the various ways of extinguishing obligations, and prescription and limitation periods;
- e) validity and the consequences of invalidity of the contract;
- f) burden of proof and legal presumptions;
- g) pre-contractual obligations.

2. Paragraph 1 e) does not preclude the application of any other governing law supporting the formal validity of the contract.

Article 10 – Assignment

In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor –

- a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs the mutual rights and obligations of the creditor and the assignee arising from their contract;
- b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs (i) whether the assignment can be invoked against the debtor, (ii) the rights of the assignee against the debtor, and (iii) whether the obligations of the debtor have been discharged.

Article 11 – Overriding mandatory rules and public policy (*ordre public*)

1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude application of a provision of the law chosen by the parties if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.

5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

Article 12 – Establishment

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.

Agreed additions to be inserted to the commentary in Preliminary Document No 1 of October 2012 for the attention of the Special Commission of November 2012 on Choice of Law in International Contracts

General

- Use of capital letters for "State"
- Illustrations will be required for all provisions

Preamble

- The function of interpretation is without prejudice to existing instruments
- Commentary should include a reference to the Vienna Convention on the Law of Treaties (with regard to interpretation)

Article 1(1) – Scope of the Principles

- Commentary should deal with online transactions and the circumstances of the parties' trade or profession

Article 1(3)

- Further detail required on excluded matters, including legal capacity vs authority, and internal operation of trusts

Article 2(3) – Freedom of choice

- Limitations of choice of law – clarification required on the timing of a modification of a choice
- In general: Provision is not intended to override procedural rules of the forum

Article 2(4)

- Certain States require a substantial connection with the chosen law

Article 3 – Rules of law

- The Commentary should address the following issues:
 - commercial need; recognised in arbitration; novelty for state court proceedings
 - choice of rules of law should be made with open eyes; commentary should present benefits and potential dangers in a balanced way
 - "generally accepted": criteria such as origin ("trusted source"); context; how widely spread
 - "set of rules": reasonably comprehensive in nature (examples for rules that are generally accepted but not a "set" of rules)
 - neutral and balanced: not imposed by market power, not one sided
 - address issues such as gap filling
 - drafting should take into account the flexibility to adapt to future developments
 - Clarify "law of the forum provides otherwise"

Art 4 – Express and tacit choice

- Non-oral modification clause
- A choice of court agreement is only one of many possible factors that may lead to tacit choice of law. Not determinative but may be relevant

Article 5 – Formal validity of the choice of law

- Clarify relationship between Article 4 (implied choice of law) and Article 5 (formal validity)

Article 6 – Agreement on the choice of law

- Illustrations on the battle of forms required
- Address further situations of possibly conflicting choices of law (e.g., when CISG and national law regime apply)
- Address the duty of the parties to plead and co-operate with regard to finding and comparing the applicable law

Article 8 – Exclusion of *renvoi*

- Clarify that exclusion relates to conflict of law rules (not private international law in the broader sense)

Article 9(1) – Scope of chosen law

- Why are the issues listed in Article 9(1) expressly mentioned (while others are not)?
- Set out a comparative overview of the listed aspects of the contract regarding characterisation / qualification, in particular with regard to the different approaches in delimitating substance and procedure
- Relationship with the procedural rules of the forum
- The reference to "*dommages et intérêts / damage-intérêts*"

Article 9(2)

- The relationship between scope of the chosen law and formal validity

Article 10 - Assignment

- Additional illustrations of situations where the law applicable to the parties' rights is determined by two or more related contracts

Article 11 – Overriding mandatory rules and public policy (*ordre public*)

- Differences in definition of mandatory rules (e.g., Rome I and others)
- Illustrations regarding the exceptional nature ("over-enforcement") of the overriding mandatory rules and the application of public policy