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The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments†

This Article discusses The Hague Principles on Choice of Law for International Contracts, *a new soft-law instrument recently adopted by the Hague Conference of Private International Law.*

The Principles will apply to "commercial" contracts only, specifically excluding consumer and employment contracts. For this reason, the Principles adopt a decidedly liberal stance toward party autonomy, exemplified inter alia by a strong endorsement of non-state norms. Such a liberality would be unobjectionable, indeed appropriate, if a contract's "commerciality" alone would preclude the disparity of bargaining power that characterizes consumer and employment contracts. The fact that—as franchise contracts illustrate—this is not always the case makes even more necessary the deployment of other mechanisms of policing party autonomy. The Principles provide these mechanisms under the rubric of public policy and mandatory rules, but their effectiveness is not beyond doubt.

The Principles are intended to serve as a model for other international or national instruments and as a guide to courts and arbitrators in interpreting or supplementing rules on party autonomy. Like other international instruments, the Principles are as good as the consensus of the participating delegations would allow. But the real test of success for these Principles depends not on academic approbation but on their reception by contracting parties, courts, and arbitrators. While it is too early to tell whether the Principles will pass this test, there is reason for optimism.

In any event, and regardless of whether they will be widely accepted, the Principles will enrich the quality of the international discourse by providing a guiding light in the search for proper solutions to the problems encountered in honoring, and defining the limits of, contractual choice of law in international contracts. This alone

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would be a significant contribution to the advancement of the art and science of law-shaping.

I. INTRODUCTION

In November 2012, a Special Commission of the Hague Conference of Private International Law adopted a new instrument entitled *Hague Principles on Choice of Law for International Contracts* (hereinafter "Principles").[1] This Article is a brief preliminary commentary on certain aspects of this instrument.[2]

The Hague Conference has produced several conventions on particular contracts,[3] but not one covering contracts in general. A feasibility study conducted thirty years ago[4] led to the conclusion that the chances of ratification of a choice-of-law convention for contracts in general were very slim and the project was abandoned. The Conference revisited the matter in 2006, but this time it set a much less ambitious goal: a non-binding instrument (e.g., "Principles") covering only part of the subject—contractual choice of law, or party autonomy.

The Principles are a relatively short document, consisting of only twelve articles and a Preamble. However—and this is a welcome novelty in the work of the Hague Conference—the Principles are accompanied by extensive, excellent article-by-article commentary,[5]

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1. *See* Draft Hague Principles as approved by the November 2012 Special Commission Meeting on Choice of Law in International Contracts, (Nov. 12-16, 2012), *available at* http://www.hcch.net/upload/wop/contracts2012principles e.pdf. *All Hague Conference documents referred to hereinafter can be found at the website of the conference at the link "Choice of law in international contracts"* http://www.hcch.net/indexen.php?act=teext.display&tid=49.

2. I had the honor of participating in the session of the Special Commission as the representative of the then Presidency of the European Union Council. However, I wrote this essay in my preferred capacity as an independent thinker. Consequently, the views expressed here are my own and should not be attributed to the EU Council or any government or other entity.

3. *See* Convention of June 15, 1955 on the Law Applicable to International Sales of Goods (in force in five Countries); Convention of Apr. 15, 1958 on the Law Governing Transfer of Title in International Sales of Goods; Convention of Apr. 15, 1958 on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods; Convention of Nov. 25, 1965 on the Choice of Court; Convention of Mar. 14, 1978 on the Law Applicable to Agency (in force in four countries); Convention of Dec. 22, 1986 on the Law Applicable to Contracts for the International Sale of Goods; Convention of July 5, 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary; Convention of June 30, 2005 on Choice of Court Agreements. For the text and status of these conventions, *see* http://www.hcch.net/index_en.php?act=conventions.listing.

4. *See* Hans van Loon, Feasibility study on the law applicable to contractual obligations, Preliminary Document E of December 1983, HAGUE CONFERENCE OF PRIVATE INTERNATIONAL LAW: PROCEEDINGS OF THE FIFTEENTH SESSION, v. I, 98 (1983).

5. *See* Consolidated Version of Preparatory Work Leading to the Draft Hague Principles on the Choice of Law in International Contracts (Prel. Doc. No 1), drawn up by the Permanent Bureau (Oct. 2012) [hereinafter *Commentary*], *available at* http://www.hcch.net/upload/wop/contracts_2012pd01e.pdf.

written by a "Working Group" of 19 internationally acclaimed scholars and practitioners under the outstanding leadership of Professor Daniel Girsberger, who also chaired the meeting of the Special Commission.[6] The commentary should be particularly useful in understanding and correctly applying the Principles.

II. PRELIMINARIES: WHY THIS PROJECT, AND WHY NOT MORE?

The first preliminary question regarding this project is whether it would fill a real need. After all, party autonomy is not only an ancient principle,[7] but also one of the most widely accepted paradigms of contemporary private international law (PIL).[8] Most recent PIL codifications, especially those influenced by the Rome Convention,[9] have assigned to this principle a very prominent role. Moreover, several codifications, along with international or regional conventions and Regulations, have extended this principle beyond its birthplace—the field of contracts—to areas such as succession,[10] matrimonial

6. The members of the Working Group are: N.B. Cohen (USA), C. Croft (Australia), S.E. Darankoum (Canada), A. Dickinson (U.K.), A. Sadek El Kosheri (Egypt), B. Fauvarque-Cosson (France), L. Gama E. Souza Jr. (Brazil), F.J. Garcimartín Alférez (Spain), D. Girsberger (Switzerland), Y. Guo (China), M.E. Koppenol-Laforce (Netherlands), D. Martiny (Germany), C. McLachlan (New Zealand), J.A. Moreno Rodríguez (Paraguay), J.L. Neels (South Africa), Y. Nishitani (Japan), R.F. Oppong (Ghana), G. Saumier (Canada), and I. Zykin (Russia). Both the Working Group and the Special Commission benefitted greatly from the outstanding preparatory and coordinating work of Dr. Marta Pertegás, First Secretary of the Hague Conference. The commentary will be completed and finalized later in 2013.

7. *See* SYMEON SYMEONIDES & WENDY C. PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 442 (3d ed. 2012) (referring to the principle of party autonomy as "almost as ancient as conflicts law itself" and describing its first appearance in a decree issued in Hellenistic Egypt in 120 B.C.).

8. *See* Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS 239, 271 (1984) (describing party autonomy as "perhaps the most widely accepted private international rule of our time.").

9. In addition to countries that later joined the European Union and are now bound by the Rome I Regulation (such as Bulgaria, Estonia, Lithuania, Romania, and Slovenia), the Rome Convention has influenced the PIL codifications of Armenia, Belarus, Croatia, FYROM, Japan, South Korea, Kyrgyzstan, Liechtenstein, Moldova, Quebec, Russia, Switzerland, Taiwan, Turkey, Ukraine, and Venezuela, as well as the Inter-American Convention on the law applicable to international contracts of 1994 ("Mexico Convention"). For citations and discussion, see SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS (Oxford University Press, forthcoming 2013) [hereinafter SYMEONIDES, CODIFYING CHOICE OF LAW].

10. *See, e.g.*, Art. 5 of the Hague Convention of Aug. 1 1989 on the Law Applicable to Succession to the Estates of Deceased Persons; Art. 22 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of July 4, 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; Andrea Bonomi, *Testamentary Freedom or Forced Heirship? Balancing Party Autonomy and the Protection of Family Members*, 2010 NEDERL. INT'L PRIV. 605 (2010); Christa Roodt, *Party Autonomy in International Law of Succession: A Starting Point for a Global Consensus*, 2 J. SO. AFRICAN L. 241 (2009).

property regimes,[11] even family law[12] and torts.[13] At least in the area of contracts, there is a high degree of convergence among the various systems in honoring party autonomy. Whatever differences exist, they mostly concern the limitations, and to a lesser extent the modalities, of this principle.

Nevertheless, there are still countries, particularly in Latin America,[14] which do not recognize party autonomy. The Principles should be helpful to those countries, but should also assist in drafting or revising national codifications or regional or international instruments in the future.[15] According to their Preamble, the Principles "may be used as a model for national, regional, supranational or international instruments."[16] But the Principles are more ambitious. They aspire to be "used to interpret, supplement and develop rules of private international law,"[17] even in countries that do recognize party autonomy.

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11. *See, e.g.*, Art. 3 of the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes; MARITAL AGREEMENTS AND PRIVATE AUTONOMY IN COMPARATIVE PERSPECTIVE (Jens M. Scherpe ed., 2011);. PARTY AUTONOMY IN INTERNATIONAL PROPERTY LAW (Roel Westrik & Jeroen van der Weide eds., 2011); Torstein Frantzen, *Party Autonomy in Norwegian International Matrimonial Property Law and Succession Law*, 12 Y.B. PRIV. INT'L L. 483 (2010); Julia H. McLaughlin, *Premarital Agreements and Choice of Law: "One, Two, Three, Baby, You and Me,"* 72 MO. L. REV. 793 (2007); Anne Sanders, *Private Autonomy and Marital Property Agreements*, 59 INT'L & COMP. L. Q. 571 (2010).

12. *See, e.g.*, Art. 5 of Council Regulation (EU) No 1259/2010 of Dec. 20, 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation; Arts. 7-8 of the Hague Protocol of Nov. 23, 2007 on the Law Applicable to Maintenance Obligations; Art. 15 of Council Regulation (EC) No 4/2009 of Dec. 18, 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (incorporating the Hague Protocol); Janeen Carruthers, *Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law?*, 61 INT'L & COMP. L.Q. 881 (2012); Erik Jayme, *Party Autonomy in International Family and Succession Law: New Tendencies*, 11 Y.B. PRIV. INT'L L. 1 (2009).

13. *See, e.g.*, Art. 14 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II); Thomas M. de Boer, *Party Autonomy and its Limitations in the Rome II Regulation*, 9 Y.B. PRIV. INT'L L. 19 (2008); Felix Maultzsch, *Choice of Law and Jus Cogens in Conflict of Laws for Contractual Obligations*, 75 RABELSZ 60 (2011); Symeon C. Symeonides, *Party Autonomy in Rome I and II: An Outsider's Perspective*, 28(2) NEDERL. IPR. 191 (2010); Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861 (2009).

14. *See* MARÍA M. ALBORNOZ, LA DÉTERMINATION DE LA LOI APPLICABLE AUX CONTRATS INTERNATIONAUX DANS LES PAYS DU MERCOSUR 64 *et seq.* (2006);), DERECHO DE LOS CONTRATOS INTERNACIONALES EN LATINOAMÉRICA, PORTUGAL Y ESPANA (Carlos Esplugues Mota, Daniel Hargain & Guillermo Palao Moreno (eds., 2008); María M. Albornoz, *Choice of Law in International Contracts in Latin American Legal Systems*, 6 J. PRIV. INT'L L. 23 (2010).

15. *See* José A. Moreno Rodriguez & María M. Albornoz, *Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts*, 7 J. PRIV. INT'L L. 491 (2011).

16. *Principles*, Preamble.

17. *Id.*

The second preliminary question is why the Hague Conference has not taken the next step of covering the choice of applicable law in contracts that do not contain a choice of law by the parties. The official answer to this question is that this step will be taken at a later stage.[18] Realistically, however, there is reason to be pessimistic about the prospects of such an undertaking. The high degree of convergence that exists among the various systems on the issue of party autonomy is largely absent in selecting the applicable law in contracts that do not contain a choice-of-law clause. Although the systems that have been influenced by the Rome Convention follow more or less the same principles, this is not true of other systems. Consequently, it will be far more difficult to attain consensus on a broad instrument that would cover all choice-of-law issues in contract conflicts. The difficulty in attaining a consensus also explains why these Principles have been proposed as a "soft" instrument rather than as an eventually binding convention.

At the same time, the fact that the Principles cover *only* party autonomy creates the expectation of completeness; an expectation, in particular, that the instrument will answer not only the obvious and easy questions, but also the less obvious and more difficult ones. The Principles have met this expectation in several respects. For example, they break new ground by defining the status of non-state norms, so-called "rules of law."[19] Also, thanks in large part to the persistence and erudition of the Swiss delegation, particularly Professor Thomas Kadner Graziano, the Principles contain a new provision on the difficult problem of the "battle of forms."[20]

Still, the Principles would have been of even greater service had they addressed some additional complex questions, such as what to do when the law chosen by the parties invalidates the contract, in whole or in part. This is not as infrequent an occurrence as one might assume, precisely because many choice-of-law clauses are carelessly drafted.[21] For example, in a fair number of cases, the clause is simply copied from another contract without any research into the chosen law. In other cases, the party that drafts the clause imposes the choice of its home-state law, only to discover later that this law invalidates the contract. The solutions that courts and commentators

18. *See* Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Hague Conference (Apr. 7-9, 2010), *available at* http://www.hcch.net/upload/wop/genaff2010concl_e.pdf ("The Council noted that there was support in the Working Group for a comprehensive draft instrument also including rules applicable in the absence of choice. The Council confirmed that priority should be given to the development of rules for cases where a choice of law has been made.").

19. *See Principles*, Art. 3, discussed *infra* at VII.

20. *See Principles*, Art. 6.1(b).

21. For cases involving choice-of-law clauses invalidating the contract, in whole or in part, and for suggested solutions, *see* PETER HAY, PATRICK BORCHERS & SYMEON SYMEONIDES, CONFLICT OF LAWS 1134-35 (5th ed. 2010) [hereinafter HAY, BORCHERS & SYMEONIDES].

have developed for this problem vary from country to country, and sometimes within the same country.[22] The Principles could lead the way by suggesting an appropriate solution. The Principles could do likewise with regard to another problem which is also not uncommon in long-term contracts: what to do when the law chosen by the parties is changed—legislatively or judicially—between the time of the choice and the time of the dispute.

III. The Goal of the Principles

The Preamble states that the Principles "affirm" the notion of party autonomy "with limited exceptions."[23] The accompanying commentary is more emphatic. Reflecting the Council's mandate, the commentary repeatedly states that the goal is to "promote" party autonomy.[24] This is certainly a laudable goal. In the abstract, party autonomy is like motherhood: nobody is against it. Indeed, most commentators enthusiastically endorse it. However, party autonomy presupposes the *free will of both parties freely expressed.* Although this is a truism, it is often forgotten amidst the euphoria generated by eloquent rhetoric about individual and contractual freedom, and other majestic generalities.

My own perspective is more cautious, perhaps skeptical. It has been shaped by my experience in conducting an annual review of *all* American choice-of-law cases for the last twenty-six years.[25] During this time, I *had* to read several thousands of cases involving choice-of-law clauses, including many that illustrate how the noble principle of party autonomy can become a euphemism for taking advantage of weak parties. For this reason, my criterion for assessing the quality of a particular PIL system depends not on how much it *promotes* party autonomy, but rather on how clearly and fairly it delineates its parameters and on whether it provides the necessary safeguards to ensure that the parties are indeed "autonomous."

These parameters and safeguards can be expressed in several different ways. They include (1) exempting certain parties, contracts, or issues from the scope of party autonomy, or subjecting them to a protective regime; (2) requiring that the choice-of-law clause satisfy

22. *See id.*

23. *Principles*, Preamble.

24. *See Commentary*, § 6 (referring to the "one guiding idea: promoting the principle of party autonomy"); § 9 (referring to the Council's reiteration of "the need to reinforce party autonomy"); and § 10 (referring to "[t]he promotion of the principle of party autonomy" as "the Working Group's *leitmotiv* throughout the drafting phase."); § 86 (stating that "the promotion of party autonomy requires limiting the use of overriding mandatory rules and public policy to overcome provisions of the parties' chosen law.").

25. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 Am. J. Comp. L. 217 (2013), with citations to the surveys of the previous twenty-five years.

certain procedural, geographic, or substantive conditions; and (3) delineating the reach of party autonomy so as to not violate certain nonwaivable rules, usually included under the rubric of "mandatory rules" or public policy. The next section discusses the parameters and safeguards established by the Principles.

IV. PARAMETERS OF, AND LIMITATIONS TO, PARTY AUTONOMY

A. *"International" Contracts*

The opening sentence of the Preamble establishes the first important parameter of party autonomy, and of the Principles themselves, by stating that the Principles apply to "international commercial" contracts. Article 1 reiterates this parameter and then defines "international" contracts negatively by excluding what one might call purely domestic contracts. According to this definition, 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."[26]

The requirement of internationality is either explicitly stated in PIL conventions and codifications[27] or is implicit in the fact that, by definition, they apply only to international or multistate rather than domestic cases. One corollary of this requirement is that internationality cannot be based solely on the choice-of-law agreement.[28] This usually means that, in a domestic contract, a choice-of-law clause is either prohibited,[29] or it is subject to more stringent conditions, as in Rome I which provides that "where all other elements relevant to the situation . . . are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."[30]

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26. *Principles,* Art. 1(2). The term "establishment" was chosen during the meeting of the Special Commission to replace the term "place of business" which was used in the draft of the Working Group. Article 12 provides that, "[i]f 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 interplay between Article 1(2) and Article 12 generates some interesting possibilities regarding internationality.

27. *See, e.g.,* Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of Dec. 22, 1986, Art. 1.; Mexico Convention, Art. 1; Ukrainian codif. Arts. 5(6), 43; Vietnamese codif. Art. 769.

28. *See, e.g.,* Uruguayan draft codif. Art. 48 (providing that a "contract cannot be internationalized through the sheer will of the parties.").

29. *See, e.g.,* Ukrainian codif. Art. 5(6) (providing that a contractual choice of law is not allowed if the relationship has no foreign element).

30. Rome I, Art. 3(3). This provision rephrased slightly the corresponding article (Art. 3(3)) of the Rome Convention, which influenced the codifications of, *inter alia,* Bulgaria (Art. 93.5), Estonia (Art. 32.3), Germany (Art. 27.3), South Korea (Art. 25.4), Quebec (Art. 3111), and Russia (Art. 1210.5).

The general requirement for internationality is different from a specific requirement imposed by some systems which require that the state whose law is chosen must have a certain relationship with the contract or the parties. For example, Section 187(2) of the Restatement (Second), which is followed in most states of the United States, provides that, for issues that are beyond the parties' contractual power, the state of the chosen law must have a "substantial relationship"[31] to the parties or the transaction, or that there must be another "reasonable basis"[32] for the parties' choice.[33] Similarly, the Uniform Commercial Code, which is in force in all states of the United States, provides that the chosen state must bear a "reasonable relation" to the transaction.[34] The Spanish and Portuguese codifications, now superseded by Rome I, also required a connection with the chosen state.[35] Rome I imposes a geographic nexus requirement only for passenger contracts, and certain insurance contracts.[36]

However, most recent PIL codifications,[37] including two in the United States,[38] as well as international conventions,[39] have elimi-

31. AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND): CONFLICT OF LAWS § 187(2) (1971) [hereinafter *Restatement (Second)*]. The Restatement differentiates between: (a) issues that the parties "could have resolved by an explicit provision in their agreement directed to that issue," *id.* § 187(1), and (b) issues that are beyond the parties' contractual power, such as those involving "capacity, formalities and substantial validity." *Id.* at cmt. d. For issues of the first category, the parties' choice of law is not subject to any geographical or substantive limitations.

32. Another "reasonable basis" can be, and usually is, not geographically based, such as the completeness of the chosen law or its expertise in the particular subject.

33. Although many cases underscore in dicta the importance of the requirement for a substantial relationship to the chosen state, cases that have actually struck down a choice-of-law clause solely on this ground are few and far between. For citations, see HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 1093.

34. UCC § 1-301.

35. *See* Spanish codif. Art. 10(5) (providing that the chosen law must have "some connection" with the contract); Portuguese codif. Art. 41(2) (providing that the parties' choice must fulfill a "serious interest" of the parties or must relate to an element of the contract that is relevant under PIL). For an identical provision, *see* Macau codif. Art. 40(2).

36. *See* Rome I, Arts. 5(2), and 7(3), respectively. For all other contracts, Rome I does not require a particular connection with the chosen country. However, as noted earlier, Article 3(3) provides that when "all other elements relevant to the situation" are located in a country other than that of the contractually chosen law, the choice of law "shall not prejudice" the application of the mandatory rules of that other country. Article 3(4) provides a similar rule for situations in which "all other elements relevant to the situation" are located in one or more EU Member States.

37. For countries outside the EU, *see* the codifications of Algeria (Art. 18); Armenia (Art. 1284); Azerbaijan (Art. 24); Belarus (Art. 1124), China (Art. 3, 41), Croatia (Art. 19), FYROM (Art. 21), Japan (Art. 7), Jordan (Art. 20), Kazakhstan (Art. 112), North Korea (Art. 24), South Korea (Art. 25); Kyrgyzstan (Art. 1198), Liechtenstein (Art. 39), Mexico (Art. 12.V), Moldova (Art. 1611), Mongolia (Art. 549), Peru (Art. 2095), Qatar (Art. 27), Quebec (Art. 3111), Russia (Art. 1215), Rwanda (Art. 14), Switzerland (Art. 116), Taiwan (Art. 20.1); Tunisia (Art. 62), Turkey (Art. 24), Ukraine (Art. 5), United Arab Emirates (Art. 19), Uruguay (Arts. 44,48), Uzbekistan (Art. 1189), Venezuela (Art. 29), Vietnam (Art. 769), and Yemen (Art. 30). For complete citations, *see* Symeonides, Codifying Choice of Law, *supra* note 9.

38. *See* La. Civ. Code Art. 3540; Or. Rev. Stat. § 15.350.

nated the requirement for a geographic nexus. The Principles follow this trend and indeed state explicitly that "[n]o connection is required between the law chosen and the parties or their transaction."[40]

B. "Commercial" Contracts

The Principles also define "commercial" contracts as those in which "each party is acting in the exercise of its trade or profession,"[41] namely, B2B contracts. This express bilaterality of commerciality is important because in some countries a contract is considered commercial even if only one of the contracting parties is acting in the exercise of its trade or profession. In any event, to avoid any doubt, Article 1 singles out two non-commercial contracts, namely consumer contracts and employment contracts, and expressly excludes them from the scope of the Principles.

This approach resembles the European model—represented by the Rome Convention and later the Rome I Regulation—of drawing a bright line between contracts in which one of the parties is presumptively weak and all other contracts. The European model protects consumers, employees and certain passengers and insureds from the consequences of an adverse choice of law,[42] and then adopts a very liberal stance with minimal restrictions on party autonomy for all other contracts. The Principles do likewise by exempting from their liberal treatment consumer and employment contracts, as well as other contracts in which one party is *not* acting in the exercise of its trade or profession. In contrast, the American model—represented by Section 187 of the Restatement (Second)—adopts the same limitations to party autonomy for all contracts without differentiation. Instead, in typical common-law fashion, the Restatement relies on courts to apply these limitations in a differentiating manner, depending on the specifics of the particular case.[43]

In another publication, I have discussed in detail the advantages and disadvantages of each model.[44] It suffices to note here that while drawing bright lines offers some advantages in terms of simplicity and predictability, it also runs the risk of over- or under-inclusion, with the attendant adverse consequences on justice in the individual

39. *See, e.g.*, Mexico Convention, Art. 7; Hague Convention of June 15, 1955 on the Law Applicable to International Sales of Goods, Art. 5; Hague Convention of Mar. 14, 1978 on the Law Applicable to Agency, Art. 5; Hague Convention of Dec. 22, 1986 on the Law Applicable to Contracts for the International Sale of Goods, Art. 7(1).

40. *Principles,* Art. 2(4).

41. *Id.*, Art. 1.

42. *See* Rome I, Arts. 5-8.

43. *See* Symeonides, *supra* note 13, at 191, 192-93, 205.

44. *See* Symeon C. Symeonides, *Party Autonomy in Rome I and II from a Comparative Perspective*, *in*, CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW – LIBER AMICORUM KURT SIEHR 513 (Katharina Boele-Woelki, Talia Einhorn, Daniel Girsberger & Symeon Symeonides eds., 2010).

case. Although there is good reason to treat commercial transactions more liberally than consumer contracts, it is useful to keep in mind that not all commercial contracts are created equal. For example, a franchise contract is clearly commercial because both the franchisor and the franchisee act in the exercise of their respective trade, but it is simplistic to assume that they are in relatively equal bargaining positions. The franchisor may be a giant multinational corporation and the franchisee may be a "mom and pop" operation with no real ability, experience, or sophistication to negotiate the terms imposed by the franchisor, much less a choice-of-law clause. Consequently, a liberal regime that automatically guarantees enforcement of such a clause can lead to serious injustice. Whether or not the Principles address this particular risk depends on the effectiveness of other limitations they establish, primarily, the mandatory-rules/public-policy exceptions provided in Article 11, which are discussed below.

C. *Mandatory Rules and Public Policy*

1. Preliminaries: Determining the *Lex Limitatis*

The fact that the limitations to party autonomy vary from one state to another raises an important preliminary question: *which state's* limitations will be used as the standard for policing party autonomy in multistate contracts, i.e., which state's law will perform the role of the *lex limitatis*? The two main candidates for this role are (a) the *lex fori,* and (b) the law that would be applicable in the absence of a contractual choice of law (hereafter referred to as the *lex causae*).[45] The *lex fori* is relevant because party autonomy operates only to the extent the *lex fori* is willing to permit. The *lex causae* is relevant because, when party autonomy operates, it displaces the *lex causae.*

Obviously, a choice-of-law clause will be enforced without problems if the application of the chosen law would remain within the limitations of both the *lex fori* and the *lex causae,* and, conversely, it will not be enforced if the application of the chosen law would exceed the limitations of both the *lex fori* and the *lex causae.* The difficulty arises when the application of the chosen law would: (1) exceed the limitations of the *lex causae,* but not the *lex fori*; or (2) would exceed the limitations of the *lex fori,* but not the *lex causae.*

The positions of recent PIL codifications and conventions on this issue can be divided into three groups. The first group, consisting of twenty-two codifications and four conventions, assigns the role of the

45. Theoretically, the chosen law is also a candidate, but it should be eliminated because it would lead to circular, or bootstrapping results. Of course, in rare or infrequent cases, these three laws, or any two of them, may coincide in the same state. The following discussion focuses on cases where they do not.

lex limitatis exclusively to the *lex fori* (and thus would uphold the choice-of-law clause in pattern 1, *supra,* but not in pattern 2). In 14 of those codifications[46] and two conventions,[47] the only limitation to the application of the chosen law is the *ordre public* of the *lex fori.* The remaining eight codifications[48] and two conventions[49] employ, in addition, the limitation of the forum's "mandatory rules."

The second group consists of systems that assign the role of *lex limitatis* to the *lex causae* (and thus would uphold the choice-of-law clause in pattern 2, *supra,* but not in pattern 1). This group includes the codifications of Louisiana,[50] Oregon,[51] Peru,[52] as well as the Restatement (Second). Section 187(2)(b) of the Restatement provides that the state whose public policy may defeat the parties' choice of law is not the forum state *qua* forum, but rather the state whose law would, under § 188, govern the particular issue if the parties had not made an effective choice (i.e., the *lex causae*).[53]

The third group occupies a middle position between the above two extremes. It consists of various combinations between the standards of the *lex fori* and those of another state, which may be the state of the *lex causae* or a "fourth" state.[54] The most widely followed

46. The following codifications belong to this group: Algeria, Croatia, Japan, Jordan, North Korea, Liechtenstein, Mexico, Mongolia, Qatar, Rwanda, United Arab Emirates, Vietnam, Yemen, and, in the United States, the U.C.C. For citations, see SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 9.

47. *See* Hague Sales Convention of 1955, Art. 6; Hague Agency Convention, Art. 17.

48. The codifications that belong to this group are: Armenia, China, FYROM, South Korea, Macau, Moldova, Taiwan, and Venezuela. For citations, *see* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 9.

49. *See* Hague Sales Convention of 1986, Arts. 17, 18; Hague Securities Convention, Arts. 11.1 and 11.2.

50. *See* La. Civ. Code Art. 3540.

51. *See* Or. Rev. Stat. § 15.355. Both the Louisiana and Oregon codifications assign the role of the *lex limitatis* exclusively to the public policy of the *lex causae*, without assigning any policing rule to the *ordre public* of the forum *qua* forum. The Puerto Rican Draft Code, drafted by the same author as these two codifications, takes the unique position (*see* Art. 35) that the chosen law must be applied unless it would violate the limitations of *both* the *lex fori* and the *lex causae*. For the rationale of this provision, *see* Symeon C. Symeonides, *Codifying Choice of Law for Contracts: The Puerto Rico Projet*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN, 419, 422–24 (James Nafziger & Symeon Symeonides, eds., 2002).

52. *See* Peruvian codif. Art. 2096.

53. To be sure, under the traditional *ordre public* exception, the public policy of the forum *qua* forum is always the last shield against the application of a repugnant foreign law, whether that law is chosen by the parties or through the forum's choice-of-law rules. Theoretically, this shield remains available to courts following the modern approaches. The Restatement recognizes the difference by stating that to be "fundamental" within the meaning of § 187, a policy "need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of § 90," which enunciates the traditional *ordre public* test. Restatement (Second), *supra* note 31, § 187 cmt. (g).

54. The other three states are the forum, the state of the chosen law, and the state of the *lex causae.*

model of such a combination was enunciated by the Rome Convention (and later emulated by several national codifications) and is preserved with slight modifications in the Rome I Regulation. Under Rome I, the chosen law must remain within the limitations imposed by the *ordre public* and the "overriding mandatory provisions" of the *lex fori*.[55] However, the chosen law must also remain within the limitations imposed by the "simple mandatory rules" of the *lex causae* in consumer and employment contracts,[56] and of the country in which "all other elements of the situation" (other than the parties' choice) are located.[57] Several national PIL codifications outside the EU follow this model, at least to the extent they protect consumers and employees through the mandatory rules of the *lex causae*.[58]

At least a dozen codifications that subject the chosen law to the limits of the *ordre public* and mandatory rules of the *lex fori* provide, in addition, that the court "may" apply or "take into account" the mandatory rules of a "third country" with which the situation has a "close connection."[59] It is safe to assume that the state of the *lex causae* would always qualify as a state that has a "close connection" because, *ex hypothesi*, it is the state whose law would have been applicable in the absence of a choice-of-law clause. This "close connection" will always render relevant the mandatory rules of the *lex causae* but will not necessarily guarantee their application because the pertinent articles are phrased in discretionary terms.

The position of the Principles on this issue is similar to that of the Mexico Convention[60] and is reflected in Article 11. The first four paragraphs of the article provide, respectively, that:

(1) the Principles "shall not prevent" a court from applying the "overriding mandatory provisions" of the *lex fori;*

55. *See* Rome I, Art. 21 (*ordre public*); Art. 9(2) ("overriding mandatory provisions" of the *lex fori*). *See also* Art. 9(3), which allows courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful."

56. *See* Rome I, Arts. 6(2) and 8(1).

57. *See* Rome I, Art. 3(3). *Cf.* Art. 3(4) (mandatory rules of EU law), Art. 11(5) (mandatory rules of the *lex rei sitae).*

58. *See* the codifications of FYROM (Arts. 24-25); Japan (Arts. 11-12); South Korea (Arts. 27-28); Liechtenstein (Arts. 45, 48); Quebec (Arts. 3117-18); Russia (Art. 1212); Switzerland (Arts. 120-21); Turkey (Arts. 26-27); Ukraine (Art. 45).

59. *See* the codifications of Azerbaijan (Arts. 4-5, 24.4), Belarus (Arts. 1099, 1100), Kazakhstan (Arts. 1090, 1091), Kyrgyzstan (Art. 11.73, 1174), Quebec (Arts. 3079, 3081), Russia (Arts. 1192, 1193), Tunisia (Arts. 36, 38), Turkey (Arts. 5, 6, 31), Ukraine (Arts. 12, 14), Uruguay (Arts. 5.1, 6.1-2), Uzbekistan (Arts. 1164, 1165). *See also* Hague Agency Convention, Arts. 16, 17. Article 9(3) of Rome I, *supra* note 55, is similar to these articles except that it is limited to the state of performance.

60. Article 18 of the Mexico Convention reiterates the classic *ordre public* exception, while paragraph 1 of Article 11 preserves the application of the mandatory rules of the forum state. The second paragraph of Article 11 provides that "[i]t shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties."

(2) the *lex fori* determines when a court "may or must apply or take into account" the overriding mandatory provisions of another law;

(3) a court may refuse to apply the chosen law only 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 *lex fori*; and

(4) the *lex fori* determines when a court "may or must apply or take into account" the public policy of the state whose law would be applicable in the absence of a choice of law (*lex causae*).[61]

2. Public Policy

Paragraph 4 did not exist in the draft that the Working Group presented to the Special Commission. Without this paragraph—and leaving aside for now the issue of mandatory rules—the only public policy limitations to party autonomy would be those provided by the law of the forum state *qua* forum. In other words, the original draft assigned the role of *lex limitatis* exclusively to the *lex fori*. This would be problematic in all cases in which the *lex fori* and the *lex causae* do not coincide, especially cases in which the forum state's connections are slim, such as when its jurisdiction is based solely on a choice-of-forum clause. One can easily imagine an economically strong party deliberately imposing a choice-of-forum clause mandating litigation in a state with very loose or no restrictions on party autonomy, and thereby rendering the choice-of-law clause virtually unassailable.

The addition of paragraph 4 ameliorates this "bootstrapping" problem, although it does not completely resolve it. Paragraph 4 refers the matter to "the law of the forum," which in this case must be understood as referring to the "whole law," that is, including the choice-of-law rules of the forum. This reference resolves the bootstrapping problem in those countries, such as the United States, which assign to the *lex causae* the role of *lex limitatis*. In contrast, paragraph 4 does not resolve the bootstrapping problem in countries that assign the role of *lex limitatis* exclusively to the *lex fori*. Rome I suffers from the same defect with regard to the *ordre public* exception, which operates only in favor of the *lex fori*, although it avoids the problem in those cases in which the mandatory rules of the *lex causae* are applicable.

61. *Principles*, Art. 11. The fifth paragraph of the article provides for arbitration, which is not discussed here.

3. Mandatory Rules

Article 11 uses the term "overriding mandatory provisions," a term that is well-understood in Europe because of the use of similar terms in the Rome Convention and Rome I Regulation. However, this term is not known or easily understood elsewhere. In interpreting this term in the future, courts and practitioners will inevitably resort to the European literature and the provisions of Rome I. It is therefore useful to compare this term with the corresponding terms of Rome I.

As noted earlier, Rome I subdivides mandatory rules into two categories: (1) rules that "cannot be derogated from by agreement"[62] (*simple* mandatory rules), and (2) "*overriding* mandatory rules"(*lois de police* in French), which are defined as those rules "the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract."[63] The two categories differ in several significant respects.[64] For the purposes of this discussion, the most important difference is that the threshold for applying these rules is higher for the "overriding" than for the "simple" mandatory rules.[65] A simple mandatory rule does not embody a public policy of the same high level as that which is embodied in the overriding mandatory rules of Article 9.[66]

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62. Rome I, Arts. 3(3-4), 6(2), 8(1), and 11(5). In the French text, the terms used are "dispositions auxquelles . . . ne permet pas de déroger par accord" (Art. 3(3)), or "dispositions auxquelles il ne peut être dérogé par accord."

63. Rome I, Art. 9(1) (emphasis added).

64. For example, the simple mandatory rules are rules of *contract* law that may not be evaded by the contractual choice of another law, whereas the overriding mandatory rules may be evaded by neither a contractual nor a judicial choice of law. Moreover, the simple mandatory rules that can defeat a contractual choice of law are those of the *lex causae* in consumer and employment contracts, *see* Rome I, Arts. 6(2) and 8(1), and those of the country in which "all other elements" of the situation are located (which may or may not be the *lex causae*) in all other contracts. *See* Art. 3(3)-(4). The "overriding" rules that may defeat either a contractual or a judicial choice of another law are those of the *lex fori* (Art. 9(2)) or the law of the place of performance, but only if they render performance unlawful. (Art. 9(3)). For pertinent discussion, *see* Andrea Bonomi, *Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts*, 10 Y.B. PRIV. INT'L L. 285 (2008); Michael Hellner, *Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?*, 5 J. PRIV. INT'L L. 447 (2009).

65. *See* Rome I, Recital 37 ("The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.").

66. Likewise, a simple mandatory rule embodies a lower level of public policy than the "fundamental policy" limitation of Restatement (Second), *supra* note 31, § 187(2)(b). For a schematic presentation of the differences among the three concepts, *see* Symeonides, *supra* note 13, at 191, 198.

Article 11 of the Principles uses the term "*overriding* mandatory provisions,"[67] which brings to mind Article 9(1) of Rome I, but it does so without incorporating that article's high-threshold definition. The accompanying commentary discloses that the Working Group rejected a proposal to include in Article 11 a definition of overriding mandatory rules, after a lengthy discussion which included a review of Article 9(1) of Rome I.[68] This raises the question whether the meaning of the term "overriding mandatory provisions" in Article 11(1) of the Principles is closer to the meaning of: (1) the "simple" mandatory rules of Rome I, namely rules which "cannot be derogated from by agreement";[69] or instead (2) the "overriding" mandatory rules in the sense of Article 9 of Rome I, albeit without that article's high-threshold definition.

The use of the word "overriding" in Article 11(1) of the Principles does not necessarily answer the above question because even the "simple" mandatory rules are "overriding" in the sense that they "override" a contrary agreement. Indeed the answer to this question is not self-evident. For example Article 11 of the Principles describes these provisions as those that apply "irrespective of the law chosen by the parties."[70] Literally speaking, the quoted phrase is almost identical to the phrase used in Rome I, Article 9(1), which describes overriding mandatory provisions as those that are "applicable . . . irrespective of the law otherwise applicable to the contract."[71] On the other hand, in cases covered by these Principles, which (unlike Rome I) apply only to contracts that contain a choice-of-law clause, the "law otherwise applicable to the contract" is the "law chosen by the parties" and this brings the mandatory rules of Article 11 of the Principles closer to rules which "cannot be derogated from by agreement."

On balance, a literal interpretation is probably incorrect. The term "overriding" mandatory rules in Article 11 of the Principles cannot be equivalent to the term "simple" mandatory rules as used in Rome I because the latter instrument uses these terms only in consumer and employment contracts which are exempted from the scope of the Principles.[72] It is more logical to assume that the term "overriding" mandatory rules in Article 11 contemplates a higher threshold than the simple mandatory rules of Rome I, probably a threshold that is closer to, or as high as, that of Article 9(1) of Rome I.

67. *Principles*, Art. 11(1) (emphasis added).
68. *Commentary*, § 88.
69. Rome I, Arts. 3(3), 3(4), 6(2), 8(1) and 11(5).
70. *Principles*, Art. 11(1).
71. Rome I, Art. 9(1).
72. Rome I also refers to simple mandatory rules in Arts. 3(3) and 3(4), but these articles contemplate "domestic" contracts which are also exempted from the scope of the Principles.

This interpretation can draw support from the French text of Article 11 of the Principles which uses the term *lois de police*, the very term used in the French text of Article 9 of the Rome I Regulation.

If this conclusion is correct, it means that the Principles adopt a fairly high threshold for the mandatory-rules exception, which, combined with the traditionally high threshold for the *ordre-public* exception, produces a very liberal party-autonomy regime. Such a regime is acceptable, indeed welcome, in international commercial contracts between parties with relatively equal bargaining power. However, in contracts such as those involving the afore-mentioned franchisees and other small business owners, this regime will worsen the existing inequalities by enabling the stronger parties to impose well-calculated combinations of choice-of-law-and-forum clauses that will deprive the weaker parties of any meaningful protection. This is a regrettable feature of the Principles.

V. The Validity of the Choice-of-Law Clause: Capacity, Consent and Form

A choice-of-law clause is itself an agreement that is usually contained in the contract that the clause purports to submit to the chosen law. Before one can properly speak of such an "agreement," however, one must verify that it really came into existence. Thus, at least theoretically, there is always a preliminary question of which law will determine the existence and validity of the choice-of-law agreement itself with regard to issues such as capacity, form, formation, and to defects such as error or duress. The three options are the *lex fori*, the chosen law, and the *lex causae*.

The option of applying the *lex fori* can be defended on the ground that, because a choice-of-law agreement displaces some of the forum's choice-of-law rules, the forum should be free to determine under its own substantive standards whether such an agreement exists before allowing such a displacement. On the other hand, the option of applying the chosen law may be efficient but it can lead to serious "bootstrapping" which can be curtained only in the relatively few cases that meet the high threshold of the mandatory rules/public policy exceptions. The third option—applying the *lex causae*— avoids the bootstrapping problem, but also undercuts much of the convenience and efficiency that make choice-of-law clauses attractive to courts and litigants.

As noted below, the solutions adopted by recent PIL codifications and conventions can be divided into two groups.

(1) The first solution is to *exempt* these preliminary issues from the scope of party autonomy and to decide them either under the substantive law of the forum, more likely, under the law that

would be applicable under the forum's choice-of-law rules, i.e., the *lex causae*.

(2) The second solution is to *not* exempt these issues from the scope of party autonomy and thus decide them under the law chosen in the "agreement," with all the attendant "bootstrapping" consequences.

A. *Capacity*

Like most international conventions,[73] the Principles follow the first solution by exempting from their scope—and thus from the scope of party autonomy—the issue of contractual capacity (albeit only of natural persons).[74] This means that a party's capacity to enter into a choice-of-law agreement will be determined by the law applicable under the choice-of-law rules of the forum state. In most cases, this will avoid the bootstrapping problem because most national PIL codifications exempt contractual capacity from the scope of party autonomy and subject it instead to autonomous choice-of-law rules typically referring this issue to the party's personal law.[75] This solution is structurally similar to that of Rome I,[76] but not to the solution adopted by the Restatement (Second) which assigns capacity to the chosen law.[77]

B. *Consent and Formation*

With regard to consent, Article 6 of the Principles follows a combination between the chosen law and the law of a party's

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73. *See* Hague Sales Convention of 1986, Art. 5; Hague Sales Convention of 1955, Art. 5; Hague Agency Convention, Art. 2; Hague Principles, Art. 1(3)(a); Mexico Convention, Art. 5.

74. *See Principles*, Art. 1(3)(a).

75. *See* the following codifications and the pertinent articles indicated in parentheses: Algeria (10), Armenia (1265), Austria (12), Azerbaijan (10), Belarus (1104), Belgium (34), Bulgaria (50), China (12), Croatia (14), Czechoslovakia (3), Estonia (12), FYROM) (15), Germany (7), Hungary (10), Italy (23), Japan (4), Jordan (12), Kazakhstan (1095), Korea (North) (17), Korea (South) (13, 15), Kyrgyzstan (1178), Latvia (8), Liechtenstein (12), Lithuania (1.16), Louisiana (3539), Macau (27), Mexico (13.II), Moldova (1589-90, 1592), Mongolia (543-44), Netherlands (11), Oregon (15.330), Peru (2070), Poland (11-13), Portugal (25, 28), Puerto Rico (33),Qatar (11), Quebec (3083, 3085-87), Romania (11, 17), Russia (1197), Slovenia (13), Switzerland (36), Taiwan (10), Tunisia (40), Turkey (9); Ukraine (18), United Arab Emirates (11), Uruguay (20), Uzbekistan (1169), Vietnam (761-63, 765), Yemen (25). For citations, *see* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 9.

76. Rome I, Art. 1(2)(a) exempts capacity from the scope of Rome I, but "without prejudice to Article 13." Article 13 provides that in contracts concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity under the law of another country only if the other party knew or should have known of that incapacity.

77. *See* Restatement (Second), *supra* note 31, § 198 cmt. a (stating that capacity is "determined by the law chosen by the parties, if they have made an effective choice."). However, as noted earlier, under the Restatement, the chosen law will not be applied to the extent it contravenes a fundamental public policy of the *lex causae*.

"establishment." Paragraph 1 of Article 6 provides that, "[s]ubject to paragraph 2, . . . whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to." Paragraph 2 provides that "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."[78]

This solution is substantively similar—despite slight differences in emphasis and in the burden of proof—to the solutions of Rome I, some other recent codifications,[79] and the Hague Sales Convention.[80] Article 10(2) of Rome I provides that a party who claims lack of consent to the contract or one of its terms (such as a choice-of-law clause) "may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the [chosen] law."[81]

In contrast, the Oregon codification avoids the bootstrapping problem altogether by exempting the issue of consent to, and formation of, the contract (and thus of the choice-of-law clause as well) from the scope of party autonomy and instead subjects it to the *lex causae*.[82] The Restatement (Second) also avoids the problem by assigning issues of misrepresentation, duress, undue influence, and mistake to the *lex fori*.[83]

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78. *Principles,* Art. 6.

79. *See, e.g.*, South Korean codif. Art. 29; Turkish codif. Art. 32; Puerto Rico codif. Art. 34.

80. *See* Hague 1986 Sales Convention, Art. 10(1)-(3).The Convention follows the same solution with regard to the contract as a whole, but also provides specifically for the validity of the choice-of-law agreement. Article 10 provides that "[i]ssues concerning the existence and material validity of the consent of the parties as to the choice of the applicable law . . . are determined by the law chosen." If under the chosen law the choice is invalid, then the contract is governed by the law chosen under the objective factors of Article 8.

81. The complete answer under Rome I begins with Article 3(5) which provides that "[t]he existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13." Article 10(1) provides that the existence and validity of a contract, or of "any term of a contract"(e.g., a choice-of-law clause) are determined by "the law which would govern it" under Rome I "if the contract or term were valid." Thus, if the contract contains a choice-of-law clause, its validity is governed by the chosen law, subject to the limitations of Article 3 and other articles of Rome I, *including* Article 10(2) which is quoted in the text.

82. *See* Or. Rev. Stat. § 15.335.

83. *See* Restatement (Second), *supra* note 31, § 187, cmt. b. ("[A] choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as . . . duress, or undue influence, or by mistake. Whether such consent was in fact obtained by improper means . . . will be determined by the forum in accordance with its own legal principles.").

C. *Form*

The options and dilemmas (and often the solutions) are the same with regard to the formal validity of the choice-of-law clause as they are with regard to consent. However, somewhat surprisingly, the Principles take a different path by proffering an autonomous and "substantive" (as opposed to a choice-of-law) rule on this issue. Article 5 provides that a choice-of-law clause "is not subject to any requirement as to form unless otherwise agreed by the parties."[84] The commentary does not give examples of cases in which the parties "agree otherwise," or explain why the parties would do so, but one example that comes to mind is a contract that prohibits oral modifications.

The commentary states that "most legal systems do not require special forms for the choice of law."[85] The statement is accurate, but it does not necessarily support the rule of Article 5. It is true that most systems do not *specifically* mandate a particular form for the choice-of-law *clause*, but only because they treat the clause as just one term of the contract that contains it—and most systems do provide choice-of-law rules for determining the formal validity of the contract as a whole.[86]

Even so, the rule of Article 5 is the logical corollary of another rule— Article 4—which provides in part that a choice of law may "appear clearly from the provisions of the contract *or the circumstances.*"[87] The circumstances may well include, for example, the parties' conduct or course of dealings *sans* any particular form.

The autonomous rule of Article 5 is also consistent with Article 7, which provides that a choice of law "cannot be contested solely on the ground that the contract to which it applies is not valid."[88] This "severability" principle is borrowed from the law of arbitration. It is bad policy there and it is bad policy here,[89] but that is another matter.

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84. *Principles,* Art. 5.

85. *Commentary*, § 60.The Commentary twice cites Article 3538 of the Louisiana Civil Code, once as adopting the *lex loci contractus* rule and once as adopting the common-domicile rule. *See id.* § 63. As the article's drafter, the undersigned disputes both readings.

86. For documentation, *see* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 9. About a dozen codifications exempt the issue of formal validity from the scope of party autonomy by providing for that issue a separate choice-of-law rule that does *not* refer to the law chosen by the parties. In most other codifications, including Rome I, and recent conventions, the rule for formal validity includes an alternative validation reference to the law that governs the *substance* of the contract. If the contract contains a choice-of-law clause, the law that governs the substance of the contract is the chosen law.

87. *Principles,* Art. 4 (emphasis added).

88. *Id.* Art. 7.

89. In arbitration, the severability principle means, for example, that an arbitrator, rather than a judge, will get to decide whether a contract that charges a 300% interest rate is usurious. *See, e.g.*, Kaneff v. Delaware Title Loans, Inc., 587 F.3d 616 (3d Cir. 2009). Under this regime, it would not matter if the arbitrator has been ruling

The point here is that severability allows for the separate treatment of the formal (as well as the substantive) validity of the choice-of-law clause from that of the contract that contains it.[90]

VI. NON-STATE NORMS

By far the most controversial issue at the session of the Special Commission was the issue of non-state norms. These are norms that are "not the product of a sovereign State,"[91] or, as the Principles call them, "rules of law."

Obviously, the very use of the term "rules of law" is neither accurate nor neutral. It cannot be accurate because, if these norms are really "rules of law," then they should possess the same attributes as *real* rules of law, such as the rules of a statute. They do not. They lack the attributes of statutory, judge-made, or customary rules. They do not emanate from the collective will of the people formally expressed through the ordinary, and nowadays democratic, legislative process; they do not result from the pronouncements of the judiciary; and they do not qualify as custom (i.e., a usually spontaneous practice repeated for a long time (*longa consuetudo*) and generally accepted as having acquired the force of common and tacit consent (*opinio juris*)).

While some of these norms are drafted by intergovernmental bodies like UNIDROIT[92] and UNCITRAL,[93] others are drafted by private non-governmental bodies without any popular participation or approbation, and express the views and predilections of those who draft them. While some of those bodies, such as the Lando Commission,[94]

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for the lender (the "repeat player") 99% of the time. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 327-28 (2012). In litigation, the severability principle means that the validity of the contract will be decided under the chosen law (rather than the *lex fori* or the *lex causae*), even though that law was chosen precisely *because* it allows a 300% interest rate. Any hope that either the *ordre public* exception or the mandatory rules of the *lex fori* will prevent such an outrageous result can be negated if the lender imposed a choice-of-forum clause, in addition to the choice-of-law clause. While it is true that this hypothetical (which is based on a real case) does not involve a question of form, the severability rule of Article 7 applies not only to questions of form but also to questions of substantive validity.

90. Under Article 9 of the Principles, the formal validity of the contract is governed by the chosen law or "any other governing law supporting the formal validity of the contract."

91. *Commentary*, § 37.

92. *See* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004), *available at* http://www.unidroit.org/english/principles/contracts/main.htm. For authoritative commentary, *see* MICHAEL BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2d ed. 1997).

93. *See* http://www.uncitral.org/uncitral/en/uncitral_texts.html.

94. *See* PRINCIPLES OF EUROPEAN CONTRACT LAW (1999) *available at* http://frontpage.cbs.dk/law/commission on_european_contract_law; For authoritative commentary by the principal drafters, *see* THE PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II (Ole Lando & Hugh Beale eds., 1999); PRINCIPLES OF EUROPEAN CON-

consist of impartial academics with the purest of intentions, others are far from disinterested. For example, in the United States, non-state norms are drafted, *inter alia*, by the American Arbitration Association (AAA), the New York Stock Exchange (NYSE), the American Stock Exchange (AmEx), the National Association of Securities Dealers (NASD), banking clearing-houses, credit card associations, commodities merchants such as diamond dealers, grain merchants, and cotton merchants, and, more recently, Internet service and domain providers.[95]

If these norms were applicable only to disputes between their drafters, e.g., grain merchants or diamond dealers, there would be little reason to be concerned. However, many of these norms, such as those drafted by credit-card associations, are applicable to credit-card holders who had no participation or input in the drafting of those norms. It is not unreasonable to assume that, in drafting these norms, the "association" was not overly solicitous of the credit-card holders' interests. These preliminary observations should serve as a check to the unbounded euphoria that seems to pervade much of the literature on non-state norms.

Returning to the Principles, the Working Group's draft provided that "[i]n these Principles a reference to law includes rules of law."[96] The accompanying Commentary took the position that (a) the term "rules of law" should not be defined, so as to provide "the maximum support for party autonomy,"[97] and (b) there should *not* be "any restrictive criteria which, for instance, may require the rules of law selected to meet a threshold test of international or regional recognition."[98]

The European Union objected strenuously to this provision on several grounds, including those for which the Union had recently rejected a similar proposal during the drafting of Rome I.[99] After intense negotiations that took the better part of the week, a compromise was reached. It is reflected in the new Article 3, which provides as follows: "In these Principles, a reference to law includes

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TRACT LAW, PART III (Ole Lando, André Prüm, Eric Clive & Reinhard Zimmerman eds., 2003).

95. For citations, see Symeon C Symeonides, *Party Autonomy and Private Law-Making in Private International Law: The* Lex Mercatoria *that Isn't, in* FESTSCHRIFT FÜR KONSTANTINOS D. KERAMEUS 1397 (2009).

96. Preliminary Draft, Art. 2.

97. *Commentary,* § 39.

98. *Commentary,* § 42.

99. During the negotiations that led to Rome I, several EU Member States opposed a proposal to allow parties to choose non-state norms. *See* Ole Lando & Peter Nielsen, *The Rome I Regulation*, 45 COMMON MKT. L. REV. 1687, 1694-98 (2008).The compromise was the insertion of a self-evident recital allowing for these norms the much lesser status of "incorporation by reference." Recital 13 states that Rome I "does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." Rome I, Recital (13).

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."[100]

The new language introduces two important qualifiers. The first focuses on the attributes of these norms. They must be a "set of rules," i.e., fairly complete and comprehensive, and must be "generally accepted as . . . neutral and balanced."

The second qualifier restates the obvious, namely that these norms will not be treated on equal footing with real rules of law, if the law of the forum "provides otherwise," e.g., by *not* treating these norms as law. This qualifier is obvious because the Principles themselves are "soft law" and thus they apply only to the extent that the law of the forum allows. Even so, this qualifier is necessary in order avoid uncertainty about preserving the *status quo* in states that do not recognise these norms. After all, the Principles aspire to be used by courts to "interpret . . . rules of private international law."[101] Without the phrase "unless the law of the forum provides otherwise," the courts of a Member State of the Hague Conference that acquiesces to this compromise may infer a change in that State's position and begin to interpret their PIL rules accordingly.

Obviously, the "unless" clause does not apply to arbitration. Indeed the divide between arbitration and litigation was omnipresent throughout the week-long session of the Special Commission. While some delegates were thinking primarily in terms of arbitration, others were thinking primarily in terms of litigation. Yet, the two processes are different. For example, non-state norms have long been applied in arbitration,[102] but in most countries, including the United States and the European Union, they have not been applied in litigation.[103] For this reason, a Member State of the Conference that belongs in this category has good reason to object to the elevation of non-state norms to the status of law *in litigation*, while acquiescing to the status quo in arbitration. After all, when the parties opt for arbitration, they know that they opt for private adjudication. It is not farfetched to assume that they have also opted for, or at least would not object to, private law-making. In contrast, parties who have not opted for arbitration have chosen to remain in the field of public adjudication, and there is no reason to subject them to private law-making. Thus, it is appropriate to differentiate between arbitration and litigation and, unlike the Working Group's earlier draft, the final text does just that.

100. *Principles*, Art. 3. The Commentary will be changed accordingly and will explain the new text.

101. *Principles,* Preamble (3).

102. *See* S. Symeonides, *Party Autonomy and Private Law-Making*, *supra* note 95.

103. *See id.*; HAY, BORCHERS & SYMEONIDES, *supra* note 21, 1135-36.

VII. THE SCOPE OF THE CHOSEN LAW

A. *Some Minor Inaccuracies*

Article 9 of the Principles defines the scope of the chosen law. The chapeau of the first paragraph states that the law chosen by the parties "*shall* govern *all* aspects of the contract between the parties, including but not limited to"[104] the aspects or issues listed in the article. The two italicized words are problematic. Indeed, they are antithetical to the very notion of party autonomy.

The word "all" contradicts Article 2(2), which provides that the parties may choose the law applicable to "the whole contract *or to only part* of it."[105] Obviously, if the parties choose a law for only a part of the contract, the chosen law will govern only that part, and not *all* of the contract.[106] In such a case, the rest of the contract will be governed by the otherwise applicable law, thus producing a contractual *dépeçage*.

For similar reasons, the word "shall" is problematic because it makes Article 9 an obligatory rule, rather than a *suppletive* rule of *interpretation*, namely a rule that supplies the unexpressed intent of the parties in those cases in which the clause does not provide otherwise. When the parties choose a law for the entire contract, the word "shall" mandates the application of the chosen law to all of the issues listed in Article 9, even though the choice-of-law clause may be phrased in a way that suggests a narrower scope. For example, a clause stating that "the contract shall be *interpreted*" (rather than "governed") "according to the law of State X" may signify an intent to submit to the chosen law only matters of interpretation (Art. 9.1(a)) and not matters of validity (Art. 9.1(e)).[107] Similarly, a clause may be phrased in a way so as to encompass only contractual, but not precontractual, obligations (Art. 9.1(g)). Indeed, nothing prevents the parties from agreeing to a narrow choice-of-law clause that expressly or implicitly exempts *one or more* of the issues listed in Article 9.1. In such a case, and despite the contrary language of the chapeau, the chosen law "shall" *not* include the exempted issue(s).

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104. *Principles*, Art. 9 (emphasis added).

105. *Principles*, Art. 2(2) (emphasis added).

106. The Commentary does acknowledge that the chosen law cannot include issues such as capacity which Article 1(3) exempts from the scope of the Principles. *See Commentary* § 74.

107. *See, e.g.*, Proctor v. Mavis, 125 P.3d 801 (Or. App. 2005), *rev. denied*, 136 P.3d 742 (Or. 2006) (holding that a clause providing that a pre-marital agreement was to be "interpreted and construed" in accordance with California law encompassed only the construction of the agreement and not the division of property upon dissolution of the marriage); Shapiro v. Barnea, 2006 WL 3780647 (D.N.J. Dec. 21, 2006) (holding that a clause providing that New Jersey law would govern "construction and enforcement" of the employment contract did not apply to all claims arising out of the parties' employment relationship, such as a claim for fraudulent performance).

In conclusion, as long as the choice-of-law remains within the outer limits of party autonomy, the chosen law has as much scope as the clause chooses to give it—no less, but also *no more*.[108] To reflect this reality, the chapeau of Article 9 should be amended to provide that, "*unless the parties agree otherwise*, the chosen law applies to all aspects of the contract, including but not limited to . . ."[109]

B. Non-Contractual Issues

One of the issues that fall within the scope of the chosen law under Article 9 are the rights and obligations "arising from the contract."[110] The quoted phrase, in combination with the phrase "all aspects of *the contract*" in the chapeau, and other references to "the contract" in Article 9, signify an intent to confine party autonomy to *contractual* rights and duties, as opposed to non-contractual duties, such as those arising from a tort, between the contracting parties.

This limitation is entirely consistent with the general goal of the Principles, which is to facilitate international commerce. Of course torts do occur in the course of commerce, but whether contracting parties should be allowed to *pre-select* the law that will govern a future tort between them is a controversial question which different countries answer differently. For example, in the EU, Article 14 of Rome II answers this question affirmatively, subject to certain conditions,[111] whereas in the United States the answers given by the various states range from negative to unclear.[112] Consequently, if only because of these disagreements, and in the interest of attaining international consensus, the Principles should not sanction pre-dispute choice-of-law clauses purporting to apply to non-contractual issues.

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108. One can visualize the scope of party autonomy and the scope of the chosen law as two concentric circles, exterior and interior, respectively. The circle representing the chosen law (interior) cannot be larger than the circle representing party autonomy, but it can be coextensive with, or smaller. Subject to this limitation, the exact size of the interior circle depends on the wording and interpretation of the choice-of-law clause. If the clause does not provide otherwise, the interior circle is coextensive with the exterior title. Article 9 should be understood as being limited to this last scenario.

109. Such an amendment will make Article 9 similar to another rule of interpretation found in Article 8, which provides that 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."

110. *Principles*, Art. 9(1)(b).

111. For criticism of Rome II on this issue, *see* Symeonides, *supra* note 13, at 191, 203-05.

112. The Restatement (Second) and the codifications of Louisiana and Oregon answer this question in the negative, while some cases have upheld choice-of-law clauses that expressly included non-contractual claims. *See* Symeonides, *supra* note 13, at 202.

C. *Prescription or Limitations*

Another issue that Article 9 includes within the scope of the chosen law is "prescription and limitation periods."[113] This inclusion is consistent with: (a) the premise of the Principles that the chosen law applies only to substantive, as opposed to procedural, issues; and (b) the continental view that characterizes prescription as a substantive issue that is governed by the same law as the law that governs the merits of the obligation.

However, the line between substance and procedure is not drawn the same way in all systems, nor is the line always clear in each system. Regarding, specifically, prescription or limitations, some countries subscribe to the opposite view, which characterizes statutes of limitations as a procedural matter which is governed by the law of the forum *qua* forum. This has been the traditional view in the United States. Although in recent years some states have abandoned this view, the majority still adhere to it.[114]

For reasons explained in detail elsewhere,[115] a prescription rule may be motivated by both procedural and substantive policies, or primarily by the one rather than the other. Thus, the uncritical assumption that, for choice-of-law purposes, prescription is always substantive or always procedural can be problematic. For example, the substantive characterization automatically subjects prescription to the chosen law, even if the choice-of-law clause is silent on the particular issue. If the chosen law has a much shorter prescriptive period than the *lex fori*, the creditor's only hope will hinge on the mandatory rules or public policy of the *lex fori*. If the chosen law has an exceedingly long prescriptive period, the forum state will be deprived of the ability to protect its courts from the burdens and dangers of adjudicating claims that have long prescribed under its own law.

On balance, it would be preferable to adopt a middle solution that recognizes the *sui generis* character of prescription. Under such a solution, prescription would not be automatically governed by the chosen law unless the choice-of-law clause expressly so provides. This would give contracting parties the opportunity to consider the pros and cons of including prescription in the chosen law and to reach an informed decision on the matter.

D. *Choice-of-Forum Clauses*

Finally, one question that Article 9 does not answer, at least not directly, is whether the chosen law will determine the validity or in-

113. *Principles*, Art. 9.1.

114. *See* SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 272-94 (2008).

115. *See* Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises,"* 54 LA. L. REV. 497, 537-39 (1994).

terpretation of a choice-of-forum clause included in the same contract (hereinafter referred to as "dual-choice" contract).[116] There are several possible answers to this question.

The first is that the chosen law does not apply to the choice-of-forum clause because that clause involves only procedural issue which are governed by the *lex fori.* Indeed, a choice-of-forum clause possesses procedural attributes because its enforcement divests one court of jurisdiction and vests it in the chosen court. Nevertheless, a choice-of-forum clause is as much an expression of party autonomy as a choice-of-law clause, and equally specific. In fact, in many cases an effective choice-of-forum clause determines whether a choice-of-law clause will be unassailable or instead unenforceable.

Another possible answer is that the Principles do not apply to choice-of-forum clauses because they are regulated by the 2005 Hague Choice of Court Convention, which is more specific on this issue.[117] However, this answer is unsatisfactory, if only because the Principles aspire to influence not only the countries that may adopt the Convention but also, and perhaps especially, the countries that will not do so.

On balance, the better view is that the Principles do apply to choice-of-forum clauses in dual-choice contracts, and that, under the Principles, the validity and interpretation of the choice-of-forum clause will be governed by the law chosen by the choice-of-law clause. This solution is consistent with the solutions adopted by the Convention, even though the Convention does not specifically address dual-choice contracts. Under the Convention, the validity of a choice-of-forum clause is determined under the law of the state whose *courts* are chosen by the clause[118] or, in some cases, the law of the state whose court is not chosen but is seised.[119] However, in both cases, the term "law" includes the private international law rules of the particu-

116. To be sure, in most cases the two clauses will designate the same state. However, this is not always true, as demonstrated by contracts involving "floating" choice-of-forum clauses.

117. *See* Hague Convention of 30 June 2005 on Choice of Court Agreements.

118. *See* Choice of Court Convention, Art. 5(1) (providing that the chosen state shall have jurisdiction to decide a dispute covered by the choice-of-court agreement, "unless the agreement is null and void under the law of that State."); Art. 6(a) (providing that a court other than the chosen court shall not adjudicate a case covered by the agreement, unless the agreement is null and void "under the law of the State of the chosen court"); Article 9(a) (allowing a court to refuse to recognize a judgment if it was based on agreement that was null and void "under the law of the State of the chosen court.").

119. *See id.* Art. 6(b)-(c) (providing that a court other than the chosen court shall not adjudicate the case covered by the choice of court agreement, unless a party lacked the capacity to conclude the agreement "under the law of the State of the court seised" or unless giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of "the State of the court seised."). *See also* Art. 9 which is applicable to recognition.

lar state.[120] Thus, if that state follows the Principles, the validity of a choice-of-forum clause will be determined by the law chosen by the choice-of-law clause.[121] This solution may not be ideal, but it is the solution adopted by the Convention.[122]

VIII. HOPES AND EXPECTATIONS

Like any collective work, an international convention is as good as the consensus of the participating delegations will allow it to be. In many cases, the final product reflects the lowest common denominator among the delegations' views. These truisms also apply to international soft-law instruments such as the Hague Principles. Unlike a convention, however, the eventual acceptance of a soft-law instrument depends in large part on its intrinsic value rather than on sovereign choice and compulsion.

From an academic perspective, the intrinsic value of the Hague Principles on Choice of Law for International Contracts is as obvious as are its few minor shortcomings. Yet, the real test of success for a soft instrument is not how academic authors view it but how contracting parties, their lawyers, and the courts will view it. While it is too early to tell whether the Principles will pass this test, there is reason to hope for a positive outcome.

In any event, and regardless of whether they will be widely accepted, the Principles will enrich the quality of the international discourse on this subject. They can function as the focal point and guiding light in the search for proper solutions to the various problems encountered in honoring, and defining the limits of, contractual choice of law in international contracts. This alone would be a significant contribution to the advancement of the art and science of law-shaping and law-making.

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120. *See* Trevor Hartley & Masato Dogauchi, Explanatory Report to Convention of 30 June 2005 on Choice of Court Agreements, § 125, *available at* http://www.hcch.net/upload/expl37e.pdf ("The question whether the [choice-of-court] agreement is null and void is decided according to the law of the State of the chosen court. The phrase 'law of the State' includes the choice-of-law rules of that State. Thus, if the chosen court considers that the law of another State should be applied under its choice-of-law rules, it will apply that law. This could occur, for example, where under the choice-of-law rules of the chosen court, the validity of the choice of court agreement is decided by the law governing the contract as a whole – for example, the law designated by the parties in a choice-of-law clause.").

121. For American cases interpreting a choice-of-forum clause under the law of the state chosen by a choice-of-law clause, *see* Symeonides, *supra* note 25.

122. It is, in any event, slightly better than the solution adopted in the Recast of the Brussels I Regulation, which refers the substantive validity of the choice-of-forum clause exclusively to the whole law of the state of the chosen court. *See* Art. 25 and Recital 20 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of Dec. 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. An attempt to draft an autonomous choice-of-law rule for choice-of-forum clauses was abandoned because of the perceived urgency to complete the Recast process at a particular time.