Intra-regional reform in East Asia and the new Hague Principles on Choice of Law in International Commercial Contracts

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INTRODUCTION

The last two decades have witnessed nations in the East Asian region evince an increasing openness to private international law reform at the

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national level. The Republic of Korea was the harbinger in this regard with *Law Number 6465 of the Act amending the Conflict of Laws Act* ("Korean Conflicts Act") taking effect on 1 July 2001.[1] Japan followed suit with the *Act on General Rules for Application of Laws* ("Japanese Application of Laws Act") taking effect from 1 January 2007.[2] China has since made significant advances. China's *Law on the Application of Law to Foreign-related Civil Relations*[3] ("Chinese Foreign-related Civil Relations Law") entered into force on 1 April 2011 and has recently been supplemented by the *Interpretation I on the Chinese Foreign-related Civil Relations Law,* which entered into force on 7 January 2013 ("Chinese Interpretation I").

With a view to facilitating increased intra-regional and international engagement, however, commentators have called for further dialogue and reform. One commentator recently emphasised the importance of "finding private international law rules that could promote values shared in the region" and doing so "in parallel" with various instruments "adopted at the Hague Conference on Private International Law".[4] This prescient observation reflects the longstanding, enduring bond that the Hague Conference shares with the East Asian region. Japan became a member of the Hague Conference in June

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1) Chapter 6 of the Korean Conflicts Act governs the choice of law rules applicable to what may be loosely termed "Obligations". See K.H. Suk (石光現), "Harmonization of Private International Law Rules in Northeast Asia", Paper presented at the International Law Association of Japan Conference, Shizuoka, October 12, 2013, 2.

2) See the English translation provided by K. Anderson and Y. Okuda, "Translation of Japan's Private International Law: Act on the General Rules of Application of Laws [Hō no Tekiyō ni Kansuru Tsūsokuhō]", Law No 10 of 1898 (as newly titled and amended 21 June 2006), *Asian-Pacific Law & Policy Journal*, Vol. 8, (1) 2006, 138.

3) «中华人民共和国涉外民事关系法律适用法» [Law on the Application of Law to Foreign-related Civil Relations of the People's Republic of China] (People's Republic of China), National People's Congress, 28 October 2010.

4) See, for example, K.H. Suk (石光現), "Harmonization of Private International Law Rules in Northeast Asia", *op. cit.* note 1, 1; W. Zhu, "A Plea for Unifying or Harmonizing Private International Law in East Asia: Experiences from Europe, America and Africa", Paper presented at the first Private International Law Seminar in East Asia and published in 한국국제사법학회 269, 270 (originally published as W. Zhu, "Unifying or Harmonizing Private International Law in East Asia: Necessity, Possibility and Approach", *Asian Women Law*, Vol. 13 , 2010).

1957; China in July 1987 and the Republic of Korea in August 1997. Beyond East Asia, the Hague Conference has a growing presence within the Asia Pacific, highlighted by the opening of its new regional office in Hong Kong in 2012 and the recent membership of Singapore,[5] bringing the number of Asian Member States to 9 (including Eurasian Turkey).

It is hoped that the increased participation of Asian States in the organisation will facilitate the development of new instruments that are better adapted to the needs of the region. This paper will present the new Hague Principles on Choice of Law in International Commercial Contracts ("the Hague Principles"),[6] the endorsement of which is expected soon, and raise the question of whether the Hague Principles may be a useful instrument for national or regional reform.

With a view to providing certainty and predictability to contracting parties in an international setting, the Hague Principles reinforce the principle of party autonomy, which is considered to be the most practical solution for conflict of laws in international contracts.[7] The Hague Principles encourage the parties to designate *ex ante* a single body of law, or of rules of law, applicable to their contract, and espouse the principle that the law chosen by the parties will govern the contract to the greatest possible extent subject to clearly defined limits.

The Hague Principles and their accompanying Commentary seek to serve as an "international code of current best practice with respect to the recognition and limits of the principle of party autonomy in choice of law in international commercial contracts". Some provisions merely cement an existing, internationally accepted approach. Other provisions reflect a "best practice" approach to issues which often lack consensus, while other introduce novel solutions.[8]

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5) Singapore joined the Hague Conference in April 2014.

6) See Annex.

7) A. Dickinson, "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?", *Journal of Private International Law*, Vol. 3, 2007, 53, 59.

8) See "The Draft Hague Principles on Choice of Law in International Commercial

This article details the development, form and scope of the Hague Principles. It then explores various best practice provisions and innovative provisions of the Hague Principles, offering a high-level comparison with, in particular, the conflict of laws rules applicable in the Republic of Korea, China and Japan. The following table provides a comparative overview of the provisions that will be addressed.

	HAGUE PRINCIPLES	JAPANESE APPLICATION OF LAWS ACT	CHINESE FOREIGN-RELATED CIVIL RELATIONS LAW	KOREAN CONFLICTS ACT
Tacit choice	✓ Article 4	✓	× Article 3	✓ Article 25
Connection between the contract/parties and the designated law	× Article 2(4)	×	× Article 41 (& Art. 7 of the Chinese Interpretation I)	×
Partial or multiple choice	✓ Article 2(2)	✓	×	✓ Article 25(2)
Choice of non-State rules of law	Article 3	×	×	×
Battle of forms	Article 6	×	×	×
Ordre public	✓ Article 11(3)-(5)	✓ Article 42	✓ Article 5	✓ Article 10
Overriding mandatory laws	✓ Article 11(1)(2)(5)	×	✓ Article 4 (& Art. 10 of the Chinese Interpretation I)	✓ Article 7

Contracts", submitted by the Permanent Bureau, Prel. Doc. No. 6 of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, available on the Hague Conference website at <www.hcch.net> under "Work in Progress" then "General Affairs", paras. I.15-I.19 ("Prel. Doc. No 6 of March 2014").

DEVELOPMENT OF THE HAGUE PRINCIPLES

In 2006, the Hague Conference conducted a series of feasibility studies concerning the development of an instrument relating to choice of law in international commercial contracts. These surveyed existing rules and practices regarding choice of law agreements in the judicial[9] and arbitral[10] arenas. In addition, the Permanent Bureau (the Hague Conference's Secretariat) sent a questionnaire to Members of the Organisation, the International Chamber of Commerce and a large number of arbitral centres and entities. The purpose of the questionnaire was to explore the use of choice of law agreements in current practice and the extent to which such agreements are respected, as well as to ascertain what would be required of a future instrument.[11]

In 2009, following the outcome of, and recommendations flowing from, the studies, the Council of General Affairs and Policy (the Hague Conference's Governing Organ) mandated the Permanent Bureau to set up a Working Group to draft a non-binding international instrument for conflict rules applicable to international contracts, which would later become the draft Hague Principles.[12] The group consisted of specialists in private

9) T. Kruger, "Feasibility study on the choice of law in international contracts - Overview and analysis of existing instruments", Prel. Doc. No 22 B of March 2007. This information is available on the Hague Conference website at <www.hcch.net>, under the headings "Work in Progress", "General Affairs", and "Prel. Doc. No 22 B of March 2007".

10) I. Radic, "Feasibility study on the choice of law in international contracts - Special focus on international arbitration", Prel. Doc. No 22 C of March 2007 ("Prel. Doc. No 22 C"), available at < www.hcch.net >.

11) "Feasibility study on the choice of law in international contracts - report on work carried out and preliminary conclusions", Prel. Doc. No 22 A of March 2007, and "Feasibility study on the choice of law in international contracts - Report on work carried out and conclusions (follow-up note)", Prel. Doc. No 5 of February 2008. This information is available on the Hague Conference website at <www.hcch.net>, under the headings "Work in Progress" then "General Affairs" and "Prel. Doc. No 22 A of March 2007" and "Prel. Doc. No 5 of February 2008" (follow-up note).

12) See the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March - 2 April 2009), available at <www.hcch.net>.

international law and international arbitration law drawn from different legal systems from all corners of the globe. In successive years the Working Group, chaired by Professor Daniel Girsberger of Switzerland, met on various occasions.

A Special Commission[13] took place in The Hague from 12–16 November 2012 in order to examine the version of the Hague Principles submitted by the Working Group in 2011. The Special Commission unanimously approved a revised form of the Hague Principles and made a number of recommendations relating to the completion of the Hague Principles and the accompanying Commentary. In line with these recommendations, in April 2013, the Council on General Affairs and Policy of the Conference approved the Hague Principles, marking a significant milestone in their development. The Council also gave a mandate to the Working Group to prepare a Commentary. The Commentary accompanies each article of the Hague Principles and serves as an interpretative and explanatory tool. Practical examples and scenarios are also provided to illustrate the application of the black letter rules.

The Permanent Bureau consolidated the Commentary and circulated it in November 2013 to the Members of the Hague Conference for consultation. Several Members submitted suggested changes to the Commentary which informed the discussions of the Working Group at its meeting in January 2014. During this meeting, the Working Group established an Editorial Committee charged with finalising the text of the Commentary with the

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13) In 2012 the Council decided to establish a Special Commission to discuss the proposals of the Working Group and make recommendations as to future steps to be undertaken, including the decision to be taken on the form of the non-binding instrument and the process through which the commentary should be completed. The Special Commission met from 12 to 16 November 2012. This is consistent with Art. 8 of the Hague Conference Statute:

"(1) The Sessions and, in the interval between Sessions, the Council, may set up Special Commissions to prepare draft Conventions or to study all questions of private international law which come within the purpose of the Conference.

(2) The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus."

assistance of the Permanent Bureau. The instrument is expected to be completed in 2014.

FORM OF THE HAGUE PRINCIPLES

Unlike previous normative instruments developed by the Hague Conference, the Hague Principles do not constitute a formally binding instrument such as a Convention or a Protocol. Rather, the Hague Principles are a non-binding set of guiding *principles* suitable for States to incorporate into their domestic choice of law regimes having regard to the specificities of their respective legal system. The Hague Principles are therefore suited to guiding the reform of domestic law on choice of law, while operating alongside existing choice of law instruments.[14]

The Hague Conference approved the development of non-binding instruments as a possible working method in 1980.[15] In particular, for choice of law in contractual matters, the Hague Conference considered a set of non-binding principles to be appropriate. It is envisaged that law reform, guided by the Hague Principles, will result in increased harmonisation between States in their treatment of choice of law in contractual matters and, perhaps, create the conditions necessary for the development of a

14) See Prel. Doc. No 6 of March 2014, op. cit. note 8, paras I.8-I.10.

15) "Recognizing that the use of certain methods of less binding effect than international conventions is in certain cases of a kind to promote the easier adoption and more wide-spread diffusion of common solutions, grants that the Conference, while maintaining as its principal purpose the preparation of international conventions, may nevertheless use other procedures of less binding effect, such as recommendations or model laws, where, having regard to the circumstances, such procedures appear to be particularly appropriate", Final Act of the Fourteenth Session (25 October 1980), Actes et documents de la Quatorzième session, Tome I, *Miscellaneous matters*, edited by the Permanent Bureau of the Conference, Netherlands Government Printing Office, The Hague (1982), I-63. On this subject, see also G. Droz, "La Conférence de La Haye de droit international privé : traités internationaux ou lois modèles ?", *Revue Internationale de Droit Comparé*, 1961, 507-521; "Conférence de La Haye de droit international privé", *Répertoire international Dalloz*, No 15 1998.

binding instrument.[16]

Although novel for the Hague Conference, non-binding instruments are not uncommon. A number of other international organisations have produced non-binding instruments that have worked to develop and harmonise law. The *United Nations Convention on Contracts for the International Sale of Goods* ("CISG") and the *UNIDROIT Principles of International Commercial Contracts* ("UPICC") have had a significant impact on the respective development of contract and sales law. The Hague Principles hope to become the "conflict of laws corollary" to these pillars of international contract law.

SCOPE OF THE HAGUE PRINCIPLES

Two criteria must be met for the Hague Principles to apply to a contract. First, the contract in question must be "international". The Hague Principles contain a negative definition according to which 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".[17] Secondly, the parties to the contract must be acting in the exercise of their trade or profession. Consistent with this requirement, the Hague Principles expressly exclude from their scope consumer and employee contracts.[18] This approach differs

16) See Prel. Doc. No 6 of March 2014, op. cit. note 8, paras I.8-I.10, I.20-I.21.

17) Art. 1(2) of the Hague Principles. See also Art. 1(2) of the *Hague Convention of 30 June 2005 on Choice of Court Agreements* ("2005 Hague Choice of Court Convention") which contains a similar definition.

18) The rationale for the decision to confine the Hague Principles to business-to-business contracts was considered to be a sufficient counter-balance to the promotion of party autonomy. The rationale is to enhance and establish party autonomy in international contracts, but only where both parties are professionals, and therefore the risks from an abuse of party autonomy are viewed as remote. See Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008), 1, at < www.hcch.net > and Conclusions and Recommendations adopted by the

from some instruments that permit party autonomy under certain conditions for some categories of contracts in which the bargaining power of one party is presumptively weaker.[19]

The Hague Principles provide rules applicable to situations in which the parties have made an express or tacit choice of law by agreement. They do not provide rules that determine the governing law in the absence of party choice.[20] This is in contrast to other instruments such as the *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations* ("Rome I Regulation")[21] and the Korean Conflicts Act.[22] The instrument does not contemplate rules in the absence of choice of law by the parties. The goal of the Hague Principles is to further party autonomy rather than to provide a comprehensive regime for ascertaining the law applicable to international commercial contracts. Moreover, there is currently no consensus as to the most appropriate rules for determining the applicable law in the absence of party choice. Notwithstanding, the Council on General Affairs and Policy of the Conference ("the Council") could issue a new mandate to develop rules that determine the law applicable to contracts in the absence of a choice of law agreement at a later date.[23]

TOWARDS A SOUND INTERNATIONAL STANDARD

We will now analyse various aspects of the Hague Principles, first considering several best practice provisions which substantially accord with the existing approach taken under Korean law but which may be the

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Council on General Affairs and Policy of the Conference (31 March to 3 April 2008), 2, at < www.hcch.net >.

19) See, for example, Art. 27 of the Korean Conflicts Act.

20) Prel. Doc. No 6 of March 2014, *op. cit.* note 8, para. I.14.

21) Art. 4 of the Rome I Regulation,.

22) Art. 26(1) of Korean Conflicts Act, .

23) Prel. Doc. No 6 of March 2014, *op. cit.* note 8, para. I.14.

subject of divergent approaches elsewhere within the region[24] and internationally. These include the ability of parties to choose tacitly the applicable law (see Art. 4) as well as the lack of a required connection between the chosen law and the transaction or the parties (see Art. 2(4)) and provisions addressing the ability of the parties to choose different laws to apply to different parts of their contract (see Art. 2(2)). We then consider several innovative provisions which may influence the future reform of conflict of laws rules in the Republic of Korea and within the region.

(A) Provisions in the Hague Principles cementing "best practices"

(a) Admission of a tacit choice of law

One of the issues discussed at length during the development of the Hague Principles related to the manner in which parties could make a choice of law. Specifically, the question was whether an implicit choice of the applicable law would be admissible or whether an explicit choice was necessary. Some instruments such as the Chinese Foreign-related Civil Relations Law appear to limit party choice to an express choice of law.[25]

A comparative review shows that an implicit choice of applicable law is generally permissible, albeit to varying degrees. For example, the Rome I Regulation requires that the choice be clearly demonstrated by the provisions of the contract *or* the circumstances of the case.[26] The Civil

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24) See the comparative table on p. 394.

25) B.A. Marshall, "Reconsidering the proper law of the contract", *Melbourne Journal of International Law*, Vol 13(1)2013, 505, 526; P. Leibkücher, "Comments on the Supreme People's Court's Interpretation No. 1 on the Private International Law Act of the PRC", *China-EU Law Journal*, 2013, 201, 206, suggests, however, that Art. 8 of the Chinese Interpretation I indicates that a tacit choice of foreign law is permissible. Art. 8 provides that "where both parties invoke the law of the same country and neither has raised any objection to it, the people's courts may determine that the parties have chosen the law applicable to the foreign-related civil relation".

26) Art. 3 of the Rome I Regulation; compare with Art. 3 of the *Convention on the Law Applicable to Contractual Obligations* of 19 June 1980 (80/934/EEC) ("Rome Convention"), which is phrased more restrictively: "The choice *must* be expressed or demonstrated

Code of Quebec, for its part, requires only that the designation of the applicable law be inferred with certainty from the terms of the contract, without recourse to the circumstances surrounding the deed.[27] Likewise, those 23 American states that follow the Restatement Second on the Conflict of Laws[28] consider that a reference to legal expressions or doctrines peculiar to the law of a particular State is a valid implied choice.[29] The Restatement Second requires courts to construe this rule narrowly so as to avoid admitting hypothetical choices of law.[30]

Under some instruments, an implicit choice is construed restrictively. For instance, the *Inter-American Convention on the Law Applicable to International Contracts*[31] provides that "[t]he parties' agreement on this selection [of applicable law] must be express or, in the event that there is no express agreement, must be evident from the parties' behaviour and from the clauses of the contract, considered as a whole".[32] That phrasing invites a two-fold analysis: subjective (behaviour of the parties) and objective (clauses of the contract). Article 25(1) of the Korean Conflicts Act,

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with reasonable certainty by the terms of the contract or the circumstances of the case" (emphasis added).

27) "A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or the designation of which may be inferred with certainty from the terms of the act", Art. 3111(1) of the Civil Code of Quebec.

28) S. Symeonides, "Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey", *American Journal of Comparative Law*, Vol. 62, 2014, 63-64 ("2013 Survey").

29) *Restatement, Second, Conflict of Laws*, 1971 § 187(2) comment (a). See also *Burchett v. MasTec North America Inc* 322 Mont. 93, 93 P. 3d 1247 (2004); P. Hay, P. Borchers, S.C. Symeonides, *Conflict of Laws*, 5thedition,WestPublishing,StPaulMN,2010,1131-1132.

30) § 187(2) comment (a) of the *Restatement, Second, Conflict of Laws*, 1971. The US Supreme court has long recognised the possibility of an implied choice of law: *Wayman v. Southard*, 23 US (10 Wheat.) 1 (1825). S.C. Symeonides, *American Private International Law*, Kluwer Law International, The Netherlands, 2008, para. 467, p. 216.

31) *Inter-American Convention of 17 March 1994 on the Law Applicable to International Contracts*, opened for signature 17 March 1994, 33 ILM 733 (entered into force 15 December 1996) < www.oas.org/DIL/CIDIPV_convention_internationalcontracts.htm > [last consulted on 14 January 2014] ("Mexico Convention").

32) Art. 7 of the Mexico Convention.

for its part, provides that "a contract shall be governed by the law expressly or impliedly chosen by the parties; provided, however, that [the] existence of an implied choice may be acknowledged only when it is resonable [sic] to do so in light of the terms of the contract or the circumstances of the case."[33]

In line with the strict approach to implied choice in the Korean Conflicts Act, Article 4 of the Hague Principles requires that the parties' choice "be made expressly or appear clearly from the provisions of the contract or the circumstances".[34] A tacit choice of law by the parties is one which is not expressly stated in the contract but is nonetheless a real choice of law. It must be clear that there is a real intention on the part of the parties that a certain law be applicable; a hypothetical choice or presumed intention imputed to the parties is insufficient.[35]

This approach acknowledges a tacit choice made by reference to elements of the contract or other relevant circumstances.[36] Generally, the terms of the contract are given priority. However, either the terms of the contract or the circumstances of the case may conclusively

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33) Art. 25 of the Law Number 6465 of The Act amending the Conflict of Laws Act [Translation of *K.H. Suk,* Professor of Law, Hanyang University, in *K.H. Suk,* "New Conflict of Laws Act of the Republic of Korea", *Journal of Korean Law*, Vol. 1, (2) 2001, 210.

34) A similar proposal was made during the consultations that lead to the Japanese Application of Laws Act but was rejected in favour of a flexible approach to ascertaining implied intention under Article 7. See Y. Nishitani, "Party Autonomy and its Restrictions by Mandatory Laws in Japanese Private International Law: Contractual Conflicts Rules" in J. Basedow et al (eds), *Japanese and European Private International Law in Comparative Perspective,* Tübingen, Mohr Siebeck 2008, 86.

35) For arguments in favour of express choice only, see Permanent Bureau of the Hague Conference on Private International Law, "Choice of Law in International Commercial Contracts: Hague Principles?", *Uniform Law Review*, Vol. XV, 2010 3/4,895. Compare with J. Neels and E. Fredericks, "Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts", 2011, *De Jure Law Journal*, 101–110, and B.A. Marshall, "Reconsidering the proper law of the contract", *op. cit.* note 25, 516–527.

36) For a survey of the indicators of tacit choice, P. Nygh, *Autonomy in International Contracts*, Oxford, Clarendon Press 1999, 58–60.

indicate a tacit choice of law. As to relevant terms of the contract, a choice of court clause or an arbitration clause may, along with other factors, indicate that the parties intended the contract to be governed by the law of that forum. Article 4 clarifies that such a choice is not in itself equivalent to a choice of law. This express clarification avoids a common point of confusion in practice: the parties' decision to choose a particular court or arbitral tribunal as the forum in which to resolve disputes does not automatically mean that the parties have selected the law of that forum as the law governing the contract.[37]

The Commentary elaborates on the requirements of Article 4. It explains that the particular circumstances of the case that may indicate the intention of the parties as to the applicable law may include their conduct and other factors surrounding the conclusion of the contract. Previous or related contracts between the parties containing an express choice of law clause in favour of the same law may also indicate that the parties intended to have that law apply to all their contractual relations. The Commentary to the Hague Principles may, in this respect, be useful in interpreting the provisions of the Korean Conflicts Act which employ similar language to Article 4.

(b) Absence of a connection between the contract and the parties, and the designated law

Article 2(4) of the Hague Principles establishes that the parties' freedom to choose the applicable law is not circumscribed by the requirement of a connection, be it geographical or otherwise, between the contract and the chosen law. This provision is designed to reflect the reality of largely delocalised commercial transactions brought about by globalisation. The provision also reflects the fact that parties may choose a particular law for a number of reasons: its neutrality *inter se*,[38] because it is highly developed in the type of transaction or

37) *Cf.* the former presumption under English law *qui elegit judicem elegit jus: Tzortzis v. Monark Line A/B* [1968] 1 WLR 406, 413 (Salmon J.).

transactions contemplated by the contract, or because it is most familiar to their legal advisors on whose advice the parties rely.

In allowing the parties to choose the law applicable to their contract without requiring a particular connection, the Hague Principles' methodology is consistent with many modern instruments relating to the law applicable to contracts, including those prevailing in the East Asian region.[39] For example, Article 7(1) of the 1955 *Hague Convention on the Law Applicable to International Sales of Goods* ("the 1955 Hague Sales Convention") promotes the parties' freedom without requiring any connection between the chosen law and the parties' transaction. A similar provision exists for choice of court agreements in the 2005 Hague Choice of Court Convention. Further, neither the Rome I Regulation, the Mexico Convention, the Korean Conflicts Act,[40] the Chinese Foreign-related Civil Relations Law,[41] nor the Japanese Application of Laws Act[42] require a connection between the chosen law and the parties or their transaction.

In contrast to other instruments, such as the Chinese Interpretation I, the Hague Principles do not contain a specific provision addressing *fraude à la loi*.[43] This limit to party autonomy focusses on the motives of the party

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38) Selecting a neutral forum is what game theory labels the second best strategy. Choosing the law and forum of an unfamiliar State imposes an additional cost on both parties and ensures that neither party has an informational advantage. See S. Voegenauer, "Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence", *European Review of Private Law*, Vol. 1, 2013, 13, 24-25.

39) See P. Nygh, *op. cit.* note 36, 58-60.

40) Art. 8(1) of the Korean Conflicts Act contains a "closest connection exception" which displaces the governing law designated by the Act in various circumstances. Pursuant to Art. 8(2) this exception does not apply where the parties have made a choice of law.

41) Art. 41 of the Foreign-related Civil Relations Law when read together with Art. 7 of the Chinese Interpretation I makes this clear.

42) K.H. Suk (石光現), "Harmonization of Private International Law Rules in Northeast Asia", *op. cit.* note 1, 11; Y. Nishitani, "Party Autonomy and its Restrictions by Mandatory Laws in Japanese Private International Law: Contractual Conflicts Rules" *op. cit.* note 34, 86-87.

43) Art. 11 of the Chinese Interpretation I provides: "Where a party deliberately creates a

which, by its choice of law, seeks to avoid the application of another law which is objectively applicable to the contract. Through application of the exceptions of *ordre public* and overriding mandatory laws provided for in Article 11, the Hague Principles address, to a large extent, the concerns attending *fraude à la loi*.

(c) Partial or multiple choice of law

The process of separating the elements comprising a legal relationship so as to subject them to the laws of several different legal systems is known as *dépeçage*.[44] Some commentators argue that *dépeçage* ought to be used restrictively in a contractual setting, asserting that it should only apply to contractual transactions that are clearly severable.[45] The Japanese Application of Laws Act and the Chinese Foreign-related Civil Relations Law are silent on the issue of *dépeçage* of a single contract.[46] A number of Japanese lower court decisions have, however, allowed *dépeçage* particularly in insurance contracts for the carriage of goods by sea.[47]

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point of contact in a foreign-related civil relation so as to evade being subject to the mandatory rules of law or administrative regulation of the People's Republic of China, the people's courts shall determine that the foreign law is not applicable." This translation is extracted from Q. He, "Interpretation I of the Supreme People's Court on Certain Issues Concerning the Application of the 'Law of the People's Republic of China on Application of Law to Foreign-Related Civil Relations", *The Chinese Journal of Comparative* Law, Vol. 2, (No 1) 2014, 175, 178.

44) P. Lagarde, "Le dépeçage en droit international privé des contrats", *Rivista Diritto Internazionale. Privato e Processuale.*, No 1, 1975, 649, 649.

45) J.-M. Jacquet, "Contrats", *Répertoire de Droit international*, Dalloz 2011, 13, para. 57. According to B. Audit, this restrictive view is inspired by the concern to observe the statutory establishments and the fear of imbalance between the parties: B. Audit, *Droit international privé*, 5e éd.2008,No 821,685.

46) An analysis conducted prior to the entering into force of the Chinese Foreign Related Civil Relations Law indicates that the former regime did not allow parties to choose to subject different substantive aspects of their contract to different foreign laws: A. Ong *Chinese Journal of International Law*, Vol. 8(3), 2009, 637, 645.

47) See discussion in See Y. Nishitani, "Party Autonomy and its Restrictions by Mandatory Laws in Japanese Private International Law: Contractual Conflicts Rules" *op. cit.* note 34, 87.

Several instruments expressly permit *dépeçage*,[48] including the Resolution of the Institute of International Law on "The Autonomy of the Parties in International Contracts between Private Persons or Entities",[49] the Rome I Regulation,[50] the Restatement Second[51] and the Korean Conflicts Act.[52] Article 2(2) of the Hague Principles adopts a similar approach, allowing the parties to choose different laws to apply to separate elements of their contract or to choose a body of law to apply to only part of their contact. The Commentary, however, counsels parties to undertake this option with a degree of caution so as to avoid the risk of contradiction or inconsistency in the determination of their rights and obligations. The parties should ensure that their choices "are logically consistent".[53]

The parties may also make a partial choice of law in accordance with Article 2(2) *a)*. Where the parties choose a law to apply to only part of their contract, the remainder of the contract (in default of a choice of law applicable to it) is governed by the law which would be applicable in the absence of choice. As the Hague Principles do not espouse rules for

48) Regarding the discussions of this matter in connection with the 1986 Convention, see *Proceedings of the Extraordinary Session of October 1985, Diplomatic Conference on the law applicable to sales* contracts, edited by the Permanent Bureau of the Conference, Netherlands Government Printing Office, The Hague, 1987, Nos 50–54, 725. In relation to arbitration, see I. Radic, Prel. Doc. No 22 C, *op. cit.* note 10.

49) Art. 7 of the Resolution, Basel Session 1991, *Revue critique du droit international privé,* 1991, 198, provides that "the parties may choose the law to be applied to the whole or one or more parts of the contract".

50) Art. 3(1) of the Rome I Regulation provides that "the parties can select the law applicable to the whole or a part only of the contract".

51) § 187(2) comment 1 of the Restatement Second,.

52) Art. 25(2) of the Korean Conflicts Act.

53) J. Fawcett and J. Carruthers, "Choices must be logically consistent", in Cheshire, North and Fawcett (eds), *Private international law*, 14th ed, Oxford, Oxford University Press, 2008, 691. *Cf.*: "the only limit of *dépeçage* is one of practice: the application of several laws to a single contract should not rupture its consistency"; J.–M. Jacquet, "Contrats", *Répertoire de Droit international*, Dalloz 2011, 13, para. 57. M. Giuliano, P. Lagarde, "Report concerning the convention on the law applicable to contractual obligations", OJEC 31 Oct. 1980, No C 282, 17.

identifying the applicable law in the absence of choice by the parties, this issue is left to be determined by the law of the forum. The parties may also choose several bodies of law to govern different aspects of their contract pursuant to Article 2(2) *b)*. Partial or multiple choices may relate to, for example, the currency applicable to the contract or clauses relating to specific obligations such as obtaining governmental authorisations.[54]

(B) Innovative provisions of the Hague Principles

Certain provisions of the Hague Principles may be considered innovative when compared to prevailing standards. One of the novel features of the Hague Principles is contained in Article 3, which allows parties to choose non-State "rules of law" subject to certain limits. A choice of norms or "rules of law" has traditionally been contemplated only if parties have also agreed to submit eventual disputes to arbitration. Another innovative provision is contained in Article 6 which seeks to address the problem, known as the battle of forms, where parties make choices of law via the exchange of standard terms. Last but not least, the approach that Article 11 takes with regard to public policy and overriding mandatory rules is unique. These provisions will be considered in turn.

(a) Choice of non-State rules of law

Where a dispute is to be resolved by litigation before a State court, most legal systems require the parties' choice of law clause to designate a State system of law. Indeed, recent legislation has rejected the ability of parties to designate non-State rules of law to their contract.[55] Choice of norms or

54) See Prel. Doc. No 6 of 2014, *op. cit.* note 8, para. 2.9, and Illustrations 2-2 to 2-4.

55) English case law has rejected the ability of parties to designate religious non-State rules of law to their contract: *Halpern v. Halpern* [2007] EWCA Civ 291 (3 April 2007) [21]-[29] ("*Halpern*"); *Musawi v. RE International (UK) Ltd* [2007] EWHC 2981 (Ch) (14 December 2007) [2]; *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 291 (28 January 2004). It is questionable, however, whether the Courts rejected rules of law in these cases exclusively because of their normative, non-State character or rather because of their religious basis. Although Art. 3(2) of the draft Rome

rules of law emanating from non-State sources has typically only been contemplated in an arbitral context. The phrase "rules of law" is derived from existing arbitration sources including national arbitration legislation, model arbitration laws and private institutional arbitration rules.[56] Article 3 of the Hague Principles widens the scope of the party autonomy to allow parties to choose non-State rules of law to govern their contract in circumstances where their dispute is subject to litigation. Where the law of the forum restricts party choice to systems of State law, however, a choice of non-State rules of law will be set aside.

An earlier version of the Draft Hague Principles, as originally proposed by the Working Group, extended party choice to non-State rules of law simply by providing that "a reference [in these Principles] to law includes rules of law". This broad, open-ended formulation was criticised by some experts at the Special Commission on the basis that it might lead to a proliferation of unfair, unilateral rules of law, dictated by the party with the greatest bargaining power.[57] This could have adverse effects on weaker or unsuspecting parties. There was also a concern that allowing parties to employ any rules of law could make the judicial resolution of disputes more time-consuming and complex, given the array of potential rules of law that could be applicable.

On the other hand, the experts who favoured retaining the formulation suggested by the Working Group stressed that the fundamental purpose of the Hague Principles - the promotion of party autonomy - ought to extend

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I Regulation permitted the parties to "choose as the applicable law the Hague Principles and rules of the substantive law of contract recognized internationally or in the Community", this provision was excluded from the final instrument. Compare Commission of the European Communities, *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*(COM(2005) 650 final), with Art. 3 of the Rome I Regulation .

56) See Art. 28(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration and, Art. 21(1) of the International Chamber of Commerce Rules of Arbitration 2012.

57) C. Fresnedo de Aguirre, "Party Autonomy - a Blank Cheque?", *Uniform Law Review*, Vol. XVII, (4) 2012 655-680.

to the freedom to choose rules of law. Several experts noted, in response to the concern about vulnerable parties, that many national laws already contained substantive provisions which prevent the application of unfair terms, and that parties transacting internationally in a commercial context should be considered capable of choosing the law or rules of law applicable to them. Furthermore, if the Hague Principles disallowed the designation of rules or remained silent as to whether parties could designate them, this would conflict with the promotion of uniform and harmonised choice of law principles.

After significant discussion and various constructive proposals, the experts reached a compromise. Article 3 of the Hague Principles, in its current form which only allows parties to choose rules of law that are "neutral and balanced", addresses the concern of unequal bargaining power leading to the application of unfair or inequitable rules of law. Moreover, the requirement that parties select a "set of rules", which are "generally accepted" seeks to dissuade parties from choosing vague or uncertain categories of rules of law. The formulation is not unnecessarily restrictive, although it may be found wanting by those experts who hoped that the Hague Principles would be forward-looking and, where possible, fashioned to promote party autonomy to the fullest extent possible.[58]

The Commentary elaborates on the elements comprising Article 3. As to the first (a "set of rules" which are "generally accepted"), the Commentary provides several examples including the UPICC and the substantive rules of the CISG as a free-standing set of contract rules and not as a nationalised version of the CISG contained in the law of a CISG Contracting State.[59]

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58) See, further, L.G. Radicati Di Brozolo, "Non-national Rules and Conflicts of Laws Reflections in Light of the Unidroit and Hague Principles", *Rivista di diritto internazionale private e processuale*, No 4, 2012, 841-864; L. Gama Jr. and G. Saumier, "Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts", *Asociación Americana de Derecho Internacional Privado*, (ASADIP) Paper, 2011 and R. Michaels, "Non-State Law in the Hague Principles on Choice of Law in International Contracts", available at SSRN <http://ssrn.com/abstract=2386186>, in particular p. 5 and note 6.

Secondly, the Commentary explains that the requirement of "neutrality" calls for a body of rules which is capable of resolving problems commonly encountered in transnational contracts. Finally, the requirement that the rules be "balanced" reflects the presumption that the parties exercise the same negotiating power. Accordingly, rules of law which are drafted to confer an advantage on one of the contracting parties are excluded under Article 3.

To ensure that all aspects of the parties' contract be governed by an applicable law, the Commentary advises that where parties choose rules of law to govern their contract, they should choose a body of national law to apply to those aspects of their contract to which the applicable rules do not extend.

(b) Battle of forms

The Hague Principles provide a solution to the vexed problem of the "battle of forms" or, more specifically, the question of the prevailing law (if any) when both parties make choices of law, via the exchange of "standard form" contracts. [60]

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59) There is some uncertainty as to whether section 3 of the Chinese Foreign-related Civil Relations Law allows parties to choose as the applicable law international treaties not ratified by China. Art. 9 of the Chinese Interpretation I relevantly provides that "Where the parties *invoke* in their contract an international convention not yet effective in the People's Republic of China, the people's courts may determine the rights and obligations between the parties in accordance with such an international convention, unless its provisions prejudice China's socio-public interests, or violate the mandatory rules of law or administrative regulation of the People's Republic of China"[Translation extracted from Q. He, *op. cit.* note 44, 175, 178 (Authors' emphasis)]. But see also P. Leibkücher, *op. cit.* note 25, 206, who observes that section 9 of the Chinese Interpretation I "does not speak of 'choice of law', but of the parties 'referring' to that treaty in their contract" leading P. Leibkücher to deduce that the Act merely envisages an incorporation of the provisions of the treaty and not a choice of them as the applicable law. Q. He and P. Leibkücher differ as to whether the word *invoke* should be read as *refer.*

60) This problem, which is not canvassed here, is also experienced in a jurisdictional context. For a discussion of the problem concerning conflicting jurisdiction clauses, see R. Garnett, "Co-existing and Conflicting Jurisdiction and Arbitration Clauses", *Journal of Private International Law*, Vol. 9(3), 2013, 361.

At a national level, there are currently at least four different approaches to the battle of forms.[61] Under Dutch law, the standard terms first used prevail ("first-shot rule"); whereas under English law and the Contract Law of the People's Republic of China,[62] the standard terms referred to last prevail ("last-shot rule"). In other jurisdictions, such as France and Germany, conflicting terms are to be ignored entirely ("knock-out rule"). The United States' Uniform Commercial Code applies a hybrid solution, taking aspects of the first-shot rule, last-shot rule and knock-out rule.[63] Other jurisdictions do not yet have a solution for the issue of conflicting standard terms.[64]

Accordingly, Article 6 of the Hague Principles provides that whether or not the parties have agreed to a choice of law is to be determined by the law that was purportedly agreed to. If both parties' standard terms designate the same applicable law, or if only one party's standard terms contain a choice of law clause, Article 6(1) *a)* applies and "the law that was purportedly agreed to" resolves the question of whether the parties "agreed" on the applicable law. Where standard terms used by the parties contain conflicting choice of law clauses, Article 6(1) *b)* applies and "the law that was purportedly agreed to" resolves the question of whether the parties "agreed" on the applicable law. If under these laws different standard terms prevail, or if no standard terms prevail, there is no choice of law.

This provision is designed to promote legal certainty for an issue that is currently characterised by a high degree of uncertainty. This provision seeks to bring much needed clarity to the divergent approaches which exist at national level. Complemented by the

61) T. Kadner Graziano, "Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution", *Yearbook of Private International Law*, Vol. 14, 2012/2013, 71, 74.

62) "中华人民共和国合同法" [*Contract Law of the People's Republic of* China] (People's Republic of China) National People's Congress, 15 March 1999.

63) § 2-207 of the Uniform Commercial Code(UCC); T. Kadner Graziano, *op. cit.* note 61, 79.

64) *Ibid.* 74-81.

Commentary, which contains illustrations of potential instances of the battle of forms, and how these situations would be resolved by the Hague Principles, Article 6 of the Hague Principles may prove to be a significant contribution to the development of an international standard for a highly complicated legal issue.

(c) Overriding mandatory laws and ordre public

Like the Korean Conflicts Act, the Chinese Foreign-related Civil Relations Law and the Japanese Application of Laws Act, the Hague Principles acknowledge that certain qualifications to party autonomy are necessary in the field of international commercial contracts. The most important qualifications to the application of parties' chosen law are those contained in Article 11. As the Commentary on Article 11 notes, the limitations contained therein provide an essential "safety valve" without which national lawmakers might be reluctant to allow the application of a foreign chosen law.[65] The purpose of Article 11 is to ensure that the choice of the law by parties does not have the effect of excluding overriding mandatory rules or the rules of *ordre public*. It is clear that overriding mandatory rules and public policy are "closely connected", and are united in the result that they achieve, namely, a setting aside of the chosen law to the extent of an inconsistency with the law against which it is being assessed. These exceptions affect the applicable law differently and, as such, call for distinct inquiries.

(i) Concepts

Ordre public concerns situations in which application of the chosen law is displaced because its application in a particular case offends the fundamental policies of the forum or another State whose law would apply to the contract, absent the parties' choice. The exception concentrates on the content of the foreign, chosen law, which is otherwise properly applicable, to set that law aside. The chosen law is only displaced *to the*

65) See *Guardianship of Infants (The Netherlands v. Sweden)* (1958) 25 ILR 254.

extent of the incompatibility with the fundamental policies of the forum or of the State whose law would apply in the absence of choice. The threshold is high in that the application of the chosen law must violate a fundamental policy of the forum. The chosen law cannot be displaced simply because it implements a different legislative policy and adopts an approach different from that of the law of the forum.

The Japanese Application of Laws Act[66] and the Korean Conflicts Act accord with this conceptualisation of *ordre public*. *Case number: 98da9038 (delivered on 10 December 1999) of the Supreme Court of Korea* is illustrative. This case concerned a contract for the carriage of the goods from Busan in the Republic of Korea to Mexico City in Mexico between a Korean entity and a foreign carrier. The Clause Paramount in the bill of lading incorporated the Hague Rules[67] and the *U.S. Carriage of Goods by Sea Act, 1936* and the annex to the bill included a "Mexico Liability Clause" providing for the carrier's liability to be determined according to "Mexican laws, said carrier's terms and conditions, and the bill of lading when loss, damage, and delay occurred in Mexico". The goods were stolen while in transit in Mexico. The Seoul High Court, the court of second instance in this case, awarded damages to the plaintiff (the insurer of the Korean entity) for the loss of the goods by applying Mexican law.

On appeal to the Korean Supreme Court, the plaintiff submitted that Mexican law should not apply because its application is contrary to the public policy of the Republic of Korea. The Supreme Court rejected this submission, upholding the Seoul High Court's decision on the quantum of damages. The damages determined by the Seoul High Court according to Mexican law were extremely small, approximately U.S. $333, considering

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66) See K. Anderson, Y. Okuda, "Translation of Japan's Private International Law: Act on the General Rules of Application of Laws [Hō no Tekiyō ni Kansuru Tsūsokuhō], Law No 10 of 1898 (as newly titled and amended 21 June 2006)", *Asian-Pacific Law & Policy Journal*, Vol. 8, (1) 2006, 138, note 1.

67) *1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and Protocol of Signature*.

that the stolen goods were exported at U.S. $127,570. The Supreme Court reasoned that although the provisions of a foreign law chosen by the parties or their application may be contrary to the (local) mandatory provisions of Korean law, this does not mean that the chosen foreign law should not apply unless the provisions of the foreign law are or its application is contrary to the good morals and other social orders (*ordre public*) of the Republic of Korea. The Supreme Court ruled that the application of Mexican law in the instant case was not contrary to the good morals and other social orders of the Republic of Korea even though the amount of damages determined by the court below, applying Mexican law, was lower than the amount calculated according to the former overriding mandatory provisions of the *Korean Commercial Code* which rendered void any attempt to reduce a carrier's liability.

Overriding mandatory provisions, as distinct from ordre public, are those positive rules of the *lex fori* or of a third legal system[68] that are essential to safeguard the public interests of the relevant legal system. The relevant inquiry when one talks about overriding mandatory laws of the forum is on those provisions themselves, *i.e.*, provisions that unilaterally determine their own scope of application (*lois d'application immediate*, as they are called in French). In other words, they apply immediately before regard is had to the chosen law[69] although the chosen law is still applied to the greatest possible extent consistently with the overriding mandatory provision.

The Chinese Foreign-related Civil Relations Law[70] and the Korean

68) The Advisory Committee on the Japanese Application of Laws Act refrained from making express provision in the Act as to the effect of overriding mandatory rules of the lex fori lest it have the unintended effect of excluding overriding mandatory provisions of a third legal system. It is clear, however, that overriding mandatory rules of the *lex fori* or of a relevant third legal system are respected in Japan. See Y. Nishitani, "Party Autonomy and its Restrictions by Mandatory Laws in Japanese Private International Law: Contractual Conflicts Rules" *op. cit.* note 34, 100-102.

69) P. Francescakis, "Lois d'application immédiate et droit du travail", *Revue critique du droit international privé*, Vol. 63, 197, 273.

70) Art 4 of the Chinese Foreign-related Civil Relations Law; Art 10 of Chinese Interpretation I. See further P. Leibkücher, *op. cit.* note 25, 210-211.

Conflicts Act broadly accord with this conceptualisation of overriding mandatory provisions.[71] Article 7 of the Korean Conflicts Act defines them as those "[p]rovisions of mandatory law of The Republic of Korea which in view of their legislative purpose must be applied irrespective of the governing law, even if a foreign law is designated as governing law by this Act."[72] Examples of overriding mandatory laws in the Republic of Korea include certain provisions of the *Foreign Exchange Management Act*, the *Foreign Trade Act* and the *Regulation of Monopoly*[73] *and Fair Trade Act*.

In *Case number: 2010da28185 (delivered on 26 August 2010)*, the Supreme Court of Korea was called upon to decide whether the defendant, a Canadian corporation, which had granted the plaintiff, a Korean corporation, the right to distribute the defendant's products in the Republic of Korea had violated the Korean *Fair Trade Act* and the *Regulation of Standardized Contracts Act* by terminating the distributorship agreement. The distributorship agreement contained a choice of law clause in favour of the laws of Ontario, Canada. The Court held that the Canadian corporation had not violated the *Fair Trade Act* and, accordingly, did not need to decide the issue of whether the *Fair Trade Act* was an overriding mandatory law. It seems that the assumption that the Fair Trade Act is mandatory was, however, implicit in the Court's reasoning. This conclusion is supported by the decision of the Seoul High Court, the court of second instance in this case, which held that the *Fair Trade Act* constitutes an overriding mandatory law in accordance with the provisions of Article 7 of the Korean Conflicts Act. With respect to the Regulation of the *Standardized Contracts Act*, the Court considered that its legislative intent was the protection of consumers in international contracts. Accordingly, the Supreme Court held that the *Standardized Contracts Act* does not apply as the overriding mandatory law

71) See generally Y. Gan, "Mandatory Rules in Private International Law in the People's Republic of China", *Yearbook of Private International Law*, Vol. 14, 2012/2013, 305-321.

72) Art. 7 of the Korean Conflicts Act.

73) See K.H. Suk, "The New Conflict of Laws Act of the Republic of Korea", *Yearbook of Private International Law*, Vol. 5, 2003, 99, 110.

to all international contracts (in this case, a business-to-business contract) in which parties have chosen a foreign applicable law.

Interestingly, the Hague Principles address public policy and overriding mandatory provisions in a single article. This departs from the traditional approach of the Hague Conference which has been to separate those two concepts (see, for example, *Hague Convention of 14 March 1978 on the Law Applicable to Agency*, Arts 16-17; *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* ("the 1986 Hague Sales Convention"), Arts 17-18; *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary*, Art. 11). It is also a departure from the prevailing approach in the European Union, which is to treat these issues separately.[74]

(ii) Separate provision for treatment of ordre public and overriding mandatory laws by arbitral tribunals

As the above analysis shows, most instruments contain rules providing for the application by a court or arbitral tribunal of overriding mandatory provisions or ordre public (whether of the forum or of another law) to qualify the law that would otherwise apply in a particular case. The Hague Principles are unique insofar as they distinguish between the treatment of these provisions by courts and arbitral tribunals.

Article 11(5) deals with the qualifications to the application of the parties' chosen law in circumstances where the parties have agreed to submit disputes to arbitration. It envisages that the Hague Principles shall not prevent the tribunal from applying or taking into account both overriding mandatory provisions and *ordre public* of any law other than the law chosen by the parties if the tribunal is required to do so.

The Commentary to the Hague Principles refers, for instance, to the

74) See M. Pauknerová, "Mandatory Rules and Public Policy in International Contract Law", Conference Paper delivered at the ERA Annual Conference on Private International and Business Law, Trier, October 8-9, 2009; *ERA Forum*, Vol. 11, 2010, 29.

situation where a tribunal is acting in accordance with arbitral rules which require it to make every reasonable effort to render an "enforceable award" (see, e.g., Art. 41 of the Rules of Arbitration of the International Chamber of Commerce (2012)). This may entail recourse to the overriding mandatory provisions of the State in which the award creditor is likely to seek enforcement. A further example might be where arbitrators are called upon to decide the enforceability of a contract for the payment of corrupt funds. In such a case, the arbitrators may have regard to the overriding mandatory laws of the place of performance of the contract.[75]

Article 11 does not *compel* arbitrators to apply overriding mandatory laws of the forum or rules of *ordre public*. Rather, it calls on arbitrators to exercise their discretion as to whether and in what circumstances they ought to do so. This is distinguishable from the provisions of Article 11 applying to State courts (paras 1 to 4) which do compel State courts to have regard to such rules.

The first two paragraphs of Article 11 deal with overriding mandatory laws, which qualify the application of the parties' chosen law, in circumstances where the parties' dispute is litigated before a State court. Article 11(1) and Article 11(2) deal respectively with the application of the "overriding mandatory provisions of the law of the forum" and the "overriding mandatory provisions of another law". Under the Hague Principles, it is for the law of the forum to determine whether and when the overriding mandatory provisions of a third legal system are taken into account. This provision should prompt policy makers to enumerate expressly the circumstances in which the overriding mandatory provisions should displace the law chosen by the parties.

It was suggested during the meeting of the Special Commission that the first two paragraphs of Article 11 be amalgamated, to preserve the brevity and succinctness of the Hague Principles. The Special Commission, however,

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75) See generally S.Z. Tang, "Corruption in International Commercial Arbitration", Paper presented at the *Journal of Private International Law* Conference, Madrid, September 12-13, 2013.

preferred to retain the two separate paragraphs, principally on the basis that where the Hague Principles are used as a model, legislators may wish to make separate reference to the role of overriding mandatory provisions of the forum and of a third country.[76] States, in any future reform, can easily import the provisions concerning the overriding mandatory laws of third countries or discard them if they consider that the matter should not be regulated.

The third and fourth paragraphs of Article 11 deal with rules of *ordre public,* which similarly qualify the application of the parties' chosen law, in circumstances where the parties' dispute is being litigated before a State court. Article 11(3) requires State courts to apply the *ordre public* of the forum and Article 11(4) leaves it to the law of the forum to determine the relevance, if any, of the *ordre public* of the State whose law would be applicable in the absence of a choice of law.

In a nutshell, Article 11 of the Hague Principles is a unique provision from a drafting perspective insofar as it considers *ordre public* and overriding mandatory provisions in the same provision, but distinguishes between arbitration and litigation. Its substantive rules appear to be in line with current practices in the Republic of Korea.

CONCLUDING REMARKS

This article has considered several provisions contained in the Hague Principles that seek to consolidate widespread standards together with other provisions which offer innovative solutions. When implemented at the national or regional level, the Hague Principles will contribute to providing greater cohesion between approaches on choice of law rules relating to international contracts. The implementation of the Hague Principles should

76) The Korean Conflicts Act, the Japanese Application of Laws Act and the Chinese Foreign-related Civil Relations Law do not provide rules that dictate when regard must be had to the overriding mandatory laws of third countries.

also raise awareness about the importance of choosing the governing law in international contracts, prompting parties to plan their cross-border transactions more effectively. Whether these objectives will be met remains to be seen.

The possible implementation of the Hague Principles and the extent to which they facilitate the adoption of common international standard s,[77] - particularly in the East Asian Region - is certainly a space to watch. That the project has found favour with the Korean Private International Law community is certainly an auspicious signal.

77) To our knowledge, the first State to formally consider implementing the Hague Principles on Choice of Law in International Contracts is Paraguay. Legislation is currently before the Paraguayan Congress. See the Hague Conference website at <www.hcch.net> under "News & Events" then "2013".

《ANNEX》

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

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 -
   a) the law applicable to the whole contract or to only part of it; and
   b) 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

Under these Principles, the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, 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 and battle of forms

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 two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws 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 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 exclude application of a provision of the law chosen by the parties 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 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.

《Abstract》

The last two decades have seen East Asian States evince an increasing openness to private international law reform at the national level. The Republic of Korea was the harbinger in this regard with Law Number 6465 of the Act amending the Conflict of Laws Act taking effect in 2001. Japan followed suit with the Act on General Rules for Application of Laws taking effect in 2007. The People's Republic of China has since made significant advances. China's Law on the Application of Law to Foreign-related Civil Relations entered into force in 2011 and has recently been supplemented by the Supreme People's Court Interpretation I on the Foreign-related Civil Relations Law, which entered into force on 7 January 2013.

In light of these developments, commentators have called for further dialogue and reform with a view to facilitating increased intra-regional and international engagement. One commentator recently emphasised the importance of developing private international law rules reflecting common values in the region and doing so in parallel with various instruments of the Hague Conference on Private International Law. This prescient observation reflects the longstanding, enduring bond that the Hague Conference shares with the East Asian region. Japan became a Member of the Hague Conference in June 1957; China in July 1987 and the Republic of Korea in August 1997. Beyond East Asia, the Hague Conference has a growing presence in the Asia Pacific, highlighted by the opening of its new regional office in Hong Kong in 2012 and the recent membership of Singapore as the 9th Asian member of the Hague Conference (including Eurasian Turkey).

It is hoped that an increased participation of Asian States in the Hague Conference will facilitate the development of new instruments that are better adapted to the needs of the region. This article will examine one such instrument, the new *Hague Principles on Choice of Law in International Commercial Contracts* ("the Hague Principles"), the endorsement of which is

expected shortly. The Hague Principles seek to serve as an international code of current best practice with respect to the recognition and limits of party autonomy in choice of law for international contracts. The article will detail the development, form and scope of the Hague Principles and their accompanying Commentary before exploring various best practice provisions and innovative provisions. It will offer a high-level comparison with the conflict of laws rules applicable in the Republic of Korea, China and Japan and, in doing so, raise the question of whether the Hague Principles may be a useful instrument for reform at a national or regional level within East Asia.

Key words : Choice of law, Hague Conference on Private International Law, East Asia, Hague Principles on Choice of Law in International Commercial Contracts, party autonomy

《국문초록》

동아시아 역내의 국제사법 개혁과 새로운 국제상사계약의 준거법 결정에 관한 헤이그원칙

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지난 20년, 동아시아 역내 국가들은 국가 차원에서의 국제사법 개혁에 대해 점차 개방적인 모습을 보여 주었다. 한국은 2001년 시행된『국제사법』의 개정을 통해 개혁의 선구자가 되었고, 일본은 2007년 발효된『法の適用に関する通則法』을 통해 동일한 개혁의 발자취를 따랐다. 이후 중국도 상당한 진전을 보여주고 있다. 중국의 국제사법인『涉外民事关系法律适用法』을 2011년 제정하였고, 최근 2013년 1월 7일부로 시행된 최고인민법원의 사법해석(1)에 의해 동법을 보충하였다.

이러한 발전의 관점에서, 학자들은 역내 및 국제적 관여를 촉진하기 위한 보다 많은 대화와 개혁을 요청해 왔다. 최근 한 학자는 동아시아 역내의 공통된 가치와 헤이그국제사법회의의 다양한 국제협약(international instruments)의 정신을 반영한 국제사법을 발전시켜야 함을 강조하였다. 이 통찰력 넘치는 견해는 헤이그국제사법회의가 동아시아 지역과 공유하는 오랫동안 지속된 유대관계를 반영하고 있다. 일본은 1957년 6월 헤이그국제사법회의의 회원이 되었고, 중국은 1987년 7월, 한국은 1997년 8월에 헤이그국제사법회의의 회원이 되었다. 헤이그국제사법회의는 동아시아를 넘어 2012년 홍콩에

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새로운 아태평양지역사무소를 개설하고 유라시아의 터키를 포함하여 싱가폴을 9번째 아시아의 헤이그국제사법회의 회원국으로 받아들일 준비를 함으로써 이 지역에서 그 존재감을 넓혀가고 있다.

아시아 국가들이 헤이그국제사법회에 많이 참여함으로써 아시아 지역의 필요에 보다 잘 대응하는 새로운 국제협약의 발전을 촉진시킬 것으로 기대한다. 이 논문은 그러한 국제협약의 하나로서 곧 승인될 예정인 새로운 국제상사계약의 준거법 결정에 관한 헤이그원칙(이하, "헤이그원칙")을 검토한다. 헤이그원칙이 추구하는 바는 국제계약의 준거법 결정에 있어 당사자자치의 승인 및 제한과 관련한 현행 모범실무(best practice)의 국제적 규준(code)이 될 수 있도록 하는 데 있다. 이 논문은 헤이그원칙의 전개, 형식 및 범위와 헤이그원칙의 주석서에 대해 상설하고, 다방면의 모범실무 규정과 혁신적 규정을 소개한다. 또한 이 글은 한국, 중국 및 일본의 해당 국제사법 규정을 면밀히 검토한 후 헤이그원칙이 개별 국가 내지 동아시아 역내 차원의 개혁을 위한 유용한 도구가 될 수 있을 것인가에 대한 문제를 제기한다.

주제어 : 법률의 선택, 헤이그국제사법회의, 동아시아, 국제상사계약의 준거법 결정에 관한 헤이그원칙, 당사자자치