

**Choice of Law for Contracts:
the Hague Principles from a Singaporean and Asian Perspective**

Abstract: *The Hague Principles on Choice of Law in International Commercial Contracts* (2015) have been put forward by the Hague Conference on Private International Law as a set of non-binding principles which can be incorporated into or be supplementary to the laws of individual states. The lecture will consider the differences between the Principles and the common law, and how the Principles may work as a model for convergence of laws in Asia.

Introduction

1. I am honoured to deliver the 10th Yong Pung How Professorship of Law Lecture. It coincides the tenth anniversary of the founding of the School of Law in SMU, and it is the first lecture of this series to be held in this new School of Law Building. My chair and this lecture series have been sponsored by a generous endowment from the Yong Shook Lin Trust. This donation was facilitated by Mr Yong Pung How. Mr Yong's contributions to Singapore are legendary. As Chief Justice from 1990 to 2006, he brought the administration of justice in Singapore to world recognition. Mr Yong provided tremendous assistance to SMU in the early years of the establishment of the School of Law. He had served as the Chairman of its first Advisory Board, subsequently as Chancellor of the University, and continues to support the School even today.
2. Mr Yong's reform of the Singapore legal system laid the foundations for subsequent developments to globalise Singapore legal services. In the previous few years there have been efforts to push Singapore to the forefront as a dispute resolution venue of choice for Asia and indeed the world. Singapore has adopted a holistic strategy to offer one-stop dispute resolution services in mediation, arbitration and litigation. The Singapore International Commercial Court (SICC) was established in January 2015 to lead the charge on litigation. An important related development is the ratification of *The Hague Convention on Choice of Court Agreements 2005*, which was given legislative effect under the Choice of Court Agreements Act 2016. The purpose of this Convention is to give effect to party autonomy in choice of court agreements. The effect is twofold. First, generally an exclusively chosen court of a Contracting State should take jurisdiction and non-chosen courts in other Contracting States should not do so unless

there are highly exceptional circumstances. Second, a judgment handed down by an exclusively chosen court of a Contracting State will be recognised and enforced in all other Contracting States with limited defences.

3. In previous lectures¹ and elsewhere,² I have discussed at length the effect of the Choice of Court Convention in Singapore law. In this lecture, I turn my attention to a sister instrument from the Hague Conference on Private International Law: *The Hague Principles on Choice of Law in International Commercial Contracts 2015* (“*Hague Principles*”).³ I consider this instrument from the perspective of Singapore law, as well as that of Asia more generally. For this purpose, I have considered the contract choice of law rules of thirteen Asian jurisdictions⁴ outside of Singapore, and will make references to them where appropriate.
4. In a break from tradition, the Hague Conference did not position this instrument as a Convention, but as model law. This instrument has three main objectives. First, it signals a strong affirmation of party autonomy in the choice of law for contracts. An effective exclusive choice of court agreement under the *Hague Convention* gets the contracting parties to the point where they can decide and predict with certainty which court will adjudicate upon their disputes. The *Hague Principles* take a step further to apply party autonomy to the question of which law the chosen court will apply to determine the substantive dispute. Second, it provides a model for “national, regional, supranational or international” law reform. Third, it may be used to “interpret, supplement and develop rules of private international law” of individual countries.

Scope of the *Hague Principles*

5. The *Hague Principles* apply only to international commercial contracts. They do not apply to employment or consumer contracts. They apply only to contracts where each party is acting in

¹ “Staying Relevant: Exercise of Jurisdiction in the Age of the Singapore International Commercial Court”, Eighth Yong Pung How Professorship of Law Lecture, 13 May 2015; “Common Law Developments Relating to Foreign Judgments”, Ninth Yong Pung How Professorship of Law Lecture, 18 May 2016.

² TM Yeo, “Hague Convention on Choice of Court Agreements 2005: A Singapore Perspective”, (2015) 114 *Journal of International Law and Diplomacy* 50-73.

³ The text can be found at: https://docentes.fd.unl.pt/docentes_docs/ma/MHB_MA_31647.pdf. Text and Commentary can be found at: <https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf>.

⁴ Australia, China, Hong Kong SAR, Indonesia, India, Japan, Malaysia, Myanmar, Philippines, Singapore, South Korea, Taiwan, Thailand, and Vietnam. I have benefitted from discussions with colleagues from nine of these jurisdictions in the course of research collaboration on a project on Asian Private International Law led by Doshisha University in Kyoto, Japan.

the exercise of its trade or profession.⁵ Purely domestic contracts are excluded from its scope, ie, where all the connections (apart from the choice of law) are with one state only.⁶ They do not apply to choice of court or arbitration agreements. Further exclusions include issues of capacity of natural persons; corporations; insolvency; property; and the external effects of agency.⁷

6. Three observations may be made. First, the exclusion of arbitration and choice of court agreements is explicable on the basis that they are governed by other international instruments. However, to the extent that the respective instruments direct a tribunal or court to its own principles of contract choice of law, there is no reason why the tribunal or court may not consider the *Hague Principles* at least by analogy. For example, the Choice of Court Convention directs that the validity of an exclusive choice of Singapore court clause be tested by the Singapore court according to the law which it would apply using its own private international law. To the extent that Singapore private international law applies, there is scope for the application of the *Hague Principles* to the extent that it is absorbed into Singapore law.
7. Second, the scope of the *Hague Principles* is narrower than the range of international commercial contracts that can come within the subject matter jurisdiction of the SICC. This is because the jurisdictional rules of the SICC have a broader definition of “international” and “commercial”⁸ and do not have the other subject matter exclusions. There is no reason why the *Hague Principles* cannot be referred to for guidance even in respect of these contracts outside its scope, after all, it is a non-binding instrument. The caveat is that many of the subject matter exclusions have to do with the inappropriateness of applying party autonomy in the first place.
8. Third, consumer, employment, and domestic contracts raise questions about the limits of party autonomy to which countries have different outlooks and techniques to deal with the issue. For example, common law choice of law rules do not distinguish between domestic and international contracts, and between commercial and employment or consumer contracts. Common law control lies in the limitation that the choice of law be bona fide, legal and not against public policy, and the use of the international mandatory rules to the extent that the

⁵ *Hague Principles*, Article 1(1).

⁶ *Hague Principles*, Article 1(2).

⁷ *Hague Principles*, Article 1(3).

⁸ For example, the SICC rules permit parties to declare their contracts to be “international” and/or “commercial”; this is not provided for under the *Hague Principles*. Order 110, r 1(2)(a)(iv) and r 1(2)(b)(iii).

connections are centred in the forum. Many civil law countries do not allow choice or at least unfettered choice of law in consumer and employment contracts, and to a lesser extent contracts which are totally domestic.⁹

Party Autonomy

9. Party autonomy is deeply entrenched in the Singapore choice of law rules for contracts. The express or inferred choice of contracting parties will be given to, the only limitation being that the choice should be bona fide, legal and not against public policy. In the absence of choice, the contract will be governed by the objective proper law, ie, the law of the country or system that has the closest connection with the transaction and the parties. Even the objective proper law is rationalised on the basis of party autonomy; it is the law which reasonable persons in the position of the contracting parties would have chosen to govern the contract in view of the objective connections.¹⁰ Party autonomy is so forceful in the jurisprudence in this area that there is no case in Singapore which has applied the limitation to parties' choice of law.
10. While party autonomy is clearly established the choice of law rules of most developed countries, it is not something that should be taken for granted when dealing with the courts of foreign countries. The *Hague Principles* thus play an important role in signalling the importance of party autonomy in the choice of law for international commercial contracts. Indeed the other fourteen other Asian countries I surveyed all embrace party autonomy in this respect. They will all as a general rule give effect to the express choice of law of the contracting parties.

No Limitation to Choice

11. Article 2(1) makes a simple but magisterial statement that a contract is governed by the law chosen by the parties. The common law limitation that the choice of law be bona fide, legal and not against public policy does not find expression in the *Hague Principles*. The protective

⁹ Vietnamese choice of law rules would not apply at all if the situation is totally domestic (Vietnam Civil Code 2015, Article 663(2)). Academic opinion in Japan suggests that contracting parties are not allowed to choose a foreign law to govern a totally domestic contract. Sometimes the choice of law may be allowed subject to the application of domestic mandatory rules of the law of the closely connected country: see, eg, the EU and South Korea. Most countries (civil or common law) have minimum standards of employee and consumer protection that cannot be derogated from by choice of law rules. One significant divergence is whether the court of the forum will apply the minimum standards of another country which is not the country of the applicable law of the contract.

¹⁰ *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [49]; *Las Vegas Hilton Corp v Khoo Teng Hock Sunny* [1996] 2 SLR(R) 589 at [42].

functions are served instead by a variety of other techniques: (1) the exclusion of consumer and employment contracts from scope; (2) the requirement of internationality of connections; (3) the requirement of trading or commercial context; and (4) the application of public policy and international mandatory rules. Given these limitations, it will be very difficult to imagine a case of a contract falling within the scope of the *Hague Principles* to which the common law will apply its own limitations.

Tacit Choice

12. The *Hague Principles* explicitly addresses inferred choice in Article 4. Two comments may be made. First, the threshold for finding an inferred choice is that it should appear clearly from the provisions of the contract or the circumstances. This is a higher threshold than the common law's open-ended search. However, the difference may be more apparent than real. Singapore courts at least have taken the pragmatic approach that if it would not be meaningful to look for an inferred intention in the circumstances, it would go straight to search for an objective proper law.¹¹ Second, the reason for dealing explicitly with inferred choice is because not all countries will give effect to tacit choice of law by the parties. For example, Taiwanese private international law stipulates that the parties' choice must be express. In Chinese private international law, an implied choice may only be effective if the contracting parties are not disputing the choice before the court. This provides a salutary lesson on the importance of drafting express choice of law agreements in contracts. It is also one instance where the *Hague Principles* could provide some encouragement to these countries to effect law reform.

Unconnected Law

13. Article 2(4) of the *Hague Principles* affirm the power of contracting parties to choose a law that is not connected to the contract. This is not an issue in Anglo-Commonwealth jurisdictions which have generally recognised this principle, subject to the limitation mentioned above. Most Asian countries do not prohibit the selection of an unconnected law. One possible exception is Indonesia where there is academic suggestion that the chosen law needs to be connected to the contract. The most famous expression for the need for a connected law is found in the

¹¹ *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [47]; *Las Vegas Hilton Corp v Khoo Teng Hock Sunny* [1996] 2 SLR(R) 589 at [40].

Restatement (Second) on the Conflict of Laws (1971) in the United States, where §187 stipulates the need for a reasonable relation between the contract and chosen law. Unsurprisingly, the State of New York legislated to overcome this requirement to allow parties to choose New York law in commercial contracts valued at more than US\$250,000.¹² Other states followed suit.¹³ Academic opinion is divided whether the requirement or circumvention of reasonable relation may be unconstitutional.¹⁴

Absence of Choice

14. The *Hague Principles* do not address the situation where there is no express or inferred choice of law. There are two reasons for this. First, the primary objective of the instrument is to affirm party autonomy, and party autonomy ends with party choice of law. Second, there is significant disagreement among countries on how the applicable law of a contract in the absence of party choice is to be determined. While common law countries utilise an open-ended search for the most closely connected law, many civil law countries use presumptions to determine either the most closely connected legal system, or locate the country where the characteristic performance is to take place, or the residence of the characteristic performer, or some combination of these techniques.¹⁵ Thus, even if all countries sign up to the *Hague Principles*, the determination of

¹² New York General Obligations (Title 14), § 5-1401 Choice of Law.

¹³ Texas Business & Commerce Code § 35.51 (for transactions over the value of one million dollars); California Civil Code § 1646.5 (for transactions over the value of \$250,000); Louisiana Civil Code Art. 3540; Oregon Revised Statutes 81.120 (2001). See Y Nishitani, "Party Autonomy in Contemporary Private International Law – The Hague Principles on Choice of Law and East Asia", (2016) 59 Jap Yrbk Int Law 300.

¹⁴ Compare MJ Kelson, "Choice-of-Law, Venue, and Consent-to-Jurisdiction Provisions in California Commercial Lending Agreements: Can Good Draftsmanship Overcome Bad Choice-of-Law Doctrine" (1990) 23 Loy LAL Rev 1337 and Robert A. Sedler, "Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism" (1981) 10 Hofstra L Rev 59 with BW Rashkover, "Title 14 New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results" (1985) 71 Cornell L Rev 227. See also K O'Neill, "Note, Contractual Choice-of-Law: The Case For a New Determination for Full Faith and Credit Limitations", (1993) 71 Texas L Rev 1019 at 1030-32.

¹⁵ In Asia: China (habitual residence of characteristic performer or closest connection with the contract); Indonesia (closest connection with contract with emphasis on connection of the characteristic performer, subject to exception of most closely connected law); Japan (closest connection with the contract with presumption of characteristic performer, subject to exception of most closely connected law); South Korea (closest connection with contract with presumption of the habitual residence of the characteristic performer); Taiwan ((closest connection with contract with presumption of the habitual residence of the characteristic performer); Thailand (common nationality of contracting parties, in the absence of which the place of contracting); Vietnam (closest connection with the contract, with series of presumptions similar in pattern to residence of characteristic performer). The common law countries (Australia, Hong Kong SAR, India, Malaysia, Myanmar and Singapore) will all apply the law of the legal system most closely connected with the contract. The Philippines, a mixed legal system, is aligned with the common law countries on this issue. The Law Reform Committee of the Singapore Academy of Law considered the doctrine of characteristic performance but preferred to retain the more flexible objective proper law methodology of the common law: *Report on Reform of the Law Concerning Choice of Law in Contract* (2003), available at: <http://www.sal.org.sg/Lists/Law Reform Committee Reports/Attachments/18/Report on Reform of the Law Concerning Choice of Law in Contract.pdf>

the law governing the contract in the absence of party choice is still left to the conflicts rules of the forum. This may of course encourage forum shopping. The practical consequence is that contracting parties should never leave the issue of the applicable law to this chance.

15. The structure of the *Hague Principles* draws a clear distinction between party choice and the absence of party choice. Once the conclusion is reached that there is no party choice, the analysis crosses the line to absence of party choice, and the *Hague Principles* cease to apply. For example, Article 9 applying the “law chosen by the parties” to issues like validity and interpretation will not be relevant. The private international law of the forum will answer these questions instead.
16. However, the common law distinction is somewhat muddled because the objective proper law is jurisprudentially founded on what objective parties standing in the shoes of the contracting parties would have selected as the law governing the contract. This objective standard is the general test of contractual intention in the common law. On one view, the objective proper law is nevertheless still chosen by the parties, and Article 9 can still apply. On the other hand, it is strongly arguable that the division between party choice and absence of party choice in the *Hague Principles* should be understood as an autonomous concept, and the objective proper law cases would fall outside the *Hague Principles*. Of course, differences may become academic if the common law converges with the *Hague Principles*. But for the differences are real. For example, Article 9(d) applies the chosen law of the contract to the issue of limitation periods, subject only to public policy and overriding mandatory rules of the forum.¹⁶ However, the Foreign Limitation Periods Act¹⁷ will apply the limitation period of an objective proper law, subject to considerations of “hardship”¹⁸ which is a broader concept than public policy and it is not clear that it would qualify as an international mandatory rule. One should always be mindful of the interfaces, convergences, and potential conflicts between the *Hague Principles* and our own private international law if one chooses to follow the *Hague Principles*.

¹⁶ Article 11.

¹⁷ Cap 111A, 2013 Rev Ed.

¹⁸ Ibid, s 4(2).

Relevance of the Principles in Singapore

17. The *Hague Principles* do not form a mandatory instrument. It may well be enacted into domestic law as a statute, as Paraguay has done. Unlike Paraguay, Singapore has already entrenched the principle of party autonomy within fairly sophisticated rules in contract choice of law. The *Hague Principles* may, however, be relevant to Singapore in three overlapping ways: (1) it could be a model for reform where the common law is found wanting; (2) it could be a gap-filler for areas where the common law is silent or unclear; (3) it could be a model for reform (quite apart from any question of dissatisfaction or uncertainty) in order to strive towards international harmonisation of choice of law principles for contracts. On any view, recourse to the *Hague Principles* will encourage convergence on any of the motivations.
18. The *Hague Principles* could serve a fourth function to supply the applicable choice of law principles, at least in the context of international commercial arbitration. Arbitrators may well adopt the *Hague Principles* as the source of relevant applicable principles of private international law, especially if the parties have agreed to their application. In international commercial arbitration, contracting parties are free to choose non-state laws, as well as rules of private international law.¹⁹ As the common law now stands, it is much more doubtful whether this is possible in a court of law.²⁰
19. There are a number of areas of Singapore law where there is no case law, or inconclusive case law, and which could benefit from some clarification, where the *Hague Principles* can potentially provide guidance.

Choice of Law as a Separate Agreement

20. Article 7 of the *Hague Principles* affirms the proposition – gradually gaining recognition in the common law at least in respect of choice of court agreements – that the choice of law agreement is severable from the main contract.²¹ Acceptance of this principle has important substantive consequences. Challenges to the validity of the main contract will not necessarily touch the

¹⁹ Article 28(1) of the UNCITRAL Model Law, International Arbitration Act, Cap 143A, First Schedule.

²⁰ See below, text to and following footnote 54.

²¹ *Hague Principles*, Article 7.

validity and effect of the choice of law clause. Affirmation of this principle also signals the growing development of dispute resolution agreements as a distinct sub-discipline in the law.²²

Depeçage

21. One issue which has not received the direct attention of the Singapore court is whether different parts of a single contract can be governed by different laws (*depeçage*).²³ Article 2(2) of the *Hague Principles* provides clearly that the parties may choose a law to govern the whole or part of a contract and different laws to govern different parts of a contract.²⁴

Modification of Choice of Law

22. Another issue which is not the subject of settled law in Singapore is whether the law governing a contract can be changed post-formation.²⁵ Article 2(3) of the *Hague Principles* provides that the law governing a contract may be modified after the conclusion of the contract, provided that such modification does not prejudice its formal validity or the rights of third parties.²⁶ The common law has resisted the idea of a unilateral change of the proper law of a contract, although the case law is ambiguous in conflating the situation of change of proper law and a situation where the parties have stipulated that there is no proper law until a certain subsequent event should occur.²⁷ The latter is an impermissible “floating proper law” because a contract is a legal construct can only exist with reference to a legal system, and must have a proper law from its inception. Provided that the unilateral power to change the proper law is the subject of a valid agreement, this would be permitted under the *Hague Principles*.²⁸

²² See eg, A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008); M Hook, *The Choice of Law Contract* (Hart 2016).

²³ While most of the surveyed Asian states allow or probably allow *depeçage*, the position is not clear in Thailand and Vietnam.

²⁴ *Hague Principles*, Article 2(2).

²⁵ There is a suggestion that Singapore law allows change of proper law but in the context of fresh substantive agreements being made: *Kredietbank NV v Sinotani Pacific Pte Ltd (Agricultural Bank of China, third party)* [1999] 1 SLR(R) 274.

²⁶ *Hague Principles*, Article 2(3).

²⁷ *Armar Shipping Co Ltd v Caisse Algerienne D'assurance et de Reassurance* [1981] 1 WLR 207; *The Iran Vojdan* [1984] 2 Lloyd's Rep 380.

²⁸ A separate issue could arise whether the term allowing for unilateral change creates an unacceptable level of uncertainty under the domestic applicable contract law of the contract.

23. Of the Asian states surveyed, the laws of China, Indonesia, Japan, South Korea, and the Philippines allow post-formation modification to the proper law of the contract provided that third party rights should be prejudiced. Taiwanese law allows for change but is silent on the effect of third party rights. The position in Thailand is unclear. The common law countries²⁹ share a common uncertainty about whether and if so when changes are allowed. In this context, the *Hague Principles* could provide a very useful benchmark for many of these Asian countries.

Formation of Contracts

24. Formation of an agreement can be a tricky issue because it goes to the root of the alleged legal relationship between the parties. If the existence of the contract is itself in dispute, to what extent can the courts look to the choice of law clause which forms part of alleged contract? If neither party disputes the existence of the choice of law agreement,³⁰ then there is no problem with applying the chosen law to determine whether the parties have indeed made an enforceable contract. Similarly, in the absence of a choice of law clause if both parties are agreed on what is the objectively most closely connected legal system to their putative contract, there is good reason to apply that law to determine whether a contract has been formed. But these are optimistic scenarios, and more likely than not, these aspects of the transaction are as likely to be disputed as the actual existence of the substantive agreement.

25. The application of the law governing the putative agreement to determine the existence of the agreement is problematic as a matter of logic, because it begins with the assumption of the very thing sought to be proven. On the other hand, it is proving to be a popular solution,³¹ because – at least in theory – where parties have negotiated with reference to a particular system of law, that law is the most appropriate one to test whether the parties have reached consensus. Whether this assumption is correct in practice remains to be validated; anecdotal evidence suggests that in many negotiations, the choice of law clause is one of the final matters to be decided, and often at the eleventh hour. The proper law of the putative contract approach may not provide a solution if multiple choice of law clauses are floated during negotiations more than one of which is valid using this test. Further, it may cause unfairness as it could allow one party

²⁹ Australia, Hong Kong SAR, India, Malaysia, Myanmar and Singapore.

³⁰ At common law, an “agreement” for this purpose may encompass a common intention: A Briggs, *Agreements on Jurisdiction and Choice of Law* (oup, 2008) at para 11.23. See also K Low, “Choice of Law in Formation of Contracts” (2004) 20 JCL 167.

³¹ The EU being the main proponent.

strategically to impose a choice of law on the other (eg, by selecting a law which allows for tacit acceptance of an offer). For these reasons, and also for practical reasons, courts are sometimes driven to apply the law of the forum.³² However, this encourages forum shopping, forum may have no connection to the putative contract at all, and it can take the parties by surprise.

26. The issue is not the subject of clear law in many of the Asian countries surveyed. In Singapore, the position is unclear,³³ though judicial statements support the proper law of the putative contract approach.³⁴ South Korea and Taiwan are the exceptions in legislating the proper law of the putative contract approach.

27. Given the dominant global influence of European Union private international law, it was not surprising that the *Hague Principles* adopted the proper law of the putative agreement approach in Article 6(1). Thus, whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to.³⁵ The *Hague Principles* provide two important qualifications. First, adopting (or adapting?) the EU model,³⁶ Article 6(2) of the *Hague Principles* directs the application of the law of a party's place of business³⁷ to determine whether that party has consented to the choice of law clause if it would not be reasonable in the circumstances to apply the proper law of the purported agreement. Although the Commentary to the *Hague Principles* states that it follows the EU approach, the wording in the *Hague Principles* is different. EU law allows a party to rely on its own law to deny consent if it would not be reasonable to apply the law purportedly agreed to. Article 6(2), however, suggests a two-layered choice of law rule.

³² *Lex fori* has been applied in Japan and Indonesia.

³³ Chinese law does not explicitly address the question, though there is academic support for the proper law of the putative contract approach.

³⁴ *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [30]; *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [157]–[158]. There is academic support for the proper law of the putative contract approach in Australia: Davies, Bell & Brereton, *Nygh's Conflict of Laws in Australia* (8th ed, 2010) at paras 19.59–19.70, but *contra Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 225 and 261. There is academic support in Malaysia for objective proper law of the putative contract: Hickling and Wu, *Conflict of Laws in Malaysia* (1995) at 169–170.

³⁵ *Hague Principles*, Article 6(1)(a).

³⁶ Rome I Regulation, Article 10(2).

³⁷ Corporations and individuals are not differentiated for this purpose because only individuals acting in the course of business are caught by the *Hague Principles*.

28. Suppose that A is based in X and B is based in Y, and negotiations for a contract were conducted with reference to the law of Z. The EU approach allows A to argue that although a contract was formed under the law of Z, A had not consented under the law of X. Article 6(2) appears to allow A to argue, in addition, that B had not consented under the law of Y. Additionally, it also allows an argument that although no contract had been formed under the law of Z, nevertheless A and B had consented under the laws of X and Y respectively. Whereas the qualification in the EU model only allows for invalidation, the wording in Article 6(2) of the *Hague Principles* is broad enough to allow validation. These examples go beyond the protection principle envisioned in the EU provision, and it may be necessary to have recourse to a purposive interpretation to avoid this broad effect.³⁸
29. The second qualification is something of an innovation. It is an attempt to deal with some of the problems that can arise in a battle of forms situation. Article 6(1)(b) state that if the same standard terms prevail under both designated choice of law clauses, then the law designated in those terms will apply; but if different standard terms prevail or if under one of both of these laws no standard terms prevail, then there is no choice of law. Take an example where A makes an offer to B on a standard form which expressly stipulates a choice of X law. B accepts the offer but the terms of acceptance expressly stipulates standard terms which include a choice of Y law clause. The parties carry out their agreement, but a dispute then materialises. Which choice of law clause is valid?
30. For the sake of analysis, assume three possible solutions in domestic contract law³⁹ to the battle of forms scenario: (1) the terms in the offer prevail (“first shot” or “FS”); (2) the terms in the acceptance prevail (“last shot” or “LS”); (3) inconsistent terms in both sets are knocked out of the agreement (“knockout” or “KO”).
31. In Scenario 1 in the table below, applying the law of the putative agreement to the question whether the parties had consented to the choice of X law clause, the answer is yes because on the assumption that the choice of X law is valid, FS applies validating the choice of X law clause. Applying the same approach to test the validity of the choice of Y law clause, the answer is no because on the assumption that the contract is governed by Y law which applies FS, the

³⁸ The interpretation will have to focus on under what circumstances it would “not be reasonable” to apply the Article 6(1).

³⁹ In reality, it is likely that many domestic contract laws do not have definitive solutions.

parties had not consented to the choice of Y law clause. The result is that the choice of X law is operative. The converse applies for Scenario 2. In Scenario 3, if the choice of law X (Y) clause is valid, the KO rule applies to knock the choice of X (Y) law clause out. The rest of the pattern can be mapped out quite easily. Applying the law of the putative agreement test to each clause, the choice of X law clause will always validate itself on the FS rule but invalidate itself on the LS or KO rule, while choice of Y law clause will always validate itself on the LS rule, but invalidate itself on the FS or KO rule.

| Scenarios | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
|------------------------------------|---------------|---------------|-----------------|------------|-----------------|---------------|-----------------|-----------------|---------------|
| | | | | | | | | | |
| Content of X law | FS | LS | KO | FS | LS | FS | LS | KO | KO |
| Content of Y law | FS | LS | KO | LS | FS | KO | KO | FS | LS |
| Law of Putative Agreement Approach | X law applies | Y law applies | Neither applies | Both apply | Neither applies | X law applies | Neither applies | Neither applies | Y law applies |
| Hague Principles approach | X law applies | Y law applies | No choice | No choice | No choice | No choice | No choice | No choice | No choice |

32. English common law authorities suggest that where there is more than one putatively applicable choice of law clause, the court should abandon the approach and apply the *lex fori* instead.⁴⁰ This is something of a cop out because the law of the putative contract approach may not always lead to a stalemate. Scenario 4 is the only clearly untenable situation under the law of the putative agreement approach in this example because the contract cannot be governed by two different laws in the same space and time. However, scenarios 1, 2, 6, and 9 illustrate how the law of the putative contract approach may provide a clear solution in some cases. In scenarios 3, 5, 7, and 8 which lead to disregarding both parties' putative choice of law clauses, one may have recourse to the objective proper law of the putative contract if one can overlook on practical grounds the objection that one is still making an assumption about the existence of the contract (which one has to in order to apply the proper law of the putative contract in the first place). Otherwise, the *lex fori* may apply as a last resort.

⁴⁰ *The Heidberg* [1994] 2 Lloyd's Rep 287; *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] EWCA Civ 389, [2006] 2 Lloyd's Rep 475 (CA) at [16] and [17].

33. Article 6(1)(b) attempts to cut through the maze using a practical approach of giving effect to the proper law of the putative agreement only where there is common ground as to a choice of law clause (scenarios 1 and 2 only). That law will in turn determine if necessary whether a valid contract has been formed.⁴¹ In other cases, the legal conclusion is that there is no choice of law by the parties, and the matter is left to the private international law of the forum to determine the applicable law in the absence of choice. The significant difference lies in scenario 6 and 9 where the knockout effect of one law does not reach the other because the proper law of the putative agreement approach tests the validity of each choice of law clause separately. In these situations, the *Hague Principles* arguably reach an objectively more balanced outcome because it prevents the self-validation by one putative law when it is not supported by the other putative law.
34. Even though the *Hague Principles* do not deal with the situation where there is no party choice of law, the practical way in which it cuts through the morass of competing choice of law clauses in the battle of forms situation provides a pragmatic approach that is worth considering for the common law.

Non-state law

35. Article 3 of the *Hague Principles* allows contracting parties to choose non-state law to govern their contract.⁴² However, an important rider to this Article is that it operates subject to the law of the forum. At first blush, this proviso renders Article 3 operationally useless because if the forum permits it, there is no need for the Article, and if the forum does not permit it, the Article does not operate. In any event, the qualification has no real legal significance in a non-binding instrument. In practical terms, Article 3 defines the issue and leaves the matter to be resolved by the private international law of the forum.⁴³ Further, references to the law of the forum beyond the traditional fields of procedure, public policy and international mandatory rules are counter-intuitive in an instrument that is designed to promote harmonisation, and it is indicative of the quality of the consensus supporting the inclusion of the Article in the instrument. Nevertheless, this Article performs an important signalling function in a very nascent area in private international law.

⁴¹ *Hague Principles*, Article 9(1)(e).

⁴² Article 3.

⁴³ Oregon and Paraguay have legislated to allow parties to choose non-state laws.

36. Article 3 does not reflect state practices in courts of law. The proposition has not been tested in any of the Asian countries surveyed whether contracting parties are allowed to choose non-state law in a court of law. EU law, English common law, and the laws of many US states⁴⁴ do not allow the choice of non-state law. In the common law, this position follows from the principle that a contract cannot exist in a legal vacuum and that its existence, validity and content must be determined with reference to a particular legal system. The opposite view is predominant in international commercial arbitration. One important difference between the two processes is that the court of law must act according to legal principles while an arbitration tribunal's powers are derived from the parties' agreement. The theoretical objection is not necessarily insurmountable because the law of the forum can supply by default the legal skeleton of the contract as "container" allowing the contents to be filled by non-state law. This is similar to incorporation of terms by reference, and it may well be asked why there is a need for the specific provision for choice of non-state laws. The answer is a desire by the parties to avoid the domestic mandatory rules of national contract laws. For example, parties incorporating UNIDROIT Principles of International Commercial Contracts (PICC) into a contract governed by Singapore law cannot exclude or evade the legal requirement of consideration in Singapore. Allowing the operation of non-state law within the framework of a Singapore law contract requires a reconceptualization of how choice of law works for contracts, but it is not an impossible exercise.

37. An important practical objection is the uncertainty of non-state laws. Article 3 addresses this problem by requiring that the chosen non-state laws must be "generally accepted on an international, supranational, or regional level as a neutral and balanced set of rules".⁴⁵ Practically every element of this test can be controversial.⁴⁶ Be that as it may, Article 3 will probably allow contracting parties to choose the PICC, or the Principles of European Law of Contract. Parties will also be able to choose the Convention on the International Sales of Goods (CISG) without selecting specifically the law of a country which has enacted the Convention into its law, though it will be unwise to choose the CISG exclusively because it does not deal

⁴⁴ Oregon stands out as a contra-example, with state legislation apparently permitting contracting parties to choose non-national laws: See SC Symeonides, "Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis" (2007-2008) 44 Willamette L Rev 205 at 228.

⁴⁵ Article 3.

⁴⁶ R Michaels, "Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts", in (K Purnhagen & P Rott eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (2014), available at: http://scholarship.law.duke.edu/faculty_scholarship/3227.

with many aspects of the sale contract. If a document on the Principles of Asian Contract Law should materialise in the future, that might well be capable of selection by the parties under this Article.

38. On the other hand, this limitation will probably disallow the choice of *lex mercatoria* for litigation as it would be unlikely to meet the standard of generally accepted set of rules. This could present a difficulty because the *Hague Principles* endeavour to serve both the litigation and arbitration communities, and this limitation which was designed to assuage the concerns of courts of law may well prove to be too limiting for arbitration tribunals which have a much larger appetite for ambiguity. This could inhibit the acceptability of the *Hague Principles* in international commercial arbitration circles. The practical way forward is the interpret Article 3 with reference to the separate spheres of operation of litigation and arbitration respectively. What is generally accepted in the international arbitration community may not necessarily correspond with what is generally accepted in the global community of courts of law.

39. In any event, allowing parties to choose non-state law may not have significant practical consequences. Commercial parties have been allowed to do so in international commercial arbitration. In a study of cases coming before the ICC from 1999 to 2012, Professor Cuniberti found that parties had chosen non-state law in fewer than 2% of the cases being adjudicated, with more than half of these being the choice of the CISG and PICC.⁴⁷ The same author's study of Asia found similar patterns. In a study of four major arbitration centres active in Asia (outside mainland China),⁴⁸ he found that commercial parties rarely asked the arbitrators to apply *lex mercatoria*.⁴⁹ He also concluded that data from the Singapore International Arbitration Centre demonstrated the same reservations.⁵⁰

Article 3 does not appear to be driven so much by commercial needs as a desire to stretch the scope of party autonomy to test the limits of national private international laws. It remains to

⁴⁷ G Cuniberti, "Three Theories of *Lex Mercatoria*" (2013-2014) 52 Colum J Transnatl L 369, at 398-403. See also F Dasser, "Mouse or Monster? Some Facts and Figures on the *lex mercatoria*", in Reinhart Zimmermann (ed), *Globalisierung und Entstaatlichung des Rechts* (Tübingen, Mohr 2008) 129.

⁴⁸ Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, ICC International Court of Arbitration, and International Centre for Dispute Resolution.

⁴⁹ G Cuniberti, "The Laws of Asian International Business Transaction" (2015) 25 Washington Intl LJ 35, at 51-52.

⁵⁰ Ibid, at 52.

be seen whether the growth of transnational non-state law or the convergence and harmonisation of national laws will be the dominant theme for the future of cross-border trade.

Choice of Rules of Private International Law

40. With the possible exception of Australia,⁵¹ practically all the surveyed countries would not apply *renvoi* in the choice of law for contracts.⁵² The position in international commercial arbitration is more nuanced, allowing parties to select private international law rules but only if done expressly. The presumption is that parties do not generally want to select private international law. Article 8 of the *Hague Principles* follows the approach in international commercial arbitration. The purpose of this Article is to honour the likely intention of the parties not to choose private international law, but yet at the same time to signal a forceful push for party autonomy in allowing the parties to do so if they make their intention clear. Another reason for taking this position is that the *Hague Principles* are addressed to both arbitration and litigation communities. Notwithstanding the common aversion to *renvoi*, this Article could serve a useful purpose if parties choose the PICC (assuming choice of non-state law is allowed as well) and want to include the choice of law rules contained therein.⁵³ In the context of international commercial arbitration which already allows parties to choose private international law rules and non-state rules of law, it could allow parties to select the *Hague Principles* as the law to govern the choice of law for their contract. In the context of a court of law, parties cannot opt-in to the *Hague Principles* by relying on the Articles in the *Hague Principles*,⁵⁴ for that would be pulling oneself up by the bootstrap.

Non-Contractual Obligations

41. Article 9(g) of the *Hague Principles* applies the law chosen by the parties to pre-contractual obligations. Two issues arise for consideration: (1) can contracting parties choose a law to govern non-contractual disputes between them? (2) to what extent do choice of law rules for

⁵¹ *O'Driscoll v J Ray Mcdermott SA* [2006] WASCA 25.

⁵² On Singapore's position, see the somewhat inconclusive discussion in *Ong Ghee Soon Kevin v Ho Yong Chong* [2016] SGHC 277 at [103]-[106].

⁵³ Eg, Article 7.4.9(2) of the UNIDROIT Principles referring to the law of the state of currency of payment to determine the interest rate in the case of failure to pay: see HCCH, *Principles on Choice of Law in International Commercial Contracts* (2015) at para 8.8, available at <https://www.hcch.net/upload/conventions/txt40en.pdf>.

⁵⁴ The choice of non-state private international law requires the application not only of Article 8 and Article 3, but also that the law of the forum permits choice of non-state law.

non-contractual obligations look to the law governing an underlying contractual relationship for a solution? The prevailing common law view is that parties' choice of law only applies to contractual issues. On the second, in Singapore, the underlying legal relationship plays a significantly larger role for restitutionary claims than for tortious claims. The proper law of a restitutionary claim arising from contract is determined at the first instance by the law applicable to the contract unless the parties share a common ground that there is no such contract.⁵⁵ Torts are governed by the double actionability rule with flexible exception. However, it is not clear how significant the underlying contractual relationship will be to the question whether the exception will be invoked.⁵⁶

42. One interesting effect of Article 9(g), read with the separability of the choice of law clause in Article 7, is that it is possible for the parties to choose a law to govern pre-contractual obligations at the start of the negotiations (rather than at the conclusion of the contract). Read with Article 3(2) on *depeçage*, this law need not be the same law eventually chosen to govern the substantive contract. The Commentary to the *Hague Principles* suggests that this choice of law could be effective even if no contract is eventually concluded,⁵⁷ presumably on the basis that matters leading up to the formation of a contract falls within the scope of the Hague Principles even if a contract does not legally materialise. This could pave the way for a new species of dispute resolution agreements focussing on the law governing liabilities arising from the process of negotiations.

43. The law in EU paved the way in allowing parties to choose a law to govern non-contractual obligations. An important distinction is drawn between pre-dispute and post-dispute choices. Pre-dispute choices are confined to freely negotiated contracts entered into by parties pursuing commercial activities. There was an obvious concern with inequality of bargaining power, a concern that is attenuated once the dispute has arisen and the parties know more or less where they stand. The position in Singapore is not certain.⁵⁸ The High Court considered the issue recently but left the question open.⁵⁹

⁵⁵ CIMB Bank Bhd v Dresdner Kleinwort Ltd [2008] 4 SLR(R) 543

⁵⁶ Compare *Trafigura Beheer BV v Kookmin Bank Co* [2006] 2 Lloyd's Rep 455, noted A Briggs, "The Further Consequences of a Choice of Law" (2007) 123 LQR 18, with *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377, noted in TM Yeo, "The Effect of Contract on the Law Governing Claims in Torts and Equity" (2007) 9 Yrbk of Pte Intl Law 459.

⁵⁷ See the Commentary at para 9.12.

⁵⁸ VK Rajah, "International Trade in Hong Kong and Singapore – An Indivisible Link" (2010) 40 HKLJ 815; TM Yeo, "The Effective Reach of Choice of Law Agreements" (2008) 20 SAcLJ 723.

⁵⁹ *Ong Ghee Soon Kevin v Ho Yong Chong* [2016] SGHC 277.

44. A survey of the selected Asian countries show strong support for post-dispute choice of the law of the forum for general torts. Practically all the countries surveyed allow the parties to choose the law of the forum after the dispute has arisen. In common law countries and the mixed legal system in the Philippines where foreign law is proven in court as a fact, this is achieved indirectly by the parties choosing not to argue or to prove foreign law. This technique is not available in most civil law countries where foreign law is not a matter of evidence and judges have a duty of investigating foreign law. In these countries, the choice of the law of the forum is effected either through an *accord procedural* which is a procedural agreement where the parties consent to the court's application of the law of the forum, or through a substantive choice of law rule.⁶⁰ Few allow choice of foreign law. Three countries stand out in this context. Chinese law allows parties to choose any law for most torts, but only post-dispute. Japanese law also allows parties to make a post-dispute choice of any law for torts. However, Japanese applies a strong version of double actionability, so that whatever foreign law is chosen by the parties, the law of the forum must additionally apply. Vietnam is the most progressive country in this respect. Under its new Civil Code 2015, parties can choose, whether pre- or post-dispute, any law to govern non-contractual obligations,⁶¹ subject to the limitation that the application of the chosen law should not contravene fundamental principles of Vietnamese law,⁶² and provided that the parties do not have a common place of establishment (which supplies the default applicable law).⁶³

45. Article 9(g) of the *Hague Principles* makes a modest inroad in nudging party autonomy out of the boundaries of contracts. Although a literal interpretation could suggest it is a general provision for allowing post-dispute choice of law to govern any non-contractual obligation (on one view the only explicit requirement is that the choice of law agreement comes after the obligation comes into existence), the contextual interpretation, backed by the official Commentary, is that it is confined to obligations arising in the course of contract negotiation and formation. Nevertheless, it is a very helpful provision which promotes consistency and international harmony, and it allows courts to circumvent difficult problems of characterisation of pre-contractual claims which could include obligations variously classified in different

⁶⁰ Thailand does not meet any of the three conditions so in theory the parties cannot choose the law of the forum post-dispute.

⁶¹ Vietnam Civil Code 2015 (Law No 91/2015/QH13), Article 687(1).

⁶² Ibid, Article 670(1)(a).

⁶³ Ibid, Article 687(2).

domestic legal systems as contractual, tortious, unjust enrichment, equity, or good faith. Article 9(g) does not purport to resolve the larger question of party autonomy for non-contractual obligations generally, but it clearly signifies the value of party autonomy at least in this limited context. However, given the general resistance to party autonomy outside the contractual context in most Asian countries, it will nevertheless be challenging for the principle in Article 9(g) to emerge as a point of convergence for Asian private international law.⁶⁴

Conclusion

46. The *Hague Principles* project is the third attempt by the Hague Conference to harmonise choice of law rules for commercial contracts. The *Convention on the Law Applicable to International Sale of Goods 1955* applies in all of seven states.⁶⁵ The *Convention on the Law Applicable to Contracts for the International Sale of Goods 1986* never came into force at all. Rather than to test whether it would be third time lucky, the Hague Conference decided to take a different approach by creating a non-binding instrument with a strong focus on giving effect to party autonomy. It was perhaps emboldened by the relative success of the *Convention on Choice of Court Agreements 2005*, which focussed on party autonomy in the context of jurisdiction and judgments when a more ambitious project on general jurisdiction and judgments fell through after many years of effort.
47. Contract law is of course the life-blood of international commerce. The harmonisation of substantive rules of contract law has been the subject of grand projects from UNCITRAL and UNIDROIT on a global scale, and the European Union and the Americas on a regional scale. There is growing interest in harmonising Asian contract laws. Divergences in contract rules in different legal systems become less problematic when there are clear and transparent rules which allow commercial parties to plan their transactions according to chosen systems of law. The *Hague Principles* aim to provide that common platform for the selection of laws.

⁶⁴ The next best alternative is to converge on the application of the underlying contractual relationship in the categories of non-contractual obligations. In respect of torts, it is one of the connecting factors in South Korea, and can be taken into consideration in the laws of Japan, Philippines, Taiwan, Indonesia, as well as in the context of the exception in the case of common law countries applying double actionability with flexible exception (Malaysia, Singapore, Hong Kong SAR and possibly India and Myanmar). There is no scope for such flexibility in Australia which applies the *lex loci delicti* without exception.

⁶⁵ Denmark, Finland, France, Italy, Norway, Sweden and Switzerland, with no new members since 1972. See <https://www.hcch.net/en/instruments/conventions/status-table/?cid=31>.

48. The *Hague Principles* contain a mix of propositions encompassing broadly existing state practices in giving effect to party autonomy in choice of law for contracts, recommended best practices on the modalities on giving effect to party autonomy in this context, and a number of bold propositions testing the boundaries of party autonomy. It certainly deserves close study as an instrument representing the consensus of a large number of member countries in the Hague Conference.⁶⁶ In many ways the *Hague Principles* are consistent with the common law, but they are also different in other ways, and we should also be mindful of its interface with our own private international law. The core principles giving effect to party choice of law and the modalities of choice of law serve as a useful reference point where Singapore common law is unknown, unclear or unsatisfactory. The *Hague Principles* can serve as a viable reference point for convergence for Asian countries, and indeed globally, on party autonomy in international commercial contracts and its modalities. Party autonomy is or should be the same for businesses anywhere in the world.

49. The more controversial propositions are the ones which push the envelope of party autonomy, where consensus across Asian or other countries is less likely to be attained. But perhaps it is also in these areas that countries which demonstrate stronger commitment to party autonomy may be able to attract more international commercial dispute resolution business. In this context, given the jurisdictional filter of “international” and “commercial” matters in the SICC it may be worth considering whether we should allow parties who choose the SICC to opt-in to the *Hague Principles*.⁶⁷ One could perhaps consider going further to allow them to select non-State law in accordance with the limitations in the *Hague Principles*, and even to allow them to choose a law to govern non-contractual obligations beyond pre-contractual obligations. This will need to be accomplished by legislative reform.⁶⁸

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⁶⁶ Singapore joined the Hague Conference on 9 April 2014, after the negotiations on the text of the Hague Principles were over.

⁶⁷ Because scope of SICC jurisdiction is broader than the scope of the *Hague Principles*, the latter may need to be replicated by extension.

⁶⁸ See note 54 above.