Tenth Yong Pung How Professorship of Law Lecture

CHOICE OF LAW FOR CONTRACTS: THE HAGUE PRINCIPLES FROM A SINGAPOREAN AND ASIAN PERSPECTIVE

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Hague Principles on Choice of Law in International Commercial Contracts

Objectives:

- Affirmation of party autonomy in choice of law for international commercial contracts
- Model for national, regional, supranational or international law reform
- Reference to interpret, supplement and develop national private international law
Scope

**Commercial** contracts = each party acting in the exercise of its trade or profession

**International** contracts = excludes situation where all connections (apart from choice of law) are connected with one state only

Exclusion of **consumer** and **employment** contracts

Exclusion of **subject matter:**
- Arbitration and choice of court agreements
- Capacity of natural persons
- Corporations
- Insolvency
- Property
- External effects of agency
Singapore law

Choice of law for contracts:

1. Express choice will be given effect to if it is bona fide, legal and not against public policy
2. Inferred choice will also be effective
3. If there is no express or inferred choice, the contract is governed by the objective proper law
   - the law with the closest connection with the transaction and the parties
   - the law which reasonable parties in the position of the contracting parties would have chosen as the governing law given the objective connections
Hague Principles

Express choice: no limitations to choice [Article 2(1)]

Tacit choice: “appear clearly from the provisions of the contract or the circumstances” [Article 4]

Choice of Unconnected law [Article 2(4)]

Absence of Choice: Hague Principles no longer apply [?]
Gap filling, clarifications, improvements

Severability of choice of law agreement [Article 7]
Depecage [Article 2(2)]
Change of proper law [Article 2(3)]
Formation of choice of law agreements [Article 6]
Non-state law [Article 3]
Exclusion (not) of renvoi [Article 8]
Non-contractual obligations [Article 9(g)]
Formation Hypothetical 1

A has place of business in X. B has place of business in Y. A negotiates agreement with B. Somewhere in the exchange of drafts is a choice of Z law clause in very fine print in a obscure part of the documentation.

Proper law of the putative contract = Z law

Rome I Regulation, Article 10(1): “a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.”

Hague Principles, Article 6(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.”
Formation hypothetical 2

A makes offer to B on A’s standard terms (choice of X law clause)
B accepts offer on B’s standard terms (choice of Y law clause)
Assume three possible solutions in domestic law for battle of forms:
1. First Shot rule (“FS”): terms in offer prevail (X law)
2. Last Shot rule (“LS”): terms in acceptance prevail (Y law)
3. Knock Out rule (“KO”): inconsistent terms knocked out (neither apply)
### Battle of forms

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<thead>
<tr>
<th>Scenarios</th>
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<tbody>
<tr>
<td><strong>Content of X law</strong></td>
<td>FS</td>
<td>LS</td>
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<td>FS</td>
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<td><strong>Law of Putative Agreement Approach</strong></td>
<td>X law applies</td>
<td>Y law applies</td>
<td>Neither applies</td>
<td><em>Both apply</em></td>
<td>Neither applies</td>
<td>X law applies</td>
<td>Neither applies</td>
<td>Neither applies</td>
<td>Y law applies</td>
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<tr>
<td><strong>Hague Principles approach</strong></td>
<td>X law applies</td>
<td>Y law applies</td>
<td>No choice</td>
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