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

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Summary: I. *Introduction*. II. *Major Issues*. III. *Other features of the draft principles*. IV. *Areas of potencial difficulty*.

I. Introduction

The Hague Conference on Private International Law recently embarked on a project of major importance to international commercial law – the preparation of an instrument setting out rules for determining the law that governs international commercial contracts. Determination of the law applicable to international commercial contracts is an area in which certainty would be desirable. That certainty is present under the law of many States, but is absent in others. Accordingly, the guidance provided by the Hague Conference project will be valuable in establishing an international norm.

The project has proceeded with great efficiency. In 2009, the Hague Conference on Private International Law established a Working Group on Choice of Law in International Commercial Contracts to prepare a set of principles to govern the topic. The Working Group met three times in 2010 and 2011, culminating with the preparation of draft Hague Principles on Choice of Law in International Commercial Contracts (hereinafter the "draft Principles," or "draft Hague Principles") as well as a policy document highlighting the policy choices made in that draft.

The report of the Working Group was then submitted to the Council on General Affairs and Policy of the Hague Conference on Private Interna-

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tional Law for its consideration. At the April 2012 meeting of the Council on General Affairs, the Council accepted the report of the Working Group and 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 shall be completed.*" The Special Commission will meet for the first time in November 2012.

This project is quite important because uncertainty as to the legal rules that will govern disputes arising under an international contract is a deterrent to entering into such contracts. While such uncertainty does not typically prevent formation of such contracts, like all uncertainty it is taken into account in pricing a transaction and determining whether it is beneficial to a party.

In the distant past, the idea that parties to a contract had a say in determining which law would govern it was controversial,[1] but, in contemporary legal regimes, most states give parties to a commercial contract some degree of autonomy in determining the applicable law.[2] Yet, while such party autonomy is a widely accepted concept, it is not accepted everywhere and, even where accepted, it is not always applied with equal vigor. The result is that, for many transactions, substantial uncertainty remains as to the law governing a contract.

As noted above, the Hague Conference has concluded that an instrument designed to further party autonomy to select the applicable law, and set uniform principles governing it, would be of significant usefulness. The Hague Conference, however, has decided that, rather than preparing a binding instrument such as a convention, it will initially formulate its principles as a set of advisory principles.

This paper summarizes the draft Principles prepared by the Working Group and highlights issues raised by those draft principles.

[1] See, Beale, Joseph H., "What Law Governs the Validity of a Contract?", 23 *Harvard L. Rev.*, 1910, 260, 261 ("So in the case of the adoption of a law to govern the nature and obligation of a contract, it is entirely possible from the point of view of any one state that the law of that state or of some other state should be applied to the determination of the question; but if the law of that state is not applied, it is a result of the sovereign will of the state which controls the contract. Now, if it is said that this is to be left to the will of the parties to determine, that gives to the parties what is in truth the power of legislation so far as their agreement is concerned. The meaning of the suggestion, in short, is that since the parties can adopt any foreign law at their pleasure to govern their act, that at their will they can free themselves from the power of the law which would otherwise apply to their acts. So extraordinary a power in the hands of any two individuals is absolutely anomalous; so much so that even the courts which adopt a rule of this sort have been occupied in defining limitations to the exercise of the parties' will").

[2] See, e.g., Uniform Commercial Code § 1-301.

II. Major issues

1. *What contracts will be covered by the Hague Principles?*

The draft Principles address "*choice of law in international contracts entered into by two or more persons acting in the exercise of their trade or profession*." Thus, the draft Principles cover business-to-business transactions but not consumer transactions.

What is an international contract? article 1(2) of the Draft Principles states that

> For the purposes of these Principles, (i) a contract is international unless the parties have their places of business 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; (ii) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

Thus, the draft Principles opt for a broad definition of internationality, under which all contracts are presumed to be international and covered by the principles unless not only do all the parties have their places of business in the same State but also all other relevant elements of the transaction are connected only with the State in which those parties are located. It is important to note that a place of business of a multi-location party is not determined by tests used in other contexts, such as its place of central administration[3] (or chief executive office),[4] habitual residence[5] or center of main interests, under which each entity has only one location. Rather, the draft Principles utilize a transaction-specific test (the place of business is that which has the closest relationship to the contract and its performance) under which a party can be located in one State for one transaction and another State for a different transaction. So, for example, the place of business of a multinational law firm with offices in many States may be the United States when the firm enters into contracts to provide legal services in the United

[3] See United Nations Convention on the Assignment of Receivables in International Trade, article 5(h).

[4] See, *e. g.*, Uniform Commercial Code § 9-307(b).

[5] See *e. g.*, Regulation (EC) num. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I"), article 4(1), pars. (a), (b), (d), (f), and article 4(2).

States from its New York office but in Mexico when it enters into contracts to provide legal services in Mexico from its Mexico City office. This rule has some advantages. For example, a contract entered into in Ireland between the Irish office of an international architectural firm headquartered in Iceland and the Irish office of an international law firm headquartered in London, is, in many ways, a domestic contract (notwithstanding the home offices of the parties); all relevant personnel are located in Ireland, both parties have offices in Ireland, and the contract will be performed in Ireland. On the other hand, this rule has some disadvantages as well, inasmuch as it requires a determination of the office of a party that has the "*closest relationship to the contract and its performance.*" This will be obvious in some cases, but not in others, especially in a world in which many offices of a party to a contract are involved in its performance.

Note as well that, although the title of the draft Principles indicates that they cover "international commercial contracts," the scope provisions of the draft Principles do not use the phrase "commercial contracts." Rather, article 1(1) indicates that the draft Principles govern international contracts "*entered into by two or more persons acting in the exercise of their trade or profession.*" The intent, obviously, is to exclude consumer contracts and include "business-to-business" contracts. Indeed, the "*Policy Document Regarding Hague Principles on Choice of Law in International Commercial Contracts*" accompanying the presentation of the draft Principles to the Council on General Affairs and Policy of the Hague Conference (hereinafter the "Policy Document") says as much: "*The draft Hague Principles will apply only to commercial contracts involving business-to-business transactions. As a result, employment and consumer contracts will be excluded*".[6] It is not so obvious, however, that the phrase "*acting in the exercise of their trade or profession*" excludes employment contracts. After all, many professional, be they lawyers or carpenters, are employed by others. While the intent of the drafters is clear, it is possible to read the language of the draft Principles in isolation and reach a different conclusion.

2. *How broad is the autonomy provided for by the Hague Principles?*

While there may be some fuzziness in determining whether a contract is within the scope of the draft Hague Principles, there is no similar fuzziness

[6] Policy Document Regarding Hague Principles on Choice of Law in International Commercial Contracts, Annex III to Choice of Law in International Contracts: Development Process of the Draft Instrument and Future Planning, January 2012 (the "Policy Document") at par. 10.

with respect to the rule of autonomy that the draft Principles propose. It is simple and straightforward: Under the draft Principles, "*a contract is governed by the law chosen by the parties*".[7] Moreover, just to make sure that no reader misses the point, the draft Principles explicitly provide that "*no connection is required between the law chosen and the parties or their transaction*".[8]

This rule, quite obviously would ratify the choice of any body of law in an international commercial transaction without regard to whether the parties or the transaction bear any relation to the law chosen by the parties.[9] This is certainly the predominant view in international instruments such as those promulgated by the Hague Conference,[10] regional instruments such the Mexico City Convention[11] and the Rome I regulations,[12] and much domestic legislation.[13]

Yet, this degree of party autonomy is not accepted world-wide. Indeed, it is not accepted in at least one jurisdiction that firmly supports party autonomy as a general matter - the United States of America. For example, in contracts within the scope of the Uniform Commercial Code, the range of choices for the law governing the contract is limited to States to which the transaction bears a "reasonable relation".[14] In cases governed by the com-

[7] Proposed Hague Principles on Choice of Law in International Commercial Contracts, Annex II to Choice of Law in International Contracts: Development Process of the Draft Instrument and Future Planning, January 2012 (the "Draft Principles"), article 2(1).

[8] Draft Principles, article 2(4).

[9] But see text at notes 22-25, *infra*, for important limits on the applicability of the law chosen by the parties.

[10] Hague Convention of December 22nd, 1986 on the Law Applicable to Contracts for the International Sale of Goods, article 7; Hague Convention of 14 March 1978 on the Law Applicable to Agency, article 5; Hague Convention of June 15th, 1955 on the law applicable to international sales of goods, article 2(1).

[11] Inter-American Convention on the Law Applicable to International Contracts, article 2.

[12] Rome I, article 3(3).

[13] According to the [policy paper], such jurisdictions include article 3 and article 41, 1st sentence Choice-of-Law Act of China's Mainland (2010); article 20 Act on the Application of Laws in Civil Matters Involving Foreign Elements of Taiwan (2010); article 7 Act on the General Rules of Application of Laws of Japan (2006); article 25(1) Conflict of Laws Act of Korea (2001); article 3540 Civil Code of Louisiana (1991); article 434(1) Civil Code of Mongolia (1994); article 3111(1) Civil Code of Quebec (1991); article 1210(1) Civil Code of the Russian Federation; article 116(1) Federal Act of 18 December 1987 on International Private Law of Switzerland.

[14] See Uniform Commercial Code § 1-301(a). It should be noted that, in 2001, the American Law Institute and the Uniform Law Commission, the joint sponsors of the Uniform Commercial Code, promulgated a new Official Text of the Uniform Commercial Code under which parties in international transactions could choose the law of any State without regard to whether the transaction bore any relation to that State. After seven years of enact-

mon law of contracts, the predominant approach in the United States is that of the Restatement (Second) of Conflict of Laws, under which a choice of law will not be enforced if *"the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice*".[15]

The difference between the prevailing view in the United States and that proposed by the draft Principles may be less than it seems. In particular, for common law contracts governed by choice of law rules such as those in the Restatement, it would be difficult for a party attacking a choice of law clause to expect success in arguing against its enforcement. If the clause selects a state that has a substantial relationship to the parties or the transaction, it will be upheld under the first prong of the test. If the state selected is one that does not have a substantial relationship to either the parties or the transaction, it is likely that the proponent of the choice of law will be able to argue that there is a reasonable basis for the choice of that state. After all, why have the parties agreed to have their contract be governed by the law of that state if there is no reasonable basis for it? As a result, the Restatement rule likely filters out very few exercises of party autonomy.

3. *What types of law may be designated by the parties?*

In light of the fact that the full title of the draft Hague Principles is "*The Hague Principles on Choice of Law in International Commercial Contracts,"* one would expect that the draft Principles would concern themselves with choices made by contracting parties as to which *law* —that is, which rules made by sovereign States— will govern their contract. The draft principles do, of course, provide rules for the choice of *law*, but they also provide for the selection by the parties of bodies of rules that do not emanate from a sovereign. Immediately after stating the rule of autonomy that the parties may choose the law that will govern their contract, the draft Principles tell us that "*In these Principles a reference to law includes rules of law*".

What are "rules of law?" The draft Principles are somewhat vague here, but the intent is clearly that the parties may not only designate law of a State but also "rules of law," such as the UNIDROIT Principles of International Commercial Contracts, that exist without being the law of any particular State.

ment efforts in which only the United States Virgin Islands enacted the new choice of law rule, however, the sponsors retrenched and the Official Text reverted to the earlier version requiring the transaction to bear a reasonable relation to the State specified by the parties.

[15] Restatement (Second) of Conflict of Laws § 187(2)(a).

Yet the text of the draft Principles contains no definition of the phrase "rules of law." Other documents prepared by the Working Group that prepared the draft Principles provide guidance, however. For example, in "*Choice of Law in International Contracts: Development Process of the Draft Instrument and Future Planning,"* the document by which the draft Principles were transmitted to the Council, the Working Group states the following:

The Working Group tentatively agreed that the chosen rules of law must be:

1. Distinguished from individual rules made by the parties; and
2. A body of rules.

The Working Group agreed to examine further characteristics of and limitations to the parties' choice of non-State law in the Commentary.

The Policy Document [included in the package presented to the Council] will report the agreement in the Working Group that the draft Hague Principles not include any express definition or limitation of the term "rules of law", as this provides the maximum support for party autonomy. The Policy Document will reflect the diversity of opinion in the literature on the definition of "rules of law" for choice of law purposes.[16]

The Policy Document addresses the matter as well. It states:

> The draft Hague Principles do not limit the parties to designating the law of a State; rather they allow for parties to select not only State laws but also "rules of law". The Working Group also agreed that the Principles would not include any express definitio or limitation of the term "rules of law", as this provides the maximum support for party autonomy, regardless of the method of dispute resolution (i.e., court or arbitration). However, the Working Group acknowledged that there are limits to the rules of law chosen by the parties. In particular, the chosen rules of law must be distinguished from individual rules made by the parties and must be a body of rules. These issues will be further examined in the Commentary on the basis of a very extensive literature and practice on this matter.[17]

The idea that parties should be able to designate "rules of law" in addition to law of sovereign States did not originate with the Working Group. Rather, such designations are common in the law of commercial arbitration, as exemplified by the UNCITRAL Model Law on International Com-

[16] Report of the Working Group, Annex I to Choice of Law in International Contracts: Development Process of the Draft Instrument and Future Planning, January 2012, p. 3.

[17] Policy Document, par. 16.

mercial Arbitration.[18] Yet, the matter is hardly without controversy. A similar principle was proposed for the Rome I Regulation,[19] but rejected.[20]

At least three issues are raised by the proposed power to designate non-State rules of law. The first issue, of course, is whether parties should be able to bypass sovereigns entirely and choose a body of law not emanating from a State. Second, if the parties are to be granted such a power, what qualifies as a "rule of law" other than law emanating from a State? The contrasting approaches of the European Commission and the Hague Conference Working Group are instructive in this regard. While the European Commission proposal for Rome I limited the choice to rules "recognized internationally or in the [European] Community,[21] the draft Hague Principles contain no "express definition or limitation," merely guiding the tribunal, in an unspecified way, to distinguish rules of law from "individual rules made by the parties" and requiring that the rules of law be a "body" of rules.

Third, bodies of non-State law are, by their nature, incomplete. Even a broadly comprehensive body of such rules, such as the UNIDROIT Principles of International Commercial Contracts, is not nearly as comprehensive as the full body of contract law of a moderately advanced legal system. Thus, if the parties designate a non-State body of rules, what is a tribunal to do if there is a dispute about an issue not addressed by those rules? Should the tribunal defer to the law of the State whose law would govern in the

[18] See UNCITRAL Model Law on Arbitration (1985, with amendments 2006), article 28(1). As pointed out in the Explanatory Note to article 28, "[b]y referring to the choice of 'rules of law' instead of 'law', the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention".

[19] The original proposal for Rome I submitted by the European Commission contained an article (3)(2), which read: "The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community." As noted by Professor Helmut Heiss, "This provision was intended to permit a choice of law in favor of non-State law, such as the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), the Principles of European Contract Law (PECL, or *Lando* Principles), or the Draft Common Frame of Reference insofar as it contains rules of contract law, including insurance contract law; not, however, the *lex mercatoria* in general." Helmut Heiss, *Party Autonomy*, in Franco Ferrari and Stefan Leible eds., Rome I Regulation: The Law Applicable to Contract Obligations in Europe, at 9-10.

[20] article 3(1) of the Rome I Regulation states simply that "A contract shall be governed by the law chosen by the Parties."

[21] See note text at notes 19-20, *supra.*

absence of the designation of non-State law by the parties? Should it try to imagine how the body that promulgated the non-State law would have resolved the matter?

4. *What limits are placed on the exercise of party autonomy by the parties?*

While the draft Principles might appear, at first glance, the give absolute dominion to the law (or rules of law) chosen by the parties, this is not the case. Rather, the draft Principles include limits on the exercise of that autonomy that are typical in this field. First, the 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*".[22] Second, a court may exclude application of a provision of the law chosen by the parties if "such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.[23] Which state's fundamental policy?

It should be noted that the concept that a provision of the law chosen by the parties may be excluded if it is manifestly incompatible with fundamental notions of public policy has some difficulties associated with it. First, it is not so obvious which State's public policy is the basis of the comparison. The draft Principles refer to the law of the forum, but that is not the only possibility. In the United States, for example, the Restatement (Second) of Conflict of Laws provides that a choice of law is not effective "*application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which… would be the state of the applicable law in the absence of an effective choice of law by the parties*".[24]

Second, the notion of "*manifestly incompatible with fundamental notions of public policy*" is not very precise, leading the possibility of excessively broad readings. Is every provision of foreign law that reaches a result that could not have been reached by the parties in the reference State (whether that State is the forum State or the State whose law would govern in the absence of choice by the parties) one that is, by virtue of that violation of legal principles of the reference State, incompatible with fundamental notions of public policy? If so,

[22] Draft Principles, article 11(1).

[23] *Ibidem*, article 11(3).

[24] Restatement (Second) of Conflict of Laws § 187(2)(b). Similarly, the proposed revision to the Uniform Commercial Code provided that a choice of law "is not effective to the extent that application of the law of the State or country designated would be contrary to a fundamental policy *of the State or country whose law would govern in the absence of agreement*". Proposed Uniform Commercial Code § 1-301(f) (2001).

the party autonomy provided by the draft Principles would be limited in effect to rules of construction rather than rules of validity. It is the clear that the Working Group did not intend such a broad reading of the public policy limitation, inasmuch as the Policy Document provides that:

> There was unanimity within the Working Group that the primary goal of promoting party autonomy supports a generally restrictive approach to overriding mandatory rules and public policy. It was affirmed that any restriction on the application of the law chosen by the parties must be clearly justifiable and no wider than necessary to serve the objective pursued. Therefore, the draft Hague Principles emphasise the exceptional character of public policy and overriding mandatory rules…The Working Group agreed that such exceptional character should be dealt with in greater detail in the Commentary, rather than in the article of the draft Hague Principles.[25]

III. Other features of the draft principles

The draft Hague Principles address several other issues that are needed for a complete instrument, but which are less likely to require investment of significant time or effort by the Special Commission.

1. *Express or tacit choice*

The draft rules provide that "*A choice of law…must be made expressly or appear clearly from the provisions of the contract or the circumstances*".[26] Quite obviously this means that arguments that a contract contains a tacit, or implicit, choice of law will not prevail under the Principles. Moreover, the draft Principles quite properly distinguish between choice of law provisions and choice of forum provisions, and indicate that the latter is not, in itself, a choice of the law of the forum.[27]

2. *Formal validity of choice of law*

The draft Principles provide that "*A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties*".[28] The main rule here is clear, but it is not clear, though, where an agreement to the contrary between the

[25] See Policy Document at paragraph 45.
[26] Draft Principles, article 3.
[27] *Idem.*
[28] Draft Principles, article 4.

parties would be found. After all, an agreement to the contrary found in the same document that contains the choice of law would be largely robbed of meaning since it is unlikely that that very document would not satisfy the form requirements mentioned in it. Perhaps, in some cases, the parties may have a master agreement of sorts that governs future contracts that may contain choice of law clauses.

3. *Law governing whether parties have consented to the choice of law*

The draft Principles provide that "*The consent of the parties as to a choice of law is determined by the law that would apply if such consent existed*".[29] Thus, in determining whether each party consented to the choice of law, the draft Principles direct a tribunal to apply the law that would apply if that consent existed (i.e., the putatively chosen law). This rule eliminates the possibility of secondary debates about which law governs the determination of whether the parties agreed to the choice of a particular law, but creates a theoretical risk of the stronger party forcing a choice of law of a State that has minimal requirements to demonstrate consent. It is for this reason, perhaps, that the rule is qualified by article 5(2). Paragraph (2) provides: "*Nevertheless, to establish that a party did not consent to the choice of law, it may rely on the law of the State where it has its place of business, if under the circumstances it is not reasonable to determine that issue according to the law specified in the preceding paragraph*". Paragraph (2) serves as a safety valve, of sorts, protecting parties from being found to have agreed to a choice of law that might be valid only under the law of the State chosen.[30] Nonetheless, this safety valve is quite subjective. While it provides needed flexibility to courts and other tribunals, it similarly undermines predictability and certainty.

4. *Autonomous nature of the choice of law*

What if the contract containing the choice of law is itself invalid (under the chosen law or some other law)? Does the invalidity of the contract, as a whole, invalidate the choice of law, perhaps requiring determination under a different law as to whether the contract is valid? article 6 of the draft Principles provides that *"A choice of law cannot be contested solely on the ground that the contract is not valid."* As explained in the policy paper:

[29] Hague Principles, article 5, par. 1.

[30] See discussion in Policy Document, par. 28.

> article 6 requires that the parties' choice of law should be subject to an independent assessment that is not automatically tied to the validity of the main contract. Thus, the parties' choice of applicable law would not be affected solely by a claim that the main contract is invalid. Instead, that claim of invalidity of the main contract would be assessed according to the applicable law chosen by the parties, provided that the parties' choice is effective. Further, arguments which seek to impugn the consent of the parties to the contract would not necessarily undermine the consent of the parties to the choice of law.[31]

Thus, in a sense, the choice of law clause is treated as a "contract within a contract," the validity of which is determined without reference to the validity of the vessel in which it is contained. This rules has analytical benefits, but may seem contrary to the general assumption that parties wish their contracts to be valid and, thus, do not intentionally choose governing law that would make their contract invalid. Contrary to that assumption, under article 6 a choice of law that renders the parties' contract invalid would be respected.

5. *No Renvoi*

As in most private international law instruments, the draft Principles contain a presumption against 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*".[32] While anti-renvoi rules eliminate the possibility of a tribunal being "bounced" from one jurisdiction to another, they can also result in the application of the law of a State even in circumstances in which the courts of that State would not apply its law.

6. *Formal validity*

Unlike the provision concerning the autonomous nature of the choice of law, the provision in the draft Principles that addresses the formal validity of the choice of law does appear to have a bias in favor of enforcing the parties' choice. The provision states that "The contract is formally valid if it is formally valid under the law chosen by the parties, *but this shall not exclude the application of any other law which is to be applied by a court or arbitral tribunal to support formal validity*".[33] As explained the policy paper:

[31] Policy Document, par. 32.
[32] Hague Principles, article 7.
[33] Hague Principles, article 9(1) (emphasis added).

> In formulating the proposed liberal regime, the Working Group followed the well-established principle of favor negotii which seeks to avoid formal invalidity as far as possible. This implies that, in relation to formal validity only, the parties' contractual relationship may be determined by reference to connecting factors other than the law chosen by the parties. Those may include, for example depending on the venue, the law of either of the States where any of the parties or their respective agent is present when the contract is concluded, the law of the State where either of the parties has its habitual residence at the time of conclusion or the law of the State where the contract was concluded.[34]

7. *Application of draft Principles to assignments*

When one party assigns its rights under a contract to a third party, the presence of the third party creates multiple relationships. For example, if the obligee of a contractual obligation assigns its rights to an assignee, the obligor retains a contractual relationship with the assignor, the assignor and assignee have a contractual relationship pursuant to the contract of assignment, and the assignee that seeks to enforce the rights under the contract (acquired from the assignor) against the assignee is asserting rights under a contract to which it was not a party. Thus, while there are two contracts (the contract between the obligor and the assignor and the contract between the assignor and the assignee), there are three relationships as to which the applicable law must be determined. Not surprisingly, many find this to be a confusing area.

The draft Principles provide guidance in this area by delineating which issues are governed by the law chosen by the parties in the contract creating the obligation and which issues are governed by the law chosen by the parties in the contract of assignment. The former 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*".[35] The latter governs only the "*mutual rights and obligations of the creditor and the assignee arising from their contract*".[36]

While there was some sentiment in the Working Group that these provisions should not be included in the draft Principles as they do not govern which law applies to a particular contract and, instead, merely clarify which

[34] Policy Document, par. 40.
[35] Draft Principles, article 10(b).
[36] *Ibidem*, article 10(a).

contract's governing law governs which issues in the context of the three-party relationship resulting from assignments, the prevailing view was to include them as a matter of guidance.[37] The Working Group considered, but rejected, providing similar guidance in the context of other multi-party situations such as such as subrogation, delegation, and set-off. Instead, it is anticipated that these issues will be addressed in commentary.[38]

IV. Areas of potencial difficulty

What issues will be most challenging for the Special Commission as it considers the recommendations of the Working Group? The issue most fraught with difficulty is likely to be the ability of the parties to designate non-State "rules of law" to govern their contract. While there is precedent for this in the world of commercial arbitration, the experience in the European Union in being unable to reach agreement on a similar provision is instructive. Moreover, even if the Special Commission decides to follow the recommendations of the Working Group and provide for designation of non-State law, decisions as to whether and how to define and limit the concept may be difficult. While there was general consensus in the Working Group that non-State rules of law such as the UNIDROIT Principles of International Commercial Contracts are included in the concept of "rules of law," there was little agreement as to how to generalize the definition, leading to the decision to leave the term undefined. Of course, the risk of too narrow a definition is that useful sources of non-State law will be excluded. On the other hand, too broad a definition could result in the inclusion of bodies of rules that do not have the same indicia of legitimacy as rules emanating from an international organization such as UNIDROIT.

In addition, two other issues that may prove challenging. First, while the limitations relating to mandatory provisions of law and incompatibility with public policy are generally accepted in most legal systems, the narrowness or breadth of their application differs among States; the application of the draft Hague Principles in this context will necessarily involve formulations of these limitations that emphasize the narrowness of application of the limitations, which may engender debate as to the appropriate role of these limitations. Second, the wide grant of party autonomy, allowing the parties to select the law of a State to which their transaction bears no relation, is broader than that currently in place in some States. While the Working

[37] Policy Document, par. 41.

[38] *Ibidem*, par. 43.

Group did not have difficulty reaching consensus on this point, the Special Commission, as a diplomatic entity rather than a collection of experts like the Working Group, may not have as an easy a time resolving the matter.

V. Future expansion of the hague principles?

In their current formulation, the draft Hague Principles address only situations in which the parties have designated the law governing their contract. They do not address what law is applicable to the contract in the absence of such a designation. Should the Hague Principles also cover situations in which the parties have not designated applicable law? Some members of the Working Group preferred a "complete instrument" such as the Rome I Regulation that would provide guidance in this context as well. Other members felt that the primary agenda of the project was the promotion and explication of party autonomy and that it might prove difficult to reach consensus on the principles determining the applicable law in the absence of a designation by the parties. At its April 2010 meeting, the Council on General Affairs and Policy of the Hague Conference decided that priority should be given to the development of rules for cases where a choice of law has been made.[39] Thus, while the current draft of the Hague Principles does not address determination of the applicable law in the absence of party choice, it is possible that, after completing its work in the context of party autonomy, the Working Group will return to this question.

[39] Hague Conference on Private International Law, Council on General Affairs and Policy, Conclusions and Recommendations Adopted by the Council (April 7th -9th, 2010) at p. 2.