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Self-regulation in Private Law in Japan and Germany

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I. INTRODUCTION

The Hague Principles on choice of law in international commercial contracts (henceforth: the Principles or HP)[1] confirm the principle of party autonomy which is recognized in many, but not in all jurisdictions.[2] They provide for rules on the formation of a choice-of-law agreement, on its scope and effects, and on its limitations. They follow rather closely the model of the 1980 Rome Convention on the law applicable to contractual obligations[3] and its successor, the Rome I Regulation of the European Union.[4] However, they diverge from that model on some points. Notable dif-

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1 The Hague Principles and the Commentary are reproduced in print in both English and French, in: Uniform Law Review 20 (2015) 365–489.

2 In particular, some countries in the Middle East and in Latin America are still opposed to party autonomy, see J. BASEDOW, The Law of Open Societies (The Hague 2015) paras. 187–191.

ferences include: allowing for the choice of non-state law,[5] enunciating the principle of severability,[6] declaring a choice of law by formless consent to be valid,[7] providing for special rules on battles of forms[8] and on compliance with overriding mandatory provisions in arbitration,[9] and, finally, merging overriding mandatory provisions and public policy into a single provision.[10] These deviating rules have been addressed in other papers published in volume 22 of the Uniform Law Review in greater detail.

In March 2015 the Principles were adopted by the Hague Conference on Private International Law in a fairly uncommon procedure. The Council on General Affairs and Policy "noted with satisfaction" that the Principles on Choice of Law in International Commercial Contracts had been approved in accordance with a procedure established by the Council itself in 2014. It provided that unless a Member raised an objection within 60 days following receipt of the finalized text, the instrument would be considered as approved.[11]

This unusual procedure mirrors the non-binding nature of the Principles, which are consistent with a broad soft-law movement in the more recent history of international law-making, *infra* II. The non-binding nature of the instrument raises questions as to its effectiveness. What will be its impact on international transactions? Who will take notice of the Principles? The latter question relates to the various actors to whom such a text is addressed, to their reactions, and to whether the content of the Principles is in line with their non-binding nature. After a survey of the various addressees, *infra* III., the following paper will take a closer look at that context with regard to private parties who might avail themselves of the Principles, *infra* IV., and with regard to the role of the Principles in arbitration, *infra* V.

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3 Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, OJ 1980 L 266/1.

4 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June of 2008 on the law applicable to contractual obligations, OJ 2008 L 177/6.

5 See Art. 3 HP.

6 Art. 7 HP.

7 Art. 5 HP.

8 See Art. 6 para. 1 lit. b HP.

9 Art. 11 para. 5 HP.

10 See Art. 11 paras. 1 and 3 HP.

11 Council on General Affairs and Policy of the Conference (24–26 March 2015), Conclusions & Recommendations adopted by the Council, para. 3, and General Affairs and Policy, prel. doc. No. 1, October 2014, Conclusions & Recommendations of the Council on General Affairs and Policy of the Conference (8–10 April 2014), para. 2; both documents are available on the website of the Hague Conference: *www.hcch.net* → governance → Council on General Affairs and Policy → archive (2000–2015).

II. The Soft-Law Movement and the Hague Principles

Private cross-border relations are governed by a large number of norms which have a great impact but, strictly speaking, are non-binding. Most of them are of a private origin and have acquired their significance through consensual adoption of usages established between the parties or by trade custom. A well-known example is the set of *Incoterms* drafted by the International Chamber of Commerce, which gave rise, together with other instruments, to a broad discussion about the so-called *lex mercatoria*. We also find manifold combinations of private and public rule-making.[12]

The Hague Principles are of a different nature. They do not flow from private initiative but originate in an intergovernmental organization. They belong to what has since the 1970s been called "soft law".[13] The development of soft law has been fostered by a number of factors: decolonization and the extraordinary growth in the number of independent states rendering the approval of binding instruments difficult or impossible in the post-World War II period; the structure of the United Nations with a General Assembly allowing for a broad representation of the international community but lacking the power to enact binding legal rules; the establishment of ever more international organizations dealing with a large variety of issues below the level of international legislation; and the growing need to promote certain practices in international relations despite the absence of binding rules.

Some of these factors are mirrored by the development of private international law. Over the 120 years of existence of the Hague Conference on Private International Law, it has emerged that many non-European countries, while interested in issues of jurisdiction and judicial cooperation, take little notice of issues relating to the applicable law.[14] Given the lack of interest, a binding convention on choice-of-law issues does not show promise of great success, although its substance may not be that controversial and courts are confronted with the issue of the applicable law in all juris-

12 For a survey of the variety of forms see J. Basedow, The State's Private Law and the Economy – Commercial Law as an Amalgam of Public and Private Rule-Making, American Journal of Comparative Law (Am. J. Comp. L.) 56 (2008) 703–721.

13 According to D. Thürer, Soft Law, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (Oxford, Electronic Resource, 2009) para. 5, it was *Lord McNair* who coined the term soft law to describe instruments with extra-legal binding effect.

14 J. Basedow, Was wird aus der Haager Konferenz für Internationales Privatrecht?, in: Rauscher/Mansel (eds.), Festschrift für Werner Lorenz zum 80. Geburtstag (Munich 2001) 463–482; see in particular the list of ratifications at 475, specifying the number of European and non-European countries that have ratified the various Hague Conventions.

dictions from time to time. A non-binding instrument may be more effective in shaping the views of lawyers in many countries; it may also be influential as a precursor of municipal legislation.[15]

The Hague Principles are embedded in a broad soft-law movement affecting business and commercial relations. As early as the 1970s the OECD and UNCTAD adopted non-binding rules on competitive practices, which later served as models for legislation in many countries in the world after 1990.[16] In 1980, Unidroit constituted a working group for the purpose of preparing what later became the Principles of International Commercial Contracts.[17] More recently, in a different context, the so-called *Ruggie* Principles, which are the "Guiding Principles on Business and Human Rights", were endorsed by the Human Rights Council of the United Nations.[18] Alongside these examples are other instruments in other fields of law. They all convey the impression that below the level of binding law, a new layer of norms is emerging that, although of academic note, has not attracted much attention from legal scholars at large so far.[19]

It is not possible, in this context, to explore in depth the various aspects of this new body of law emerging from the various lists of principles. The following remarks will concentrate on one aspect: the perception and impact of the Hague Principles. The effect of non-binding instruments is very much dependent on how they are perceived by their addressees, i.e. the various actors who may make decisions on issues covered by the Hague Principles.

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15 THÜRER, *supra* note 13, paras. 28 and 30, referring to this function of soft law in general.

16 ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT (OECD), Declaration on international investment and multinational enterprises of 21 June 1976, as amended in: Horn (ed.), Legal problems of codes of conduct for multinational enterprises (Deventer 1980) 451–461; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), Set of multilaterally agreed equitable principles of rules for the control of restrictive business practices, UN Document TD/RBP/Conf./10 of 2 May 1980.

17 UNIDROIT, Unidroit Principles of International Commercial Contracts 2010, Rome, Unidroit 2010, XXII with regards to the history of these Principles.

18 Guiding Principles on Business and Human Rights, implementing the United Nations "Protect, Respect and Remedy" Framework (New York/Geneva/United Nations 2011), see also Document A/HRC/17/31.

19 The character of the Hague Principles as *droit savant* is stressed by B. FAUVARQUE-COSSON/P. DEUMIER, Un nouveau instrument de droit souple international – Le projet des Principes de La Haye sur le choix de la loi applicable en matière de contrats internationaux, Recueil Dalloz 2013, 2185–2190, 2187; for a broader treatment of non-state law see N. JANSEN/R. MICHAELS (eds.), Beyond the State – Rethinking Private Law (Tübingen 2008); G.-P. CALLIESS (ed.), Transnationales Recht (Tübingen 2014).

III. The Addressees of the Hague Principles

The impact of the Principles on cross-border transactions will result from the reactions of a number of actors addressed. These actors are: contracting parties in the business community, academics as the gate-keepers of legal information, state courts, arbitrators and related organizations, and legislatures at the national or international level.

Since the Principles, contrary to other Hague instruments, only deal with the selection of the applicable law by *private parties* and do not make provision for the absence of such choice, the most relevant addressees are these parties and their counsel. Unless they agree on the applicable law – which, if at all, usually occurs *ex ante,* i.e. at the early stages of a transaction – the Principles will largely be devoid of practical significance. We shall therefore take a closer look at the prospects for the successful implementation of the Principles by private actors, *infra* IV.

How will private actors know that the Principles exist? The working group of the Hague Conference that authored the instrument was constituted by a majority of *academics* and only few practitioners; apparently no in-house counsel of any big company was a member or observer.[20] Thus, there is a long road to be travelled from the forum that drafted the Principles to those who might decide on their actual use one day. The dissemination of legal information required to overcome that distance is primarily a task for academics. It will be up to them to spread knowledge about the Principles in legal education, in seminars for practitioners, and by means of scholarly publications. Given the flood of information lawyers already have to accommodate, this will be a difficult task. Its effects can be expected only in the long term.

Courts have to face issues of the law governing international transactions from an *ex-post* perspective. In many jurisdictions they have to apply the binding conflict rules of the forum state. To the extent that these conflict rules already cover issues arising in a pending case, there is no room for the application of the Principles. For example, under the Rome I Regulation, the formal validity of a contract including a choice-of-law clause is subject to a rather detailed conflict rule providing for alternative connections. While those connections favour formal validity, they exclude recourse to a substantive rule such as Art. 5 HP, which states that a choice of law is valid by mere consent of the parties.[21] Conversely, in jurisdictions

20 See the website of the Hague Conference: *www.hcch.net* → Instruments → Conventions, Protocols and Principles → Principles on Choice of Law in International Commercial Contracts → Preparatory Work → 2013: Members of the Working Group.

21 For a detailed analysis see T. Pfeiffer, Die Haager Prinzipien des internationalen Vertragsrechts – Ausgewählte Aspekte aus der Sicht der Rom I-VO, in: Mankowski/

such as China, where explicit regulation of the formal validity of a choice-of-law clause is lacking, no such barrier exists.[22] Since one function of the Principles is "to interpret, supplement and develop rules of private international law",[23] a Chinese judge might feel encouraged to refer to Art. 5 HP in order to allow formless choice-of-law agreements. In other words, the less detailed the national conflict rules are, the more room there is for the application of the Principles by courts.

Arbitrators are a further group of addressees of the Principles. Since a *lex fori* is lacking in international arbitration, they are not bound by a set of specific conflict rules, unless the parties have imposed such an obligation on them. While this may open the door for the application of the Principles, there are other restrictions and complications which deserve a closer analysis later on, see *infra* V.

The greatest impact that may be expected for the Principles is where *legislatures* set out to codify choice-of-law rules for international contracts, taking the Principles as a blueprint. The relevant texts are a bit ambivalent on this point. On the one hand the Preamble specifically points out that the Principles "may be used as a model for national, regional, supranational or international instruments."[24] On the other hand the official Commentary makes clear that the Principles are not "a model law that States are encouraged to enact."[25] The apparent contradiction may be the result of inattentive drafting. The Principles have the style of a codification of the continental European type and are without any doubt suited to serve as a model law; Paraguay has in fact copied them almost verbatim into a municipal statute on the law applicable to international contracts.[26] The assertion of the

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Wurmnest (eds.), Festschrift für Ulrich Magnus (Munich 2014) 501–513, 506 et seq., pointing out the differences but also the far-reaching similarity of results to be achieved under Arts. 3 para. 5 and 11 Rome I and Art. 5 HP; see also S. SYMEONIDES, The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments, American Journal of Comparative Law (Am. J. Comp. L.) 61 (2013) 873–899, 891.

22 Cf. Q HE, Recent Developments of New Chinese Private International Law with Regard to Contracts, in: Basedow/Pissler (eds.), Private International Law in Mainland China, Taiwan and Europe (Tübingen 2014) 157–179, 165.

23 See para. 3 of the Preamble of the HP.

24 See para. 2 of the Preamble of the HP.

25 See the Commentary, *supra* note 1, para. I.8.

26 Ley No. 5393 sobre el derecho aplicable a los contratos internacionales, Gaceta Oficial de la República del Paraguay No. 13 del 20 de enero de 2015, 2; an English translation is published in: J. BASEDOW/F. FERRARI/P. DE MIGUEL ASENSIO/G. RÜHL (eds.), Encyclopedia of Private International Law (EPIL), Vol. IV (Cheltenham 2017), see the materials under Paraguay. The statute is not confined to the choice of the applicable law but also deals with the law applicable in the absence of such choice.

Commentary that they are not a model law is perhaps meant to prevent the misunderstanding that they exclusively address legislatures and not the judiciary and other actors.

IV. The Principles and Private Parties

How can private parties avail themselves of the Principles? Where other soft law instruments such as the Unidroit Principles[27] are at issue, the answer appears easy: the parties can incorporate the Unidroit Principles into their contract by agreement. Incorporation by agreement is possible within the freedom of contract often granted by the applicable law.[28]

That solution is excluded for the Hague Principles since, at the time of conclusion of the contract when the choice of law is made, there is not yet an applicable law to determine the boundaries of freedom of contract; it is the very purpose of the Hague Principles to allow the parties to determine that applicable law by their choice. If the foundational assertion of Art. 2 para. 1 HP that "a contract is governed by the law chosen by the parties" were to serve as a basis for such choice, this would come down to the recognition of a vicious circle. Art. 2 para. 1 HP is meaningless in a legal sense, at least from a strictly positivistic perspective of private international law. To the extent that national conflict rules such as those of Uruguay or Iran disallow a choice,[29] the Hague Principles remain ineffective.[30] In a similar vein, the explicit admission of the choice of non-state law in Art. 3 HP cannot set aside the prohibition of such a choice in Art. 3 Rome I or in the Regulation's pertinent recitals and legislative history.[31]

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27 See *supra* at note 17.

28 Cf. R. Michaels, in: Vogenauer (ed.), Commentary on the Unidroit Principles of International Commercial Contracts (PICC) (2nd ed., Oxford 2015) Preamble I, paras. 34 seq.

29 For Uruguay see Arts. 2399 and 2403 of the Civil Code and D. Hargain/G. Mihali, Uruguay, in: Esplugues Mota/Hargain/Palao Moreno (eds.), Derecho de los contratos internacionales en Latinoamérica, Portugal y España (Madrid et al. 2008) 765–788, 773; for Iran see Art. 968 of the Civil Code and N. Yassari, Das internationale Vertragsrecht des Iran, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2009, 451–456, 454; at p. 455 the author refers to the 1997 law on international arbitration that allows for unrestricted party autonomy with regard to arbitration.

30 Very clear on this point Fauvarque-Cosson/Deumier, *supra* note 19, 2189–2190; see also the broad discussion reaching the same result in A. Schwartze, Weltweit einheitliche Standards für die Wahl des Vertragsstatuts, in: Kaal/Schmidt/Schwartze (eds.), Festschrift zu Ehren von Christian Kirchner (Tübingen 2014) 315–332, 321–323.

Art. 2 para. 1 HP is nevertheless an important statement; it is a *political commitment* made by the Hague Conference having relevance for its own future work, and it is a *political appeal* to the states of the world to allow party autonomy. In this sense it gives support to the human-rights based approach to party autonomy that has been elaborated elsewhere.[32] Both approaches coincide in the great weight they afford to the goal of certainty and predictability in international commercial relations.[33]

While the admission of party autonomy as such in a non-binding instrument cannot set aside the restrictions laid down in statutory conflict rules, the Principles contain many other provisions that clarify the contours of choice of law. These relate to the formation of the choice-of-law agreement, the scope of the chosen law, and other effects of the choice. Many details are not regulated by the binding conflict rules of the various jurisdictions. The example of the form of the choice-of-law agreement under Chinese law was given above.[34] There are many more examples: *Marta Pertegás* and *Brooke Marshall* have compared some of the Hague Principles with recent conflicts legislation in Korea, Japan and China; the resulting checklist is a good illustration of the numerous issues arising under national conflict rules that could receive clear solutions under the influence of the Principles.[35] If we look into older legislation such as the Civil Code of Egypt, the under-regulation is even more conspicuous; we do not find more than a single rule on the admission of choice of law, all details being left to legal scholarship and case law.[36]

Enhancing legal certainty is in the interest of the parties where their international contract may be somehow affected by the fragmentary regula-

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31 See recitals 12 and 13 of the Rome I Regulation; the Commission Proposal of 15 December 2005, COM(2005) 650 contained a rule allowing for the choice of non-state law, see Art. 3 para. 2, but it was not accepted by the Council and did not finally make it into the Rome I Regulation; the divergence between Art. 3 Rome I and Art. 3 HP is pointed out by D. GIRSBERGER, Die Haager Prinzipien über die Rechtswahl in internationalen kommerziellen Verträgen, Schweizerische Zeitschrift für internationales und europäisches Recht 2014, 545–552, 550.

32 See BASEDOW, *supra* note 2, paras. 239 et seq.

33 See the Commentary, *supra* note 1, para. I.3 and the reference to Art. 28 of the Universal Declaration of Human Rights of 1948, in: BASEDOW, *supra* note 2, para. 252.

34 See text at note 22, above.

35 M. PERTEGÁS/B. A. MARSHALL, Intra-regional reform in East Asia and the New Hague Principles on Choice of Law in International Commercial Contracts, Korea Private International Law Journal 20 (2014) 391–428, 394.

36 See Art. 19, 2nd sentence of the Preliminary Chapter of the Civil Code, English translation in EPIL, *supra* note 26, Vol. IV, Egypt; for an account of the Egyptian law see H. JUNG, Ägyptisches Internationales Vertragsrecht (Tübingen 1999) 7 et seq.

tion of choice of law in countries such as Egypt. As pointed out above, binding law will usually not be opposed to gaps being filled by the Hague Principles, and the parties will welcome an instrument that deals with details which rarely become the subject of negotiations. But there is of course the risk that courts or arbitrators will fill the gaps of national conflict rules with other rules and in an inconsistent way. To foreclose or minimize such a risk, the parties should refer to the Hague Principles in an appropriate contract clause that could be drafted along the following lines:

"The present contract is subject to the law of […]; to the extent that it is not inconsistent with binding conflict rules, this choice is to be construed in accordance with the Hague Principles on Choice of Law in International Commercial Contracts."

The Hague Conference could promote the Principles by recommending such a standard clause. This would be a step towards the use of the Principles in commercial practice. Business associations at both international and national levels would be encouraged to recommend the use of the standard clause and would thereby promote the Principles to the business community at large. A company inclined to accept the Principles could propose the standard clause to its contracting partners, relying on the reputation and the neutral standing of the Hague Conference. In the event of litigation, the incorporation of the standard clause into the contract would alert judges and arbitrators to the Principles. All in all, such a clause would be an element in the slow process of disseminating information about the Principles.

V. The Hague Principles in Arbitration

1. Arbitration and State Law

International commercial arbitration is characterized by a certain independence from state law. The degree of that independence differs from country to country. But it can be taken for granted everywhere that state courts do not and cannot intervene as long as both parties comply with the arbitration agreement and with the resulting award; in that case the arbitration may be considered as an equivalent to a successful out-of-court settlement.

But even if one of the parties, contrary to the arbitration agreement, starts litigation in a state court, or if the losing party applies for the annulment of the award or objects to its enforcement, the review by a state court will usually be confined to a limited number of grounds relating to procedural fairness, to the arbitrability of the subject matter, and to aspects of public policy.[37] As a matter of principle, the law applied by the arbitrators

37 See Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature in New York on 10 June 1958, UNTS 330, 38; see

to the subject matter of the dispute is outside the scope of review. This opens the door for the Hague Principles.

In commercial arbitration three types of agreements have to be distinguished: the main agreement that gives rise to the dispute; the arbitration agreement that excludes the jurisdiction of state courts and is foundational for the authority of the arbitrators to decide the case; and an agreement relating to the procedure to be followed. While the latter agreement is outside the scope of the Principles,[38] the two former agreements raise choice-of-law issues and may be subject to a selection of the applicable law by the parties. What role can be assigned to the Hague Principles in those conflicts analyses?

2. The Arbitration Agreement

Following the Rome I Regulation, the Hague Principles exclude arbitration agreements from their scope of application.[39] The reason given in the official Commentary is the fact that arbitration agreements, in some jurisdictions, are considered procedural in nature and are therefore governed by the *lex fori* or the *lex arbitri*.[40] While this is true, it reflects the perspective of a state court and not the viewpoint of an arbitration panel which has to assess the validity and scope of the underlying arbitration agreement prior to any proceedings in a state court.

In general, arbitrators neither know whether a state court will review their action at a later stage, nor can they predict which jurisdiction will carry out that review. Thus, they are not aware of the law that may become relevant as the *lex fori* at a later stage; nor do they know whether a state court that may be approached one day will consider the validity of the arbitration agreement as a procedural issue to be assessed under the *lex arbitri.* Nevertheless, their authority depends on a valid arbitration agreement, and they will have to establish the law that determines its validity and scope. If that law results from the parties' choice, why should that choice not be construed in accordance with the Hague Principles? The alternative is the complete absence of any applicable conflict rule. The application of the Principles could provide helpful assistance, in particular in mixed arbitration panels composed of arbitrators from different jurisdictions.

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also Arts. 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, Vienna 2008.

38 M. KOPPENOL-LAFORCE, Arbiters en rechtskeuze: het handvat van de Draft Hague Principles on choice of law, in: Erasmus School of Law, Piet Sanders – Een honderdjarige vernieuwer (The Hague 2012) 293–298, 295.

39 Art. 1 para. 3 lit. b HP and Art. 1 para. 2 lit. e Rome I Regulation.

40 Commentary, *supra* note 1, para. I.26.

Take the example of a seller established in the EU and a buyer in a third country who have entered into a sales contract containing an arbitration clause that subjects "all disputes arising from the legal relationship between the parties to arbitration at X (city) in accordance with the law of Y (state)". It turns out that the sales price, fixed by the seller in accordance with a price cartel, was excessive; consequently the buyer brings a claim for damages. The arbitrators have to decide whether the claim falls within the scope of the arbitration agreement. This interpretive question will probably be answered in the affirmative by laws of non-EU countries. But the answer will most likely be negative under the laws of any EU Member State in accord with a recent ruling of the European Court of Justice. In *Hydrogen Peroxide* the Court held that a choice-of-forum clause, in order to exclude an otherwise competent jurisdiction, must explicitly refer to claims arising from the breach of competition law.[41] The same requirement of specificity arguably applies to arbitration clauses.[42] Thus, the outcome of the case will depend on the law applicable to the interpretation of the arbitration clause. The Hague Principles, were they applicable, would refer questions of interpretation to the law of Y chosen by the parties.[43] Since their application is excluded, considerable uncertainty will prevail for the arbitrators.

The example shows that it would have been preferable not to exclude arbitration agreements from the scope of the Principles and instead trust that arbitrators would wisely exercise the discretion they have anyway in applying the Hague Principles.[44] To extend this analysis to a more general level, it appears doubtful whether a list of precisely drafted exclusions as figuring in Art. 1 (3) HP is compatible with the nature of a non-binding instrument. Such lists are a familiar occurrence and are necessary in binding international conventions. But in a non-binding instrument the same technique excludes what has not been previously included by compulsory rules.

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41 CJEU, 21 May 2015, case C- 352/13 *(Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV and others),* ECLI:EU:C:2015:335, paras. 68–71.

42 In this sense C. HARLER/J. WEINZIERL, The ECJ's CDC-Judgment on Jurisdiction in Cartel Damages Cases: Repercussions for International Arbitration, Europäisches Wirtschafts- und Steuerrecht (EWS) 2015, 121–123 (122); in a similar vein C. STEINLE/S. WILSKE/M. ECKARDT, Kartellschadensersatz und Schiedsklauseln – Luxemburg Locuta, Causa Finita?, German Arbitration Journal (SchiedsVZ) 2015, 165–169, 168 et seq.

43 Art. 9 para. 1 lit. a HP.

44 See para. 4 of the Preamble of the Principles and D. MARTINY, Die Haager *Principles on Choice of Law in International Commercial Contracts,* The Rabel Journal of Comparative and International Private Law (RabelsZ) 79 (2015) 625–652, 632, who correctly points out that the Principles by necessity have to grant this discretion to both courts and arbitrators.

3. The Main Contract

All articles of the Hague Principles apply to the designation of the law applicable to the main contract by both courts and arbitrators, and a distinction is made in only two provisions: (i) with regard to the choice of non-state law and (ii) as concerns the application of overriding mandatory provisions and public policy.[45] A further, not explicit but inherent distinction results from the fact that an arbitration panel has no *lex fori* that may block or supplement the parties' agreement. Instead, arbitration rules often allow the arbitral tribunal to designate the applicable law in the absence of a choice by the parties;[46] this reduces the significance of the Principles as a guideline for arbitrators.

Art. 3 HP allows for the choice of "rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise". The limitation in the final part of the provision exclusively relates to state courts; it does not apply to arbitration where the parties – in the absence of a "forum" – are deemed free to choose non-state law provided that it has the named attributes.[47]

These attributes are not required in Art. 28 of the UNCITRAL Model Law on International Commercial Arbitration,[48] the provision which is cited in the Commentary as the model for Art. 3 HP.[49] While the additional requirements appear reasonable in substance,[50] they are difficult to encapsulate in clear language.[51] Moreover, the divergent wording raises the ques-

45 Cf. Arts. 3 and 11 para. 5 HP; see also the Commentary, *supra* note 1, para. P.6.

46 See e.g. Art. 35 para. 1 of the UNCITRAL Arbitration Rules (as revised in 2010), New York 2011; Art. 21 para. 1 2nd sentence of the Arbitration Rules of the International Chamber of Commerce of 2012, *www.iccwbo.org*.

47 This is clearly spelled out in the Commentary, *supra* note 1, para. P.6; MARTINY, *supra* note 44, 639 voices some doubts, however.

48 See *supra* note 37.

49 See the Commentary, *supra* note 1, para. 3.1.

50 The criteria set forth in Art. 3 HP – completeness and neutrality – were enunciated in the discussion preceding the adoption of the Rome I Regulation, see MAX PLANCK INSTITUTE FOR FOREIGN PRIVATE AND PRIVATE INTERNATIONAL LAW, Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, The Rabel Journal of Comparative and International Private Law (RabelsZ) 68 (2004) 1–118, 32–33.

51 See the harsh criticism expressed by A. DICKINSON, A Principled Approach to Choice of Law in Contract?, Butterworths Journal of International Banking and Financial Law (JIBFL) 28 (2013) 151–153, 152: "[…] this provision should not have seen the light of the day: almost every word drips with uncertainty." This criticism is further elaborated by R. MICHAELS, Non-State Law in the Hague Principles in In-

tion whether rules of law agreed upon by the parties in their contract as the applicable law may be subject, by the arbitral tribunal, to scrutiny under the criteria set forth in Art. 3 HP. Put in other words, could the arbitrators declare a set of rules forming part of the contract as too fragmentary or too one-sided to be treated as the applicable law under Art. 3 HP if the same set of rules can be expected to be regarded as the applicable law in court proceedings under the national provision implementing Art. 28 of the UNCITRAL Model Law?

The debate of the drafters on the additional properties of the "rules of law"[52] apparently did not take this divergence into consideration. It rather turned on the right of the parties to select non-state law as the applicable law, seemingly looking at this question from the *ex-post* perspective of a state court. But since that court will likely apply the national provision implementing Art. 28 UNCITRAL Model Law, the role of Art. 3 HP is a bit opaque. Perhaps the drafters simply wanted to reinforce the general tendency toward non-state law that already emerges from Art. 28. If that were the case, they should have copied Art. 28 verbatim. Perhaps Art. 3 HP is rather meant to clarify the concept of "rules of law" used in Art. 28. If that were the case, it should have been made clear at least in the Commentary, which would however raise some doubts as to its legitimacy. Whatever the correct understanding of Art. 3 HP may be, the preceding discussion points to an unclear overlap of non-binding provisions drafted by different international organizations.

Under Art. 11 (5) HP, an arbitral tribunal is not prevented from applying or taking into account public policy or the overriding mandatory provisions of a law other than the *lex causae* in cases where "the arbitral tribunal is required or entitled to do so". What at first sight looks a bit tautological appears to be a useful statement after all. Arbitrators often find themselves in a dilemma between a narrow perception of their terms of reference and the need to give effect to certain imperative norms of other laws in the interest of the effectiveness of their award.[53] Where they do not take notice

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ternational Commercial Contracts, in: Purnhagen/Rott (eds.), Varieties of European Economic Law and Regulation – Liber amicorum for Hans Micklitz, (Heidelberg 2014) 43–69, 56 et seq., 61: "The additional requirements […] have made a problematic rule far worse."

52 On that debate see FAUVARQUE-COSSON/DEUMIER, *supra* note 19, 2188 pointing to the disagreement between the working group and the special intergovernmental commission; SYMEONIDES, *supra* note 21, American Journal of Comparative Law (Am. J. Comp. L.) 61 (2013) 893–994; MARTINY, *supra* note 44, The Rabel Journal of Comparative and International Private Law (RabelsZ) 79 (2015) 637–638.

53 See e.g. PERTEGÁS/MARSHALL, *supra* note 35, 416–417.

of those imperative norms, the award may later be annulled or turn out to be unenforceable.[54]

Art. 11 para. 5 HP makes clear that the arbitration tribunal is empowered – not compelled[55] – to apply or take into consideration those imperative norms, and that a state court seized of the annulment or enforcement of the resulting award cannot quash or refuse to enforce it on the ground that the tribunal is acting *ultra vires*. The proviso that the tribunal is *entitled* to give effect to the imperative norms will be fulfilled where the applicable arbitration rules aim at an enforceable award[56] or at the final resolution of the dispute.[57] Since these are the very objectives of arbitration, the proviso comes down to a negative condition: the tribunal is empowered to give effect to imperative norms unless that is excluded in its terms of reference.

VI. Conclusion

The Hague Principles stand as a novel approach to international contract law. As a non-binding instrument, its impact on international business transactions depends on the echo it finds with several groups of addressees: private parties, academics, courts, arbitral tribunals, and legislatures. The drafters appear not to have always been fully aware of the specific perspectives of these groups. Some of the provisions too closely follow the model of binding texts. The most promising addressees for the future proliferation of the Principles are, first, legislatures and courts in countries that have no or no detailed rules on choice of law in contracts and, second, international commercial arbitrators in general. The Hague Conference should keep working on the dissemination of knowledge about the Principles in business practice.

54 See CJEU 1 June 1999, case C-126/97 *(Eco Swiss China Time Ltd. v. Benetton International N.V.),* ECLI:EU:C:1999:269: EU competition law to be enforced against an award rendered under a different law.

55 The discretion of arbitrators is highlighted by M. Pertegás/B. A. Marshall, Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts, Brooklyn Journal of International Law 39 (2014) 975–1003, 1001.

56 See Art. 41 of the Arbitration Rules of the International Chamber of Commerce of 2012, *supra* note 46.

57 See Art. 17 of the UNCITRAL Arbitration Rules, *supra* note 46.