Oiling the Machine

Overriding Mandatory Provisions and Public Policy in the Hague Principles on Choice of Law in International Commercial Contracts

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I. Introduction

Art. 11 of the Principles on Choice of Law in International Commercial Contracts, adopted by the Council of the Hague Conference in March 2015 contains provisions governing the relationship between the system of law[1] chosen by the parties under Art. 2(1) (the "chosen law") and the laws and policies of other systems. It provides as follows:

> 1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.
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> 2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.
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> 3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.
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> 4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.
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> 5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

In brief summary, therefore, the first and third paragraphs address the relationship between the chosen law and certain laws and policies of the forum, the second paragraph addresses the relationship between the chosen law and certain laws of legal systems other than the forum, the fourth paragraph addresses the relationship between the chosen law and the certain policies of

[1] The relevant system of law may be the law of a country or, unless the law of the forum prohibits this, "rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules" (Art. 3).

the legal system whose laws would have applied but for the parties' choice under Art. 2(1) and the fifth paragraph addresses the limits of the application of the chosen law in arbitration proceedings.

The first paragraph of the Preamble to the Principles states that:

> This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.

This idea is developed in the Introduction to the Commentary upon the Principles in the following way:[2]

> While the aim of the Principles is to promote the acceptance of party autonomy for choice of law, the principles also provide for limitations on that autonomy. The most important limitations to party autonomy, and thus the application of the parties' chosen law, are contained in Article 11. Article 11 addresses limitations resulting from overriding mandatory rules and public policy (*ordre public*). The purpose of those limitations is to ensure that, in certain circumstances, the parties' choice of law does not have the effect of excluding certain rules and policies that are of fundamental importance to States.

Article 11 has its own Commentary, running to 32 numbered paragraphs[3] and containing a detailed account, with illustrations, of how the principles set out in Art. 11 might be understood and applied. This paper does not set about to trespass upon all of the matters considered in that commentary. Instead, it considers three topics of a more general character. First, the drafting history of Art. 11. Secondly, the role of Art. 11 within the Principles. Thirdly, the relationship between the Principles and the Hague Choice of Court Convention (2005) in terms of the limits that they place upon choice of law and choice of court agreements. Each topic casts some further light upon Art. 11, and how it is to be understood and applied.

II. Drafting History

The Annex to this paper contains an overview of the development of the provision for overriding mandatory provisions (mandatory rules) and public policy (*ordre public*) in the Hague Principles. This covers the period from the first tentative proposals made by the sub-group working on these issues (2010 and 2011), through the Working Group's drafts (2011 and 2012), to the text approved by the Special Commission (2012) and the final text of the Principles.

As appears from the publicly available papers,[4] and from the reports of its meetings,[5] the Working Group gave very detailed consideration to this subject area. A preliminary discussion

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2 Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (The Hague, 2015), Commentary, [I.11].

3 Ibid. [11.1]-[11.32]. The author, together with Professor Geneviève Saumier (McGill University), had primary responsibility for drafting this Section of the Commentary.

4 A Dickinson, 'The Role of Public Policy and Mandatory Rules within the Proposed Hague Principles on the Law Applicable to International Commercial Contracts', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168056 (**2010 Working Paper**) and 'The Role of Public Policy and Mandatory Rules within the Proposed Hague Principles on the Law Applicable to

took place at the Working Group's second meeting held in November 2010, with reference to a detailed working paper. That paper addressed the topics identified by the sub-working group under the following headings:

- Should the Principles address the relationship with public policy and mandatory rules at all?
- Public policy (ordre public) of the forum State.
- Mandatory rules of the forum State.
- Public policy/Mandatory rules of a "third country", i.e. other than the forum and the chosen law.
- Transnational public policy.
- Public policy and mandatory rules in arbitration proceedings.

As to the first and most basic of these points, the 2010 Working Paper noted the *renvoi* to national private international law rules in Art. 1(4) of the UNIDROIT principles on International Commercial Contracts (2004 version),[6] but rejected this as providing a general solution in this context on the ground that it was "inconsistent with the main objective of the Principles, that of promoting the principle of party autonomy".[7] A solution along these lines was, however, recommended to deal with the much more problematic, and at that time controversial,[8] topic of the treatment of third country mandatory rules and public policy within the principles.[9]

The Working Paper considered, but rejected, the suggestion that the Principles should take account of "transnational public policy":[10]

> "[T]ransnational public policy" appears not only vague, uncertain and highly subjective as to its content, but also to lack a principled normative basis for its application as (1) a reason in itself for refusing to apply the law chosen by the parties, or (2) a restriction on the application of the (international) public policy of the forum to justify a refusal to apply that law. If a principle of public policy is considered sufficiently well-established and important by the legal system of the forum to override the application of the law chosen by the parties then that should suffice whether or not the same or a similar principle is "generally" followed by the courts of "civilised"

International Commercial Contracts - Updating Note', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168057 (**2011 Working Paper**).

5 See, in particular, the Reports of the Second Meeting (15-17 November 2010) and Third Meeting (28-30 June 2011), available at https://www.hcch.net/en/instruments/contracts-preparatory-work.

6 "Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law." The same Principle applies under Art. 1.4 of the 2010 version of the UNIDROIT Principles.

7 2010 Working Paper, 2.

8 In light of the debate surrounding Art. 8(3) of the Commission's Proposal for a Regulation to replace the Rome Convention on the law applicable to contractual obligations (COM (2005) 650 final). See A Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 J. Priv. Int. L., 27; A Dickinson, 'Third Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?' (2007) 3 J. Priv. Int. L. 53, 59-73.

9 2010 Working Paper, 6-10.

10 2010 Working Paper, 11 (words in square brackets added for sense).

> nations. Conversely, if the legal system of the forum does not consider a principle of public policy to be sufficiently well-established and important, it should be of no import that the principle or a similar principle is so observed [by other legal systems] (*res inter alios acta*).

Three embryonic draft Principles were put forward for discussion.[11] First, a single principle providing for the overriding effect of the forum's public policy (*ordre public*) and mandatory provisions, expressed as an exclusive exception under the Principles themselves to the predominant requirement to apply the law chosen by the parties. Secondly, a single principle enabling the law of the forum to provide for its courts to apply or take account of the public policy (*ordre public*) or mandatory rules of any other legal system. Thirdly, a principle applicable to proceedings for an arbitral tribunal, formulated in very different terms from that which ultimately prevailed.[12]

At the second meeting, members of the Working Group expressed a range of views.[13] There was unanimous agreement that the Principles should make provision at least for the public policy and mandatory rules of the forum, and strong support for the position taken in the 2010 Working Paper regarding third country mandatory rules, but little enthusiasm for extending this to third country public policy or to including a provision dealing with transnational policy. A majority (but not the present author) favoured the formulation of the Principles, including in the present context, in the passive voice rather than as directions/permissions to national courts. There was strong support for the view that the exceptions to the principle of chosen law should be narrowly defined, and their narrow character emphasised, in order to promote the principle of party autonomy. The draft Principles were adjusted during, and after the meeting, and further refined following discussion at the Working Group's third meeting.[14] At this meeting a number of areas were identified for more detailed treatment in the Commentary.[15]

Only two changes of note were made by the Special Commission.[16] First, the removal of a provision (Art. 11(4) in the Working Group's final draft) emphasising that the general provisions should extend to court proceedings relating to arbitration, which was thought to be unecessary and at risk of trespassing upon specialist arbitration incidents.[17] Secondly, the re-introduction of a provision enabling the law of the forum to provide for its courts to apply or take into account the public policy (*ordre public*) of a third country, but one limited (unlike the early proposal in the Working Group and by contrast with the provision for non-forum overriding mandatory provisions in Art. 11(2)) to the public policy of the country whose law would have applied to the contract in the absence of a choice of law. This restriction was justified on the ground of legal

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11 See Annex, Column I.

12 See the discussion on this point and the revised proposals in the 2011 Working Paper, 2-5, 7 (Annex II.F). Compare Principles, Art. 11(5). This paper does not address the role of public policy etc. as limiting party choice of law in arbitration, but focuses exclusively on court proceedings.

13 2011 Working Paper, 1-2.

14 Report of the Second Meeting (n.5), 3; 2011 Working Paper, 7; Report of the Third Meeting, iii-iv.

15 Report of the Third Meeting, 4.

16 Report of the November 2012 Special Committee Meeting, available at https://www.hcch.net/en/instruments/contracts-preparatory-work, 9-11.

17 Ibid. [40].

certainty.[18] It is, however, a curiosity that the Principles, which themselves contain no rules for determining the law applicable to a contract in the absence of choice, should seek to impose this control upon third country public policy when no similar gateway was imposed (and, indeed, had been rejected by the Working Group) for third country overriding mandatory provisions. Moreover, it is a matter of regret that the wording of Art. 11(3), which refers to "fundamental notions of public policy", emphasising the limited nature of the qualification to the principle of party autonomy, was not carried forward into Art. 11(4).[19] The Commentary to Art. 11(4) attempts to patch up this discrepancy, with the statement that:[20]

> Subject to any further restrictions imposed by the law of the forum, the category of public policy (*ordre public*) to which reference may be made and the limits on its application are to be understood as being subject to the same requirements and restrictions as the exclusionary principle in Article 11(3).

This, however, is a point that States implementing the Principles in the future may wish to address expressly by clarifying the wording of Art. 11(4).

III. The Role of Art. 11 within the Principles

As noted above, the Preamble to the Principles refers to "limited exceptions" to the principle of party autonomy, and the Commentary refers to "limitations on that autonomy".[21] The Commentary to Art. 11 opens with the following statements:[22]

> Party autonomy, as recognised by the Principles, is not absolute. Rather, in the Principles, as in all States that recognise party autonomy, it operates within limits. This Article sets out the limits on the general autonomy principle recognised in Article 2. ... These are the only limitations upon the application of the law chosen by the parties within the framework of the Principles.
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> While Article 11 consists of five paragraphs, it embodies one basic point – party autonomy to select the governing law can be limited, in the exceptional circumstances identified in the Article, when the effect of its use would be to contravene certain fundamental norms. Article 11 sets out the contours of that point by identifying the two situations in which a forum may, consistent with the Principles, decline to give full effect to the law chosen by the parties. First, notwithstanding the law chosen by the parties, the forum may apply or take into account "overriding mandatory provisions" of law. Second, the forum may decline to apply the law chosen by the parties to the extent that the result would be "manifestly incompatible with fundamental notions of public policy (*ordre public*)". Of course, in order to apply those limits, one must know which State's overriding mandatory provisions of law or fundamental notions of public policy (*ordre public*) are

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18 Ibid. [41].

19 A more critical account of Art. 11(4), among other aspects of the Principle, is to be found in P de Vareilles-Sommières, 'Autonomie et ordre public dans les Principes de la Haye sur le choix de la loi applicable aux contrats commerciaux internationaux' (2016) Journal du Droit International, no. 2, April 2016.

20 Commentary, [11.29]. For completeness, the cross-reference in that paragraph should be to [11.23]-[11.27], and not just to [11.26].

21 Text to n.2 above.

22 Commentary, [11.1]-[11.2], [11.4].

> to be taken into account. While the Principles primarily look to the law of the forum for those limits, they also provide rules under which the forum may look to the law of a different State. ...
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> These limitations apply only with regard to rules and policies that are of fundamental importance within the legal systems in which they operate ... Indeed, if the limitations are not circumscribed in this manner, the principle of party autonomy would be undermined.

These statements are, of course, accurate statements of the role that Art. 11 plays within the Principles. Nevertheless, a more positive aspect of Art. 11 should not be overlooked. Indeed, it should be given pride of place. As the Commentary explains under the heading 'The relationship of Article 11 to the principle of party autonomy':[23]

> Rules that provide for the application by a court or arbitral tribunal of overriding mandatory provisions or public policy (whether of the forum or of another law) to qualify the law that would otherwise apply in a particular case are of fundamental importance in private international law. Those rules provide an essential "safety valve" without which national lawmakers might be reluctant to allow the application of the chosen law or "rules of law". ...
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> In the present context, although the qualifications in Article 11 do restrict the application of the law chosen by the parties, they are intended to buttress the principle of party autonomy. By acknowledging and defining the exceptional circumstances in which a national court or arbitral tribunal may legitimately override the parties' choice in the exercise of the power conferred on them by Article 2(1), the provisions described in the following paragraphs serve as important control mechanisms, which should serve to reinforce the confidence that a legal system reposes in the parties by allowing them that choice. Without provisions of this kind, which protect the integrity of a legal system and the society that it represents, the freedom of the parties to choose the law applicable to a contract might not be accepted at all and, if recognised, would be at risk of being undermined or negated on insubstantial or spurious grounds.

In support of the statement in the last sentence of the first paragraph above, the Commentary refers to the Separate Opinion of Sir Hersch Lauterpacht in the International Court of Justice's *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*.[24] It may be helpful to put the reference to a "safety valve" in context. Dealing with the general role of *ordre public* within national systems of private international law, Judge Lauterpacht stated:[25]

> Admittedly, the notion of *ordre public* - like that of public policy - is variable, indefinite and occasionally productive of arbitrariness and abuse. It has been compared in this respect, not without some justification, with the vagueness of the law of nature. Admittedly also, it has often been the instrument or the expression of national exclusiveness and prejudice impatient of the application of foreign law. Yet these objections, justified as they are, do not alter the fact that the principle permitting reliance on *ordre public* in the sphere of private international law has become- and that it is - a general principle of law of most, if not all, civilized States. More than that: It is, on its own merits, part and parcel of the entire doctrine and practice of private international law

23 Commentary, [11.8]-[11.9].
24 Judgment of 28 November 1958, ICJ Reports 1958, 55.
25 Ibid. 93-94.

> almost from its very inception; the two are inseparable, not only as a matter of history but also of necessity; they have grown together in a mutual interaction and compromise. The purpose of private international law is to make possible the application, within the territory of the State, of the law of foreign States. This is an object dictated by considerations of justice, convenience, the necessities of international intercourse between individuals and indeed, as has occasionally been said, by an enlightened conception of public policy itself. But there is an obvious element of simplification in the view that the law of a State should be deemed to have consented or that it should reasonably be expected to consent in advance to the application of foreign law without any limitations, in any circumstances whatsoever, without a safety valve, without a residuum of contingencies in which, because of the very nature of its structure and the fundamental legal, moral and political conceptions which underlie it, it should be able to decline to apply foreign law.
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> Within the State, the judicial use of public policy - of *ordre public* - has often been exposed to criticism. But it is seldom, if ever, suggested that it is not an indispensable instrument of the interpretation, application and development of the law. If that is so in relation to the national law of the State which may be changed by ordinary legislative processes, it is particularly so in relation to foreign law over which the State has no control and which, in certain circumstances, its courts may find it inconceivable to apply. History - modern history - has occasionally produced examples of legislation manifesting eruptions of malevolent injustice, or worse, to which courts of foreign countries may find it utterly impossible to give effect and with regard to which the right to denounce the treaty may not provide a timely or practicable remedy.

This is a powerful positive case for providing mechanisms within a conflict of laws' system which enable the forum State to control, within specified limits, the conditions under which it will receive and apply foreign laws, so as to address exceptional cases of manifest conflict of the designated foreign law with fundamental elements of the forum's legal system. The systemic object of such provision is to encourage the adoption by that State of appropriate choice of law rules which will be applied generally subject only to those conditions, and the predictable judicial application of those rules in the large majority of cases.

The case for enabling such control by the forum State is strengthened in the context of the Principles, in which the parties themselves are free to connect their contract to *any* legal system, regardless of connection to the contract (Art. 2(4)) or, within the parameters laid down, to a non-State set of rules (Art. 3).

Moreover, if the case for forum control is accepted with respect to the forum State's fundamental public policies (Art. 11(3)), it applies with equal force to the application of its overriding mandatory provisions, rules that are demonstrably so important that legal system that they cannot be derogated from and apply irrespective of the fact that the parties have chosen another law to govern their relationship (Art. 11(1)).[26] By an extension of the same process of reasoning, the forum State should also be enabled, although it will generally be under no

[26] See Commentary, [11.16]-[11.17].

obligation in this regard,[27] to make provision for the fundamental public policies or overriding mandatory provisions of the law of a third country as a condition of its willingness in general to apply the law chosen by the parties (Art. 11(2), (4)).[28]

Thus, putting Art. 11(5) to one side for present purposes, the provisions contained within Art. 11 of the Principles can best be understood to as a standard package of protections for the legal system (or systems) of any State which may wish to consider using the Principles as a template for the development of its own rules of private international law. They serve as a complement and counterbalance to the principle of party autonomy (Art. 2). Without them, that principle would likely be unpalatable or adopted only on a limited basis in qualified terms.

Art. 11 also reinforces the principle of party autonomy by encouraging a more harmonious approach in setting limits to the principle of party autonomy. Its provisions have been drafted in light of a comprehensive examination of State practice and further consideration by the expert members of the Working Group and Special Commission. They are formulated in terms which emphasise the exceptional and exhaustive character and restricted effect of the control devices retained by the forum's legal system, as the Commentary repeatedly explains.[29] Hopefully, over time, State practice in the adoption and application of the Principles will reinforce this message, and create a virtuous circle.

Of course, it must be acknowledged the Principles are not binding,[30] and that legislators (or courts) may choose to depart from the standards that Art. 11 lays down. Thus, Paraguay, for example, adjusted and supplemented the Principles so as to bring them in certain respects into line with the 1994 Inter-American Convention on the Law Applicable to International Contracts.[31] This included, in accordance with Art. 10 of that Convention, a provision (Art. 12) for the "equitable harmonisation of interests" founded on "the guidelines, customs and principles of international law as well as commercial usage and practice". However, the basis proposition remains: an "off the shelf" product such as the Principles is more likely to be successful in its object of promoting the principle of party autonomy if its design accommodates the main concerns that the users of that principle[32] are likely to have and can be adopted without significant tailoring.

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27 But cf. Articles of Agreement of the International Monetary Fund, adopted 22 July 1944, as amended (Bretton Woods Agreement), Art. VIII(2)(b): "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement."

28 As to Art. 11(4), see text to nn.18-19 above.

29 e.g. Commentary, [11.1], [11.4], [11.6], [11.10], [11.12], [11.17]-[11.18], [11.23]-[11.27], [11.29].

30 Commentary, [I.8]-[I.10].

31 See https://www.hcch.net/en/news-archive/details/?varevent=336. Paraguay is not a party to that Convention

32 The Commentary ([I.20]) states that "[t]he envisaged users of the Principles include lawmakers, courts and arbitral tribunals, and parties and their legal advisors". If the Principles are to be successful, the

Thus, Art. 11 does not undermine party autonomy, but enhances it. Without too much licence, its provisions be described as the oil that lubricates the machinery in the Principles for implementing the principle of party autonomy. Without it, the product would likely either remain on the shelf or break down in short order and be returned for a refund.

IV. Inter-action between the Principles and the Hague Choice of Court Convention

The Oxford English Dictionary defines "autonomy" as "the condition or right of a state, institution, group, etc., to make its own laws or rules and administer its own affairs". Autonomy comers in many forms. A State, such as Paraguay, which adopts the principles exercises its autonomy with respect to its conflict of laws rules. Art. 11 recognises the adopting State's autonomy to depart from the chosen law, restricted to the cases mentioned. Subject to Art. 11, Arts. 2 and 3 define the collective autonomy of the parties to choose the law which governs their contract. That autonomy is not, however, freestanding and universal. It applies only within a legal system that has adopted the Principles within its law.

Thus, as always in private international law analysis, identification of the forum becomes important. At this point, two further examples of autonomy become relevant. First, the autonomy of each party to choose to litigate in the event of a dispute in the forum that he considers will best serve his interests ("forum shopping"). Secondly, the autonomy of the parties to choose the forum for the resolution of disputes between them, by a choice of court or arbitration agreement. By exercising the second, collective autonomy, the parties may restrict the first, individual form.

The collective autonomy is, of course, the object of another instrument adopted by the Hague Conference, the 2005 Convention on choice of court agreements ("**Hague Choice of Court Convention**"). In drafting the Principles, the Working Group were mindful of the link between the two instruments, notwithstanding their different structures and the different roles that they play. There are some similarities between them, most notably in the definition of the "international contracts" to which they apply. [33]

For present purposes, the provisions of interest in the Convention are Arts. 5 and 6 which are functionally equivalent to Art. 11 of the Principles in empowering the forum State to limit the

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first group is by far the most important. Courts and arbitral tribunals have only limited ability to shape private international law rules within the boundaries allowed by legislation. The Principles are likely to be of very limited interest to the parties and their legal advisers except insofar as they foresee litigation before a court or tribunal in a legal system that has adopted the Principles by legislation or judicially.

[33] Principles, Art. 1(2); Hague Choice of Court Convention, Art. 1(2). The Choice of Court Convention contains longer a list of exclusions (Art. 2(2)) than the Principles (Art. 1(3)), including, e.g., contracts for the carriage of passengers and goods, but the differences between the two instruments can be explained on the basis of the Convention's binding character and the broader potential coverage of choice of court agreements, given that choice of law under the Principles extends only to contractual and pre-contractual obligations (see Principles, Art. 9). See also Art. 21 of the Convention (declarations with respect to specific matters.

principle of party autonomy in relation to the choice of court in matters to which the Convention applies. Art 5 provides, so far as relevant:

> (1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
>
> (2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
>
> …

Article 6 provides:

> A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless -
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> a) the agreement is null and void under the law of the State of the chosen court;
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> b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
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> c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
>
> d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
>
> e) the chosen court has decided not to hear the case.

Art. 5(1) and 6(1)(a), concerning the validity of the choice of court agreement and correspond, in terms of their function, to Art. 6(1)(a) of the Principles. The reference to the law of the State of the chosen court includes its choice of law rules,[34] but those rules will not include the Principles if adopted by that State in their approved form as the Principles do not apply to agreements on choice of court.[35] Perhaps it is not too ambitious to suggest a future Annex to the Principles concerning the law applicable to choice of court and arbitration agreements; in the meantime, adopting States may wish to consider adapting the Principles to apply in the determination of the law applicable to such agreements, where relevant.[36]

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34 T Hartley and M Dogauchi, *Explanatory Report on the Hague Choice of Court Convention*, [96], [125], [149].

35 Principles, Art. 1(3)(b).

36 An obvious adjustment would be the disapplication of the last sentence of Art. 4: whereas a choice of court or arbitration seat may not constitute a sufficiently clear demonstration of the law applicable to the parties' main contract, it is a very powerful indicator of the law applicable to a choice of court or arbitration agreement absent an express choice of law in relation to that agreement (to be considered as an agreement separate from the main agreement: see Choice of Court Convention, Art. 3(d)).

Note that the Principles also exclude the law governing the capacity of natural persons (Art. 1(3)(a)) and companies or other collective bodies and trusts (Art. 1(3)(c)), and would not assist in resolving the questions of capacity to which Art. 6(b) refers.

Grounds (a) to (e) within Art. 6 of the Choice of Court Convention have no counterparts in Art. 5. For grounds (b), (d) and (e), the explanations for this disparity appear obvious.[37] Art. 6(c) merits further comment, in light of its obvious connection to Art. 11 of the Principles and its contrast to Art. 5(2) of the Convention which prohibits the chosen court from declining to exercise jurisdiction on the ground that the dispute should be decided in another State (*forum non conveniens*).

In discussing the limits of Art. 6(c) as a ground for refusing to give effect to a choice of court agreement, the authors of the Explanatory Report on the Convention emphasise its limited character as follows:[38]

> … The third exception is where giving effect to the agreement would lead to a "manifest injustice" or would be "manifestly contrary to the public policy of the State of the court seised". In some legal systems, the first phrase would be regarded as covered by the second. Lawyers from those systems would consider it axiomatic that an agreement leading to a manifest injustice would necessarily be contrary to public policy. In the case of such legal systems, the first phrase might be redundant. In other legal systems, however, the concept of public policy refers to general interests – the interests of the public at large – rather than the interests of any particular individual, including a party. It is for this reason that both phrases are necessary.
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> The phrase "manifest injustice" could cover the exceptional case where one of the parties would not get a fair trial in the foreign State, perhaps because of bias or corruption, or where there were other reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court. It might also relate to the particular circumstances in which the agreement was concluded – for example, if it was the result of fraud. The standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.
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> The phrase "manifestly contrary to the public policy of the State of the court seised" is intended to set a high threshold. It refers to basic norms or principles of that State; it does not permit the court seised to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised. As in the case of manifest injustice, the standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.

It is evident, therefore, that Art. 6(c), like Art. 11 of the Principles, sets the bar for departing from the collective autonomy of the parties at a high level. A mere incompatibility with "domestic law" or a "technical violation" of a mandatory rule of the State of the court seised will not suffice. Whereas Art. 11(3) focuses on the process of applying the chosen law, Art. 6(c) focuses on the consequences of "giving effect to the agreement" on choice of court by suspending or dismissing proceedings. In this regard, there is a notable similarity to Art. 11(3) in

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37 As to paras. (b) and (e), the chosen court is the court seised under Art. 5. As to para. (d), this relates not to the existence of jurisdiction, but to the procedural exercise of jurisdiction, and a court able to rule on the question whether the choice of court agreement can reasonably be performed may be assumed to be able to continue to exercise jurisdiction. See Hartley and Dogauchi (n.34), [154].

38 Hartley and Dogauchi (n.34), [151]-[153].

that the court must focus not on the choice of court (or law) in the abstract but on the consequences of applying that choice in the particular case.[39]

Thus, before invoking the Art. 6(c) exception, the court must address the framework for the resolution of the dispute in the legal system of the chosen court, including its choice of law rules. If the chosen court has given effect to the Principles, as well as the Convention,[40] it may be important to consider how it has chosen to implement Art. 11. Take, for example, a franchise contract between a franchisor, established in State A, and a franchisee, established in State B for a business venture to be carried out exclusively in the latter State. State B has legislation which protects the franchisee against abuse of power by the franchisor, and which is expressed to be mandatory irrespective of the law applicable to the franchise agreement. At the insistence of the franchisor, the franchise agreement includes an exclusive choice of court agreement designating the courts of State A and a choice of the laws of State A. The franchisee complains of abusive business practices, and brings proceedings in State B.

In the event that the franchisor invokes the choice of court agreement, and relies on Art. 6 of the Convention, the court in State B must consider whether giving effect to that agreement would lead to manifest injustice or would be manifestly contrary to State B's public policy. If the State B court were to decline jurisdiction under Art. 6, the franchisee's entitlement to legal protection would require it to bring proceedings before the courts of State A. That consequence, of itself, cannot amount to manifest injustice or be a manifest violation of State B's public policy, for it is the essence of the Hague Choice of Court Convention that effect may be given to exclusive choice of court agreements in commercial contracts. Something more is needed.

If there is nothing to suggest that the franchisee would not have access to an impartial and fair tribunal in State A, the most important factor for the court in State B when applying Art. 6 of the Convention will likely be consideration of the question whether its franchising laws contain or inform principles of public policy (*ordre public*) of the forum and, if so, whether that public policy would be manifestly violated by declining jurisdiction in favour of the courts of State A. To this end, the State B court ought to consider whether the laws of State A afford protection to parties such as the franchisee against unfair or abusive commercial practices or, if they do not or such protection appears deficient in some fundamental respect, whether the choice of law regime applied by the State A court might allow that court to apply the overriding mandatory provisions or public policy of State B to the case. If State A has adopted the Principles, it will be necessary to ascertain whether and, if so, how State A has chosen to exercise the autonomy conferred on it by Art. 11(2) (overriding mandatory provisions) and Art. 11(4) (public policy).[41]

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39 Commentary, [11.23], [11.26].

40 Art. 6 applies only if the chosen court is the court of a Contracting State (Choice of Court Convention, Arts. 3 and 6(a)).

41 In the case of Art. 11(4), it would also be necessary to consider what law would apply to the franchise agreement in the absence of choice under State A's residual choice of law rules.

In this connection, if the Principles are adopted in a number of States, it might be useful for the Hague Conference to develop in the future a database containing basic information of this kind.

The court in State B will almost certainly require the assistance of the parties and their legal advisers to undertake this enquiry. Its limits must, however, be recognised. The court in State B should not seek to undertake a line-by-line comparison of its own laws with those of State A, conduct its own "hypothetical trial" or speculate as to how the court in State A might decide the case. That would stray too far into an examination of the substance of the case, and would be incompatible with the object and spirit of the Choice of Court Convention. The State B court may well characterise its franchising law as an overriding mandatory provision, but it does not follow that the prospect of its non-application in proceedings before the courts of State A justifies the conclusion that the choice of court agreement should be nullified. The requisite enquiry is more nuanced: if *either* the laws of State A afford material protection to franchisees as weaker parties against the franchisor's abuse of a dominant position *or* there is a realistic prospect that the court of State A might apply or take account of the protection given to franchisees under the laws of State B, the State B court should conclude that there would be no manifest injustice or manifest violation of State B's public policy by giving effect to the choice of court agreement, even if the State B court's perception is that the probable result of that decision is that the franchisee will lose a claim that it would have won before the courts of State B.

Accordingly, there is a balance to be struck. Courts in applying the Art. 6(c) manifest injustice/public policy exception in the Hague Choice of Court Convention must avoid taking an approach that is either too abstract or too granulated. So too with Art. 11(3) of the Principles, when it falls to be applied. According to the Commentary:[42]

> Article 11(3) emphasises the third requirement, namely, that it is the result of applying the chosen law in a particular case rather than the chosen law in the abstract that must be assessed for compliance with public policy. The court is not, however, restricted to considering the outcome of the dispute between the parties, but may have regard to wider considerations of public interest. For example, a court may refuse on public policy grounds to enforce a contract, valid under the law chosen by the parties, based on a finding that the choice was designed to evade sanctions imposed by a United Nations Security Council resolution, even if non-enforcement would benefit financially a person targeted by those sanctions and even if the other party was not party to the evasion.

It follows that the object of the Art. 11 enquiry is neither the "chosen law in the abstract" nor "the outcome of the dispute between the parties", but whether (and, if so, to what extent[43]) it would be manifestly incompatible with the forum State's public policy (*ordre public*) for the courts of that system to answer the call to apply the relevant rules of the chosen law to decide the dispute. Those rules must not be assessed in isolation, but in the context of the legal system of which they form part and from which they are drawn, recognising that legal systems may legitimately choose to pursue compatible ends by different means.

This leads to a further, and final, point concerning Art. 5(2) of the Choice of Court Convention. Art. 5(2) brooks no exceptions. In particular, it contains no exception, corresponding to Art. 6(c) for cases in which giving effect to the agreement would result in manifest injustice or be

42 Commentary, [11.26].
43 Commentary, [11.27].

manifestly contrary to the public policy (*ordre public*) of the chosen court. At first sight, such a case might appear to be a mirage. In practice, a choice of court agreement will usually be accompanied by a choice of the law of the forum and, even if such choice is absent, the choice of court might provide a basis for concluding that the parties intended that the law of the forum should apply to their relationship.[44] Even if a different law applies to the dispute, the applicable choice of law regime will almost certainly allow the forum State to give effect to its overriding mandatory provisions and public policy. How then can giving effect to the parties' choice of court fail to be compatible with the forum's fundamental notions of justice and public policy? The Principles serve to highlight some gaps in that argument. First, in the case where there is no choice of law, Art. 4 provides that "agreement between the parties to confer jurisdiction on a court ... to determine disputes under the contract is not in itself equivalent to a choice of law". Secondly, as appears from the list of matters set out in Art. 9, recognition of the principle of party autonomy under the Principles does not extend beyond contractual and pre-contractual obligations and party choice of law in relation to non-contractual obligations has only rarely been allowed in international practice.[45] By contrast, choice of court agreements often extend to non-contractual matters. Thirdly, Art. 11(2) and (4) of the Principles contemplate that a court may, or may be required to, apply or take into account internationally mandatory provisions or public policy of a legal system other than that of the forum even if that law has not been chosen to govern the parties' contract. These provisions highlight, therefore, the potential situations in which a court chosen by the parties as the exclusive venue for the determination of disputes between them may be required or entitled to apply the law of another country. Of itself, there can be no objection to that: it is the lifeblood of the conflict of laws and the foundation for international instruments such as the Principles. However, is it too unrealistic to contemplate a situation in which it may be contrary to the public policy (*ordre public*) of the chosen court to apply foreign laws, for example in a case that it politically sensitive or in which there is a constitutional or other challenge to the validity or legality of a foreign rule? In exceptional cases of these kinds, the lack of flexibility within Art. 5(2) may be a cause of concern or regret.

44 See Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), Recital (12).

45 cf. Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), Art. 14.

Annex

An Overview of the Development of the Provision for Overriding Mandatory Provisions and Public Policy (Ordre Public) in the Hague Principles

	I. Sub-group 2010 discussion draft	**II. Sub-group 2011 discussion draft**	**III. Working Group 2011 draft (Art. 11)**	**IV. Consolidated Version of Preparatory Work 2012 (Art. 11)**	**V. Text approved by the Special Commission (Art. 11)**	**VI. Final Text (Art. 11)**
A. General		[1. Considerations of public interest justify giving courts [and arbitral tribunals] the possibility, in exceptional circumstances, of applying exceptions based on [international] public policy (ordre public) and overriding mandatory provisions, as set out in the following paragraphs of this Principle.] [2. Overriding mandatory provisions are provisions which are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation and which apply irrespective of the law chosen by the parties or otherwise applicable.]				

	I. Sub-group 2010 discussion draft	**II. Sub-group 2011 discussion draft**	**III. Working Group 2011 draft (Art. 11)**	**IV. Consolidated Version of Preparatory Work 2012 (Art. 11)**	**V. Text approved by the Special Commission (Art. 11)**	**VI. Final Text (Art. 11)**
B. Forum mandatory rules	A court [in the determination of any matter arising from the parties' contract] shall only refuse to apply a provision of the law chosen by the parties in accordance with [Article X of] these Principles if, and then only to the extent that, its application to the case in question would be [manifestly] incompatible with: (a) [international] public policy (*ordre public*) of the forum (b) the application by the court of a provision of the law of the forum which applies to any situation falling within its scope, irrespective of the law otherwise applicable to the contract.	3. Nothing in these Principles shall restrict the application of the overriding mandatory provisions of the law of the forum.	1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.	No change	No change	**1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.**

	I. Sub-group 2010 discussion draft	**II. Sub-group 2011 discussion draft**	**III. Working Group 2011 draft (Art. 11)**	**IV. Consolidated Version of Preparatory Work 2012 (Art. 11)**	**V. Text approved by the Special Commission (Art. 11)**	**VI. Final Text (Art. 11)**
C. Non-forum mandatory rules	These Principles shall also not prevent a court from giving effect to, or taking account of, the [international] public policy (*ordre public*) or mandatory rules of any other legal system [in the determination of any matter arising from the parties' contract] to the extent that [a mandatory provision of] the law of the forum otherwise requires. [The law chosen by the parties in accordance with [Article X of] these Principles shall nevertheless be applied to the extent that it is not incompatible with the [third country] policy or rule referred to in paragraphs [ ].]	5. It shall be for the [private international law of the] forum State to decide when its courts may or must apply or take account of the mandatory provisions of another law.	2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.	No change	No change	**2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.**

	I. Sub-group 2010 discussion draft	**II. Sub-group 2011 discussion draft**	**III. Working Group 2011 draft (Art. 11)**	**IV. Consolidated Version of Preparatory Work 2012 (Art. 11)**	**V. Text approved by the Special Commission (Art. 11)**	**VI. Final Text (Art. 11)**
D. Forum public policy (*ordre public*)	*See I.B above*	4. Application of a provision of the law or a rule of law chosen by the parties may only be excluded if and to the extent that such application would be manifestly incompatible with fundamental notions of [international] public policy (*ordre public*) of the forum.	3. A court may only exclude application of a provision of the law chosen by the parties if and to the extent that such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.	No change	No change	**3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.**
E. Non-forum public policy	*See 1.C above*	N/A	N/A	N/A	4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.	**4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.**

	I. Sub-group 2010 discussion draft	II. Sub-group 2011 discussion draft	III. Working Group 2011 draft (Art. 11)	IV. Consolidated Version of Preparatory Work 2012 (Art. 11)	V. Text approved by the Special Commission (Art. 11)	VI. Final Text (Art. 11)
F. Arbitration	An arbitral tribunal [in the determination of any matter arising from the parties' contract] shall only refuse to apply a provision of the law chosen by the parties in accordance with [Article X of] if, and then only to the extent that, it is [manifestly] incompatible with the parties' arbitration agreement [or with a provision of the law applicable to the arbitration agreement which applies to any situation falling within its scope, irrespective of the law otherwise applicable to the main contract]. These Principles [concern the law applicable to international contracts and] shall be without prejudice to other national laws which regulate [the conduct of arbitration proceedings and] the validity and enforceability of arbitral awards.	[6. Paragraphs [3, 4 and 5]] shall apply in court proceedings, including (without limitation) in court proceedings relating to arbitration.] [7. These Principles shall not prevent an arbitral tribunal from applying [any] principles of international public policy (*ordre public*) or overriding mandatory provisions of a law, other than the law or rules of law chosen by the parties, if the tribunal considers that [, as a matter of law,] it is [legally] required or entitled to do so [notwithstanding the parties choice].]	4. Paragraphs 1, 2 and 3 also apply in court proceedings relating to arbitration. 5. These Principles shall not prevent an arbitral tribunal from applying public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.	No change	5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.	**5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.**