The Hague Principles on Choice of Law in International Commercial Contracts: An Exercise in Convergence

From Choice of Court to Choice of Law

Choice of court and choice of law agreements are practically de rigueur in drafting contracts involving cross-border transactions. They are also problematic because the effects of such agreements differ from country to country. As Singapore readies itself to ratify and implement the Hague Convention on Choice of Court Agreements 2005 ("HCCCA") which seeks to harmonise the effect of agreements on exclusive choice of court, a related instrument of some significance has emerged from the Hague Conference on Private International Law. The Hague Principles on Choice of Law in International Commercial Contracts 2015 (the "Principles") marks a break from the normal output of the Hague Conference in the form of Conventions (like the HCCCA) which are open to be adopted by nation states as (uniform) law. As the Preamble to the Principles states, the instrument is intended to be used as a model for “national, regional, supranational or international” laws, and may be used to “interpret, supplement and develop rules of private international law”.

Relevance of the Principles

The common law principles on choice of law for contracts which are applicable in Singapore private international law are for the most part well-established. Contracting parties’ express or inferred choice will be given unless the choice was not bona fide, or was illegal or against public policy. In the absence of choice, the contract will be governed by the country or system of law that has the closest connection with the transaction and the parties. Party autonomy is so powerful a force in common law thinking that there is hardly any case law (and none in Singapore) applying the limitations to party choice.

While party autonomy is generally given effect to in this context in many developed legal systems, it is not something that can always be taken for granted when dealing with the laws of foreign countries. The Principles thus plays an important signalling function for the international community in championing party autonomy as a norm for cross-border commercial transactions. For example, Paraguay only recently joined the fold after enacting a version of the instrument into its own law.

What then is the significance of the instrument for Singapore where the principle of party autonomy is so well-entrenched? It could be relevant at three different levels: (1) as a model for reform of the common law where the law is unsatisfactory; (2) as a gap-filler where the common law is uncertain; and (3) as a model for reform of the common law (whether it is satisfactory or not and whether it has gaps or not) in a move towards international harmonisation of choice of law principles for contracts. Recourse to the Principles will encourage convergence whatever the motivation. In (1) and (2), the convergence will be incidental whereas in (3) it will be the express intention.

Additionally, in international arbitration tribunals, the instrument could well serve a fourth function in supplying the applicable choice of law principles. Arbitrators who subscribe to the notion of the arbitration process as delocalised might feel at
Where the Common Law is Unsatisfactory

As far as choice of law principles are concerned, the topic of contracts has been subject to much more judicial scrutiny in the common law than any other choice of law topic, and the applicable principles have been honed from many years of judicial experience in dealing with increasingly complex cross-border commercial transactions. Most common lawyers would be hard put to point out any part of the law that is really unsatisfactory in the practical sense.

One area which has not surfaced very much in reported case law that is potentially unsatisfactory is the supposed applicability of the proper law of a putative contract to the issue of formation of international contracts. While this has been argued to be a practical solution in spite of its theoretical difficulty (in assuming what it seeks to prove) because in most cases it meets the reasonable expectations of the parties, it can lead to uncertainty if multiple clauses are thrown up in the negotiation process, and unfairness if one of the parties has been taken by surprise.

The Principles proposes a general rule of referring to the law purportedly chosen in the contract the existence of which is challenged (Article 6(1)(a)). However, there are two important qualifications. First, the law of the country where a party has its establishment may be used to determine whether the party has consented to the choice of law if under the circumstances it would not be reasonable to apply the general rule (Article 6(2)). This is a technique borrowed in turn from European Union law. The second qualification, something of an innovation, provides for a solution in a battle of forms scenario. It provides that if the same law would apply anyway under competing terms, that law would apply, but if different laws would result, then there is no choice of law (Article 6(1)(b)). The common law could benefit from these insights.

Where the Common Law is Uncertain

There are a number of areas where there is no case law, or inconclusive case law, and which could benefit from some clarification. One is whether different parts of a single contract can be governed by different laws. Another is whether the law governing a contract can be changed after the contract has been entered into. Both issues are addressed in the Principles. It is provided that different laws may govern different parts of a contract (Article 2(2)). It is also provided that the law governing a contract may be modified after the conclusion of the contract, such modification (again borrowing a leaf from EU law) not to prejudice its formal validity or third parties (Article 2(3)). The common law has in particular resisted the idea of a unilateral change of the proper law of a contract. Provided that the unilateral power to change is the subject of a valid agreement, this would be allowed under the Principles (although there could be a potential challenge independently on the basis of uncertainty under the applicable domestic contract law). The Principles also affirm the proposition – gradually gaining recognition in the common law – that the choice of law agreement is severable from the main contract (Article 7).

One moot point in the common law is whether contracting parties must choose the law of a real country to govern the contract, or whether they can choose free-standing rules of law that are not tied to any national legal system. First instance
authority in England has stated that the common law does not allow a contract to be governed by a non-national legal system of law. EU law and the majority of US laws adopt the same view. In the common law, this follows from an oft-repeated principle that a contract cannot exist in a legal vacuum and that its existence, validity and content must be determined with reference to a specific system of law. The opposite view prevails in the context of international arbitration. The difference is often explained on the basis of the difference between adjudication according to the law in a court and the law-making powers of arbitrators in a private adjudication drawing their authority from the parties’ agreement. The theoretical objection is not insurmountable as the law of the forum can by default supply the legal “container” for the contract with the terms (the “contents”) being supplied by another source. The practical objection lies in the potential uncertainty of terms.

The Principles addresses this issue at two levels. First, it recognises in principle that contracting parties can choose delocalised rules of law to govern their contract, provided they are “generally accepted on an international, supranational or regional level as a neutral and balanced set of rules” (Article 3). This means that parties can independently select, eg, the Vienna Convention on the International Sales of Goods to govern their contract, without selecting specifically the law of a country which has enacted the Convention into its law. (However, it would practically be unwise to do this without a fall-back choice of law clause since the Convention does not deal with all aspects of the contract.) The Principles will probably disallow a simple choice of lex mercatoria since it would not meet the requisite level of acceptance at least as far as the contents (“set of rules”) are concerned. Secondly, the Principles provides that whether a choice of supranational rules of law is possible is a matter for the law of the forum. Practically, this leaves the common law issue untouched. The Principles has deliberately left it to each jurisdiction to decide whether to allow this type of choice in litigation and arbitration contexts respectively. Paraguay, for example, left the law of the forum proviso out of its enacting legislation, thus adopting the general principle as part of its private international law.

Another area where the common law is uncertain is whether contracting parties are allowed to choose private international law rules. Renvoi (the reference to the conflict of laws rules of the applicable law) is too frequently (and somewhat inaccurately) stated to be excluded as a matter of principle from the private international law of contracts. The Principles takes a more measured approach, excluding renvoi unless the parties have expressly provided otherwise (Article 8). This is similar to the position in international arbitration. Read with the issue discussed in the foregoing paragraphs, this presents an interesting question on the extent to which contracting parties can choose the free-standing Principles to regulate the effects of their choice of law to govern their contract.

Yet another grey area of the common law is the extent to which the proper law of the contract applies to non-contractual obligations. This surfaces as two related questions: (1) Can contracting parties choose a law to govern non-contractual disputes between them? (2) To what extent do choice of law rules for non-contractual obligations look to the law governing an underlying contractual relationship for the solution? On the first, the prevailing common law view is that contracting parties’ choice only applies to contractual issues. On the second, the law of the underlying contractual relationship appears to play a larger role in choice of law rules for restitutionary obligations (“the proper law of the restitutionary obligation”) than in choice of law rule for tortious obligations (“double actionability subject to exception”, ie, law of the forum and law of the place of the tort, but the law with the closest connection to the tort may apply to the extent that double actionability causes injustice), at least in the common law of Singapore. It is clear that the Principles is focussed on contractual obligations. However, it is also

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provided that the law chosen by the parties shall apply to “pre-contractual obligations”. This could be tortious, or restitutionary, or equitable in origin (in the common law), or based on some principle of good faith (in the civil law). The advantage of this approach is that it provides a simple solution that bypasses what can often be difficult theoretical questions of characterisation. However, it does not go as far as EU law has, to allow for contracting parties to choose a law to govern non-contractual obligations arising out the performance of the contract. This is a more controversial issue.

**Harmonisation**

However, it is premature to suggest enacting the *Principles* into Singapore law. There are three factors to consider. First, it will effect a structural change in the private international law methodology of Singapore. Secondly it will still leave significant gaps which needs to be filled by the common law. Thirdly, some specific changes need to be considered with caution.

Modern civil law scholars have long been working hard to resolve dissimilarities among different civil law regimes originating from the Justinian Code. On the other hand, until recently discourse on common law jurisprudence tended to focus on divergence in order to achieve autochthony in independent legal systems. Given this historical backdrop and the fact that much of the international harmonisation efforts have been taking place in Europe which is dominated by civil law countries, it is not surprising that international instruments of harmonisation are almost invariably strongly influenced by civil law thinking. The *Principles* is no exception.

The common law tends to focus on deriving principles and exceptions from specific instances, for the purpose of general application in turn. Thus, principles must be broad enough, and exceptions flexible enough, to deal with multitudes of practical instances. On the other hand, civil law traditions tend to categorise situations and devise specific rules for different categories. Thus, the civil law choice of law rules for contracts do not differentiate between different types of contract. Justice is done in individual cases based on the flexible notion of bona fide choice, and a limited doctrine of forum public policy. Categorisation is at the forefront of the *Principles*. It only applies to “international” contracts entered into by parties each of whom is “acting in the exercise of its “trade or profession”, and “consumer” and “employment” contracts are excluded from its scope (Article 1(1)). “International” is defined negatively to exclude contracts where the parties and their relationship are based in a single country and all other relevant factors (apart from the choice of law) are connected only with that country (Article 1(2)). It is notable that the *Principles* do not apply if one of the contracting parties is not acting in the course of its trade or profession, whether or not it may be categorised as a consumer contract under national laws.

Choice of law instruments in EU have special rules to apply to consumer and employment contracts. In Singapore, these gaps will need to be filled by the common law. Moreover, there is a stark absence in the *Principles* of provision for the situation where no choice of law is made. There was probably too much disagreement on how to deal with this situation, and the drafters of the *Principles* decided to leave the issue to be settled (if at all) in the future. Again the common law will need to fill the gap (with the application of the law that has the closest connection with the transaction and the parties).

Three specific points where *Principles* differ from the common law should also be considered. First, under the *Principles* the choice of law must “be made expressly or appear clearly from the provisions of the contract or the circumstances” (emphasis added). This creates a higher threshold for proving the existence of a choice of law agreement, compared to the second stage (the first stage being whether there is an

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express choice) of the common law test which allows a free-ranging search for an inferred choice of law which does not have to emerge “clearly”, but only on a balance of probability, from the evidence. Practically, it causes the gap arising from absence of choice to be larger than it first appears.

Secondly, under the Principles the choice will be given effect to unconditionally, subject only to the overriding mandatory rules and public policy of the forum. There is no scope for the common law doctrine of limiting the choice to one that is bona fide, legal and not against public policy. As mentioned above, the control techniques are shifted to specific rules for different categories of contracts (which are absent in Singapore private international law).

Thirdly, under the Principles the governing law will supply the law on the limitations and prescription of time. This might be thought to be consistent with Singapore law after the Foreign Limitation Periods Act (Cap 111A, 2013 Rev Ed). There is, however a nuance. The Act allows for the disapplication of foreign limitation law where it would cause “hardship”, which would ordinarily not be sufficient to invoke the doctrine of forum public policy.

Conclusion

We should pay some heed to the Principles, at least in the ways that it could influence the development of Singapore law in areas where there are gaps and uncertainties in the private international law of Singapore as it relates to choice of law for contracts, and perhaps also in the reform of any aspect of it that is regarded as unsatisfactory. At the same time, it is probably premature for the legislature to adopt it wholesale into our own law, especially since the common law has mostly worked very well for international commercial transactions.

The question remains whether it is possible for contracting parties to choose the Principles to regulate the effects of their choice of law agreement in their contract. This could work in the context of international arbitration. Whether it will be permitted in a common law court will depend on its view on whether parties can choose a supranational law to govern their contract, and its opinion on the extent to which parties can direct a court of law to apply a different system of private international law. The distinction between the facilitative and regulatory functions of private international law will come to the fore in this debate.

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