THE HAGUE PRINCIPLES & RESTATEMENT (SECOND) OF CONFLICTS OF LAW: COMPARATIVE STUDY

	THE HAGUE PRINCIPLES: RELEVANT QUOTES	2nd RST-CONFLICTS OF LAW: RELEVANT QUOTES	ANALYSIS
Scope of Provisions	A) "*These principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.*"- Art. 1, Para. 1 B) "*For purposes of these Principles, a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chose law, are connected only with that State.*"- Art. 1, Para. 2 C) "*These principles do not address the law governing—a) the capacity of natural persons; b) arbitration agreements and agreements on choice of court; c) companies or other collective bodies and trusts; d) insolvency; e) the proprietary effects of contracts; and f) the issue of whether an agent is able to bind a principal to a third party.*"- Art. 1, Para. 3 D) "*The reasons for Article 1(3) are twofold: the legal nature of enumerated issues, and the lack of consensus on whether to characterize them as contractual issues or on whether to subject them to party autonomy. The Principles are neutral on this point and, therefore, do not preclude lawmakers or other users from extending party autonomy to*	A) "*Conflict of Laws rules include: Judicial jurisdiction and competence…foreign judgments… choice of law…*"- §2, Comment A (detailing what the definition encompasses for the scope of the RST) B) "*Certain types of conflicts that are not dealt with directly in the Restatement of this Subject are mentioned below…Federal-State conflicts…Intrastate conflicts… Conflicts of personal (non-territorial) law…Conflicts in time… Criminal law…*"- §2, Comment C C) "*The rule of this Section states a principle applicable to all contracts and to all issues in contract.*"- §186, Comment A (referencing the applicability of §186, which states that "issues in contract are determined by the law chosen by the parties…") D) "*The capacity of the parties to contract is determined by the law selected by the application of the rules of §§ 187-188.*"- §198 (1) E) "*The method of enforcing an arbitration agreement is determined by the local law of the forum.*"- §219 F) "*The law selected by application of the present rule determines such questions as…whether the contract can be rescinded because of the buyer's insolvency….*"- §191, Comment A (referring to the scope of the contracts section as it relates to contracts to sell interests in chattel and the issue of party	The key difference to be found in both instruments in terms of the scope of their provisions is the more limited application of the Principles to contractual disputes. In the RST, it would appear that the provisions apply quite broadly. Though Comment C to §2 suggests a few areas that the RST is not meant to address in its application, there are no similar mentions of circumstances excepted from the provisions of Chapter 8 (contracts). From this, one could deduce that Chapter 8 would apply, as Comment A to §186 implies, to all contracts: commercial, consumer, and employment alike. The Principles, by contrast, limit the scope of its application threefold. First, the contract in question must be of an "international" character. In the commentary, this is interpreted as having the broadest possible meaning, with the only exception being those contracts that concern purely domestic transactions (of the type presented in the Commentary referenced in item (E) in Column 2). However, as item (F) in Column 2 points out, the Principles could be extended to such disputes if the lawmaker chooses to do so. Second, the Principles expressly exclude consumer and employer contracts from the purview of the instrument. Thus, only commercial transactions are addressed. It is important to note, here, of the reluctance expressed by the American party to HCCH's use of the term "commercial" in the title, *The Hague Principles on Choice of Law in International Commercial Contracts*. The divisiveness over the use of "commercial" stems from the competing nature of how the term is interpreted in the European and American systems. In the former, "commercial" is construed as pertaining solely to those transactions that are of a business-like nature, with the underlying assumption that the parties entering into the contract maintain equal bargaining power. Thus, in the European view, the term automatically precludes those contracts that relate to consumers and employers since they lack a similar equality of bargaining agency. The American representatives, in contrast, felt the term was misleading since "commercial," in the American jurisprudential sphere, necessarily encompasses consumer and employment contracts alike. However, the American delegation eventually accepted the title in its present form given that, earlier, they had accepted a similar UNIDROIT principle that incorporated "commercial" in its own title. Third, the Principles expressly exclude six other areas of dispute from the scope of the instrument, found in Art. 1, Para. 2. The RST, by contrast
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Freedom of Choice Provisions	A) "*A contract is governed by the law chosen by the parties.*"- Art. 2., Para. 1 B) "*The parties may choose—a) the law applicable to the whole contract or to only part of it; and b) different laws for different parts of the contract.*"- *Id.* at Para. 2 C) "*The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.*"- *Id.* at Para. 3 D) "*…under the Principles the freedom of parties to choose the law or "rules of law" to govern their contract is not dependent on the method of dispute resolution involved…*"- Commentary to Art. 2, Rationale, 2.3 E) "*…the parties' choice of law is expressly limited by overriding mandatory rules and public policy…*"- *Id.* at 2.4 F) "*The Principles permit partial or multiple choice of law; that is, subjecting separate parts of the contract to different laws (also known as* dépeçage*)…the use of* dépeçage *carries with it the risk of contradiction or inconsistency in the determination of the parties' rights and obligations.*"- Commentary to Art. 2(2), 2.6 G) "*Under Article 2(2) a), parties may choose the law applicable to*	A) "*The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.*"- §187(1) *B)* "*The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either:* (a) *the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or* (b) *application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.*"- §187(2) *C) "There is nothing to prevent the forum from employing a choice-of-law rule which provides that, subject to stated exceptions, the law of the state chosen by the parties shall be applied to determine the validity of a contract and the rights created*	Both the Principles and the RST share the common goal of enhancing respect for party's freedom to choose the law that shall govern the contract. As between the two, however, the Principles provide more explicit guidance as to the amount of liberty contractual parties can hope to have in the drafting of their contractual relationship. The vague ambiguity and open-ended questions left unanswered by the RST suggest that it offers parties the option to choose freely, but with no sense of parameters in which this freedom may be exercised (outside the express limitations it announces). One may refer specifically to Para(s). 2(a), 2(B), and 3 of the Principles to get a sense of the type of parameters referred to above (the paragraph regarding "connection" as part of Article 2 is excepted from this comparison as it is dealt with below separately. 2(a) specifically grants parties the freedom to choose whether a law is made applicable to the whole contract or just a portion of it. 2(b) extends this freedom of choice by further allowing parties to pick different laws for different portions of the contract (as a point of caution, Commentary to Art. 2(2) warns that the use of *dépeçage* carries with it the risk of contradiction or inconsistency). 3 goes one step further by granting parties the ability to make or modify the choice at any time without harming the formal validity and rights created by the original contract. From these 3 sections, contacting parties may better tailor a contract to fit their specific transaction's needs. Rather than be obligated to choose one law to govern the entire relationship, parties following the Principles are given the option of customizing the contract as they see fit, as well as being granted the liberty of making such choices at their leisure. This, theoretically, means that transactions created under the guide of the Principles will be better able to capture the essence of the underlying deal and, in turn, could mean that fewer disputes arise in the context of a commercial relationship. Two caveats should be made with regards to the arguments above. The Principles make clear the distinction between choice of law and choice of court as is readily discernible in the Commentary to Art. 2, 2.3. The choice that the parties make with regards to which forum will resolve their dispute has no bearing on the actual law that governs the transaction. This is distinction is one that is emphasized thoroughly in the European system, in contrast to general American jurisprudence. The second point that is to be

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Connection to Underlying Transaction? **Connection to Underlying Transaction? (Cont'd.)**	A) *"No connection is required between the law chosen and the parties or their transaction."*- Art. 2, Para. 4 B) "*Under the Principles, party autonomy is not limited by any requirement of a connection, whether geographical or otherwise, between the chosen law and the contract or the parties. Accordingly the parties may choose the law of a State with which the parties or their transaction bears no relation."*- Commentary to Art. 2(4), 2.14 C) "*Parties may choose a particular law because it is neutral between the parties or because it is particularly well-developed for the type of transaction contemplated…"- Id.* D) "*Contracts governed by "rules of law, as defined in Article 3, do not raise this issue, since such "rules of law" are usually not connected to any national legal order.-* Commentary to Art. 2(4), 2.16	*A)* *"The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless…(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice..."*- §187(2)(a) *B)* *"The forum will not apply the chosen law to determine issues the parties could not have determined by explicit agreement directed to the particular issue if the parties had no reasonable basis for choosing this law. The forum will not, for example, apply a foreign law which has been chosen by the parties in the spirit of adventure or to provide mental exercise for the judge."*- §187, Comment F *C)* *"When the state of the chosen law has some substantial relationship to the parties or the contract, the parties will be held to have had a reasonable basis for their choice."- Id.* *D)* *"The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship."- Id.* *E)* *"The rights and duties … are determined by the local law of the state which… has the most significant relationship to the*	In line with its objective of expanding party autonomy, the Principles under Art. 2(4), allow parties to freely choose any applicable law, without the restriction of having the chosen law be connected, geographically or otherwise, to the contract itself. The justification, as found in the Commentary, explains that such a liberal grant stems from the "increasing delocalisation of commercial transactions." Parties are able to, therefore, select a State's law that best achieves the aims of their contract without being prohibited from selecting it based on a lack of connection. In the Commentary, the Principles note that contracts governed by "rules of law" do not raise this specific issue considering they are "usually not connected to any national legal order." By contrast, the RST evokes a negative condition whereby the choice of law would not be respected. Where there is "no substantial relationship" to the underlying transaction, the RST suggests there is no obligation to apply the chosen law. While the RST is quick to point out in its commentary that such desires of legal "adventure" are rare in a contractual situation, it makes note of the fact that a forum will not apply the law chosen if there is no rational basis for the parties having done so. This condition poses a possible problem of subjective valuation on the part of the judiciary that may lead to reduced party autonomy. As such, what may be reasonable for the parties may be completely irrational to the adjudicator. Of course, judges are usually able to maintain an objective stance on the wide array of matters that come before them, but it must not be forgotten that they may lack the technical expertise that some contracts may require. Instructive to this comparison is the exception made in Comment F regarding multistate contracts. While it addresses contracts that span across state borders in America, one could imagine the same exception being possibly extended to an international cross-border exchange as well. To this degree, the RST aligns somewhat with the Principles. The RST understands that in such cases the disparity between the parties' geographic establishments may cause both to seek out a neutral forum well-suited to the transaction. Indeed, this aligns with the quoted Commentary from the Principles, which details exactly the same explanation for its having no condition of connectivity to the transaction or the parties involved in consideration of their multi-State (this time, meaning those who establishments are across national borders) makeup.

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Rules of Law **Rules of Law (Cont'd.)**	A) *"The law chosen by the parties may be 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."*- Art. 3 B) *"The criteria refer to the admissible sources and the attributes of those "rules of law" recognised under Article 3. In addition, Article 3 recognises that the forum State retains the prerogative to disallow the choice of "rules of law."- Id.* at 3.2 C) *"… apply those "rules of law" that are generally accepted as a neutral and balanced set of rules."- Id.* at 3.3 D) *"…the "rules of law" cannot refer to a set of rules contained in the contract itself, or to one party's standard terms and conditions, or to a set of local industry-specific terms."- Id.* at 3.4 E) "*International treaties and conventions may be considered a generally accepted source of "rules of law" when those instruments apply solely as a result of the parties' choice of law."* – *Id.* at 3.5 F) "*Another source of "rules of law" that would satisfy this first criterion may come from non-binding instruments formulated by established international bodies."- Id.* at 3.6	N/A N/A	Of key importance in the Principles is something that may, by more conservative experts, be considered quite progressive and, perhaps, even radical. Rather than simply allowing the parties to choose a sovereign law to govern the contract as a whole, in part, or in conjunction with other chosen national laws, the Principles grant contracting parties the added option of choosing so-called "rules of law" that are not derived from State sources. Article 3 suggests that those rules that can be sourced back to international treaties and conventions (i.e., CISG) , international bodies (i.e., UNIDROIT), and supranational/regional sources (i.e., PECL) are available to these parties. The Principles impose a four-part limitation to the selection of these rules. As the Commentary explains, the four requisite attributes that the Principles address are that the "rules of law" must be (a) a set of rules; (b) the set must be neutral; (c) the set must be balanced; and (d) the set must have garnered general recognition beyond a national level. As to (a), the explanatory notes explain that the Principles do not impose a requirement of "comprehensiveness," the rules must constitute more than "a small number of provisions" and must be able to provide "a resolution of common contract problems in the international context." This limitation serves the purpose of decreasing the incentive of parties to "cherry-pick" provisions that do not derive from or constitute what may be regarded as a "body" of rules. (B) and (C) jointly point to the fact that the Principles demand that the parties choose those rules that do not contain an inherent prejudice to one side of the transaction and represent a variety of legal, political, economic, and geographic perspectives. As an example, the Commentary at 3.12 states: "[t]his requires would likely preclude the choice of a set of rules that benefit one side of transactions in a particular regional or global industry." Lastly, (D) ensures that potential contracting parties choose those "rules" that are not of an obscure character. Indeed, the "rules" "cannot refer to a set of rules contained in the contract itself, or to one party's standard terms and conditions, or to a set of local industry-specific terms." (Commentary at 3.4). The "rules," thus, must not only be recognized outside the contract, contractual relationship, or local community; it must also have been recognized beyond the national level. In this sense, the Principles ensure that should disputes arise within the context of such international commercial contracts, whoever adjudicates the matter, be it a judge or arbitration tribunal, will not be faced with "rules" that they are unlikely to have heard of prior to the dispute.

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Absence of Choice of Law Provisions	A) "*The Principles do not provide rules for determining the applicable law in the absence of party choice. The reasons for this exclusion are twofold. First, the goal of the Principles is to further party autonomy rather than provide a comprehensive body of principles for determining the law applicable to international commercial contracts. Secondly, a consensus with respect to the rules that determine the applicable law in the absence of choice is currently lacking.*"- Introduction at 1.14 B) "*The limitation of the scope of the Principles does not, however, preclude the Hague Conference from developing rules at a later date for the determination of the law applicable to contracts in the absence of a choice of law agreement.*"- *Id.* C) *"…the Principles do not determine the law governing the contract."*- Commentary to Art. 4, 4.17	*A)* "*In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:* *(a) the place of contracting,* *(b) the place of negotiation of the contract,* *(c) the place of performance,* *(d) the location of the subject matter of the contract, and* *(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.* *These contacts are to be evaluated according to their relative importance with respect to the particular issue.*" - §188(2) *B)* *"If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189- 199 and 203."*- §188(3)	The difference to be found between the Principles and the RST with regards to their respective positions where there are absences of choice of law provisions can be found in the nuances in tone within the texts themselves. Indeed, both instruments do not expressly declare what law should govern in the absence of an explicit (or tacit) choice. The Principles, in numerous explanatory notes, declare themselves to be limited in scope, providing only the means by which to bolster party autonomy given the lack of procedural issues dealt with in the document and the lack of consensus as to choosing the applicable law in the international community. Instead, the Principles provide signs of guidance by suggesting that such things as a choice of court agreement or arbitration agreement may serve as one of the factors in determining what law may be applicable under the circumstances (see Commentary to Art. 4 at 4.11 & 4.12). Similarly, the RST guides the user through a list of "contacts" to be considered. However, the distinction is that where the Principles utilize the permissive tone through the use of the word *"may,"* the RST, by contrast, favors a more authoritative voice. Thus, the contacts listed are not ones that "may" be looked at for purposes of determining the applicable law in the absence of a choice of law provision, but rather, they *must* be reviewed by the adjudicator. It also instructs that the local law of the state will prevail in such an absence if two of the contacts are found within the same state. Thus, the RST goes further than the Principles in providing a method by which to determine how to determine which law should govern the contract and the resulting dispute. In this sense, the RST is willing to foray much more into issues of procedure in contrast to the general hesitation that the Principles have in delving into such problems.