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THE HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS: ENHANCING PARTY AUTONOMY IN A GLOBALIZED MARKET

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 J.D. expected, May 2017, New York University School of Law. I am grateful to Marta Pertegás, First Secretary of the HCCH, for allowing me the opportunity to conduct a comprehensive comparative analysis of the Principles with the help of Theodore J. Folkman, Partner at Murphy & King and author of the popular legal blog, *Letters Blogatory*, during my summer internship with the Permanent Bureau of the HCCH. Through this study (cited later in this Note), I was able to discern how the Principles provided a marked departure from the rather outdated rules proposed by the *Restatement (Second) of Conflicts of Law*. Beyond her guidance with this analytical project, Ms. Pertegás has given invaluable advice, as the lawyer with primary responsibility over the Principles, with regard to exploring the connection between the instrument and the TFEU Fundamental Freedoms.

INTRODUCTION

The Hague Conference on Private International Law (HCCH, also known as la Conférence de La Haye de droit international privé) recently approved its first non-binding soft-law instrument, *The Hague Principles on Choice of Law in International Commercial Contracts* ("the Principles"). The promulgation provides an opportunity to discuss how the instrument may be utilized by the European community and other regions to advance the aims behind the Fundamental Freedoms found in the Treaty on the Functioning of the European Union (TFEU). The Principles represent the concerted effort by the HCCH and the instrument's drafters to grant further party autonomy in the field of international commercial law, a guiding principle in the commercial sphere that has been held in high regard by states within the European Union and abroad. This Note argues that companies with their principal places of business, affiliates, and subsidiaries located in jurisdictions outside the European Union, specifically Latin America, would have much to celebrate if these Principles were adopted by their respective sovereign states. Through such a legal transposition into the domestic regimes of those states where party autonomy is restricted, the HCCH enhances the reach of the TFEU Fundamental Freedoms beyond the confines of the European Union.

Part I of this Note presents a brief overview of the term "party autonomy" and introduces the legislative history behind the Principles concerning the need for a choice-of-law instrument that enhances party autonomy. Part II analyzes the chief innovations of the instrument and demonstrates their compatibilities with the TFEU Fundamental Freedoms in lifting impediments to efficient commercial markets and contractual ventures. Part III examines the potential of the Principles to export the flexibility that companies enjoy under E.U. company law, and ultimately, to eliminate some barriers to intranational and international commerce through recognition by in-

ternational trade bodies. Part III also reviews Paraguay's adoption of the Principles as a non-E.U. Member State in Latin America.

I.
What Is "Party Autonomy" and Why Did the HCCH Seek to Enhance It?

In the field of international commercial relations, it is important to define the doctrine of "party autonomy" and discuss why it is regarded as an important value in cross-border transactions in order to understand the HCCH's interest in a normative choice-of-law instrument. As technological advances moved contemporary commercial dealings further into a globalized market, early commentators noted the need to respect the ability of parties to choose the law applicable to a given transaction.[1] Party autonomy, as Professor Mo Zhang stresses, implicates "two fundamental and interrelated elements: autonomy and mutuality."[2] Even though autonomy is of central importance to party autonomy, "the *exercise* of the autonomy must be based on mutuality."[3] Thus, party autonomy involves the power that commercial actors maintain in se-

1. *See, e.g.*, Morris. J. Levin, *Party Autonomy: Choice-of-Law Clauses in Commercial Contracts*, 46 Geo. L.J. 260, 261 (1957–1958) ("As science has made great strides in diminishing the distances between state and national borders, the conflicts problems have increased proportionally . . . there can be no doubt that there will be an increase in commercial transactions among parties of different jurisdictions. The rules of conflict of laws must keep abreast of these changing conditions . . . ."). For Levin, the term "party autonomy" addresses situations involving "commercial contracts in which the parties have expressly stipulated for a governing law which has a substantial connection with the transaction." *Id.* at 260; *see also* Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. Kan. L. Rev. 471, 471 (1989) (explicating the historical fascination with which legal scholars have addressed party autonomy); Robert Johnson, *Party Autonomy in Contracts Specifying Foreign Law*, 7 Wm. & Mary L. Rev. 37, 37–38 (1966) (providing early case law in English and American courts that laid down the foundations for the doctrine of party autonomy); Symeon C. Symeonides, *Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple*, 39 Brook. J. Int'l L. 1123, 1123–26 (2014) (explaining that while party autonomy is an "ancient principle," it only began to receive legislative support in the twentieth century, especially in the last fifty years).

2. Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 Akron L. Rev. 123, 130 (2008).

3. *Id.* (emphasis added).

lecting, based on mutual agreement, the governing law of a contract. This capacity, in turn, transforms the contract into the "instrument of party autonomy."[4] Upholding the sanctity of such party autonomy in choice-of-law clauses has been routinely advocated by the relevant literature, citing the increased control and predictability that it allows in commercial transactions, domestic and otherwise.[5]

Prior to the creation of the Principles, the HCCH had produced several conventions relating to specific contracts, but none governed contracts generally.[6] After conducting a feasibility study over thirty years ago that revealed little chance of ratifying a choice-of-law convention for contracts, the HCCH abandoned the project and did not return to it until 2006.[7] The timeline, included hereafter, lays credence to the thoroughness of the process that the HCCH employed in creating the Principles, demonstrating that the instrument represents a concerted effort to address concerns from principal actors who preferred an enhancement in party autonomy.

In June 2006, the Special Commission on General Affairs and Policy of the Conference invited the Permanent Bureau to prepare another feasibility study on the development of an instrument for choice-of-law provisions in international contracts.[8] However, this time the mandate was far less comprehensive. The HCCH was tasked with the responsibility of creat-

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4. Stefan Grundmann, *Information, Party Autonomy and Economic Agents in European Contract Law*, 39 COM. MRKT. L. REV. 269, 270 (2002).

5. *See, e.g.*, Friedler, *supra* note 1; Zhang, *supra* note 2, at 130–31 ("It is believed that by letting the parties choose which law governs their contract, the objectives of protecting the justified expectations of the parties and enabling the parties to foretell with accuracy what their rights and liabilities are under the contract will be best attained."); Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 512 (2006) ("[Many practitioners in international business transactions] believe that allowing the contractual parties to determine the law that applies to the disposal of their rights and obligations will help achieve efficiency, certainty, predictability, and protection of the parties' expectations—the conflict of laws values that have particular importance in today's global economy." (brackets added by author)).

6. *See* Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 874 (2013).

7. *Id.*

8. THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS 9 (2015), http://

ing a *non-binding instrument* that would entail only contractual choices of law rather than a more exhaustive convention.[9]

After conducting a series of feasibility studies from 2006 to 2009, the Permanent Bureau issued a *Report on Work Carried Out and Suggested Work Programme for the Development of a Future Instrument* in March 2009.[10] This research led the Council on General Affairs to invite the Permanent Bureau to form a working group of experts in private international law, international commercial law, and international arbitration law in order to further the development of a draft non-binding instrument that would promote greater party autonomy in international commercial contracts.[11] The Working Group met for the first time in The Hague in January 2010 to define the scope of the proposed instrument.[12] By November 2012, a Special Commission was convened and unanimously approved a revised form of the Principles, with the Council on General Affairs giving its preliminary endorsement of the working draft in April 2013.[13] In January 2014, the Working Group met for the fifth time to finalize its drafting of the Commentary to the Draft Hague Principles and, by April 2014, a written consultation procedure was produced, which invited Members to submit their comments on the draft.[14] On March 19, 2015, after the completion of the written procedure, and facing no additional objections, the Principles were formally approved, becoming the HCCH's first normative non-binding soft-law instrument.[15]

The Principles were drafted with an eye to fulfilling the organization's statutory mission to seek the continued harmonization of private international law (PIL).[16] To this end, Christophe Bernasconi, current Secretary General of the HCCH, wrote about how legislators and courts should concep-

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www.hcch.net/index_en.php?act=publications.details&pid=6353&dtid=3 [hereinafter PRINCIPLES].

9. *Id.* at 10.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 11–12.

14. *Id.* at 12.

15. *See id.*

16. *See* STATUTE OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, art. 1 (1955) ("The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.").

tualize the value and purpose behind their creation and the envisaged uses in his foreword to the Principles:

> At their core, the Hague Principles are designed to promote party autonomy in international commercial contracts. By acknowledging that parties to a contract may be best positioned to determine which set of legal norms is most suitable for their transaction, party autonomy enhances predictability and legal certainty—important conditions for effective cross-border trade and commerce. At the same time, the Hague Principles also set balanced boundaries to party autonomy and thus may provide a refinement of the concept where it is already accepted. In essence, the Hague Principles may be considered to be an international code of current best practice in relation to party autonomy in international commercial contracts.[17]

The Principles' primary goal can therefore be summarized as pursuing the further unification of choice-of-law regimes in order to increase party autonomy in the area of international commercial contracts.

Some critics fail to see the purpose behind such an instrument, especially in light of the widely held esteem for party autonomy within the PIL traditions found across the European Union and beyond.[18] However, a "high degree of convergence"[19] does not devalue efforts in the form of soft-law instruments like the Principles to foster the party autonomy af-

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17. Christophe Bernasconi, *Foreword* to PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS 7 (2015), http://www.hcch.net/index_en.php?act=publications.details&pid=6353&dtid=3.

18. *See, e.g.*, Symeonides, *supra* note 1, at 1123–24 (citing Alfred E. von Overbeck, *L'Irrésistible Extension de L'Autonomie de la Volonté en Droit International Privé*, *in* NOVEAUX ITINÉRAIRES EN DROIT: HOMMAGE À FRANÇOIS RIGAUX 619 (1993) (an "irresistible" principle); Erik Jayme, *Identité Culturelle et Intégration: Le Droit International Privé Postmoderne*, 251 RECUEIL DES COURS 147 (1995) (characterizing party autonomy as a "fundamental right"); Ole Lando, *The EEC Convention on the Law Applicable to Contractual Obligations*, 24 COMMON MKT. L. REV. 159, 169 (1987) ("the common core of the legal systems"); Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS 239, 271 (1984) ("perhaps the most widely accepted private international rule of our time")).

19. Symeonides, *supra* note 6, at 876 ("At least in the area of contracts, there is a high degree of convergence among the various systems in honor-

forded to commercial parties under such regimes. This is particularly true with regard to pushing beyond the "limitations" currently in place in most domestic PIL rules. As the Commentary to the Preamble of the Principles makes clear, the provisions of the instrument may be utilized in "the continued development and refinement of the concept [of party autonomy] where it is already accepted."[20]

In addition to the expansion of party autonomy in regions that currently appreciate its importance, the Principles are an "international code of current best practice."[21] They should serve as a starting point for those domestic settings where such autonomy is discouraged and restricted. From their provisions, the drafters conceived that, in those systems where party autonomy does not exist, the idea may be realized and codified through the Principles in the hope of facilitating enhanced cross-border commerce.[22] Indeed, there are countries, primarily within Latin America, where lawmakers and judiciaries still do not recognize party autonomy in commercial contractual situations.[23] The Principles are addressed to these constituencies as well, encouraging them to "interpret, supplement and develop rules of private international law . . . [that] may [or may not] exist on a national . . . regional, supranational or international level."[24]

The drafters' vision of the Principles as stimulating harmonization and advancing party autonomy within the international commercial sector exemplifies the HCCH's commit-

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ing party autonomy. Whatever differences exist, they mostly concern the limitations, and to a lesser extent the modalities, of this principle.").

20. THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, COMMENTARY TO PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS § I.4, at 23 (2015), http://www.hcch.net/index_en.php?act=publications.details&pid=6353&dtid=3 [hereinafter COMMENTARY] (brackets added by author).

21. Bernasconi, *supra* note 17.

22. COMMENTARY, *supra* note 20, § P.3, at 27 ("The objective of the Principles is to encourage the spread of party autonomy to States that have not yet adopted it, or have done so with significant restrictions . . . . Party autonomy enables the parties to choose a neutral law or the law they consider most appropriate for the specific contract. The Principles therefore affirm the freedom of parties to an international commercial contract . . . to choose the law applicable thereto . . . .").

23. *See, e.g.*, María M. Albornoz, *Choice of Law in International Contracts in Latin American Legal Systems*, 6 J. PRIV. INT'L L. 23 (2010).

24. COMMENTARY, *supra* note 20, § P.5, at 28 (brackets added by author).

ment to continue its efforts to remove obstacles to transnational trade and commerce.[25] By advocating for additional developments, both at the legislative and judicial levels, to allow for a greater degree of contractual free choice (at least with respect to choice-of-law provisions), the HCCH, through its Principles, contributed to the recognition of party autonomy as an important pillar of PIL and contractual relations. Some skeptics charge that the promotion of party autonomy may produce undesirable effects in the markets.[26] Yet, in granting parties the autonomy to make such choices, legislators and judges incentivize commercial actors to enter more freely into new business ventures with the confidence of knowing that their choice-of-law provisions will be given due accord (subject to certain limitations and overriding mandatory principles, of course). Thus, the legislative history and specified uses for the Principles demonstrate how they serve commercial interests in the ever-growing global economy if adopted at the national level by State actors.

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25. It should be noted that the use of the term "commercial" excludes consumer and employment contracts from the scope of the instrument. *See* PRINCIPLES, *supra* note 8, art. 1(1), at 17 ("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 employer contracts."). This term's inclusion within the title of the instrument itself proved to be a source of contention during the drafting period. *See* Jonathan Levin & Theodore J. Folkman, *A Comparative Look at the New Hague Principles on Choice of Law and the Restatement (Second) of Conflict of Laws: First Post*, LETTERS BLOGATORY (July 30, 2015), https://lettersblogatory.com/2015/07/30/a-comparative-look-at-the-new-hague-principles-on-choice-of-law-the-restatement-second-of-conflict-of-laws-first-post/ ("This word was quite divisive in the negotiations. Speaking broadly, to many in Europe the use of the word 'commercial' excludes consumer and employment contracts, since to them the word 'commercial' implies a business deal among parties with roughly equal bargaining power. From the American perspective, on the other hand, the word 'commercial' has no such connotation. A contract of adhesion, in the American way of looking at things, may still be 'commercial.' But in the end the states participating in the negotiations reached a consensus in light of the fact that the term 'commercial' had previously been used in UNIDROIT principles that had received wide support throughout the world.").

26. *See, e.g.*, Symeonides, *supra* note 6, at 878 (expressing skepticism over the promotion of party autonomy and its use as a "euphemism for taking advantage of weak parties").

II.
Selected Provisions of the Principles and Their Relationship to the E.U. Fundamental Freedoms

Since the Principles endeavor to assure the furtherance of party autonomy, this Part will address three important features of the instrument: the use of "establishment" in its internationality requirement, the lack of a nexus requirement in selecting a foreign law, and the ability of parties to choose non-sovereign law as the governing law of a contract ("rules of law"). Beyond identification of the actual "principles" that function to promote the contractual doctrine, the analysis will delve deeper into how these policies connect to the TFEU Fundamental Freedoms in supporting businesses within the European Union.[27] Chiefly, the overarching premise of this comparative study is that, by granting enhanced party autonomy via choice-of-law provisions to commercial actors, the Principles further the aims of the E.U. Fundamental Freedoms (particularly, the Free Movement of Goods,[28] Free Movement of Services,[29] and Freedom of Establishment[30]) by motivating parties, *ex ante*, to more freely enter into contractual relationships. In turn, this encouragement could potentially create more profitable commercial ventures and more fluid, efficient markets.

A. *The Internationality Requirement and the Use of the Term "Establishment" as a Metric*

Similar to internationality requirements set forth in other international conventions,[31] the Principles set out an important restriction to their application in commercial settings by

27. For an explanation of the connection between party autonomy and the Fundamental Freedoms, see generally Grundmann, *supra* note 4.

28. Consolidated Version of the Treaty on the Functioning of the European Union arts. 28, 30, 34, 35, Oct. 26, 2012, O.J. (C 326) 47 [hereinafter TFEU].

29. TFEU art. 56.

30. TFEU arts. 49, 54.

31. *See, e.g.*, United Nations Convention on Contracts for the International Sales of Goods art. 1(1), Apr. 11, 1980, 1489 U.N.T.S. 3 ("This Convention applies to contracts of sale of goods between parties whose places of business are in different States.") [hereinafter CISG].

stipulating an international threshold in Article 1(2).[32] In drawing such a limitation, however, the instrument allows for two situations in which the internationality prong may be satisfied.[33] Article 12, relatedly, provides for situations whereby a party has more than one establishment for the purposes of determining internationality: "If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion."[34]

As the Commentary to the Principles (the "Commentary") explains, the need for an internationality requirement is made obvious where PIL is implicated.[35] It is important to note that, within the negative definition employed by the drafters, the provision specifically references "establishment" as the preferred metric. While the use of establishment as a test for internationality is itself not one of the more prominent innovations that the Principles advance, the drafters' choice to employ the term "establishment" rather than "place of business" prompts an interesting discussion about the consequences of such a linguistic decision for enhancing party autonomy.[36] After all, numerous international conventions have utilized

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32. PRINCIPLES, *supra* note 8, art. 1(2), at 17 ("For the 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 chosen law, are connected only with that State."). *See also* COMMENTARY, *supra* note 20, § 12.3, at 81 (defining establishment as "a business location in which the party has more than a fleeting presence. It encompasses a centre of administration or management, headquarters, principal and secondary places of business, a branch, an agency and any other constant and continuous business location. The physical presence of the party, with a minimum degree of economic organisation and permanence in time, is required to constitute an establishment. Hence, the statutory seat of a company without more does not fall within the notion of establishment.").

33. COMMENTARY, supra note 20, §§ 1.16–1.18, at 32 (describing the two tests outlined by the drafters for fulfilling internationality of the contract).

34. PRINCIPLES, *supra* note 8, art. 12, at 20.

35. *See* COMMENTARY, *supra* note 20, § 1.13, at 31 ("To fall within the scope of the Principles, the contract must qualify as an 'international' contract. This requirement is consistent with the traditional understanding that private international law applies only to international cases. The definition of 'internationality' varies considerably among national and international instruments.").

36. *See* Symeonides, *supra* note 6, at 879 n.26 (detailing that the term "establishment" was selected during the Special Commission "to replace the term 'place of business' which was used in the draft of the Working Group").

"place of business" as the standard geographic measure for purposes of satisfying internationality.[37]

At first glance, the choice to use "establishment" could seem to make little difference. Indeed, the distinction may be deemed trivial because the two terms can be seen as synonymous and interchangeable. Yet, such a reading precludes a subtle nuance that may have larger implications for contractual relationships falling within the scope of the Principles. Specifically, the fact that "place of business" appears in the Commentary's definition of "establishment"[38] suggests that it would be improper to assert that the two terms are granted equal weight by the drafters. The necessary conclusion to be drawn from such a textual analysis is that "establishment" is to be read *more* expansively than "place of business" in light of the Commentary providing a list of possible locations that may be utilized: "[establishment] encompasses a centre of administration or management, headquarters, principal and secondary places of business, a branch, an agency, and any other constant and continuous business location."[39]

The drafters' choice to incorporate the term "establishment," rather than "place of business," implicates the Freedom of Establishment provided by Article 49 of the TFEU, which states:

> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.[40]

This provision of the TFEU has been interpreted by European Court of Justice (ECJ) precedent[41] to mean that companies (as defined by Article 54 of the TFEU)[42] will enjoy the same rights

37. *See, e.g.,* CISG, *supra* note 31.

38. COMMENTARY, *supra* note 20, § 12.3, at 81.

39. *Id.*

40. TFEU art. 49.

41. *See, e.g.,* Case C-55/94, Gebhard v. Consiglio, 1995 E.C.R. I-4165; Case 2/74, Reyners v. Belgium, 1974 E.C.R. 631.

42. TFEU art. 54 ("'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and

to carry out commercial activity as nationals within any Member State of the European Union. These commercial enterprises are accordingly protected from discrimination based on their nationality or chosen method of incorporation.

The Principles, in referencing "establishment," arguably manifest the Freedom under Article 49 of the TFEU by inserting the term into the internationality requirement. In addressing the E.U. situation regarding company establishment, the instrument reinforces the ability of corporate entities and professionals to establish themselves across the "internal market" by granting such non-domestic establishments due credence. This concept of "credence" dictates that the Principles permit recognition of such "establishments" (even if they are not "places of business") so long as they are not merely "statutory seats."[43] Consequently, parties are able to assert the non-domestic nature of their contractual relationship more easily under the Principles due to the ability to point to a variety of locations, which may have been foreclosed by other international conventions and model laws that employ the more limited term "place of business." Therefore, the parties are able to trigger the necessary internationality more freely. The flexibility inherent in the "establishment" term, given its catch-all phrase ("and any other constant and continuous business location"), allows for commercial parties to be unfettered in crafting choice-of-law provisions.

Overall, the use of "establishment" in the internationality requirement is a unique feature to be found at the very outset of the Principles. By implicating the TFEU's Freedom of Establishment clause through its inclusion of the broader term "establishment" as a threshold measure of internationality, the Principles further the objectives of the E.U. legislators. Expanding the possibility of triggering internationality, in turn, allows for the parties to more readily dictate the law that will govern their interactions upon entering into an international commercial agreement. If national legislators of the various E.U. Member States were to embrace the Principles, cross-border commerce would increase in light of the enhanced pre-

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other legal persons governed by public or private law, save for those which are non-profit-making.").

43. *See* COMMENTARY, *supra* note 20, § 12.3, at 81 (referencing the distinction between "establishment" and "statutory seat").

dictability and certainty in selecting the applicable law to a contract. Given the ability to more easily establish an entity beyond national borders with recognition for the purposes of internationality, the parties can feel confident that their autonomous decision about the governing law will be respected by the courts of that State.

B. *The Lack of Underlying Nexus Requirements for Choice-of-Law Provisions*

The lack of a nexus feature found in Article 2(4) of the Principles extends autonomy for parties in the pursuit of their commercial ventures.[44] This facet of the Principles falls in line with the growing trend in PIL of greater party autonomy. Initially, the Principles appear to be no different from instruments like the Rome I Regulation, which addresses "Freedom of Choice" provisions in Article 3.[45] However, the Principles go further than Rome I, where parties have made a choice of law, either explicitly or implicitly.[46] One principal distinction concerns the texts of both instruments. While Rome I provides no

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44. PRINCIPLES, *supra* note 8, art. 2(4), at 18 ("No connection is required between the law chosen and the parties or their transaction."). *See generally* Marta Pertegás & Brooke A. Marshall, *Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts*, 39 BROOK. J. INT'L L. 975, 988–92 (2014) (describing the absence of a connection between the contract and/or parties with the law designated).

45. Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 3(1), 2008 O.J. (L 177/6) (EC) [hereinafter Rome I] ("A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to party only of the contract.") As the title of the regulation suggests, Rome I governs choice-of-law provisions in the European Union. Replacing the preceding Convention on the Law Applicable to Contractual Obligations 1980 (the "Rome Convention"), Rome I largely replicates much of the Rome Convention's language regarding party autonomy.

46. *See* COMMENTARY, *supra* note 20, § 1.4, at 29 (explaining why the drafters decided to not address applicable law in the absence of choice, but noting that such a preclusion would not prevent the HCCH from developing such rules at a later time). For a comparative analysis of the Draft Principles and Rome I, see Ole Lando, *The Draft Hague Principles on the Choice of Law in International Contracts and Rome I, in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 299 (2013). An important limitation of the Principles, thus, is that, unlike Article 4 of Rome I, it

express statement concerning the disavowal of a nexus justification based on the choice of law,[47] the Principles explicitly specify this repudiation in Article 2(4).[48] The Commentary to the Principles reinforces the extensive scope of freedom granted under this feature, addressing the "increasing delocalisation of commercial transactions" and the adoption of a "more expansive concept of party autonomy," unlike "some States which require such a connection or another reasonable basis for the parties' choice of law."[49]

Another point of departure between Rome I and the Principles relates to derogation from mandatory principles. Of course, both instruments subject potential contracting parties to certain limits, instructing them that the forum will still give due consideration to overriding mandatory provisions and *ordre public*.[50] Beyond this, Rome I subjects parties to the potential intervention by another country's provisions of law or, more generally, E.U. Community Law when all other relevant elements of the contract point either to a country different from the one whose law has been chosen or to one or more E.U. Member States.[51] Arguably, the overriding feature of Articles 3(4) and 3(5) of Rome I further limits the choice of law by acknowledging such superseding considerations. The Principles, by contrast, impose no similar bar to the parties' choice. Once the forum is satisfied that the decision violates neither

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does *not* provide the law applicable where a choice of law is absent from the contract.

47. Though Article 3 does not contain an express provision regarding the lack of nexus requirement, it has been universally understood by numerous commentators that such an interpretation is correct in reading Rome I in light of the drafters' intention. *See, e.g.*, Volker Behr, *Rome I Regulation: A–Mostly–Unified Private International Law of Contractual Relationships Within—Most—of the European Union*, 29 J.L. & COM. 233, 241–42 (2011) ("[T]here are no additional restrictions as to which law parties may choose like under U.S. law. There is no requirement of the chosen law to bear some 'reasonable' or 'substantial' relationship to the parties or the transaction. Contract law being mostly about parties', and hence private, interests, under the European concept there seems to be no need to limit party autonomy in general. This unlimited acknowledgment of parties' choice of law significantly contributes to the general objective of the Regulation: to provide for legal certainty and foreseeability.").

48. *Supra* note 44.

49. COMMENTARY, *supra* note 20, §§ 2.14–2.15, at 39–40.

50. *See* PRINCIPLES, *supra* note 8, art. 11, at 20; Rome I art. 9, at 13.

51. Rome I arts. 3(4), 3(5), at 10–11.

overriding mandatory principles of the forum nor public policy, the choice is granted deference. Thus, while Rome I, on the whole, is more exhaustive given its status as a European Community regulation, the Principles' lack of connection feature is less restrictive and grants more certainty than Rome I in removing obstacles to selecting the applicable law.[52]

The Principles' disavowal of the requirement that the chosen law have a connection to the underlying transaction (unlike, for example, the Restatement (Second) of Conflicts of Law in the United States),[53] includes a significant caveat. When Article 1(2)[54] is read in light of the corresponding Commentary,[55] that choice of law, standing alone, *cannot* be enough to trigger the requisite internationality set forth by the instrument. Therefore, while the Principles do not impose any rational nexus for the decision made by the parties, provided they meet the internationality requirement, the boundaries of such autonomy are delineated by proscribing the use of the clauses as a means of circumventing the internationality prong *in toto*.

Moving past this important carve-out, it is imperative to analyze how freedom from a nexus threshold[56] helps companies in the E.U. landscape. Similar to the goal that underlies

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52. This interpretation of the relationship between Article 11 of the Principles and Article 9 of Rome I is shared by Symeonides. *See* Symeonides, *supra* note 6, at 886–88.

53. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (AM. LAW INST. 1971) ("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 . . . the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice").

54. PRINCIPLES, *supra* note 8, art. 1(2), at 17.

55. COMMENTARY, *supra* note 20, § 1.21, at 33 ("The phrase 'regardless of the chosen law' in Article 1(2) means that the parties' choice of law is not a relevant element for determining internationality. In other words, the parties may not establish internationality of the contract solely by selecting a foreign law, even if the choice is accompanied by a foreign choice of court or arbitral tribunal, when all the relevant objective elements are centered in one State . . . .").

56. Note further that parties are allowed to make decisions that not only subject the entirety of the contract to the law chosen, regardless of the connection to the underlying contract, but also utilize only partial choices of law or employ *dépeçage*. *See* PRINCIPLES, *supra* note 8, art. 2(2), at 18.

the Free Movement of Goods and Services, this independence from a connection reinforces the concept that commercial parties should not be subject to restrictions that would limit their mobility across the internal market. By allowing parties to make such unencumbered choices of law, the Principles incentivize companies and other persons acting within the scope of their profession to take advantage of more business opportunities.

Parties are better equipped to take advantage of the freedoms addressed above when they agree on a law that is more favorable to their dealings than the available law in domestic fora. With regard to the Free Movement of Goods, the elimination of discriminatory practices against foreign products entering domestic markets strengthened the idea put forth that the European Union should "ensure normal conditions of competition and . . . remove all restrictions of a fiscal nature capable of hindering the free movement of goods within the Common Market."[57] The ability to voluntarily choose the law applicable to a contract for imported goods would bolster the Free Movement of Goods by permitting parties to escape the United Nations Convention on Contracts for the International Sale of Goods (CISG),[58] for example, or, if CISG would be inapplicable[59] and no choice of law is made, the inhospitable laws of an

57. Case 27/67, Fink-Frucht GmbH v. Hauptzollamt München-Landsbergerstrasse, 1968 E.C.R. 230, 233.

58. *See* CISG, *supra* note 31, art. 6 (allowing for parties to opt-out of the Convention where it would otherwise apply). However, as Dr. Franco Ferrari, Director of the NYU School of Law Center for Transnational Litigation, Arbitration and Commercial Law, advises, parties who wish to exclude the CISG from otherwise applying to the contract should specifically write into their contract that they wish for the *domestic* law of a country to apply. Stating a choice in favor of French law, for example, may not be enough given that the CISG is, in fact, part of French law given its status as a Contracting State. *See* Franco Ferrari, *Remarks on the UNCITRAL Digest's Comments on Article 6 CISG*, 25 J.L. & COM. 13, 25–27 (2005) (citing numerous court decisions and arbitral awards that confirm that a selection in favor "of the law of a Contracting State, if made without particular reference to the domestic law of that State . . . does not *per se* exclude the Convention's application.").

59. For example, if the forum was located in Portugal or the United Kingdom, the CISG would not be applicable, even if the two parties had their places of business located within Contracting States. Portugal and the United Kingdom are the only E.U. Member States that are not Contracting States to the CISG. Apart from this, there are numerous other reasons why

exporter country (the law of the seller).[60] Hence, the Principles promote the goal of freeing goods from discriminating policies by granting these parties the opportunity to escape laws that are potentially unfavorable to such contracts without requiring them to submit their choice to a "reasoned basis" scrutiny standard. This same reasoning can be extrapolated to the Free Movement of Services, though service contracts are not governed by the CISG. Service providers, analogous to those commercial parties who supply and purchase goods, need the ability to readily make such choices of law with their clauses enforced and recognized by courts and tribunals. The Principles lend service providers certainty and predictability where they may otherwise be wary of extending their business outside of their domestic settings. They may seek laws beyond their national jurisdiction as a means of expanding their interests without the concern that their decision has no relationship to any other factors of their international service contracts.

Apart from motivating actors to enter into profitable cross-border commercial contracts, the Principles, through their adoption by Member States' PIL regimes, could also benefit free parties, both in their *ex ante* negotiations and *ex post* litigations, from the restrictions imposed by Rome I, namely those concerning the escape from non-overriding mandatory provisions. Some critics charge that parties are allowed to more easily elude these provisions, but parties would not necessarily use the Principles to evade responsibilities that would otherwise be imposed.[61] It could be possible, for example, that the law chosen by the parties is *more* developed in an area al-

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the CISG might not be applicable, chief among these being the exclusions found in Article 2 of the Convention.

60. *See* Rome I, art. 4(1)(a).

61. It is important, at this point, to remind the reader of this Note that the Principles concern *only* "commercial" contracts. They cannot be used within the realm of consumer or employment contracts, as expressly stated in the Introduction to the Principles and in the Commentary to Article 1(1), given the assumption that commercial parties, unlike consumers or employees, are sophisticated and maintain equal bargaining power. Therefore, the concern that this paragraph addresses is somewhat ameliorated by the fact that the Principles would still not allow for parties to escape those protections addressing consumers and employees, as afforded by the various E.U. legislative directives or regulations, such as The Directive on Consumer Rights (2011/83/EC).

ready governed by E.U. Community law. In that situation, the parties would be unduly prevented from opting out of those provisions even when doing so would not implicate uneven bargaining power and where market efficiency could be enhanced.

By allowing parties to voluntarily choose the governing law and not subjecting that choice to further scrutiny, the Principles enable commercial parties within the European Union to more freely engage in transactions with the assurance that their choice of law will be respected by both State courts and arbitral tribunals, effectively advancing the purpose of the Free Movement of Goods and Services. Parties are able to opt out of laws that would otherwise be applicable to their goods or service agreements, thus incentivizing greater commercial activity with this commensurate increase in party autonomy.

C. *The Ability to Choose "Rules of Law" Rather than State Law*

Arguably, the most progressive (and contested) provision of the Principles is found in Article 3: "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."[62] By referring to "rules of law," the HCCH drafters meant to address those legal norms that do not emanate from a State source.[63] These include choices in favor of international treaties, conventions, non-binding instruments, and even model rules deriving from expert groups.[64]

The Principles limit such choices in favor of non-state rules by imposing a threefold requirement for them to be considered valid. First, the chosen rules of law must constitute a "set of rules." The Commentary details that this requirement does not call for a test of exhaustiveness. Instead, the chosen rules "must be such as to allow for the resolution of common contract problems in the international context."[65] The second and third attributes refer to the "neutrality" and "balanced"

62. PRINCIPLES, *supra* note 8, art. 3, at 18.

63. *See generally* Pertegás & Marshall, *supra* note 44, at 996–98 (discussing the Principles' allowance of non-state rules of law to be chosen as applicable law).

64. COMMENTARY, *supra* note 20, §§ 3.5–3.7, at 40–41.

65. *Id.* § 3.10, at 41.

nature of the set of rules.[66] The rationale behind these preconditions is that the drafters wanted to ensure that parties are mindful to select rules that derive from sources that are favorable to parties on either side of a transaction[67] and "represent diverse legal and economic perspectives."[68] With this three-pronged test, the drafters guaranteed that parties are selecting only those rules that *resemble* State law so that courts are not left sifting through a cherry-picked mélange of divergent legal norms.

Decisions in favor of such non-State sources of law are not novel in the context of arbitral proceedings, but they are quite radical when discussed within the framework of traditional litigation before State courts.[69] Critics charge that, while the Principles purport only to allow for those choices of rules that resemble "real" rules of law, such rules lack the essential characteristics of State law given that they do not arise from the will of a democratic and legislative process, judicial pronouncement, or custom.[70] Thus, it is no surprise that certain Member States to the HCCH presented strong objections to the inclusion of such a provision in the Principles.[71]

This resistance to the incorporation of a non-State norm regime into the Principles, however, may not be well-founded. In Article 3, the drafters added the secondary qualification to the three-pronged test: "unless the law of the forum provides otherwise."[72] Despite the Principles' status as a non-binding soft-law instrument, this stipulation is still necessary to the extent of providing assurances to States who choose not to recognize such norms as valid choices of law.[73] The Principles do not seek to override the authority of the forum. Only if the

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66. *Id.* § 3.9, at 41.

67. *Id.* § 3.12, at 41.

68. *Id.* § 3.11, at 41.

69. *See* Genevieve Saumier, *The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract*, 40 BROOK. J. INT'L L. 1, 19 (2014) ("In other words, even if parties have included a choice of law clause in their contract designating, for example, the UPICC to govern their contract, this choice would not be effective if a dispute is brought before a State court.").

70. *See* Symeonides, *supra* note 6, at 892.

71. *See id.* at 893 (discussing the European Union's strongly oppositional stance to the allowance of parties to choose non-State norms).

72. PRINCIPLES, *supra* note 8, art. 3, at 18.

73. *See* Symeonides, *supra* note 6, at 894.

forum is located within a State where legislators have adopted such a provision can parties reasonably rely on such choices to be granted deference. Accordingly, it could be said that a choice of law favoring non-State rules is still subject, in a sense, to a democratic and legislative process. This view is further bolstered by the argument that, as previously mentioned, States have no issue permitting arbitral tribunals to take full advantage of non-State norms in resolving disputes arising out of international commercial contracts.[74] While the arbitral process appears wholly separate from litigation, parties still rely on State courts for the enforcement of such arbitral awards. If States implicitly assent to the validity of rules of law through recognition and enforcement of such awards, they should not hesitate to recognize this legitimacy *explicitly* in litigations brought before their own courts at the outset.[75] Therefore, while Article 3 may appear, on its face, to require a drastic change to PIL regimes currently in place, the acceptance of such non-State norms as choices of law has already occurred at the State court level, albeit indirectly.

Article 3 further enhances the Free Movement of Goods and Services by granting parties the ability to choose rules of law that may be more attuned to and compatible with the underlying transaction. This analysis will focus on the effect of the Principles on contracts for the movement of goods throughout the European Union, though the analysis is still relevant for service providers as well. Take, for example, two parties who, both having their establishments in France, desire to conclude a contract for the sale of goods that would be governed by the CISG. Let us also suggest that multiple factors, such as the place of conclusion of the contract, the place of performance, and one of the party's nationalities, point to the Netherlands.[76] Hence, this contract, regardless of the fact that both France and The Netherlands are Contracting States to

74. *See* Saumier, *supra* note 69, at 20.

75. *Id.*

76. The example purposefully utilizes the expansive internationality test set forth for the Principles' applicability. Here, it is obvious that the parties in question fail to automatically have their contract considered international given that they have their places of establishment located in the same state (France), but the Principles may still consider such a contract international. The fact that all other relevant elements (place of conclusion of the contract, place of performance, and party nationality) points outside of France

the CISG, cannot be governed by the Convention because it fails the internationality test as set forth by Article 1(1).[77] Under current PIL regimes as well, even if the parties were to "opt in" to the CISG, that decision would not constitute a choice of law.[78] With the adoption of the Principles, however, opting in to the CISG could now constitute a valid choice of law for these parties, letting them proceed with their transaction under the auspices of the CISG and take full advantage of the TFEU's Free Movement of Goods provision where they might otherwise be dissuaded from entering into a contract.

The incentive effects that the Principles would have on stimulating cross-border exchanges of goods and services within the European Union by allowing potential parties to choose "rules of law" would, of course, need to be quantified after a State adopts the instrument into its own PIL regime. Nonetheless, it would seem that in granting parties such autonomy, as the example above illustrates, there is the potential that there would be an increase in such activities. Rules of law, like the CISG, are attractive to parties who view them as more closely aligned with their own commercial interests, especially when they wish to expand their business outside of their domestic setting. The drafters' allowance of choices in favor of rules of law, while controversial to State legislators and courts, may be a way to further eliminate the discriminatory practices that inhibit unfettered movement of goods and services across the European Union.

(to the Netherlands) would arguably be considered enough to trigger the requisite internationality.

77. CISG, *supra* note 31, art. 1(1).

78. *See* Ferrari, *supra* note 58, at 36 ("[T]he choice of the CISG in contracts to which it would otherwise not apply does not constitute a 'choice of law,' as there are no private international law rules that allows such a 'choice' to have a different value."); *see also* Ostroznik Savo, legal representative of Vzerja Kuncev, and Eurotrafic S.r.l. v. La Faranono soc. Coop. A.r.l. and Banca di Credito Cooperativo di Roveredo di Guà, Tribunale di Padova, Italy, (Jan. 11, 2005), http://cisgw3.law.pace.edu/cases/050111i3.html (advising that a choice in favor of the CISG where it would otherwise not be applicable to a contract cannot be considered a "choice of "law," since the Convention itself does not allow for choices of law to refer sources outside of state law).

III.
Support from the International Community for the Principles and the Possibility of Transposing E.U. Company Law to Non-E.U. Fora

The foregoing section reveals the many potential benefits of the Principles and how they may help reinforce the current TFEU Fundamental Freedoms. Yet, the true test of the Principles' effectiveness relies on the consensus from the E.U. community and global economy.[79] As previously mentioned in this Note, the envisaged usages of the instrument are outlined forthright in the Preamble:

> [The Principles] may be used as a model for national, regional supranational or international instruments. They may be used to interpret, supplement and develop rules of private international law. They may be applied by courts and arbitral tribunals.[80]

The Preamble, therefore, highlights the drafters' awareness that the Principles are only as successful as the support received outside the HCCH.

To the credit of the instrument, since its formal approval, the HCCH has been able to cite its endorsement by two internationally renowned trade organizations, the United Nations Commission on International Trade Law (UNCITRAL)[81] and the International Chamber of Commerce (ICC).[82] The Principles mark the first HCCH instrument to be officially endorsed by UNCITRAL. In combination with the support of the ICC, the largest and most diverse business organization in the world, these signals from the wider international commercial

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79. *See* Symeonides, *supra* note 6, at 899 ("Like any collective work, an international convention is as good as the consensus of the participating delegations will allow it to be.").

80. Principles, *supra* note 8, at 18.

81. U.N. Comm'n on Int'l Trade Law, Rep. on the Work of its Forty-Eighth Session, U.N. Doc. A/70/17, at ¶¶ 238–40 (2015). In my capacity as a legal intern for the HCCH, I had the distinct pleasure to prepare Ms. Pertegás' address to the Assembly seeking the Principles' endorsement by UNCITRAL at its 48th Session in Vienna on July 8, 2015.

82. Int'l Chamber of Commerce, *ICC Appeals to Authorities to Strengthen Legal Certainty for International Contracts by Implementing the Newly Approved Hague Principles* (Nov. 4, 2015), http://www.iccwbo.org/News/Articles/2015/ICC-appeals-to-authorities-to-strengthen-legal-certainty-for-international-contracts-by-implementing-the-newly-approved-Hague-Principles/.

community cannot be ignored: there is a distinct desire from these experts for the incorporation of such Principles into domestic and regional PIL regimes.

A codification of the Principles has already been accomplished at the State level in Latin America, of all regions, well-known for placing limitations on regional commercial actors' ability to freely choose applicable law to contracts.[83] On January 15, 2015, Paraguay promulgated Law No. 5393 on the Law Applicable to International Contracts, which implements the Draft Hague Principles.[84] Thus, the HCCH may now point to evidence of the Principles' potency by virtue of its adoption by a State legislature in a region acknowledged for its lack of contractual party autonomy.

CONCLUSION

The international encouragement that the Principles have received thus far is promising. As this Note has attempted to demonstrate, many reasons exist for E.U. legislators to embrace its provisions based on the Principles' ability to advance the TFEU Fundamental Freedoms for commercial parties. Moreover, the promulgation in Paraguay illustrates how adoption of the Principles outside an E.U. context could help promote the Fundamental Freedoms abroad, leading to less restricted cross-border commerce in areas such as Latin America. The acceptance of the Principles "depends in large part on its intrinsic value rather than on sovereign choice and

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83. For more on the limitations of party autonomy in Latin America, see, for example, Albornoz, *supra* note 23.

84. The Hague Conference on Private Int'l Law, *Paraguay Promulgates the Law based on the Draft Hague Principles on Choice of Law in International Commercial Contracts* (Jan. 20, 2015), http://www.hcch.net/index_en.php?act=events.details&year=2015&varevent=392 ("In line with the Draft Principles, this Law accepts party autonomy for choice of law in international contracts, which enhances legal certainty and predictability in the contractual dealings concluded between Paraguayan companies and companies from around the world. It therefore will contribute to the facilitation of foreign investment and trade in Paraguay. In addition to confirming the pioneering role played by Paraguay in bringing the Draft Principles into operation, the enactment of the Law affirms the objective of the Draft Principles as a guide to 'best practices' with regard to the choice of law in international commercial contracts."); *see also* José Antonio Moreno Rodríguez, *The New Paraguayan Law on International Contracts: Back to the Past?, in* EPPUR SI MUOVE: THE AGE OF UNIFORM LAW–FESTSCHRIFT FOR MICHAEL JOACHIM BONELL (2016).

compulsion."[85] Though they are not as exhaustive as other HCCH uniform substantive conventions, the Principles definitively contain this "intrinsic value," embodying a vigorous and progressive step forward in the expansion of commercial party autonomy in the European Union and beyond.

85. *See* Symeonides, *supra* note 6, at 899.