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SERIES EDITORS' PREFACE

The Hague Principles on Choice of Law in International Commercial Contracts 2015 are a landmark development. Rather than taking the traditional form of an international convention, they instead set out a series of general principles of choice of law for international commercial contracts. The Principles place party autonomy at the fore. At the same time, they seek to strike an appropriate balance between predictability and flexibility (as, for instance, in the treatment of mandatory rules and public policy).

The Principles are likely to provide invaluable assistance and guidance to courts around the world in resolving thorny questions of private international law. This includes issues not explicitly addressed in other choice of law instruments (such as the Rome I Regulation on the Law Applicable to Contractual Obligations), for instance, those arising from a battle of forms. The Principles also include (as the introductory text states) 'novel solutions,' such as the ability to choose directly non-State law within certain parameters. The Principles may also prove highly valuable to arbitral tribunals, particularly given the dearth of harmonised choice of law rules directly applicable to such bodies.

More generally, the Principles provide a template for the development of choice of law rules at the national and international levels. The Principles can (again, in the words of the introduction to the text), 'guide the reform of domestic law on choice of law and operate alongside existing instruments on the subject'.

In order for the full potential of the Principles to be realised as a catalyst for reform and development, however, a detailed understanding of the similarities and differences between existing private international law rules and approaches across the globe is required. This facilitates a considered assessment of the opportunities and barriers to further integration. Against this background, the editors of this work (all members of the working group that drafted the Principles) have assembled an outstanding team of authors from around the world to explain and analyse, by reference to the Articles of the Principles, the relevant choice of law rules in this field, drawing comparisons and contrasts between the Principles and existing national law and considering the prospects for the adoption or adaptation of the Principles. The result is a comprehensive work embracing more than sixty countries and regions, along with a number of special reports (including, for instance, analysis from a Hague Conference, UNCITRAL and UNIDROT perspective). The editors have skilfully analysed the resulting material in a General Comparative Report.

This is a magisterial work, which will provide an indispensable resource for practitioners and scholars; and one which paves the way for further development and harmonisation of the choice of law rules for international commercial contracts.

Professor Jonathan Harris QC
London
Professor Andrew Dickinson
Oxford

24 December 2020

Cross references

Internal cross references in Chapter 1, the 'General Comparative Report', are cited in square brackets, eg Brazil [56.01], for the sake of simplicity. The special, national and regional reports (Chapters 2 ff) might be read as stand-alone pieces and refer to internal cross references as follows: Lauro Gama, Carmen Tiburcio, and Felipe Albuquerque, 'Brazil', Chapter 56 in this volume.

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CHILE

Chilean Perspectives on the Hague Principles

Jaime Gallegos-Zúñiga*

Introduction and Preamble

57.01 Due to the scarce and mostly unilateral provisions on private international law contained in Chilean legislation, there remain large gaps in the system.[1] Chilean judges must therefore deduce relevant principles, and the result is often unclear solutions.[2] Nevertheless, the recognition of party autonomy is increasingly gaining ground in academic literature and court judgments.

57.02 Chile's legal system is dualist, and the law guiding International Commercial Arbitration (hereafter ICA) is contained in Act No 19.971,[3] based on the UNCITRAL Model Arbitration Law.[4] This system broadly acknowledges party autonomy in arbitration awards,[5] and this has been recognized in Supreme Court judgments.[6] On the other hand, there still exists a highly territorialist nineteenth-century system,[7] applicable when disputes are brought before common courts.

* Assistant Professor, University of Chile.

[1] Federico Duncker, *Derecho Internacional Privado. Parte General* (Santiago: Jurídica de Chile1950) 146 (hereafter Duncker, *Derecho Internacional Privado*).

[2] María Vial, 'La autonomía de la voluntad en la legislación chilena de Derecho Internacional Privado' (2013) 40 Revista Chilena de Derecho 895–896 (hereafter Vial, 'La autonomía de la voluntad en la legislación chilena de Derecho Internacional Privado').

[3] See Gonzalo Vial and Francisco Blavi, 'Santiago as a Seat for International Commercial Arbitration' (2016) 18 Oregon Review of International Law 25–49; Elina Mereminskaya, 'Arbitraje Comercial Internacional en Chile: Una mirada jurisprudencial' (2010) 2 Revista Ecuatoriana de Arbitraje 262–285.

[4] See José Carlos Fernández-Rozas, *Tratado de Arbitraje Comercial en América Latina* (Madrid: Iustel 2008) 269, 270 (hereafter Fernández-Rozas, *Tratado de Arbitraje Comercial en América Latina*); Gonzalo Biggs, 'Breakthrough for International Commercial Arbitration in Chile' (2004) 59 Dispute Resolution Journal 65–68; Gonzalo Fernández, 'Arbitraje comercial internacional en Chile: Marco legal y jurisprudencial' in Cristián Conejero, Antonio Hierro, Valeria Maccia, and Carlos Soto, (eds), *El arbitraje comercial internacional en Iberoamérica. Marco legal y jurisprudencial* (Madrid: La Ley 2009) 287–316 (hereafter Fernández, 'Arbitraje comercial internacional en Chile: Marco legal y jurisprudencial').

[5] Dyalá Jiménez and Angie Armer, 'Notas sobre la nueva ley chilena de arbitraje comercial internacional' (2005) 4 Revista Chilena de Derecho Privado 311–315.

[6] *Qisheng Resources Limited v Minera Santa Fe,* Supreme Court (case file 7854-2013).

[7] Bernard Audit, 'Le droit international privé en quête d'universalité: Cours général' (2003) 305 *Recueil des Cours* 40, 66; Antonio Boggiano, *Contratos Internacionales* (Buenos Aires: Depalma 1990) 9; Jurgen Samtleben, 'La relación entre el Derecho Internacional Público y Privado en Andrés Bello' (1982) 34 REDI 399–403; Rodrigo Maluenda, *Contratos Internacionales en el Derecho chileno* (Santiago: Conosur 1998) 28 (hereafter Maluenda, *Contratos Internacionales en el Derecho chileno*); Elina Mereminskaya, 'Las paradojas del Derecho Internacional Privado chileno' (2007) 1 Revista del Magíster y Doctorado en Derecho 139–142 (hereafter Mereminskaya, 'Las paradojas del Derecho Internacional Privado chileno').

57.03 The general and subsidiary regulations applicable to international contracts are found in both the Civil Code of 1855 (hereafter CC) and the Commercial Code of 1867 (hereafter CommC). Article 2 of the CommC states that it is necessary to resort to the CC in situations not expressly covered by the mercantile legislation—meaning it is applicable to cases regarded as mercantile according to the CommC provisions. However, some of its Articles have been scholarly and judicially construed as a valid source of interpretation to determine the applicable law when a conflict of laws arises. Relevant provisions in these normative sources include Articles 16 and 1545 of the CC and Article 113 of the CommC. Article 16 of the CC states that 'assets located in Chile are subject to Chilean laws, even if their owners are foreigners and do not reside in Chile'.[8] It then adds that 'this provision should be understood without prejudice to the stipulations contained in contracts validly granted in a foreign country'.[9] However, it concludes by stating that 'where the contract will be fulfilled in Chile, but was granted in a foreign country, its effects will be determined in accordance with Chilean laws'.[10] In turn, Article 1545 of the CC prescribes that 'every legally concluded contract is binding for the contracting parties and cannot be invalidated except by their mutual consent or for legal reasons'. In line with the provisions of the third paragraph of Article 16 of the CC, under Article 113 of the CommC, all acts concerning the execution of contracts concluded in a foreign country, which are to be fulfilled in Chile, are governed by Chilean law. Therefore, particulars such as the delivery and payment, receipts and their form, responsibilities for compliance, or any other act relating to the mere execution of the contract, must comply with the provisions of the laws of Chile, 'unless the contracting parties have agreed otherwise'.[11]

57.04 In 1933, Chile ratified the Convention on Private International Law—the Bustamante Code—with a reservation relegating the Convention to a position of supplementary law applicable only when there is some gap in Chilean legislation. This approach has been criticized[12] as it involves the exclusion of many of the Convention's provisions in matters of great legal relevance, leaving disputes to be ruled by local Chilean law in a precarious way according to the principles of private international law.[13]

57.05 Whilst the Bustamante Code implicitly acknowledges party autonomy,[14] Chilean courts have not recognized this interpretation due to the abovementioned reservation. Instead, courts have favoured more restrictive criteria by following the third paragraph of Article 16 of the CC, as referred to above.

57.06 However, notwithstanding the positive changes that the 1933 Bustamante Code could have introduced in the past, given the developments in this field, its broad treatment of the scope of party autonomy is now outdated and it would no longer provide an adequate response to international commercial transactions.[15]

57.07 In 1978, Chile issued the Decree-Law No 2.349, which established rules on international contracts for the public sector, granting broad powers to select a competent court and applicable

[8] Own translation.

[9] Own translation.

[10] Own translation. There is no statutory definition of 'international contract' nor of 'commercial contract' under Chilean Private International Law.

[11] Own translation.

[12] Duncker, *Derecho Internacional Privado* (n 1) 144–146.

[13] Ignacio García, 'Derecho Internacional Privado, de Carlos Villarroel Barrientos y Gabriel Villarroel Barrientos' (2016) 2 Revista Chilena de Derecho Internacional Privado 147.

[14] Hernán Somerville, *Uniformidad del Derecho Internacional Privado Convencional Americano* (Santiago: Jurídica de Chile 1965) 69, 70 (hereafter Somerville, *Uniformidad del Derecho Internacional Privado Convencional Americano*).

[15] José Carlos Fernández-Rozas, *Armonización del Derecho Internacional Privado en el Caribe. Estudios y materiales preparatorios y proyecto de Ley modelo de la Ohadac de Derecho Internacional Privado de 2014* (Madrid: Iprolex 2015) 349 (hereafter Fernández-Rozas, *Armonización del Derecho Internacional Privado en*