Tacit choice of law in the Hague Principles on Choice of Law in International Contracts

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OPSOMMING

Stilswyende Regskeuse in die "Hague Principles on Choice of Law in International Contracts"

Die onderhawige artikel bevat die voorlegging wat insake stilswyende regskeuse aan die werkgroep gemoeid met die opstel van die *Hague Principles on Choice of Law in International Contracts* gemaak is. Aandag word aan die verskillende kriteria vir stilwyende regskeuse in verskeie internasionale instrumente en nasionale regstelsels bestee. Daar word aangevoer dat relatief streng vereistes vir 'n stilwyende regskeuse gestel moet word om regsonsekerheid en die omseiling van die objektiewe internasionaal-privaatregtelike norme te voorkom. Die prosedurele element wat in hierdie verband in sekere kodes gevind word, moet vermy word in die tersaaklike aanwysingsregtelike konteks. Die moontlike bronne vir 'n stilswyende regskeuse word bespreek en dit blyk dat die kontraktuele bedinge asook die omstandighede van die geval in hierdie verband 'n rol mag speel. Die outeurs doen aan die hand dat die keuse van 'n forum nie as sodanig 'n stilwyende regskeuse daarstel nie. Met inagneming van die voorafgaande ontleding, is sekere voorstelle oor 'n juiste formulering van die toets vir 'n stilwyende regskeuse gemaak. Daar word aangedui welke wysigings deur die werksgroep aangebring en op welke formulering voorlopig ooreengekom is. Die voorgestelde reël kan soos volg vertaal word: "'n Kontrak word beheers deur die regstelsel of regsreëls wat deur die partye gekies is. Die keuse of enige wysiging daarvan moet uitdruklik gemaak word of duidelik blyk uit die bedinge van die kontrak of uit die omstandighede. 'n Ooreenkoms tussen die partye om jurisdiksie aan 'n hof of arbitrasietribunaal in 'n sekere staat te verleen, kom nie as sodanig op 'n keuse van die reg van daardie staat neer nie."

1 Introduction

During 2009, the Hague Conference on Private International Law[1] appointed a working group to draft the provisionally so-called *Hague*

* Member of the working group drafting the Hague Principles on Choice of Law in International Contracts for the Hague Conference on Private International Law.

1 See http://www.hcch.net/.

Principles on Choice of Law in International Contracts.[2] The working group met twice, during January and November 2010, and has conditionally agreed on some of the provisions of the future instrument.

The purpose of the *Hague Principles* may be understood from the proposed preamble, which is partially inspired by the preamble to the UNIDROIT *Principles of International Commercial Contracts* of 2004.[3] In terms of the proposed preamble, the *Hague Principles* "may be applied by the courts[4] in disputes involving international commercial contracts and by arbitral tribunals in international commercial arbitration".[5] They may also be used "as a model for national, regional, supranational[6] and international instruments", "to interpret and supplement domestic private international law rules, as well as regional, supranational and international instruments" and, finally, "in the development of private international law rules by the courts and arbitral tribunals".[7]

The current article contains, in paragraphs 2–9, the proposals made to

2 See in general, *Bureau permanent de la Conférence de La Haye de droit international privé* (Pertegás, Radic *et al*) "Choix de la loi applicable aux contrats du commerce international: des principes de La Haye" 2010 1 *Revue critique de droit international privé* 83 (available at www.hcch.net/catalogue/i0035.pdf).

3 "These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators." The full text of the UNIDROIT *Principles* may be found at http://www.unidroit.org. The first edition appeared in 1994 and the third edition is expected to be approved by the governing council of UNIDROIT during 2011. No changes in the preamble are expected in the 2011 edition.

4 Although the courts are usually bound by the *lex fori*'s private international law, there are jurisdictions where the courts have wide-ranging powers of adopting the rules and principles of international instruments. See s 173 of the Constitution of the Republic of South Africa, 1996.

5 Commercial arbitral tribunals are often not bound by the *lex fori*'s private international law. See art 28(2) of the UNCITRAL *Model Law on International Commercial Arbitration* (1985/2006): "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

6 The word "supranational" is used here to refer to instruments of regional or international organisations with binding legislative powers. The European Union would be the primary example. See Anderson *et al* (eds) *Collins English Dictionary* (2006) *sv* "supranational": "beyond the authority or jurisdiction of one national government". As an example, the editors indeed refer to "the supranational institutions of the EU".

7 The wording used here is based on the first author's proposal for a preamble to the Hague Principles, taking into account amendments proposed by Mr Andrew Dickinson and Prof Lauro Gama E Souza Jr and as accepted by the working group.

the working group in respect of tacit choice of law by the parties.[8] Paragraph 10 concludes the article with the commentary and the provisional formulation accepted by the working group.

2 General Principle of Party Autonomy; Express Choice of Law

The articulation of a test for a tacit choice of law depends on the accompanying formulation of the general principle of party autonomy and the specific rule for an express choice of law.

The first part of article 3(1) of the *Rome I Regulation* of 2008[9] reads: "A contract shall be governed by the law chosen by the parties." There seems to be no reason for the imperative form here. The *Hague Principles* should read in its corresponding provision: "A contract is governed by the law chosen[10] by the parties." If this formulation is accepted, the express choice of law may be referred to as follows: "The choice must be made expressly …"[11]

Instead of "must be made expressly", one could use "must be express"[12] or "must be expressed",[13] but "must be made expressly" is

8 The proposal was drafted by the first author of this article. It *inter alia* draws on research performed for the purposes of a report to the European Commission on the revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980) (hereinafter "the Rome Convention"), published as Neels and Fredericks "Revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): perspectives from international commercial and financial law" 2004 1 *EUREDIA Revue européenne de droit bancaire et financier / European Banking and Financial Law Journal* 173 (reprinted in 2006 *TSAR* 121).

9 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the *Law Applicable to Contractual Obligations* (hereinafter "the *Rome I Regulation*" or "*Rome I*").

10 An alternative for "chosen" would be "designated": see *eg* art 35(1) of the UNCITRAL *Arbitration Rules* (1976/2010). *See* art 8(2) of the protocol to the UNIDROIT *Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (Cape Town, 2001): "The parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part."

11 See art 3(1) of the *Rome I Regulation*.

12 See art 7(1) of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1986) (hereinafter "the 1986 Hague Convention"); art 7 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994) (hereinafter "the Mexico City Convention"); art 1(2) of the International Chamber of Commerce's *Draft Recommendation on the Law Applicable to International Contracts* of 1981 (see the appendix to Lando "Conflict-of-law rules for arbitrators" in Bernstein, Drobnig and Kötz (eds) *Festschrift für Konrad Zweigert zum 70.Geburtstag* (1981) 157 173-78); s 7(2) of the Oregon *Conflicts Law Applicable to Contracts*; art 34 of the Puerto Rico *Projet* (see Puerto Rican Academy of Legislation and Jurisprudence (reporters Symeonides and von Mehren) "*Projet* for the codification of Puerto Rican private international

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clearly the more elegant variation. Of course, if "shall" is used in the provision corresponding to the first part of article 3(1) of the *Rome I Regulation*, the word "shall" must also be employed in the reference to an express choice of law.

One should not refer to "an express clause" in this regard, as the *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels*[14] does, as this implies the existence of a written contract and there is no reason why the Hague Principles should be limited to written contracts only.

3 No Explicit Reference to Tacit or Implied Choice of Law

A true or real choice of law which is not made expressly, is in some legal systems referred to as a tacit choice of law[15] and in others as an implied choice of law.[16] An explicit reference to implied or tacit choice[17] should therefore be avoided.

4 Level of Strictness of Criteria for a Tacit / Implied Choice of Law

The Rome Convention of 1980 requires the tacit or implied choice to be "demonstrated with reasonable certainty".[18] The Turkish *Private International Law Act of 2007* also uses the phrase "reasonable certainty"

law", appendix to Symeonides "Codifying choice of law for contracts: the Puerto Rico *Projet*" in Nafziger and Symeonides (eds) *Law and Justice in a Multistate World. Essays in honor of Arthur T von Mehren* (2002) 419 435-37).

13 See art 3(1) of the Rome Convention.

14 (The Hague, 1955) (hereinafter "the 1955 Hague Convention"). See art 2, second sentence: "Cette désignation doit faire l'objet d'une clause expresse, ou résulter indubitablement des dispositions du contrat."

15 See *eg* Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2002) 303-04; Kropholler *Internationales Privatrecht* (2006) 460; Strikwerda *Inleiding tot het Nederlandse Internationaal Privaatrecht* (2008) 166; Sykes and Pryles *Australian Private International Law* (1991) 108 (but see Mortensen *Private International Law in Australia* (2006) 393-95).

16 See *eg* Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws 2* (2006) 1573-77; Diwan and Diwan *Private International Law. Indian and English* (1998) 512-13; Pitel and Rafferty *Conflict of Laws* (2010) 274-75; Xiao and Long "Contractual party autonomy in Chinese private international law" 2009 *Yearbook of Private International Law* 193 198-99.

17 As found in art 6(1) of the Hague Convention on the Law Applicable to Trusts and on their Recognition (1985) and in art 25(1) of the South Korean *Private International Law Act of 2001*.

18 Art 3(1): "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case…." *See* art 3111 of the

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in this regard.[19] However, the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986 requires the tacit or implied choice to be "clearly demonstrated".[20] This much stricter test is also used in the Oregon *Conflicts Law Applicable to Contracts of 2001*,[21] the Puerto Rico *Projet*[22] and the *Rome I Regulation*.[23] Similar terminology is used in the Russian Civil Code of 2001.[24] The 1994 Mexico City Convention's provision that the tacit or implied agreement must be "evident"[25] and the provision in the International Chamber of Commerce's *Draft Recommendations on the Law Applicable to*

Quebec Civil Code of 2000: "L'acte juridique, qu'il présente ou non un élément d'extranéité, est régi par la loi désignée expressément dans l'acte ou dont la désignation résulte d'une façon certaine des dispositions de cet acte." Art 21(a) of the UN Convention on Independent Guarantees and Stand-by Letters of Credit (1995) merely uses the word "demonstrated".

19 Art 24(1): "Obligations arising from contracts shall be governed by the law explicitly chosen by the parties. Choice of law that may be understood with reasonable certainty from the provisions of the contract or the relevant circumstances shall also be valid" (translation in 2007 *Yearbook of Private International Law* 583). See art 25(1) of the South Korean *Private International Law Act*: "A contract shall be governed by the law expressly or impliedly chosen by the parties, provided that an implied choice may be acknowledged only when it is reasonable to do so in the light of the terms of the contract or the circumstances of the case" (translation in 2003 *Yearbook of Private International Law* 315).

20 Art 7(1): "A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety…."

21 S 7(1): "[T]he contractual rights and duties of the parties are governed by the law or laws that the parties have chosen …"; s 7(2): "The choice of law must be express or clearly demonstrated from the terms of the contract …".

22 Art 34: "Contractual obligations are governed by the law or laws chosen for that purposes by the parties. The choice must be express or must be demonstrated clearly from the provisions of the contract or from the conduct of the parties…."

23 Art 3(1): "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…." It was suggested before that "clearly demonstrated" would be an improvement on "demonstrated with reasonable certainty" – see Neels and Fredericks 2004 1 *EUREDIA Revue européenne de droit bancaire et financier / European Banking and Financial Law Journal* 173 179. *See* art 2, second sentence of the 1955 Hague Convention; art 116(2) of the Swiss *Private International Law Act*: "Die Rechtswahl muss ausdrücklich sein oder sich eindeutig aus dem Vertrag oder aus den Umständen ergeben …"; art 3540 of the Louisiana *Civil Code* of 1991: "All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties …"; and art 3111 of the Quebec *Civil Code*.

24 Art 1210(2): "An agreement of parties as to the selection of law to be applicable shall be expressly stated or clearly ensue from the terms and conditions of the contract or the complex of circumstances of the case" (translation in 2002 *Yearbook of Private International Law* 349).

25 Art 7: "The contract shall be governed by the law chosen by the parties. The parties' agreement on selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole …".

International Contracts of 1981 that the tacit or implied agreement "must appear clearly",[26] have approximately the same meaning. Alternatives on the same level would be "demonstrated with substantial certainty" or "demonstrated with considerable certainty".

A strict test for the existence of tacit or implied agreements is supported – to allow readily deduced tacit or implied agreements leads to unpredictability of decision and legal uncertainty and undermines the conflicts rule that applies in the absence of a choice of law.[27] It may therefore be considered to use an even stricter formulation than these in the examples cited, namely that the tacit or implied agreement must be "manifestly clear".

5 Procedural Element

The word "demonstrated" is used in various codes in formulating the criterion for a tacit or an implied choice. These include the Rome Convention,[28] the 1986 Hague Convention,[29] the Oregon *Conflicts Law Applicable to Contracts*,[30] the Puerto Rico *Projet*[31] and the *Rome I Regulation*.[32] However, the word "demonstrated" has a procedural connotation which does not seem warranted in a choice-of-law context. It is therefore suggested that the word "demonstrated" be avoided. One should rather use the phrases "evident from", "appear clearly from" or "manifestly clear from".

6 *Indiciae* of a Tacit / Implied Choice of Law

The existence of a tacit or an implied agreement may be inferred from various sources.[33] Some codes refer here to the provisions of the contract only.[34] Some refer to both the provisions (terms) of the contract[35] and the conduct or behaviour of the parties.[36] Some refer to the provisions of

26 Art 1(1): "The law chosen by the parties shall govern the contract …"; art 1(2): "The choice of law must be express or must appear clearly from any indications in the contract or from the behaviour of the parties."
27 Neels and Fredericks 2004 1 *EUREDIA Revue européenne de droit bancaire et financier / European Banking and Financial Law Journal* 173 179.
28 Art 3(1).
29 Art 7(1).
30 S 7.
31 Art 34.
32 Art 3(1).
33 See *eg* Nygh *Autonomy in International Contracts* (1999) 113-20.
34 Art 2 of the 1955 Hague Convention; sec 7 of the Orgeon *Conflicts Law Applicable to Contracts*; art 3111 of the Quebec *Civil Code*.
35 The Mexico City Convention uses the term "clauses of the contract" in art 7 but this limits the sources to a written contract. The ICC *Draft Recommendation on the Law Applicable to International Contracts* refers to "any indications in the contract" (art 1(2)).
36 Art 7(1) of the 1986 Hague Convention; art 1(2) of the ICC *Draft Recommendation on the Law Applicable to International Contracts*; art 7 of the Mexico City Convention; art 34 of the Puerto Rico *Projet*.

the contract and the circumstances (of the case).[37] There seems to be no reason to limit the source of a tacit or an implied choice of law to the provisions of the relevant contract without taking note of the circumstances of the case. The conduct of the parties is included in the phrase "the circumstances of the case". The reference should therefore be to both the provisions of the contract and the circumstances of the case.

The word "or" should be used to link the reference to the contractual provisions and the circumstances of the case in order to make it clear that a tacit or an implied choice may be inferred from either the contract or the specific circumstances.[38] For the same reason, phrases as "viewed in their entirety"[39] and "considered as a whole"[40] should be avoided.

7 Forum Selection

As courts and arbitral tribunals sometimes confuse choice of forum and choice of law, it may be useful to add a provision addressing the role of forum selection in determining a tacit or an implied choice of law.

According to the Mexico City Convention, "[s]election of a certain forum by the parties does not necessarily entail selection of the applicable law".[41] According to the Convention, forum selection on its own *may* therefore, depending on the particular circumstances, indicate a tacit or an implied choice of law.

According to recital 12 of the *Rome I Regulation*,

> [a]n agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

The reference to a member state is unexpected as *Rome I* also determines that a law specified by the Regulation shall be applied whether or not it is the law of a member state.[42] The recital, also unexpectedly, only refers to conferring *exclusive* jurisdiction as one of the relevant factors.

Choice of forum and choice of law are, in principle, separate issues. A forum may be chosen, for instance, for its neutrality or expertise and not

37 Art 3(1) of the Rome Convention; art 3(1) of the *Rome I Regulation*; art 24(1) of the Turkish *Private International Law Act*; art 25(1) of the South Korean *Private International Law Act*; art 1210(2) of the Russian *Civil Code*; art 116 of the Swiss *Private International Law Act*.

38 *Contra* art 7(1) of the 1986 Hague Convention and art 7 of the Mexico City Convention where the word "and" is employed.

39 Art 7(1) of the 1986 Hague Convention.

40 Art 7 of the Mexico City Convention.

41 Art 7.

42 Art 2.

for its domestic law.[43] The authors therefore agree with GEDIP[44] that a choice of forum should not on its own indicate the existence of a tacit or an implied choice of law.[45] Of course, conferring either exclusive or non-exclusive jurisdiction on a court or an arbitral tribunal may nevertheless be one of the factors to be taken into account to determine the existence of a tacit or an implied choice of law.

8 Consumer Protection and *Renvoi*

As the *Hague Principles* will deal with international commercial contracts only, the consumer protection provision in the Oregon *Conflicts Law Applicable to Contracts* does not seem to be necessary.[46] If *renvoi* is excluded by a general provision,[47] exclusion in this particular context, as was done in the 1955 Hague Convention,[48] is also superfluous.

9 Proposals

Taking all the above considerations into account, the following formulations, in order of preference, were proposed:

a. A contract is governed by the law chosen by the parties. The choice must be made expressly or be manifestly clear from the provisions of the contract or the circumstances of the case. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.

b. A contract is governed by the law chosen by the parties. The choice must be made expressly or appear clearly from the provisions of the contract or the circumstances of the case. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.

43 *See* Sykes and Pryles 116.

44 *Groupe européen de droit international privé* or the European Group for Private International Law (EGPIL): see http://www.gedip-egpil.eu/.

45 GEDIP "Third consolidated version of a proposal to amend articles 1, 3, 4, 5, 6, 7, 9, 10*bis*, 12 and 13 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, and article 15 of Regulation 44/2001/EC (Brussels I)" (Vienna, 2003) www.gedip-egpil.eu/documents/gedip-documents-20vce.html: "In particular, the choice of a court or the courts of a given State shall not in itself be equivalent to a choice of the law of that State." *Contra* the traditional common-law position: see *eg* Collins 1575-76; See Nygh 116-18.

46 See the last sentence of s 7(2): "In a standard-form contract drafted primarily by only one of the parties, any choice of law must be express and conspicuous."

47 As was done in eg art 15 of the Rome Convention, art 15 of the 1986 Hague Convention, art 17 of the Mexico City Convention and art 20 of the *Rome I Regulation*.

48 See art 2, first sentence: "La vente est régie par la loi *interne* du pays désigné par les parties contractantes" (own italics).

c. A contract is governed by the law chosen by the parties. The choice must be made expressly or be evident from the provisions of the contract or the circumstances of the case. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.

d. A contract is governed by the law chosen by the parties. The choice must be made expressly or be clearly demonstrated by the provisions of the contract or the circumstances of the case. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.

10 Decisions of the Working Group

At the commencement of the discussion on the formulation of a criterion for implied or tacit choice of law, the following formulation of the principle of party autonomy had provisionally been agreed upon: "A contract is governed by the law chosen by the parties."

The working group was of the opinion that the formulation in paragraph 9.1 above (using the phrase "manifestly clear") is too strict. Members agreed that the word "demonstrated" in paragraph 9.4 has an inappropriate procedural connotation but argued that the same applies to "evident" in paragraph 9.3. Paragraph 9.2 was accordingly used as point of departure.

The working group deleted the words "of the case" to avoid the phrase being interpreted as referring to the specific dispute before the court or arbitral tribunal. The words "or any modification of the choice" were added after discussion of a related issue. The working group also added the phrase "or rules of law" after the almost unanimous decision that parties must be able to directly[49] choose non-state law to govern their contract,[50] for example the UNIDROIT Principles of International Commercial Contracts.[51] The principle in the last sentence of the proposed formulations was virtually undisputed.

The following rule was accordingly provisionally accepted to become part of the Hague Principles:

A contract is governed by the law or rules of law chosen by the parties. The choice or any modification thereof must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in

49 Ie not *via* incorporation by reference in terms of the proper law of the contract.

50 See for support of this view eg Neels and Fredericks 2004 1 *EUREDIA Revue européenne de droit bancaire et financier / European Banking and Financial Law Journal* 173 175-79.

51 *Idem* 178-79. The formulation is sufficiently wide as to include the choice of a religious or indigenous legal system.

a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.[52]

52 The accepted version was edited by the current authors by substituting "thereof" for "of the choice" and by deleting a second "must" before the word "appear".