

Title	2015 Principles on Choice of Law in International Commercial Contracts: Impact, Promotional Work and Possible Future Work
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Agenda Item	Item TBD
Mandate(s)	C&D No 34 of CGAP 2021
Objective	To report on ongoing promotional work on the 2015 Principles and to invite endorsement on future work in relation to choice of law rules in international commercial contracts
Action to be Taken	For Decision <input checked="" type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
Annexes	N/A
Related Documents	N/A

2015 Principles on Choice of Law in International Commercial Contracts: Impact, Promotional Work and Possible Future Work

I. Introduction

- 1 This document reports on the impact of the 2015 *Principles on Choice of Law in International Commercial Contracts* (2015 Principles) and on the respective promotional work carried out by the Permanent Bureau (PB) in the past year. It presents the influence of the 2015 Principles in national law reform in the field of choice of law, as well as their practical relevance in resolving contractual disputes before national courts (Section II). Furthermore, it outlines the work carried out on the continuous promotion of the 2015 Principles in both the field of commercial litigation as well as arbitration (Section III). The last Section proposes possible work to be undertaken by the PB in the field of choice of law in international commercial contracts, with a view to enhancing legal certainty and foreseeability in international trade and business.

II. Influence of the 2015 Principles

- 2 The 2015 Principles continue to demonstrate their influence in the modernisation of national choice of law rules in contracts. Their use and practical relevance in transnational commercial dispute resolution are acknowledged within the fields of litigation and arbitration.

A. Legislative reform

- 3 The 2015 Principles continue to be used as a model or inspiration for the modernisation of national laws. In addition to Paraguay and Uruguay,¹ the 2015 Principles have now been considered by Mozambique in its ongoing reform of the Law on international Commercial Contracts.

B. Case law

- 4 Recent court proceedings have referenced the 2015 Principles as an instrument that reflects contemporary global practice, and which provides expanding protection for consumers by way of excluding consumer contracts from the scope of choice of law due to discrepancies in bargaining powers between the parties.²

C. Arbitration survey

- 5 Since 2019, the PB has carried out an annual survey assessing the impact of the 2015 Principles in arbitration proceedings. This survey, which forms a part of the promotional efforts within the arbitration community, is generating positive results. For the second survey, carried out in 2021, there were twice as many respondents compared to those received for the 2020 survey. Sixteen arbitral institutions from 15 jurisdictions and based in four different continents responded that they had either incorporated the 2015 Principles into their own institutional rules or that they had

¹ Uruguayan General Law of Private International Law (*Ley general de derecho internacional privado*, C/619/2020, N°130).

² This reference was addressed for the first time in the submission by the Israeli Attorney General to the Israel Supreme Court in Request for Leave to Appeal, see 9463/17 *Hotels.com v. Nadav Sylis* [2018]. In 2020, a similar reference was made, for the second time, by the Israeli Attorney General in the submission to the Tel-Aviv District Court in a class action, see Tel-Aviv District Court, 9139-05-18 *Shai Tzvia v. Agoda Company Pte. Ltd* [2020]. See also, I. Canor, "Private International Law in a Globalized World – The Choice of Law of Consumer Contracts", 31(3) *Bar-Ilan Law Studies* 833, 848 (2018), note 51.

advertised or facilitated their use in other ways. A ‘Status Table’,³ which compiles the responses received, is designed to provide information about arbitral institutions and their rules that respect and interpret the choice of law in accordance with the 2015 Principles, for the benefit of the parties in the selection of an arbitral institution.

- 6 For the third survey, which is carried out for 2022, the PB goes further and explores the practice in relation to the law applicable in the absence of a (valid) party’s choice of law in arbitration proceedings. Specifically, it investigates any method or approach employed by arbitral institutions, or any trends developed in dealing with international commercial contractual disputes, in the absence of a choice of law by the parties. The outcome of the 2022 survey could help put these matters into perspective, and further highlight the need to respect party autonomy in choice of law. As such, the survey will reiterate the importance of the 2015 Principles in transnational commercial transactions.

III. Continued promotional endeavours

- 7 The PB continued to carry out promotional work with a view to raising awareness and enhancing the wide use of the 2015 Principles by diverse stakeholders, including global legal and business communities and academic circles (see sections A and B below).

A. Seeking endorsement

- 8 The PB invited nine organisations that aim at harmonising law or promoting business at the regional or international level⁴ to give further consideration to the 2015 Principles, including by endorsing them. The invitation for endorsement is aimed at achieving a wider-spread consideration of the Principles. The endorsement is also expected to boost the interest of lawmakers, courts, arbitral tribunals and practitioners in the Principles, and in party autonomy, and eventually assist law reform efforts relating to international commercial contracts.

- 9 The PB received many positive reactions further to this endeavour. The Inter-American Juridical Committee of the OAS, during its 98th Regular Session, adopted the resolution by which it unanimously endorsed the 2015 Principles, taking note and acknowledging, among others, the importance of the Principles in international commercial transactions and the inspirational role of the Principles in the development of the *OAS Guide on the Law Applicable to International Commercial Contracts in the Americas*. Furthermore, through this activity, the PB and the Economic Committee (EC) of APEC, particularly members of the Strengthening Economic and Legal Infrastructure (SELI), are exploring the possibility of presenting the Principles in future EC meetings as well as organising policy discussions, or other forms of capacity building activities that will be beneficial for EC members. Joint promotional activities in this regard are envisaged to take place in the first half of 2022, resources permitting.

B. Promoting the tripartite Legal Guide

- 10 Following its completion in 2020, the *Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on Sales)* (Legal Guide),⁵ a joint publication of

³ Available on the HCCH website at www.hcch.net under “Choice of Law in International Commercial Contracts” then “Arbitration Institutions”.

⁴ The Asian-African Legal Consultative Organization (AALCO), Asia-Pacific Economic Cooperation (APEC), the Association of Southeast Asian Nations (ASEAN), the Commonwealth of Independent States (CIS), the Caribbean Community (CARICOM), MERCOSUR, the Organization of American States (OAS), the Organisation for the Harmonisation of Corporate Law in Africa (OHADA) and the World Intellectual Property Organization (WIPO).

⁵ Available on the HCCH website at www.hcch.net under “Choice of Law in International Commercial Contracts” then “Legal Guide for International Commercial Contracts”.

the Secretariats of UNCITRAL, UNIDROIT and the HCCH, was officially launched on 20 April 2021. The 2015 Principles, as one of the principal legislative texts presented in the Legal Guide, are further promoted in the context of marketing this publication. For example, with a view to promoting the use of the Legal Guide, the PB, together with the Secretariats of UNIDROIT and UNCITRAL, delivered a joint online lecture for the *Centro de Estudios de Derecho, Economía y Política*'s (CEDEP) Fall Course on Choice of Law.

- 11 It is also worth noting that the Legal Guide is now available in all six United Nations' official languages, which will help further raise awareness of the Principles globally.

C. Publications on the 2015 Principles

- 12 The 2015 Principles are further promoted through various publications. The book, *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles*, edited by Daniel Girsberger, Thomas Kadner Graziano and Jan L. Neels, was officially launched on 4 May 2021. This publication provides a definitive reference guide to the key choice of law principles on international contracts, including 60 national and regional reports written by experts from all parts of the world, and a dedicated commentary on the 2015 Principles as applied to international commercial arbitration. The PB contributed a chapter describing the "Roadmap for the promotion of the HCCH Principles on Choice of Law in International Contracts, with a focus on the role of international organisations".

IV. Proposal for CGAP

- 13 Given the importance of ensuring legal certainty and predictability in the law applicable to international commercial contracts, and based on the interest drawn from the PB's promotion of the 2015 Principles as well as the upcoming 2022 Commercial and Financial Law Conference, the PB proposes the following for CGAP's consideration, being mindful of the available resources and priorities to be addressed within the Transnational Litigation Team at the PB:
- to take note of the efforts made by the PB in the promotion of the 2015 Principles;
 - to mandate the PB to assess, in cooperation with other relevant institutions, the acceptance and interpretation of Article 3 of the 2015 Principles pertaining to the possibility for parties to choose rules of law or non-State law as the law governing international commercial contracts, and, subject to available resources, to report to CGAP in 2023.