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2015 Principles on Choice of Law: Updates and possible future work

I. Introduction

- 1 At its 2022 meeting, in its Conclusions and Decisions (C&D) Nos 36 and 37, the Council on General Affairs and Policy (CGAP) mandated the Permanent Bureau (PB) to continue monitoring developments with respect to the *Principles on Choice of Law in International Commercial Contracts* (2015 Principles) and, subject to available resources, to carry out further work assisting with the interpretation of the Principles.¹ In fulfilment of C&D No 33 and following the mandate of CGAP in March 2022,² the inaugural HCCH Conference on Commercial, Digital and Financial Law Across Borders (the CODIFI Conference) was successfully held online from 12 to 16 September 2022. One of the six tracks of the CODIFI Conference discussed matters related to the 2015 Principles. This Preliminary Document (Prel. Doc.) reports on the discussions on the 2015 Principles and suggests possible topics and areas for future work.³
- 2 Building on the discussions by experts speaking at the CODIFI Conference, this Prel. Doc. reports on the continuing influence of the 2015 Principles and recent developments with respect to this instrument (section II), and identifies areas of applicable law that would benefit from harmonisation, with a particular focus on the protection of weaker parties. This Prel. Doc. then explores whether and how weaker parties' protection is dealt with from the perspective of applicable law rules, with reference to examples of law and practice, as well as initiatives at the regional level (section III). Proposals for possible future work are then presented for CGAP's decision (section IV). An overview of national and regional laws concerning the protection of weaker parties with respect to applicable law is set out in Annex I.

II. Continuing Influence of the 2015 Principles

- 3 As highlighted at the CODIFI Conference, the 2015 Principles have continued to serve as a model in the modernisation of national laws, notably, those in Chile, the Democratic Republic of Congo, Indonesia, Morocco and Mozambique. They have also contributed to the development of other soft law instruments, such as the African Principles on the Law Applicable to International Commercial Contracts (African Principles) and the Asian Principles of Private International Law (Asian PIL Principles). The 2015 Principles have, moreover, been cited before national courts, assisting with the interpretation and development of applicable law rules in the relevant jurisdictions.⁴
- 4 Experts speaking at the CODIFI Conference recognised the continuing utility of the 2015 Principles, and emphasised the role of parties' choice of law agreements in international commercial dealings and the importance of upholding the principle of party autonomy. Experts

¹ C&D No 36 of CGAP 2022, "CGAP welcomed the efforts of the PB to promote the 2015 Choice of Law Principles, including as part of the 2022 Commercial and Financial Law Conference".

C&D No 37 of CGAP 2022, "CGAP invited the PB to assess, subject to available resources and in cooperation with other relevant institutions, the acceptance and interpretation of Article 3 of the 2015 Choice of Law Principles". See "Conclusions and Decisions of the Council on General Affairs and Policy of the Conference (28 February – 4 March 2022)", available on the HCCH website at www.hcch.net under "Governance" then "Council on General Affairs and Policy" then "Archive (2000-2022)".

² "Conclusions and Decisions of the Council on General Affairs and Policy of the Conference (1-5 March 2021)", C&D No 38, available on the HCCH website (see path indicated in note 1).

³ The report of the CODIFI Conference is provided as Annex I in Prel. Doc. No 3A of December 2022, available on the HCCH website at www.hcch.net under "Governance" then "Council on General Affairs and Policy".

⁴ CODIFI Conference, M. Dotto and Y. Weiner, "Implementation of the HCCH Principles on Choice of Law", 13 September 2022.

also exchanged views on the use and interpretation of Article 3 of the 2015 Principles with regard to the application of non-State law. Significantly, these experts highlighted the substantial gaps concerning applicable law which may be of relevance for the future work of the HCCH.

III. Areas for Future Work

- 5 Experts speaking at the CODIFI Conference identified various areas of future work in relation to the 2015 Principles that they considered timely, feasible and desirable. These include developing default applicable law rules in the absence of a (valid) choice of law⁵ and in international data transactions, reconsidering the scope of the 2015 Principles in relation to certain contracts, such as insurance contracts,⁶ and clarifying the scope of party autonomy, including in the context of (investment) arbitration.⁷
- 6 Notably, the majority of experts indicated the urgent need for, and importance of, developing a set of applicable law rules in international contracts directed at protecting weaker parties, such as consumers and individual employees.⁸ This is in line with a concern that had already been flagged by the Working Group that developed the 2015 Principles.⁹
- 7 Against this background, this section provides an overview of the different approaches and various degrees of protection afforded to weaker parties in international contractual dealings, from the perspective of applicable law rules. These different approaches demonstrate a need for the harmonisation of applicable law rules in international contracting dealings involving weaker parties. This section summarises the HCCH Conventions in the field of applicable law (section A), regional initiatives (section B), the different approaches adopted under current laws and practice (section C), and presents a conclusion in section D.

A. HCCH Conventions in the Field of Applicable Law

- 8 The HCCH has developed a number of Conventions dealing with applicable law in the areas of civil and commercial law.¹⁰ Although efforts have been made in consumer protection,¹¹ the core

⁵ CODIFI Conference, G. Cordero-Moss, R.F. Oppong, L. Gama, G. Xu and N. Zhao, "The Role of the Principles in International Commercial Dispute Resolution", 15 September 2022, in particular, R.F. Oppong; G. Xu; L. Gama; CODIFI Conference, D. Goddard, "The Role of Party Autonomy in International Commercial Contracts", 15 September 2022. Along those lines also: CODIFI Conference, D. Girsberger, "Opening of the HCCH Principles Track", 12 September and CODIFI Conference, Y. Nishitani, "The Principles in the Modernisation of National and Regional Laws", 14 September 2022.

⁶ CODIFI Conference, S.C. Symeonides, "Principles Closing", 16 September 2022 (Symeonides 2022).

⁷ CODIFI Conference, G. Cordero-Moss, R.F. Oppong, L. Gama, G. Xu and N. Zhao, *supra*, note 5.

⁸ CODIFI Conference, D. Girsberger, *supra*, note 5; CODIFI Conference, G. Cordero-Moss, R.F. Oppong, L. Gama, G. Xu and N. Zhao, *supra*, note 5; and CODIFI Conference, Symeonides 2022, *supra*, note 6.

⁹ First Meeting of the Working Group on Choice of Law in International Contracts, 2010, p. 2, reads the following: "A wish was voiced that, subject to the decision of the Council on General Affairs and Policy of the Conference, the Hague Conference should undertake specific work on choice of law in international consumer contracts at a later stage".

¹⁰ *Convention du 12 juin 1902 pour régler les conflits de lois en matière de mariage; Convention du 12 juin 1902 pour régler les conflits de lois et de juridictions en matière de divorce et de séparations de corps; Convention du 12 juin 1902 pour régler la tutelle des mineurs; Convention du 17 juillet 1905 concernant les conflits de lois relatifs aux effets du mariage sur les droits et les devoirs des époux dans leurs rapports personnels et sur les biens des époux; Convention du 17 juillet 1905 concernant l'interdiction et les mesures de protection analogues; Convention of 15 June 1955 on the law applicable to international sales of goods; Convention of 24 October 1956 on the law applicable to maintenance obligations towards children; Convention of 15 April 1958 on the law governing transfer of title in international sales of goods; Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions; Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants; Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions; Convention of 4 May 1971 on the Law Applicable To Traffic Accidents; Convention of 2 October 1973 on the Law Applicable to Products Liability; Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations; Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes; Convention of 14 March 1978 on the Law Applicable to Agency; Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition; Convention of 22 December 1986 on the Law Applicable to Contracts for*

HCCH Conventions dealing with applicable law do not pay particular attention to consumers or employees, who are likely to have weaker bargaining powers in their contractual relationships with business or employers.

- 9 The 2015 Principles, which aim to reinforce party autonomy in international commercial contracts, explicitly exclude consumer and employment contracts from their scope.¹² This exclusion aimed to avoid the risk that party autonomy may be abused in such contractual relationships, and was also due to the fact that many States lay down special protective rules on these subjects that may not be derogated from by contract.¹³

B. Regional Initiatives

- 10 At the regional level, there are non-binding instruments or initiatives aimed at harmonising applicable law rules. Some do not touch upon weaker party protection, such as the Guide on the Law Applicable to International Commercial Contracts in the Americas (OAS Guide), prepared by the Organization of American States (OAS),¹⁴ and the African Principles.¹⁵ Others do include applicable law rules that provide protection to weaker parties, for example, the ongoing project at the OAS on “Contracts Between Merchants with a Contractually Weaker Party” and the ongoing project on the Asian PIL Principles.¹⁶ These ongoing projects demonstrate the need for having harmonised applicable law rules to provide protection to parties that are usually considered to be the “weaker party” in contractual relationships.

C. Law and Practice

- 11 The current lack of harmonised applicable law rules in this area leads to legal uncertainty as to the law governing contractual relationships. In particular, weaker parties may not know which law governs their relationship or what entitlements they may have to protection until a competent court decides these questions. This sub-section lays down the rationale for the weaker party protection and the differences in law and practice in the area of applicable law.

1. Rationale

- 12 The protection of weaker parties is often subject to both private and public law regulations. In the field of private law, such protection is particularly dealt with in the regulation of relationships established under contracts, such as consumer or individual employment contracts. When there is a cross-border element in these contracts, the laws of another legal system may apply to those relationships under the relevant applicable law rules. As such, contracts can also be subject to parties’ choice of law under the principle of party autonomy.

the International Sale of Goods; Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons; Convention of 13 January 2000 on the International Protection of Adults; Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary; Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

¹¹ See M. Pelichet, “Memorandum on Consumer Sales (Protocol to the Convention on the Law Applicable to International Sales of Goods, concluded on 15th June 1955)”, Prel. Doc. No 1 of March 1979 drawn up for the attention of the Fourteenth Session, in *Actes et documents de la Quatorzième session (1980), tome I / II, Miscellaneous matters / Consumer sales*, II-7.

¹² Art. 1(1).

¹³ Paras 1.4 and 1.10 of the 2015 Principles Commentary.

¹⁴ The OAS Guide is available at http://www.oas.org/en/sla/iajc/docs/Guide_Law_Applicable_to_International_Commercial_Contracts_in_the_Americas.pdf.

¹⁵ J.L. Neels, “The African Principles on the Law Applicable to International Commercial Contracts – a first drafting experiment”, *Uniform Law Review*, Vol. 25, Issue 2-3 (2020), pp. 426–436.

¹⁶ CODIFI Conference, Y. Nishitani, *supra*, note 5.

- 13 In these contractual relationships, the vulnerability of parties in weaker bargaining positions or with more limited access to information, such as consumers and individual employees, leads to concerns that they should be properly protected. An example of contracts where special protection accorded to consumers is indispensable is adhesion contracts, where the consumer can either accept the offered contract without any objections or reject the conclusion of the contract as a whole, even if the objection was only to a few provisions of the contract (a “take it or leave it” contract). Other examples include individual employment contracts, where employees are in an inherently unequal bargaining position with respect to their employers. Many jurisdictions have rules granting substantive law protection to weaker parties, but these rules differ across jurisdictions.¹⁷
- 14 In cross-border cases, many jurisdictions that grant substantive weaker party protection also extend that protection through the use of applicable law rules in order to safeguard public interest. In general, there are two approaches by which the applicable law rules aim to protect weaker parties: first, by establishing an “objective” rule favouring the weaker party, such as designating the law of the weaker party’s habitual residence or working place to govern the contractual obligations; and secondly, by imposing restrictions on party autonomy.
- 15 Two mechanisms that are available in applicable law rules – the public policy exception and the doctrine of overriding mandatory rules – often come into play in such cases. The function of the public policy exception is to negate foreign law that is manifestly incompatible with the fundamental principles of the forum. Overriding mandatory rules are superimposed on the law applicable to the contract to protect an interest that is regarded as fundamental by the forum State or other relevant States. Of the two mechanisms, the doctrine of overriding mandatory rules has, in practice, played a more prominent part in the protection of weaker parties.¹⁸

2. Different Laws and Practice

- 16 In the context of applicable law rules, national law and practice deal in different ways with the protection of weaker parties in contractual relationships.
- 17 First, not all jurisdictions provide specific applicable law rules for weaker parties and, as such, general applicable law rules, whether contained in legislation or case law, apply.¹⁹ As mentioned above, while national laws may not consistently provide specific applicable law rules for the protection of weaker parties, courts provide protection to consumers or employees, by way of

¹⁷ It is to note that due to diverse social and economic circumstances, what is considered a weak party also varies among jurisdictions.

¹⁸ L.M. van Bochove, “Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law”, *Erasmus Law Review*, Issue 3 (2014).

¹⁹ Such as Venezuela (see D. Girsberger, T.K. Grazino, J.L. Neels, *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles*, OUP, (2021); Jordan, see M. Azmi Abu Moghli & M. Abd Al-Salam Al-Sararia, “Law Applicable to Consumer E-Contracts of International Nature”, (2014), p. 1364. In certain common law jurisdictions, choice of law rules are of general application and apply to all kinds of contracts, including employment and consumer contracts: In New Zealand, *Méditerranée NZ v. Wendell* [1989] 1 NZLR 216 (CA). Note however that in New Zealand not all claims relating to employment or consumer matters may be classified as contractual and that in some cases those claims may fall under other specific legislation, such as fair-trading one, beyond the scope of the contractual rules for choice of law within the country (see D. Girsberger, T.K. Grazino, J.L. Neels, *supra*, note 19, para. 42.05); in Canada common law jurisdictions, there is no *a priori* limitation on the effect of a choice of law in such contracts. Instead, the general rules governing party autonomy will apply. In a landmark decision in 2017, *Douez v Facebook*, the Supreme Court of Canada refused to enforce a forum selection clause in a consumer contract but did not decide whether the choice of foreign law clause ought to be given effect in the British Columbia litigation. Instead, it indicated that it would be for the trial judge to determine whether the choice was operative and whether any mandatory rules of the forum might displace it. In doing so, the Court followed the general methodology for choice of law in contract and did not carve out a special regime for consumer contracts (see D. Girsberger, T.K. Grazino, J.L. Neels, *supra*, note 19, para. 67.10).

invoking overriding mandatory rules,²⁰ or public policy.²¹ Jurisdictions that incorporate applicable law rules for the protection of weaker parties may incorporate such rules in different ways. Some jurisdictions provide specific provisions within their private international law (PIL) rules,²² while others opt to introduce applicable law provisions within substantive legislation dedicated to the protection of one of these parties.²³

18 Secondly, among those jurisdictions that provide applicable law rules aimed at protecting weaker parties, the ways in which weaker parties are protected differ.²⁴ Some jurisdictions allow parties to choose, with certain restrictions, the law applicable to a contract involving weaker parties,²⁵ while others entirely prohibit party autonomy in such contracts.

19 Applicable law rules provided for weaker parties also vary depending on the type of weaker party involved. For consumer contracts, in certain jurisdictions, party autonomy applies without any specific restrictions.²⁶ In other jurisdictions, consumers are allowed to enter choice of law agreements, but with conditions. For example, such choice of law agreements cannot deprive the consumers of protection they would otherwise have enjoyed,²⁷ or the consumer is the only party who can choose the law at the locality of the provision of goods or services.²⁸ In other jurisdictions, specific applicable law rules, such as the *lex fori*, are provided for consumer contracts, with the purpose of preventing consumers' rights from being evaded or limited by this choice.²⁹ Yet other jurisdictions opt to protect consumers by excluding, partially or entirely, any possibility of concluding choice of law agreements.³⁰

²⁰ As is the case in California and other US states, or several Asian States. With respect to the US, see G. Cuniberti, *Conflict of Laws: A Comparative Approach*, 2nd edition, Edward Elgar Publishing (2022). Information about Asian States may be found in: W. Chen and G. Goldstein, "The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law", *Journal of Private International Law*, Vol. 13 (2017), p. 430.

²¹ For instance, many US states, see S.C. Symeonides, *Choice of Law*, The Oxford Commentaries on American Law, (2016), pp. 414-433. Or, choice of law clauses are null and void, if the courts consider them unfair under certain circumstances, for instance, the Hotels.com case in Israel. CODIFI Conference, M. Dotta and Y. Weiner, *supra*, note 4. In that case, mandatory rules to protect consumers override the Texan choice of law. Similarly, it was argued that the choice of law clause itself is an unfair term in a standard form contract and that it should be disregarded. In this case, the Attorney General emphasised the imbalance of power, even more so when consumers interact with large corporations.

²² Such as, the People's Republic of China, the EU, Japan, the Republic of Korea and Uruguay.

²³ Sec. 67 of Sch. 2 of the Australian Consumer Law of 2010 (*Valve Corporation v ACCC* [2017] FCAFC 224); Sec. 13(1) of the Singapore Consumer Protection (Fair Trading) Act 2009; in the US, the Model Consumer Credit Code (MCCC) drafted by the Uniform Law Commission. For an overview of the situation in the EU, see L.M. van Bochove, *supra*, note 18.

²⁴ S.C. Symeonides, "The scope and limits of party autonomy in international contracts" in F. Ferrari and D. Fernández Arroyo (eds), *Private International Law: Contemporary challenges and continuing relevance*, Edward Elgar Publishing (2019) (Symeonides 2019), p. 105.

²⁵ For example, under the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation), for individual employment contracts and consumer contracts a specific protection technique is used, which ensures that the weaker party can profit from a choice of law in the contract and cannot lose any protection they would otherwise have enjoyed (see Arts 6 and 8); see also in Vietnam, Art. 682(5) of the 2015 Civil Procedure Code.

²⁶ For example, in Colombia and Venezuela, see C. Fresneda de Aguirre, "Second Progress Report: Contracts Between Merchants with a Contractually Weaker Party", 100th Regular Session of the OAS, (2022), p. 7.

²⁷ Such as, in Bahrain (Art. 22 of Act No 6/2015 on Conflict of Law in Civil and Commercial Matters involving a Foreign Element); in Canada (Quebec) (Art. 3117 of the Civil Code of Quebec); in the EU (Art. 6 of the Rome I Regulation); in Japan (Art. 11 of the Japanese Act on the General Rules of Application of Laws (2006)) (Japanese Act 2006).

²⁸ Art. 42 of the Law on the Choice of Law for Foreign-related Civil Relationships of the People's Republic of China (Chinese Law on Choice of Law).

²⁹ Such as Brazil and several common law African countries, see CODIFI Conference, G. Cordero-Moss, R.F. Oppong, L. Gama, G. Xu and N. Zhao, *supra*, note 5.

³⁰ Such as Argentina (Art. 2651 of the Civil and Commercial Code of the Nation); Brazil (see D. Girsberger, T.K. Grazino, J.L. Neels, *supra*, note 19, para. 56.20, stating that "Given the special nature and the mandatory character of the laws governing these agreements, consumer contracts and labour agreements generally fall outside the scope of party autonomy in international contracts."); Mexico (See C. Fresneda de Aguirre, *supra*, note 26, p. 8); Uruguay (Art. 50(E) of the Law 19,920 of November 2020 General Law of Private International Law (Uruguay PIL Act) and Switzerland

- 20 With regard to employment contracts, certain jurisdictions allow for the possibility to conclude choice of law clauses in individual employment contracts, as long as these clauses do not deprive employees from the protection they would otherwise have been granted by the law of the State in which or from which they habitually carry out their activities or where they were engaged.³¹ In another jurisdiction, specific mandatory rules of the law of the place with which the contract is most closely connected will apply, provided that the employee expressly accepts that these mandatory rules apply.³² Similarly, some jurisdictions set limitations on the laws that can be chosen by the parties in employment contracts,³³ while others exclude party autonomy for employment contracts³⁴ and provide specific applicable law rules instead.³⁵
- 21 There are also differences as to which categories of parties require special protection given the weaker bargaining power that they have in contractual relationships.³⁶ In addition to consumers and individual employees, who are generally recognised as weaker parties, some jurisdictions also consider insurance policyholders³⁷ and passengers³⁸ as weaker parties, and provide protection to these categories of parties in the context of their applicable law rules.³⁹

D. Conclusion

- 22 Experts have written about the need for the protection of weaker parties from a PIL perspective since the 1970s.⁴⁰ There is continuing concern that unlimited freedom by stronger parties to choose would lead to the circumvention of the rules enacted to protect weaker parties from exploitation.⁴¹
- 23 Increased cross-border commercial activity as a result of globalisation and development of technology has exposed consumers and employees to unfamiliar legal systems and an increased risk of being a vulnerable party. Consumers are less capable of managing such risks, particularly in an international context, where they may encounter higher costs and have more limited access to legal information and advice.⁴² Electronic and web-based commerce has led to the expansion of temporal and geographical boundaries of transactions. This may exacerbate information asymmetries and unfair commercial practices. As a response to these developments and a risk-

(Art. 120(2) of the Swiss Federal Act on Private International Law (Swiss PIL Act) excludes the possibility of concluding choice of law agreements in consumer contracts).

³¹ Art. 8 of the Rome I Regulation; Art. 3118 of the Civil Code of Quebec.

³² Art. 12 of the Japanese Act 2006. (The law of the contract which is most closely connected is presumed to be the law of the place where the work should be carried out under the contract.)

³³ For example, Switzerland (Art. 121(3) of the Swiss PIL Act) and Uruguay (Art. 50(F) of the Uruguay PIL Act).

³⁴ For example, Brazil (*supra*, note 30); People's Republic of China (Art. 43 of the Chinese Law on Choice of Law); Mexico (see C. Fresno de Aguirre, *supra*, note 26, pp. 7-8); Qatar (Art. 28 of the Qatar Civil Code, for explanation, see D. Girsberger, T.K. Grazino, J.L. Neels, *supra*, note 19, para. 34.12); Tunisia (D. Girsberger, T.K. Grazino, J.L. Neels, *supra*, note 19, para. 18.12) and Ukraine (see Symeonides 2019, *supra*, note 24, p. 105).

³⁵ For example, under Chinese law, labour contracts are governed by the laws of the working locality of labourers (Art. 43 of the Chinese Law on Choice of Law); in Qatar, the law of jurisdiction where the head office of the employer is located governs the employment contracts.

³⁶ N. Reich, "The Principle of Protection of the Weaker Party", *General Principles of EU Civil Law*, Intersentia, (2013), pp. 37-58.

³⁷ Canada (Quebec) (Art. 3119 of the Civil Code of Quebec); Uruguay (Art. 50(G) of the Uruguay PIL Act) or the EU (Art. 7 of the Rome I Regulation). G. Rühl, "The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy", *Journal of Private International Law*, Vol. 10 (2014), pp. 335-358. See also F. Ferrari and D. Fernández Arroyo, *supra*, note 24, pp. 105-107; A. Briggs, *Agreements on Jurisdiction and the Choice of Law*, Oxford Private International Law series, (2007), p. 425.

³⁸ For example, Art. 50(H) of the Uruguay PIL Act; Art. 50 of the Albania Law on Private International Law; Art. 5.2 of the Rome I Regulation.

³⁹ The EU and Uruguay, by way of example, provide specific rules for protection of these parties, while other jurisdictions, for instance, Argentina, offer only specific protection for insurance policyholders.

⁴⁰ A. Briggs, *supra*, note 37, p. 12. Similarly, M. Azmi Abu Moghli & M. Abd Al-Salam Al-Sararia, *supra*, note 19, p. 1364.

⁴¹ G. Cuniberti, *supra*, note 20, pp. 410-418.

⁴² A. Galić, "Jurisdiction over Consumer, Employment, and Insurance Contracts under the Brussels I Regulation Recast", *Austrian Law Journal*, Vol. 2 (2016), p. 123.

management strategy, there have been calls for the development of an HCCH instrument that would protect weaker parties and deal with applicable law issues in electronic consumer contracts,⁴³ including through the creation of a worldwide network of cooperation to ensure consumer protection.⁴⁴

- 24 Due to the lack of an international instrument dealing with applicable law rules while focusing on weaker party protection and the divergence among national law and practice in this area, the HCCH may consider embarking on a project providing protection to weaker parties from the perspective of applicable law. This will be in line with the mandate of the HCCH for the progressive unification of PIL rules, as well as help achieve the United Nations Sustainable Development Goals through enhanced legal certainty and access to justice.

IV. Proposal for CGAP

- 25 Weaker party protection through an international instrument dealing with applicable law rules will bridge the divergences among national law and practice in this area, in particular, to address the increasing cross-border contracts that are concluded as a result of globalisation and the growth of electronic and web-based commerce. Having in mind the limited resources at the PB and the work programme assigned to the International Commercial, Digital and Financial Law Division, the PB proposes the following Conclusions and Decisions for CGAP's consideration:

CGAP mandated the establishment of an Experts' Group to explore the feasibility, desirability and necessity of developing guidance on applicable law in international contracts providing protection to weaker parties. Subject to available resources, CGAP mandates the PB to continue monitoring developments relating to the 2015 Principles in order to identify areas for review and future work, and to develop promotional documents on the 2015 Principles. The Experts' Group and the PB are to report to CGAP at its next meeting in March 2024.

⁴³ CODIFI Conference, G. Cordero-Moss, R.F. Oppong, L. Gama, G. Xu and N. Zhao, *supra*, note 5.

⁴⁴ C. Lima Marques, "Nota sobre a Conferência de Haia de Direito Internacional Privado e a Proteção Internacional dos Consumidores" in A. Carvalho Ramos (de) and N. Araujo (de) (eds.), *A Conferência da Haia de Direito Internacional Privado e Seus Impactos Na Sociedade – 125 anos (1893 – 2018)*, (2018), pp. 454 and 472.

ANNEX

Annex I National and Regional Law

Jurisdiction	Legislation	Provisions
Albania	Law “On Private International Law” No 10428 of 02.06.2011. (not official translation)	<p>Article 48 Work contract</p> <ol style="list-style-type: none"> 1. The individual employment contract is governed by the law chosen by the parties. 2. When the parties have not chosen the applicable law, the government rules in Article 3 of the Labor Code are followed. <p>Article 50 Contract of carriage</p> <ol style="list-style-type: none"> 1. The parties can choose as the applicable law of the passenger transport contract only the law of the state where: <ol style="list-style-type: none"> a) the traveller has his foreign residence; b) the transport has its external location; c) the center's sales carrier; ç) the place of departure is located; d) the place of destination is located. 2. When the law applicable to a passenger agreement has not been chosen by the parties, the law of the country of the passenger's foreign residence applies, provided that both the place of departure and the place of destination are also located in this country. When this condition is denied, the law of the country where the carrier has its seat in England applies. 3. The law applicable to a contract for the carriage of goods, unless it is chosen by the parties, applies the law of the country where the transport has its foreign location, provided that its place of delivery is also the place of delivery in this country. 4. When it is applied it is clear from all that are the issues that the contract, in some points of the law issues from the parties, is not related to another state that is indicated in points 1, 2 and 3 others state law. <p>Article 51 Insurance contract</p> <ol style="list-style-type: none"> 1. The law applicable to the insurance contract covering a major risk is the law chosen by the parties.

	<p>2. When the applicable law has not been chosen by the parties, insurance contracts covering a major risk are governed by the law of the state where the insurer has its foreign residence.</p> <p>3. When it is clear from all these issues that the contract is concluded with another state, the law of the state applies.</p> <p>4. In the case of other insurance contracts, other than insurance contracts, covering a large risk, the parties may choose:</p> <p>a) in the state where the risk is located in the laws;</p> <p>b) the law of the state where the security police have their official residence;</p> <p>c) the law of the state whose citizen was detained by the insurance police in the case of life insurance;</p> <p>ç) in the relevant state or the law in force in the place of residence of the persons detained by the police, when the insurance police holder of a contract performs an activity and the economic insurance contract covers two or more people, who are related to this activity and are located in different countries.</p> <p>5. When the applicable law is not chosen by the insurance contracts, according to point 4 of the article, it is governed by the law of the state where the risk is located in the contractual relationship.</p> <p>6. The rules of this provision do not apply to insurance contracts.</p> <p>Article 52 Contracts with the consumer</p> <p>1. Without prejudice to articles 50 and 51 of the law, related to a consumer and a person, acting in the exercise of his commercial or professional activity, is regulated by the law of the country in which the consumer has his foreign residence, provided that:</p> <p>a) trader or professional:</p> <p>i) to develop his commercial or professional activity in the country of the consumer;</p> <p>ii) direct this activity, by any means, to the state or to different states, including the latter;</p> <p>b) contracts in the field of this activity.</p> <p>2. Except from point 1 of an article, the parties may choose the applicable contract law, which meets the conditions of point 1, instead of article 45 such law. However, the choice of law cannot deprive the consumer of protection, which are</p>
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Argentina	Civil and Commercial Code of the Nation (CCCN) (not official translation)	<p>Article 2651 Party autonomy. Rules.</p> <p>This article does not apply to consumer contracts.</p>
Azerbaijan	Law About Private International Law (On June 6, 2000 No 889-IG, as amended of the Law of the Azerbaijan Republic of 09.07.2021 No. 370-VIQD) (not official translation)	<p>Article 24. Choice of law by agreement of the contract participants</p> <p>24.1. Determining the rights and obligations of the parties in relation to the contract, interpretation, execution, non-execution, termination of the contract, the consequences of non-execution and invalidity of the contract, as well as concession of the claim and transfer of the debt related to the contract are regulated by the law of the country chosen by the agreement of the parties.</p> <p>24.2. The contracting parties can choose the law to be applied both for the contract as a whole and for its separate parts.</p> <p>24.3. The parties may choose the law to be applied at any time, including at the time of signing the contract or after. The parties may also agree to change the law applicable to the contract at any time.</p> <p>24.4. A choice of law that leads to non-application of the mandatory norms of the country regarding the contract is invalid.</p>

Bahrein	Act No 6/2015 on Conflict of Law in Civil and Commercial Matters involving a Foreign Element (not official translation)	<p>Article 19 Employment Contracts</p> <ul style="list-style-type: none"> a) Employment contracts shall be subject to the law of the state where the contract is substantially performed. b) If the contract is substantially performed in more than one state, then the law applicable shall be of the state within which the principal place of business is situated. c) If the principal place of business is abroad, nevertheless, employment contracts were concluded by a branch located in Bahrain, then Bahraini law shall apply provided that the employment contract is substantially performed in the Kingdom of Bahrain. d) Without prejudice to the overriding mandatory rules of the applicable law as stated in paragraphs (a) and (b) of this article, parties have the freedom to choose another law to be applied to their employment contract. <p>Article 22 Consumer Contracts</p> <p>Consumer contracts shall be subject to the law of the state of consumer's habitual residence, unless otherwise agreed by the parties, or if it is evident from the circumstances that another law is intended to be applied. Such choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by virtue of the law of his habitual residence.</p>
Canada (Quebec)	Civil Code of Quebec	<p>§ 3. — Consumer contract</p> <p>3117. The choice by the parties of the law applicable to a consumer contract cannot result in depriving the consumer of the protection afforded to him by the mandatory rules of the law of the State where he has his residence if the conclusion of the contract was preceded, in that State, by a specific offer or by advertising and the consumer took in that State all the steps necessary on his part for the conclusion of the contract, or if the order from the consumer was received in that State. The same rule also applies where the consumer was induced by the other contracting party to travel to a foreign State for the purpose of concluding the contract.</p> <p>In the absence of a designation by the parties, the law of the place where the consumer has his residence is, in the same circumstances, applicable to the consumer contract.</p> <p>1991, c. 64, a. 3117; I.N. 2014-05-01.</p> <p>§ 4. — Contract of employment</p> <p>3118. The choice by the parties of the law applicable to a contract of employment cannot result in depriving the worker of the protection afforded to him by the mandatory rules of the law of the State where the worker habitually carries out his work, even if he is on temporary assignment in another State or, if the worker does not habitually carry out his work in any one State, of the law of the State where his employer has his domicile or establishment.</p> <p>In the absence of a designation by the parties, the law of the State where the worker habitually carries out his work or the law of the State where his employer has his domicile or establishment is, in the same circumstances, applicable to the contract of employment.</p> <p>1991, c. 64, a. 3118; I.N. 2014-05-01.</p>

		<p>§ 5. — <i>Contract of non-marine insurance</i></p> <p>3119. Notwithstanding any agreement to the contrary, a contract of insurance covering property or an interest situated in Québec, or that is subscribed in Québec by a person resident in Québec, is governed by the law of Québec if the policyholder applies for the insurance in Québec or the insurer signs or delivers the policy in Québec. Similarly, a contract of group insurance of persons is governed by the law of Québec where the participant has his residence in Québec at the time he becomes a participant. Any sum due under a contract of insurance governed by the law of Québec is payable in Québec.</p>
China, People's Republic of	Law on the Application of Law to Foreign-Related Civil Relations (not official translation)	<p>Article 42</p> <p>The laws at the habitual residence of consumers shall apply to consumer contracts; If a consumer chooses the applicable laws at the locality of the provision of goods or services or an operator has no relevant business operations at the habitual residence of the consumer, the laws at the locality of the provision of goods or services shall apply.</p> <p>Article 43</p> <p>The laws at the working locality of laborers shall apply to labor contracts; if it is difficult to determine the working locality of a laborer, the laws at the main business place of the employer shall apply. The laws at the dispatching place of labor services shall apply to labor dispatches.</p>
European Union	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 On the law applicable to contractual obligations (Rome I)	<p>Article 5 Contracts of carriage</p> <p>1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.</p> <p>2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.</p> <p>The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:</p> <ol style="list-style-type: none"> 1. the passenger has his habitual residence; or 2. the carrier has his habitual residence; or

	<p>3. the carrier has his place of central administration; or</p> <p>4. the place of departure is situated; or</p> <p>5. the place of destination is situated.</p> <p>3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.</p> <p>Article 6 Consumer contracts</p> <p>1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:</p> <p>(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or</p> <p>(b) by any means, directs such activities to that country or to several countries including that country,</p> <p>and the contract falls within the scope of such activities.</p> <p>2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.</p> <p>3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.</p> <p>4. Paragraphs 1 and 2 shall not apply to:</p> <p>(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;</p> <p>(b) a contract of carriage other than a contract relating to package travel within the meaning of Council</p>
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		<p>effective exercise of freedom to provide services and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.</p> <p>Article 8 Individual employment contracts</p> <p>1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.</p> <p>2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.</p> <p>3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.</p> <p>4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.</p>
Japan	Act 78 of 2006, on General Rules for Application of Laws (not official translation)	<p>Article 11 Consumer Contracts</p> <p>(1) Even if the law governing the formation and effect of a contract (except for a labor contract) that is concluded between a consumer (the term "consumer" as used in this article means an individual who becomes a contractual party neither in nor for the purpose of business) and a business operator (the term "business operator" as used in this article means a juridical person or other association or foundation, or an individual who becomes a contractual party in or for the purpose of business), which is referred to in the following provisions of this article as a "consumer contract", is, according to a choice or change of governing law pursuant to Article 7 or Article 9 respectively, a law other than the law of the place where the consumer habitually resides, the specific mandatory rules in the law of the consumer's habitual residence shall also apply to matters subject to such mandatory rules with regard to the formation and effect of the consumer contract, provided that the consumer expresses his/her will to the business operator to the effect that such mandatory rules should apply.</p> <p>(2) If the parties have not chosen a law to govern the formation and effect of their consumer contract pursuant to Article 7, the formation and effect of such consumer contract shall be, notwithstanding Article 8, subject to the law of the</p>

		<p>consumer's habitual residence.</p> <p>(3) Even if a law other than the law of the consumer's habitual residence has been chosen to govern the formation of a consumer contract pursuant to Article 7, the specific mandatory rules in the law of his/her habitual residence shall exclusively apply to matters subject to such mandatory rules with regard to the formalities of the consumer contract, notwithstanding paragraphs 1, 2 and 4 of the preceding article, provided that the consumer expresses his/her will to the business operator to the effect that such mandatory rules should apply.</p> <p>(4) If the law of the consumer's habitual residence has been chosen to govern the formation of a consumer contract pursuant to Article 7, and if the consumer expresses his/her will to the business operator to the effect that the law of his/her habitual residence should exclusively apply to the formalities of the consumer contract, the formalities of the consumer contract shall be governed by the law of the consumer's habitual residence, notwithstanding paragraphs 2 and 4 of the preceding article.</p> <p>(5) If the parties have not chosen a law to govern the formation of their consumer contract pursuant to Article 7, the formalities of the consumer contract shall be governed by the law of the consumer's habitual residence, notwithstanding paragraphs 1, 2 and 4 of the preceding article.</p> <p>(6) The preceding paragraphs 1 through 5 are not applicable in any of the following cases:</p> <ul style="list-style-type: none"> (i) the business operator's establishment which relates to the consumer contract is located in a jurisdiction other than the jurisdiction of the consumer's habitual residence, and the consumer goes to the jurisdiction of the business operator's establishment and concludes a consumer contract in that jurisdiction; except where the consumer has been solicited by the business operator to conclude the consumer contract in that jurisdiction. (ii) the business operator's establishment which relates to the consumer contract is located in a jurisdiction other than the jurisdiction of the consumer's habitual residence, and the consumer goes to the jurisdiction of the business operator's establishment and receives or is to receive complete performance by the business operator in that jurisdiction; except where the consumer has been solicited by the business operator to receive complete performance to be performed by the business operator in that jurisdiction. (iii) at the time the consumer contract is concluded, the business operator is unaware of the location of the consumer's habitual residence and has reasonable ground for such unawareness. (iv) at the time the consumer contract is concluded, the business operator has misidentified the counterparty as not being a consumer and has reasonable ground for such misidentification. <p>Article 12 Labor Contracts</p> <p>(1) Even if the law governing the formation and effect of a labor contract is, according to a choice or change of governing law pursuant to Article 7 or Article 9 respectively, a law other than the law of the place with which the labor contract is most</p>
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		<p>closely connected, the specific mandatory rules in the law of the place with which the labor contract is most closely connected shall also apply to matters subject to such mandatory rules with regard to the formation and effect of the labor contract, provided that the employee expresses his/her will to the employer to the effect that such mandatory rules should apply.</p> <p>(2) In applying the preceding paragraph, the law of the place where labor is to be carried out according to the labor contract (if the place where labor is to be carried out cannot be identified, the law of the place of the establishment at which the employee has concluded the employment contract; the same definition applies to the following paragraph) is presumed to be the law of the place with which the labor contract is most closely connected.</p> <p>(3) If the parties have not chosen a law to govern the formation and effect of the labor contract pursuant to Article 7, the law of the place where labor is to be carried out is, notwithstanding Article 8, paragraph 2, presumed to be the law with which the labor contract is most closely connected.</p>
Qatar	Qatar Civil Code (Federal Law No 22 of 2004) (not official translation)	<p>Article 28</p> <p>Employment contracts between employers and employees shall be governed by the law of jurisdiction where the head office of the employer is located. If the head office is located abroad, but particular contracts are concluded by offices based in Qatar, then Qatari law shall apply to those contracts.</p>
Switzerland	Federal Act on Private International Law (PILA) (not official translation)	<p>Consumer contracts</p> <p>Article 120</p> <p>1 Contracts pertaining to goods or services of ordinary consumption intended for a consumer's personal or family use and not connected with the consumer's professional or business activity are governed by the law of the state of the consumer's habitual residence:</p> <ul style="list-style-type: none"> a. if the supplier received the order in that state; b. if the contract was concluded after an offer or advertising in that state and if the consumer performed in that state the acts required to conclude the contract; or c. if the consumer was induced by the supplier to go abroad for the purpose of placing the order. <p>2 No choice of law is allowed.</p> <p>Employment contracts</p> <p>Article 121</p>

		<p>1 Employment contracts are governed by the law of the state in which the employee habitually performs their work.</p> <p>2 If the employee habitually performs their work in several states, the employment contract is governed by the law of the state of the establishment or, in the absence of an establishment, of the domicile or habitual residence of the employer.</p> <p>3 The parties may submit the employment contract to the law of the state in which the employee has their habitual residence or in which the employer has their establishment, domicile, or habitual residence.</p>
Republic of Korea	Act on Private International Law [Act No.18670, 4 January 2022, Total Amendment] (not official translation)	<p>Article 47 Consumer Contract</p> <p>(1) The protection given by the mandatory provisions of the country where the habitual residence of the consumer is located, shall not be deprived even if the parties choose the applicable law.</p> <p>(2) In case the parties do not choose the applicable law, the contract shall be governed by the law of the habitual residence of the consumer irrespective of the provision of Article 46.</p> <p>(3) The method of a contract shall be governed by the law of the habitual residence of the consumer irrespective of the provisions of Article 31 (1) through (3).</p> <p>Article 48 Employment Contract</p> <p>(1) In case of an employment contract, even if the parties choose the applicable law, the protection, given to the employee under the mandatory provisions of the country of the applicable laws designated under paragraph (2), shall not be deprived.</p> <p>(2) In case the parties do not choose the applicable law, irrespective of the provisions of Article 46, the employment contract concerned shall be governed by the law of the country where the employee habitually provides his/her service. In case the employee does not habitually provide his/her service within one country, the law of the country, where the business office of the employer who hires the employee is located, shall govern.</p>
Tunisia	Code of Private International Law of 1998 (not official translation)	<p>Article 67</p> <p>The employment contract is governed by the law of the State in which the worker usually performs his work.</p> <p>If the worker habitually performs his work in several States, the employment contract is governed by the law of the State of establishment of the employer, unless it results from all the circumstances that the right to work has closer property with another State, in which case the law of the latter is applicable</p>
Uruguay	Law 19,920 of November 2020 General Law of Private International Law	<p>Article 50 (Special Solutions)</p> <p>The previous rules of this chapter are not applicable to the following contracts, even if they are international, which will be governed by the rules indicated below:</p> <p>E) The contracts granted in consumer relations are governed:</p> <p>1) By the law of the State where the goods are purchased or the services are used by the consumer.</p> <p>2) In the event that the goods are acquired or the services are used in more than one country or if said law cannot be</p>

	(not official translation)	<p>determined for other reasons, they will be governed by the law of the place of domicile of the consumer.</p> <p>3) In contracts entered into at a distance, as well as when the conclusion has been preceded by offers or specific advertising at the consumer's home, the law of this State shall apply, provided that the consumer has given his consent to it.</p> <p>F) Individual employment contracts in a dependency relationship - except those for remote work - are governed by the law of the place where the work is provided or by the law of the worker's domicile or by the law of the employer's domicile, at the option of the worker. But once it is determined, it will govern all aspects of the employment relationship.</p>
Vietnam	2015 Civil Code (not official translation)	<p>Article 683 Contracts</p> <p>1. Contracting parties in a contract may agree to select the applied law for the contract, other than regulations of Clauses 4, 5 and 6 of this Article. In case the contracting parties fail to agree the applied law, the law of the country with which such contract closely associates shall apply.</p> <p>2. The laws of any of the following countries shall be treated as the law of the country with which such contract closely associates:</p> <p>a) The law of the country where the seller being natural person resides or the seller being juridical person is established in terms of sale contracts;</p> <p>b) The law of the country where the provider being natural person resides or the provider being juridical person is established in terms of service contracts;</p> <p>c) The law of the country where the transferee being natural person resides or the seller being juridical person is established in terms of contracts of transferring rights to use or intellectual property rights;</p> <p>d) The law of the country where employees frequently perform do jobs in terms of labor contracts. If an employee frequently does jobs in multiple countries or the country in which the employee frequently does his/her job is unidentifiable, the law of the country with which his/her labor contract closely associates shall be the law of the country where the employer being natural person resides or the employer being juridical person is established.</p> <p>dd) The law of the country where consumers resides in terms of consume contract.</p> <p>[...]</p> <p>5. If the applied law selected by contracting parties in a labor contract or a consume contract affects adversely minimum interests of employees or consumers as prescribed in the law of Vietnam, the law of Vietnam shall prevail.</p>

Deleted: Procedure