

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Basel - 1991

**The Autonomy of the Parties in International Contracts
Between Private Persons or Entities**

(Seventh Commission, Rapporteur : Mr Eric Jayme)

(The French text is authoritative. The English text is a translation.)

The Institute of International Law,

Stressing the primary importance of private international law for the development of trade and relations between private persons or entities in the international sphere ;

Considering that the autonomy of the parties is one of the fundamental principles of private international law ;

Recognizing that the autonomy of the parties has also been enshrined as a freedom of the individual in several conventions and various United Nations resolutions ;

Reserving generally, and especially with regard to arbitration, the question of the choice by the parties, and the application of rules of law other than those of a particular State ;

Adopts the following Resolution :

Article 1

1. This Resolution shall apply to international commercial contracts made between private persons or entities, where the parties have agreed on the application of the law of any State.
2. However, this Resolution shall not apply to contracts of employment or to contracts concluded with consumers.

Article 2

1. The parties shall be free to choose the law applicable to their contract. They may agree on the application of the law of any State.

For the purpose of this Resolution, a territorial unit shall be treated as if it were a State where such unit has its own substantive law governing contracts.

2. The law chosen by the parties shall apply to the exclusion of its choice of law rules, unless the parties expressly provide otherwise.

Article 3

1. The choice of the applicable law shall be derived from the agreement of the parties.

2. In the absence of an express agreement, the choice shall be derived from those circumstances which indicate clearly the intention of the parties.

3. Whenever the contract is not valid under the law chosen by the parties, that choice shall have no effect.

Article 4

1. The existence and validity of the agreement of the parties to the choice of the applicable law shall be determined by that law.

2. However, a party who does not reply to an offer to conclude a contract may have the effects of his silence governed by the law of the State of his habitual residence.

Article 5

1. The applicable law may be designated by general conditions of contract, to which the parties have agreed.

2. Such agreement must be expressed in writing, or in a way which conforms with practices established by the parties, or in accordance with trade custom known to them.

Article 6

1. The parties may, after the conclusion of the contract, choose the applicable law or modify an earlier choice.

2. Subject to rights acquired by third parties, the parties may give retrospective effect to such a choice.

Article 7

The parties may choose the law to be applied to the whole or to one or more parts of the contract.

Article 8

If the parties agree that the chosen law is to be applied as it is in force at the time when the contract was concluded, the provisions of that law shall be applied as substantive provisions incorporated in the contract ; if, however, the chosen law has been amended or repealed by mandatory rules which are intended to govern existing contracts, effect shall be given to those rules.

Article 9

1. The chosen law shall apply without prejudice to mandatory provisions of the law of the forum, which must be applied to the situation irrespective of the law applicable to the contract.
2. If regard is to be had to mandatory provisions, within the meaning of the preceding paragraph, of a law other than that of the forum or that chosen by the parties, then such provisions can only prevent the chosen law from being applied if there is a close link between the contract and the country of that law and if they further such aims as are generally accepted by the international community.

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(31 August 1991)