Global Empirical Survey on Choice of Law

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Survey Goals

In contract negotiations, parties may frequently choose the governing contract law based on previous practices and the positive and negative experiences related to the trading partner and/or the transaction. Nonetheless, there are factors of a practical standpoint that parties should evaluate and take into consideration while assessing the pros and cons of any governing contract law at the choice-of-law decision stage.

The governing law sets out the standards, defines the effects of acts and omissions of the contracting parties, and dictates and guides the parties' behaviour in the course of a contract's life.[2] For example, such decisions may include whether or not to perform or breach the contract, to remain silent in respect of an offer, to claim damages or mitigate losses, to gather evidence, to exchange and communicate information, to manage, transfer or allocate risks, to behave opportunistically, to adopt recalcitrant tactics, and to spend resources in resolving (or not) disputes.

Under a pure rational perspective, individuals make decisions utilizing a compensatory strategy. In other words, they identify and evaluate all available options, assess and weigh all of the relevant attributes of each option, and then select the option they evaluate most favorably[3]. This requires actors to infer facts by applying principles of deductive logic to all known and relevant information. Therefore, while choosing the governing contract law, parties would process all available information, make choices and execute behaviors in a way calculated to maximize their expected utility, *i.e.* maximize the differential between expected benefits and expected costs[4].

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[2] See KATZ, Avery W., *Contract Formation and Interpretation*. In: The New Palgrave Dictionary of Economics and the Law (Peter Newman, Ed.), May 1998, pp. 1-14, p. 2, available at <http://ssrn.com/abstract=69534>.

[3] GUTHRIE, Chris. *Law, Information, and Choice: Capitalizing on Heuristic Habits of Thought. Heuristics and the Law*. In: Vanderbilt Law and Economics Research Paper No. 06-11, p. 427, available at <http://ssrn.com/abstract=900133>.

[4] KOROBKIN, Russell B. *The Problems with Heuristics for Law* (February 1, 2004). In: UCLA School of Law, Law & Econ Research Paper No. 4-1, p. 2, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=496462>.

On the other hand, under a heuristic-based approach[5], or an intuitive process, the choice of law decision may be based on empirical evidence, meaning that individuals use mental shortcuts to make decisions on the basis of limited information. In such a scenario, the decision would be assessed premised on their success or failure in real-world environments and not according to the logical and mathematical rules[6]. It is rather a simplified cognitive process of making decisions with uncertainties.

While the choice of law process may seldom be regarded as a rational choice, there are many factors, both legal and economic, that may influence and guide this choice.

This is precisely what the Survey has envisioned to demonstrate: a complete diagnosis of parties' preferences in the international contract negotiation context - their strategies and choices - while they assess and decide on the governing contract law of international sales, the advanced precautions taken, and the legal and economic considerations and concerns arising out of the table of negotiations.

Finally, the Survey brings to the readers, including parties to an agreement, party advisors, legal practitioners and laymen, empirical knowledge on parties' preferences in international sales negotiations, coupled with commercial tactics, useful observations and comments out of an international negotiation setting. It also includes an assessment of the main concerns associated with the substantive law, the intricate analysis of advantages and disadvantages of choosing domestic law and/*vis-à-vis* uniform laws to govern international sales contracts and the exclusions and opt-out mechanisms available to the contracting parties.

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[5] KOROBKIN, Russell B. *The Problems with Heuristics for Law* (February 1, 2004). In: UCLA School of Law, Law & Econ Research Paper No. 4-1, p. 2, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=496462>.
In this connection, see also FRAIDIN, Matthew I. *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability.* In: Cleveland State Law Review, vol. 60, 2013, pp. 913-974, noting that "[…] heuristics devices include "availability" and "representativeness", among other "mental shortcourts"…The availability heuristic allows a decision-maker to reach a decision by immediate, reflexive reference to a *different* situation that comes readily to mind… The "representativeness" heuristic similarly reflects a decision-maker's substitution of one item for another. A decision-maker who relies on the representativeness heuristic assesses a probability "by the degree to which A is representative of B, that is, by the degree to which A resembles B"… "Affect" or the good or bad feelings generated by a person or event, is another heuristic that sometimes drives decision-making" (pp. 919-920).

[6] For further information about heuristics and choice of law processes, see SPAGNOLO, Lisa. *Green eggs and ham: the CISG, path dependence, and the behavioural economics of lawyers' choices of law in international sales contracts*. In: Journal of Private International Law, vol. 6, issue 2, pp. 417-464, p. 438.

Respondent Profile

The respondents were profiled based on professional experience, legal background and geographical location. Party counsels and party advisors with significant experience in international sales contracts were invited to participate in the Survey.

The respondents were leading practitioners in the subject matter in their respective countries. All of the professionals invited to participate in the Survey were carefully selected through a series of searches premised on the above criteria.

Finally, legal practitioners who combined international sales law experience with expertise in other areas of law or practice areas were also approached, as the Survey aimed to offer a multi-disciplinary view on the choice-of-law process, and a clearer perception of this practice worldwide.

Methodology

The Survey was composed of an online questionnaire accessible by invitation only. The content of the Survey was available via a click-through link that guided the respondent to eight multiple-choice questions. The respondents were invited to participate in the Survey from July - September 2014.

In the online invitation, the respondent was made aware of the Survey goals, as well as of its structure, the estimated time to respond to the questionnaire, and the web link.

Being directed to the Survey webpage, the respondent was firstly informed about the Survey goals.

As a preliminary request, the respondent was invited to indicate his or her country of residence.

While completing the questionnaire, the respondent was allowed to specify other choices, preferences and/or concerns not listed in the provided answers and/or to make comments that he or she might wish to include regarding the choice-of-law decision-making process.

The questionnaire offered an indicative and non-exhaustive list of preferences that was, to a great extent, focused on legal and economic aspects, with some variations of terms for adequacy and methodological purposes. Nonetheless, in all of the proposed questions, the respondent was offered a blank box to identify or specify other choices, preferences and/or concerns, which could also be used to link a non-listed choice to precedent questions and for additional thoughts and comments.

A respondent should have taken around five to 10 minutes to respond to the questionnaire.

The eight questions displayed choices in random orders each time a new respondent accessed the questionnaire.

Questions 1 and 4 allowed the respondent to select only three choices or preferences – the reason for this was to better assess the main legal and economic considerations. The respondent could specify in a blank box his or her choice(s), preference(s) and/or concern(s) not listed. Questions 2, 3, 5, 6 and 7 allowed the respondent to select an unlimited number of choices, preferences and/or concerns – the Survey was intended to give the respondent more alternatives that would help draw assumptions regarding parties' preferences in these questions. Finally, Question 8 could be skipped or, if selected by the respondent, the reason for the exclusion or opting-out choice could be disclosed or omitted. Questions 1 to 8 are reproduced later in this article.

Survey Results

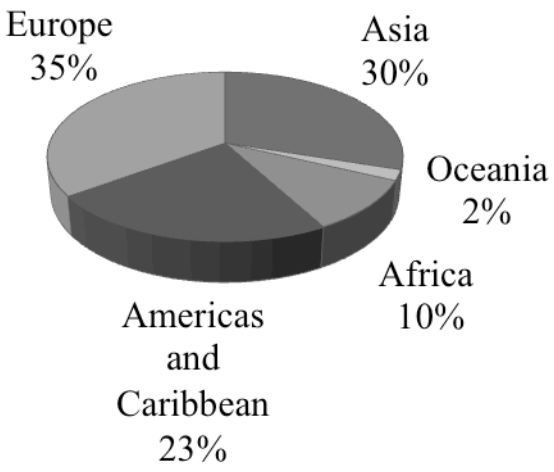
228 respondents from 93 jurisdictions completed the Survey. The respondents are located in Europe, Asia, the Americas and Caribbean, Africa and Oceania.

The respondents comprised 40 of the largest national economies in the world and some of the jurisdictions are listed in the top 100, in accordance with the World Bank's figures that measure the economy growth by the gross domestic product[7].

The figure below shows the percentage of jurisdictions per geographical region[8].

[7] Further information and data available at <http://data.worldbank.org/indicator/>.

[8] The full list of jurisdictions in alphabetical order: Albania, Austria, Azerbaijan, Australia, Armenia, Argentina, Bangladesh, Barbados, Bolivia (Plurinational State of), Brazil, Bahrain, Belarus, Belgium, Bermuda, Bulgaria, Cambodia, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Finland, France, Germany, Guatemala, Greece, Hong Kong (China), Hungary, Iceland, Indonesia, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Jamaica, Japan, Latvia, Luxembourg, Macao (China), Malaysia, Malta, Mexico, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Norway, Nicaragua, Nigeria, Panama, Paraguay, Peru, Poland, Portugal, Philippines, Kuwait, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Serbia, Singapore, South Africa, Slovakia, Slovenia. Spain, Sri Lanka, Sweden, Switzerland, Taiwan (Province of China), Tanzania (United Republic of), Thailand, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Ukraine, Uruguay, Venezuela (Bolivarian Republic of), Viet Nam, Zambia and Zimbabwe. Except for Taiwan, please note that the author classified the jurisdictions into geographical regions according to the United Nations Statistics Division. Further information available at <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.



Africa
Cameroon, Egypt, Mozambique, Namibia, Nigeria, South Africa, Tanzania (United Republic of), Zambia, Zimbabwe.

Americas and Caribbean
Argentina, Barbados, Bermuda, Bolivia (Plurinational State of), Brazil, Canada, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay, Venezuela (Bolivarian Republic of).

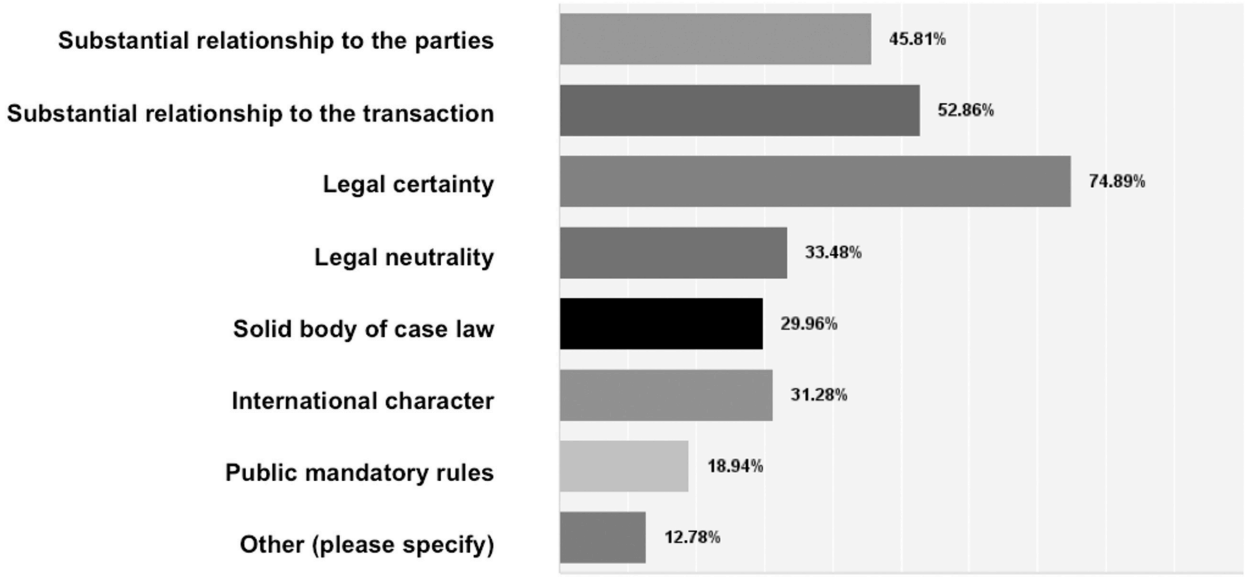
Asia
Armenia, Azerbaijan, Bahrain, Bangladesh, Cambodia, China, Cyprus, Hong Kong (China), Indonesia, India, Iran (Islamic Republic of), Israel, Japan, Kuwait, Macao (China), Malaysia, Myanmar, Nepal, Philippines, Republic of Korea, Saudi Arabia, Singapore, Sri Lanka, Taiwan (Province of China), Thailand, Turkey, United Arab Emirates, Viet Nam.

Europe
Albania, Austria, Belarus, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, Ukraine.

Oceania
Australia, New Zealand.

Legal Considerations

Question 1*: When choosing a substantive law to govern an international sales contract, what are your three (3) main legal considerations?*



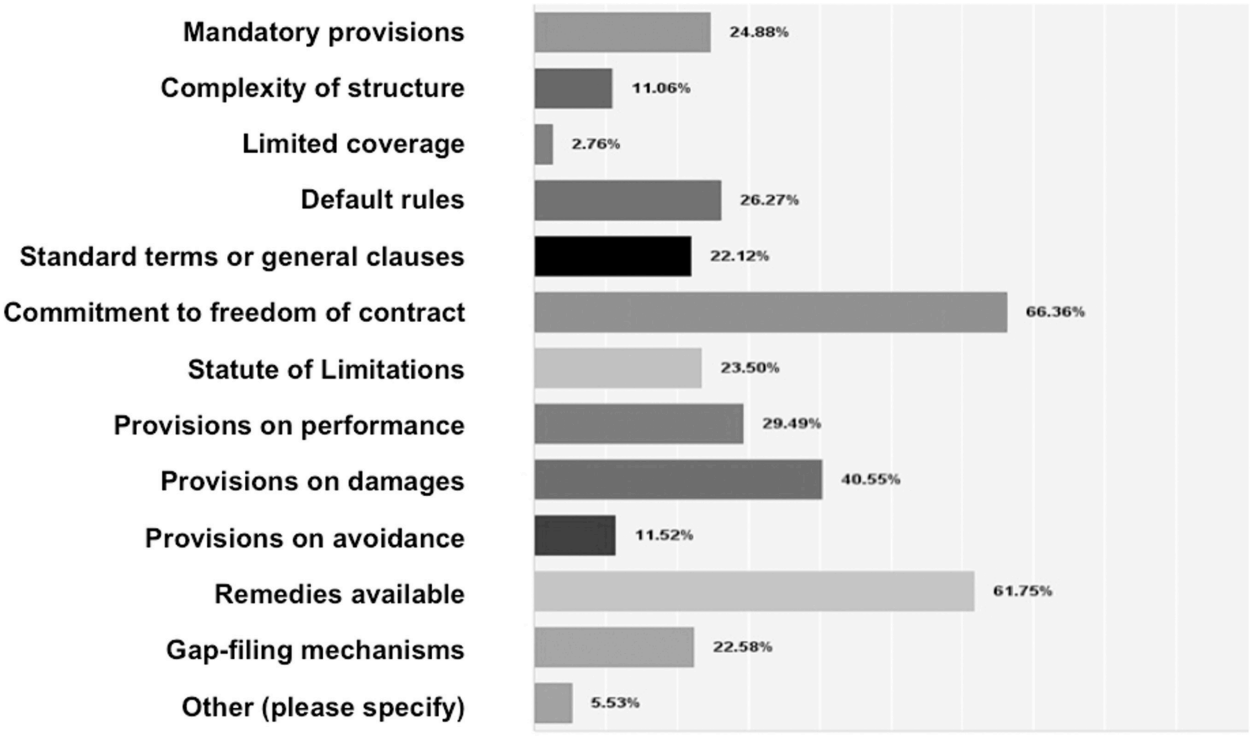
With respect to the main legal considerations in a choice-of-law decision-making process, the respondents elected legal certainty (74.89 per cent), substantial relationship to the transaction (52.86 per cent) and substantial relationship to the parties (45.81 per cent).

The respondents indicated the following additional main legal considerations:

- level of development of the proposed governing law;
- degree of familiarity with the law;
- cost and time;
- clients' interests;
- for a sale on credit basis, law of the buyer's jurisdiction;
- flexibility;
- accessibility to the law;
- legal rules easy to ascertain;
- "home turf" advantage where possible;
- enforceability;
- positive effects on the party who seeks advise;
- forum for dispute resolution;
- independent and corruption-free judiciary;
- habit - use of standard contracts;

- counsel and client's favorable experiences with, and knowledge of, the law;
- arbitration know-how available;
- enforceability of resulting judgment or award; and
- familiarity to lawyers acting.

Question 2: *Under a legal perspective approach, while analyzing the provisions of a substantive law, please indicate the features that may call particular attention and contribute to a decision in favor of the substantive law under analysis:*



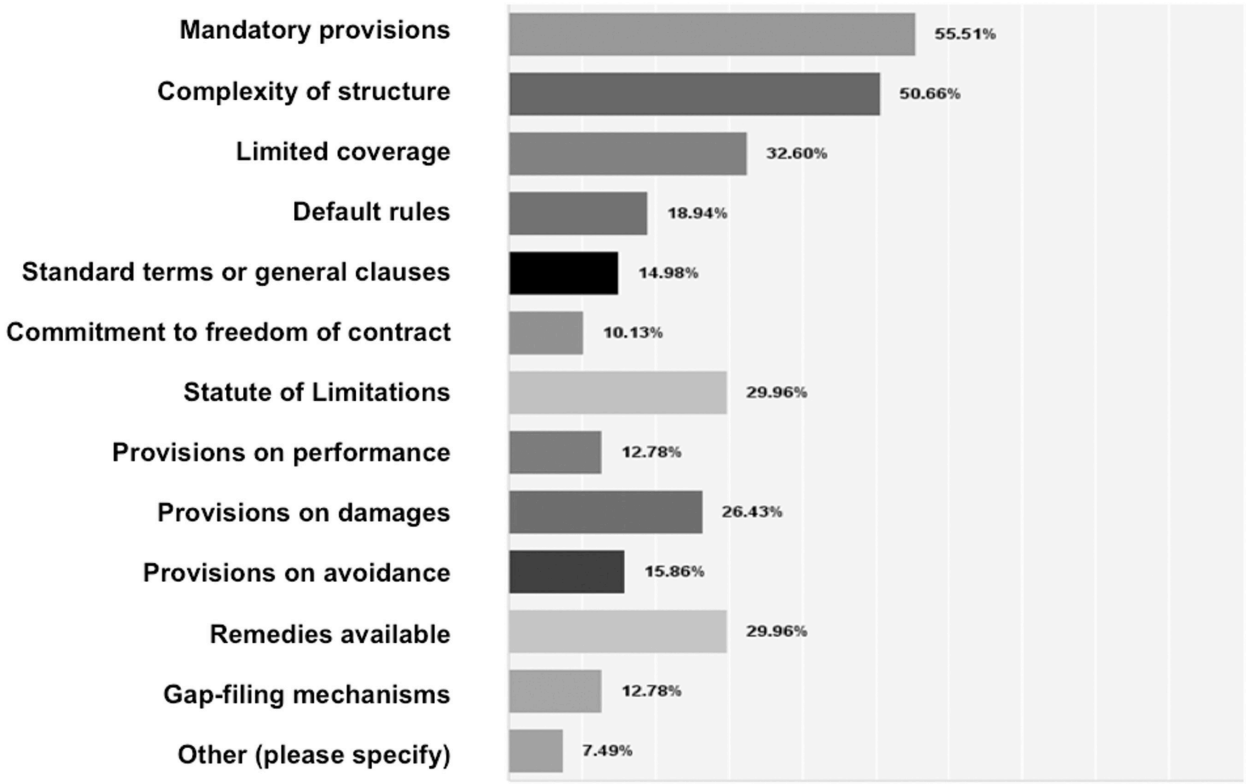
With respect to the positive legal features of a governing contract law, the respondents elected commitment to freedom of contract (66.36 per cent), remedies available (61.75 per cent) and provisions on damages (40.55 per cent).

The respondents indicated the following additional positive legal features of a governing contract law:

- predictability;
- enforcement rules and procedure;
- familiarity with the law of the jurisdiction by the parties;
- cost/convenience of resolving disputes;

- language considerations;
- depends on whether one is representing seller or buyer. For example: buyer's duties to verify; goods and related time limits; extent of seller's warranty;
- whether the jurisdiction has ratified the UN Convention on Contracts for the International Sale of Goods (CISG);
- quality of available arbitrators;
- provisions on discovery;
- contract law rules; and
- provisions on limitation of liability.

Question 3: *Under a legal perspective approach, while analyzing the provisions of a substantive law, please indicate the features that may call particular attention and contribute to a decision against the substantive law under analysis:*



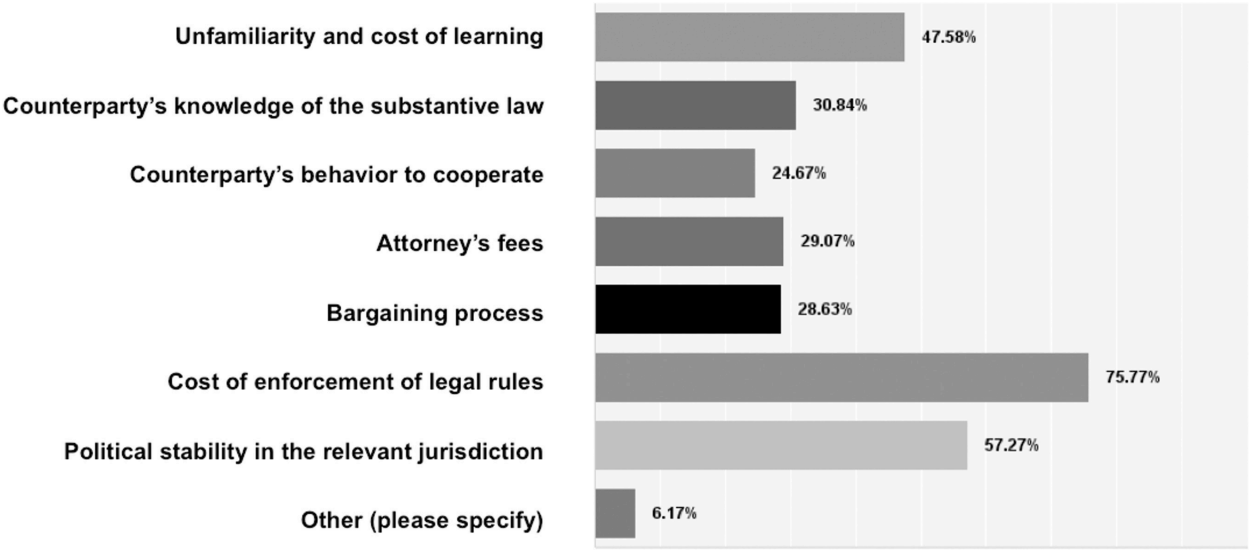
With respect to the negative legal features of a governing contract law, the respondents elected mandatory provisions (55.51 per cent), complexity of structure (50.66 per cent) and limited coverage (32.60 per cent).

The respondents indicated the following additional negative legal features of a governing contract law:

- restriction of parties' rights under a commercial transaction;
- unfamiliarity with the laws of the particular jurisdiction;
- state of administration of justice in applicable jurisdiction;
- cost/convenience of resolving disputes;
- language considerations;
- lack of qualified and impartial arbitrators in the relevant jurisdiction;
- independence and impartiality (or lack thereof) of judiciary;
- depends on whether one is representing seller or buyer;
- mandatory provisions curtailing the freedom of contract;
- lack of case law and doctrine;
- law different from the one of the place of performance;
- potential enforcement issues; and
- unpredictability.

Economic Considerations

Question 4: *When choosing a substantive law to govern an international sales contract, what are your three (3) main economic considerations?*

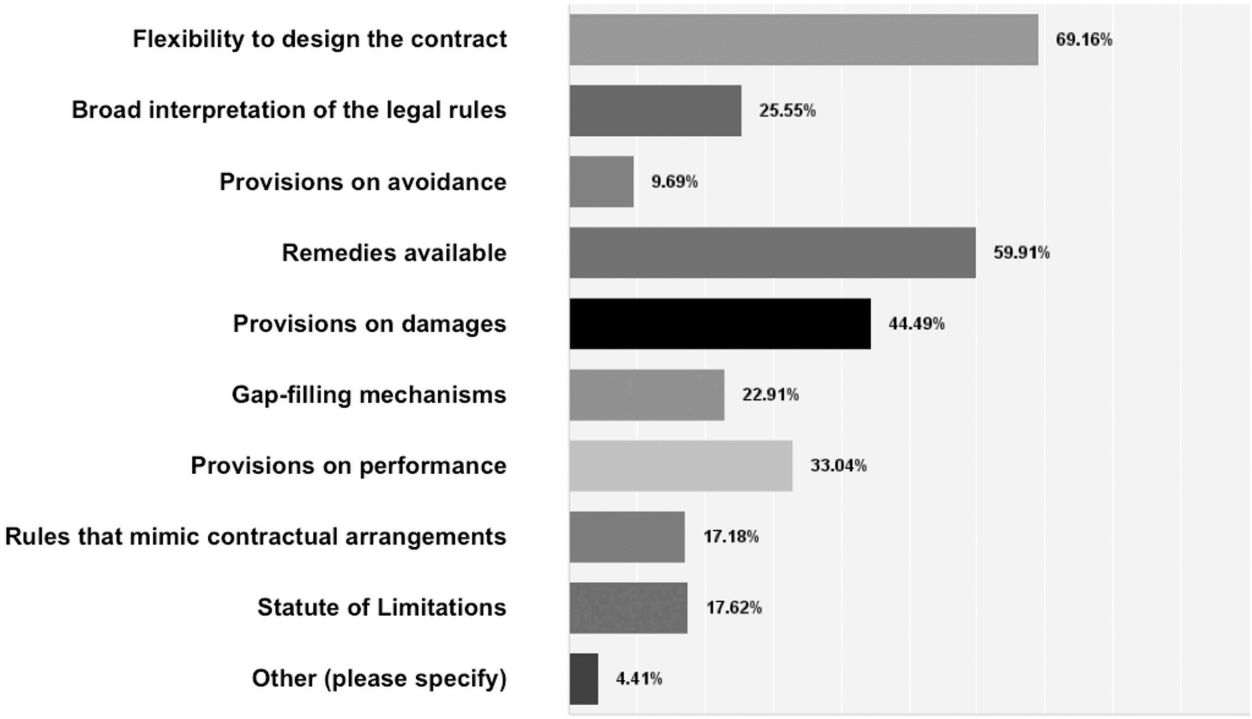


With respect to the main economic considerations, the respondents elected cost of enforcement of legal rules (75.77 per cent), political stability in the relevant jurisdiction (57.27 per cent) and unfamiliarity and cost of learning (47.58 per cent).

The respondents indicated the following additional main economic considerations:

- predictability of outcome coupled with law's recognition of freedom of parties to a contract;
- level of education of the judges;
- own knowledge of the substantive law;
- what courts will decide on potential disputes;
- if arbitration is chosen, then this consideration is of minor importance;
- depends on whether one is representing seller or buyer;
- how to financially secure the transaction;
- enforceability;
- breadth of available discovery;
- relationship to parties transaction; and
- similarity of chosen law with law of the client.

Question 5: *Under an economic perspective approach, while analyzing the provisions of a substantive law, please indicate the features that may call particular attention and contribute to a decision in favor of the substantive law under analysis:*

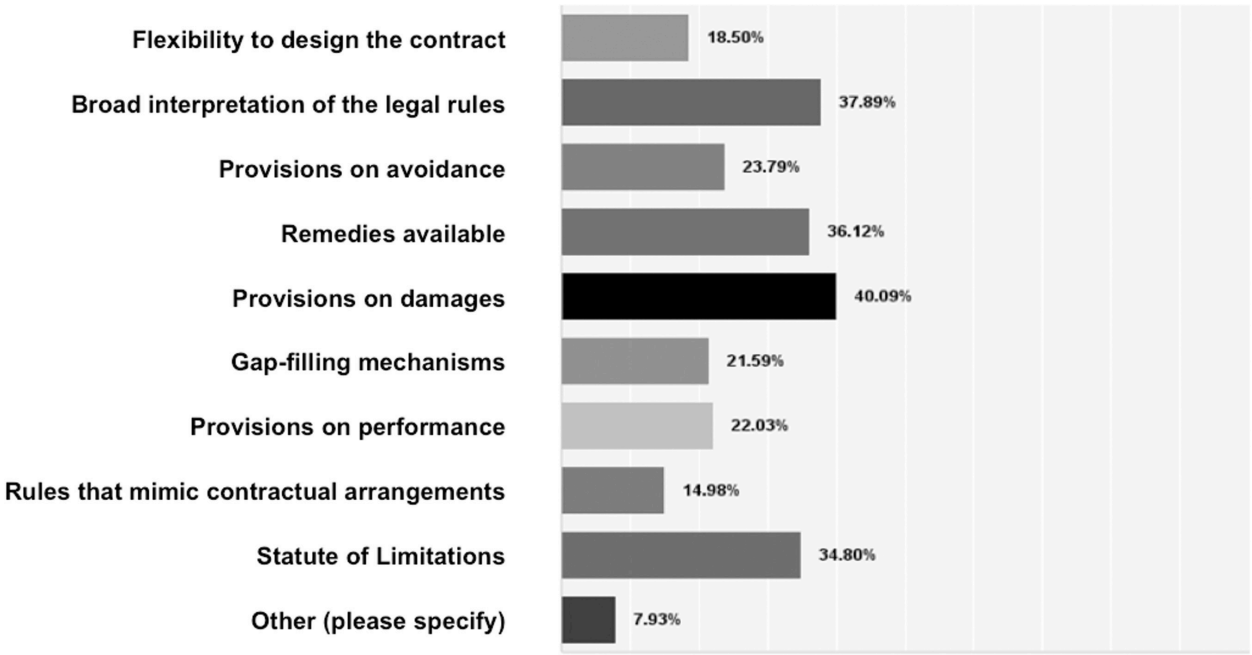


With respect to the positive economic features of a governing contract law, the respondents elected flexibility to design the contract (69.16 per cent), remedies available (59.91 per cent) and provisions on damages (44.49 per cent).

Additionally, the respondents indicated the following additional positive economic features of a governing contract law:

- predictability of approach or interpretation to be taken (respectable system, settled case law);
- warranty: the more protective of the buyer, the better (including statute of limitations);
- familiarity / unfamiliarity of a party with the law - if a party always needs to retain foreign legal advice whenever a legal issue arises under a contract this increases cost and incentivizes early moving or settlement;
- independent and corruption-free judiciary; and
- breadth of discovery, strict construction of contractual terms.

Question 6: *Under an economic perspective approach, while analyzing the provisions of a substantive law, please indicate the features that may call particular attention and contribute to a decision against the substantive law under analysis:*



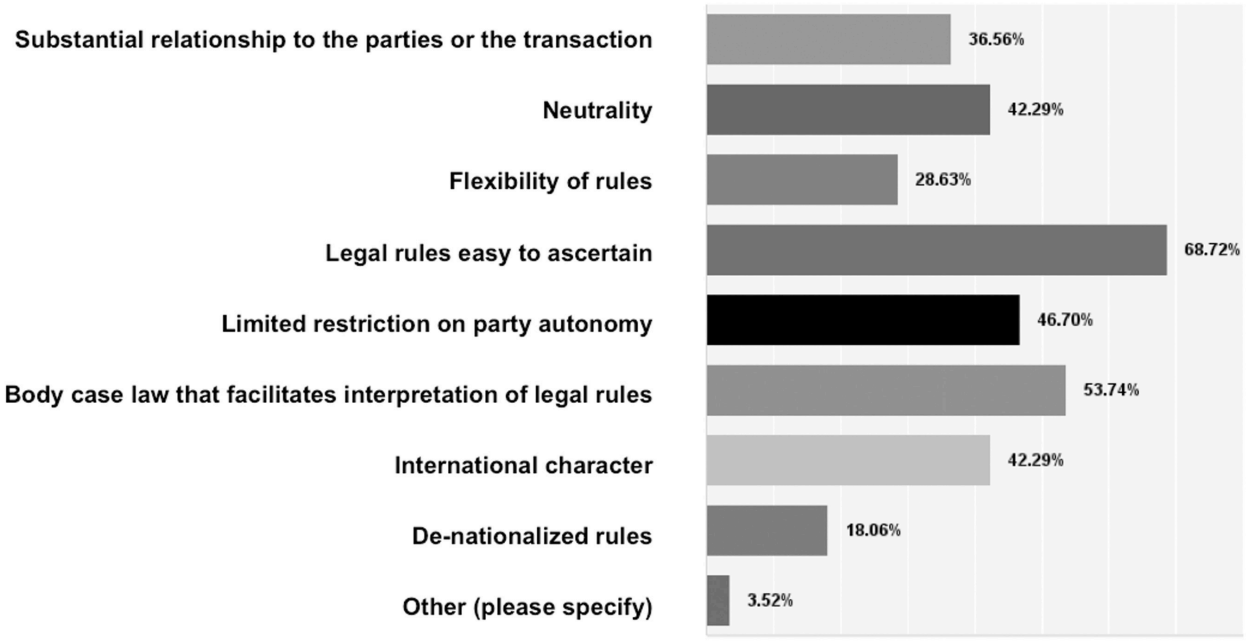
With respect to the negative economic features of a governing contract law, the respondents elected provisions on damages (40.09 per cent), broad interpretation of the legal rules (37.89 per cent) and remedies (36.12 per cent).

The respondents indicated the following additional negative economic features of a governing contract law:

- features that limit the parties' ability to freely negotiate terms, or that automatically imply terms;
- unpredictable approach/interpretation;
- costly to access;
- mandatory indemnities;
- unclear gap-filling schemes; no freedom to adapt legal solutions;
- mandatory law provision;
- too favorable to the counterparty;
- from seller's perspective: the more protective of buyer, the more reason against;
- average speed of legal enforcement processes;
- difficult enforcement in the country;
- corrupt judiciary; and
- legal uncertainty.

Most desirable substantive law: features

Question 7: *Please indicate the features of a most desirable substantive law*:

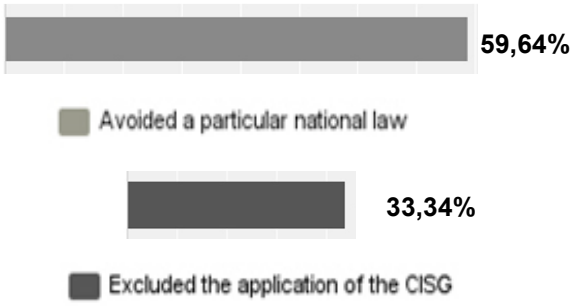


The respondents were required to indicate the features of a most desirable substantive law. The following results were obtained: legal rules easy to ascertain (68.72 per cent), body of case law that facilitates interpretation of legal rules (53.74 per cent), limited restriction on party autonomy (46.70 per cent) and neutrality (42.29 per cent).

The respondents also indicated the following additional features of a most desirable substantive law:

- gap-filling mechanisms easy to ascertain;
- applicable jurisdiction member of the CISG;
- whether or not mandatory rules are in favor of one of the parties;
- language; and
- ability to enforce.

Question 8: *In your experience in negotiating a substantive law to govern an international sales contract, please indicate if you have undertaken one (or both) of the following approaches and, if so, please specify the reason(s) for that:*



The respondents were required to indicate whether a particular national law and/or the CISG had been avoided or opted-out.

In total, 33.34 per cent of the respondents have already opted-out of the CISG and 59.64 per cent avoided a particular national law. Respondents could specify the reason for the avoidance or exclusion of the CISG or not, although it was encouraged to specify the reasons for purposes of the Survey.

Out of 59.64 per cent of the respondents who avoided a particular national law, 37.35 per cent did not inform or disclose the relevant reasons.

Out of 33.34 per cent of the respondents who opted-out of the CISG, 44.73 per cent did not inform or disclose the reason for the exclusion of the CISG's application.

National laws

Below are the reasons indicated by the respondents for the avoidance of certain national laws:

- "neutrality of law" concern;
- client's request;
- since the national law requires multiple signatures or other arcane contract formation requirements;
- for contracts involving intellectual property, national laws were chosen because of stronger copyright protection for software and less confusion about moral rights;
- international sales of goods are international in essence, so a particular national law might bring obligations not conceived for international trade;
- it contained a prohibited penalty clause;
- a particular national law most of the time meant a benefit to only one party, usually the party familiar with such a law;
- it is considered a "weak law";
- it is not adequate to the parties' juridical culture;
- it avoids the law of the counterparty's domicile because choosing that law might encourage the counterparty to breach the contract relying on legal advice available in its own country instead of trying to cooperate in the full performance of the contract;
- it demonstrates a lack of knowledge of that specific national law in order to examine if that was the best option;
- difficulty of enforcement;
- uncertainty and difficulty in interpretation of that country's law;
- opposing party's law;
- in matters of first demand guarantee, a national law was recommended to be avoided as it meant less difficulty in obtaining an order to prevent the payment to the beneficiary;
- the limitations of the substantive law of many under-developed countries;
- it did not apply to the place of execution of the agreement;
- more flexible approach regarding the limitation of liability;
- national law was not favorable for specific transactions;
- in order to avoid punitive damages and not to be stuck in a very costly litigation;
- international organization is involved;
- limited freedom of contract; no reliable gap-filling mechanisms;

- law not developed within the energy sector;
- to avoid uncertainty or inconvenience/cost issues;
- substantive law not sufficiently developed to govern the main aspects of the contractual matters;
- certainty and predictability;
- preference for freedom to contract and avoidance of jurisdictions with less developed judicial systems;
- certain jurisdictions restrict party autonomy and have introduced mandatory statutory provisions, which is highly undesirable;
- unfair terms or higher learning costs to understand the law;
- the substantive law has unfavorable provisions on time limitation, limitations of liability or other provisions which ca be unfavorable for our client;
- extremely costly to use;
- parties needed more flexibility to design their particular contracts;
- for reasons of its contents and the remedies available;
- to avoid the application of specific mandatory provisions;
- "exotic" laws that we always advise against applying;
- generally preferred common law and therefore avoided civil law as being less flexible;
- does not meet the positive satisfactory requirements;
- lack of available legal framework;
- complex and dogmatic interpretation of parties' intention and broad interpretation of mandatory rules which significantly limits contractual freedom;
- uncertainty;
- cost of enforcement;
- due to potential invalidity of standard terms;
- risk of damages in case of breach of contract;
- whenever provisions regarding filling in the gaps are absent from the text or impacted negatively by other provisions;
- doubts on the correct application of the law by the courts;
- best practice to avoid choosing substantive law from any nation where the legal system is not stable, neutral and fair, to the extent possible given the wishes of the parties and the particular circumstances of the transaction;
- political and social instability;
- uncertain rule of law, protection of national parties by court;
- national law not flexible enough and restricts the party autonomy;
- neutral law instead of the law of the counterparty's country;

- unpredictable jurisprudence; and
- civil law jurisdiction.

CISG

Below is a list of the reasons[9] indicated by the respondents for the exclusion of the CISG's application:

- lack of familiarity and lower degree of legal certainty;
- client's request;
- the CISG was considered weighted in favor of buyers;
- use of precedent contract that excluded CISG;
- the CISG was excluded because of the contracts involve service and intellectual property as well as goods, and the CISG is not well suited to those aspects of the transaction and may produce unwanted results;
- unconvinced that CISG struck the right balance;
- it is a question of balance. If I want balance, I go for the CISG. If I want to enforce obligations strictly, I go for specific national state laws;
- lack of knowledge of particular body of law and its consequences on contract performance and avoidance;
- national law more favorable than CISG;
- national law more advantageous for the seller;
- the desire is to have the entire agreement between the parties reflected within the four corners of the contract, without importing - perhaps unintentionally - CISG provisions;
- less legal certainty; CISG is not covering all issues usually relevant in a contract law dispute;
- especially in software-related contracts, counterparties expect the CISG to be excluded;
- the other side refused to have the CISG applicable;
- to make sure specified States applied the law without exception;
- uncertain outcome of application in particular by State courts;
- the national rules available are more flexible than the CISG;
- the CISG can sometimes add to perceived complexity, which may not be favorable for parties, notably also for negotiation of the contract;
- The CISG is one sided;
- if a national courts have jurisdiction, application of domestic civil code is more predictable;
- lack of safety rules;

[9] The "absentees", or the respondents who indicated the exclusion of the CISG without specifying the reason for that, amount to 44.73 per cent. Therefore, this list compiles the reasons of 55.27 per cent of the respondents.

- lack of a body of case law;
- it all depends on who you are representing - buyer or seller. Very buyer-friendly law is reason for seller's representatives to avoid this law;
- undesirable solutions;
- the CISG is excluded whenever we assist a seller. If we assist a buyer, seller's national law is avoided if the differences between buyer's and seller's national laws are considered to be too extensive;
- provisions were more favorable to the counterparty;
- have only excluded CISG where other party insisted or there was a specific reason;
- depending on clients position and interests;
- international conventions, especially UN conventions, embody political compromises between a large number of countries, representing different interests. Therefore, these compromise solutions do not always fit the interests of specific parties in international sale contracts;
- excluded the CISG only in cases where the client prefers to have arbitration in common law jurisdictions as lawyers and arbitrators in these jurisdictions are familiar with common law;
- because of the doubts on the application of the said rules since there is no established precedents;
- risk of different interpretation of same rules in different jurisdictions;
- excluded the application of the CISG because it may infer with the contract in an unpractical manner;
- principle of good faith;
- certain CISG provisions – for example the one on consequential damages - are not necessarily more advantageous than the available national alternatives;
- to avoid uncertainty or inconvenience/cost issues;
- no experience;
- clients do not like the CISG because people exclude it; and
- the cost of advising under CISG is bigger than under a national law.

Conclusion

The factors that guide the parties' choices in their choice-of-law decision are explored by the Survey results: parties in international sales contracts seek legal certainty, freedom of contract, and flexibility to design its duties, rights and obligations. They seemingly achieve this by subjecting themselves to an ascertainable and intelligible legal framework that facilitates the transactions. Neutrality

and international character were indicated as main legal considerations for a significant number of the respondents.

Moreover, parties tend to analyze the applicable law, forum (state courts or private adjudication), and the enforcement mechanisms (predictability, cost and time) together in their decision, thereby demonstrating their anticipation of the risks and legal measures to be taken in the course of a potential legal battle.

The choice of forum, its adequacy and predictability, was pointed out as an important factor throughout the Survey responses. The comments suggest a fear of unwanted results, inefficient coercive mechanisms, and biased decisions from state courts, whereas arbitration was cited as a forum that would minimize concerns regarding predictability of the application of the rules, awards rendered and enforcement of decisions.

Furthermore, emphasis was added with respect to specific provisions of a governing contract law, and the relevant choice varied according to the parties' position in the transaction and prior experiences - positive or negative - with the counterparty and the law chosen.

The Survey on choice of law, in addition to its pragmatic value, successfully addressed the main legal and economic considerations of parties while negotiating the governing contract law of international sales. It is therefore aimed to serve as practical toolkit for parties to an agreement, party advisors, legal practitioners and laymen to better understand the mechanics behind the choice of a governing contract law. The Survey also provides insight into the cost-benefit analysis exercised by those involved in international sales contracts, and the advanced precautions and strategies taken by parties and their advisors while analyzing and choosing a governing law in cross-border contracts.

Some readers may be surprised by some of the Survey outcomes, which revealed incongruities between theory and practice – that is, a mismatch between parties' wishes and parties' actual choices. As a matter of fact, in contract negotiations, parties may frequently choose the substantive law to govern their contracts based on prior dealings, positive and negative experiences related to the trading partner and/or the transaction. In addition, parties in the choice-of-law process may also use deductive reasoning. However, we should not overlook the fact that individual preferences are highly idiosyncratic and subject to subliminal influences, leading to scenarios where the choices taken are not always rational and parties might just choose to follow in another parties' decision-making footsteps.

Consequently, in some instances, we may not always know the reasons behind parties' choices: the underlying intention could be driven by momentary needs, affective valences, instincts, or other suggestible factors. Nonetheless, being aware of the factors subject to party's rational assessment and control may help contracting parties to take advance precautions and implement strategies in an attempt to obtain mutual benefits from the transaction.