“ADOLAT”
MILLIY HUQUQIY AXBOROT MARKAZI
Guvohnoma № 636478
Litsenziya C-5669732

“HUQUQ va BURCH+” —
«ПРАВО и ДОЛГ+» —
"RIGHT and DUTY+"
Journal home page:
https://adolatmarkazi.uz/magazine/electron?id=346

2026-yil
1-son
yanvar
ISSN 3093-8546



“Huquqni tanlashning “yashil’ tamoyili”: xalqaro shartnomalarda taraflarning erk muxtoriyatidan “esg” standartlarining ustuvorligi”

Davronbek Abdugaffarov,
Toshkent davlat yuridik universiteti
tayanch doktoranti
e-mail: davronbekabdugaffarov@gmail.com

Аннотация. Taraflarning erk muxtoriyati tamoyili xalqaro xususiy huquqning asosiy tamoyillaridan biri bo‘lib, shartnoma tuzayotgan tomonlarga uni tartibga soluvchi huquqni erkin tanlash imkonini beradi. Biroq global iqlim inqirozi va korporativ mas’uliyatga bo‘lgan talablar ortib borayotgan hozirgi davrda bu erkinlik muhim huquqiy bo‘shliqni yuzaga keltirmoqda. Bu esa kompaniyalarga ekologik, ijtimoiy va boshqaruv (ESG) standartlari sust bo‘lgan yurisdiksiyalarni ataylab tanlash orqali “pastlikka poyga”ni davom ettirish imkonini beradi. Mazkur maqola ushbu muammoni bartaraf etish maqsadida transmilliy biznesda taraflarning erk muxtoriyatini qayta belgilovchi yangi konsepsiyani–“Yashil” huquqni tanlash tamoyilini ilgari suradi.Taklif etilgan tamoyilga ko‘ra, agar bitim muayyan yurisdiksiya bilan haqiqiy aloqaga ega bo‘lsa, sudlar va arbitraj tribunalari tomonlar tanlagan huquqqa qaramay, eng yuqori tegishli ESG va barqarorlik standartlariga ega bo‘lgan huquqni qo‘llashlari shart. Tadqiqot doktrinal va qiyosiy yuridik tahlil usullaridan foydalanib, ushbu yangi tamoyili xalqaro xususiy huquqdagi mavjud vositalar –lois de police(majburiy normalar) va jamoat tartibi (ordre public) bilan uyg‘unlashtiradi.

Калит сўзлар. xalqaro xususiy huquq, huquqni tanlash, taraflarning erk muxtoriyati, ESG, barqarorlik huquqi, lois de police, jamoat tartibi

Аннотация. Принцип автономии воли сторон традиционно является краеугольным камнем международного частного права, предоставляя контрагентам свободу выбора права, регулирующего их договор. Однако в эпоху глобального климатического кризиса и возрастающих требований к корпоративной ответственности эта свобода создает существенный нормативный пробел, позволяющий «гонку ко дну» посредством стратегического выбора юрисдикций с более слабыми экологическими, социальными и управленческими (ESG) стандартами. Настоящая статья устраняет данный пробел, предлагая концепцию «Зелёного принципа выбора применимого права»–новую доктрину, направленную на ограничение автономии сторон в транснациональных коммерческих отношениях.Предлагаемый принцип устанавливает императивное правило, обязывающее суды и арбитражные трибуналы применять право юрисдикции с наиболее высокими соответствующими ESG и

Guvohnoma № 636478 Litsenziya C-5669732 ISSN 3093-8546

устойчивыми стандартами, независимо от действительного выбора сторон, если сделка имеет реальную связь с этой юрисдикцией. Используя доктринальный и сравнительно-правовой анализ, исследование помещает данный принцип в контекст существующих инструментов международного частного права loisdepolice (императивных норм) и публичного порядка (ordrepublic).

Ключевые слова. международное частное право; выбор применимого права, автономия воли сторон, ESG, устойчивое развитие, lois de police, публичный порядок.

Annotation. The principle of party autonomy has long been the cornerstone of international private law, granting contracting parties the freedom to select the governing law for their agreement. However, in an era defined by global climate urgency and heightened demands for corporate accountability, this freedom presents a significant regulatory loophole, enabling a"race to the bottom"through the strategic selection of laws with lax Environmental, Social, and Governance (ESG) standards. This article addresses this critical gap by proposing the adoption of the 'Green' Choice-of-Law Principle, a novel concept designed to qualify party autonomy in transnational business. The proposed principle establishes a super-mandatory rule that requires courts and arbitral tribunals to apply the law with the highest relevant ESG and sustainability standards, notwithstanding an otherwise valid contractual choice, provided the transaction has a genuine connection to that jurisdiction. Employing a doctrinal and comparative legal analysis, the study frames this new principle within the existing private international law tools oflois de police(mandatory rules) and public policy (ordre public).

Keywords. Private International Law, Choice of Law, Party Autonomy, ESG, Sustainability Law, Lois de Police, Public Policy.

I. Introduction: The Crisis of Choice in a Sustainable World

A. The Research Problem

Private international law (PIL), the body of rules governing cross-border private relationships, is built upon a foundational pillar: party autonomy. This principle, enshrined in leading international instruments like the EU's Rome I Regulation and the Hague Principles on Choice of Law in International Commercial Contracts, grants commercial actors the presumptive right to select the law that will govern their **contractual obligations[1:2].** This freedom is celebrated as a facilitator of commercial certainty and efficiency, allowing parties to choose a sophisticated, neutral, and predictable legal regime for their transaction.

However, this deference to private will creates a profound tension in the 21st century an era demanding collective action on global challenges such as climate change, environmental degradation, and human rights violations. The unfettered freedom to choose a governing law allows corporations to engage in systemic regulatory arbitrage. By inserting a choice-of-law clause

pointing to a jurisdiction with minimal or non-existent Environmental, Social, and Governance (ESG) regulations, parties can effectively contract out of the public interest standards of the states in which they operate, produce, or cause harm. This creates a "race to the bottom," undermining the legislative efforts of states that have enacted stringent sustainability laws and rendering them territorially impotent in the face of transnational contractual arrangements.

B. Contextualizing the Gap

The current PIL framework is ill-equipped to handle this challenge. Its traditional safety valves – the doctrines of overriding mandatory rules (*lois de police*) and public policy (*ordre public*) are typically construed narrowly and applied retrospectively. They serve as a shield to protect a state's fundamental interests, not as a sword to proactively impose higher standards of conduct that serve a global good. For instance, a court in Germany may refuse to enforce a contract for forced labor by invoking public policy, but it is not empowered to disregard the parties' choice of a lax law in favor of applying Germany's more demanding supply chain due diligence law to the substance of the contract itself. This gap allows corporate activity with significant cross-border externalities to escape meaningful legal scrutiny, facilitating "greenwashing" where public commitments to sustainability are not backed by legally enforceable obligations.

C. Thesis Statement

This article argues that the traditional conception of party autonomy is no longer tenable in a world confronting existential environmental and social crises. It proposes the adoption of a novel conflict-of-laws rule: the 'Green' Choice-of-Law Principle. This principle functions as an *a priori* overriding mandatory rule, compelling courts and arbitral tribunals to set aside a contractually chosen law in favor of the law of a connected jurisdiction that offers the highest relevant ESG and sustainability standards. By doing so, the principle recalibrates the balance between private commercial interests and public global imperatives, elevating the protection of the global commons to a central concern of private international law. It transforms ESG considerations from a "soft law" aspiration into a "hard law" reality within the machinery of transnational dispute resolution.

D. Structure of the Article

This article proceeds in five parts. Part II reviews the doctrinal foundations of party autonomy and its existing limitations, demonstrating their inadequacy for addressing ESG concerns. Part III establishes the conceptual and normative basis for the proposed principle, arguing that ESG has achieved the status of international public policy. Part IV meticulously formulates the 'Green' Choice-of-Law Principle, outlining its mechanics and integration into existing PIL frameworks. Part V illustrates its practical application through two case scenarios and discusses its role in

international arbitration. Finally, Part VI concludes by summarizing the findings and outlining policy implications for the future development of a sustainable international legal order.

II. Literature Review and Doctrinal Foundation

A. The Primacy of Party Autonomy

The principle of party autonomy, or *lex contractus*, has been the organizing principle of modern contract conflict of laws for over a century. Its justifications are both philosophical and economic. Philosophically, it is seen as an extension of individual liberty into the commercial sphere[2]. Economically, it is championed for promoting legal certainty, predictability, and efficiency, allowing parties to mitigate the risks associated with legal diversity in international trade[3:]. Instruments like Article 3 of the Rome I Regulation [4:3] and the Hague Principles[5:1] reflect a near-global consensus on its primacy, subject to limited exceptions.

B. Limitations of Party Autonomy: The *Lois de Police* Doctrine

The most significant exception to party autonomy is the doctrine of overriding mandatory rules, or *lois de police*. As defined in Article 9(1) of the Rome I Regulation, these are provisions "the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization”[6:9]. These rules apply to any situation falling within their scope, irrespective of the law otherwise applicable to the contract. Classic examples include competition laws, consumer protection statutes, and labor laws.

However, the current scope of *lois de police* is too narrow and state-centric to effectively address global ESG harms. First, the doctrine is designed to protect the public interests of a specific state, not diffuse, universal interests like climate stability. A national court is primarily concerned with safeguarding its own socio-economic order. Second, the threshold for a rule to be considered a *loi de police* is exceptionally high, typically requiring an explicit legislative intent for the rule to have extraterritorial effect. Many ESG laws, while crucial, are not drafted with the specific language of a *loi de police*, leaving their application in international disputes uncertain. The doctrine is thus an unreliable tool for enforcing global norms.

C. The Public Policy (*Ordre Public*) Clause

The second safety valve is the public policy reservation, found in instruments like Article 21 of the Rome I Regulation. This allows a court to refuse the application of a provision of the chosen foreign law if such application is "manifestly incompatible with the public policy (*ordre public*) of the forum”.[7:21]

Traditionally, this doctrine serves a "negative" function: it acts as a last-resort mechanism to prevent an outcome that would shock the conscience of the forum, such as enforcing a contract that violates fundamental human rights. It does not, however, have a “positive” function to actively displace the chosen law and substitute it with a more robust law of the forum or a third state.

For example, a court may use public policy to void a contract for the sale of goods produced by child labor, but it will not use it to affirmatively impose the forum's stricter labor reporting standards on the parties' transaction. It is a shield, not a sword, and is therefore incapable of mandating compliance with higher ESG standards as a substantive matter of governance.

D. The Emerging Field of Transnational Sustainability Law

The doctrinal inertia in PIL stands in stark contrast to the dynamic developments in substantive law. A field of transnational sustainability law is rapidly emerging, moving from voluntary “soft law” frameworks like the UN Guiding Principles on Business and Human Rights to binding “hard law” obligations. The EU's proposed Corporate Sustainability Due Diligence Directive (CSDDD) is a prime example, mandating that companies identify and mitigate adverse human rights and environmental impacts in their value chains[8]. These new laws represent a paradigm shift, treating corporate responsibility not as a matter of voluntary disclosure but as a legally enforceable duty. The central challenge, which this article addresses, is that PIL has not yet developed the tools to ensure these critical new laws are not simply circumvented by a choice-of-law clause.

III. The Conceptual and Normative Basis for a 'Green' Principle

A. ESG as a Super-Mandatory Rule

The central normative claim of this article is that the core tenets of ESG particularly climate protection and fundamental human rights have transcended the status of mere national policy to become matters of international public policy (*ordre public international*). These are not just values cherished by one state but are foundational principles of the international legal order, recognized in treaties, customary international law, and as *jus cogens* norms[9]. The failure to prevent catastrophic climate change or widespread human rights abuses in supply chains does not merely harm the public interest of one nation; it undermines the stability and integrity of the entire global system. Consequently, the rules designed to protect these interests demand a higher status in the conflict-of-laws hierarchy, qualifying them as “super-mandatory”.

The Global Commons Argument

The justification for this elevated status lies in the “global commons” argument. The impacts of many international contracts are not confined to the contracting parties or even the state of performance. A contract to finance a coal-fired power plant, for instance, produces carbon emissions that affect the shared global atmosphere. A contract for the procurement of minerals mined using forced labor debases a universal standard of human dignity. Traditional PIL, with its focus on connecting factors like party domicile or place of contracting, is built for a world of localized transactions. It fails to account for delocalized harms to shared resources the climate, biodiversity, and the corpus of human rights

which belong to no single state but are the collective responsibility of all. The law governing such contracts must therefore reflect this shared responsibility.

C. The Rationale of Non-Delegation

Flowing from this, a principle of non-delegation emerges. States bear the primary responsibility for upholding international law and protecting the global commons. When they enact robust ESG legislation, they are fulfilling this duty. Party autonomy, in its current, unqualified form, allows private actors to effectively nullify this public legislative function. It amounts to a delegation of a state's sovereign regulatory power over matters of fundamental public interest to private parties, who can then choose a legal vacuum. This is untenable. States should not and arguably cannot permit their fundamental duties to be contractually waived by private actors choosing a foreign, weaker law, particularly when the effects of that contract are felt within their jurisdiction or impact the global commons.

D. Distinguishing the 'Green' Principle from Traditional *Lois de Police*

The 'Green' Choice-of-Law Principle is fundamentally different from traditional *lois de police* in its function and ambition.

Proactive vs. Reactive: *Lois de police* and public policy are reactive. They are triggered only when a chosen law offends a fundamental norm of the forum. The 'Green' Principle is proactive. It does not ask whether the chosen law is objectionable, but rather whether a different, connected law offers a superior standard for protecting a recognized global interest.

Best-in-Class vs. Minimum Standard: The traditional doctrines are concerned with enforcing a minimum floor of mandatory norms. The 'Green' Principle seeks to apply a "best-in-class" or "race to the top" standard. It identifies the most protective relevant law among connected jurisdictions and gives it precedence.

Global vs. National Interest: While *lois de police* serve the public interests of a single state, the 'Green' Principle is designed to serve the collective public interest of the international community.

IV. Proposing the 'Green' Choice-of-Law Principle

Building on the foregoing normative foundation, this section formulates the 'Green' Choice-of-Law Principle as a concrete, operable rule of private international law.

Formulation of the Principle

The principle can be articulated as follows:

Where an international contract raises a substantial issue concerning a recognized Environmental, Social, or Governance interest of international public policy, and the law chosen by the parties provides a materially lower standard of protection for that interest than the law of another state with a close connection to the contract, the chosen law shall be disapplied in respect of that issue, and the law of the state with the higher standard shall apply.

This formulation involves a two-part test: a condition precedent (a substantial ESG interest) and an overriding effect (application of

the higher standard).

1. Condition Precedent: The principle is not triggered for every international contract. It applies only when the transaction implicates a substantial ESG interest. This could be determined by the subject matter of the contract (e.g., natural resource extraction, fossil fuel financing, arms sales), the industry context (e.g., textiles, agriculture, technology with high supply chain risks), or the foreseeable impact of performance (e.g., significant greenhouse gas emissions, risk of deforestation, use of hazardous materials).

2. The Overriding Effect: If the condition is met, the forum must compare the level of protection afforded by the chosen law with that of other connected legal systems. If the chosen law is found to be “materially lower”, it is displaced not in its entirety, but *in respect of the specific ESG issue*. The higher-standard law then governs that part of the dispute. This *dépeçage* allows the rest of the contract to remain governed by the parties' chosen law, thus respecting party autonomy to the maximum extent possible.

B. Identifying the “Highest Relevant ESG Standard”

The most challenging aspect of the principle is its application. This requires a structured inquiry by the judicial or arbitral body.

Criteria for Connection: The court cannot simply choose any law in the world. The “higher standard” law must have a sufficiently close connection to the transaction. Relevant connecting factors would include:

The place of contractual performance.

The location where the principal environmental or social harm occurs.

The domicile or principal place of business of the party with the greater ESG-related obligations.

The state whose market the products or services are intended for.

Criteria for Relevance and Comparison: The comparison must be specific to the ESG pillar at issue. For a contract involving a global supply chain, the relevant laws to compare would be those imposing human rights due diligence obligations (e.g., Germany's *Lieferkettensorgfaltspflichtengesetz* or the EU CSDDD). For a shipping contract, the relevant laws might be those imposing carbon levies or emissions standards on maritime transport. The court would assess which of the connected jurisdictions' laws provides the most robust, specific, and enforceable standard for the issue at hand.

C. The Role of the Judicial/Arbitral Body

Under this principle, the court or arbitral tribunal has a duty to raise this issue *proprio motu* (of its own motion). Given that the principle is designed to protect public interests that transcend those of the litigants, the forum cannot be passive. It must actively undertake the comparative legal analysis required to determine if a higher standard from a connected jurisdiction should be applied. This represents a significant shift from the traditional adversarial model but is necessary for the enforcement of norms that protect

third parties and the global commons.

D. Integration into Existing PIL Frameworks

The 'Green' Principle could be integrated into the existing PIL architecture in several ways:

Judicial Interpretation: Courts could interpret Article 9 of the Rome I Regulation more broadly, recognizing that crucial ESG laws are indeed *lois de police* designed to protect a state's fundamental interest in a stable climate and a just social order.

Legislative Amendment: A more direct approach would be to amend instruments like Rome I to include a new provision explicitly codifying the principle. For instance, a new Article 9a could be drafted.

A New Convention: The most ambitious approach would be the development of a new Hague Convention on Choice of Law in Contracts Affecting ESG Interests, which would codify the principle as a globally accepted standard.

V. Case Studies and Practical Implications

A. Case Scenario 1: Climate Regulatory Arbitrage

Facts: PetroCorp, domiciled in Jurisdiction A (a “tax haven” with no climate laws), enters into a financing agreement with Global Bank, domiciled in Jurisdiction B (which also has lax environmental regulations). The contract is for the development of a large offshore oil field located in the exclusive economic zone of Jurisdiction C, a nation that has recently enacted a stringent carbon tax on all domestic fossil fuel extraction. The contract explicitly chooses the law of Jurisdiction A as the governing law.

Application of the 'Green' Principle:

Condition Precedent: The contract directly finances a high-emission project, triggering a substantial environmental (E) interest.

Connection: Jurisdiction C has the closest connection to the environmental harm, as the extraction and emissions will occur there.

Comparison: The law of Jurisdiction A provides zero protection (no carbon tax). The law of Jurisdiction C provides a high standard of protection via its carbon tax. The difference is “materially lower”.

Outcome: A court or tribunal applying the 'Green' Principle would set aside the choice of Jurisdiction A's law on the specific issue of emissions pricing. It would apply the carbon tax law of Jurisdiction C to the project, ensuring that the economic externalities of the extraction are priced into the transaction, regardless of the parties' contractual attempt to avoid it.

B. Case Scenario 2: Supply Chain Due Diligence

Facts: FastFashion Inc., a US-based company, contracts with a supplier, GarmentCo, located in Jurisdiction X. Jurisdiction X has notoriously weak labor laws and no human rights due diligence requirements. The contract stipulates that the law of Jurisdiction X governs. The garments are manufactured in factories in Jurisdiction Y, where child labor and unsafe working conditions are

documented risks. A significant portion of the final product is sold in the German market. Germany has a strict Supply Chain Due Diligence Act.

Application of the 'Green' Principle:

Condition Precedent: The contract for sourcing goods from a high-risk area triggers a substantial social (S) interest related to human and labor rights.

Connection: The transaction is closely connected to both Jurisdiction Y (place of performance/harm) and Germany (the end market and location of a party with due diligence obligations).

Comparison: The law of Jurisdiction X offers no protection. German law offers the highest and most specific standard of protection through its due diligence act.

Outcome: The 'Green' Principle would require the application of German due diligence law. This would impose an obligation on the parties to identify, prevent, and mitigate human rights risks in their supply chain. A breach of this duty could then give rise to liability, even though the chosen law of Jurisdiction X would not recognize such a claim.

C. The Arbitral Conundrum

International commercial arbitration presents a unique challenge, as arbitrators derive their authority from the parties' agreement. An argument could be made that applying a law against the parties' explicit choice exceeds this authority. However, the modern consensus is that arbitrators are not merely agents of the parties but actors within a transnational legal order. They are increasingly expected to apply international public policy and transnational mandatory rules[10-24]. The 'Green' Choice-of-Law Principle, framed as a rule of international public policy, would therefore fall within the arbitrators' duty to render an enforceable award that does not violate fundamental principles of international law. Its application would be essential to the legitimacy and public purpose of international arbitration in a sustainable world.

VI. Conclusion

A. Summary of Findings

The principle of party autonomy, while vital for commercial efficiency, has created a critical governance gap in an era of global sustainability crises. Its unqualified application facilitates a “race to the bottom” that undermines national and international efforts to enforce ESG standards. This article has argued that the existing doctrinal tools of *lois de police* and *ordre public* are insufficient to close this gap. It has therefore proposed a necessary evolution in private international law: the 'Green' Choice-of-Law Principle. This principle recalibrates the balance of power, ensuring that when private contracts implicate matters of international public policy, the most protective law of a closely connected state will prevail over the parties' choice.

B. Policy and Future Research Implications

The adoption of this principle requires a concerted effort from legislators, judges, and international bodies. The immediate next step should be for national courts in jurisdictions with strong ESG laws to begin interpreting their existing mandatory rule and public policy doctrines in a more purposive, globally-minded manner. For the long term, international harmonization, perhaps through the Hague Conference on Private International Law or UNCITRAL, is essential to ensure consistent application and prevent forum shopping. Future research should focus on developing detailed criteria for comparing the "materiality" of different ESG laws and exploring the procedural mechanisms for implementing the principle in both court litigation and arbitration.

C. Final Thought

Private law does not operate in a vacuum. The rules that govern private contracts shape the world we live in. For too long, private international law has prioritized commercial expediency over collective well-being. The evolution of this field must now reflect the fundamental shifts in global governance, ensuring that our legal systems are architected to support, rather than subvert, a just and sustainable future. Justice for the planet and its people must, in the final analysis, supersede the untrammeled freedom of contract.

References

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3. Hay, P., Borchers, P.J., & Symeonides, S.C., *Conflict of Laws*, 5th ed. (Thomson/West, 2010).

4. Rome I Regulation, Art. 3(1) states: "A contract shall be governed by the law chosen by the parties."

5. Hague Principles, Art. 1(1) affirms that the parties' choice of law governs their contract.

6. Rome I Regulation, Art. 9(1).

7. Rome I Regulation, Art. 21.

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