

**CHOIX DE LA LOI APPLICABLE  
EN MATIÈRE DE CONTRATS INTERNATIONAUX**

**RAPPORT SUR LES TRAVAUX EFFECTUÉS ET PERSPECTIVES  
SUR L'ÉLABORATION DU FUTUR INSTRUMENT**

*Note établie par le Bureau Permanent*

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**CHOICE OF LAW  
IN INTERNATIONAL CONTRACTS**

**REPORT ON WORK CARRIED OUT AND PERSPECTIVES  
FOR THE DEVELOPMENT OF THE FUTURE INSTRUMENT**

*Note submitted by the Permanent Bureau*

*Document préliminaire No 6 de mars 2010 à l'intention  
du Conseil d'avril 2010 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 6 of March 2010 for the attention  
of the Council of April 2010 on General Affairs and Policy of the Conference*

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## I. Introduction

1. Further to substantial preparatory work carried out by the Permanent Bureau since 2006,<sup>1</sup> the Council on General Affairs and Policy of the Conference ("the Council") decided in 2009 that work should continue for the benefit of the promotion of party autonomy in the field of international commercial contracts. In particular, the Permanent Bureau was invited to form a working group consisting of experts in the field of private international law, international commercial law and international arbitration law and to facilitate the development of a draft non-binding instrument ("Instrument") within this Working Group.

2. This document summarises the work carried out so far to fulfil the current mandate and presents a suggested work programme for the continuing development of the draft Instrument ("the Project").

## II. Progress achieved in the past year

3. The Permanent Bureau continued its work on the preparation of a draft Instrument, undertaking research and consulting Members and other stakeholders on the main issues to be considered during the drafting process. Most importantly, the Working Group on Choice of Law in International Contracts ("the Working Group") was set up after extended consultations with many stakeholders. The first meeting of the Working Group took place in The Hague on 21 and 22 January 2010.

### A. Preparatory work and consultations

4. In order to set out the parameters of the Instrument to be developed, the Permanent Bureau continued its evaluation of the current role of party autonomy in international commercial contracts. Special attention was devoted to the current practice as to the use of choice of law clauses and the extent to which they were respected. In that respect, the Permanent Bureau notes that differences in the recognition of party autonomy continue to be reported in doctrinal writings and case law in different parts of the world.<sup>2</sup>

5. Consequently, the Permanent Bureau has invested efforts in informing the international legal community on the current Hague Conference Project. An informative article entitled "Choice of Law in International Commercial Contracts: Hague Principles?" has recently been completed by the Permanent Bureau and submitted for publication in three languages, *i.e.*, French, English and Spanish. It is hoped that the forthcoming publication of these three linguistic versions<sup>3</sup> will contribute to the Project's visibility among interested circles, to ensure that the future draft Instrument reasonably reflects the expectations of potential end-users.

6. In addition, the Permanent Bureau has intensified dialogue with relevant parties in the field of international commercial law who are potentially interested in the development of an Instrument on choice of law in international contracts. International co-ordination of the rules applicable to international contracts remains a key element in that perspective.

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<sup>1</sup> For ease of reference, all preparatory documents related to this project have been assembled on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "International Contracts".

<sup>2</sup> See, from different angles, *inter alia* J.M. Graves, "Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform", *Seton Hall Law Review*, Vol. 36, No 1, 2005, pp. 59-123; N. Yassari, "Das Internationale Vertragsrecht des Irans", *IPRax* 2009, 451-456; M.M. Albornoz, "Choice of Law in International Contracts in Latin American Systems", *Journal of Private International Law* (to be published in the April 2010 issue).

<sup>3</sup> The article will soon appear in the *Revue critique de droit international privé* (in French), in *DeCita* (in Spanish), and in a still to be determined legal review in English.

7. As in the past, the Permanent Bureau would like to thank its "sister" organisations - UNCITRAL and UNIDROIT – for the attention they have given to the multiple issues discussed in the past year. The Permanent Bureau has benefited from the expertise of UNIDROIT and, in particular, that of the Working Group for the preparation of the third edition of the Principles of International Commercial Contracts. As an Observer to this Working Group, the Permanent Bureau took note of the specific working methods for the development of a non-binding Instrument, as well as the interactions between an Instrument containing substantive rules and a future Instrument on conflict rules applicable to international contracts. In particular, discussions on the notion of "illegality" by the UNIDROIT Working Group at its May 2009<sup>4</sup> session may be of direct relevance to the discussions on the possible development of international standards on the notion of public policy within the framework of the Hague Conference's Project.

8. Similarly, the Permanent Bureau and the UNCITRAL Secretariat examined the synergies between two ongoing UNCITRAL projects, *i.e.*, the revision of UNCITRAL Rules of Arbitration and the drafting of a Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property rights, and the future Hague Conference Instrument.<sup>5</sup> Both ongoing UNCITRAL projects contain conflict-of-law provisions relating to specific contractual matters and should, like previous UNCITRAL work including choice of law rules in international contracts, be taken into consideration in subsequent stages of discussions within the Working Group.

9. The Permanent Bureau also consulted with the International Chamber of Commerce, International Bar Association, International Swaps and Derivatives Association and other (national, regional or international) organisations involved in international commerce and international dispute resolution, to better determine what type of Instrument would best respond to the practical needs of international business professionals. Some international organisations have been associated as Observers to the current activities of the Working Group. The Permanent Bureau is very appreciative of the invitations extended to it to present its Project at numerous colloquia and seminars, and expresses its utmost gratefulness to the organisers, participants and other speakers for their comments and feedback on the Project.

## **B. The setting up of the Working Group and progress made so far**

10. Further to the April 2009 invitation of the Council to form a Working Group and to facilitate the development of a draft non-binding Instrument within this Working Group, the Permanent Bureau is pleased to report that the Working Group on Choice of Law in International Contracts has been formed and commenced its deliberations on the development of a draft non-binding Instrument in early 2010.

11. In line with its mandate, the Permanent Bureau was mindful of including a variety of experts from the field representing the principal legal systems present at the international level, while limiting the size of the Working Group to facilitate the discussions. The experts come from diverse parts of the world from a geographic, social and economic perspective. The Working Group comprises approximately 20 participants,

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<sup>4</sup> See < <http://www.unidroit.org/english/workprogramme/study050/wg03/wg-2009.htm> > (last consulted 15 March 2010).

<sup>5</sup> For a current overview of the progress of the work, see the recent documents of UNCITRAL Working Group II (Arbitration and Conciliation), available on the UNCITRAL website at the address < [http://www.uncitral.org/uncitral/fr/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/fr/commission/working_groups/2Arbitration.html) > (last consulted on 15 March 2010) and the recent documents of Working Group VI (Security Interests) of UNCITRAL, available from < [http://www.uncitral.org/uncitral/en/commission/working\\_groups/6Security\\_Interests.html](http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html) > (last consulted on 15 March 2010). The Permanent Bureau of the Hague Conference actively participated in the discussions on the chapter on conflict of laws relating to the Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property rights.

members and observers taken into account (see Annex I for the Working Group's composition).<sup>6</sup>

12. It is expected that the Working Group shall meet several times in order to discuss and draft a text which is expected to contain a coherent set of rules on the choice of law in international commercial contracts.

13. On 21 and 22 January 2010, the Working Group held its inaugural meeting at the offices of the Permanent Bureau. The main purpose of the two-day meeting was to exchange views on the development and possible scope of the future draft Instrument. It was decided that the Working Group would be chaired by the Swiss expert, Mr Daniel Girsberger ("the Chairman"). On the basis of a draft Agenda and two working papers submitted by the Permanent Bureau, the Working Group began its deliberations on (1) the substantive scope of the draft Instrument (*i.e.*, the concept of "international commercial contracts") and (2) the need to develop subsidiary rules in the absence of choice of law by the parties. In addition, a number of organisational matters for the functioning of the Working Group were decided. The Agenda and Report of the Working Group's first meeting are attached for further reference (see Annexes II and III). It is noted that the experts of the Working Group very kindly agreed to take on an active role in the drafting of preparatory documents. To this effect, the Permanent Bureau was invited to set up a restricted electronic discussion platform to facilitate discussions among the experts of the Working Group. This platform will soon be operational and is expected to provide the Working Group's members with an adequate forum for the further exploration of specific issues in preparation of subsequent meetings.<sup>7</sup>

14. Following this first meeting, the Permanent Bureau will co-ordinate further research and the drafting of proposals on the issues that were already examined by the Working Group in January 2010. The Permanent Bureau also assists with translating the drafting proposals in order to ensure that the drafting process is concurrently undertaken in the two official languages of the Hague Conference. In addition, the preparations for the second meeting of the Working Group, to be held from 15 to 17 November 2010, are already under way.

### **III. Current positions and future perspectives**

#### **A. Objectives**

15. Thanks to the impetus of a very participative Working Group, it is expected that the draft Instrument will continue to develop steadily (although the emphasis lies on authoritative work rather than a specific time-frame). The outcome of the current drafting phase within the Working Group could be presented to the Council in 2012, to seek its views as to whether the draft Instrument should be submitted to a Special Commission of governmental experts. It could indeed be envisaged that a Special Commission meeting be convoked to enable the Members of the Hague Conference to examine the draft Instrument (Art. 8 of the Statute). Despite the non-binding nature of the future Instrument, its discussion during a Special Commission meeting appears to be justified by an expected role for the adopted Instrument as a legislative model for countries where regulation of the law applicable to international contracts does not exist, is fragmentary, or is simply awaiting reform.

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<sup>6</sup> See also the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "International Contracts".

<sup>7</sup> See the Hague Conference website, at the address above. All members of the Working Group have the possibility to make comments and recommendations at any stage by means of this discussion platform. They are notified via e-mail when new information is posted on the discussion platform. The observers to the Working Group are being kept informed of the progress and are actively involved in the discussions when the Working Group meets in person.

16. The Working Group acknowledged that the main objective of the future Instrument is to establish a global model for conflict rules applicable to contracts. To this end, its work is guided by one central idea – promoting the principle of party autonomy. The enforceability of a choice of law made by the parties therefore constitutes the *leitmotiv* of this Project. At the same time, the majority of the members of the Working Group expressed their preference for a comprehensive draft Instrument which would include subsidiary rules in the absence of a choice of law by the parties. The Working Group was mindful of the added difficulty involved in adopting common subsidiary rules in an attempt to reconcile the different legal cultures and thus came to the view that further discussion on the feasibility of subsidiary rules should be subsequent to the development of rules on choice of law. Accordingly, the work currently undertaken by the Working Group will prioritise a set of comprehensive rules for cases where parties have selected the law applicable to their international contracts.

17. The following methodology has been tentatively agreed upon by the Working Group. First, a preliminary round of discussions takes place on the basis of a draft Agenda formulated by the Permanent Bureau in consultation with the Chairman. The experts will be provided with papers on the key issues to be discussed prior to those discussions. Those papers will be the outcome of preparatory work carried out by the Permanent Bureau in co-operation with volunteering Working Group members. Then, a Preliminary Report is drawn up after each meeting and is circulated to all participants for comments which evolves into a definitive Report. The definitive Report forms the basis for further preparations and discussions leading to the drafting of proposals. The draft proposals will be examined in a subsequent meeting (or meetings) until there is agreement within the Working Group. This working method is flexible and can be adapted if the circumstances so require.

## **B. Form of the draft Instrument**

18. Underlying the benefits of a global legal framework on the choice of law in international contracts, the Working Group carefully examined the form that the draft Instrument should take. It was agreed that the draft Instrument should be developed in a way that would serve both the needs of practitioners as well as those of legislators.

19. It was noted that there are different non-binding models available (Principles, Model Laws, Good Practice Guides, etc.), and that each of these models can take on different forms in the framework of different international organisations and other legislative bodies. In view of this diversity, the Working Group decided to focus its efforts on the substantive contents of the draft Instrument rather than on a tentative title. A preference was expressed for a draft Instrument to be developed in the form of provisions / articles / sections (black-letter rules), followed by comments and examples, irrespective of the final form the Instrument will take. A comprehensive body of rules, each of which is complemented by comments and examples which contribute to their interpretation, was considered to lend credibility to the Instrument and enhance utility for all relevant stakeholders.

## **C. Substantive scope of the draft Instrument**

20. In line with its mandate, the Working Group examined in detail the substantive parameters of the draft Instrument during its first meeting. It was noted that the application of the draft Instrument would be triggered by three elements: (i) the existence of a contract, (ii) its international character and (iii) its commercial character.

21. The attached Report (Annex III) summarises the preliminary views exchanged by the members of the Working Group on these three elements.

22. In particular, preliminary support was expressed for a negative formulation of internationality, so as to exclude only those situations where no international element is

involved, thus excluding contracts which are connected with one State only.<sup>8</sup> A draft proposal on how this concept should be formulated will be discussed at a later stage on the basis of further preparatory work. In addition, a list of possible examples and / or determinative factors to illustrate (“white list”), or narrow down (“black list”), where necessary or appropriate, the definition of internationality, will be submitted to the Working Group for further consideration.

23. Furthermore, the question of excluding certain categories of contracts was carefully considered by the Working Group. The Working Group came to a preliminary understanding that consumer and employment contracts were not to be addressed within the draft Instrument.

24. However, the Working Group noted that the preliminary conclusions on the substantive scope of the draft Instrument may have to be reviewed at further stages of the drafting process. This is because issues like the substantive scope of the draft Instrument, matters to be governed by the applicable law and the core issue on the choice of law and its limitations are intrinsically interrelated. Therefore, the Working Group reserved the possibility to revisit any preliminary conclusions reached on any of these elements at a later stage of the drafting process.

#### **D. Main focus for the next meeting**

25. True to the main objective of promoting party autonomy, the Working Group will soon be considering the core of the Project, *i.e.*, the provisions on choice of law by the parties and the possible limitations to party autonomy. In this regard, important questions, such as the suitability of allowing parties to choose a set of non-State rules or the admission of the implicit choice of law, will have to be carefully considered in the coming months by the Permanent Bureau, in co-operation with the members of the Working Group. It is planned that these issues will be discussed at the second meeting of the Working Group, to be held in November 2010.

26. In addition, the Working Group is expected to return to the “scope issues” of the draft Instrument, which was on the agenda of the January 2010 meeting. In its work of drafting proposals, alongside a comparative overview of other relevant legal models, the Working Group will progressively delineate the substantive parameters of the draft Instrument.

#### **IV. Conclusions**

27. The utility of a future Instrument on the choice of law in international contracts has been outlined by the preparatory work and consultations which have been carried out by the Permanent Bureau of the Hague Conference over many years. In the past year, work has intensified now that the Project has reached its drafting phase.<sup>9</sup>

28. High expectations have been set in this Project. Promoting party autonomy in international contracts effectively corresponds to a real need for its recognition in the field of international commerce. Under the experienced guidance of Mr Girsberger and with the solid commitment of its members, the Working Group has started its work with *brio*. An intense work programme for the coming year has tentatively been agreed upon and day-to-day consultations will soon be facilitated by the imminent establishment of an electronic discussion platform for the Working Group. The Permanent Bureau is confident that the drafting phase of this Project has successfully been launched and expects that

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<sup>8</sup> The 2005 Choice of Court Convention illustrates what is meant by a “negative formulation”: Art. 1(2) considers a commercial transaction to be international (for jurisdictional purposes) “unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State”.

<sup>9</sup> The Permanent Bureau acknowledges with gratitude the support provided by Ms Rosehana Amin, former intern at the Permanent Bureau and currently part-time consultant (25% FTE) on this Project.

the first tangible results on the development of a draft Instrument will soon become a reality.

29. Taking into account the above, the Permanent Bureau proposes that the Council envisage adopting Conclusions formulated as follows:

- The Council welcomes the setting up of a Working Group on Choice of Law in International Contracts and invites the Permanent Bureau to continue its work for the progressive development of a draft Instrument of a non-binding nature within this Working Group.
- The Permanent Bureau is invited to draw up a report on the state of progress of this work for the attention of the Council of 2011.

## **A N N E X E S**



**List of Working Group Members and Observers**  
**(as per 8 March 2010)**

**MEMBERS**

**Mr Neil B. COHEN**, Professor of Law, Brooklyn Law School, Brooklyn, New York, United States of America

**Mr Clyde CROFT**, Lawyer and Arbitrator, Owen Dixon Chambers, Melbourne, Victoria, Australia

**Mr Sibidi Emmanuel DARANKOUM**, Professor of Law, University of Montreal, Montreal, Quebec, Canada

**Mr Andrew DICKINSON**, Visiting Fellow in Private International Law, British Institute of International & Comparative Law; Solicitor Advocate, Consultant to Clifford Chance LLP, London, United Kingdom

**Mr Ahmed Sadek EL KOSHERI**, Partner of Kosheri, Rashed & Riad, Legal Consultants & Attorneys at Law, Cairo, Egypt

**Ms Bénédicte FAUVARQUE-COSSON**, Professor of Law, University Paris II Panthéon-Assas, Paris, France

**Mr Lauro GAMA E. SOUZA Jr.**, Lawyer specializing in international law and commercial arbitration; Associate Professor, Pontifical Catholic University of Rio de Janeiro, Brazil

**Mr Francisco J. GARCIMARTÍN ALFÉREZ**, Professor of Law, University of Rey Juan Carlos, Madrid, Spain

**Mr Daniel GIRSBERGER**, Professor, University of Lucerne, Law School, Luzern, Switzerland

**Ms Yujun GUO**, Professor of Law, Wuhan University, Institute of International Law, Wuhan, China

**Mrs Marielle E. KOPPENOL-LAFORCE**, Professor of Law, University of Leiden; Lawyer (International Contracts and Litigation), Houthoff Buruma, Amsterdam, Netherlands

**Mr Dieter MARTINY**, Professor Em. of Law, Europa University Viadrina, Frankfurt (Oder); Max-Planck-Institut für ausländisches und internationales Privatrecht Mittelweg, Hamburg, Germany

**Mr Campbell McLACHLAN**, Professor of Law, Victoria University of Wellington, Wellington, New Zealand

**Mr José Antonio MORENO RODRÍGUEZ**, Professor, CEDEP – Centro de Estudios de Derecho, Economía y Política, Asunción, Paraguay

**Mr Jan L. NEELS**, Professor of Private International Law, Faculty of Law, University of Johannesburg, South Africa

**Ms Yuko NISHITANI**, Associate Professor, *Max-Planck-Institut für ausländisches und Internationales Privatrecht*, Hamburg, Germany

**Mr Richard F. OPPONG**, Lecturer in Law, Lancaster University, Law School, Lancaster, United Kingdom

**Ms Geneviève SAUMIER**, Professor of Law, McGill University, Faculty of Law, Montreal, Quebec, Canada

**Mr Ivan ZYKIN**, Vice-Chair of the International Commercial Court of Arbitration, Chamber of Commerce and Industry of the Russian Federation, Moscow, Russia

## **OBSERVERS**

**Ms Francesca MAZZA**, Counsel, Secretary of the ICC Commission on Arbitration, International Court of Arbitration, Paris, France

**Mr Michael Joachim BONELL**, Chair Working Group Contract Principles, UNIDROIT, Rome, Italy

**Mr Fabio BORTOLOTTI**, Chair of the ICC Commission on Commercial Law and Practice, International Chamber of Commerce, Paris, France

**Mr Klaus REICHERT**, Co-Chair, IBA Litigation Committee, International Bar Association (IBA), London, United Kingdom

**Mr Timothy LEMAY**, Principal Legal Officer, Head, Legislative Branch, UNCITRAL, Secretariat, Vienna, Austria

**Mr Peter WERNER**, Policy Director, International Swaps and Derivatives Association (ISDA), London, United Kingdom

**DRAFT AGENDA****MEETING OF THE WORKING GROUP ON CHOICE OF LAW IN  
INTERNATIONAL CONTRACTS****(Permanent Bureau, The Hague, 21 – 22 January 2010)**

It is proposed that each day the meeting will begin at 9.30 a.m. and end at 6.00 p.m. (at the latest on 22 January). Lunch breaks will be from 1.00 – 2.30 p.m.

The suggested timetable will be followed with a certain degree of flexibility and may need to be modified in the light of progress in the discussions.

***Wednesday 20 January 2010***

6.00 p.m. Guided tour at Escher Museum (Lange Voorhout 74 – 2514 EH The Hague)

7.15 p.m. Informal dinner at restaurant “Plato” (Frederikstraat 32 – 2514 LK The Hague)

***Thursday 21 January 2010***

9.30 – 9.45 a.m. **1. Opening of the meeting**

Opening remarks by the Secretary General of the Hague Conference on Private International Law

9.45 – 10.30 a.m. **2. « Tour de table »**

10.30 – 11.30 a.m. **3. Brief overview of Project**

Presentation by Marta Pertegás, followed by discussion

a) Mandate

b) Organisational matters

11.30 – 11.45 a.m. *Coffee break*

11.45 a.m. – 1.00 p.m. **4. The substantive scope of the draft instrument**

a) Oral presentation of Working Paper No 1

b) Discussion

1.00 – 2.30 p.m. *Lunch break*

2.30 – 6.00 p.m.           **4. The substantive scope of the draft instrument (cont.)**

4.00 – 4.15 p.m.           *Tea break*

**Friday 22 January 2010**

9.30 – 11.00 a.m.           **5. The need for subsidiary rules in the draft instrument**

- a) Oral presentation of Working Paper No 2
- b) Discussion

11.00 – 11.15 a.m.       *Coffee break*

11.15 a.m. – 1.00 p.m.   **5. The need for subsidiary rules in the draft instrument (cont.)**

- b) Discussion (cont.)

1.00 – 2.30 p.m.           *Lunch break*

2.30 – 3.30 p.m.           **6. Next stages of the Project**

3.30 – 3.45 p.m.           *Tea break*

3.45 – 6.00 p.m.           **7. Conclusions and Recommendations of the first meeting of the Working Group**

- a) Discussion
- b) Adoption of Conclusions and Recommendations in view of the Council on General Affairs and Policy of April 2010

**First Meeting of the Working  
Group on Choice of Law in  
International Contracts  
(21 - 22 January 2010)**



**Report**

On 21 and 22 January 2010, the **Working Group on Choice of Law in International Contracts** (the Working Group) met at the Permanent Bureau of the Hague Conference on Private International Law (HCCH) for the first time. Guided by the mandate given by the Council on General Affairs and Policy of the Hague Conference,<sup>10</sup> the participating Experts discussed the following:

**(A) Issues of a general nature**

Underlying the benefits of a global legal framework on choice of law in international contracts, the Working Group identified the following goals in the drafting process of the instrument (the Draft Instrument):

- (1) to achieve the fundamental goal of promoting party autonomy;
- (2) to prepare a Draft Instrument serving the needs of practitioners as well as legislators;
- (3) to define a realistic time-frame for the project considering what is achievable within the available resources;
- (4) to determine the scope of the Draft Instrument;
- (5) to determine the reach of the applicable law as determined by the Draft Instrument; and
- (6) to determine the form that the Draft Instrument will take, in particular whether the Draft Instrument should become a body of principles, a legislative guide, a model law, or another form of instrument.

It was noted that the aforementioned issues were intrinsically linked, and therefore any preliminary conclusions reached on any one of these elements may need to be revisited at a later stage.

Mr Daniel Girsberger was elected as Chair of the Working Group.

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<sup>10</sup> "The Council invited the Permanent Bureau to continue its work on promoting party autonomy in the field of international commercial contracts. In particular, the Permanent Bureau was invited to form a Working Group consisting of experts in the fields of private international law, international commercial law and international arbitration law and to facilitate the development of a draft non-binding instrument within this Working Group. The Permanent Bureau will keep Members informed on progress", see "Report of the Council on General Affairs and Policy of the Conference of 31 March to 2 April 2009", Prel. Doc. No 1 of December 2009 for the attention of the Council of April 2010 on General Affairs and Policy of the Conference, also available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "International Contracts".

## **(B) Substantive scope of the Draft Instrument**

The Working Group was of the preliminary view that the determination of the precise scope of the Draft Instrument should focus on the following three central concepts: "international", "commercial" and "contracts".

### **(i) International**

The Working Group recommended that a balance be struck between the wish to confer the broadest possible interpretation to the term "international" and the need for the Draft Instrument to exclude purely internal cases.

The Working Group expressed preliminary support for a negative formulation of internationality, so as to exclude only those situations where no international element is involved, thus excluding those contracts which are only connected with one State and do not involve a relevant foreign element.

The Working Group agreed that a proposal on how this concept should be formulated would be discussed at a later stage on the basis of further preparatory work. Further, a list of possible examples and / or determinative factors to illustrate ("white list"), or narrow down ("black list"), where necessary or appropriate, the definition of internationality, should be submitted to the Working Group for further consideration.

### **(ii) Commercial**

The Working Group came to a preliminary understanding that consumer and employment contracts were not to be addressed within the Draft Instrument.

Bearing in mind the non-binding nature of the Draft Instrument, it was noted that the possible exclusion of certain other commercial contracts from its scope may still be relevant to the drafting of its operational provisions. Therefore, it was decided that any proposal on possible exclusion of other contracts should be discussed at a later stage on the basis of further preparatory work.

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.

### **(iii) Contracts**

The Working Group was of the opinion that the Draft Instrument should not attempt to define the precise meaning of "contract" but rather that the commentary should include considerations as to the characterisation of a contractual issue, especially with regard to interrelated areas of law, such as insolvency, corporate, property, torts, etc. The general view was that the Draft Instrument should not interfere with the application of other rules on these areas.

The Working Group agreed to continue the discussions on (1) the scope of the Draft Instrument and (2) the issues to be governed by the applicable law, on the basis of further preparatory work. Particular attention should be given to multilateral relationships (agency, assignment, subrogation, etc.).

**(C) The need for subsidiary rules**

The majority of the members of the Working Group preferred a comprehensive Draft Instrument which would include subsidiary rules in the absence of a choice of law by the parties.

It was also considered that a discussion on subsidiary rules should be dealt with subsequent to the development of choice of law rules on applicable law. That is to say, the first tranche of work undertaken by the Working Group is to define rules concerning choice of law agreements (without however excluding the Working Group from considering the interrelationship between choice of law and subsidiary rules).

**(D) Methodology**

It was suggested that the Draft Instrument should be developed in the form of provisions / articles / sections (black-letter rules), followed by comments and examples, irrespective of the final type of Instrument to be proposed.

Further preparatory work on the principal elements of the Draft Instrument should include a comparative overview of relevant legal sources.

Most Members of the Working Group expressed their willingness to contribute to further preparatory work and identified their specific areas of interest within the topics that will require further exploration in preparation of subsequent meetings.

It was suggested that a second meeting be organised for mid-November 2010 (precise dates and draft agenda to be communicated by the Permanent Bureau as soon as possible). It was further suggested that a subsequent meeting would be held not later than nine months thereafter.

The Working Group invited the Permanent Bureau to set up a restricted electronic discussion platform to facilitate discussions among the Members of the Working Group on a permanent basis. The Permanent Bureau will inform the Members of the Working Group when this platform is operational.

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