

**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>1</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>1</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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