

**CHOIX DE LA LOI APPLICABLE EN MATIÈRE DE CONTRATS INTERNATIONAUX
ÉTAT D'ÉLABORATION DU PROJET D'INSTRUMENT**

établie par le Bureau Permanent

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**CHOICE OF LAW IN INTERNATIONAL CONTRACTS
DEVELOPMENT PROCESS OF THE DRAFT INSTRUMENT**

drawn up by the Permanent Bureau

*Document préliminaire No 6 de février 2011 à l'intention
du Conseil d'avril 2011 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 6 of February 2011 for the attention
of the Council of April 2011 on General Affairs and Policy of the Conference*

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I. Introduction

1. The 2010 Council on General Affairs and Policy of the Conference (“the Council”) encouraged the Permanent Bureau to carry out further work in drafting an instrument on choice of law in international contracts (“the Draft Instrument” or “the Project”).¹ This mandate, entrusted to the Permanent Bureau by the Council in 2009,² confirmed the important preparatory work on promoting party autonomy carried out since 2006.³

2. The Working Group on Choice of Law in International Contracts (“the Working Group”), formed by the Permanent Bureau in 2009, is the driving force of the Project and its work is progressing at a steady pace. The Permanent Bureau would like to thank Mr Daniel Girsberger, Chair of the Working Group, for his sustained co-ordination efforts as well as all the members of the Working Group for the quality of their scientific contributions.

3. This document summarises the work carried out so far to fulfil the current mandate (II) and presents a suggested work programme for the continuing development of the Draft Instrument (III).

II. Progress achieved in the past year

4. The progressive work on the Draft Instrument is hereafter primarily in the hands of the Working Group. Progress was particularly evident during the second meeting, which took place in The Hague from 15 to 17 November 2010, the main conclusions of which are discussed below.

5. In addition, the Permanent Bureau continues its efforts to raise awareness for the future instrument and continues to analyse recent developments in comparative law on the law applicable to international contracts. Given their importance to the Project, these recent developments are being constantly monitored.

A. Progress achieved by the Working Group

6. Further to the April 2009 decision of the Council, a Working Group was formed in order to facilitate the development of a draft non-binding Instrument. A reminder as to the composition of the Working Group can be found in Annex I. Following two meetings, one in January and the other in November 2010, it appears to be now established that the size and composition of the group are optimal. The 20 or so experts who participate represent a diversity of geographic, social and economic perspectives and represent the principal legal systems present at the international level. Given the sustained progress made by the Working Group, it is the view of the Permanent Bureau that this diversity helps to give the Project a truly international foundation and a concrete future influence.

7. After its meeting on 21 and 22 January 2010, the Working Group identified key issues concerning the scope of the future Instrument and the range of the choice of applicable law. Two sub-groups of experts were then formed to elaborate on the many preliminary contributions to these questions in order to lay the groundwork for future

¹ “Report of the Council on General Affairs and Policy of the Conference of 7 to 9 April 2010”, Prel. Doc. No 1 of September 2010 for the attention of the Council of 2011 on General Affairs and Policy of the Conference, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” then “International Contracts”.

² “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 2010 on General Affairs and Policy of the Conference, also available on the Hague Conference website at < www.hcch.net > under “Work in Progress” then “International Contracts”.

³ For ease of reference, all preparatory documents related to this project are available on the website of the Hague Conference at < www.hcch.net > under “Work in Progress” then “International Contracts”.

debate. The first sub-group on the scope of the instrument was chaired by Mr Francisco J. Garcimartín Alférez, and the second sub-group on the range of the choice of law was jointly chaired by Mr Dieter Martiny and Mr Andrew Dickinson (collectively “the Chairs of the sub-groups”). The list of topics discussed is appended (see Annex II).

8. Some experts kindly agreed to conduct extensive research on certain highlighted topics, notably in comparative law, and to present the results thereof to their colleagues. The Permanent Bureau thanks them for their work. It was agreed that the results of these preliminary findings would be forwarded and submitted for comment to members of each sub-group through a restricted electronic discussion platform.⁴ This platform was set up by the Permanent Bureau on 23 April 2010. Experts with access rights have since visited the platform over 300 times.⁵

9. At the end of summer 2010, all preliminary contributions written by experts were posted to the forum. Some documents have been amended in light of comments received.

10. Based on these contributions, the Chair, the Chairs of the sub-groups and the Permanent Bureau agreed on a draft Agenda to ensure that the second meeting of the Working Group would run efficiently. The strategic objective was to streamline the work of the sub-groups and to group the related topics (*e.g.*, issues concerning the existence and material validity of the agreement on choice of law and the consent of the parties and those relating to tacit choice of law applicable to a contractual relationship) in order to ensure as wide a coverage as possible of the topics studied and to significantly advance in the drawing up of the Draft Instrument. This draft Agenda is appended (see Annex III).

11. The second meeting of the Working Group was held at the offices of the Permanent Bureau from 15 to 17 November 2010. The objective of this three-day meeting was to begin discussions on the core issues of the Project, namely the provisions concerning choice of law by the parties and the possible limitations to such autonomy, and to resume the discussions on the scope of the Draft Instrument. Informed of the Conclusions and Recommendations adopted by the Council in 2010, the Working Group understood “that priority should be given to the development of rules for cases where a choice of law has been made”.⁶

12. First, the Working Group devoted at least one entire working session to each item on the Agenda, with the exception of the question regarding the scope of the Draft Instrument which had already been discussed during the first meeting but was nevertheless peripherally addressed during the other working sessions of the second meeting.

13. In particular, the Working Group was able to agree on the wording for articles for most topics discussed, constituting an important step for the Draft Instrument. These proposals are featured in the appended report (see Annex IV).

14. Throughout the discussions, the Working Group also identified topics for which further research was needed and those for which new analysis was needed. For the purposes of the former, the sub-groups established after the first meeting were maintained. For the purposes of the latter, new sub-groups were created. The Permanent

⁴ See the Hague Conference website at < <http://www.hcch.net/forum> >. The discussion platform enables all members of the Working Group to submit comments and recommendations at each stage of the Project. The members are notified by e-mail of the addition of new information to the discussion platform. The observers of the Working Group receive the complete documentation before each meeting.

⁵ Up until 31 January 2011, there had been 314 visits by members and 94 visits by observers.

⁶ See Prel. Doc. No 1 of September 2010, *supra* note No 1, p. 16.

Bureau would like to once again express its gratitude to the experts who have kindly agreed to begin new research and analysis. The list of the work to be undertaken, the constitution of these working groups as well as certain methodological details are featured in the report of the second meeting (see Annex IV). In addition, the dates for the next meeting have been set for 28, 29 and 30 June 2011.

15. As for the form which the Draft Instrument should eventually take, the Working Group reiterated its preference for an instrument which would not only include a set of provisions similar to articles of a Convention, but also additional sections with comments and illustrations to aid in the interpretation of each provision.⁷ Keeping in mind the impact the form of the Draft Instrument would have on the length of time it would take to draw up, the Council is invited to take into consideration the different possible scenarios and perhaps to clarify the scope of the mandate of the Working Group.

16. The Council could perhaps agree that the mandate of the Working Group is limited, at this stage, to drawing up draft provisions / articles / sections (black-letter rules). Should this approach be accepted, the Working Group felt that it would be realistic to conclude the drawing up of the Draft Instrument during the first half of 2012 and thus before the meeting of the Council, presuming it takes place during the month of April. Following the study and possible adoption of the Draft Instrument by the Council, the drawing up of a possible draft commentary, by way of an explanatory report, could be entrusted to an expert, possibly a member of the Working Group, in collaboration with the Permanent Bureau. The study, and possible adoption of the draft commentary, would be conducted in a manner similar to that implemented, in general, for explanatory reports of Hague Conference Conventions.

17. Alternatively, the Council could invite the Working Group to include comments and illustrations for each of the proposed provisions in the Draft Instrument. Should this approach be chosen, it should be noted that the Working Group has estimated that its work would be prolonged until mid-2013. The Permanent Bureau considers that this assessment is realistic so long as the drawing up and study of an explanatory supplement is understood to require sustained commitment from the entire Working Group and at least one additional meeting of the Working Group. While recognising the implied delays in this approach, the Permanent Bureau approves of entrusting the Working Group with this task. The contribution of the Working Group as a whole to the drawing up of this part of the Draft Instrument will almost certainly increase the visibility of the Instrument and its future usefulness, both to practitioners and to legislators.

18. Finally, it would be possible to proceed in two stages: first the Council could analyse the draft rules drawn up by the Working Group during 2012 and then invite the Permanent Bureau to resume the work within the Working Group by drawing up a subsequent explanatory supplement. This method has the advantage of allowing the Council, at an intermediate stage, to decide on the legislative choices retained before finalising the entire set of rules, with the associated comments and illustrations contributing to their interpretation. As previously mentioned, the contribution of the Working Group as a whole to the drawing up of this part will most likely increase the visibility of the Instrument and its future usefulness, both to practitioners and to legislators.

19. With a view to organising this Project's work programme and, more generally, the work programme of the Permanent Bureau, it would be important to agree as soon as possible on the exact mandate of the Working Group and on the progressive steps, if any, to implement the mandate. An additional important question is the possibility of convening a Special Commission of governmental experts, which will be discussed in paragraph 26 *infra*.

⁷ See Prel. Doc. No 6 of March 2010, p. 6, paras 18 and 19.

B. Dissemination of the work on the Draft Instrument and monitoring of developments in comparative law

20. The preparatory work led by the Permanent Bureau between 2006 and 2009 revealed some differences in the recognition granted by States to party autonomy. Accordingly, parallel to supporting the Working Group and in order to ensure that the Draft Instrument has the widest recognition and reach possible, the Permanent Bureau continued its efforts to disseminate the Draft Instrument and to analyse the developments relating to the Draft Instrument in other institutions.

21. The informative article entitled "Choice of Law in International Commercial Contracts: Hague Principles?" which was published in French and Spanish in 2010,⁸ was published in English in 2011.⁹ This article formed the basis for a new contribution in French, included in the proceedings of a colloquium held in Dijon (France) in September 2010,¹⁰ where the Permanent Bureau presented the progress of the Project and the relevance of the Draft Instrument in view of the entry into force of the "Rome I" Regulation in the European Union.¹¹ Such contributions will likely increase the visibility of the Project in interested circles.

22. The section of the Hague Conference website devoted to the Project¹² has also attracted interest. Between 1 December 2009, and 30 November 2010, this section was visited 9,062 times.¹³ Following consultations, certain researchers, including PhD students who have a vested interest in the work of the Hague Conference on international contracts, contacted the Permanent Bureau for more information on the progress of the Project.

23. The Permanent Bureau also continues its efforts to consult with its "sister" organisations – UNIDROIT and UNCITRAL – in order to explore the possible synergies between the work of the three organisations, as well as its regular consultations with other international organisations that work in the field of international commercial law. In addition to the large array of instruments containing conflict of law rules in contract matters that have already been adopted, the Permanent Bureau intends to focus specifically on the ongoing projects of UNCITRAL, notably the work of Working Groups II (Arbitration and Conciliation) and III (Online Dispute Resolution). More specifically, the current work of the latter concerning online dispute resolution for cross-border electronic commerce transactions concerns the development of an online system of dispute resolution relating to transactions involving the use of Internet, including business-to-business and business-to-consumer transactions. The question of applicable law, and hence of choice of law by the parties to international commercial contracts will without a doubt be raised and it would therefore be expedient to continue this co-operation.

24. Finally, the Permanent Bureau is continuing its evaluation of other developments relating to party autonomy in international commercial contracts. Special attention has been devoted to current practice as to the use of choice of law clauses and the extent to which they are respected, as well as to legislative modifications in this field. A recent example is the adoption by China of a new Statute on the Application of Laws over

⁸ The Permanent Bureau of the Hague Conference on Private International Law, "Choix de la loi applicable aux contrats du commerce international: Des Principes de La Haye?", (2010) 99:1 *Revue critique de droit international privé*, 2009, 83-102; Oficina permanente de la Conferencia de La Haya de derecho internacional privado, « Elección de la ley aplicable a los contratos de comercio internacional: ¿Principios de La Haya? », Jürgen Basedow, Diego P. Fernández Arroyo y José A. Moreno Rodríguez (coord.), *¿Cómo se codifica hoy el derecho comercial internacional?* (Asunción, CEDEP, 2010), 341-363.

⁹ The Permanent Bureau of the Hague Conference on Private International Law, "Choice of Law in International Commercial Contracts: Hague Principles?", *Uniform Law Review* 2011, Issue Nos 3-4 (forthcoming).

¹⁰ S. Corneloup et N. Joubert, *Le règlement communautaire Rome I et le choix de loi dans les contrats internationaux*, CREDIMI, Dijon, 2011 (forthcoming).

¹¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4.7.2008, 6.

¹² Available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "International Contracts".

¹³ As at 31 January 2011, the English version has been consulted 6088 times; the French version, 1501 times; the Spanish version, 842 times, and the German version, 631.

Foreign-Related Civil Relations of the People's Republic of China, which enters into force on 1 April 2011. Recognition of party autonomy in international contractual relationships is strengthened by this new Statute, with its Articles 3 and 41 specifically providing for choice of law by the parties. In terms of the future Hague Instrument, it is interesting to note that Article 3 appears to limit itself to the *explicit* choice of law, which conflicts with the Working Group's proposal on tacit choice of law.¹⁴ On the American continent, the actual role of the will of the parties in international commercial contracts continues to waver. For example, in the United States of America, divergent decisions have been reported regarding the applicability of the law chosen by the parties; the cases concerned the applicability of the law of the state of Washington in franchise agreements in, respectively, California and Oregon. In a first case, the California court accepted the choice of law made by the parties, despite the territorial restrictions of the law of the state of Washington. In contrast, in a second case, the Washington Federal District Court and, on appeal, the Ninth Circuit, considered that a law that contains territorial limitations cannot be applied beyond its scope of application, even if the parties specifically chose it.¹⁵ However, this question has already been considered by the Working Group and it is felt that the position taken in the context of the future Instrument could one day influence case law on the effects of choice of law clauses.¹⁶ At the same time, it has proven particularly effective to advance with the progressive drawing up of a Draft instrument following the practice of the 1994 Inter-American Convention on the Law Applicable to International Contracts (within the framework of the OAS)¹⁷ and the evolution of the issue within the European Union.¹⁸

25. In conclusion, legislative and case law developments in this field have certainly fuelled the debate and analysis undertaken until present. In the opinion of the Permanent Bureau, it seems essential that this comparative law analysis continues to be carried out.¹⁹

III. Future perspectives

26. Thanks to the impetus provided by the Working Group during the past year, it is realistic to envisage the finalisation of a first set of "provisions" of the Draft Instrument by early 2012, to be submitted to the Council in April 2012 at the latest. With a view to organising the work of the Working Group beyond its third meeting in June 2011, it

¹⁴ See Annex IV, p. 2.

¹⁵ S.C. Symeonides, "Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey", *American Journal of Comparative Law*, Vol. 58, 2011. Available at SSRN: < <http://ssrn.com/abstract=1737558> >, 69 and following.

¹⁶ See Annex IV, p. 2, as well as the preparatory document drawn up by Dieter Martiny for the attention of the second meeting of the Working Group ("General Principle of Party Choice under the Proposed Hague Principles on the Law Applicable to International Commercial Contracts").

¹⁷ J.A. Moreno Rodríguez and M.M. Albornoz, "Reflexiones emergentes de la Convención de México para la elaboración del futuro instrumento de La Haya en materia de contratación internacional", communication to be presented at the bi-annual Colloquium of the Journal of Private International Law, to be held in Milan (Italy) from 14 to 16 April 2011.

¹⁸ In particular, the case law of the European Court of Justice on the Rome Convention and the Rome I Regulation. For a regular overview, see, *i.a.*, H.-P. Mansel, K. Thorn and R. Wagner, "Europäisches Kollisionsrecht 2010: Verstärkte Zusammenarbeit als Motor der Vereinheitlichung?", *IPRax* 2011, 1-30, in particular p. 28.

¹⁹ The Permanent Bureau would like to express its gratitude to an increasing number of external collaborators (mostly former Permanent Bureau interns who were involved in this Project) who continue to provide relevant information on their respective jurisdictions: Ms Laurence Bich-Carrière (Canada), Ms Aicha Brahma (Morocco), Ms Peggy Carlier (France), Ms Yang Du (China), Ms Ephigénie Gagné (Canada), Ms Chloé Grenadou (France), Ms Ivana Radic (Canada), Ms Sun Yi (China), Ms Ning Zhao (China), as well as Judge Jung Hoon Park (South Korea, on secondment at the Permanent Bureau since September 2010). The Permanent Bureau would also like to thank Ms Rosehana Amin, part-time consultant (25% FTE) for her assistance with the Project.

would be important for the Council to consider the choices already expressed by the Working Group at this stage,²⁰ and to decide on (i) the three options discussed above in paragraphs 15-17 and (ii) on the opportunity to submit the Draft Instrument to a Special Commission of governmental experts. At the meeting of the Council in 2010, some delegations expressed their preference for a Special Commission to review the Draft Instrument or at least a prior consultation by experts of Members before the eventual adoption of the Instrument by the Council.²¹ The direction taken by the 2011 Council on these two issues will undoubtedly influence future work as well as the methodology and the timeframe of the Project.

27. In the meantime, the Working Group will redouble its efforts to tackle important pending issues such as the impact of overriding mandatory provisions, or the public policy exception on the choice of law, or even certain issues regarding the scope of the Draft Instrument. In preparation for the next meeting of the Working Group, the definition and preliminary analysis of pending issues has begun. The sub-groups formed after the first meeting have been invited to further define the remaining issues to be analysed for discussions, and newly created sub-groups have been invited to further examine issues of scope of the instrument, *inter alia*, arbitration / choice of court agreements, effect on third-party rights and obligations as well as severability (autonomous nature) of the choice of law clause. This work will surely invigorate discussion and analysis during the June 2011 meeting.

IV. Conclusions

28. The need to promote party autonomy in international commercial contracts in the field of international commerce is real. In this regard, the Working Group has been able to make significant progress in its work. The development of the Draft Instrument is progressing at a steady pace (see in particular the proposed articles on important issues such as allowing parties to choose a set of non-State rules or the admission of a tacit choice of applicable law). It is hoped that the third meeting of the Working Group will consolidate the proposed provisions.

29. In light of the previous comments, the Permanent Bureau suggests that:

- The Council welcome the progress made by the Working Group, notably the adoption of draft articles for the Draft Instrument, and encourage the continuation of the work.
- The Council decide on the methodology to be followed in order to allow the Working Group to complete [the Draft Instrument / the drawing up of the proposed provisions of the Draft Instrument].
- The Council decide whether to convene a Special Commission of governmental experts to discuss [the Draft Instrument / the drawing up of the proposed provisions of the Draft Instrument] and, if so, at which stage of the Project the Special Commission should take place.
- The Council invite the Permanent Bureau to draw up a report on the state of progress of this work for the attention of the Council of 2012.

²⁰ At its meeting in November 2010, the report of which is appended in Annex IV, the Working Group tentatively agreed on fundamental issues such as the existence and material validity of the agreement on choice of law and the consent of the parties, the implicit choice of law, change of the choice of law and severability, the formal conditions, and the range of the selected law (including the choice non-State rules).

²¹ See Prel. Doc. No 1 of September 2010, *supra* note No 1, 30 ff.

ANNEXES



List of Working Group Members and Observers
(as per 1 February 2010)

MEMBERS

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

The Hon. Justice Clyde CROFT, Supreme Court of Victoria, Melbourne, Australia

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

Mr Andrew DICKINSON, Professor of Law, Sydney Law School (Australia) 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

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

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

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

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

**PREPARATORY DOCUMENTS FOR THE ATTENTION OF THE
SECOND MEETING OF THE WORKING GROUP ON CHOICE OF LAW
IN INTERNATIONAL CONTRACTS**

Andrew DICKINSON, "The Role of Public Policy and Mandatory Rules within the Proposed Hague Principles on the Law Applicable to International Commercial Contracts" (8 July 2010);

Lauro GAMA E. SOUZA, Emmanuel DARANKOUM, Geneviève SAUMIER, "Preliminary report of the sub-group on non-State law and choice of law in arbitration" (10 May 2010);

Francisco GARCIMARTIN, "Scope of the instrument and Scope of the applicable law" (31 May 2010);

Dieter MARTINY, "General Principle of Party Choice under the Proposed Hague Principles on the Law Applicable to International Commercial Contracts" (2 August 2010);

Dieter MARTINY, "Law applicable to Determine Consent under the Proposed Hague Principles on the Law Applicable to International Commercial Contracts" (2 August 2010);

Dieter MARTINY, "Severability and Change of Applicable Law under the Proposed Hague Principles on the Law Applicable to International Commercial Contracts" (2 August 2010);

Jan L. NEELS, "Preamble – First Draft" (March 2010);

Jan L. NEELS, "Express and Tacit or Implied Choice of Law: Proposal for the Hague Principles on Choice of law in International Commercial Contracts" (29 September 2010);

Jan L. NEELS, "Formal Validity of Choice of Law – First Draft" (5 October 2010).

DRAFT AGENDA**SECOND MEETING OF THE WORKING GROUP
ON CHOICE OF LAW IN INTERNATIONAL CONTRACTS****(Permanent Bureau, The Hague, 15-17 November 2010)**

It is proposed that the meeting will begin each day at 9.30 a.m. and end at 6.00 p.m. Lunch breaks will be from 1.00 to 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.

Monday 15 November 2010

- | | |
|------------------------|---|
| 9.30-10.00 a.m. | Opening of the meeting
Opening remarks by the Secretary General of the Hague Conference on Private International Law
Brief update on progress made since January 2010, by Marta Pertegás |
| 10.00-10.30 a.m. | Introductory presentation
Overview of preparatory materials, brief introduction of the draft agenda and other organisational issues, by Daniel Girsberger (Chairman) and by Dieter Martiny, Andrew Dickinson and Paco Garcimartín (Chairs of the sub-groups) |
| 10.30-11.00 a.m. | General aspects of party autonomy: available options and structure

a) Presentation <ul style="list-style-type: none">• Preamble• Formulation of the principle of party autonomy in general• Joint or different principles for State courts and arbitral tribunals?• Other general aspects (<i>excluding</i> specific agenda items) b) Discussion |
| 11.00-11.15 a.m. | Coffee break |
| 11.15 a.m. – 1.00 p.m. | General aspects of party autonomy (cont.)

b) Discussion (cont.) |
| 1.00-2.30 p.m. | Lunch break |
| 2.30-4.15 p.m. | Existence and material validity of the choice of law agreement and consent of the parties

a) Presentation <ul style="list-style-type: none">• Existence• Material validity• Consent b) Discussion |

- 4.15-4.30 p.m. Tea break
- 4.30–6.00 p.m. **Implied choice of law**
- a) Presentation
 - b) Discussion
- Dinner offered by the Permanent Bureau (time and location to be decided)

Tuesday 16 November 2010

- 9.30-11.00 a.m. **Change of choice of law and severability**
- a) Presentation
 - b) Discussion
- 11.00-11.15 a.m. Coffee break
- 11.15 a.m. – 1.00 p.m. **Formal requirements**
- a) Presentation
 - b) Discussion
- 1.00-2.30 p.m. Lunch break
- 2.30-4.30 p.m. **The range of the selected law (in particular non-State law)**
- a) Presentation
 - b) Discussion
- 4.30-4.45 p.m. Tea break
- 4.45-6.00 p.m. **Preliminary discussion on public policy and mandatory rules**
- a) Presentation
 - b) Discussion

Wednesday 17 November 2010

- 9.30 – 11.00 a.m. **Scope of the applicable law**
- a) Presentation
 - Particular issues
 - Multi-party relationships
 - Drafting models
 - b) Discussion
- 11.00-11.15 a.m. Coffee break

11.15 a.m. – 1.00 p.m.	Scope of the instrument (continued from First Meeting) a) Presentation <ul style="list-style-type: none">• Other excluded contracts?• Delimitation of a “contract” / “contractual matter” b) Discussion
1.00-2.30 p.m.	Lunch break
2.30-4.15 p.m.	Follow-up / make-up session Time allocated to any previously discussed subjects that require additional attention
4.15-4.30 p.m.	Tea break
4.30-6.00 p.m.	Conclusions and Recommendations of the Second Meeting of the Working Group a) Presentation of the Preliminary Report of the Second Meeting and future stages of the Project b) Discussion

**REPORT OF THE SECOND MEETING OF THE WORKING GROUP
ON CHOICE OF LAW IN INTERNATIONAL CONTRACTS
(15-17 NOVEMBER 2010)**

From 15 to 17 November 2010, the **Working Group on Choice of Law in International Contracts** (the Working Group), chaired by Mr Daniel Girsberger, met at the Permanent Bureau of the Hague Conference on Private International Law (HCCH) for the second time. Guided by the mandate given by the Council on General Affairs and Policy of the HCCH,¹ the participating experts tentatively agreed on the text of certain provisions of the Draft Instrument (text in brackets to be further analysed):

GENERAL ASPECTS OF PARTY AUTONOMY

Preamble

The Working Group proposed the following formulation:

These Principles set forth rules [and principles] concerning choice of law [agreements for/in] international commercial contracts.

[They recognise that the parties to international commercial contracts are best placed to determine the appropriate rules to govern their transactions. [Enabling them to do so is consistent with general principles of freedom of contract, meets the legitimate expectations of the parties and [notably] promotes legal certainty, thereby reducing costs associated with uncertainty.]]

They affirm the principle of “party autonomy”, according to which the parties are free to choose the law or rules of law governing their contract.

[ALTERNATIVELY: They affirm the fundamental importance of party autonomy meaning the freedom of the parties to choose the law applicable to the contract that is subject to certain limitations.]

They recognise limited exceptions to the principle of party autonomy.

They may be used as a model for national, regional, supranational and international instruments.

They may be applied by the courts in disputes involving international commercial contracts and by arbitral tribunals in international commercial arbitration.

They may be used in the development of private international law rules and principles by the courts and arbitral tribunals.

They may be used to interpret and supplement domestic private international law rules and principles, as well as regional, supranational and international instruments.

¹ At its 2010 annual meeting, the Council “welcomed the setting up of a Working Group on Choice of Law in International Contracts. It expressed its appreciation to the experts for the progress made and invited the Working Group to continue its work for the progressive development of a draft instrument of a non-binding nature. The Permanent Bureau was invited to draw up a report on the state of progress of this work for the attention of the Council of 2011.”, Report of the Council on General Affairs and Policy of the Conference of 7 to 9 April 2010, Prel. Doc. No 1 of September 2010 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference.

It was noted that the aforementioned provisions were intrinsically linked with the main text of the Draft Instrument and may need to be revisited at a later stage.

FORMULATION OF THE PRINCIPLE OF PARTY AUTONOMY IN GENERAL

The Working Group proposed the following formulation:

A contract is governed by the law or rules of law chosen by the parties.

The choice may be made at any time.

[No connection is required between the law chosen and the parties or their transaction./

The parties may choose any law whether or not connected to them or to the transaction.]

EXISTENCE AND MATERIAL VALIDITY OF THE CHOICE OF LAW AGREEMENT AND CONSENT OF THE PARTIES

The Working Group proposed the following formulation:

The existence and material validity of the consent of the parties as to the choice of the applicable law shall be determined by the law that would apply [in accordance with the provisions of Article / paragraph xx²] if the choice were valid.

Nevertheless, to establish that he did not consent to the choice of law, [to the contract itself, or to any term thereof,] a party may rely on the law of the State where he has his [habitual residence / principal place of business], if under the circumstances it is not reasonable to determine that issue according to the law specified in the preceding paragraph.

EXPRESS AND TACIT CHOICE OF LAW

The Working Group proposed the following formulation:

The choice or any modification of the choice must be made expressly or must appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or arbitral tribunal in a given State to determine disputes under the contract, is not in itself equivalent to a choice of the law of that State.

CHANGE OF CHOICE OF LAW AND SEVERABILITY

The Working Group proposed the following formulation:

The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that initially applicable law was chosen by the parties.

² See provision on implied choice of law.

Nevertheless, that change shall not prejudice the formal validity of the contract [nor adversely affect the rights of third parties].

By their choice the parties may select the law applicable to the whole or part only of the contract.

FORMAL REQUIREMENTS

The Working Group proposed the following formulation:

A choice of law agreement [or any modification thereof] is not subject to any particular requirement as to form unless otherwise agreed by the parties.

THE RANGE OF THE SELECTED LAW (IN PARTICULAR NON-STATE LAW)

The majority of the members of the Working Group was of the view that the Draft Instrument should allow the designation of non-State law by parties to commercial contracts. This designation would be effective both in court proceedings and arbitration. It was not decided which limitations (if any) should be placed on the nature and / or type of rules available to the parties. Rather, the majority of the Working Group agreed to consider the terminology used in Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration and further instruments in order to profit from the developments and observations in theory and practice of the past decades.

The Working Group also agreed to continue the analysis and discussions on the identification of the law applicable where the chosen rules do not provide a solution (gap-filling).

PRELIMINARY DISCUSSION ON PUBLIC POLICY AND MANDATORY RULES

The Working Group was of the view that the following provisions would form the basis of further analysis and discussions:

[Overriding mandatory provisions are provisions which are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation and which apply irrespective of the law chosen by the parties or otherwise applicable.]

Nothing in these Principles shall restrict the application of the overriding mandatory provisions of the law of the forum.³

Application of a provision of the law or a rule of law chosen by the parties may only be excluded if and to the extent that such application would be manifestly incompatible with fundamental notions of [international] public policy (*ordre public*) of the forum.

[For court proceedings, it shall be for the [private international law of the] forum State to decide when its courts may or must apply or take account of the mandatory provisions of another law [with which the [contract / situation] has a close connection].]

A separate provision addressing overriding mandatory provisions in arbitration proceedings is to be inserted.

³ See note 2 above.

SCOPE OF THE APPLICABLE LAW

The Working Group was of the view that the following provisions would form the basis of further analysis and discussions:

The law chosen by the parties shall govern all aspects or issues related to the contract between the parties.

It was considered that a non-exhaustive list of issues should be developed within the main text of the Draft Instrument, and the following was proposed:

- (a) interpretation [and construction];
- (b) rights and obligations arising from the contract;
- (c) performance and the consequences of non-performance, including the assessment of damages and interest in so far as it is governed by rules of law;
- (d) the various ways of extinguishing obligations, prescription or limitation periods;
- (e) validity and the consequences of invalidity [or nullity] of the contract;
- (f) [burden of proof]; and
- (g) [pre-contractual obligations].

SCOPE OF THE INSTRUMENT

The Working Group will examine at a later stage whether certain issues such as arbitration / choice of court agreements and capacity fall outside the scope of the Draft Instrument.

PENDING ISSUES

The Working Group was of the view that further work should be conducted on:

1. the effect of the Draft Instrument on third party rights and obligations;
2. assignment, subrogation and the like; and
3. the separability / autonomous nature of a choice of law clause.

Accordingly, it was agreed that these issues be explored by sub-groups with a view to discuss them at the third meeting of the Working Group.

The Working Group also agreed to examine whether a section containing defined terms (*e.g.*, "habitual residence", "State") is necessary.

METHODOLOGY AND TIMEFRAME

The Working Group reaffirmed that the Draft Instrument should include comments and illustrations.

The Permanent Bureau, in consultation with the Chair and the Chairs of the sub-groups will further define the remaining issues to be analysed for discussion at the next meeting.

It was suggested that a third meeting be organised in the summer of 2011.

The Permanent Bureau encourages the Working Group to continue to utilise the HCCH electronic forum to facilitate discussions among Members on a permanent basis.