

**Third Meeting of the Working
Group on Choice of Law in
International Contracts
(28-30 June 2011)**



Report

From 28 to 30 June 2011, the **Working Group on Choice of Law in International Contracts** ("Working Group"), chaired by Mr Daniel Girsberger, met at the Permanent Bureau of the Hague Conference on Private International Law ("HCCH") for the third time. Guided by the mandate given by the Council on General Affairs and Policy of the HCCH,¹ the participating experts finalised the text of the draft articles of the future Principles (the "draft Hague Principles") and identified relevant issues which will either be referred to in a document as requested by the Council indicating the policy choices involved ("Policy Document") and / or elaborated in greater detail in the commentary accompanying the draft Hague Principles ("Commentary"):

**HAGUE PRINCIPLES ON CHOICE OF LAW IN
INTERNATIONAL COMMERCIAL CONTRACTS**

The draft Hague Principles adopted by the Working Group are attached as an annex.

¹ At its 2011 meeting, the Council "welcomed the progress made by the Working Group, notably the adoption of draft articles, and encouraged the continuation of the work. Upon completion of the draft articles by the Working Group, the Permanent Bureau is invited to report back to the Council and present a succinct document prepared by the Working Group highlighting the substance of the draft articles and indicating the policy choices involved. The Council decided that the draft articles and the commentary prepared by the Working Group should be reviewed by a Special Commission at a later stage." See Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference, available at < www.hcch.net >.

ADDITIONAL ISSUES

The Working Group also identified certain issues which warrant further discussion either in the Commentary or the Policy Document. These issues, in addition to those referred to in the Reports of prior meetings, are as follows:

PREAMBLE

The Working Group noted that both the Policy Document and the Commentary will:

1. explain the justification for party autonomy; and
2. refer to the considerations of public interest which justify giving courts [and arbitral tribunals] the possibility, in exceptional circumstances, of applying exceptions based on public policy (*ordre public*) and overriding mandatory provisions.

SCOPE

The Working Group noted that the Commentary will:

1. recognise that there are different ways to define “international” commercial contracts; and
2. note that consumer and employment contracts, including collective agreements, are excluded from the scope of the draft Hague Principles.

The Policy Document will also address the exclusion of consumer and employment contracts.

CONSENT

The Working Group recognised that the notion of consent and its various elements (intrinsic and external / factual and legal) will be detailed in the Commentary.

AUTONOMY

The Working Group considered that the Policy Document should summarise, and the Commentary should further explain, the underlying rationale of the autonomy of the choice of law clause from the contract.

RENOI

In relation to *renvoi*, further explanation in the Commentary will be necessary regarding:

1. the parties’ express reference to private international law rules of the chosen law;
2. the relevance of conflict of law rules of multi-unit States (*i.e.*, interregional law).

CHOICE OF NON-STATE LAW

The Working Group recognised the need for the Commentary to provide further details on the role of gap-filling rules, and give specific examples of situations in which gap-filling will be required.

In addition, the Commentary will highlight that, in principle, trade usages can supplement and assist in interpreting, but cannot override, the choice of law or rules of law by the parties, and give various examples.

The Policy Document will also briefly address these issues.

The Working Group tentatively agreed that the chosen rules of law must be:

1. distinguished from individual rules made by the parties; and
2. a body of rules.

The Working Group agreed to examine further characteristics of and limitations to the parties' choice of non-State law in the Commentary.

The Policy Document will report the agreement in the Working Group that the draft Hague Principles not include any express definition or limitation of the term "rules of law", as this provides the maximum support for party autonomy. The Policy Document will reflect the diversity of opinion in the literature on the definition of "rules of law" for choice of law purposes.

SCOPE OF THE CHOSEN LAW

The Working Group considered that the Policy Document will:

1. note that, although certain issues are not determined by the draft Hague Principles (*e.g.*, the law applicable to agreements to arbitrate and agreements on choice of court), a court or arbitral tribunal is not prevented from applying the draft Hague Principles to these issues; and
2. recognise the differing views within the Working Group regarding pre-contractual obligations.

The Commentary will:

1. explain the relations and differences to provisions on choice of law included in other international instruments (*e.g.*, UNCITRAL Legislative Guide on Secured Transactions); and
2. provide further illustrations and comments, *e.g.*, on elements of company law and negotiable instruments which are not covered by the draft Hague Principles.

FORMAL VALIDITY OF THE CONTRACT

The Commentary will address the distinction between formal validity of the choice of law agreement (which is not subject to any formal requirement based on Art. 4 of the draft Hague Principles) and of the remainder of the contract. Furthermore, the Commentary will stress the non-exclusive application of the chosen law to determine the formal validity of the contract, *i.e.*, allowing courts or arbitral tribunals to refer to other laws if the form of the contract is invalid under the chosen law (principle of "*favor validatis*").

THIRD PARTIES

The Working Group considered that the Commentary will:

1. explain that, as a general rule, the effects of a change of a choice of law are governed by party autonomy;
2. clarify that the pre-existing rights of third parties must be related to the contract; and
3. provide illustrations and comments regarding the operation of party autonomy in third party relationships (*e.g.*, surety, pledge of a right or claim and third party beneficiaries of the contract).

The Policy Document will also briefly address the first two issues.

ASSIGNMENT

The Working Group considered that the Policy Document will emphasise, and the Commentary further clarify, that although several issues of choice of law in the context of related contracts (*e.g.*, subrogation, set-off, etc.) were considered, the draft Hague Principles focus on assignment as it is an important and recurring issue in international commercial practice.

OVERRIDING MANDATORY RULES AND PUBLIC POLICY

The Working Group considered that the Commentary will:

1. consider and illustrate the exceptional nature of public policy (*ordre public*) with reference to the terms "manifestly incompatible" and "fundamental notions";
2. provide illustrations and comments on overriding mandatory provisions;
3. further explain the reference to the law of the forum State to rule on the application / consideration of third country overriding mandatory rules;
4. examine whether, and if so to what extent, the chosen law includes or excludes overriding mandatory rules;
5. describe, by way of illustrations and comments, how arbitral tribunals may determine issues of public policy (*ordre public*) and overriding mandatory provisions; and

6. reflect and illustrate the diverging approaches and methodologies arbitral tribunals may adopt, in different contexts, when considering the role of public policy (*ordre public*) and overriding mandatory provisions.

The Policy Document will also address these issues and the reasons for the lack of further specifications as to the application of the mandatory rules of a third country (as opposed to, for example, Art. 9(3) of the Rome I Regulation, or Art. 19 of the Swiss Private International Law Act).

ANNEXE / ANNEX

HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS

(final draft adopted by the Working Group in June 2011)

Preamble

These Principles set forth general rules concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.

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

They may be used to interpret, supplement and develop rules of private international law.

They may be applied by courts and by arbitral tribunals.

Article 1 Scope of the Principles

1. These Principles apply to choice of law in international contracts entered into by two or more persons acting in the exercise of their trade or profession.
2. For the purposes of these Principles, (i) a contract is international unless the parties have their places of business in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State; (ii) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
3. These Principles do not address the law governing:
 - a) the capacity of natural persons;
 - b) arbitration agreements and agreements on choice of court;
 - c) companies or other collective bodies;
 - d) insolvency proceedings;
 - e) the proprietary effects of contracts;
 - f) the issue of whether an agent is able to bind a principal to a third party.

Article 2 Freedom of choice

1. A contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law.
2. The parties may choose (i) the law applicable to the whole contract or to only part of it and (ii) different laws for different parts of the contract.
3. The choice may be modified at any time without prejudice to the pre-existing rights of third parties.
4. No connection is required between the law chosen and the parties or their transaction.

Article 3 Express and tacit choice

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

Article 4 Formal validity of the choice of law

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Article 5 Consent

1. The consent of the parties as to a choice of law is determined by the law that would apply if such consent existed.
2. Nevertheless, to establish that a party did not consent to the choice of law, it may rely on the law of the State where it has its place of business, if under the circumstances it is not reasonable to determine that issue according to the law specified in the preceding paragraph.

Article 6 Autonomy

A choice of law cannot be contested solely on the ground that the contract is not valid.

Article 7 Renvoi

A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.

Article 8 Scope of the chosen law

The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to:

- a) interpretation;
- b) rights and obligations arising from the contract;
- c) performance and the consequences of non-performance, including the assessment of damages and interest;
- d) the various ways of extinguishing obligations, and prescription and limitation periods;
- e) validity and the consequences of invalidity of the contract;
- f) burden of proof; and
- g) pre-contractual obligations.

Article 9 Formal validity of the contract

1. The contract is formally valid if it is formally valid under the law chosen by the parties, but this shall not exclude the application of any other law which is to be applied by a court or arbitral tribunal to support formal validity.
2. Any change in the applicable law shall be without prejudice to formal validity.

Article 10 Assignment

In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor:

- a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs mutual rights and obligations of the creditor and the assignee arising from their contract;
- b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs (i) whether the assignment can be invoked against the debtor, (ii) the rights of the assignee against the debtor, and (iii) whether the obligations of the debtor have been discharged.

Article 11 Overriding mandatory rules and public policy

1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.
2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude application of a provision of the law chosen by the parties if and to the extent that such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.
4. Paragraphs 1, 2 and 3 also apply in court proceedings relating to arbitration.
5. These Principles shall not prevent an arbitral tribunal from applying public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.