

**Second Meeting of the Working
Group on Choice of Law in
International Contracts
(15-17 November 2010)**



Report

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.

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.

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.

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.

² See provision on implied choice of law.

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.

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.

³ See note 2 above.

[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.

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.