

**ÉTUDE DE FAISABILITÉ SUR LE CHOIX DE LA LOI APPLICABLE
EN MATIÈRE DE CONTRATS INTERNATIONAUX**

**RAPPORT SUR LES TRAVAUX EFFECTUÉS ET CONCLUSIONS
(NOTE DE SUIVI)**

Note établie par le Bureau Permanent

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**FEASIBILITY STUDY ON THE CHOICE OF LAW
IN INTERNATIONAL CONTRACTS**

**REPORT ON WORK CARRIED OUT AND CONCLUSIONS
(FOLLOW-UP NOTE)**

Note prepared by the Permanent Bureau

*Document préliminaire No 5 de mars 2008
à l'intention du Conseil d'avril 2008
sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 5 of March 2008
for the attention of the Council of April 2008
on General Affairs and Policy of the Conference*

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ADDENDUM – RÉPONSES AU QUESTIONNAIRE DU PORTUGAL
ADDENDUM – RESPONSES TO QUESTIONNAIRE FROM PORTUGAL

PORTUGAL

**HAGUE QUESTIONNAIRE TO EXAMINE THE
PRACTICAL NEED FOR THE DEVELOPMENT OF AN
INSTRUMENT CONCERNING CHOICE OF LAW IN
INTERNATIONAL CONTRACTS**

ANSWERS BY THE PORTUGUESE DELEGATION

- 1) Does the law in your State provide in general for party autonomy, with possible public policy exceptions, as to the choice of law for international contracts?

YES - please specify whether it is provided by usage (custom), domestic law or international law:

Party autonomy as a relevant connecting factor in the field of international contracts is widely accepted in Portuguese Private International Law.

One of the main legal sources of party autonomy relevance in this field is the 1980 Rome Convention on the law applicable to contractual obligations, which has come into force in Portugal in 1994 and where party autonomy plays a central role (article 3);

Portugal is also a Contracting State to the Hague Convention on the law applicable to agency, concluded on 14 March 1978, and which has come into force in 1992, that also allows the parties to choose the applicable law (article 5);

The choice of law by the parties in international contracts is also admitted for contractual obligations under the Portuguese Civil Code (articles 41 e 42); the Civil Code admits both an express reference by the parties as to the applicable law and a tacit designation. These provisions are applicable where and when the Rome Convention or special provisions don't apply – virtually all aspects of international contracts are regulated by the law designated by the parties, without

prejudice to special choice of law provisions related to form (art. 36 Civil Code).

Article 41 of the Portuguese Civil Code establishes two alternative criteria that have to be met, in order to admit party autonomy to the choice of law for international contracts: the designated law has to simultaneously correspond with one of the usually relevant connecting factors in the field of Private International Law (although they are not listed as such), or correspond to a relevant interest of the parties. This alternative leads to conclude that only the designation grounded on merely arbitrary reasons and with little (or none) other connection with the contract will be excluded. In other words, although the formulation seems to impose on the choice done by the parties a positive judgment of the admissibility of their choice, in reality the law establishes a negative delimitation of the admissible choice of law, as to not frustrate the parties legitimate expectancies as to the choice made.

As far as international custom is concerned, it is argued among the Portuguese doctrine whether – and to what extent – it plays or not a relevant role as an autonomous source of law; it may be relevant in the field of international commerce, exception made to custom *contra legem*. Usage may be taken into account, namely as an accessory element of interpretation, yet its relevance is not as a potential source of party autonomy as to the applicable law, but as an eventual material reference done by the parties to commercial usage in the limits of the *lex contractus*.

[] NO - please briefly explain:

- 2) In your State, are consumers, employees and/or other parties excepted from party autonomy as to the choice of law for international contracts?

YES - please list such types of parties:

Although the choice of law provisions of the Portuguese Civil Code don't expressly contain specific rules for consumer contracts, labour contracts, etc, the Portuguese legislation has taken into account some of these concerns in specific legislation, as it is the case in the legal framework of general contractual clauses.

It should also be underlined, once more, the fact that Portugal is a Contracting State to the Rome Convention, which contains special provisions concerning consumer contracts and labour contracts.

NO

3) In your State, are certain subject matters excepted from party autonomy as to the choice of law for international contracts?

YES - please list such subject matters:

At present, the Portuguese Private International Law excludes the possibility of party autonomy for international contracts in the fields of family and successions (namely marriage contract, pre-nuptial conventions).

As mentioned before, the formal validity of contracts is also excluded from the scope of party autonomy. Nonetheless, the Portuguese system allows, under certain conditions, the recognition of the formal validity of contracts under a law other than the *lex causae*, as long as its validity is admitted by another relevant connecting factor, such as the habitual residence (article 36 CC).

NO

4) Approximately, what is the proportion of international contracts entered into in your State that include a choice of law provision?

There are no official data available on this matter.

5) Are you of the view that a legally binding norm, such as an international treaty or domestic law (which could be based on a Model Law) is or would be useful to assist, in relation to international contracts,

a) Parties with their choice of law;

No

b) Judicial authorities in resolving disputes regarding the applicable law; and

No

c) Arbitral tribunals in resolving disputes regarding the applicable law?

No

Taking into account both the current and foreseeable framework in the field of choice of law in international contracts (Rome Convention and the "Rome I" Regulation), Portugal does not support a new binding instrument fully or partially covering areas within the scope of such instruments. We would like to stress that the negotiations of the "*Rome I Regulation*", within the Council of Ministers and with the European Parliament clearly demonstrated that this is an area of difficult technical and political agreement. During the Portuguese Presidency of the Council, in the second semester 2007, a political agreement was reached regarding the above mentioned Regulation and Portugal would hardly support entering negotiations of a binding instrument at global level in a near future.

6) Are you of the view that a non-binding instrument such as a set of Legal Principles or Guide to Good Practice is or would be useful to assist, in relation to international contracts,

a) Parties with their choice of law;

No

b) Judicial authorities in resolving disputes regarding the applicable law; and

No

c) **Arbitral tribunals in resolving disputes regarding the applicable law?**

No

At this stage, Portugal does not consider necessary to adopt a non-binding instrument in the field of choice of law in international negotiations. We could, however, revert to this possibility in the future, after weighing the possible added value of such instrument. Nevertheless, this would depend on an evaluation of the application of the "Rome I" Regulation, and as such Portugal does not consider such project a priority.