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# VERSION CONSOLIDÉE DES TRAVAUX PRÉPARATOIRES MENANT AU PROJET DE PRINCIPES DE LA HAYE SUR LE CHOIX DE LA LOI APPLICABLE EN MATIÈRE DE CONTRATS INTERNATIONAUX

*établie par le Bureau Permanent*

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# CONSOLIDATED VERSION OF PREPARATORY WORK LEADING TO THE DRAFT HAGUE PRINCIPLES ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS

*drawn up by the Permanent Bureau*

*Document préliminaire No 1 d'octobre 2012*
*à l'attention de la Commission spéciale de novembre 2012*
*sur le choix de la loi applicable en matière de contrats internationaux*

*Preliminary Document No 1 of October 2012*
*for the attention of the Special Commission of November 2012*
*on Choice of Law in International Contracts*

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**VERSION CONSOLIDÉE DES TRAVAUX PRÉPARATOIRES MENANT AU PROJET DE PRINCIPES DE LA HAYE SUR LE CHOIX DE LA LOI APPLICABLE EN MATIÈRE DE CONTRATS INTERNATIONAUX**

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**CONSOLIDATED VERSION OF PREPARATORY WORK LEADING TO THE DRAFT HAGUE PRINCIPLES ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS**

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**Introduction:**

1. The purpose of this Note is to present in consolidated form the work undertaken by the Working Group on the Choice of Law in International Contracts (the "Working Group"), and in particular the "draft Hague Principles on the Choice of Law in International Commercial Contracts" ("the draft Hague Principles") and the Reports of the three meetings of the Working Group and the Policy Document drawn up by the Working Group. It is hoped that presentation of the project's history Article by Article will enable the Members and Observers attending the Special Commission meeting of November 2012 to review the Working Group's proposals and make recommendations regarding future action, including a decision with respect to the form of the non-binding instrument and the process whereby the Commentary is to be finalised.

2. It will be recalled that the Working Group was established pursuant to a decision made by the Council on General Affairs and Policy of the Conference (the "Council") in 2009, whereby 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 to facilitate the development of a draft non-binding instrument. Chaired by Mr Daniel Girsberger, expert from Switzerland, the Working Group has held three meetings in The Hague: from 21 to 22 January 2010, from 15 to 17 November 2010 and from 28 to 30 June 2011. The Council has been informed annually of the progress of the Working Group on the basis of the reports drawn up by the Permanent Bureau,[1] and approved the continuation of the proceedings. In April 2012, the Council also decided to organise this meeting of the Special Commission.

3. This project originated in 2006, when the Special Commission on General Affairs and Policy of the Hague Conference (the then Council) invited the Permanent Bureau to prepare a feasibility study regarding the development of an instrument relating to the choice of law in international contracts.[2]

4. Two comparative law studies were drafted: one described and analysed the existing rules generally applied in court proceedings[3] and the other focused on the situation in the area of international arbitration.[4] In January 2007, to supplement these analyses based mainly on legal doctrine, the Permanent Bureau launched an enquiry by means of a three-part Questionnaire. Parts I and II of the Questionnaire were addressed,

[1] Unless otherwise specified, all the documents mentioned in this Note may be consulted on the "International Contracts" page of the Hague Conference website, at < www.hcch.net >. See "Feasibility study on the choice of law in international contracts. Report on work carried out and suggested work programme for the development of a future instrument", note drawn up by the Permanent Bureau, Prel. Doc. No 7 of March 2009, for the attention of the Council of March / April 2009 on General Affairs and Policy of the Conference (hereinafter Prel. Doc. No 7 of 2009); "Choice of law in international contracts. Report on work carried out and perspectives for the development of the future instrument", note drawn up by the Permanent Bureau, Prel. Doc. No 6 of March 2010, for the attention of the Council of April 2010 on General Affairs and Policy of the Conference; "Choice of law in international contracts – development process of the draft instrument", drawn up by the Permanent Bureau, Prel. Doc. No 6 of February 2011, for the attention of the Council of April 2011 on General Affairs and Policy of the Conference (hereinafter Prel. Doc. No 6 of 2011); and "Choice of law in international contracts: development process of the draft instrument and future planning", drawn up by the Permanent Bureau, Prel. Doc. No 4 of January 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference (hereinafter Prel. Doc. No 4 of 2012).

[2] "Conclusions adopted by the Special Commission on General Affairs and Policy of the Conference (3-5 April 2006)", drawn up by the Permanent Bureau, Prel. Doc. No 11 of June 2006 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, Recommendation and Conclusion No 2.

[3] T. Kruger, "Feasibility study on the choice of law in international contracts – overview and analysis of existing instruments", Prel. Doc. No 22 B of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference.

[4] I. Radic, "Feasibility study on the choice of law in international contracts – special focus on international arbitration", Prel. Doc. No 22 C of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference.

respectively, to the Members of the Conference and the International Chamber of Commerce, which circulated it among its members. Part III was addressed to 115 arbitration centres and bodies active on an international scale. The main purpose of the Questionnaire was to explore current practice with respect to the use of clauses for the choice of law in international contracts, and the extent to which they were observed. An additional objective was to identify any problems and gaps and to obtain an initial impression as to whether the parties to commercial disputes before courts and arbitrators, and those who determine such disputes, considered a further lawmaking effort to be justified.[5]

5. After review, it appeared that promoting party autonomy in the area of international contracts, not only on a domestic and regional scale, but also worldwide, was a genuine need of the actors in international trade. The consultations conducted in connection with the mandate given by the Council of April 2008, and the development of legislation and case law relating to international contracts, confirmed the importance of growing recognition of the choice of law in international contracts.

6. The work that has taken place in recent years was therefore directed by or orientated towards one guiding idea: promoting the principle of party autonomy in a universal model of conflict rules applicable to the choice of law applicable to contracts.

7. As for the methodology applied for the development of the project, the Council expressed its initial preference for a non-binding instrument in April 2009.[6] It appeared, therefore, that the method used within UNIDROIT for the development and revision of the UNIDROIT Principles of International Commercial Contracts was suitable for the development of a parallel instrument with respect to the choice of law applicable to international contracts. The future instrument will accordingly contain, in addition to the draft Hague Principles, submitted for review at this stage in the form of "black-letter rules", commentary and illustrations to facilitate the interpretation of each Article (the "Commentary"). The Working Group is of the view that the draft Hague Principles would certainly be enhanced by an explanatory background, in addition to practical illustrations.[7] It shall be noted that this document mentions at several points that the Commentary will provide additional details. This is subject, however, to the decision of the Council of April 2013 on the completion of the instrument pursuant to the recommendations of this meeting of the Special Commission.

[5] It will be recalled that the idea was born in 1980. See Proposal of the Government of Czechoslovakia, *Actes et documents de la Quatorzième session*, Tome I, *Miscellaneous matters*, published by the Permanent Bureau of the Conference, The Hague 1982, p. I-158, No 18. However, after a prospective study carried out in 1983, the Members of the Conference considered that the chances of ratification of a binding instrument (Convention) in this matter would be very slim.

[6] See the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009), and in particular "Choice of law in international contracts", p. 1 (hereinafter C&R of 2009).

[7] "Report of the First Meeting of the Working Group on the choice of law in international contracts (21-22 January 2010)", p. 3, para. (D) (hereinafter Report of Meeting No 1).

**The Preamble**

**Paragraph 1**

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

**Comments:**

8. Beginning with the very first research conducted on the matter, and in particular at the stage of the feasibility study for the choice of law in international contracts, there was a desire to create a universal model of conflict rules applicable to international commercial contracts.[8]

9. The Council reiterated the need to reinforce party autonomy in the area of international contracts, making this feature the driving force of the project.[9] While party autonomy seems to be gradually consolidating at the international level, this is nonetheless a development on varying scales and with major gaps in comparative law.[10] The discussions in the Working Group confirmed that party autonomy is not accepted to the same extent in all legal systems.

10. The promotion of the principle of party autonomy – *i.e.*, the ability of parties to a contract to agree on the law that will govern the contract or parts of it – was indeed the Working Group's *leitmotiv* throughout the drafting phase. The aim was thus to improve international co-ordination of legal systems, and especially to strengthen the legal predictability of solutions through the principle of party autonomy and limited exceptions to it where necessary.[11]

[8] See Prel. Doc. No 7 of 2009, *op. cit.* (note 1), paras 15 and 16.

[9] See the recurring references to the promotion of party autonomy in the Conclusions and Recommendations adopted by the Council, repeated in Prel. Doc. No 1 of September 2011 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference.

[10] Prel. Doc. No 7 of 2009, *op. cit.* (note 1), para. 7.

[11] The 2007 Questionnaire responses show that over two thirds of the Organisation's Member States that replied consider that a new instrument would be useful to assist parties to the contract, judicial authorities or arbitration panels. See "Feasibility study on the choice of law in international contracts – Report on work carried out and conclusions (follow-up note)", Note drawn up by the Permanent Bureau, Prel. Doc. No 5 of February 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference, p. 6 (hereinafter Prel. Doc. No 5 of 2008).

**The Preamble**

**Paragraph 2**
**They may be used as a model for national, regional, supranational or international instruments.**

**Comments:**

11. Regarding the use of the draft Hague Principles as a model, several options were considered, and the Working Group chose the development of a non-binding instrument which will constitute, concurrently:

– a global model for conflict rules applicable to the choice of law in international commercial contracts;
– a source of inspiration for lawmakers and legal practitioners called upon to apply and interpret the applicable instruments; and, if the Council so decides,
– a basis for future negotiations relating to a binding instrument.[12]

12. In the second paragraph, the emphasis is on the draft Hague Principles as a model for legislation: the legislators in charge of reforming rules relating to the choice of law in international contracts may be encouraged to use the future instrument for inspiration or for support.[13]

13. Indeed, the objectivity and scientific proficiency of the experts involved and the solutions selected were major features of the Working Group's proceedings. Thus it may be legitimately expected that the future instrument will be used as a source of inspiration for the gradual development of uniform rules relating to the law applicable to international contracts, by avoiding any risk of conflict of norms with the range of instruments laying down the principle of party autonomy at the regional level. For instance, there will be no direct interference with the Rome I Regulation[14] within the European Union. On the other hand, it seems clear that the solutions used in the future instrument may influence the evaluation and eventual reform of the Rome I Regulation.[15] Likewise, the future instrument will likely influence the state of progress of the Inter-American Convention on the Law Applicable to International Contracts adopted by the Organization of American States (OAS) in Mexico in 1994.[16]

[12] Brief presentation by Mr Cohen (member of the Working Group, in the absence of the Group's chairman Mr Girsberger), to the Council on General Affairs and Policy (17 to 20 April 2012). See "Report of the Council on General Affairs and Policy of the Conference of 17 to 20 April 2012", drawn up by the Permanent Bureau, Prel. Doc. No 1 of July 2012 for the attention of the Council of April 2013 on General Affairs and Policy of the Conference, p. 33.
[13] For the policy underlying the draft Hague Principles, see Prel. Doc. No 4 of 2012, *op. cit.* (note 1), Annex III, para. 7.
[14] 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), OJEU L 177/6, 4 July 2008.
[15] For an analysis, see the contribution by M. Pertegás, "Les travaux de la Conférence de La Haye sur un instrument non contraignant favorisant l'autonomie des parties", in S. Corneloup and N. Joubert, *Le règlement communautaire "Rome I" et le choix de loi dans les contrats internationaux*, proceedings of the Conference organised at the *Université de Bourgogne* on 9 and 10 September 2010*,* Paris, 2011, p. 19.
[16] J.A. Moreno Rodríguez and M.M. Albornoz, "La *lex mercatoria* en la Convención de México de 1994. Reflexiones en ocasión de la elaboración del futuro instrumento de La Haya en materia de contratación internacional", in D. Fernández Arroyo and J.J. Obando Peralta (eds.), *El derecho internacional privado en los procesos de integración regionales*, San José, Ed. Jurídica Continental, 2011, pp. 15-40.

**The Preamble**

**Paragraph 3**
**They may be used to interpret, supplement and develop rules of private international law.**

**Paragraph 4**
**They may be applied by courts and by arbitral tribunals.**

**Comments:**

14. Paragraphs 3 and 4 of the Preamble are a reminder of the possible benefits the future instrument may offer legal practitioners called upon to interpret, supplement or develop rules of private international law in the area of international contracts.

15. Interpretation consists of determining the meaning of a legal rule, treaty or declaration.[17] In the present case, "to interpret" means the action performed by national courts and arbitral tribunals.

16. Interpretation of the draft Hague Principles, by judges or arbitrators, or even by domestic legislators, can supplement existing law. In instances where the domestic law, or international instruments, are incomplete, the draft Hague Principles, representing a fairly comprehensive instrument, may be used to fill in the gaps, while avoiding any conflict of norms. In addition, the draft Hague Principles may assist courts in developing appropriate private international law rules when dealing with the evolving practice.

17. Finally, the development of new rules on the basis of a future instrument could be found to be necessary if the applicable provisions do not provide a specific reply to the precise legal issue to be determined by the judges or arbitrators. Let us take the example of a law recognising the principle of party autonomy in general terms (*e.g.,* "the rights and duties arising out of a contract shall be determined according to the law of the country where the contract is performed, unless the parties agree otherwise"). If the parties to the international contract select "international custom" to govern their contractual relationship, it would be desirable for the future instrument, and in particular Article 2 and its commentary, to guide the judge or arbitrator called upon to determine the dispute.[18] Another recent example in this respect is the adoption in China of the new *Law on the application of laws to foreign-related civil relationships*, in force since 1 April 2011. It reinforces the recognition of party autonomy in international contractual relations, as Article 3 and Article 41 of the new Law specifically provide for the choice of law by the parties. From the perspective of the future Hague instrument, one might wonder, however, whether Article 11 of the draft Hague Principles might influence the application of Article 4 of the Chinese Law. That Article, which requires application of Chinese overriding mandatory provisions against the parties' choice of law, might raise difficulties in interpretation with respect to the nature, the source and the content of the relevant overriding mandatory provisions.[19] Thus it might be possible to advantageously use the discussions and decisions made during development of Article 11 of the draft Hague Principles.[20]

18. Recourse to a *non-binding* instrument provides a special framework for achieving these various targets. Accordingly, the Working Group took care to develop draft Hague

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[17] *Dictionnaire de la terminologie du droit international, publié sous le patronage de l'Union académique internationale*, Sirey (Paris), 1960.
[18] This illustration is based on Art. 769-1 of the Vietnamese Civil Code, which was reported to the Permanent Bureau by Mr T.P. Le, intern with the Bureau during the summer of 2011.
[19] See Jieying Liang, "Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?", *Journal of Private International Law*, Vol. 8(1) (2012), p. 104.
[20] See Art. 11 of the draft Hague Principles and related commentary, *infra*, paras 87 *et seq.*

Principles which are aimed at heightening awareness about the applicable law issue among all practitioners of international commercial transactions and disputes, whether legislators, contract drafters, business lawyers, counsel specialising in arbitration, company counsel, academics or judges. Particular attention was devoted to the goal of preparing the draft Hague Principles as a potentially useful tool for international arbitration, since the international arbitration community is particularly inclined to incorporate a body of non-binding principles into their decision-making process.[21] Throughout the drafting process, the Working Group considered whether there was a need to distinguish between a set of principles to be applied by national courts and another that would be applied by arbitral tribunals. It was agreed that one common set of principles would be drafted. Where necessary, explicit references would be added when different rules apply depending on the chosen dispute resolution mechanism, for example with regard to overriding mandatory rules and public policy.[22]

19. The Working Group also considered that judges may be reluctant to apply the draft Hague Principles owing to their non-binding character.[23] Nonetheless, the draft Hague Principles may gain in legal stature and be relied upon by courts in the future, particularly if, for example, they serve as a model for legislators in countries where the law relating to choice of law in international contracts is non-existent, fragmented or simply awaiting reform. In the interim, the draft Hague Principles might provide support or inspiration to courts dealing with the determination of the law or laws applicable to international commercial contracts.

[21] This was confirmed by the experts of arbitration matters, see "Report of the Working Group (15-17 November 2010" (hereinafter Report of Meeting No 2). See also Prel. Doc. No 4 of 2012, *op. cit.* (note 1), Annex III, para. 6.

[22] See Report of Meeting No 1, *op. cit.* (note 7).

[23] In January 2007, the Permanent Bureau prepared a three-part Questionnaire addressed to Member States, the ICC and stakeholders in the field of international commercial arbitration to explore the practice as to the use of choice of law clauses and the possible problems that such practice raises. The replies have shown that States do not consider soft law useful for courts, see Prel. Doc. No 5 of 2008, *op. cit.* (note 11).

**Article 1**
**Scope of the Principles**

**<u>Paragraph 1</u>**
**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.**

**Comments:**

20. The applicability of the draft Hague Principles relies on two criteria: the contract's commercial nature (Art. 1(1)), and its international character (Art. 1(2)).

21. As regards the contract's commercial nature, the proceedings were guided by the mandate established by the Council. It should be noted that in 2008, the mandate referred to "international contracts *between professionals*" before adopting, in 2009, a reference to "international *commercial* contracts",[24] using the same terms as the UNIDROIT Principles. In this context, it was suggested that the future instrument's title should contain an explicit reference to the contract's commercial nature.

22. For the wording of Article 1, the Working Group, after reviewing several alternative formulations, proposed a draft that emphasises that the contract is made by persons "acting in the exercise of their trade or profession". Accordingly, contracts of employment and consumer contracts are excluded.[25] In addition, the Working Group specified, in the Report of the Third Meeting, that collective bargaining agreements were excluded.[26]

23. The exclusion of these areas is due mainly to the fact that they are increasingly subject to special rules across various legal systems. These rules are usually mandatory, and aimed principally at protecting the weaker party. Analysis of the responses to the Questionnaire of January 2007 led to the realisation that, although consumers and employees may frequently choose a law for their contracts of employment and consumer contracts, most of the legal systems of those who replied to the Questionnaire provide for some protection of the weaker party. Although far from uniform, many legal systems provide that the choice of law in those situations may not deprive the weaker party of the protection that would be available to him or her under the law that would have been applicable if no choice had been made.[27]

24. Furthermore, the draft Hague Principles address only international contracts (for a definition of this term, see the following paragraph). This is because, for the most part, States employ a more restrictive policy on party autonomy in disputes involving solely domestic parties, which lack an international counterparty or element. Where a contract is classed as domestic, the predominant policy response across States is that, for reasons of efficiency, fairness or otherwise, parties are not always free to choose the applicable law. By contrast, in international contracts, the domestic legal system may be said to have a lesser stake, and States are more willing to recognise the ability of parties to choose the applicable law.[28]

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[24] "Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1 to 3 April 2008)", p. 1, and C&R of 2009, *op. cit.* (note 6), p. 2, available on the Hague Conference website at <www.hcch.net>, under the headings "Work in Progress" and "General Affairs".
[25] See Report of Meeting No 1, *op. cit.* (note 7), p. 2, para. B (iii).
[26] Report of the Third Meeting of the Working Group on the choice of law in international contracts (28-30 June 2011) (hereinafter Report of Meeting No 3), p. 2, Scope.
[27] Prel. Doc. No 5 of 2008, *op. cit.* (note 11).
[28] In domestic contracts in many States with two or more territorial units, however, parties have some freedom to choose which territorial unit's law will be applied. In a sense, such contracts may be said to be treated as similar to international contracts in those States.

**Article 1**
**Paragraph 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.**

**Comments:**

25. Regarding the notion of an international contract, the Working Group initially supported a negative definition of internationality, so as to exclude solely the situations that did not involve any international element.[29]

26. The discussions within the Working Group showed that the wording of "international character" has evolved. The *Hague Convention of 15 June 1955 on the Law Applicable to International Sale of Goods* mentions merely that it is not applicable if the only international aspect of the contract lies in a clause for applicable law, and imposes no further criteria for the international character. The *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* specifies that the Convention's application is contingent on the existence of *objective* connections with several States. In other words, the international element is only proven if the parties have their establishments in different States, or if the situation leads to a choice between the laws of different States.

27. The *Hague Convention of 30 June 2005 on Choice of Court Agreements* considers that a commercial transaction is international (for jurisdiction purposes) "unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State" (Art. 1(2)).

28. The *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* adopts a broader meaning for international character, since it is defined as relating to "all cases involving a choice between the laws of different States". The Working Group eventually decided not to follow such a broad interpretation, which is only of use in ensuring that the certainty and legal predictability which the Convention seeks to provide are not foiled by "reference to specific, pre-established and precisely defined factors or by means of a definition of internationality".[30]

29. Also based on examples external to the Hague Conference, the Working Group noted that the UNIDROIT Principles[31] do not expressly state criteria allowing a contract's international nature to be determined. The Commentary to the Preamble of the UNIDROIT Principles states that "the concept of 'international' contracts should be given the broadest possible interpretation so as ultimately to exclude only those situations where no international element is involved".[32]

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[29] Report of Meeting No 1, *op. cit.* (note 7), p. 2, para (B)(i).
[30] R. Goode, H. Kanda and K. Kreuzer, with the assistance of C. Bernasconi, Explanatory Report on the Hague Securities Convention of 2006, *Proceedings of the Nineteenth Session*, Tome II, *Securities*, M. Nijhoff Publishers, Leyden, 2006, p. 632, para. 3-3.
[31] *UNIDROIT Principles of International Commercial Contracts*, International Institute for the Unification of Private Law (UNIDROIT), 3rd ed. (2010) (hereinafter UNIDROIT Principles).
[32] See Commentary to the Preamble of the UNIDROIT Principles, *ibid.*, p. 2, para. 1.

30. The Working Group accordingly chose a simplified definition of international character, following the definition laid down in the 2005 Hague Convention on Choice of Court Agreements.

31. Clause (ii) in paragraph 2, modeled on Article 10(a) of the United Nations Convention on Contracts for the International Sale of Goods (CISG), clarifies that, for the purposes of determining the place of business of a party with multiple business locations, reference is to be made to the place of business with "closest relationship" to the contract prior to or at its conclusion. A conscious decision was made to omit a provision such as Article 5(h) of the 2001 UNCITRAL Receivables Convention, which refers to the place where the central administration of the assignor or the assignee is exercised in order to determine which place of business is the relevant one, where multiple exist.[33]

[33] *United Nations Convention on the Assignment of Receivables in International Trade* (hereinafter 2001 UNCITRAL Receivables Convention), Art. 5(h). It is noted that "the closest relationship with the original contract" is used in order to determine the debtor's relevant place of business.

**Article 1**
**<u>paragraph 3</u>**
**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.**

**Comments:**

32. The Working Group identified a list of matters which, in its view, should be excluded from the instrument's scope. The deliberations were inspired by, among others, Article 1(2) of the Rome I Regulation[34] and Article 5 of the Convention of Mexico of 1994.[35]

33. The Working Group also recommended that the future Commentary deal with each of the excluded matters, pursuant to review of those matters during the meeting of the Special Commission.[36]

[34] See Regulation Rome I, *supra* (note 14).
[35] *Inter-American Convention of 17 March 1994 on the Law Applicable to International Contracts*, Fifth Inter-American Conference on Private International Law, Mexico (hereinafter 1994 Mexico Convention).
[36] See Prel. Doc. No 4 of 2012, *op. cit.* (note 1), Annex III, para. 12.

**Article 2**
**Freedom of choice**

**Paragraph 1**
**A contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law.**

**Comments:**

*a) The principle of party autonomy*

34. The promotion of the principle of party autonomy is the fundamental goal of the draft Hague Principles. Paragraph 1 of the present Article expressly provides, therefore, that "a contract is governed by the law chosen by the parties". The Working Group considered that the central role ascribed to party autonomy is justified on the following grounds. First, the principle of party autonomy defers to the expectations of the parties and protects legal certainty. Second, insofar as the parties' choice of law is seen as being part of the contractual regime concerning dispute settlement, the exercise of party autonomy helps to achieve efficiency by reducing the legal costs of dispute resolution.[37] Third, the principle of party autonomy promotes cross-border economic activity by enabling the parties to choose the applicable law, which facilitates their intended transaction. Finally, increased international mobility and communication accentuate the relevance of party autonomy as the most practical solution for international commercial contracts.[38]

35. The Working Group unanimously considered that the primary role given to party autonomy in the draft Hague Principles is in line with the widely accepted approach to choice of law in international commercial contracts around the world. The Working Group was well aware that party autonomy generally is a widely-accepted principle in international litigation, as enshrined by international conventions including the Hague Conventions,[39] by regional instruments,[40] and by domestic codifications.[41] It was also noted that the principle of party autonomy is a general choice of law principle in international arbitration.[42] It was acknowledged, however, that while the principle of

[37] P. Nygh, *Autonomy in International Contracts*, Oxford University Press, 1999, pp. 2-3.
[38] A. Dickinson, "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?", *Journal of Private International Law,* Vol. 3, 2007, 59.
[39] Art. 7 *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* (hereinafter Contracts of Sale Convention); Art. 5 *Hague Convention of 14 March 1978 on the Law Applicable to Agency* (hereinafter 1978 Agency Convention); Art. 2(1) *Hague Convention of 15 June 1955 on the law applicable to international sales of goods*.
[40] See Rome I Regulation, *supra* (note 14), Art. 3(1).
[41] *E.g.*, Arts 3 and 41, para. 1 of the Law on the application of laws to foreign-related civil relationships; Art. 20 Act on the Application of Laws in Civil Matters Involving Foreign Elements of Taiwan (2010); Art. 7 Act on the General Rules of Application of Laws of Japan (2006); Art. 25(1) Conflict of Laws Act of Korea (2001); Art. 3540 Civil Code of Louisiana (1991); Art. 434(1) Civil Code of Mongolia (1994); Art. 3111(1) Civil Code of Quebec (1991); Art. 1210(1) Civil Code of the Russian Federation; Art. 116(1) Federal Act of 18 December 1987 on International Private Law of Switzerland.
[42] For conventions see, *e.g.*, Art. VII *European Convention on International Commercial Arbitration* (Geneva Convention); Art. 42 *Convention on Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention). For a non-binding instrument see, *e.g.*, Art. 28(1) UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006. For national laws, see, *e.g.*, Art. 1496(1) new French Code of Civil Procedure; Art. 1051 German Code of Civil Procedure; Art. 36(1) Arbitration Law of Japan (2003); Art. 28(1) Law of the Russian Federation on International Commercial Arbitration (1993). For further arbitration rules, see, *e.g.*, Art. 33(1) UNCITRAL Arbitration Rules; Art. 21(1) of the revised ICC Rules (in force as of 1 January 2012; corresponding to Art. 17(1) of the 1998 ICC Arbitration Rules); Art. 15(1) Uniform Act on the Arbitration Law Within the Framework of OHADA Treaty.

party autonomy seems to have gained increasing acceptance, the challenge is in the worldwide consolidation of the principle.[43] In this light, the draft Hague Principles, when implemented, will meet a genuine need for reinforcement of party autonomy throughout the world. The aim of the draft Hague Principles is thus to improve international harmonisation of laws, and to promote predictability of the outcome of dispute resolution through the principle of party autonomy, *i.e.*, ensuring that an agreement by the parties on a law applicable to the contract will be honoured in any jurisdiction which follows these Principles. It should be noted that some States in which party autonomy is accepted require that the transaction bear a relation to the State whose law is designated. The Working Group is of the view, however, that such a relation should not be required.

36. Nevertheless, the Working Group was mindful that certain restrictions of the principle of party autonomy are necessary even in the field of international commercial contracts.. It is on this basis that the Working Group considered that the principle of party autonomy should be subject to, and be reconciled with, overriding mandatory rules and public policy as eventually addressed by the draft Hague Principles.[44]

*b) Choice of law and rules of law*

37. The draft Hague Principles do not limit the parties to designating the law of a State; rather, they allow the parties to select not only State laws but also "rules of law", that is, rules that are not the product of a sovereign State.

38. In an internal report drawn up in June 2010 by the Working Sub-Group on non-State rules,[45] three options for the designation of non-State legal rules were presented and analysed:

1) reserving the designation of non-State rules for arbitration proceedings, in other words, retaining the *status quo* in many jurisdictions;
2) permitting the designation of non-State rules of law, without regard for the form of resolution of the dispute; or
3) omitting a reference to non-State rules in the draft Hague Principles, in order to leave the matter open to interpretation by judges and arbitrators (this last option, however, has the drawback of creating uncertainty, and placing the burden of developing the "law" on the parties involved in international trade).

39. During the Third Meeting of the Working Group, the experts agreed on the wording of an open clause (following the second option submitted by the Sub-Group). The Working Group also agreed that the draft Hague Principles should not include any express definition or limitation of the term "rules of law", as this provides the maximum support for party autonomy, regardless of the method of dispute resolution (*i.e.*, court or arbitration). However, the Working Group acknowledged that there are limits to the rules of law chosen by the parties. In particular, the chosen rules of law must be distinguished from individual rules chosen by the parties and must be a body of rules. The Working

[43] For analysis of legislation rejecting party autonomy in some Latin American and Middle Eastern jurisdictions, see, *e.g.*, J. Basedow, "Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 75(1), 2011, pp. 34-37; M.M. Albornoz, "Choice of Law in International Contracts in Latin American Legal Systems", *Journal of Private International Law*, Vol. 6(1), 2010, pp. 23-56.
[44] See Art. 11 of the draft Hague Principles and related commentary, *infra*, paras 45 *et seq*.; also Prel. Doc. No 4 of 2012, *op. cit.* (note 1) Annex II, p. iii.
[45] See Report of Meeting No 3, *op. cit.* (note 26), p. 3, Choice of non-State rules.

Group recommends a review of these issues in further detail in the Commentary, on the basis of the very extensive literature and of the practice on this matter.[46]

40. In the case of arbitration, it was recognised that the field already widely recognises the ability for parties to select non-State rules of law to govern their contract. On the other hand, courts have not widely recognised the ability of parties to select rules of law, other than the law of a State, to govern their contract. In addition, courts may consider rules of law to be incomplete, as opposed to domestic legal systems, which govern legal issues in a more exhaustive and comprehensive manner. However, courts ought to be able to interpret and supplement a set of rules on contract law in the same way as they interpret and supplement domestic and applicable foreign law.

41. Detailed discussions within the Working Group recognised that it was important to allow contracting parties to choose rules of law to govern their contract, as it reinforces the scope of the principle of party autonomy. It also allows parties to choose, where available, industry- or transaction-specific rules[47] which may better serve the commercial needs of the parties. In addition, the choice of rules of law may provide parties with a balanced contractual relationship by offering neutrality and transparency in their dealings.[48] Although, in some instances, a choice of rules of law may be more difficult to ascertain, allowing this choice serves to reinforce parties' expectations under their contract.

42. The Working Group rejected the view that the draft Hague Principles require the rules of law chosen by the parties to be subject to a test of legitimacy, as a pre-condition to the exercise of party autonomy. Accordingly the parties' choice of law should not be subject to any restrictive criteria which, for instance, may require the rules of law selected to meet a threshold test of international or regional recognition. By not imposing any criteria to distinguish between the bodies of rules of law that parties may choose from, the draft Hague Principles avoid any assessment of the nature and characteristics of the selected rules of law, and preclude the need for parties to justify their choice of law. If such requirements were imposed, they may limit the options available to parties and invite litigation on the interpretation or sphere of application of the parties' choice of law.

*c) Gap-filling rules*

43. The Working Group also extensively considered the role of gap-filling rules where the parties have designated rules of law to govern their contract and reviewed relevant provisions in existing instruments such as the CISG and the UNIDROIT Principles of International Commercial Contracts. It was agreed that the role of gap-filling rules would

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[46] In arbitration practice, the ability of parties to refer to rules of law to govern their contract is widely accepted. See, for all, Art. 28(1) UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, Art. 28(1) ICC Rules of Arbitration, Art. 22.1(c) LCIA Arbitration Rules, Art. 1496(1) *Code de procédure civile* (France, Code of Civil Procedure), Art. 1051 Code of Civil Procedure (Germany), Art. 36 Arbitration Law of Japan (2003), Art. 187(1) Federal Act on Private International Law of 18 December 1987 of Switzerland. In recent literature, see, *inter alia*, C. Sural, "Respecting the Rules of Law: The UNIDROIT Principles in National Courts and International Arbitration", 14 *Vindobona Journal of International Commercial Law and Arbitration* (2010/2) pp. 249-266 and, specifically about the gradual acceptance of choice of rules of law in Latin America, J.A. Moreno Rodríguez and M.M. Albornoz, *op. cit.* (note 16), pp. 15-40.

[47] Such as, for instance, a reference in maritime transport contracts to the so-called "Rotterdam Rules" (the 2008 *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*) before their entry into force.

[48] J. Basedow, "*Lex Mercatoria* and the Private International Law of Contracts in Economic Perspective" in J. Basedow, T. Kono and G. Ruhl (eds.), *An Economic Analysis of Private International Law*, Tubingen, Mohr Siebeck, 2006, p. 71.

be dealt with in the Commentary, which will provide further detail on the role of gap-filling rules and give specific examples.

44. The majority of the Working Group agreed that international trade usages could supplement the parties' choice of law. Examples were drawn from the field of international trade law and the Working Group established that for the purposes of the draft Hague Principles, trade usages are better suited to play a subsidiary role rather than be chosen as the governing law of the contract, as trade usages do not form a sufficiently comprehensive set of rules that could be chosen as the governing law of a contract. It is envisaged, therefore, that the Commentary will highlight, by reference to examples, the difference between rules of law and trade usages, emphasising that, in principle, trade usages can supplement and assist in the interpretation of, but cannot override or contradict the operation of, the law or rules of law chosen by the parties.[49]

[49] Reference to trade usages should be distinguished from trade codes expressly selected by the parties as the governing rules of law.

**Article 2**
**Paragraph 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.**

**Comments:**

45. The draft Hague Principles permit *dépeçage*, *i.e.,* the separation of the elements making up the legal situation in order to subject them to the application of several different sets of rules.[50] It was decided, during the Third Meeting of the Working Group, that the limitations of *dépeçage* should not be directly articulated in the body of the Principles, but ought to be addressed in the Commentary.[51] Considering that *dépeçage* is by nature one of the forms of exercise of party autonomy, it seems preferable that the draft Hague Principles leave to the parties the option to use that process freely.

46. The parties will be required, however, to be consistent in the solutions they adopt, in relation to the rules selected and the contract itself.[52] In fact, the issue of whether there is an implied condition relating to the severability of part of the contract is debated amongst legal scholars. According to some of them, there is a limitation at the level of rules of conflict of laws, so that the split must be related to the severable part of the contract. Others claim that once the parties have made a choice that may result in a contradiction, the problem should probably be resolved pursuant to the applicable law, which may need to be objectively determined if the choice does not make this clear. In all cases, even the most liberal views consider that the parties' choice becomes meaningless and void if it results in an obvious contradiction. For this reason, the Working Group considered that the addition of a restriction or clarification in the draft Hague Principles was not necessary.

47. There are two ways to sever the contract. The parties may choose one or more different laws to govern their contract. This solution is expressly accepted by certain domestic codifications.[53] There may also be a partial choice of applicable law, leaving the remainder of the contractual obligations to be determined objectively.[54] The Rome I Regulation expressly allows such a partial choice, specifying that the parties may choose the law applicable to part of the contract only.[55]

48. In practice, such partial choices concern different aspects of the contract which are governed by the *lex contractus*. Examples of clauses resulting in severing the contract are clauses relating to the contract's currency denomination, special clauses relating to performance problems, and liability clauses.[56]

49. *Dépeçage* should not be confused with another process which has consequences for the validity of the contracts and the obligations: modification of the applicable law (see below, Art. 2 (3)).

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[50] P. Lagarde, "Le dépeçage dans le droit international privé des contrats", *Riv. Dir. Int. Priv. e Proc*., 1975, No 1, p. 649.
[51] Report of Meeting No 3, *op. cit.* (note 26), p. 6.
[52] 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?", *Revue critique de droit international privé*, 99(1), January-March 2010, p. 83.
[53] *E.g.*, Art. 3111(3), Civil Code of Quebec (1991); Art. 1210(4), Civil Code of the Russian Federation.
[54] P. Nygh, *op. cit.* (note 37), pp. 128 *et seq.*
[55] See Rome I Regulation, *supra* (note 14), Art. 3(1)3.
[56] Y. Nishitani, "Party Autonomy and Its Restrictions by Mandatory Rules in Japanese Private International Law", in J. Basedow/H. Baum/Y. Nishitani (ed.), *Japanese and European Private International Law in Comparative Perspective* (Tübingen 2008) 77 (87); P. Nygh, *op. cit* (note 37), p. 132.

**Article 2**
**Paragraph 3**
**The choice may be modified at any time without prejudice to the pre-existing rights of third parties.**

**Comments:**

50. The argument of party autonomy justifies the possibility of modification of the choice of law. It is generally accepted, therefore, that the effects of the change of the choice of applicable law are governed by the principle of party autonomy.[57]

51. However, Article 2(3) is a reminder that the change of the law applicable to the contract does not only affect the parties' rights, but may in some cases affect third parties. There is a broad consensus to the effect that a change of the choice of law may only occur when the rights of persons privy to the contract are not affected. The Working Group considered that this aspect should be handled directly in the rules of conflict of laws, and should not be left to the substantive law. A similar clause designed to protect the rights of parties privy to the contract is often expressly included in international conventions,[58] regional instruments,[59] and domestic codifications.[60]

52. The change of law applicable to the contract may also have consequences for the contract's formal validity. Since at least one of the points of connection for the contract's formal validity is determined by the law applicable to the contractual relationship, that formal validity must be protected against retroactive eradication, which is indeed expressly specified by Article 9(2) of the draft Hague Principles.[61]

[57] During the proceedings of the Third Meeting, the experts stated that the Commentary should make it clear that third parties' pre-existing rights should be respected if they are connected with the contract, and provide illustrations and commentary regarding the issue of operation of the principle of party autonomy in relations involving third parties. See Report of Meeting No 3, *op. cit.* (note 26), p. 4.
[58] See Contracts of Sale Convention, *supra* (note 39), Art. 7(2); 1994 Mexico Convention, *supra* (note 35), Art. 8.
[59] See Rome I Regulation, *supra* (note 14), Art. 3(2) 2nd sentence.
[60] Art. 9 Code of private international law of Japan (2006), Art. 1210(3) Civil Code of the Russian Federation.
[61] See Art. 9(2) of the draft Hague Principles and related commentary, *infra*, paras 76 *et seq.*

**Article 2**

**Paragraph 4**

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

**Comments:**

53. In the past, there was frequently a requirement of a connection between the chosen law and the parties or their contract. The theory of localisation, which consists of ruling out the chosen law when it is alien to the places where the elements of the contractual situation are located, is still applied in some legal systems. According to this view the law of the State where the transaction has taken place, should apply, as it is most likely more efficient, directly applicable and relevant to a 'local' transaction. Restricting the choice may also prevent an opportune choice of law, based for example, on a State's willingness to enforce onerous terms that the local system would not support.[62] However, abandonment of the theory of localisation is supported by the more recent conventions and legislation relating to the law applicable to contracts.[63] In line with this contemporary attitude, the draft Hague Principles do not require a "substantial relation" with the chosen law. The law of a State to which the contract bears no relation may accordingly be chosen.

[62] Permanent Bureau, *op. cit.* (note 52).
[63] P. Nygh, *op. cit.* (note 37), pp. 58-60.

**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.**

**Comments:**

54. During the discussions of the Working Group, the issue of acceptance of tacit choice of applicable law was raised. One expert in particular stated that implied choice ought to be recognised only where the parties' intentions are manifestly clear. A review of existing instruments shows that tacit choice of applicable law is permitted by the instruments, but is sometimes considered restrictively.[64]

55. However, there is no consensus in comparative private international law regarding the forms of admissibility of tacit choice, even within the broad families of civil law and common law.[65] On the basis of a comparative analysis of the different standards, the Working Group submitted principles offering legal stability and predictability, and encouraged the parties to state explicitly the law to which any disputes between them will be subject. Accordingly, it was decided to add the words "made expressly or appear clearly". Most of the experts voiced concerns regarding the standard of "manifestly clear intentions", which could appear to be too high, in particular in certain States which require lower standards for other substantial aspects of the contract.

56. Thus, a choice, in the event there is no express indication, can be inferred if it appears "clearly from the provisions of the contract or the circumstances".[66]

57. The Working Group is in favour of a tacit choice by reference to elements of the contract or other relevant circumstances, a "test" that should be illustrated with examples in the Commentary.

58. However, the Working Group expressly declined to accept a choice of court or arbitral tribunal as of itself a sufficient indicator of the parties' tacit choice of law under the draft Hague Principles. This is because the parties' decision to choose a particular court or arbitral tribunal as the forum in which to resolve disputes does not necessarily mean that the parties have selected the law of that forum as the law governing the contract.

[64] Permanent Bureau, *op. cit.* (note 52).
[65] See, as regards the discrepancies on the European continent, N. Joubert, "Le choix tacite dans les jurisprudences nationales: vers une interprétation uniforme du Règlement Rome I?" in S. Corneloup and N. Joubert, *op. cit.* (note 15), pp. 234 *et seq.*
[66] See Prel. Doc. No 4 of 2012, *op. cit.* (note 1), Annex III, p. 7.

**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.**

**Comments:**

59. From the outset of its work, the Working Group considered that an Article settling the issue of the formal validity of choice of law needed to be included, especially if the draft Hague Principles provided for the possibility of implied choice of law.

60. Formal validity in this context refers to the need for a choice of law clause to comply with formal requirements (*e.g.*, a requirement that the clause be expressed in writing) for it to be valid and effective. The Working Group considered including a substantive provision relating to the formal validity of the choice of law, in the draft Hague Principles, instead of including a conflicts rule (as occurs in the *Convention of 30 June 2005 on Choice of Court Agreements*). However, most legal systems do not require special forms for the choice of law.

61. From the outset of discussions, the Working Group tended to prefer a rather neutral wording. The different formulations adopted in various regional and international instruments were studied. The study revealed that, in practice, there are few requirements for formal validity, other than the clear manifestation of an intent to choose the law; most often seen in the express provisions of the contract. This is therefore connected with Article 3 of the draft Hague Principles. For example, Article 3(1) of the Rome I Regulation requires that "[t]he choice shall be made *expressly or clearly demonstrated* by the terms of the contract or the circumstances of the case" (emphasis added).[67]

62. The Working Group also studied the precedents within the Hague Conference, and in particular the *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*. Article 7 of that Convention provides that "[t]he parties' agreement on this choice must be *express or be clearly demonstrated* by the terms of the contract and the conduct of the parties, viewed in their entirety" (emphasis added).

63. In reviewing certain domestic laws, the Working Group observed that, in some cases, the law used to determine those formal requirements is the *lex loci contractus*, meaning the law of the place where the contract was made.[68] The problem is that the *lex*

[67] See Rome I Regulation, *supra* (note 14).

[68] See. Art. 13(1) Civil Code of Cuba (1987); Art. 3538 Civil Code of Louisiana (1991); Art. 3109 Civil Code of Quebec (1991); Art. 433(1) Civil Code of Mongolia (1994); Art. 2094 Civil Code of Peru (1984); Art. 29 Civil Code of Qatar (2004); Art. 1209 Civil Code of the Russian Federation (2001); Art. 14 Civil Code of Rwanda (1989); Art. 124 of the Swiss Federal Act on PIL (1989); Art. 31 of the Ukrainian Act on PIL (2005); Art. 1181 Civil Code of Uzbekistan (1997); Art. 37 of the Venezuelan Act on PIL (1998); Art. 834(1) Civil Code of Vietnam (1996); Art. 31 Civil Code of Yemen (1992). *Cf.* para. 199(2) of *Restatement (Second) of Conflict of Laws*. For non-codified legal systems, see *e.g.*, P. Nygh, *Conflict of Laws in Australia,* 5th ed, Sydney, Butterworths, 1991, p. 281; E. Sykes and M. Pryles, *Australian Private International Law,* 3rd ed, Sydney, Law Book Co, 1991, p. 615; M.J. Tilbury, G. Davis and B. Opeskin, *Conflict of Laws in Australia*, South Melbourne, Victoria, Australia; New York: Oxford University Press, 2002, pp. 777-778; J. Walker, *Castel & Walker: Canadian Conflict of Laws*, Vol. 2, 6th ed., Markham, Ont.: LexisNexis Butterworths, 2005, para. 31.4; J. Walker, *Halsbury's Laws of Canada: Conflict of Laws,* Butterworths & Company, Canada, 2006, p. 516; G. Johnston, *The Conflict of Laws in Hong Kong*, Hong Kong, Sweet & Maxwell Asia, 2005, p. 199; P. Diwan and P. Diwan, *Private International Law: Indian and English*, 4th ed., New Delhi, Deep and Deep publication, 1998, pp. 524 and 525; R.H. Hickling and Wu Min Aun, *Conflict of Laws in Malaysia*, Kuala Lumpur; Salem, N.H.: Butterworth, 1995, pp. 172 and 173; C.F. Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts*, 5th ed. 2012, pp. 318 and 319 and Van Rooyen, *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg*, Capetown-Wynberg-Johannesburg, Juta en Kie Beperk, 1972, p.144 (note 3). See also P. Nygh, *op. cit.* (note 37), p. 91.

*loci contractus* is sometimes difficult to determine, uncertain or unplanned.[69] Certain legal systems apply the law of the parties' domicile, nationality or head office.[70]

64. The issue of the formal validity of choice of law was examined in further depth during the Second Meeting of the Working Group. During that meeting, it was eventually considered that there would be no formal requirement for the choice of law unless the parties agreed otherwise.

[69] See *e.g.*, L. Collins (ed.), *Dicey, Morris and Collins on the Conflict of Laws*, Vol. 2 (2006) 1606; J.J. Fawcett, J.M. Carruthers and P. North (eds), *Cheshire, North and Fawcett: Private International Law,* 14th ed., Oxford, 2008, p. 748.

[70] For instance, Art. 14 of the Civil Code of Rwanda (1989) refers to the law of common nationality, while Art. 29 of the Civil Code of Qatar (2004) and Art. 31 of the Civil Code of Yemen (1992) both utilise the law of common domicile and the law of common nationality of the parties. Art. 3538 of the Civil Code of Louisiana (1991) refers to the law of common domicile or place of business of the parties.

**Article 5**
**Consent**

**Paragraph 1**
**The consent of the parties as to a choice of law is determined by the law that would apply if such consent existed.**

**Comments:**

65. In line with the leading role ascribed to party autonomy, the Working Group drafted a rule on consent which primarily relies on the law that would apply if that consent existed (*i.e.*, the putatively chosen law). Once the consent is confirmed by that law, all issues relating to the remainder of the main contract are then assessed under the chosen law as the *lex causae*, not as the putatively applicable law. The Working Group considered that this removes any need for a provision in the draft Hague Principles referring to issues related to the principal contract being "determined by the chosen law assuming that the choice were valid". The Article dealing with the scope of the chosen law is worded in line with this approach.[71] Accordingly, consent is to be determined by reference to the law that would apply if such consent existed *(i.e.*, the putative law), unless the party invoking the lack of consent can rely on the limited exception in Article 5(2) (see below). In this regard, the Working Group followed a well_established choice of law rule in international instruments.[72]

66. In formulating Article 5, the Working Group deliberately avoided use of the expression "existence and material validity of the choice of law". It was considered that this expression may be too specific to be meaningful across legal traditions, and may encourage wider grounds of challenge to the chosen law, thereby jeopardising the legal certainty which the draft Hague Principles seek to promote. Therefore, the present Article refers only to "consent" which is intended to encompass all issues as to whether the parties have effectively made a choice of law.

67. Moreover, when the present Article is read alongside the draft rule on autonomy of the choice of law,[73] issues of duress or misrepresentation fall within these issues of "consent", but such grounds of challenge can be relied on to demonstrate the absence of consent if they specifically address the parties' consent to the choice of law, which is to be considered independently from consent to the main contract. Thus, Article 5 provides the greatest support to party autonomy by providing that the "consent" of the parties' to the choice of law is to be determined as if such consent existed (even if it alleged that such consent is somehow deficient).

[71] See Art. 8 of the draft Hague Principles and related commentary, *infra*, paras 65 *et seq.*
[72] For illustrations, see Contracts of Sale Convention, *supra*, (note 39), Art. 10(3) (and Explanatory Report by A. von Mehren, paras 103 *et seq.*); see also Art. 10 of the Rome I Regulation, *supra*, (note 14), and P. Nygh, *supra* (note 37), pp. 93-97.
[73] See Art. 6 of the draft Hague Principles and related commentary, *infra*, paras 60 *et seq.*

**Article 5**

**<u>Paragraph 2</u>**

**Nevertheless, to establish that a party did not consent to the choice of law, it may rely on 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.**

**Comments:**

68. At present, it is widely accepted that there should be an exception to the application of the law putatively chosen to determine the validity of the parties' consent. However, a special connection with an entirely separate rule leading to the law of the silent party seems to go too far. Accordingly, application of the exception provided for under Article 5(2) depends on two concurrent conditions: first, "under the circumstances it is not reasonable to [determine the issue on the basis of] the chosen law" and, second, no valid consent can be established on the basis of the law of the State where the party invoking this provision has its place of business.

**Article 6**
**Autonomy**

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

**Comments:**

69. The Working Group recognised the need for an Article dealing specifically with the severability of the parties' choice of law. It was recognised that the parties' choice of law should be treated as separate from the remainder of the contract, in order to achieve greater protection of party autonomy. In this respect, the Working Group drew upon analogies to forum selection and arbitration clauses which are widely understood as severable from the other elements of the contract.[74]

70. Accordingly, Article 6 requires that the parties' choice of law should be subject to an independent assessment that is not automatically tied to the validity of the main contract. Thus, the parties' choice of applicable law would not be affected solely by a claim that the main contract is invalid. Instead, that claim of invalidity of the main contract would be assessed according to the applicable law chosen by the parties,[75] provided that the parties' choice is effective. Further, arguments which seek to impugn the consent of the parties to the contract would not necessarily undermine the consent of the parties to the choice of law. In this light, the present Article reinforces the policy underlying the preceding provisions in the draft Hague Principles.[76]

[74] In particular, the Working Group referred to the existing *Hague Convention of 30 June 2005 on Choice of Court Agreements* which includes a provision dealing with the autonomy of choice of court clauses. For arbitration see, *e.g.*, Art. 16(1) UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, Art. 23(1) UNCITRAL Arbitration Rules, Art. 23.1 LCIA Arbitration Rules, Art. 6(4) ICC Rules of Arbitration, s. 7 Arbitration Act 1996 (UK), Art. 178(3) Federal Act on Private International Law of 18 December 1987 (Switzerland), Art. 1053 Arbitration Act 1986 (Netherlands).
[75] Subject to the exception from the principle *in favorem validatis* under Art. 9(1) of the draft Hague Principles, see *infra*, p. 27.
[76] Art. 4 and Art. 5, respectively, of the draft Hague Principles, see *supra*, p. 20 *et seq*.

**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.**

**Comments:**

71. The provision proposed by the Working Group is one which is consistent with existing Hague Conventions which rule out the use of *renvoi* in the resolution of conflicts of law with a formulation that has now become traditional: "the term 'law' means the law in force in a State other than its choice of law rules".[77] However, the parties may provide otherwise.

72. Further, as the draft Hague Principles are intended to serve as a model and, possibly, to promote the international co-ordination of solutions through the uniformisation of private international law, the function of *renvoi* was considered to be of little utility.

73. However, the Working Group, guided by the principle of party autonomy, considered that parties should not be prevented from expressly providing for *renvoi*. Accordingly, while the general proposition is that the law chosen by the parties does not refer to rules of private international law of that law, parties to the contract may expressly provide otherwise. The Working Group recognised the need for the Commentary to provide further clarification and illustrations on the operation of this Article.

[77] J. Derruppé, *Le renvoi dans les conventions internationales*, Juris-Classeur International, fasc. 532-3 (1993), No 7 p. 3. See, *e.g.*, Art. 12 of the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, available on the Hague Conference website at < www.hcch.net > under "Conventions".

**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;**
**g) pre-contractual obligations.**

**Comments:**

74. The Working Group gave careful consideration when delineating the scope of the applicable law as it determines the matters that fall within the domain of the law chosen by the parties and the matters governed by a different law. In order to ensure legal certainty, it was agreed that as a starting point, the law chosen in the contract governs all aspects or issues related to the voluntarily agreed relationship between the parties. In this regard, the particular exceptions in paragraph 3 of Article 1 must be borne in mind.

75. In order to formulate the provision, the Working Group referred to instruments previously drafted by the Hague Conference such as the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*,[78] and regional instruments such as the EC Regulation on the Law Applicable to Contractual Obligations (Rome I)[79] as a source of inspiration.

76. The Working Group agreed that the draft Hague Principles should provide further guidance to users by including a non-exhaustive list of issues which the applicable law will govern. The discussions on the issue during the meeting of the Special Commission of November 2012 will doubtless provide additional elements to examine in the Commentary. In particular, it should be noted that when determining the matters listed in this Article, the Working Group discussed at length whether pre-contractual obligations should be excluded from the scope of the applicable law. In spite of the different views set out during the discussions, the Working Group eventually agreed that the law chosen by the parties should also govern pre-contractual obligations.

[78] See Art. 12 of the Convention.
[79] See Rome I Regulation, *supra* (note 14), Art. 10.

**Article 9**
**Formal validity of the contract**

**Paragraph 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.**

**Comments:**

77. The Working Group agreed that the law chosen by the parties may not be the exclusive law for determining the formal validity of the main contract. Therefore, under the present Article, the formal validity of the contract is not precluded from being determined other than by reference to the law chosen by the parties, if this is permitted by the private international law rules of the forum, or by the rules applied by an arbitral tribunal.

78. In formulating the proposed liberal regime, the Working Group followed the well-established principle of *favor negotii* which seeks to avoid formal invalidity as far as possible.[80] This implies that, in relation to formal validity only, the parties' contractual relationship may be determined by reference to connecting factors other than the law chosen by the parties. Those may include, for example, depending on the venue, the law of either of the States where any of the parties or their respective agents are present when the contract is concluded, the law of the State where either of the parties has its habitual residence at the time of conclusion, or the law of the State where the contract was concluded. This rule accordingly enables the national courts or arbitral tribunals to take other laws into consideration where the form of the contract is not valid under the applicable law. Nevertheless, once the law applicable to the contract is determined, any change of choice of law is without prejudice to the contract's formal validity.[81]

[80] In this respect, the Working Group drew inspiration from many international works, which all recognise this principle, to some extent. See *e.g.*, Contracts of Sale Convention, *supra* (note 39), Art. 11.
[81] See Art. 9(2), below.

**Article 9**
**Paragraph 2**
**Any change in the applicable law shall be without prejudice to formal validity.**

**Comments:**

79. It goes without saying that the parties are permitted to change the law applicable to the contract. In this respect, Article 2(3) of the draft Hague Principles specifies that "the choice may be modified at any time without prejudice to the pre-existing rights of third parties". As mentioned earlier,[82] the inclusion of such a right in favour of the parties seems logical in relation to the very purpose of the draft Hague Principles, which is to reinforce party autonomy.

80. The Working Group agreed, however, that any change concerning the choice of law should not prejudice in any way the issue of the contract's formal validity. That limitation is customary in the international conventions[83] and regional instruments[84] that were reviewed by the Working Group. It was concluded that a provision specifying this limitation expressly, included in the draft Hague Principles, would be useful, so that a contract validly made will remain valid despite the change of the law chosen by the parties.

[82] See Art. 2(3) of the draft Hague Principles and related commentary, *supra*, paras 43 *et seq.*
[83] See Contracts of Sale Convention, *supra* (note 39), Art. 7(2); 1994 Mexico Convention, *supra* (note 35), Art. 8.
[84] See Rome I Regulation, *supra* (note 14), Art. 3(2).

**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.**

**Comments:**

81. Among "complex" contractual disputes - those arising out of two or more related contracts – the draft Hague Principles focus on assignment as it is an important and recurring issue in international commercial practice.[85]

82. The Working Group recognised that situations involving the contractual assignment of a right to payment or performance do not deal directly with issues of choice of law. However, it determined that it was useful to examine how choice of law operates in cases involving such assignments given (i) their common occurrence in international commerce and (ii) the potential for confusion as to which law governs which aspects of the relationship among the debtor, assignor and assignee in cases in which the debtor-assignor contract is governed by a different law than the assignor-assignee contract.

83. The draft Hague Principles provide a set of principles that determine, in cases of assignment, the role of the chosen law where the rights and duties of the parties are defined by two or more related contracts that are entered into by a different combination of parties, and governed by different laws, respectively. The provision formulated in the draft Hague Principles takes into account the approaches adopted in international and regional instruments,[86] as well as the domestic law of various jurisdictions.[87] In line with the nature of the draft Hague Principles, however, Article 10 addresses only the situation in which the law governing a particular contract has been chosen by the parties.

84. The Working Group also considered other situations where rights fall to be determined by reference to two or more contracts between different parties, such as in cases of subrogation, delegation or compensation. However, the Working Group agreed that these issues could be better addressed in the Commentary, where sufficient

[85] See Report of Meeting No 3, *op. cit.* (note 26), p. 4, Assignment. The problems that the choice of law can cause in connection with assignments were highlighted. In particular, the fact that in the case of an assignment, the assignee is unable to rely against the debtor on use of the law chosen in the contract of assignment, since that contract is binding between the assignee and assignor but not on the debtor, and the choice of law in the contract between the debtor and the assignor is binding between them but not on the assignee.

[86] See, *e.g.,* Rome I Regulation, *supra* (note 14) and Arts 28 and 29 of the 2001 UNCITRAL Receivables Convention.

[87] In Japan, Art. 23 of the Act on the General Rules of Application of Laws; in Russia, Art. 1216 of the Civil Code of the Russian Federation; in South Korea, Art. 34 of the Conflict of Laws Act (2001); in Switzerland, Art. 145 Federal Act of 18 December 1987 on International Private Law; in Taiwan, Art. 32 of the Act on the Application of Laws in Civil Matters Involving Foreign Elements (2010); and, in the United States, sections 210-211 of the *Restatement (Second) of Conflict of Laws*.

attention could be given to their particular nuances and complexity. In this respect, the Commentary ought also to include illustrations of cases where the law applicable to the parties' rights is determined by two or more related contracts.[88]

[88] Prel. Doc. No 4 of 2012, *op. cit.* (note 1), Annex III, p. 11.

**Article 11**
**Overriding mandatory rules and public policy**

**Paragraph 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.**

**Comments:**

85. In general, the purpose of Article 11 is to meet the concerns raised by the possibility of the choice of the law by parties to an international commercial contract having the effect of excluding an overriding mandatory rule or public policy of the forum. It allows application, on an exceptional basis, of two restrictions on party autonomy: overriding mandatory provisions and public policy. During the discussions of the Working Group, it was noted that as a rule, public policy and overriding mandatory provisions are two elements dealt with separately. In addition, the Conference's traditional approach tends to separate those two aspects. However, certain experts mentioned that, having regard to the particular nature of the instrument being developed, drafting the Hague Principles provides an opportunity to consider the issue on a more principled and holistic basis.[89]

86. There was unanimity within the Working Group that the promotion of party autonomy requires limiting the use of overriding mandatory rules and public policy to overcome provisions of the parties' chosen law. It was affirmed that any restriction on the application of the law chosen by the parties must be clearly justifiable and no wider than necessary to serve the objective pursued. Therefore, the draft Hague Principles emphasise the exceptional character of public policy and overriding mandatory rules. It was also recommended that this exceptional character be reflected in the Commentary, by providing more detailed guidance as to the limited class of potentially justifiable exceptions.[90]

87. The first paragraph of Article 11 emphasises the relationship between the law chosen by the parties and the overriding mandatory provisions of the *forum*. It takes into account the approaches adopted in international and regional instruments, and the domestic laws of various jurisdictions, in order to yield to "local" overriding mandatory rules.

88. The issue of a possible definition of overriding mandatory provisions was discussed at length during the meetings of the Working Group. The Working Group agreed that overriding mandatory rules are rules which must be applied to the determination of a dispute between contracting parties irrespective of the law applicable to the contract. In preparing the present Article, the Working Group revealed some concerns about the detailed definitions of "overriding mandatory rules", or equivalent terms, adopted by pre-existing international instruments.[91] Therefore, a proposal to include in the present Article a detailed definition of "overriding mandatory rules", with a view to emphasising the narrow character of this exception, was not adopted. If the Special Commission deems it desirable, the Commentary can develop and illustrate the relationship envisioned between the law chosen by the parties and overriding mandatory rules of the forum.

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[89] According to the summary, drawn up by the Permanent Bureau, of the session of 16 November 2010.. See also, M. Pauknerová, "Mandatory Rules and Public Policy in International Contract Law" (2010) 11 *ERA Forum* 29, who notes that overriding mandatory rules and public policy are "closely connected", and whilst they occur at different stages of a dispute, share the same doctrinal basis.
[90] Prel. Doc. No 4 of 2012, *op. cit.* (note 1), Annex III, p. 12.
[91] The Working Group reviewed, in particular, Art. 9(1) of the Rome I Regulation, see *supra* (note 14).

**Article 11**

**Paragraph 2**

**The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.**

**Comments:**

89. This paragraph deals with a far more controversial and complex issue: application of the overriding mandatory provisions "of another law", *i.e.,* the law of a country other than that of the forum or of the law chosen by the parties.

90. Certain international instruments, such as the *Hague Convention of 14 March 1978 on the Law Applicable to Agency*, or the *Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations*, contain fairly broad provisions allowing the courts to give effect, on a discretionary basis, to the overriding mandatory provisions of another law. The Working Group considered whether those precedents were relevant. Several reasons were mentioned for rejecting a discretionary basis, in particular, that:

– according to the test of "close connection", overriding mandatory provisions of several legal systems can claim to apply to cross-border transactions;
– such a rule allows wide judicial discretion as to the content of the applicable law, diminishing legal certainty in the applicability of these provisions; and
– using a broad discretion implies a complex analysis of governmental interests, requiring the judges and parties to carry out a process of identification of a foreign legislature's intentions, a process that merely heightens the degree of uncertainty.

91. However, there was more than this to the issue. It was accepted that the Working Group should not seek to formulate an exhaustive statement of the circumstances in which a legal system could require or permit its courts to apply or consider third-country overriding mandatory rules.[92] Accordingly, the Working Group unanimously adopted the flexible and open principle set out in the second paragraph of the present Article, which relies upon the use of the law of the forum (including rules of private international law) to determine whether and under which circumstances third-country overriding mandatory rules may or must be applied or taken into account.

[92] There was little enthusiasm within the Working Group for the specific provision concerning third-country overriding mandatory rules in Art. 9(3) Rome I Regulation, see *supra* (note 14).

**Article 11**

**Paragraph 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.**

**Comments:**

92. If application of the law chosen by the parties conflicts with fundamental concepts of public policy in the forum, the chosen law *may* be set aside. The wording of this paragraph and use of the concept of "manifestly incompatible" was dictated by the *leitmotiv* of this lawmaking project, *i.e.,* promoting party autonomy as much as possible. This phrase has been widely used in a number of jurisdictions and regional and international instruments, and implies a heavy duty as to when a Court may exclude provisions of the law chosen by the parties.[93]

93. The issue of a possible delimitation of "fundamental principles of public policy" was discussed at length during the meetings of the Working Group. The Working Group is of the view that it is almost impossible to include specific guidelines in this respect, except as regards the restricted nature of the exception from party autonomy that recourse to public policy implies. If the Special Commission deems it desirable, the Commentary can develop and illustrate the relationship envisaged between the law chosen by the parties and the public policy of the forum.

[93] See, *e.g.,* Art. 17 of the 1978 Agency Convention *supra* (note 39); Art. 11(1) of the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*; Art. 21 of the Belgian Code on Private International Law (2004).

**Article 11**

**Paragraph 4**

**Paragraphs 1, 2 and 3 also apply in court proceedings relating to arbitration.**

**Comments:**

94. The Working Group considered that a court dealing with proceedings relating to arbitration is not in a different position from a court dealing with other civil proceedings, in that the court must invoke public policy and give effect to overriding mandatory rules of the forum, insofar as they are relevant to the subject matter of the proceedings before it. Moreover, it was agreed that the present Article should not assimilate the position of an arbitral tribunal with that of a court dealing with proceedings relating to arbitration. Accordingly, the principles set out for court proceedings under the present Article apply to all court proceedings, including court proceedings relating to arbitration.

**Article 11**

**Paragraph 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.**

**Comments:**

95. The issue of application of the rules of public policy and overriding mandatory provisions in arbitration proceedings is one of the most difficult issues in the wording of this Article. In order to address these issues, several consultations and discussions were held among the experts concerned, during and around the three meetings held in The Hague. During the Third Meeting of the Working Group, agreement was reached regarding the adoption of a neutral position, whereby arbitral tribunals would enjoy some discretion to determine which overriding mandatory provisions or rules of public policy should be applied.[94]

96. This paragraph was drafted to reflect the different state of affairs facing arbitral tribunals, as opposed to national courts. Arbitral tribunals face a duty to render an enforceable award, and may, for example, need to consider the laws of potential enforcement jurisdictions to be in a position to do so. However, as indicated, the draft Hague Principles, by their very nature as a non-binding instrument, do not (and cannot) grant an arbitral tribunal any authority beyond what it already has pursuant to its mandate. Consequently, this paragraph does not confer any additional powers on arbitral tribunals; it instead serves to clarify that the draft Hague Principles, particularly Article 11, do not prevent an arbitral tribunal from taking into account public policy or overriding mandatory provisions from any law, but only where it is "required or entitled to do so".

97. In addition, it was decided that guidance would be provided in the Commentary. In particular, the Commentary will be tailored with a view to:

a. describe, by way of illustrations and comments, how arbitral tribunals may determine issues of public policy and overriding mandatory provisions; and
b. reflect and illustrate the diverging approaches and methodologies arbitral tribunals may adopt, in different contexts, when considering the role of public policy and overriding mandatory provisions.[95]

98. Finally, the Working Group noted that the non-binding nature of the draft Hague Principles enables the provisions addressing overriding mandatory rules and public policy to be more flexible and open than in a binding convention. Future users of the draft Hague Principles may thus refine these provisions in a certain manner, and as narrowly as possible, in order to further support the principle of party autonomy.

[94] See Report of Meeting No 3, *op. cit.* (note 26). Minutes drawn up by the Permanent Bureau, Part 7. *Role of public policy and mandatory rules (continuation*), (p. 1).
[95] See, *e.g.,* Art. 21(1) of the Rules of Arbitration of the International Chamber of Commerce (2012); Art. 35 of the UNCITRAL Arbitration Rules (2010) and Art. 32(2) of the Arbitration Rules of the London Court of International Arbitration (1998).