

**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*

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## I. Introduction

1. In April 2006, the Special Commission on General Affairs and Policy of the Hague Conference on Private International Law (the "Hague Conference") invited the Permanent Bureau to prepare a feasibility study on the development of an instrument (for example, a convention, a model law, principles or a guide to good practice) concerning the choice of law<sup>1</sup> in international contracts. It was decided that the study should consider in particular whether there is a practical need for the development of such an instrument.

2. In carrying out this mandate, the Permanent Bureau has pursued a multiple approach. On the one hand, two comparative law studies were prepared for the attention of the April 2007 Council on General Affairs and Policy of the Hague Conference. One described the status of the law governing choice of law in international contracts in general at the global, regional and sometimes national levels<sup>2</sup> and focused on how such rules are generally applied in court proceedings. The other study provided a description of the legal situation with regard to choice of law in international contracts that are subject to international commercial arbitration.<sup>3</sup> These studies did not cover the area of family law because, although this was not made explicit in the 2006 Conclusions, the Special Commission on General Affairs and Policy was contemplating international *commercial* contracts when giving its mandate to the Permanent Bureau.

3. Furthermore, in addition to these analyses mainly based on doctrine, in January 2007 the Permanent Bureau embarked on a fact-finding mission by way of a three-part Questionnaire.<sup>4</sup> Part I of the Questionnaire was addressed to Member States. Part II was sent to the International Chamber of Commerce which circulated it among its members; and Part III was sent to 115 international arbitration centres and organisations involved in international arbitration.<sup>5</sup> The purpose of the Questionnaire was not so much to identify the precise legal nature and content of any future Hague instrument in this field but rather to explore the current practice as to the use of choice of law clauses in international contracts and to what extent they are respected, to identify possible problems and lacunae and to obtain a first impression as to whether parties to commercial disputes in courts and arbitration as well as those who would decide these disputes feel that any (binding or non-binding) instrument might improve the situation. An analysis of the responses received until 29 March 2007 was provided in Preliminary Document No 22 A of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy.

4. In April 2007, the Council asked the Permanent Bureau to distribute again the January 2007 Questionnaire with a view to offer the opportunity to respond to those Members of the Organisation which had not done so already.<sup>6</sup> The responses from the three different target groups to the Questionnaire were sought with a view to supplementing and confirming the legal analysis carried out in the two March 2007 comparative law studies, in addition to the feasibility study, and to evaluate the potential need for a new instrument. This Preliminary Document is an up-dated version of Preliminary Document No 22 A of March 2007 for the attention of the Council of

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<sup>1</sup> This study only addresses the freedom to choose the law applicable to a contract (it does not cover non-contractual obligations). It does not address either the freedom to choose a court which is already covered by the *Hague Convention of 30 June 2005 on Choice of Court Agreements*. One purpose of this study is to explore whether that Convention should be supplemented by an instrument on choice of law.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> See Annex, "Questionnaire addressed to Member States to Examine the Practical Need for the Development of an Instrument concerning Choice of Law in International Contracts" of January 2007, drawn up by the Permanent Bureau.

<sup>5</sup> A list of the international arbitration centres and organisations consulted is attached to the Questionnaire.

<sup>6</sup> The Questionnaire was redistributed on 24 July 2007.

April 2007 on General Affairs and Policy of the Conference. It takes into consideration responses received and developments which occurred<sup>7</sup> until 8 February 2008.

## II. Analysis of the responses to the Questionnaire

### A. Responses to Part I of the Questionnaire – Member States

5. Responses to Part I were received from 33 Members of the Organisation.<sup>8</sup> While Questions 1-3 aimed at obtaining a description of the basic features of each legal system as regards party autonomy and its possible limits, Question 4 asked for information on current practice regarding the usage of choice of law clauses. Given the short timeframe, answers to this latter question were often based on general impressions.

6. All of the legal systems covered by the responses recognise the principle of party autonomy as to the choice of law for international contracts. This is sometimes laid down in international conventions,<sup>9</sup> sometimes in domestic statutes<sup>10</sup> or established by case law<sup>11</sup> or custom.<sup>12</sup> Asked for an estimation as to how many of the international contracts entered into in their State contain a choice of law provision, a majority of 80% gave an estimation of half or more of the contracts<sup>13</sup> and only 20% of less than half.<sup>14</sup> While this number of responses might not be representative of the 68 Members of the Hague Conference, the estimations given suggest that choice of law clauses may well be widely used in international contracts.

7. While the principle of party autonomy seems to be almost universal within the membership of the Organisation (with the exception of some States in Latin-America), limitations to party autonomy, although also widely known, show a more diverse picture. In general terms, limitations to party autonomy often come in the form of mandatory

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<sup>7</sup> At the time of publication the Rome I Regulation was not yet adopted.

<sup>8</sup> As of 8 February 2008, the following Members of the Organisation had responded to the January 2007 Questionnaire: Albania, Australia, Austria, Belgium, Bulgaria, Chile, China (including Hong Kong and Macao SAR), Croatia, Czech Republic, Denmark, Estonia, European Community, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Malaysia, Mexico, Monaco, New Zealand, Norway, Poland, Serbia, Slovakia, Slovenia, Spain, Switzerland, Turkey, United Kingdom and the United States of America. It is to be noted in the case of European Community that, in 2007 15 Member States of the European Community responded individually to Questions 1 to 4 of Part I of the Questionnaire (Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Poland, Slovakia, Slovenia, Spain and the United Kingdom) and sometimes to Questions 5 and 6 (the same 15 States with the exception of Austria, Germany, and Poland), where the February 2008 answers of the European Community and its 27 Member States to Questions 5 and 6 are general. Members States of the European Community acknowledged with satisfaction the analysis prepared in March 2007 on the basis of the answers they provided, the present analysis being an up-date of the former.

<sup>9</sup> *E.g.* in the Hague Convention of 15 June 1955 on the international sales of goods, which currently applies in eight States, and is also often referred to in arbitral proceedings; the *Hague Convention of 14 March 1978 on the Law Applicable to Agency* (three Contracting States); the *Hague Convention of 22 December 1986 on the Law Applicable to International Sale of Goods* (not yet in force), the *Convention on the law applicable to contractual obligations* (Rome, 1980 – hereinafter referred to as European Contracts Convention) which currently applies to all 15 “old” Member States of the European Union and most of the 12 new Member States that joined the Union since May 2004 (Poland is still in the process of completing its ratification), and in the *Inter-American Convention on the Law Applicable to International Contracts* (Mexico, 1994), which is currently in force in Mexico and Venezuela.

<sup>10</sup> Albania, Bulgaria, Chile, China (including Macao SAR), Croatia, Czech Republic, Estonia, Greece, Hungary, Iceland, Italy, Japan, Mexico (Federal and state laws), Monaco, Poland, Serbia, Slovakia, Slovenia, Switzerland, Turkey, United States of America (Uniform Commercial Code and Restatement (Second) of Conflict of Laws).

<sup>11</sup> Australia, China (Hong Kong SAR), France, Malaysia (under English common law prior to 7 April 1956), applicable in Malaysia by virtue of Section 3 and Section 5 (Application of English law in Commercial Matters) of the Civil Law Act 1956 (Revised 1972) (Act 67), Monaco, United States of America.

<sup>12</sup> Norway and Serbia.

<sup>13</sup> Malaysia, Mexico, Slovakia, Slovenia: all or virtually all; Chile, China (Macao SAR), Croatia, Monaco, Germany, Spain, United Kingdom: more than half; Iceland, Poland: about half; Greece, Hungary.

<sup>14</sup> Bulgaria, China – mainland, Czech Republic.

rules.<sup>15</sup> Moreover, a public policy exception is known in several legal systems.<sup>16</sup> In Poland, China (Macao SAR) and the United States of America, a connection or relationship of the parties or the transaction with the chosen law is often required. Sometimes party autonomy as to a choice of law is excluded or at least limited for contracts involving certain subject matters – such as public procurement,<sup>17</sup> immovable property,<sup>18</sup> insurance,<sup>19</sup> transport / carriage,<sup>20</sup> foreign investments,<sup>21</sup> the establishment, operation and termination of companies,<sup>22</sup> obligations deriving from bills of exchange, order papers and cheques<sup>23</sup> or competition law<sup>24</sup> – while some legal systems do not know any subject-matter related restrictions to party autonomy.<sup>25</sup>

8. Consumers and employees may often<sup>26</sup> also choose a law for their consumer or employment contracts<sup>27</sup> but most of the legal systems that responded to the Questionnaire provide for some protection of the weaker party: the choice may not deprive this party of the protection it would enjoy under the law which would be applicable in the absence of a choice.<sup>28</sup> In other legal systems, no such protection exists.<sup>29</sup>

9. After the exploration of the basic features of legal systems as regards party autonomy for choice of law in international contracts and current practice in this regard, Questions 5 and 6 asked for policy views: Members of the Organisation were invited to respond whether, based on their own system and practice as described, they would consider an international instrument – be it legally binding (“hard law”), such as an international treaty or domestic law (which could be based on a model law), or non-binding (“soft law”), such as a set of legal principles or a “guide to good practice” – to be useful to assist, in relation to international contracts, parties with their choice of law as well as judicial authorities and arbitral tribunals in resolving disputes regarding applicable law. Further research would of course be required to enable Members of the Organisation to give a final answer to these questions, but at this stage it is important to explore at least whether, based on the experience of the current legal and factual situation, some need is felt by law and policy makers to go further down this road. The following responses were received:

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<sup>15</sup> Mentioned, *e.g.*, by Australia, Bulgaria, China (Macao SAR), Croatia, Japan, Norway, Switzerland (for tenancies in immovable property located in Switzerland) and the United States of America. This is also the case under the European Contracts Convention.

<sup>16</sup> It was explicitly mentioned by China – mainland, Malaysia, Norway, Poland and the United States of America. This exception also exists under several international instruments, *e.g.* under the 1955 Hague Sales Convention (Art. 6), the 1978 Hague Agency Convention (Art. 17), the 1986 Hague Sales Contract Convention (Art. 18), the European Contracts Convention (Art. 16) and the Inter-American Convention (Art. 18).

<sup>17</sup> Albania.

<sup>18</sup> Croatia, Poland, Serbia, Slovenia, Switzerland (strong limitations for transfer of rights *in rem* in immovable property), Turkey.

<sup>19</sup> Estonia, Slovenia.

<sup>20</sup> China (Hong Kong SAR), Norway, Serbia.

<sup>21</sup> China – mainland (contracts for Chinese-foreign joint venture and co-operative explorations and development).

<sup>22</sup> Croatia.

<sup>23</sup> Bulgaria, China (Macao SAR).

<sup>24</sup> Spain.

<sup>25</sup> Iceland, Japan, Malaysia, Mexico, Monaco, Slovakia, Spain and the United States of America.

<sup>26</sup> For consumers this is not the case in Switzerland. For employees this is not the case in China (including Hong Kong SAR). It seems that in Croatia, for work carried out there Croatian law cannot be derogated from unless provided otherwise by law.

<sup>27</sup> Norway, Turkey and the United States of America mentioned that there are certain restrictions for contracts with these parties. In Switzerland, restrictions exist concerning employees. In China (including Hong Kong SAR), restrictions exist regarding consumers.

<sup>28</sup> Bulgaria, China (Hong Kong SAR) for employees, Croatia (for consumers), Japan and Turkey (by jurisprudence and case law). This is also the case under the Hague Articles of 25 October 1980 on the Law Applicable to Certain Consumer Sales (see *Actes et documents de la Quatorzième session*, Tome I, p. 60) and the European Contracts Convention.

<sup>29</sup> Australia, Malaysia, Serbia and China (Macao SAR).

10. In their general answer to Questions 5 and 6, the European Community and its 27 Member States indicate, in the light of their recent experience regarding the negotiations of an EU Regulation on the law applicable to contractual obligations, the rules of which will be of universal application, that the subject matter is very challenging and that long and difficult negotiations would lie before the Hague Conference were it to decide to launch work on a binding instrument on choice of law at the global level. The European Community and its Member States would therefore adopt a cautious approach on this issue and would recommend examining instead a non-binding instrument.<sup>30</sup>

11. From a global point of view, when examining the detailed individual responses received in 2007 to the Questionnaire in relation to Questions 5 and 6 (paragraphs a), b) and c) of both questions), it appears that more than two thirds of the respondents consider that a new instrument concerning choice of law in international contracts would be useful to assist parties, judicial authorities or arbitral tribunals. On the one hand ten of them<sup>31</sup> believe that a binding as well as a non-binding instrument would be useful in all cases. Four Members of the Organisation are of the point of view that only a legally binding instrument would be useful in all cases.<sup>32</sup> On the contrary, two Members of the Organisation express some support only for a non-binding instrument.<sup>33</sup> On the other hand, six Member States note that a new instrument (binding or non-binding) is unnecessary to assist parties, judicial authorities and arbitral tribunals.<sup>34</sup>

12. With regard to Questions 5 a) and 6 a), roughly 80% of the Members of the Organisation that responded consider that an instrument would be useful to assist the *parties* with their choices. A third of the respondents think, indeed, that a binding as well as a non binding instrument would be useful to assist the *parties*.<sup>35</sup> On the other hand, seven Members of the Organisation think that only a binding instrument would be useful while soft law would rather lead to confusion<sup>36</sup> and yet six other respondents were against a *binding* norm. These latter respondents are indeed of the view that a *non-binding* instrument could be useful to private parties.<sup>37</sup> On the contrary, five respondents consider that neither instrument would assist the parties.<sup>38</sup>

13. In relation to Questions 5 b) and 6 b), concerning the possible benefits for *judicial authorities* in deciding about the law applicable, the situation similarly shows two-thirds of those who consider an instrument to be potentially useful. A group of eleven Members of the Organisation thinks that both hard and soft law would be an improvement.<sup>39</sup> Here the preference for a binding norm is similar (60%) to the previous response concerning the benefit for the *parties* while soft law is considered to be a little less useful to courts (50%). Four Members of the Organisation would see a benefit in soft law but not in a binding norm,<sup>40</sup> but the group of eleven mentioned above is joined by another seven who think that (only) a binding norm would be useful to courts.<sup>41</sup>

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<sup>30</sup> The European Community and its Member States will, however, be quite prepared to discuss openly the need for an instrument at a worldwide level with other Members of the Hague Conference and are not against maintaining the topic on the list of items for future work.

<sup>31</sup> Chile, China – mainland, Croatia, Czech Republic, Estonia, Hungary, Italy, Norway, Switzerland and it seems that Albania also supports this point of view.

<sup>32</sup> Japan, Serbia, Turkey, Spain. China (Macao SAR) also shares this point of view.

<sup>33</sup> Iceland and Slovakia.

<sup>34</sup> Denmark, France, Greece, Monaco, United Kingdom. China (Hong Kong SAR) shares this view.

<sup>35</sup> Albania, China – mainland, Croatia, Czech Republic, Estonia, Hungary, Italy, Mexico, Norway, Switzerland, Turkey.

<sup>36</sup> Belgium, Bulgaria, Japan, Serbia, Spain, Turkey. China (Macao SAR) also supports this view.

<sup>37</sup> Australia, Iceland, Malaysia, New Zealand, Slovakia, Slovenia. For the reasons indicated by New Zealand, see *infra*, note 40.

<sup>38</sup> France, Greece, Monaco and United Kingdom. Denmark also seems to consider the existing instruments, in particular the European Contracts Convention and the UNCITRAL Model Law on International Commercial Arbitration, to be sufficient for its purposes. China (Hong Kong SAR) also shares this point of view.

<sup>39</sup> Albania, Chile, China – mainland, Croatia, Czech Republic, Estonia, Hungary, Italy, Malaysia, Norway and Switzerland.

<sup>40</sup> Australia, Iceland, New Zealand, Slovakia. The reason given by New Zealand is that a binding instrument would not bring about the benefits that the 2005 *Hague Convention on Choice of Court Agreements* entails, namely that the resulting judgment will be enforceable in all other Contracting States. It is felt that the elaboration of soft law would be a first step to clarify how much common ground there is among the Member States of the Hague Conference.

<sup>41</sup> Bulgaria, Japan, Mexico, Serbia, Spain, Turkey followed by China (Macao SAR).

14. As to Questions 5 c) and 6 c), concerning the usefulness of an instrument for *arbitral tribunals* in resolving disputes regarding applicable law, again almost two-thirds of the respondents consider that an instrument could be useful. A group of ten thinks that both a binding and a non-binding instrument would be useful.<sup>42</sup> Six more share their positive attitude towards a binding instrument but would have a negative view on a non-binding instrument.<sup>43</sup> This latter view is shared by three more States.<sup>44</sup> In sum, however, there is no distinct preference for hard or soft law but an almost equal number (15 for hard law, 14 for soft law) in favour of each.

15. In an overall perspective, the prevailing view is that an instrument would provide greater predictability for the parties and – certainly in the case of hard law, slightly less in the case of soft law – facilitate the work of judicial authorities. It is expected that the benefits of a *binding* instrument would be greatest for judicial authorities in resolving disputes regarding applicable law and slightly less for the parties while the lowest amount of improvement is expected for the work of arbitral tribunals. The differences in absolute figures were however minor. The primary reason reported against the elaboration of a *binding* instrument is the fear that such instrument might establish the requirement of certain connecting factors and thereby limit party autonomy.<sup>45</sup> It is also feared that negotiations of such an instrument would be long and difficult. In the field of arbitration it was sometimes feared that also the freedom of the arbitrator would be unduly limited by a binding instrument.<sup>46</sup> Malaysia responded, on the other hand, that in most arbitration proceedings, one of the most contentious issues is the determination of the applicable law, and that therefore a binding instrument would be very useful. In equal proportion, as concerns a *non-binding* instrument, the usefulness for parties, courts and arbitral tribunals is not expected to be as high as that of a binding instrument.

## **B. Responses to Part II of the Questionnaire – Stakeholders from the international business community**

16. The International Chamber of Commerce sent out Part II of the Questionnaire to its national committees and groups, as well as to the members of its Commission on Commercial Law and Practice. 35 responses were received. Most of those who responded do not normally enter into consumer transactions but into business-to-business transactions (28). 32 respondents indicated that the law in force in their State allowed them to choose the law that would govern their international contracts. This freedom is apparently widely used: 27 respondents reported that all or virtually all of their contracts include a choice of law provision.<sup>47</sup> 18 stated that this choice was upheld in court proceedings in all or virtually all cases; 8 more indicated that the rate was more than half. "None or virtually none" was given by 2 respondents. In arbitration, choice of law agreements are respected to a slightly lesser extent: 14 respondents reported that their choice of law was upheld in all or virtually all cases while 11 stated that the rate was more than half. A rather high number of 8 respondents reported that their choice of law had been respected in none or virtually none of their arbitrated cases.

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<sup>42</sup> Chile, Croatia, China – mainland, Czech Republic, Estonia, Hungary, Italy, Malaysia, Norway, Switzerland.

<sup>43</sup> Japan, Mexico, Serbia, Spain, Turkey. China (Macao RAS) shares this approach.

<sup>44</sup> Bulgaria, Iceland, Slovakia.

<sup>45</sup> Malaysia, Monaco, Slovakia.

<sup>46</sup> Bulgaria.

<sup>47</sup> The number of international contracts entered into annually ranged from 15 to 3000 among the respondents.

17. The question arises whether the absence of a choice of law clause (which is not a frequent case among those who responded) gives rise to litigation about the applicable law. Here, the answers concerning proceedings before State courts and before arbitral tribunals are similar but not supporting any particular conclusion: 11 respondents (with regard to court proceedings) and 11 respondents (with regard to arbitration), respectively, replied that applicable law was disputed in none or virtually none of these disputes. Nevertheless, 6 (for court proceedings) and 4 (for arbitration) respondents, respectively, reported that the absence of a choice of law clause had led to a dispute about the law applicable in all or virtually all cases. For arbitration, another five reported the same for about half or more of their cases.

18. When asked whether a binding instrument on choice of law would be useful, roughly 80% of the responses were positive. Such instrument was considered equally useful for parties, for courts and for arbitrators. As to a non-binding instrument, the support was slightly less strong (about 75%), while roughly 25% felt that this would not be useful.

### **C. Responses to Part III of the Questionnaire – Stakeholders in the field of international commercial arbitration**

19. The first half of Part III of the Questionnaire is addressed to arbitrators and / or arbitration centres and institutions while the second half is addressed to parties to commercial arbitration making use of the arbitration centres and institutions to which the Questionnaire is addressed.

20. The Permanent Bureau received 17 responses<sup>48</sup> to the first half of Part III and only 10 responses to the second half of Part III. This low number of responses seems to reveal a lack of interest for this subject in spite of the quality of the responses collected.

21. Responses based on empirical data show at first glance, both from arbitration centres and parties to commercial arbitration, that the issue of choice of law in international contracts is usually well addressed in the contracts themselves, rarely the subject of disputes, and if so, the choice of law is usually upheld.

22. Arbitration centres report in majority that none or virtually none of the international contracts they are seized of have applicable law as subject of dispute.<sup>49</sup> They also report that in the majority of cases (75%) more than half of the contracts include a choice of law provision. Actually, in a good number of cases (35%) all, or virtually all, contracts include a choice of law provision. One arbitration centre<sup>50</sup> reported that about half of the international contracts it was seized of included a choice of law provision and another three arbitration centres<sup>51</sup> reported that it was less than half. The arbitration centres report in majority (65%) that none or virtually none of the international contracts they are seized of have the validity of the choice of law provision regarding the applicable law as subject of dispute. Five arbitration centres report that the validity of the choice of law provision is the subject of dispute in less than half of the cases. Finally, in the majority of cases (80%), in all, or virtually all, arbitration concerning international contracts that include a choice of law provision the choice of law provision is upheld / respected by the arbitral tribunal. Four arbitration centres however indicated a lower rate and reported

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<sup>48</sup> Responses were received from arbitration centres based in Belgium, Bulgaria, Chile, China (including Hong Kong SAR), Congo, Germany, Iceland, Mexico, Moldova, Romania, Slovakia, Switzerland (3) and two international institutions, namely the International Centre for the Settlement of Investment Disputes and the Permanent Court of Arbitration.

<sup>49</sup> Six centres out of 17 reported that it is less than half. Parties to arbitration report similar figures.

<sup>50</sup> Bulgaria.

<sup>51</sup> China (China International Economic and Trade Arbitration Commission), Moldova, Switzerland.

that the choice of law provision is upheld / respected in more than half<sup>52</sup> or even in none or virtually none<sup>53</sup> of the cases.<sup>54</sup>

23. As to the policy question whether 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, parties with their choice of law and arbitral tribunals in resolving disputes regarding applicable law the responses from arbitration centres are somewhat split. Regarding the usefulness for the parties, the rate is 50:50.<sup>55</sup> However, almost 65% of the respondents are of the view that a legally binding norm would be useful for arbitral tribunals while 35% are not. Most of the reasons reported by the latter against this possibility indicate that this would be contrary to the principle of party autonomy.<sup>56</sup> It was also reported that when writing a contract a legal counsel should choose the law he or she knows. Furthermore, another response indicated that when the applicable law is not provided for, the arbitral tribunal should decide in accordance with the elements presented by the parties and the factors most closely connected to the contract. Finally, one response was to the effect that there would be no practical benefit resulting from an additional norm; rather it would increase the possibility of disputes regarding the validity of the parties' choice of law. That same response indicated that a set of binding norms could cause additional complexities in cases where the parties' choice of law and the norms would not coincide.

24. With regard to the question whether 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, parties with their choice of law and arbitral tribunals in resolving disputes regarding applicable law the responses arbitration centres are again somewhat split. However, more than two-thirds of the respondents are of the view that this would be useful for parties and arbitral tribunals. The non-binding nature of the instrument is one of the main reasons raised against this possibility. It was also mentioned that an additional norm in this area could result in additional disputes and complexities. Finally, it was mentioned that a "guide to good practice" in this area would assist parties to construe their respective agreement properly. Furthermore, such a guide would provide parties and their lawyers with explanations and justifications with regard to their choice of law.

### **III. Conclusion**

#### **A. Content of possible future instrument**

##### **1. Scope**

25. The scope of the instrument would have to be discussed: will it only apply to contracts? If so, will it only apply to business to business contracts or also to contracts with consumers or employees (or other parties with unequal bargaining power)?

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<sup>52</sup> Chile, Iceland, Romania.

<sup>53</sup> Congo.

<sup>54</sup> Parties to arbitration report similar figures.

<sup>55</sup> It is interesting to note that for the same question, seven parties to arbitration against one were in favour of the development of binding *and* non-binding norms. They are parties from Chile, China (including Hong Kong SAR), Congo, Mexico, Moldova and Romania.

<sup>56</sup> However, it is to be understood that if a legal norm were to be developed in this respect it would undoubtedly enshrine the principle of party autonomy.

## 2. Rule on party autonomy

26. A future instrument would have to reflect the almost universally accepted principle of party autonomy. The starting point should be that a choice of law by the parties has to be respected. This would be true in court proceedings as well as in arbitration.<sup>57</sup>

## 3. Limitation of party autonomy

27. In most legal systems, party autonomy is not without limits. It is therefore likely that also future instrument would spell out some limitations to party autonomy. They should not be so broad that they undermine the fundamental principle of party autonomy and in the process deprive the parties of legal certainty. On the other hand, States have an interest in retaining certain restrictions, based on public law, or in the form of public policy or mandatory rules etc. These restrictions are different in different States.<sup>58</sup> The challenge will be to find compromises on which limitations to permit in a future instrument. Again, these considerations apply to an instrument to be used in court proceedings as well as in arbitration.

28. The instrument might also need to clarify whether it is permissible for parties to choose not only national laws but also transnational or a-national rules or principles to govern the dispute. This has for long played an important role in arbitration but is also of growing importance in court proceedings.

## 4. Choice of law rule in the absence of a choice by the parties

29. A future instrument could go further and contain rules on the law that should be applied in the absence of a choice by the parties. If the rule is that the contract is governed by the law of the place to which it is closest connected, discussion will be necessary on how the closest connection should be determined: according to rules, or according to presumptions. If presumptions are chosen, consideration should be given to whether and how easily these presumptions could be rebutted.

30. If it were to be applied in arbitration, a future instrument, in order to be successful, should avoid mechanical solutions and aim at providing arbitrators with some freedom to determine the applicable law, without the related uncertainty and unpredictability such wide freedom may cause to the parties. Here again, the rule of the closest connection might come into play.<sup>59</sup>

31. Moreover, with regard to arbitration, consideration may need to be given to whether in the absence of a choice of the parties, arbitrators may base their award solely on transnational or a-national rules or principles and whether they may use these to fill in gaps in the event that the chosen law does not provide for a complete solution.

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<sup>57</sup> This principle would of course have to be complemented with other rules. For example, it may be necessary to consider the circumstances in which a choice, though not expressed, may be inferred (*e.g.* from previous dealings between the Contracting Parties or from a jurisdiction clause). It may also be necessary to consider which aspects of validity are regulated by the parties' choice (*e.g.* where an issue of consent is raised).

<sup>58</sup> The need to include possible limits to party autonomy will also depend on the scope of the instrument as such. The more contracts are covered (*e.g.* also consumer contracts) the greater the need for some to include limitations.

<sup>59</sup> It is interesting to note that at a recent session, the United Nations Commission on International Trade Law submitted a report on the revision of the UNCITRAL Arbitration Rules in which "a proposal was made to replace the default provision that reference be made to conflict of laws rules failing designation by the parties with a reference to a direct choice of rules of law most closely connected to the dispute." See Report of the Working Group on Arbitration and Conciliation on the work of its 45<sup>th</sup> session, Vienna, 11-15 September 2006, p. 25. This proposal is under discussion.

## B. Type of instruments

32. Another important element that needs to be considered is the form that a possible future Hague instrument in this field could take. There are several options: (1) a convention as a binding instrument, (2) a set of non-binding legal principles, (3) a model law which could be used as a basis for (binding) national laws but could also be used by parties in a similar way as principles, and (4) a guide to good practice or (5) a legislative guide.

33. The Hague Conference on Private International Law has long-standing experience in elaborating international conventions. However, a convention stating the principle of party autonomy and making provision for exceptions based on “mandatory rules” without spelling them out might be of limited use in the absence of details on what is considered as mandatory in different legal systems. A rule of this general nature is not very likely to enhance predictability for the parties. Should the convention however aim at establishing its own standard or list of rules considered mandatory, *e.g.* by including a list of subject-matters, considerable further research will be required in order to establish which rules are currently considered nationally and internationally mandatory in the legal systems involved in the negotiations, and explore a possible common denominator.

34. Moreover, States that are already Parties to a binding instrument in this field indicated that they were generally satisfied with those rules and would see the benefit of another binding instrument only in relation to those States that are not bound by the existing instrument. In other words, difficult questions concerning the delimitation of the territorial scope of application of the respective instruments will have to be resolved. This “disconnection issue” may be even more difficult to resolve than it was with regard to jurisdiction during the negotiations leading to the *2005 Hague Convention on Choice of Court Agreements* because the rules contained in some of the existing instruments on choice of law are of universal application. They apply regardless of nationality, domicile or residence of the parties and regardless of whether the law designated by the instrument is that of a Contracting or non-Contracting State. For the instrument to apply, it is sufficient that a court of a Contracting State is seized. Should that same State then envisage becoming Party to a future Hague Convention on choice of law in international contracts, either the rules in both instruments would have to be the same, or the issue of when a court in the State Party to both would have to apply one or the other instrument (while in principle both would claim universal application) would have to be decided in a rule that is easy for parties to contracts to understand, clear, practical and politically acceptable to States Parties. This would be particularly difficult with regard to other instruments that would also deal with contractual obligations *in general*.

35. Another possibility is to draw up principles or a model law. The Conference’s working methods could also be used for this purpose.<sup>60</sup> The advantage of principles is that they can serve more than one goal: they can be (1) a source of inspiration for legislators, (2) a tool for interpretation for courts and arbitrators, or (3) a binding set of rules incorporated or referred to in contracts between private parties. Similarly, a model law can serve as example for national legislators, but – depending on the way it is phrased – parties might also incorporate some of its provisions into their contract, either directly or by reference.<sup>61</sup>

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<sup>60</sup> The question whether the Hague Conference should or could draw up model laws was extensively discussed at the Ninth (1960) and Tenth (1964) Sessions. More recently, the Fourteenth Session (1980) adopted a Decision to the effect that “the Conference, while maintaining as its principal purpose the preparation of international conventions, may nevertheless use other procedures of less binding effect, such as recommendations or model laws, where, having regard to the circumstances, such procedures appear to be particularly appropriate” (see *Actes et documents de la Quatorzième session*, Tome I, p. 63).

<sup>61</sup> It is to be understood that this incorporation or reference would be upheld only if the general principle of party autonomy would be accepted under the applicable law.

36. A guide to good practice or recommendations to interpret existing laws, indicating to courts and arbitral tribunals how choice of law agreements ought to be dealt with, could be another option. This would be similar to principles, but would have only the second of the three above-mentioned purposes. Courts and arbitral tribunals could have recourse to it when dealing with choice of law clauses. While parties could of course follow the recommendations of such guide when drafting their choice of law agreement, the guide would probably not contain any provisions that parties could incorporate as such into their contract.

37. While the Hague Conference has already elaborated several chapters of a Guide to Good Practice under the 1980 Hague Convention on the Civil Aspects of International Child Abduction and has been requested to carry out similar work under the 1993 Intercountry Adoption Convention, the 1996 Child Protection Convention and more recently under the 2007 Maintenance Convention, a guide in the context discussed here would be a novelty in that it would not accompany and supplement any existing convention. While admittedly legal harmonisation can take place not only through hard law (conventions) but also through soft law, it is suggested that in order for this harmonisation to take place, the soft law would have to be drafted in terms similar to legal norms – albeit of a non-binding character – rather than in the form of a stand-alone guide or handbook which does not supplement any hard-law instrument.

38. A legislative guide, indicating to legislators how choice of law agreements ought to be dealt with, could also be another option. This option would only have the first purpose of the three above-mentioned purposes. Legislators could use it as a source of inspiration. While parties could of course follow the recommendations of such guide when drafting their choice of law agreement; the guide would probably not contain any provisions that parties could incorporate as such into their contract.

### **C. Next steps proposed**

39. In April 2006, Member States requested the Permanent Bureau to prepare three different feasibility studies on a variety of different topics. While the two comparative law studies and the responses received at the time to the Questionnaire provided some first indications, it appeared that there was some potential for further work on this topic but more information was required before States were in a position to make a well-informed decision. It was therefore proposed that the Questionnaire be circulated again to Members of the Organisation, the international business community and stakeholders in the field of arbitration. This additional time – together with the two comparative law studies presented to them in March 2007 – enabled Members of the Organisation to consult more fully internally – *e.g.* on practice as explored by Question 4 and policy preferences as explored by Questions 5 and 6 – and to return a well-founded response. These responses enabled the Permanent Bureau to present this up-dated version of the Report submitted to the Council of April 2007.

40. Should Members of the Organisation eventually decide to embark on this project such a decision would then enable the Permanent Bureau to concentrate its limited resources currently dedicated to the three research projects in parallel, and carry out the necessary further research. In particular, a considerable amount of further thorough comparative research – in close co-operation with the States and Organisations concerned – will be required to identify in detail the mandatory rules and other limitations on party autonomy or indeed the absence of party autonomy in the Member States of the Hague Conference, and if possible also of other States.

41. Most of the Members of the Organisation have rules concerning the choice of law in international contracts. However, some do not and these Members would certainly have an interest in the development of rules in this area. In the light of the possible challenges highlighted in this analysis to develop these rules at the global level in any binding form,

they would certainly be content, at this point in time, to settle on the development of non-binding rules.

42. The development of non-binding global rules would be of particular interest given the absence of clear modern choice of law rules in international contracts in a number of countries that are not (yet) Members of the Hague Conference. These States would obviously draw immediate benefits from such globally agreed rules. But the benefits would not be restricted to these countries, but be more general. Transactions increasingly cross border between legal systems. Parties established in countries with highly developed choice of law rules on contracts will do business with parties established in countries with less developed choice of law rules. They may find themselves before courts or arbitral bodies in such States that may not honour the choice of a foreign law. Obviously, the development of such global rules could certainly not be pursued without participation of experts from countries with different levels of sophistication of private international law rules.

## **ANNEX**

QUESTIONNAIRE

janvier / January 2007



**QUESTIONNAIRE ADRESSÉ AUX ETATS MEMBRES  
EN VUE D'EXAMINER L'OPPORTUNITÉ D'ÉLABORER UN  
INSTRUMENT RELATIF AU CHOIX DE LA LOI APPLICABLE EN  
MATIÈRE DE CONTRATS INTERNATIONAUX**

*établi par le Bureau Permanent*

\* \* \*

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

*drawn up by the Permanent Bureau*

**Questionnaire addressed to Member States  
to examine the practical need for the development  
of an instrument concerning choice of law in international contracts**

As you know, in April 2006, the then Special Commission (now called Council) on General Affairs and Policy of the Hague Conference on Private International Law invited the Permanent Bureau to prepare a feasibility study on the development of an instrument (for example, a Convention, a Model Law, Principles or a Guide to Good Practice) concerning choice of law<sup>1</sup> in international contracts. It was decided that the study should consider in particular whether there is a practical need for the development of such an instrument.

The attached Questionnaire addressed to Member States of the Organisation has been prepared for that purpose. Part I of the Questionnaire is specifically for Member States to complete in their legislative capacity.

Conscious of the short delay to respond to this Questionnaire the Permanent Bureau is further sending: a) Part II of the Questionnaire to the International Chamber of Commerce which will consult all its members; and, b) Part III to a number of International Arbitration Centres / Organisations, a list of which is attached for your information. However, if time allows and Member States so wish, they could also use Part II to consult relevant companies, industries or business sectors in their jurisdiction. Similarly, Member States might use Part III to consult arbitration centres within their jurisdiction.

The Permanent Bureau would very much appreciate receiving your answers if possible **before 2 March 2007**. Answers should be sent by e-mail to < [secretariat@hcch.net](mailto:secretariat@hcch.net) > with the following heading and indication in the subject field: "Questionnaire concerning choice of law in international contracts – [name of the Member State]". It is the intention to present to the Council at its meeting of 2-4 April 2007 the results of this consultation along with an analysis, under preparation, of the norms available at the international or regional levels that provide some solutions in this area of the law. Your cooperation in responding to this Questionnaire is very much appreciated.

**Identification**

**Name of the Member State:** \_\_\_\_\_

**For follow-up purposes**

Name of contact person: \_\_\_\_\_

Telephone number: \_\_\_\_\_

E-mail address: \_\_\_\_\_

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<sup>1</sup> This Questionnaire only addresses the freedom to choose the *law applicable* to a contract. It does not address the freedom to choose a *court* which is already covered by the *Hague Convention of 30 June 2005 on Choice of Court Agreements*. One purpose of this Questionnaire is to explore whether that Convention should be supplemented by an instrument on choice of law.

**Part I – Questions addressed to Member States in their legislative capacity**

- 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:  
 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:  
 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:  
 NO
- 4) Approximately what is the proportion of international contracts entered into in your State that include a choice of law provision?
- All, or virtually all  
 More than half  
 About half  
 Less than half  
 None or virtually none
- 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;
- YES - please specify whether it should be limited to certain contracts:  
 NO - please briefly explain:
- b) judicial authorities in resolving disputes regarding the applicable law; and,
- YES - please specify whether it should be limited to certain contracts:  
 NO - please briefly explain:
- c) arbitral tribunals in resolving disputes regarding the applicable law?
- YES - please specify whether it should be limited to certain contracts:  
 NO - please briefly explain:

- 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;
- YES - please specify whether it should be limited to certain contracts:  
 NO - please briefly explain:
- b) judicial authorities in resolving disputes regarding the applicable law; and,
- YES - please specify whether it should be limited to certain contracts:  
 NO - please briefly explain:
- c) arbitral tribunals in resolving disputes regarding the applicable law?
- YES - please specify whether it should be limited to certain contracts:  
 NO - please briefly explain:
- 7) Other comments:

**Part II – Questions addressed to members of the international business community**

- 1) Can you please roughly estimate the number of international contracts your company, industry or business sector enters into every year?
- 2) Approximately what proportion of the international contracts of your company, industry or business sector are entered into with consumers?
- All, or virtually all  
 More than half  
 About half  
 Less than half  
 None or virtually none
- 3) Approximately what is the proportion of international contracts of your company, industry or business sector that include a choice of law provision?
- All, or virtually all  
 More than half  
 About half  
 Less than half  
 None or virtually none

- 4) In court proceedings concerning international contracts of your company, industry or business sector **that include a choice of law provision**, approximately what is the proportion of cases in which the choice was upheld/respected by the judge?
- All, or virtually all
  - More than half
  - About half
  - Less than half
  - None or virtually none
- 5) In court proceedings concerning international contracts of your company, industry or business sector **that do not include a choice of law provision**, approximately what is the proportion of cases in which the issue of applicable law was the subject of litigation?
- All, or virtually all
  - More than half
  - About half
  - Less than half
  - None or virtually none
- 6) In international arbitration concerning international contracts of your company, industry or business sector **that include a choice of law provision**, approximately what is the proportion of cases in which the choice was upheld/respected by the arbitral tribunal?
- All, or virtually all
  - More than half
  - About half
  - Less than half
  - None or virtually none
- 7) In international arbitration concerning international contracts of your company, industry or business sector **that do not include a choice of law provision**, approximately what is the proportion of cases in which the issue of applicable law was the subject of dispute?
- All, or virtually all
  - More than half
  - About half
  - Less than half
  - None or virtually none
- 8) Under the law in force in your State are you allowed to choose the law that would govern your international contracts?
- YES - please specify whether this freedom is provided by usage (custom), domestic law or international law:
  - NO - please briefly explain:

9) If the law in your State does not allow you to choose the law that would govern your international contract, is your company, industry or business sector of the view that a norm that would allow party autonomy (with appropriate safeguards) as to the choice of law in international contracts is needed or appropriate?

- YES  
 NO - please briefly explain:

10) Is your company, industry or business sector of the view that a legally binding norm such as an international treaty or domestic law is or would be useful to assist, in relation to international contracts,

a) parties with their choice of law;

- YES  
 NO - please briefly explain:

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

- YES  
 NO - please briefly explain:

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

- YES  
 NO - please briefly explain:

11) Is your company, industry or business sector 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;

- YES  
 NO - please briefly explain:

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

- YES  
 NO - please briefly explain:

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

- YES  
 NO - please briefly explain:

12) Other comments:

**Part III - Stakeholders in the field of international commercial arbitration**

**Questions for arbitrators and / or arbitration centres and institutions**

- 1) Can you please roughly indicate the number of disputes with regard to international contracts you are seized of every year?
- 2) Approximately what is the proportion of international contracts you are seized of for which the issue of applicable law was the subject of dispute?
  - All, or virtually all
  - More than half
  - About half
  - Less than half
  - None or virtually none
- 3) Approximately what is the proportion of international contracts you are seized of that include a choice of law provision?
  - All, or virtually all
  - More than half
  - About half
  - Less than half
  - None or virtually none
- 4) Approximately what is the proportion of international contracts you are seized of for which the issue of the validity of the choice of law provision regarding the applicable law was the subject of dispute?
  - All, or virtually all
  - More than half
  - About half
  - Less than half
  - None or virtually none
- 5) In arbitration concerning international contracts that include a choice of law provision, approximately what is the proportion of cases you are seized of in which the choice of law provision is upheld/respected by the arbitral tribunal?
  - All, or virtually all
  - More than half
  - About half
  - Less than half
  - None or virtually none
- 6) 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; and,  
 YES  
 NO - please briefly explain:
- b) arbitral tribunals in resolving disputes regarding the applicable law?  
 YES  
 NO - please briefly explain:
- 7) 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; and,  
 YES  
 NO - please briefly explain:
- b) arbitral tribunals in resolving disputes regarding the applicable law?  
 YES  
 NO - please briefly explain:
- 8) Other comments:

**Questions for parties to commercial arbitration**

- 9) Approximately what is the proportion of your international contracts that include a choice of law provision?  
 All, or virtually all  
 More than half  
 About half  
 Less than half  
 None or virtually none
- 10) Approximately what is the proportion of your international contracts that actually end-up before arbitral tribunals?  
 All, or virtually all  
 More than half  
 About half  
 Less than half  
 None or virtually none

11) In international arbitration concerning international contracts of your company, industry or business sector **that include a choice of law provision**, approximately what is the proportion of cases in which the choice was upheld/respected by the arbitral tribunal?

- All, or virtually all
- More than half
- About half
- Less than half
- None or virtually none

12) In international arbitration concerning international contracts of your company, industry or business sector **that do not include a choice of law provision**, approximately what is the proportion of cases in which the issue of applicable law was the subject of dispute?

- All, or virtually all
- More than half
- About half
- Less than half
- None or virtually none

13) 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; and,

- YES
- NO - please briefly explain:

b) arbitral tribunals in resolving disputes regarding the applicable law?

- YES
- NO - please briefly explain:

14) 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; and,

- YES
- NO - please briefly explain:

b) arbitral tribunals in resolving disputes regarding the applicable law?

- YES
- NO - please briefly explain:

15) Other comments:

List of Consulted International Arbitration Centres / Organisations

***National Institutions***

- Abu Dhabi Commercial Conciliation and Arbitration Center at the Abu Dhabi Chamber of Commerce and Industry (United Arab Emirates)
- Addis Ababa Chamber of Commerce & Sectorial Association [AACCSA] Arbitration Institute (Ethiopia)
- Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce (Norway)
- Arbitration Court at the Bulgarian Chamber of Commerce and Industry (Bulgaria)
- Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (Czech Republic)
- Arbitration Court of the Estonian Chamber of Commerce and Industry (Estonia)
- Arbitration Court of the Slovak Chamber of Commerce and Industry (Slovakia)
- Arbitration Foundation of Southern Africa (South Africa)
- Arbitration Institute of the Stockholm Chamber of Commerce (Sweden)
- Arbitration of Latvian Chamber of Commerce and Industry (Latvia)
- Arbitration Service of the Cyprus Chamber of Commerce and Industry (Cyprus)
- Australian Centre for International Commercial Arbitration (Australia)
- Bahrain Chamber of Commerce and Industry (Bahrain)
- Bangladesh Council for Arbitration of the Federation of Bangladesh Chambers of Commerce and Industry (Bangladesh)
- Beijing Arbitration Commission (China)
- Board of Arbitration of the Central Chamber of Commerce of Finland (Finland)
- British Columbia International Commercial Arbitration Centre (Canada)
- Canadian Commercial Arbitration Centre (Canada)
- Centre belge d'arbitrage et de médiation – CEPANI (Belgium)
- Centre d'arbitrage de médiation et de conciliation de la Chambre de commerce et d'industrie du Bénin (Benin)
- Centre d'arbitrage du Congo (Congo)
- Centre d'arbitrage du Groupement interpatronal du Cameroun (Cameroun)
- Centre d'Arbitrage et de Médiation de Dakar (Senegal)
- Centre d'Arbitrage, de Médiation et de Conciliation de Ouagadougou de la Chambre de Commerce, d'Industrie et d'Artisanat (Burkina Faso)
- Centre d'arbitrage et de médiation de Madagascar (Madagascar)
- Centre de conciliation et d'arbitrage d'Agadir (Morocco)
- Centre de conciliation et d'arbitrage du Mali (Mali)
- Centre de conciliation et d'arbitrage de Tunis (Tunisia)
- Centre de médiation et d'arbitrage de la Chambre algérienne de commerce et d'industrie (Algeria)
- Centre de Médiation et d'Arbitrage de Paris (France)
- Centre Libyen de Médiation et d'Arbitrage (Libya)
- Centro de Arbitraje de la Cámara de Comercio de Caracas (Venezuela)
- Centro de Arbitraje de México (Mexico)
- Centro de Arbitraje y Conciliación de la Cámara de Comercio de Guayaquil (Ecuador)
- Centro de Arbitraje y Mediación de la Cámara Nacional de Comercio y Servicios de Paraguay (Paraguay)
- Centro de Conciliación y Arbitraje de la Cámara de Comercio e Industria de Tegucigalpa (Honduras)
- Centro de Conciliación y Arbitraje de la Cámara de Comercio, Industrias y Agricultura de Panamá (Panama)
- Centro de Conciliación y Arbitraje Nacional e Internacional de la Cámara de Comercio de Lima (Peru)
- Chamber of Commerce and Industry of Geneva (Switzerland)

## List of Consulted International Arbitration Centres / Organisations

- Chamber of National and International Arbitration at the Milan Chamber of Commerce (Italy)
- Chambre arbitrale de Paris (France)
- Chambre de Commerce du Grand-Duché de Luxembourg (Luxembourg)
- Chartered Institute of Arbitrators (United Kingdom - England)
- Chartered Institute of Arbitrators (United Kingdom - Scotland)
- Chicago International Dispute Resolution Association (United States)
- China International Economic and Trade Arbitration Commission (China)
- Comisión de Resolución de Conflictos de la Cámara de Industria de Guatemala (Guatemala)
- Commercial Arbitration and Conciliation Centre at the Bogota Chamber of Commerce (Colombia)
- Commercial Arbitration Centre in Harare (Zimbabwe)
- Commercial Arbitration Court- Iceland Chamber of Commerce (Iceland)
- Conciliation, Mediation and Arbitration Commission (Swaziland)
- Council For National and International Commercial Arbitration (India)
- Cour d'Arbitrage de Côte d'Ivoire (Côte d'Ivoire)
- Court of Arbitration at the Polish Chamber of Commerce (Poland)
- Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (Hungary)
- Court of International Commercial Arbitration Attached to the Chamber of Commerce and Industry of Romania and Bucharest (Romania)
- Danish Institute of Arbitration (Denmark)
- Directorate of dispute Prevention and Resolution (Lesotho)
- Dubai International Arbitration Centre (United Arab Emirates)
- Dublin International Arbitration Centre (Ireland)
- Foreign Trade Arbitration at the Chamber of Commerce and Industry of Serbia (Serbia)
- German Arbitration Institute (Germany)
- Hong Kong International Arbitration Center (China)
- Indian Council of Arbitration (India)
- International Arbitration Centre of the Austrian Federal Economic Chamber (Austria)
- International Arbitration Court of the Belarusian Chamber of Commerce and Industry (Belarus)
- International Arbitration Court of the Juridical Centre "IUS" (Kazakhstan)
- International arbitration- Venice Chamber of National and International Arbitration (Italy)
- International Center of Dispute Resolution of the American Arbitration Association (United States)
- International Centre for Alternative Dispute Resolution (India)
- International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (Russian Federation)
- International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (Ukraine)
- International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Republic of Moldova (Moldova)
- International Court of Arbitration in Affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic (Kyrgyzstan)
- Israeli Institute of Commercial Arbitration at the Federation of Israeli Chambers of Commerce (Israel)
- Italian Association for Arbitration (Italy)
- Japan Commercial Arbitration Association (Japan)
- Lebanese Arbitration Centre of the Chamber of Commerce & Industry & Agriculture of Beirut and Mount Lebanon (Lebanon)
- Malta Arbitration Centre (Malta)

### List of Consulted International Arbitration Centres / Organisations

- Mongolian National Arbitration Court (Mongolia)
- Netherlands Arbitration Institute (The Netherlands)
- Permanent Arbitration Court at the Croatian Chamber of Commerce (Croatia)
- Permanent Court of Arbitration at the Mauritius Chamber of Commerce and Industry (Mauritius)
- Permanent Court of Arbitration of the Chamber of Commerce and Industry of Slovenia (Slovenia)
- Philippine Dispute Resolution Center Inc. of the Philippine Chamber of Commerce and Industry (Philippines)
- Portuguese Chamber of Commerce and Industry Arbitration Center (Portugal)
- Riga International Arbitration Court (Latvia)
- Santiago Arbitration and Mediation Center (Chile)
- Singapore International Arbitration Center (Singapore)
- Spanish Court of Arbitration (Spain)
- St Petersburg International Commercial Arbitration Court (Russian Federation)
- Swiss Chambers' Arbitration (Switzerland)
- Thai Arbitration Institute (Thailand)
- Vietnam International Arbitration Centre at the Chamber of Commerce and Industry of Vietnam (Vietnam)
- Yemen Center for Conciliation and Arbitration (Yemen)
- Zurich Chamber of Commerce (Switzerland)

#### ***Regional Institutions***

- Cairo Regional Center for International Commercial Arbitration (Africa)
- Commercial Arbitration Centre for the States of the Co-operation Council for the Arab States of the Gulf
- Corte de Arbitraje Internacional para el MERCOSUR (South America)
- Cour commune de justice et d'arbitrage de l'Organisation pour l'harmonisation en Afrique du droit des affaires (Africa)
- European Court of Arbitration (Europe)
- Kuala Lumpur Regional Centre for Arbitration (Asia)
- Lagos Regional Centre for International Commercial Arbitration (Africa)
- Tehran Regional Arbitration Centre (Middle East)

#### ***International Institutions***

- International Centre for Settlement of Investments Disputes
- International Court of Arbitration of the International Chamber of Commerce
- London Court of International Arbitration
- Permanent Court of Arbitration
- WIPO Arbitration and Mediation Center

#### ***Other Organisations***

- Institut de droit international
- Institute for Transnational Arbitration
- Organisation of American States
- UNCITRAL
- UNIDROIT

**ADDENDUM NO 1 – RÉPONSES AU QUESTIONNAIRE DE LA LETTONIE**

**ADDENDUM NO 1 – RESPONSES TO QUESTIONNAIRE FROM LATVIA**

**LATVIA**

*From the Ministry of Foreign Affairs of the Republic of Latvia*

**Questionnaire addressed to Member States  
to examine the practical need for the development of an instrument  
concerning choice of law in international contracts**

Answers to questions 1-4 of the Hague questionnaire to examine the practical need for the development of an instrument concerning choice of law in international contracts

Part I — Questions addressed to Member States in their legislative capacity

- 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:

**NO** - please briefly explain:

*In general party autonomy to choose applicable law is provided for in domestic law. The domestic law allows for party autonomy only in relation to contractual obligations, excluding or with limited possibilities to choose the applicable law in other fields of civil law, such as family and succession matters. The party autonomy and application of foreign law to contractual obligations is subject to public policy exception and compliance to morals and mandatory rules.*

*Party autonomy in relation to contractual obligations is also provided for in international agreements and conventions which are binding on Latvia. Hence, the provisions of the domestic law are applicable, unless provided differently in international agreements and conventions which are binding on Latvia.*

- 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:

**NO**

*Still such parties have additional safeguards or limited party autonomy, but not necessarily exception from possibility to choose applicable law.*

- 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:

**NO**

*Still for certain subject-matters falling in the field of contractual obligations such as insurance, financial instruments, employment and others, there are limited possibilities to choose the applicable law, but not necessarily exception from possibility to choose applicable law.*

- 4) Approximately what is the proportion of international contracts entered into in your State that include a choice of law provision?
- All, or virtually all
  - More than half
  - About half
  - Less than half
  - None or virtually none

**No data available.**

**ADDENDUM NO 2 – RÉPONSES AU QUESTIONNAIRE DU PORTUGAL**  
**ADDENDUM NO 2 – 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.