

**ÉTUDE DE FAISABILITÉ SUR LE CHOIX DE LA LOI APPLICABLE
DANS LES CONTRATS INTERNATIONAUX**

- APERÇU ET ANALYSE DES INSTRUMENTS EXISTANTS -

Note établie par Thalia Kruger pour le Bureau Permanent

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FEASIBILITY STUDY ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS

- OVERVIEW AND ANALYSIS OF EXISTING INSTRUMENTS -

Note prepared by Thalia Kruger for the Permanent Bureau

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I. Introduction

1. At the Special Commission on General Affairs and Policy of the Hague Conference on Private International Law, held 3 to 5 April 2006, the future work of the Conference was discussed. The Permanent Bureau was asked to conduct three feasibility studies on topics that could possibly be covered by future instruments of the Conference. One of these was the law applicable to international contracts. Paragraph 2 of the Special Commission's Conclusions reads as follows:

*"The Special Commission decided to invite the Permanent Bureau to prepare a feasibility study on the development of an instrument concerning choice of law in international contracts. The study should consider in particular whether there is a practical need for the development of such an instrument."*¹

2. The purpose of this study is to give a brief overview of the issues involved relating to the law applicable to contracts. Special attention will be paid to the topic of party autonomy as conflict of laws rule. The paper will mainly treat international commercial contracts. When using the term "international contracts" in the mandate, the Special Commission on General Affairs and Policy did not intend to include family law.

3. While this part of the study will focus on finding the law applicable to contracts in court proceedings, a second part of the feasibility study will deal with similar issues in international arbitration.²

4. The paper includes an annex which contains a list of conventions, uniform acts, model laws and principles in the field of contract law. The list has been divided into two parts: one on applicable law instruments and the second on instruments treating substantive contract law. Major conventions on substantive law have been included because they have an influence on the question of whether or not another private international law instrument is necessary. Signatures, ratifications and entry into force have been indicated where possible. Hague Conference Member States have been put in italics for easy reference. The list is by no means exhaustive, but aims to give an overview of the most important instruments. Bilateral treaties have not been included.

5. It is impossible to give a complete picture of the diverse international and national legal rules in a short feasibility study based mainly on available literature. National case law has not been investigated and discussed in the feasibility study. The Permanent Bureau has therefore sent out a Questionnaire to Member States, to arbitration institutions and – through the International Chamber of Commerce – to the international business community. The responses to the Questionnaire will form an important supplement to this study. Based on the responses, the possibilities of future work on this topic are further examined in Part A of this Preliminary Document No 22.

6. In this study, the terminology that is normally used by the Hague Conference has been employed as far as possible. When reference is made to the possible future project of the Hague Conference, the subject of this study, the word "instrument" is used, as this is a neutral term which does not in any way attempt to predict the type of project that might be chosen. It could include a convention, a model law, principles or a "Guide to Good Practice".

¹ See the Conclusions of the Special Commission held from 3–5 April 2006 on General Affairs and Policy of the Conference, available at < www.hcch.net > under "Work in Progress" and "General Affairs".

² See I. Radic, "Feasibility study on the choice of law in international contracts – Special focus on international arbitration", Preliminary Document No 22 C of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference.

7. At the beginning of this study, some regional achievements in the relevant field are addressed. The main part then focuses on the principle of party autonomy, the limitations that legal systems place on party autonomy and the reach of the concept, both in the sphere of contract law (does it for instance include the pre-contractual phase) and in other areas of law. In the last phase, the rules on the law applicable to contractual obligations in the absence of a (valid) choice made by the parties will be discussed.

8. The Hague Conference has experience in drawing up conventions containing applicable law rules in many different fields (commercial and non-commercial) including sales contracts,³ agency,⁴ products liability,⁵ trusts,⁶ securities,⁷ traffic accidents,⁸ estates of deceased persons and wills,⁹ maintenance obligations,¹⁰ matrimonial property,¹¹ child protection,¹² the protection of adults¹³ and choice of court.¹⁴ Even conventions that have not been ratified by a great number of States have served as source of inspiration for national legislation.¹⁵

9. This is not the first time that the topic of the law applicable to contractual obligations crosses the path of the Hague Conference. In 1983 a feasibility study on the law applicable to contractual obligations was also conducted.¹⁶ At the time, the topic was put on hold while the Hague Sales Convention¹⁷ was completed.

10. However, much has changed since 1983 and a new feasibility study is a useful exercise. International trade, including electronic, has increased significantly. At the international level a number of conventions, uniform acts, model laws and principles have

³ *Convention of 15 June 1955 on the law applicable to international sales of goods; Convention of 15 April 1958 on the law governing transfer of title in international sales of goods; Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods.* For Contracting States, see Annex.

⁴ *Convention of 14 March 1978 on the Law Applicable to Agency.* For Contracting States, see Annex.

⁵ *Convention of 2 October 1973 on the Law Applicable to Products Liability.* For Contracting States, see < www.hcch.net >.

⁶ *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.* For Contracting States, see < www.hcch.net >.

⁷ *Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary.* This Convention has not yet entered into force, but has been signed by Switzerland and the United States of America (see < www.hcch.net >).

⁸ *Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.* For Contracting States, see < www.hcch.net >.

⁹ *Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions; Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.* For Contracting States of the 1961 Convention, see < www.hcch.net >. The 1989 Convention has not yet entered into force; for signatory States see < www.hcch.net >.

¹⁰ *Convention of 24 October 1956 on the law applicable to maintenance obligations towards children; Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.* For Contracting States, see < www.hcch.net >.

¹¹ *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes.* For Contracting States, see < www.hcch.net >.

¹² *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.* For Contracting States, see < www.hcch.net >.

¹³ *Convention of 13 January 2000 on the International Protection of Adults.* The Convention has not yet entered into force. For States having signed and / or ratified, see < www.hcch.net >.

¹⁴ *Convention of 30 June 2005 on Choice of Court Agreements;* see < www.hcch.net >. This Convention has not yet entered into force.

¹⁵ For instance, the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* has not yet been ratified by all European Union Member States, but was an important source of inspiration for European Community legislation in the field. Similarly, the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* has been used as an example for national legislation.

¹⁶ See H. van Loon, "Feasibility study on the law applicable to contractual obligations", Preliminary Document E of December 1983, *Proceedings of the Fifteenth Session*, Tome I, p. 98.

¹⁷ *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods.*

been drawn up in the sphere of international contract law. Some of these contain rules of private international law while others treat substantive contract law.¹⁸

II. Some regional achievements

11. Regional economic integration has recently become increasingly important, as has the harmonisation or unification of law in certain areas. While many regional organisations focus on international trade (in the sense of the elimination of trade barriers and tariffs) and investment, some are also active in promoting commerce between private parties. This touches the domains of private law and private international law. Only those organisations that are relevant for private and private international law will be regarded in this section.

12. The European Community (EC)¹⁹ is currently in the process of updating the *Convention on the law applicable to contractual obligations* (Rome, 1980 – hereinafter referred to as the European Contracts Convention)²⁰ and converting it into a Regulation (referred to as the Rome I Regulation).²¹ Apart from this private international law instrument, numerous pieces of legislation on substantive contract law already form part of the European Community's *acquis communautaire*. In this list, one finds legislation on consumer protection, insurance, agency contracts, etc.²² This legislation is for the largest part not limited to the European Community, but extends to the European Economic Area (EEA).²³

13. The Principles of European Contract Law also deserve mention. These are not the result of legislation, but of the endeavours of academics. The principles have been drafted after an analysis of the contract law rules of the different European Community Member States. The result was not always a convergence between the national systems, but rather a consensus among the drafters about rules that were fair and appropriate.²⁴ These principles have been compared to the United States Restatements,²⁵ or as a first step towards such a restatement.²⁶ This leads to the next step: within the European Community there are initiatives to draw up a civil code. Such work is also taking place in the field of contract law. While not everybody agrees that common rules in all areas of private law are necessary, the process is ongoing.²⁷

¹⁸ For a list of such conventions, see the Annex to this paper.

¹⁹ The current European Community Member States are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Turkey is a Candidate Member State; accession is foreseen at a later stage. In the sphere of private international law, Denmark does not participate and European Community legislation is not applicable there. Ireland and the United Kingdom have the option of participating in legislation in this field, but are not obliged. All these States are bound by legislation harmonising certain rules of private law, such as consumer protection, as this is based on a different chapter of European Community law, namely the internal market or the free movement of persons, goods, capital or services.

²⁰ See Annex.

²¹ See Proposal of 15 December 2005, COM(2005) 650 final, at < http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf > (as per 28 March 2007).

²² See Annex.

²³ The European Economic Area is composed of the European Community plus Iceland, Liechtenstein and Norway.

²⁴ O. Lando, "Why does Europe need a civil code?" in S. Grundmann & J. Stuyck, *An Academic Green Paper on European Contract Law*, Kluwer Law International, London, 2002, pp. 207-213, at p. 209.

²⁵ See O. Lando (*supra*, note 24), at p. 212.

²⁶ C. von Bar, "Paving the way forward with Principles of European Private Law", in S. Grundmann & J. Stuyck, *An Academic Green Paper on European Contract Law*, Kluwer Law International, London, 2002, pp. 137-145, at p. 143.

²⁷ See in general S. Grundmann & J. Stuyck, *An Academic Green Paper on European Contract Law*, Kluwer Law International, London, 2002.

14. The Organization of American States (OAS),²⁸ an organisation with a broad range of activities, has also been active in the fields of private law and private international law. It has adopted the *Inter-American Convention on General Rules of Private International Law* (Montevideo, 1979)²⁹ and the *Inter-American Convention on the Law Applicable to International Contracts* (Mexico, 1994).³⁰ The OAS has also adopted a convention on transport contracts.³¹

15. In the United States of America, the most common instruments in the field under discussion are the Restatements of Contracts and of Conflict of Laws and the Uniform Commercial Code (UCC). While the legal systems of the states differ, the Restatements explain what the law is. Restatements are drawn up by the American Law Institute (ALI).³² The UCC and its revision are also products of the ALI, in cooperation with the National Conference of Commissioners on Uniform State Laws (NCCUSL).³³ The UCC, as a proposed law that states are encouraged to adopt, or use as basis for their legislation, is a comprehensive document covering various aspects of contract law, including issues of conflict of laws.³⁴ It has been adopted by all 50 states of the United States. In Canada the Uniform Law Conference conducts similar processes.³⁵ It has adopted, *inter alia*, the Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts,³⁶ the Frustrated Contracts Act,³⁷ the Uniform Illegal Contracts Act³⁸ and the Uniform International Sales Conventions Act.³⁹ In Mexico, the Mexican Center for Uniform Law has recently been created.⁴⁰

16. Mercosur, the common market of the southern cone, is on its way to becoming a true Regional Economic Integration Organisation (REIO).⁴¹ It has a parliament drawn from the Member States' national parliaments. Mercosur has adopted a number of protocols in the sphere of private international law, for instance on international jurisdiction in contractual matters (Buenos Aires, 1994) and on international commercial arbitration (Buenos Aires, 1998). Mercosur has not adopted any instruments specifically

²⁸ See < www.oas.org >. The Member States of the Organization of American States are Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (although the current government is excluded from participation), Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America, Uruguay and Venezuela.

²⁹ See Annex for a list of the Contracting States.

³⁰ The Convention is currently in force only in Mexico and Venezuela; see Annex.

³¹ See Annex.

³² See < www.ali.org >.

³³ See < www.nccusl.org >. See also F.H. Miller, "The uniform law process and its global impact", *Consumer Financial Law Quarterly Report*, Vol. 56 (2002), pp. 136-141, discussing the work of the NCCUSL and its international impact.

³⁴ See, *e.g.*, para. 1-301 on the ability of parties to choose the applicable law. See also J.M. Graves, "Party autonomy in choice of commercial law: the failure of revised UCC § 1-301 and a proposal for broader reform", *Seton Hall Law Review*, Vol. 36 (2005), pp. 59-123.

³⁵ See < www.ulcc.ca >. See also F.H. Miller, "The uniform law process for the development of private state law in the United States: a model for other systems?", *Consumer Financial Law Quarterly Report*, Vol. 60 (2006), pp. 4-10 at p. 7.

³⁶ 2003.

³⁷ 1948.

³⁸ 2004.

³⁹ 1998.

⁴⁰ See F.H. Miller, *op cit.* (*supra*, note 35) at pp. 7-8.

⁴¹ See < www.mercosur.int >. The Member States are Argentina, Brazil, Paraguay, Uruguay and Venezuela. It also has a number of Associate Members, which can join free-trade agreements, but which remain outside the customs union: Bolivia, Chile, Colombia, Ecuador and Peru. See also R.A. Porrata-Doria Jr., "MERCOSUR: The Common Market of the Twenty-first century?", *Georgia Journal of International and Comparative Law*, Vol. 32 (2004), pp. 1-72; T. Zamudio, "MERCOSUR: General Ideas", *International Journal of Legal Information*, Vol. 32 (2004), pp. 627-638; M.E. Carranza, "Mercosur, the Free Trade Area of the Americas, and the future of U.S. hegemony in America", *Fordham Int'l L.J.*, Vol. 27 (2003-2004), pp. 1029-1065; Z. Kembayev, "Integration processes in South America and in the Post-Soviet area: a comparative analysis", *Southwestern Journal of Law and Trade in the Americas*, Vol. 12 (2005), pp. 25-44.

on the law applicable to contractual obligations. However, legal instruments on commercial law seem relevant to Mercosur's process of economic integration.⁴²

17. The Commonwealth of Independent States (CIS) was created in 1991, as dusk was falling on the Union of Soviet Socialist Republics.⁴³ It purports co-operation in political, economic, environmental, humanitarian, cultural and other fields. The CIS comprises of several organisations and institutions responsible for co-ordination or harmonisation in various fields. The powers of these organisations and institutions are not identical. Not all CIS Member States participate in each of these organisations and institutions. The CIS Interparliamentary Assembly is responsible for the approximation and harmonisation of national laws and has power to draw up model laws and recommendations. It has, among its many instruments and projects, drawn up a model civil code.

18. Some of the CIS Member States created a customs union in 1995.⁴⁴ This customs union gave birth to the Eurasian Economic Community in 2000.⁴⁵ This Community has the goal of creating a common market and forming a unified position on international trade issues, specifically with a view to WTO negotiations.

19. The Association of Southeast Asian Nations (ASEAN)⁴⁶ is a regional organisation with political, economic, and socio-cultural objectives. It is, *inter alia*, working towards economic integration and eventually an economic community. Although ASEAN has not yet drawn up legal instruments in the field of this study, it has indicated that it attaches importance to the gradual harmonisation of national laws.⁴⁷ Thus it might in the future develop instruments in the field of private or private international law.⁴⁸

20. In Australia and New Zealand commissions similar to those in North America exist, working on *i.a.* uniformity of law.⁴⁹ The Australian Law Reform Commission presented a report on choice of law rules in 2002 which contains a chapter on contracts.⁵⁰

21. In Africa there are several regional organisations. The most active in the field of commercial law is the Organisation for the Harmonisation of Business Law in Africa (OHBLA, or more commonly known by its French acronym OHADA).⁵¹ OHADA has enacted

⁴² See, in general, L. Da Gama E Souza Jr., "The UNIDROIT Principles of International Commercial Contracts and their Applicability in the Mercosur Countries", *Revue Juridique Thémis*, Vol. 36 (2002), pp. 375-419.

⁴³ Member States are Armenia, Azerbaijan, Belarus, Georgia (joined in 1993), Kazakhstan, Kyrgyzstan, Moldova, the Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. See < www.cis.minsk.by >; A.G. Khodakov, "The Commonwealth of Independent States as a legal phenomenon", *Emory International Law Review*, Vol. 7 (1993), pp. 13-34; S.A. Voitovich, "The Commonwealth of Independent States: an emerging institutional model", *European Journal of International Law*, Vol. 4 (1993), pp. 403-417; R. Petrov, "Regional integration in the post-USSR area: legal and institutional aspects", *Law and Business Review of the Americas*, Vol. 10 (2004), pp. 631-646; Z. Kembayev, *op cit.* (*supra*, note 41) at pp. 33-37.

⁴⁴ Belarus, Kazakhstan and the Russian Federation. Kyrgyzstan and Tajikistan joined the customs union later.

⁴⁵ See Z. Kembayev, *op cit.* (*supra*, note 41) at p. 36.

⁴⁶ See < www.aseansec.org >. The Member States of the Association of Southeast Asian Nations are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

⁴⁷ See Joint Communiqué of the 6th ASEAN Law Ministers Meeting (ALAWMM), held in Hanoi, Viet Nam 19-20 September 2005, < www.aseansec.org/17738.htm > (as per 28 March 2007).

⁴⁸ See R. Amoussou-Guénou, "Perspectives des principes ASEAN (ou Asiatiques) du droit des contrats", *Revue de droit des affaires*, (2005), pp. 573-591, pleading for the drafting of ASEAN or Asian Principles of Contract Law, modelled on the Principles of European Contract Law.

⁴⁹ See F.H. Miller, *op cit.* (*supra*, note 35) at p. 8. See also < www.alrc.gov.au > and < www.lawcom.gvt.nz >.

⁵⁰ See the table of contents at < www.austlii.edu.au/au/other/alrc/publications/reports/58 > (as per 28 March 2007) and the chapter on contracts at < www.austlii.edu.au/au/other/alrc/publications/reports/58/chap9.pdf > (as per 28 March 2007).

⁵¹ See < www.ohada.org >. The Member States of OHADA are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo (Brazzaville), Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.

uniform laws, for instance on commercial law in general (1997) and on the transport of goods by road (2003).⁵² These uniform laws are applicable in all the Member States. OHADA also has a draft uniform act on contracts. This draft is based on the UNIDROIT Principles of International Commercial Contracts, while taking the specific characteristics and needs of contract law in this African region into account.⁵³

22. We thus observe a gradually growing convergence at the regional levels around the world. At the same time, a global instrument is lacking. Global trade, however, requires global solutions. Once time is ripe for such a global solution, the Hague Conference on Private International Law, the only global organisation whose mandate it is to work for the progressive unification of private international law, would be the only conceivable forum.

III. Analysis: Party autonomy in choice of law

A. The principle

23. The principle of party autonomy has its roots in general contract law: contracting parties may choose the way in which they assume obligations towards each other. This is the very essence of contracts: parties make promises – whatever these are – and are bound by them.

24. Private international law has taken this principle over from contract law. In private international law it has the effect that parties may choose the law applicable to their contractual relationship. In this sense contract law and private international law theories approach each other to such an extent that the dividing line becomes difficult to discern.

25. According to contract law, as stated, contracting parties may choose the content of their obligations. The governing law to an extent also determines the obligations of the parties since it determines the obligations that the parties had not specified in their contract. Thus the governing law contains a more complete set of rules than the parties envisage in their contract.

26. In this sense there seems to be little difference between choosing the contract law of State X by way of a choice of law clause and copying the provisions on contract law from the legislation into the contract, or incorporating them by reference. The applicable law merely supplements the contract with issues which the parties did not regulate. These rules are called *jus dispositivum*, suppletive or default rules.⁵⁴

27. Difficulties arise with respect to the discrepancies between national legal systems. What might be seen in the realm of rules that can be freely chosen in one legal system might be a rule which one cannot derogate from in the next, and might be an internationally mandatory rule in the third.

B. Limitations on choice of law clauses

28. Although the principle that parties can choose the law applicable to their contract seems rather widely accepted, it is not without limitations.⁵⁵ These limitations vary

⁵² See Annex.

⁵³ See Annex. See also M. Fontaine, "The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts", *Uniform Law Review*, (2004), pp. 573-584; S. Kofi Date-Bah, "The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa", *Uniform Law Review*, (2004), pp. 269-273.

⁵⁴ See S.C. Symeonides, "Contracts subject to non-State norms", *American Journal of Comparative Law*, Vol. 54 (2006), pp. 209-231 at p. 216 (United States Report on Private International Law for the 17th International Congress of Comparative Law, held in Utrecht, the Netherlands, 16-22 July 2006).

⁵⁵ See, for example, J.M. Graves, "Party autonomy in choice of commercial law: the failure of revised UCC § 1-301 and a proposal for broader reform", *Seton Hall Law Review*, Vol. 36 (2005), pp. 59-123, at p. 66 (on the United States of America); M. Zhang, "Choice of law in contracts: a Chinese approach", *Northwestern Journal of International Law and Business*, Vol. 26 (2006), pp. 289-333, at p. 314; V.D. Do, "*Les clauses de droit applicable au Vietnam*", *Revue de droit des affaires*, (2005), pp. 601-617, at p. 606; D. Stringer, "Choice of law and choice of forum in Brazilian international commercial contracts: party autonomy, international jurisdiction, and the emerging third way", *Columbia Journal of Transnational Law*, Vol. 44 (2006), pp. 959-991, at p. 959; B. Izadi, "Iran", in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts. The UNIDROIT*

between different legal systems and different international instruments. They are not only formulated in different ways, but often also applied differently. One finds that they are sometimes used in practice as an excuse not to apply foreign law and rather to revert to the law of the forum.

1. *International contract*

29. In some systems parties are permitted to choose the law applicable to their contract only if the contract is international. The exact meaning of the term "international contract" is not always clear, but it generally refers to a contract that has links with more than one legal system. Relevant links usually include the residence and places of business of the parties, the place of conclusion of the contract, the place(s) of performance of the contract, etc. The definitions of the term "international contract" found in international agreements vary, from quite narrow to broad.

30. The *United Nations Convention on Contracts for the International Sale of Goods* (CISG) states that it applies to contracts when the parties have their place of business in different States.⁵⁶

31. The *Inter-American Convention on the Law Applicable to International Contracts* provides: "It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party."⁵⁷

32. The Uniform Commercial Code states as follows: "'International transaction' means a transaction that bears a reasonable relation to a country other than the United States."⁵⁸

33. The European Contracts Convention attempts to find a broad definition for "international contracts": "The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries."⁵⁹

34. Traditionally these links should have an objective or factual character. The fact that the parties chose the law of another State does not make the contract international.⁶⁰ However, under the European Contracts Convention, although not entirely unanimously,⁶¹ it seems accepted that the choice by the parties can make a contract international. Thus a contract that is linked to only one legal system, but in which the parties had chosen the law of another State as applicable, is seen as an international contract.⁶² This argument is based on a provision in the Convention stating that a court may apply its mandatory rules if all the elements relevant to the situation at the time of the choice, except for the chosen law, are purely internal to that State.⁶³ Therefore, in reality there is no requirement that the contract must be international for parties to be able to insert a choice of law clause.

Principles of International Commercial Contracts, Kluwer Law International, The Hague, 1999, pp. 151-165, at p. 157; G. Alpa, "Italy" in M.J. Bonell (ed.), *op. cit.*, pp. 175-190, at p. 183, explaining that European Community directives limit freedom of contract; L. Da Gama E Souza Jr., "The UNIDROIT Principles of International Commercial Contracts and their Applicability in the Mercosur Countries", *Revue Juridique Thémis*, Vol. 36 (2002), pp. 375-419, at pp. 384-387.

⁵⁶ Art. 1.

⁵⁷ Art. 1.

⁵⁸ Para. 1-301(a)(2).

⁵⁹ Art. 1.

⁶⁰ See P.E. Nygh, "The reasonable expectations of the parties as a guide to the choice of law in contract and in tort", *Collected courses of The Hague Academy of international law*, Vol. 251 (1995), pp. 269-400, at p. 305.

⁶¹ T.C. Hartley, "Mandatory rules in international contracts: the common law approach", *Collected courses of The Hague Academy of international law*, Vol. 266 (1997), pp. 337-426, at p. 366.

⁶² See P.E. Nygh (*supra*, note 60), at p. 305.

⁶³ Art. 3(3) of the European Contracts Convention.

35. Apart from being a requirement in some cases for a choice of law clause to be accepted, the distinction between an international and a domestic contract can be relevant for other purposes, such as the determination of which mandatory rules should be applied.⁶⁴

2. Requirement of a reasonable link

36. Former Section 1-105 of the Uniform Commercial Code retained the requirement of a reasonable link. Parties could only choose the law of a State that had a reasonable relationship with the contract. This requirement has been altered by Section 1-301 of the revised version of the Code: it now only applies to domestic contracts. For international contracts the requirement has been abandoned. This issue has caused controversy in the United States of America.⁶⁵

37. Outside the United States the requirement of a reasonable link for a choice of law agreement to be valid has little support.⁶⁶ The requirement that parties may only choose a legal system that has a link to their contract does not exist under the European Contracts Convention, nor under the *Inter-American Convention on the Law Applicable to International Contracts*.

3. Mandatory rules

38. Legal systems often specify rules that may not be derogated from by way of contract, referred to by terms such as *jus cogens*, mandatory, obligatory or imperative rules.⁶⁷ These rules vary from one State's legal system to another. Parties often choose a specific legal system for the very reason of avoiding such rules in other systems.

39. The existence of mandatory rules is probably the most important limitation to the principle of party autonomy. Even if parties can freely determine their contractual obligations, they are still limited by certain rules that are too important to derogate from. The number of mandatory rules and their reach differ significantly in different legal systems. Contracting parties are often not aware of all the possible mandatory rules of all the legal systems that they might come into contact with.

40. In the first place a distinction should be made between different types of mandatory rules. Legal systems normally have rules from which parties may not derogate by way of contract. These are *domestic mandatory rules*. *Internationally mandatory rules* go one step further: these have to be applied, even if another legal system regulates the contract between the parties. Thus, in the context of party autonomy, internationally mandatory rules impose a restriction on the choice that the parties are permitted to make.

41. Currently, mandatory rules are no longer dictated on a national level only. As has been indicated, regional integration is increasing. Harmonised or unified regional legislation might also contain mandatory rules. In the European Union this point of view has been confirmed by the Court of Justice of the European Communities, which found that the Agency Directive⁶⁸ contained internationally mandatory rules.⁶⁹ In that case, a

⁶⁴ See *infra* under 3 (p. 10).

⁶⁵ The revision of this article was completed in 2001. For further information, see J.M. Graves, "Party autonomy in choice of commercial law: the failure of revised UCC § 1-301 and a proposal for broader reform", *Seton Hall Law Review*, Vol. 36 (2005), pp. 59-123; E.F. Scoles, P. Hay, P.J. Borchers & S.C. Symeonides, *Conflict of Laws*, 4th ed., Thomson West, St. Paul, 2004, pp. 983-987.

⁶⁶ See P.E. Nygh (*supra*, note 60), at p. 306.

⁶⁷ See S.C. Symeonides, "Contracts subject to non-State norms", *American Journal of Comparative Law*, Vol. 54 (2006), pp. 209-231, at p. 216.

⁶⁸ Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents; *Official Journal* L 382, 1986, p. 17.

⁶⁹ ECJ case C-381/98, *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, judgment of 9 November 2000, [2000] ECR I-9305; also available at < <http://curia.europa.eu/> >.

principal, established in California, appointed an agent for the United Kingdom. The contract contained a choice for the law of California. The Court found that the English national legislation transposing the Agency Directive had to be applied. The Agency Directive was mandatory according to the Court and the parties could not escape its rules by choosing the law of another State.

42. It is not always clear which internationally mandatory rules are to be applied in a case. Often the forum will apply its own internationally mandatory rules. However, provision is sometimes made for the application of internationally mandatory rules of other legal systems than that of the forum. This possibility exists in the European Contracts Convention⁷⁰ and is taken over in the proposed Rome I Regulation.⁷¹ According to these instruments a State *may* apply the internationally mandatory rules of another legal system if the case has a close connection to that legal system. The application of foreign mandatory rules is thus not compulsory.

43. If one accepts that foreign mandatory rules can be applied, the next question is whether various mandatory rules of different legal systems can be applied to the same case. If the criterion is not that only the mandatory rules of the forum can be applied, one should be able to apply internationally mandatory rules of all legal systems that are closely connected to the dispute. There might be more than one legal system that is closely connected to the dispute, and there might be more than one legal system that contains relevant mandatory rules. What should be done if the mandatory rules are not identical, or even contradict each other? Should the closest legal system be chosen to have its mandatory rules applied? Or should one try to apply as many of the mandatory rules as possible? One can also envisage a situation in which various mandatory rules of different legal systems are relevant to different parts of the contract. This might lead to further *dépeçage*: *i.e.*, three or more legal systems will have to be applied, namely the chosen law and those two or more laws containing the mandatory rules.

4. Public policy

44. The term “public policy” is used in different ways. Sometimes it refers to the same issue as “mandatory rules”, as discussed above. One would then say that certain rules in a legal system are so fundamental that parties cannot derogate from them by choosing another law as applicable to their contract. The rules that cannot be derogated from are then referred to as rules of public policy.

45. “Public policy” is also sometimes used in a more narrow sense. According to this definition, while mandatory rules are rules that impose themselves by virtue of their own fundamental nature, public policy is a mechanism by which certain foreign norms are refused. Thus, there might be no specific mandatory rule on a certain aspect of the contract, but the rule to which the parties agreed might not be acceptable and thus not capable of being applied. The rule applied as substitute is found in a different legal system (mostly that of the forum), but that rule is in itself not necessarily of great importance.

46. Public policy in this second sense does not often come up in matters of contract law, because of the very principle of party autonomy: the parties can agree on what they want to do. However, examples of public policy can be found in a contractual obligation that is illegal.

5. Evasion of law (fraude à la loi)

47. Evasion of law is defined as the manipulation of connecting factors in private international law in order to obtain a result that would otherwise not have been

⁷⁰ Art. 7(1). Several States, however, made reservations excluding the application of this paragraph: Germany, Ireland, Luxembourg and the United Kingdom.

⁷¹ See *supra*, note 21, Art. 8(3). Here, it will no longer be possible to make a reservation against the application of foreign internationally mandatory rules.

obtained.⁷² The examples usually given are taken from family law. In the sphere of contract law, where the principle of party autonomy is key, it is difficult to see how the idea of evasion of law can lead to the non-application of the law chosen by the parties. It is quite conceivable that the parties had chosen a law in order to evade the rules of another legal system. However, they can probably not be blamed for such action. If they have sought to evade a mandatory rule, *e.g.* on issues like competition, anti-trust or anti-corruption laws, their choice might be invalidated by this exception.⁷³ Nonetheless, in court proceedings, it is more likely that the rule the parties tried to evade might still find application under the mandatory rules limitation. Therefore the theory of evasion of law is probably not necessary in the sphere of conflict of laws in contracts.⁷⁴

6. Protection of weaker parties

48. In some legal systems attention is paid to the fact that weaker parties are often not in a position to negotiate contracts and to have their will represented in the final agreement. The most common example is the consumer, but also the employee and the insured party can fall in this category. In the sphere of conflict of laws, the protection means that a choice of law clause might be limited. In the European Contracts Convention, a choice of law agreement to which a consumer or an employee is party, may not have the result that the weaker party loses the protection he / she would have had under the law that would have been applicable to the contract in the absence of choice.⁷⁵

49. Hartley points out that the provision on consumers in the European Contracts Convention is theoretically interesting, but unlikely to be of practical importance because of the general provision on mandatory rules in the same Convention.⁷⁶ Indeed, the questions that arise with regard to weaker parties can in a simple way be dealt with by the exceptions of mandatory rules and public policy. The *Inter-American Convention on the Law Applicable to International Contracts* follows this line: it does not contain specific rules on weaker parties, but exceptions of public policy and mandatory rules are foreseen.⁷⁷

50. Protecting these weaker parties in fact amounts to reverting to contract law in its purest form: the will of the parties. If one of the parties was not able to express his / her will, something is wrong with the contract. However, this is a point on which legal systems differ greatly. Some legal systems, as explained, attach much importance to the protection of weaker parties. Other legal systems respect the contracts and ignore the possible lack of will of one of the parties relating to some of the terms.

7. Unequal bargaining power

51. The concern that the choice of law agreement might contain only the will of one of the parties which has been forced upon the other, is not limited to consumers and employees. Small and medium-sized enterprises may face the same unequal bargaining power when contracting with big (multinational) companies.⁷⁸

⁷² See F. Rigaux & M. Fallon, *Droit international privé*, 13th ed., Larcier, Brussels, 2005, p. 215; P.E. Nygh (*supra*, note 60), p. 311.

⁷³ See Preliminary Document No 22 C (*supra*, note 2).

⁷⁴ See P.E. Nygh (*supra*, note 60), p. 311.

⁷⁵ Art. 5(2) and 6(1).

⁷⁶ T.C. Hartley (*supra*, note 61), p. 373.

⁷⁷ Art. 11 and 18.

⁷⁸ See W.J. Woodward, Jr., "Finding the contract in contracts for law, forum and arbitration", *Hastings Business Law Journal*, Vol. 2 (2006), pp. 1-46, at p. 3.

8. Financial limitations

52. This point is linked to the previous two on the unequal bargaining power of the parties. In some legal systems a choice of law clause will be respected more easily if the transaction has a certain minimum financial value.⁷⁹ This is a simple, but not watertight way of excluding consumer contracts and contracts by small enterprises, while encouraging large businesses to choose the law (and possibly also the courts) of that State.

9. Public law limitations

53. Public law limitations are similar to the second interpretation of public policy discussed above. The autonomy of the parties is limited by certain aspects of public law. In this sense one can mention competition or anti-trust rules, which prevent certain contractual provisions by way of exception to the choice of the parties.

54. A court will most often apply the public law rules of its own State and limit contractual provisions. Arbitrators are not always held to consider such public law rules. The question of whether or not courts will apply the public law rules of other States does not have a definite answer. The issues are similar to those arising in relation to the application of foreign mandatory rules.⁸⁰

10. May principles be chosen?

55. Principles can fulfill different functions:

1. They can serve as a model for national legislators (similar to a model law);
2. Courts might use them as an interpretation tool to interpret the contract or some clauses of it (even if parties have not referred to them);
3. They can become a binding part of the parties' agreement through incorporation by reference (or copying into the agreement).

56. The most common sets of principles on contract law currently in existence are the UNIDROIT⁸¹ Principles of International Commercial Contracts and the Principles of European Contract Law.⁸² These can serve all three of the above-mentioned functions.

57. UNIDROIT has drawn up various types of legal instruments, including conventions, model laws, principles and guides. The first version of the UNIDROIT Principles of International Commercial Contracts was completed in 1994 and a revised version followed in 2004. The Principles are based on comparative research and the drafters attempted to find the best solution in law.

⁷⁹ This is the case in the state of New York. An agreement for the application of New York law will be respected even if there are no substantial contacts with New York if the contract involves a transaction of more than \$250.000, does not involve a consumer contract or a contract for personal services, and does not contravene certain UCC limitations. See E.F. Scoles, P. Hay, P.J. Borchers & S.C. Symeonides, *Conflict of Laws*, 4th ed., Thomson West, St. Paul, 2004, p. 976.

⁸⁰ See above, p. 10 *et seq.*

⁸¹ UNIDROIT is an intergovernmental organisation which currently comprises 61 Member States: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Holy See, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States of America, Uruguay and Venezuela. See, in general, A. Schulz, "International Organizations: The Global Playing Field for US-EU Cooperation in Private law Instruments", in R.A. Brand (ed.), *Private Law, Private International Law, & Judicial Cooperation in the EU-US Relationship*, CILE Studies Vol. 2, Thomson West, St. Paul, 2005, pp. 237-262.

⁸² See Annex.

58. The Principles of European Contract Law were drawn up by a private group consisting mainly of academics. Like the UNIDROIT Principles, they are based on comparative research and attempts to find the best legal solutions.

59. The Basel Principles on the autonomy of the parties in international contracts between private persons or entities were adopted by the Institute of International Law in 1991. The Institute of International Law draws up resolutions, which highlight the characteristics of existing law, but which can also draw attention to desirable legal rules and in this sense contribute to the development of international law.⁸³ Thus the Basel principles serve mainly the first and second functions.

60. The ICC Incoterms are in fact also a form of principles, or a codification of the *lex mercatoria*, but in a small part of contract law, namely transport. They differ from the UNIDROIT Principles and the Principles of European Contract Law in that they can only serve the third function described above. An Incoterm is an abbreviation for an entire legal principle. Incoterms are an example of optional corporate governance rules elaborated by the business world for its own purposes. They are standard off-the-shelf terms and conditions which come complete with a supporting structure.

61. Sometimes both the UNIDROIT Principles and the Principles of European Contract Law are mentioned in the same contract, or the UNIDROIT Principles are declared applicable in combination with an international convention such as the *United Nations Convention on Contracts for the International Sale of Goods* (CISG).⁸⁴

62. Courts often do not respect choice of law agreements in which parties have chosen a set of principles without choosing a national law. To date, the UNIDROIT Principles have played a much greater role in international arbitration than in litigation before national courts.⁸⁵ The reasons are firstly one of sovereignty and secondly that courts consider the principles to be incomplete as opposed to national legal systems that regulate matters more comprehensively.⁸⁶ However, Nygh remarked that courts should be in a position to interpret and supplement a set of principles on contract law in the same way that they interpret and supplement national law. He also pointed out that arbitrators have been less reluctant to do so.⁸⁷ Courts, however, have had less difficulty in applying and interpreting Incoterms. This indicates that it is at least possible for national courts to work with something that comes close to principles.⁸⁸

C. Which matters are covered by the chosen law?

1. Pre-contractual phase

63. In some legal systems pre-contractual obligations form part of the law of contract; in other legal systems their violation is classified as tort and might therefore be subject

⁸³ See < www.idi-iii.org >.

⁸⁴ See M.J. Bonell (ed.), *The UNIDROIT Principles in Practice*, Transnational Publishers Inc., Ardsley, New York, 2002, at p. xii.

⁸⁵ See M.J. Bonell (ed.), *The UNIDROIT Principles in Practice* (*supra*, note 84), at p. xi.

⁸⁶ See P.E. Nygh (*supra*, note 60), at pp. 307-309.

⁸⁷ See P.E. Nygh (*supra*, note 60), at p. 309.

⁸⁸ Interestingly, the European Commission, in its proposal for the so-called Rome I Regulation (*supra*, note 21), had suggested an Art. 3(2) that read:

*"The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community.
However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation."*

In a joint proposal by the previous Finnish and the current German Presidency of the Council of the European Union, however, it is suggested to delete this paragraph (see *Praxis des Internationalen Privat- und Verfahrensrechts*, 2007, No 2, p. 11).

to a different conflict of laws rule than the contract as such.⁸⁹ The principles, for instance that of good faith, that regulate this phase, as well as their interpretation, vary widely in different legal systems.⁹⁰

64. Parties often try in all sorts of ways to ensure that their negotiations are not yet seen as a contract, using terms such as memorandum of understanding, letter of intent, subject to contract, conditional civil transaction, and so forth.⁹¹ In this way they seek to postpone the moment on which they take up obligations. This might be because they are still waiting for some specifications from the other party, or because they want to check certain facts themselves.

65. The choice of law clause governing "the contract" between the parties will only apply once there is a contract. Before that, one remains in the pre-contractual phase and the different laws referred to above might be applicable, depending on which court one ends up in. Some international instruments exclude the pre-contractual phase.⁹² Others are silent on the matter,⁹³ which means that one will use national law to determine whether a memorandum of understanding should be covered by rules on contract law.

2. Formation of the contract

66. Linked to the question of the pre-contractual phase, is the issue of the way in which a contract is formed, *i.e.*, must there be an offer and an acceptance? What constitutes a valid offer and a valid acceptance? At what point exactly does the contract come into existence? This is important if the choice of law clause is only permitted to cover obligations after the contract has come into existence.

67. Offers and acceptances can be modified or withdrawn; acceptance can be tacit, or deduced from the execution of the first contractual obligation. In order to determine the law under which such first contractual obligation should be examined and whether or not the choice is valid, one must know the exact moment at which the contract was created. This is in the assumption that the choice is only relevant as from the moment of the creation of the contract.

3. Validity of the choice of law agreement

68. The validity of the choice of law agreement is not necessarily dependent on the validity of the remainder of the contract. The choice of law agreement might be regarded as valid even though the validity of the contract is in dispute.

a) Formal validity

69. The requirements on formal validity of the choice of law agreement may vary in different legal systems. The first issue which comes to mind, is whether the agreement has to be in writing, or whether an oral agreement can be valid. For consumer contracts, *e.g.*, the Canadian Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts require the choice of law agreement to be in writing.⁹⁴

⁸⁹ N. Audier & N. Picard, "La pratique des lettres d'intention au Vietnam", *Revue de droit des affaires*, (2005), pp. 593-600. See also the opinion of the Advocate General in ECJ case C-334/00, *Fonderie officine Meccaniche Tacconi SpA v. HWS Heinrich Wagner Sinto Maschinenfabrik GmbH*, [2002] ECR I-7357, also available at < <http://curia.europa.eu/> >.

⁹⁰ See L. Vandomme, "La négociation des contrats internationaux", *Revue de droit des affaires*, (2003), pp. 487-501, at p. 488.

⁹¹ See N. Audier & N. Picard, "La pratique des lettres d'intention au Vietnam", *Revue de droit des affaires*, (2005), pp. 593-600.

⁹² See, *e.g.*, the *United Nations Convention on Contracts for the International Sale of Goods* (CISG), Art. 4.

⁹³ See the *European Contracts Convention* and the *Inter-American Convention on the Law Applicable to International Contracts*.

⁹⁴ Section 7(1).

70. Secondly, in some legal systems a choice of law agreement must be express, while in others an implicit choice of law agreement can be accepted if the intention of the parties is sufficiently clear. The European Contracts Convention, *e.g.*, does not require the choice of law agreement to be express. A choice may also be deduced from the contract if it is sufficiently clear the parties intended such a choice (*demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case*).⁹⁵ Similarly, the *Inter-American Convention on the Law Applicable to International Contracts* permits an implied choice if it is evident from the parties' behaviour and from the clauses of the contract, considered as a whole.⁹⁶

71. The elements that might suffice to deduce a choice by the parties will not be identical in all legal systems. The Inter-American Convention explicitly states that the choice of a forum does not imply a choice of law,⁹⁷ but this is not the case in all legal systems.

72. There is also an argument that the validity of a choice of law agreement should be upheld as far as possible. Parties should be protected in circumstances when they have chosen a law that would invalidate their contract if the law that would have been applicable in the absence of that choice would have upheld the validity of the contract.⁹⁸

b) Substantive validity: Formation of the choice of law agreement

73. Substantive validity is a more complex question. As for the contract as such, the chosen law normally also governs the issue of the conclusion of the choice of law agreement, *i.e.* questions of offer and acceptance, and of what constitutes a valid offer and a valid acceptance.

74. In some cases, however, a choice may be invalid because one of the parties lacked contractual capacity. Other private international law rules exist for contractual capacity (for example, the nationality or domicile of the party concerned). The issue of contractual capacity is (partially) excluded from the scope of many private international law conventions.⁹⁹ The *Convention on Contracts for the International Sale of Goods* (CISG) excludes all (formal and substantive) validity issues from its scope.¹⁰⁰

D. The areas of law in which a choice of law agreement might be permitted

75. This feasibility study focuses on international commercial contracts. However, mention should be made of the fact that various legal systems permit parties to choose the law applicable to their legal relations, also outside the realm of commercial law. Choices are sometimes permitted with regard to maintenance,¹⁰¹ matrimonial property¹⁰² and divorce.¹⁰³

⁹⁵ Art. 3(1).

⁹⁶ Art. 7.

⁹⁷ Art. 7.

⁹⁸ See P.E. Nygh (*supra*, note 60), at p. 307. See also Art. 3(3) of the Basel Principles on the autonomy of the parties in international contracts between private persons or entities, adopted by the Institute of International Law in 1991.

⁹⁹ See European Contracts Convention (Art. 1(2)(a)) and the *Inter-American Convention on the Law Applicable to International Contracts* (Art. 5(a)).

¹⁰⁰ Art. 4(a).

¹⁰¹ See, *e.g.*, for the European Community Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations of 15 December 2005, COM(2005) 649 final, introducing a limited possibility for parties to choose the law applicable to maintenance obligations in Art. 14.

¹⁰² In the European Community, this is the subject of one of the questions in the Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the questions of jurisdiction and mutual recognition of 17 July 2006, COM(2006) 400 final, Question 5.

¹⁰³ See, *e.g.*, for the European Community, Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters of 17 July 2006, COM(2006) 399 final, introducing a limited possibility for parties to choose the law applicable to their divorce in Art. 1(7).

76. Some legal systems permit choices to be made with regard to actions in tort, seeing this as an extension of the possibility that exists in contract law.¹⁰⁴ However, this is not the case in all legal systems.

E. What is the rule if no choice has been made?

1. General rule

77. It is an open question whether a possible future instrument should also deal with the question of the law applicable to contractual obligations in the absence of a choice of law by the parties.

78. On the one hand, there is the possibility to limit a future instrument to the protection of party autonomy. Thus the instrument would be similar to the Choice of Court Convention. If parties have made a choice, that choice should be respected. If the parties have not chosen the law that is to regulate their contractual relationship, the instrument would be inapplicable.

79. Another possibility is to create a more comprehensive instrument treating conflict of laws in contractual matters which would provide rules according to which courts of Contracting States can determine the applicable law in all situations. The main argument is that if the instrument were limited to choice of law clauses, there would be no solution if the clause should turn out to be invalid. Unlike in the field of international jurisdiction, the court would have to find a solution. In cases where a court does not have jurisdiction, its work is completed. However, in cases where it has jurisdiction, the court needs to find an answer as to the question of applicable law.

80. What the rule should be would probably create less debate than its actual application in practice. Most legal systems have a rule more or less to the effect that the law of the closest connection should govern the contract. However, legal systems differ on what the closest connection is. One finds connecting factors such as the place of the conclusion of the contract, the place of performance of the contract, the residences of the parties, etc.

2. Presumptions

81. Apart from the expression of the rule itself, some legal systems have a general rule on the closest connection accompanied by presumptions on how to fill in this general rule. The differences lie with the weight that is given to specific presumptions. For instance, should the presumption that a contract is the most closely connected to the habitual residence of the seller be hard to rebut so that exceptional circumstances must be indicated before another place is seen as the most closely connected to the contract, or should a presumption be easy to rebut? Some are in favour of presumptions that are hard to rebut, as this ensures legal certainty in their view.¹⁰⁵ According to others, such inflexibility in the application of presumptions can lead to rigidity, and in some instances bizarre results.¹⁰⁶ In this sense legal certainty is not promoted, but the result might be the opposite.

¹⁰⁴ See, e.g., Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (Rome II) of 21 February 2006, COM(2006) 83 final, Art. 4; Introductory Act to the Civil Code (EGBGB) in Germany, Art. 40(1), which gives a limited choice. The emerging trend in the United States of America is also to permit choice of law in tort; see E.F. Scoles, P. Hay, P.J. Borchers & S.C. Symeonides, *Conflict of Laws*, 4th ed., Thomson West, St. Paul, 2004, p. 950.

¹⁰⁵ See the European Commission's Explanatory Memorandum on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, at p. 5.

¹⁰⁶ See A. Dickinson, "The Law applicable to contracts – uncertainty on the horizon?", *Butterworths Journal of International Banking and Financial Law*, Vol. 21 (2006), pp. 171-173, at p. 172.

IV. Conclusion: possibilities for action by the Hague Conference on Private International Law

82. Various options for future action and its possible content exist. The choice will depend not only on this feasibility study, but also on the responses to the Questionnaire, and on the discussions that will follow.

A. Type of future action

1. Convention

83. The Hague Conference on Private International Law has up to present created international instruments mainly by way of convention. A convention in this field remains a possible route. However, a convention stating the principle of party autonomy and making provision for exceptions on bases such as mandatory rules (as they may exist in national law) might be of limited use in the absence of details on what is considered as mandatory in different legal systems.

2. Model law

84. Another possibility is to draw up a model law that can serve as example for national legislators seeking to establish the principle of party autonomy. The point made above as to the possible content of mandatory rules applies here as well. The permissible limitations to the principle of party autonomy should therefore be clearly indicated.

3. Principles

85. The UNIDROIT Principles on International Commercial Contracts and the Principles of European Contract Law seem to work well. The advantage of principles is that they can serve more than one goal, depending on the way they are drafted: (1) they can be a source of inspiration for legislators, (2) a tool for interpretation for courts, or (3) a binding set of rules in contracts between private parties who have incorporated them into their contract, either by reference or by directly incorporating their provisions. Principles should address not only party autonomy as such, but also its limitations and the application of mandatory rules.

86. Although the Hague Conference has little experience in drafting principles, the Conference's working methods could also be used for this purpose.

4. Guide to good practice

87. It might also be useful to draw up a guide to good practice, indicating to legislators and courts how choice of law agreements ought to be dealt with. This would be similar to principles, but would have only the first two of the three purposes mentioned above under 3.

5. No action

88. The Member States of the Hague Conference might indicate that the moment is not right to launch a new project on the law applicable to contractual obligations.

6. Information on limitations

89. Another useful route might be an instrument based on thorough comparative research to indicate the mandatory rules and other limitations on party autonomy in the legal systems of the Member States of the Hague Conference, and if possible also of other States. Which form such an instrument could take, remains open. It might take the

form of a guide to good practice, or it might simply be a list based on legal comparison. Parties to a contract would then be able to make choices with more certainty that these will be respected. For instance, they will know that the mandatory rules of State X have the consequence that a choice of the law of State Y will never be respected. Therefore, they could consider options of choosing another forum where the law of State Y would be applied if chosen. In the alternative, they could opt for another law that will be applied in State X.

B. Content of possible future instrument

1. Rule on party autonomy

90. A future convention, model law or principles would have to contain the principle of party autonomy. The starting point should be that a choice by the parties has to be respected. This is the same starting point as that of the Choice of Court Convention.

91. 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, as the Choice of Court Convention, or also to contracts with consumers or employees (or other “weaker” parties)?

2. Limitation of party autonomy

92. A future instrument would have to spell out the permissible limitations to party autonomy. They should not be so broad that they undermine the fundamental principle of party autonomy and deprive the parties of legal certainty. On the other hand, States have an interest to keep applying certain restrictions, based on public law, or in the form of public policy or mandatory rules etc. These restrictions are different in different States. The challenge would be to find compromises on which limitations to permit in a future instrument.

3. Choice of law rule in the absence of choice by the parties

93. A future convention, model law or principles 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 were that the contract is governed by the law of the State to which it is closest connected, discussion would 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 how easily these presumptions could be rebutted.

A N N E X

List of instruments in the field of contract law & Contracting States / States concerned

Each part contains first a chronological list of conventions and then a chronological list of uniform acts / model laws / regional legislation. Part B on Substantive law also contains a list of principles.

For easy reference Hague Conference Member States have been put in italics.

Part A: Applicable law

CONVENTIONS	DATE	Signed in	Signed by; <u>ratified by</u> ; <u>in force in</u>
<i>Convention on the law applicable to international sales of goods</i>	1955-06-15	The Hague (Hague Conference)	<u>Denmark, Finland, France, Italy, Luxembourg, the Netherlands, Niger, Norway, Spain, Sweden, Switzerland</u>
<i>Convention on the law governing transfer of title in international sales of goods</i>	1958-04-15	The Hague (Hague Conference)	<i>Greece, Italy</i>
<i>Convention on the Law Applicable to Agency</i>	1978-03-14	The Hague (Hague Conference)	<u>Argentina, France, Netherlands, Portugal</u>
<i>Inter-American convention on general rules of private international law</i>	1979-05-08	Montevideo (Organization of American States)	<u>Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, Venezuela</u>
<i>Convention on the law applicable to contractual obligations</i>	1980-06-19 (amended several times)	Rome (European Community)	<u>Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom</u>
<i>Convention on the Law Applicable to Contracts for the International Sale of Goods</i>	1986-12-22	The Hague (Hague Conference)	<i>Argentina, Czech Republic, Moldova, the Netherlands, Slovakia</i>

<i>Inter-American Convention on the law applicable to international contracts</i>	1994-03-17	Mexico (Organization of American States)	Bolivia, Brazil, <u>Mexico</u> , Uruguay, <u>Venezuela</u>
Uniform acts / model laws / regional legislation	Date	Institution	In force in
Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)	2005-12-15	(European Community)	Will be in force in <i>Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden</i> ; the application in <i>Ireland</i> and the <i>United Kingdom</i> is not yet certain.
Principles			
The Autonomy of the Parties in International Contracts Between Private Persons or Entities	1991	Basel (Institute of International Law)	

Part B: Substantive law

Conventions	Date	Signed in	Signed by; <u>ratified by</u> ; <u>in force in</u>
<i>Convention relating to a uniform law on the international sale of goods (ULIS)</i>	1964-07-01	The Hague (UNIDROIT)	<i>France, <u>Gambia</u>, Greece, Holy See, Hungary, <u>Israel</u>, <u>San Marino</u>, <u>United Kingdom</u> (denounced by <i>Belgium, Germany, Italy, Luxembourg, the Netherlands</i>)</i>
<i>Convention relating to a uniform law on the formation of contracts for the international sale of goods (ULFIS)</i>	1964-07-01	The Hague (UNIDROIT)	<i>France, <u>Gambia</u>, Greece, Holy See, Hungary, <u>Israel</u>, <u>San Marino</u>, <u>United Kingdom</u> (denounced by <i>Belgium, Germany, Italy, Luxembourg, the Netherlands</i>)</i>
<i>International convention on the travel contract</i>	1970-04-23	Brussels (UNIDROIT)	<u>Argentina</u> , <u>Benin</u> , Burkina Faso, <u>Cameroon</u> , Côte d'Ivoire, Holy See, <u>Italy</u> , Lebanon, <i>Morocco</i> , Niger, Philippines, San Marino, <u>Togo</u> , <i>United States of America</i> (denounced by <i>Belgium</i>)
<i>Convention on the carriage of goods by sea</i>	1978-03-31	Hamburg (United Nations)	<u>Austria</u> , <u>Barbados</u> , <u>Botswana</u> , <i>Brazil</i> , <u>Burkina Faso</u> , <u>Burundi</u> , <u>Cameroon</u> , <u>Chile</u> , Democratic Republic of the Congo, <u>Czech Republic</u> , <i>Denmark</i> , Ecuador, <u>Egypt</u> , <i>Finland</i> , <i>France</i> , <u>Gambia</u> , <u>Georgia</u> , <i>Germany</i> , Ghana, <u>Guinea</u> , Holy See, <u>Hungary</u> , <u>Jordan</u> , <u>Kenya</u> , <u>Lebanon</u> , <u>Liberia</u> , <u>Lesotho</u> , Madagascar, <u>Malawi</u> , <i>Mexico</i> , <u>Morocco</u> , <u>Nigeria</u> , <i>Norway</i> , Pakistan, <i>Panama</i> , <u>Paraguay</u> , Philippines, <i>Portugal</i> , <u>Romania</u> , <u>Saint Vincent and the Grenadines</u> , <u>Senegal</u> , <u>Sierra Leone</u> , Singapore, <i>Slovakia</i> , <i>Sweden</i> , <u>Syrian Arab Republic</u> , <u>United Republic of Tanzania</u> , <u>Tunisia</u> , <u>Uganda</u> , <i>United States of America</i> , <i>Venezuela</i> , <u>Zambia</u>
<i>Convention for contracts for the international sale of goods</i>	1980-04-11	Vienna (United Nations)	<u>Argentina</u> , <u>Australia</u> , <u>Austria</u> , <u>Belarus</u> , <u>Belgium</u> , <u>Bosnia and Herzegovina</u> , <u>Bulgaria</u> , <u>Burundi</u> , <u>Canada</u> , <u>Chile</u> , <u>China</u> , <u>Colombia</u> , <u>Croatia</u> , <u>Cuba</u> , <u>Cyprus</u> , <u>Czech Republic</u> , <i>Denmark</i> , <i>Ecuador</i> , <u>Egypt</u> , <u>Estonia</u> , <i>Finland</i> , <i>France</i> , <u>Gabon</u> , <u>Georgia</u> , <u>Germany</u> , Ghana, <u>Greece</u> , <u>Guinea</u> , <u>Honduras</u> , <u>Hungary</u> , <u>Iceland</u> , <u>Iraq</u> , <u>Israel</u> , <u>Italy</u> , <u>Republic of Korea</u> , <u>Kyrgyzstan</u> , <u>Latvia</u> , <u>Lesotho</u> , <u>Liberia</u> , <u>Lithuania</u> , <u>Luxembourg</u> , <u>Mauritania</u> , <u>Mexico</u> , <u>Moldova</u> , <u>Mongolia</u> , <u>Montenegro</u> , <u>the Netherlands</u> , <u>New Zealand</u> , <u>Norway</u> , <u>Paraguay</u> , <u>Peru</u> , <u>Poland</u> , <u>Romania</u> , <u>Russian Federation</u> , <u>Saint Vincent and the Grenadines</u> , <u>Serbia</u> , Singapore, <u>Slovakia</u> , <u>Slovenia</u> , <u>Spain</u> , <u>Sweden</u> , <u>Switzerland</u> , <u>Syrian Arab Republic</u> , <u>Uganda</u> , <u>Ukraine</u> , <u>United States of America</u> , <u>Uruguay</u> , <u>Uzbekistan</u> , <i>Venezuela</i> , <u>Zambia</u>

<i>Convention on the limitation period in the international sale of goods</i> (as amended by protocol)	1974-06-14 Protocol 1980-04-11	New York (United Nations) Protocol Vienna	<u>Argentina, Belarus, Cuba, Czech Republic, Egypt, Guinea, Hungary, Liberia, Mexico, Moldova, Montenegro, Paraguay, Poland, Romania, Slovakia, Slovenia, Uganda, United States of America, Uruguay, Zambia</u>
<i>Convention on the limitation period in the international sale of goods</i> (unamended)	1974-06-14	New York (United Nations)	<u>Argentina, Belarus, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Costa Rica, Cuba, Czech Republic, Dominican Republic, Egypt, Ghana, Guinea, Hungary, Liberia, Mexico, Moldova, Mongolia, Nicaragua, Norway, Paraguay, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Uganda, Ukraine, United States of America, Uruguay, Zambia</u>
<i>Convention on agency in the international sale of goods</i>	1983-02-17	Geneva (UNIDROIT)	<i>Chile, France, Holy See, Italy, Mexico, Morocco, the Netherlands, South Africa, Switzerland</i>
<i>Convention on international bills of exchange and international promissory notes</i>	1988-12-09	New York (United Nations)	<i>Canada, Gabon, Guinea, Honduras, Liberia, Mexico, Russian Federation, United States of America</i>
<i>Inter-American convention on contracts for carriage of goods</i>	1989-07-15	Montevideo (Organization of American States)	<i>Bolivia, Colombia, Ecuador, Guatemala, Haiti, Paraguay, Peru, Uruguay, Venezuela</i>
<i>Convention on the liability of operators of transport terminals in international trade</i>	1991-04-19	Vienna (United Nations)	<i>Egypt, France, Gabon, Georgia, Mexico, Paraguay, Philippines, Spain, United States of America</i>
<i>Convention on independent guarantees and stand-by letters of credit</i>	1995-12-11	New York (United Nations)	<u>Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama, Tunisia, United States of America</u>
<i>Convention on international interests in mobile equipment</i>	2001-11-16	Cape Town (UNIDROIT)	<u>Angola, Burundi, Canada, Chile, China, Congo, Cuba, Ethiopia, France, Germany, Ghana, Ireland, Italy, Jamaica, Jordan, Kenya, Lesotho, Malaysia, Nigeria, Oman, Pakistan, Panama, Saudi Arabia, Senegal, South Africa, Sudan, Switzerland, Tanzania, Tonga, Turkey, Ukraine, United Kingdom, United States of America</u>
<i>Convention on the assignment of receivables in international trade</i>	2001-12-12	New York (United Nations)	<i>Liberia, Luxembourg, Madagascar, United States of America</i>
<i>Convention on the use of electronic communications in international contracts</i>	2005-11-25	New York (United Nations)	<i>Central African Republic, China, Lebanon, Madagascar, Paraguay, Senegal, Sierra Leone, Singapore, Sri Lanka</i>

Uniform acts / model laws / regional legislation	Date	Signed in	Legislation based on uniform act or model law / States in which regional legislation applies or has been enacted
Frustrated Contracts Act	1948	(Uniform Law Conference of Canada)	
Uniform Commercial Code	1952; last version 2005	(American Law Institute)	Different states of the United States of America enacted different parts of the Uniform Commercial Code.
Council Directive 72/166/EEC on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (amended on several occasions)	1972-04-24	(European Community)	Part of the European Community's <i>acquis communautaire</i>
First Council Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (amended on several occasions)	1973-07-24	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Council Directive 76/580/EEC amending Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance	1976-06-29	(European Community)	Part of the European Community's <i>acquis communautaire</i>

Uniform Rules on contract clauses for an agreed sum due upon failure of performance	1983	(UNCITRAL)	
Second Council Directive 84/5/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (amended on several occasions)	1983-12-30	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Council Directive 84/641/EEC amending, particularly as regards tourist assistance, the First Directive (73/239/EEC) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance	1984-12-10	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premise	1985-12-20	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents	1986-12-18	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit	1986-12-22	(European Community)	Part of the European Community's <i>acquis communautaire</i>

Second Council Directive 88/357/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC (amended on several occasions)	1988-06-22	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Third Council Directive 90/232/EEC on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (amended on several occasions)	1990-05-14	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship	1991-10-14	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Model Law on international credit transfers	1992-05-15	(UNCITRAL)	<i>Directive of the European Parliament and of the Council of the European Union</i>
Council Directive 93/13/EEC on unfair terms in consumer contracts	1993-04-05	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Directive 94/47/EC of the European Parliament and the Council on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis	1994-10-26	(European Community)	Part of the European Community's <i>acquis communautaire</i>

Model Civil Code		(Commonwealth of Independent States)	
Model Law on electronic commerce	1996-06-12	(UNCITRAL)	<i>Australia, Canada (all provinces except Northwest Territories and Nunavut), China, Colombia, Dominican Republic, Ecuador, France, India, Ireland, Jordan, Republic of Korea, Mauritius, Mexico, New Zealand, Pakistan, Panama, Philippines, Singapore, Slovenia, South Africa, Sri Lanka, Thailand, United States of America (Washington DC and all States except Georgia and New York), Venezuela, several crown dependencies and overseas territories of the United Kingdom</i>
<i>L'Acte Uniforme relatif au droit commercial général</i>	1997-04-17	(OHADA/OHBLA)	Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Congo, Comoros, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo
Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts	1997-05-20	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Uniform International Sales Conventions Act	1998	(Uniform Law Conference of Canada)	
Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees	1999-05-25	(European Community)	Part of the European Community's <i>acquis communautaire</i>

Directive 2000/26/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive)	2000-05-16	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Model Law on electronic signatures	2001-07-05	(United Nations)	<i>China, Mexico, Thailand</i>
Model franchise disclosure law	2002	(UNIDROIT)	
Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC	2002-09-23	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts	2003	(Uniform Law Conference of Canada)	
<i>L'Acte Uniforme relatif aux contrats de transport des marchandises par route</i>	2003-03-22	Yaoundé (OHADA/OHBLA)	Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Congo, Comoros, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, Togo
Uniform Illegal Contracts Act	2004	(Uniform Law Conference of Canada)	

Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')	2005-05-11	(European Community)	Part of the European Community's <i>acquis communautaire</i> Also relevant for the European Economic Area (<i>i.e.</i> European Union Member States + <i>Iceland, Liechtenstein, Norway</i>)
Directive 2002/83/EC of the European Parliament and of the Council concerning life assurance	2002-11-05	(European Community)	Part of the European Community's <i>acquis communautaire</i>
Directive 2005/68/EC of the European Parliament and of the Council on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC	2005-11-16	(European Community)	Part of the European Community's <i>acquis communautaire</i> Also relevant for the European Economic Area (<i>i.e.</i> European Union Member States + <i>Iceland, Liechtenstein, Norway</i>)
Draft Uniform Act on contracts	Ongoing	(OHADA/ OHBLA)	

Principles			
UNIDROIT Principles of international commercial contracts	1994 & 2004	(UNIDROIT)	
INCOTERMS	last version 2000	(International Chamber of Commerce)	
Principles of European contract law	from 1995 ongoing		