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

- RAPPORT SUR LES TRAVAUX EFFECTUÉS ET CONCLUSIONS PRÉLIMINAIRES -

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 PRELIMINARY CONCLUSIONS -

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[1] 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 have been prepared. One describes the status of the law governing choice of law in international contracts in general at the global, regional and sometimes national levels[2] and focuses on how such rules are generally applied in court proceedings. The other study provides a description of the legal situation with regard to choice of law in international contracts that are subject to international commercial arbitration.[3] They do 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 has embarked on a fact-finding mission by way of a three-part Questionnaire.[4] 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.[5] 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. In other words, at this stage of the feasibility study, the responses of the three different target groups to the Questionnaire are sought with a view to supplementing and confirming the legal analysis carried out in the two comparative law studies and to evaluate the potential need for a new instrument.

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[1] 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.

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

[3] 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.

[4] 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.

[5] A list of the international arbitration centres and organisations consulted is attached to the Questionnaire.

II. Analysis of the responses to the Questionnaire

A. Responses to Part I of the Questionnaire - Member States

4. Responses to Part I were received from 21 Member States.[6] 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.

5. All of these legal systems recognise the principle of party autonomy as to the choice of law for international contracts. This is sometimes laid down in international conventions,[7] sometimes in domestic statutes[8] or established by case law[9] or custom.[10] 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[11] and only 20% of less than half.[12] While this number of responses might not be representative of the 65 Member States of the Hague Conference, the estimations given suggest that choice of law clauses may well be widely used in international contracts.

6. While the principle of party autonomy seems to be almost universal, 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 rules.[13] Moreover, a public policy exception is known in several legal systems.[14] In Poland 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,[15] immovable property,[16] insurance,[17]

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[6] Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Iceland, Italy, Japan, Malaysia, Mexico, Monaco, New Zealand, Norway, Poland, Slovakia, Slovenia, Spain, Switzerland, Turkey and the United States of America.

[7] *E.g.* in the *Hague Convention of 15 June 1955 on the International Sale of Goods*, which currently applies in 8 States, and is also often referred to in arbitral proceedings; the *Hague Convention of 14 March 1978 on the Law Applicable to Agency* (3 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 10 new Member States that joined the Union in 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.

[8] Albania, Bulgaria, Croatia, Czech Republic, Estonia, Iceland, Italy, Japan, Mexico (Federal and state laws), Monaco, Poland, Slovakia, Slovenia, Switzerland, Turkey, United States of America (Uniform Commercial Code and Restatement (Second) of Conflict of Laws).

[9] 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.

[10] Norway.

[11] Malaysia, Mexico, Slovakia, Slovenia: all or virtually all; Croatia, Monaco, Spain: more than half; Iceland, Poland: about half.

[12] Bulgaria, Czech Republic.

[13] Mentioned, *e.g.*, by Bulgaria, 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.

[14] It was explicitly mentioned by 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).

[15] Albania.

[16] Croatia, Poland, Slovenia, Switzerland (strong limitations for transfer of rights *in rem* in immovable property).

[17] Estonia, Slovenia.

transport / carriage,[18] the establishment, operation and termination of companies,[19] obligations deriving from bills of exchange, order papers and cheques[20] or competition law[21] – while some legal systems do not know any subject-matter related restrictions to party autonomy.[22]

7. Consumers and employees may often[23] also choose a law for their consumer or employment contracts[24] 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.[25] In other legal systems, no such protection exists.[26]

8. 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: States 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 States 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:

9. Roughly two thirds of the Member States that responded think that a binding as well as a non-binding instrument would be useful to assist *the parties* with their choice. Interestingly, States mostly did not express a preference for either hard or soft law; on the contrary, it is mostly the same States that think that either instrument would have this beneficial effect.[27] Five States that pronounced themselves against a *binding* norm are of the view that a *non-binding* instrument could indeed be useful to private parties.[28] Three States think that only a binding instrument would be useful while soft law would rather lead to confusion,[29] and one is of the view that neither instrument would assist the parties.[30]

10. Concerning the possible benefits for *judicial authorities* in deciding about the law applicable, the situation similarly shows a majority of those who consider an instrument to be potentially useful. A group of nine States thinks that both hard and soft law would

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[18] Norway.
[19] Croatia.
[20] Bulgaria.
[21] Spain.
[22] Iceland, Japan, Malaysia, Mexico, Monaco, Slovakia, Spain and the United States of America.
[23] For consumers this is not the case in Switzerland. It seems that in Croatia, for work carried out there Croatian law cannot be derogated from unless provided otherwise by law.
[24] 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.
[25] Bulgaria, Croatia (for consumers), Japan. This is also the case under the Hague of 25 October 1980 Articles 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.
[26] Malaysia.
[27] Albania, Croatia, Czech Republic, Estonia, Italy, Mexico, Norway, Switzerland, Turkey.
[28] Iceland, Malaysia, New Zealand, Slovakia, Slovenia. For the reasons indicated by New Zealand, see *infra*, note 32.
[29] Bulgaria, Japan, Spain.
[30] Monaco. 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.

be an improvement.[31] Here the preference for a binding norm is even higher (76%) than in the previous response concerning the benefit for the *parties* while soft law is considered to be a little less useful to courts (65%). Two States would see a benefit in soft law but not in a binding norm,[32] but the group of nine mentioned above is joined by another four who think that (only) a binding norm would be useful to courts.[33]

11. Concerning the usefulness of an instrument for *arbitral tribunals* in resolving disputes regarding applicable law, again roughly two-thirds of the respondents consider that an instrument could be useful. A group of eight thinks that both a binding and a non-binding instrument would be useful.[34] Three more share their positive attitude towards a binding instrument but would have a negative view on a non-binding instrument.[35] This latter view is shared by three more States.[36] In sum, however, there is no preference for hard or soft law but an equal number (11) in favour of each.

12. 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.[37] In the field of arbitration it was sometimes feared that also the freedom of the arbitrator would be unduly limited by a binding instrument.[38] 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. As concerns a *non-binding* instrument, the usefulness for courts is not expected to be as high as that of a binding instrument while it is expected to be at least as useful to parties and arbitral tribunals as a binding norm.

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

13. 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. 26 responses were received. Most of those who responded do not normally enter into consumer transactions but into business-to-business transactions (23). 24 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: 21 respondents reported that all or virtually all of their contracts include a choice of law provision.[39] 15 stated that this choice was upheld in court proceedings in all or virtually all cases; 5 more indicated that the rate was more than

[31] Albania, Croatia, Czech Republic, Estonia, Italy, Malaysia, Norway, Switzerland and Turkey.
[32] Iceland, New Zealand. 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.
[33] Bulgaria, Japan, Mexico, Spain.
[34] Croatia, Czech Republic, Estonia, Italy, Malaysia, Norway, Switzerland, Turkey.
[35] Japan, Mexico, Spain.
[36] Monaco, New Zealand and Slovenia.
[37] Malaysia, Monaco, Slovakia.
[38] Bulgaria.
[39] The number of international contracts entered into annually ranged from 15 to 3000 among the respondents.

half. “None or virtually none” was given by 2 respondents. In arbitration, choice of law agreements are respected to a slightly lesser extent: 11 respondents reported that their choice of law was upheld in all or virtually all cases while 8 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.

14. 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: 8 respondents (with regard to court proceedings) and 7 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 three reported the same for about half or more of their cases.

15. 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 60%), while roughly 40% felt that this would not be useful.

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

16. 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.

17. As of 30 March 2007, the Permanent Bureau had received 14 responses[40] to the first half of Part III and only 7 responses to the second half of Part III. Two conclusions could be drawn from this low level of responses. Either a period of 5 weeks to respond the Questionnaire was too short or there is a lack of interest for this subject.

18. 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.

19. Arbitration centres report in majority that none or virtually none of the international contracts they are seised of have applicable law as subject of dispute.[41] They also report that in the majority of cases (70%) 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[42] reported that about half of the international contracts it was seised of included a choice of law provision and another two arbitration centres[43] reported that it was less than half. The arbitration centres report in majority (60%) that none or virtually none of the international contracts they are seised

[40] Responses were received from arbitration centres based in Belgium, Bulgaria, 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.
[41] Four centres out of fourteen reported that it is less than half. Parties to arbitration report similar figures.
[42] Bulgaria.
[43] Moldova, Switzerland.

of have the validity of the choice of law provision regarding the applicable law as subject of dispute. Four 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. Three arbitration centres however indicated a lower rate and reported that the choice of law provision is upheld / respected in more than half[44] or even in none or virtually none[45] of the cases.[46]

20. 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. 40% of the respondents are in favour while 60% are not as concerns the usefulness for parties.[47] Concerning the usefulness for arbitral tribunals the rate is 50:50. Most of the reasons reported against this possibility indicate that this would be contrary to the principle of party autonomy.[48] 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.

21. 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

22. 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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[44] Iceland, Romania.
[45] Congo.
[46] Parties to arbitration report similar figures.
[47] It is interesting to note that for the same question, four parties to arbitration against one were in favour of the development of binding *and* non-binding norms. They are parties from Congo, Mexico, Moldova and Romania.
[48] 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

23. 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.

3. Limitation of party autonomy

24. 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 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.[49] 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.

25. 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

26. 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.

27. 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.[50]

28. 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.

B. Type of future action

29. 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

[49] 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.

[50] 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 45th session, Vienna, 11-15 September 2006, p. 25. This proposal is under discussion.

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 legislative guide.

30. 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.

31. 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 seised. 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*.

32. Another possibility is to draw up principles or a model law. The Conference's working methods could also be used for this purpose.[51] 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 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.

33. A guide to good practice or legislative guide, indicating to legislators and courts 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 first two of the three above-mentioned purposes. Legislators could use it as a source of inspiration, and courts 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,

[51] The question whether the Hague Conference should or could draw up model laws was extensively discussed at the Nineth (1960) and Tenth (1964) Sessions. More recently, the XIVth 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).

the guide would probably not contain any provisions that parties could incorporate as such into their contract.

34. 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 and the 1996 Child Protection 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 harmonization can take place not only through hard law (conventions) but also through soft law, it is suggested that in order for this harmonization 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.

C. Next steps proposed

35. In April 2006, Member States requested the Permanent Bureau to prepare three different feasibility studies on a variety of different topics. At the current stage, while the two comparative law studies and the responses received so far to the Questionnaire have provided some first indications, it appears that there is some potential for further work on this topic but more information is required before States are in a position to make a well-informed decision. It is therefore proposed that the Questionnaire be circulated again to Member States, 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 - should enable States to consult internally – *e.g.* on practice as explored by Question 4 and policy preferences as explored by Questions 5 and 6 - and return a well-founded response. These responses would then enable the Permanent Bureau to present a further-developed version of this Report with proposals for action to the meeting of Commission I (General Affairs and Policy) during the Twenty-first Session in November 2007 and / or to the following meeting of the Council on General Affairs and Policy of the Hague Conference in Spring 2008.

36. Should Member States eventually decide to embark on this project out of the three proposals currently under discussion, such 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 concerned - will be required to identify in detail the mandatory rules and other limitations on party autonomy in the Member States of the Hague Conference, and if possible also of other States.

A N N E X

QUESTIONNAIRE

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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

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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[52] 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 > 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: _____

[52] 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