

**CHOIX DE LA LOI APPLICABLE EN MATIÈRE DE CONTRATS INTERNATIONAUX :  
ÉTAT D'ÉLABORATION DU PROJET D'INSTRUMENT ET PLANIFICATION FUTURE**

*établi par le Bureau Permanent*

\* \* \*

**CHOICE OF LAW IN INTERNATIONAL CONTRACTS: DEVELOPMENT PROCESS OF THE DRAFT  
INSTRUMENT AND FUTURE PLANNING**

*drawn up by the Permanent Bureau*

*Document préliminaire No 4 de janvier 2012 à l'intention  
du Conseil d'avril 2012 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 4 of January 2012 for the attention  
of the Council of April 2012 on General Affairs and Policy of the Conference*

**CHOIX DE LA LOI APPLICABLE EN MATIÈRE DE CONTRATS INTERNATIONAUX :  
ÉTAT D'ÉLABORATION DU PROJET D'INSTRUMENT ET PLANIFICATION FUTURE**

*établi par le Bureau Permanent*

\* \* \*

**CHOICE OF LAW IN INTERNATIONAL CONTRACTS: DEVELOPMENT PROCESS OF THE DRAFT  
INSTRUMENT AND FUTURE PLANNING**

*drawn up by the Permanent Bureau*

1. The purpose of this Note is to inform the Council on General Affairs and Policy ("the Council") on progress made by the Working Group on Choice of Law in International Contracts ("the Working Group") during 2011. Looking ahead, it also sets out a tentative planning for the next steps with regard to the work on choice of law in international contracts ("the Draft Instrument" or "the Project").
2. At its third meeting in June 2011, the Report of which is appended in Annex I, the Working Group finalised the draft articles of the tentatively entitled "Hague Principles on Choice of Law in International Commercial Contracts" ("the draft Hague Principles"), which are appended in Annex II. Furthermore, the Working Group took note of the Council's invitation to prepare "a succinct document [ ] highlighting the substance of the draft articles and indicating the policy choices involved" (the "Policy document"). In response to this invitation, the Chair of the Working Group, Mr Daniel Girsberger, expert from Switzerland, took a leading role in the preparation of a first draft of this document, which was submitted to all other Working Group experts for their consideration. Their feedback was then compiled and analysed, and subsequently discussed via conference calls and e-mail exchanges. Annex III features the final version of the Policy document established by the Working Group.
3. The Permanent Bureau hopes that the early circulation of the annexed materials will provide Members with sufficient time for internal analysis and consultations on the draft Hague Principles and the accompanying Policy document. In this regard, it will be recalled that the Council at its 2011 meeting decided that "the draft articles and the commentary prepared by the Working Group should be reviewed by a Special Commission at a later stage". If the Council, at its meeting in April 2012, after reviewing the annexed documents, confirms this decision, it may decide to hold a Special Commission meeting of governmental experts of Members of the Hague Conference before the end of 2012 to examine the draft Hague Principles, as well as the underlying legislative choices, and to formulate recommendations to Council with regard to the future of the project.
4. Alternatively, the Council may, after reviewing the work done by the Working Group, decide to approve the work conducted so far. In that case, the Council may consider inviting the Working Group to resume its activities in 2012, drafting comments and illustrations to aid in the interpretation of each provision. The possibility of convening a Special Commission of governmental experts could then be reconsidered by the time the Working Group completes its extended mandate, not before mid-2013.
5. In light of the above comments, the Permanent Bureau suggests that:
  - The Council welcomes the progress made by the Working Group, notably the adoption of the text of the articles of the draft Hague Principles.
  - The Council
    - o Option 1: Decides to set up a Special Commission of governmental experts to take place before the end of 2012 to discuss the draft Hague Principles in their current formulation;  
OR
    - o Option 2: Approves the draft Hague Principles in their current form, as well as the underlying legislative choices and invites the Working Group to draft comments and illustrations in line with the proposed provisions;
  - The Council invites the Permanent Bureau to draw up a report on the state of progress of this Project for the attention of the Council of 2013.

## **ANNEXES**

**Third Meeting of the Working  
Group on Choice of Law in  
International Contracts  
(28-30 June 2011)**



**Report**

From 28 to 30 June 2011, the **Working Group on Choice of Law in International Contracts** ("Working Group"), chaired by Mr Daniel Girsberger, met at the Permanent Bureau of the Hague Conference on Private International Law ("HCCH") for the third time. Guided by the mandate given by the Council on General Affairs and Policy of the HCCH,<sup>1</sup> the participating experts finalised the text of the draft articles of the future Principles (the "draft Hague Principles") and identified relevant issues which will either be referred to in a document as requested by the Council indicating the policy choices involved ("Policy Document") and / or elaborated in greater detail in the commentary accompanying the future Principles ("Commentary"):

---

**HAGUE PRINCIPLES ON CHOICE OF LAW IN  
INTERNATIONAL COMMERCIAL CONTRACTS**

The draft Hague Principles adopted by the Working Group are attached as an annex.

---

<sup>1</sup> At its 2011 meeting, the Council "welcomed the progress made by the Working Group, notably the adoption of draft articles, and encouraged the continuation of the work. Upon completion of the draft articles by the Working Group, the Permanent Bureau is invited to report back to the Council and present a succinct document prepared by the Working Group highlighting the substance of the draft articles and indicating the policy choices involved. The Council decided that the draft articles and the commentary prepared by the Working Group should be reviewed by a Special Commission at a later stage." See Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference, available at < [www.hcch.net](http://www.hcch.net) >.

## **ADDITIONAL ISSUES**

The Working Group also identified certain issues which warrant further discussion either in the Commentary or the Policy Document. These issues, in addition to those referred to in the Reports of prior meetings, are as follows:

### **PREAMBLE**

The Working Group noted that both the Policy Document and the Commentary will:

1. explain the justification for party autonomy; and
2. refer to the considerations of public interest which justify giving courts [and arbitral tribunals] the possibility, in exceptional circumstances, of applying exceptions based on public policy (*ordre public*) and overriding mandatory provisions.

### **SCOPE**

The Working Group noted that the Commentary will:

1. recognise that there are different ways to define “international” commercial contracts; and
2. note that consumer and employment contracts, including collective agreements, are excluded from the scope of the draft Hague Principles.

The Policy Document will also address the exclusion of consumer and employment contracts.

### **CONSENT**

The Working Group recognised that the notion of consent and its various elements (intrinsic and external / factual and legal) will be detailed in the Commentary.

### **AUTONOMY**

The Working Group considered that the Policy Document should summarise, and the Commentary should further explain, the underlying rationale of the autonomy of the choice of law clause from the contract.

### **RENOI**

In relation to *renvoi*, further explanation in the Commentary will be necessary regarding:

1. the parties’ express reference to private international law rules of the chosen law;
2. the relevance of conflict of law rules of multi-unit States (*i.e.*, interregional law).

## **CHOICE OF NON-STATE LAW**

The Working Group recognised the need for the Commentary to provide further details on the role of gap-filling rules, and give specific examples of situations in which gap-filling will be required.

In addition, the Commentary will highlight that, in principle, trade usages can supplement and assist in interpreting, but cannot override, the choice of law or rules of law by the parties, and give various examples.

The Policy Document will also briefly address these issues.

The Working Group tentatively agreed that the chosen rules of law must be:

1. distinguished from individual rules made by the parties; and
2. a body of rules.

The Working Group agreed to examine further characteristics of and limitations to the parties' choice of non-State law in the Commentary.

The Policy Document will report the agreement in the Working Group that the draft Hague Principles not include any express definition or limitation of the term "rules of law", as this provides the maximum support for party autonomy. The Policy Document will reflect the diversity of opinion in the literature on the definition of "rules of law" for choice of law purposes.

## **SCOPE OF THE CHOSEN LAW**

The Working Group considered that the Policy Document will:

1. note that, although certain issues are not determined by the draft Hague Principles (*e.g.*, the law applicable to agreements to arbitrate and agreements on choice of court), a court or arbitral tribunal is not prevented from applying the draft Hague Principles to these issues; and
2. recognise the differing views within the Working Group regarding pre-contractual obligations.

The Commentary will:

1. explain the relations and differences to provisions on choice of law included in other international instruments (*e.g.*, UNCITRAL Legislative Guide on Secured Transactions); and
2. provide further illustrations and comments, *e.g.*, on elements of company law and negotiable instruments which are not covered by the draft Hague Principles.

## **FORMAL VALIDITY OF THE CONTRACT**

The Commentary will address the distinction between formal validity of the choice of law agreement (which is not subject to any formal requirement based on Art. 4 of the draft Hague Principles) and of the remainder of the contract. Furthermore, the Commentary will stress the non-exclusive application of the chosen law to determine the formal validity of the contract, *i.e.*, allowing courts or arbitral tribunals to refer to other laws if the form of the contract is invalid under the chosen law (principle of "*favor validatis*").

## **THIRD PARTIES**

The Working Group considered that the Commentary will:

1. explain that, as a general rule, the effects of a change of a choice of law are governed by party autonomy;
2. clarify that the pre-existing rights of third parties must be related to the contract; and
3. provide illustrations and comments regarding the operation of party autonomy in third party relationships (*e.g.*, surety, pledge of a right or claim and third party beneficiaries of the contract).

The Policy Document will also briefly address the first two issues.

## **ASSIGNMENT**

The Working Group considered that the Policy Document will emphasise, and the Commentary further clarify, that although several issues of choice of law in the context of related contracts (*e.g.*, subrogation, set-off, etc.) were considered, the draft Hague Principles focus on assignment as it is an important and recurring issue in international commercial practice.

## **OVERRIDING MANDATORY RULES AND PUBLIC POLICY**

The Working Group considered that the Commentary will:

1. consider and illustrate the exceptional nature of public policy (*ordre public*) with reference to the terms "manifestly incompatible" and "fundamental notions";
2. provide illustrations and comments on overriding mandatory provisions;
3. further explain the reference to the law of the forum State to rule on the application / consideration of third country overriding mandatory rules;
4. examine whether, and if so to what extent, the chosen law includes or excludes overriding mandatory rules;
5. describe, by way of illustrations and comments, how arbitral tribunals may determine issues of public policy (*ordre public*) and overriding mandatory provisions; and



6. reflect and illustrate the diverging approaches and methodologies arbitral tribunals may adopt, in different contexts, when considering the role of public policy (*ordre public*) and overriding mandatory provisions.

The Policy Document will also address these issues and the reasons for the lack of further specifications as to the application of the mandatory rules of a third country (as opposed to, for example, Art. 9(3) of the Rome I Regulation, or Art. 19 of the Swiss Private International Law Act).

## **HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS**

*(final draft adopted by the Working Group in June 2011)*

### *Preamble*

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

They may be used as a model for national, regional, supranational and international instruments.

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

They may be applied by courts and by arbitral tribunals.

### Article 1 Scope of the Principles

1. These Principles apply to choice of law in international contracts entered into by two or more persons acting in the exercise of their trade or profession.
2. For the purposes of these Principles, (i) a contract is international unless the parties have their places of business in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State; (ii) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
3. These Principles do not address the law governing:
  - a) the capacity of natural persons;
  - b) arbitration agreements and agreements on choice of court;
  - c) companies or other collective bodies;
  - d) insolvency proceedings;
  - e) the proprietary effects of contracts;
  - f) the issue of whether an agent is able to bind a principal to a third party.

Article 2  
Freedom of choice

1. A contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law.
2. The parties may choose (i) the law applicable to the whole contract or to only part of it and (ii) different laws for different parts of the contract.
3. The choice may be modified at any time without prejudice to the pre-existing rights of third parties.
4. No connection is required between the law chosen and the parties or their transaction.

Article 3  
Express and tacit choice

A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.

Article 4  
Formal validity of the choice of law

A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

Article 5  
Consent

1. The consent of the parties as to a choice of law is determined by the law that would apply if such consent existed.
2. Nevertheless, to establish that a party did not consent to the choice of law, it may rely on the law of the State where it has its place of business, if under the circumstances it is not reasonable to determine that issue according to the law specified in the preceding paragraph.

Article 6  
Autonomy

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

Article 7  
Renvoi

A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise.

Article 8  
Scope of the chosen law

The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to:

- a) interpretation;
- b) rights and obligations arising from the contract;
- c) performance and the consequences of non-performance, including the assessment of damages and interest;
- d) the various ways of extinguishing obligations, and prescription and limitation periods;
- e) validity and the consequences of invalidity of the contract;
- f) burden of proof; and
- g) pre-contractual obligations.

Article 9  
Formal validity of the contract

1. The contract is formally valid if it is formally valid under the law chosen by the parties, but this shall not exclude the application of any other law which is to be applied by a court or arbitral tribunal to support formal validity.
2. Any change in the applicable law shall be without prejudice to formal validity.

Article 10  
Assignment

In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor:

- a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs mutual rights and obligations of the creditor and the assignee arising from their contract;
- b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs (i) whether the assignment can be invoked against the debtor, (ii) the rights of the assignee against the debtor, and (iii) whether the obligations of the debtor have been discharged.

Article 11  
Overriding mandatory rules and public policy

1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.
2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude application of a provision of the law chosen by the parties if and to the extent that such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.
4. Paragraphs 1, 2 and 3 also apply in court proceedings relating to arbitration.
5. These Principles shall not prevent an arbitral tribunal from applying public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

**DOCUMENT SUR LES CHOIX LÉGISLATIFS SOUS-JACENTS AUX PRINCIPES DE LA HAYE  
SUR LE CHOIX DE LA LOI APPLICABLE EN MATIÈRE DE CONTRATS COMMERCIAUX  
INTERNATIONAUX**

*établi par le Groupe de travail sur le choix de la loi applicable  
en matière de contrats internationaux*

\* \* \*

**POLICY DOCUMENT REGARDING HAGUE PRINCIPLES ON CHOICE OF LAW IN  
INTERNATIONAL COMMERCIAL CONTRACTS**

*drawn up by the Working Group  
on Choice of Law in International Contracts*

## Introduction

1. At its meeting in April 2011, the Council on General Affairs and Policy (“the Council”) of the Hague Conference on Private International Law (“the Hague Conference”) invited the Working Group on Choice of Law in International Contracts (“the Working Group”), upon completion of the draft articles on choice of law in international contracts, to report back to the Council and to present a succinct document “highlighting the substance of the draft articles and indicating the policy choices involved”.<sup>1</sup>

2. In response to this invitation, the Working Group submits the present draft articles, tentatively entitled “the Hague Principles on Choice of Law in International Commercial Contracts” (hereinafter “the draft Hague Principles”), along with a “Policy paper”, as requested by the Council, to underscore the main characterising features of the draft Hague Principles and the considerations which guided the Working Group in the gradual development of these Principles.

3. The Working Group was established further to a decision taken at the 2009 Council on General Affairs and Policy: “The Council invited the Permanent Bureau to continue its work on promoting party autonomy in the field of international commercial contracts. In particular, the Permanent Bureau was invited to form a Working Group consisting of experts in the fields of private international law, international commercial law and international arbitration law and to facilitate the development of a draft non-binding instrument within this Working Group.” Chaired by Mr Daniel Girsberger, expert from Switzerland, the Working Group has held three meetings in The Hague: 21-22 January 2010, 15-17 November 2010 and 28-30 June 2011.

4. The final draft adopted by the Working Group in June 2011 is in line with the main objective identified by the Council at its 2010 meeting, *i.e.*, the development of rules of a non-binding nature for cases where a choice of law has been made in an international commercial contract.

5. The draft Hague Principles are currently presented as “black letter rules” only. The Working Group is, however, of the opinion that the principles would very much benefit from a Commentary that would provide them with a context, and offer practical examples. It will be seen that the Policy paper anticipates such a future Commentary in several places. However, pending a decision by the Council on the completion of the draft Hague Principles subsequent to the Special Commission meeting that is currently tentatively scheduled to take place before the end of 2012,<sup>2</sup> the Working Group operated on the basis of the current Council’s mandate.

## Preamble – general considerations

6. The Working Group was mindful that recourse to a *non-binding instrument* offered a singular framework for the development of this project. Hence, it developed the draft

---

<sup>1</sup> See “Conclusions and Recommendations adopted by the Council (5-7 April 2011)”, Conclusion and Recommendation No 5, available on the Hague Conference website < [www.hcch.net](http://www.hcch.net) > under “Work in Progress” then “General Affairs”:

“The Council welcomed the progress made by the Working Group, notably the adoption of draft articles, and encouraged the continuation of the work. Upon completion of the draft articles by the Working Group, the Permanent Bureau is invited to report back to the Council and present a succinct document prepared by the Working Group highlighting the substance of the draft articles and indicating the policy choices involved.”

<sup>2</sup> See Conclusion and Recommendation No 6, *ibid*:

“The Council decided that the draft articles and the commentary prepared by the Working Group should be reviewed by a Special Commission at a later stage.”

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

7. At the same time, the Working Group was well aware that judges may be reluctant to apply the draft Hague Principles owing to their non-binding character.<sup>3</sup> And yet, in strategic terms, the Working Group was convinced that the draft Hague Principles may gain in legal stature and be relied upon by courts in the future, particularly if, for example, they serve as a model for legislators in countries where the law relating to choice of law in international contracts is non-existent, fragmented or simply awaiting reform. In the interim, the draft Hague Principles might provide support or inspiration to the courts dealing with the determination of the law applicable to a contract.

8. The promotion of the principle of party autonomy - *i.e.*, the ability of parties to a contract to agree as to the law that will govern the contract - was indeed the Working Group's *leitmotiv* throughout the whole drafting phase. The aim was thus to improve international co-ordination of legal systems and especially to strengthen the legal predictability of solutions through the principle of party autonomy.<sup>4</sup>

#### *Article 1 – Scope of the instrument*

9. The Working Group determined that the applicability of the draft Hague Principles will be contingent on two features, namely a contract's *commercial* nature, and its *international* character.

10. The draft Hague Principles will apply only to commercial contracts involving business-to-business transactions. As a result, employment and consumer contracts will be excluded. The Working Group recognised that employment and consumer contracts are subject to specific rules, many of which are mandatory, designed to protect the consumer<sup>5</sup> and employee. It was considered that the

---

<sup>3</sup> In January 2007, the Permanent Bureau prepared a three-part Questionnaire addressed to Member States, the ICC and stakeholders in the field of international commercial arbitration to explore the current practice as to the use of choice of law clauses and the possible problems that such practice raises. The replies to the Questionnaire have shown that States do not consider soft law useful for courts, see "Feasibility study on the choice of law in international contracts. Report on work carried out and conclusions (follow-up note)", Prel. Doc. No 5 of February 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference, p. 6, available on the Hague Conference website, *ibid.*

<sup>4</sup> The 2007 Questionnaire responses show that over two thirds of the Organisation's Member States that replied consider that a new instrument would be useful to assist parties to the contract, judicial authorities or arbitration panels, see Prel. Doc. No 5 of February 2008, *ibid.*, p. 6.

<sup>5</sup> On the subject of consumer contracts, the absence of specific rules in the *Hague Convention of 15 June 1955 on the law applicable to international sales of goods* needs to be borne in mind along with the Declaration and Recommendation relating to the scope of the *Hague Convention of 15 June 1955 on the law applicable to international sales of goods* contained in the Final Act of the Fourteenth Session (*Proceedings of the Fourteenth Session*, Tome I, *Miscellaneous matters*, edited by the Permanent Bureau of the Conference, Netherlands Government Printing Office, The Hague, 1982, p. I-62) as well as the extract from the Final Act of the Fourteenth Session (*Proceedings of the Fourteenth Session*, Tome II, *Consumer sales*, edited by the Permanent Bureau of the Conference, Netherlands Government Printing Office, The Hague, 1982, pp. II-177 to II-180), which contains a draft Convention relating to the law applicable to certain consumer sales. However, that subject-matter was not included in the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*. See also J. Fawcett, J. Harris and M. Bridge, *International Sale of Goods in the Conflict of Laws*, Oxford, OUP, 2005, p. 871.



Commentary should further specify how these excluded areas are to be delimited (para. 1).

11. In addition, the draft Hague Principles are intended to have the broadest possible application. Accordingly, the term “international contracts” is defined as to exclude only entirely domestic contracts. The definition provides that a contract is international unless the parties have their place of business in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State (para. 2).

12. In order to assure that the draft Hague Principles would not apply to issues for which they may be considered inappropriate, the Working Group identified a list of issues that, in their view, should be excluded from the scope of the instrument. The Commentary will address each of these matters in greater detail (para. 3).

## *Article 2 – Freedom of choice*

### *a) The principle of party autonomy in general*

13. The promotion of the principle of party autonomy is the fundamental goal of the draft Hague Principles. Paragraph 1 of the present Article expressly provides, therefore, that “a contract is governed by the law chosen by the parties”. The Working Group considered that the central role ascribed to party autonomy can be justified on the following grounds. First, the principle of party autonomy defers to the expectations of the parties and protects legal certainty. Second, insofar as the parties’ choice of law is seen as being part of the contractual regime concerning dispute settlement, then the exercise of party autonomy would help to achieve efficiency by reducing costs in dispute resolution.<sup>6</sup> Third, the principle of party autonomy promotes cross-border economic activity by enabling the parties to choose the applicable law which facilitates their intended transaction. Finally, increased international mobility and communication accentuates the relevance of party autonomy as the most practical solution for international commercial contracts.<sup>7</sup>

14. The Working Group unanimously considered that the primary role given to party autonomy in the draft Hague Principles is in line with the widely accepted approach to choice of law in international commercial contracts across the world. The Working Group was well aware that party autonomy generally is a widely accepted principle in international litigation, as enshrined by international conventions including the Hague Conventions,<sup>8</sup> by regional

---

<sup>6</sup> P. Nygh, *Autonomy in International Contracts*, Oxford University Press, 1999, pp. 2-3.

<sup>7</sup> A. Dickinson, “Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?”, *Journal of Private International Law*, Vol. 3, 2007, 59.

<sup>8</sup> Art. 7 *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*; Art. 5 *Hague Convention of 14 March 1978 on the Law Applicable to Agency*; Art. 2(1) *Hague Convention of 15 June 1955 on the law applicable to international sales of goods*.

instruments,<sup>9</sup> and by domestic codifications.<sup>10</sup> It was also noted that the principle of party autonomy is a general choice-of-law principle in international arbitration.<sup>11</sup> It was acknowledged, however, that while the principle of party autonomy seems to have gained increasing acceptance, the challenge is in the worldwide *consolidation of the principle*.<sup>12</sup> In this light, the future Hague Principles, when implemented, would meet a *genuine need for reinforcement of party autonomy throughout the world*. The aim of the draft Hague Principles is thus to improve international harmonisation of laws, and to promote predictability of the outcome of dispute resolution through the principle of party autonomy, *i.e.*, ensuring that an agreement by the parties on a law applicable to the contract will be honoured in any jurisdiction which follows these Principles. It should be noted that some States in which party autonomy is accepted require that the transaction bear a relationship to the State whose law is designated. The Working Group, however, decided that such a relationship should not be required.

15. Nevertheless, the Working Group was mindful that certain restrictions of the principle of party autonomy are necessary even in the field of international commercial contracts. It was recognised that contractual obligations derive their authority from the willingness of the State to compel their performance. It is on this basis that the Working Group considered that the principle of party autonomy should be subject to, and be reconciled with, overriding mandatory rules and public policy as eventually addressed by the draft Hague Principles.<sup>13</sup>

b) *Choice of law and rules of law*

16. The draft Hague Principles do not limit the parties to designating the law of a State; rather they allow for parties to select not only State laws but also “rules of law”. The Working Group also agreed that the Principles would not include any express definition or limitation of the term “rules of law”, as this provides the maximum support for party autonomy, regardless of the method of dispute resolution (*i.e.*, court or arbitration). However, the Working Group acknowledged that there are limits to the rules of law chosen by the parties. In particular, the chosen rules of law must be distinguished from individual rules made by the parties and must be a body of rules. These issues will be

---

<sup>9</sup> Art. 3(1) *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*.

<sup>10</sup> *E.g.*, Art. 3 and Art. 41, 1<sup>st</sup> sentence Choice-of-Law Act of China’s Mainland (2010); Art. 20 Act on the Application of Laws in Civil Matters Involving Foreign Elements of Taiwan (2010); Art. 7 Act on the General Rules of Application of Laws of Japan (2006); Art. 25(1) Conflict of Laws Act of Korea (2001); Art. 3540 Civil Code of Louisiana (1991); Art. 434(1) Civil Code of Mongolia (1994); Art. 3111(1) Civil Code of Quebec (1991); Art. 1210(1) Civil Code of the Russian Federation; Art. 116(1) Federal Act of 18 December 1987 on International Private Law of Switzerland.

<sup>11</sup> For conventions see, *e.g.*, Art. VII *European Convention on International Commercial Arbitration* (Geneva Convention); Art. 42 *Convention on Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Convention). For a non-binding instrument see, *e.g.*, Art. 28(1) UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006. For national laws, see, *e.g.*, Art. 1496(1) new French Code of Civil Procedure; Art. 1051 German Code of Civil Procedure; Art. 36(1) Arbitration Law of Japan (2003); Art. 28(1) Law of the Russian Federation on International Commercial Arbitration (1993). For further arbitration rules, see, *e.g.*, Art. 33(1) UNCITRAL Arbitration Rules; Art. 17(1) ICC Arbitration Rules (corresponding to Art. 21(1) of the revised ICC Rules (in force as of 1 January 2012); Art. 15(1) Uniform Act on the Arbitration Law Within the Framework of OHADA Treaty.

<sup>12</sup> For analysis of legislation rejecting party autonomy in some Latin American and Middle Eastern jurisdictions, see, *e.g.*, J. Basedow, “Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts”, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 75(1), 2011, pp. 34-37; María Mercedes Albornoz, *Choice of Law in International Contracts in Latin American Legal Systems*, *Journal of Private International Law*, 6(1), 2010, pp. 23-56.

<sup>13</sup> See Art. 11 draft Hague Principles and accompanying policy considerations, *infra* paras 45 *et seq.*

further examined in the Commentary on the basis of a very extensive literature and practice on this matter.<sup>14</sup>

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

18. Detailed discussions within the Working Group recognised that it was important to allow the parties to choose rules of law to govern their contract, as it reinforces the scope of the principle of party autonomy. It also allows parties to choose, where available, industry or transaction specific rules<sup>15</sup> which will serve the commercial needs of the parties. In addition, the choice of rules of law also provides parties with a balanced contractual relationship by offering neutrality and transparency in their dealings.<sup>16</sup> In doing so, although a choice for rules of law may in some cases be more difficult to ascertain, it promotes stabilisation of the parties' expectations under their contract.

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

### c) *Gap-filling rules*

20. The Working Group also extensively considered the role of gap-filling rules where the parties have designated rules of law to govern their contract and reviewed relevant provisions in existing instruments such as the United Nations Convention on Contracts for

---

<sup>14</sup> In arbitration practice, the ability of parties to refer to rules of law to govern their contract is widely accepted. See, for all, Art. 28(1) UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, Art. 28(1) ICC Rules of Arbitration, Art. 22.1(c) LCIA Arbitration Rules, Art. 1496(1) *Code de procédure civile* (France, Code of Civil Procedure), Art. 1051 Code of Civil Procedure (Germany), Art. 36 Arbitration Law of Japan (2003), Art. 187(1) Federal Act on Private International Law of 18 December 1987 of Switzerland. In recent literature, see, *inter alia*, C. Sural, "Respecting the Rules of Law: The UNIDROIT Principles in National Courts and International Arbitration", 14 *Vindobona Journal of International Commercial Law and Arbitration* (2010/2) 249-266 and, specifically about the gradual acceptance of rules of law in Latin America, J.A. Moreno Rodríguez and M.M. Albornoz, "La *lex mercatoria* en la Convención de México de 1994. Reflexiones en ocasión de la elaboración del futuro instrumento de La Haya en materia de contratación internacional", in D. Fernández Arroyo and J.J. Obando Peralta (eds.), *El derecho internacional privado en los procesos de integración regional*, San José, Ed. Jurídica Continental, 2011, pp. 15-40.

<sup>15</sup> Such as, for instance, a reference in maritime transport contracts to the so-called "Rotterdam Rules" (the 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea) before their entry into force.

<sup>16</sup> J. Basedow, "Lex Mercatoria and the Private International Law of Contracts in Economic Perspective" in J. Basedow, T. Kono and G. Ruhl (eds.), *An Economic Analysis of Private International Law*, Tubingen, Mohr Siebeck, 2006, p. 71.

the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts. It was agreed that the role of gap-filling rules would be dealt with in the Commentary which will provide further detail on the role of gap-filling rules, and give specific examples.

21. In addition, the majority of the Working Group agreed that international trade usages could supplement the parties' choice of law. Examples were drawn from the field of international trade law and the Working Group established that for the purposes of the Hague Principles, trade usages are better suited to play a subsidiary role rather than be chosen as the governing law of the contract as trade usages do not form a sufficiently comprehensive set of rules that could be chosen as the governing law of a contract. The Commentary will highlight that, in principle, trade usages can supplement and assist in the interpretation of, but cannot override or contradict the operation of the law or rules of law by the parties, and will give various examples.<sup>17</sup>

### *Article 3 – Express and tacit choice*

22. The choice of law can be made expressly or tacitly. There was unanimity within the Working Group that an explicit choice indisputably reflects the parties' intent.<sup>18</sup>

23. Lengthier discussions led to a decision on whether a tacit choice should be admissible within the draft Hague Principles. The Working Group examined at length relevant precedents at the national and regional level and developed a principle according to which a choice, in the event there is no express indication, can be inferred if it appears "clearly from the provisions of the contract or the circumstances".

24. The suggested formulation allows courts and arbitral tribunals to contemplate the possibility of a tacit choice. However, the Working Group indicated that it must be *clear* from the contract or the circumstances that a choice was made.<sup>19</sup> The Working Group is hence in favour of a tacit choice by reference to elements of the contract or other relevant circumstances, a "test" that should be illustrated with examples in the Commentary.

25. However, the Working Group expressly declined to accept a choice of *court* or *arbitral tribunal* as of itself a sufficient indicator of the parties' tacit choice of *law* under the Hague Principles. The Working Group was aware that a choice of *court* or *arbitral*

---

<sup>17</sup> Reference to trade usages should be distinguished from trade codes expressly selected by the parties as the governing rules of law.

<sup>18</sup> An explicit choice is made or documented in writing or by any other means of data transmission or storage communication. The Commentary should refer to the formulation of, e.g., Art. 9(2) of the *United Nations Convention of 23 November 2005 on the use of electronic communications in international contracts* or Art. 3 c) of the *Hague Convention of 30 June 2005 on Choice of Court Agreements*.

<sup>19</sup> Having examined several international instruments developed by the HCCH or other international organisations, the Working Group was inspired by Art. 1(2) of the *ICC Draft Recommendations on the Law Applicable to International Contracts*, as commented in O. Lando, "Conflict-of-Law Rules for Arbitrators", in *Festschrift für Konrad Zweigert zum 70. Geburtstag*, J.C.B Mohr (Paul Siebeck), Tübingen, 1981, p. 174. Compare with the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* and *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, which both use a fairly identical test ("choice must be (...) clearly demonstrated by...") and the *Inter-American Convention of 17 March 1994 on the Law Applicable to International Contracts*, which refers to a stricter test ("choice (...) must be evident").

*tribunal* may be considered by some systems to be a highly relevant criterion to be taken into consideration in ascertaining a choice of law, and hence considered it necessary to express a clear position in this regard.

#### *Article 4 – Formal validity of the choice of law*

26. In formulating the rules in the draft Hague Principles in relation to formal validity of the choice of law, the Working Group had regard to international, regional and national conflict rules. It was acknowledged that different legal traditions adopted varying approaches to determine the formal validity of a choice of law by the parties.

27. The Working Group agreed, however, that there would be no formal requirement for the choice of law unless parties agreed otherwise. Again, this decision accords with the principle of party autonomy.

#### *Article 5 – Consent*

28. In line with the leading role ascribed to party autonomy, the Working Group drafted a rule on consent which primarily relies on the law that would apply if that consent existed (*i.e.*, the putatively chosen law). Once the consent is confirmed by that law, all issues relating to the remainder of the main contract are then assessed under the chosen law as the *lex causae*, not as the putatively applicable law. The Working Group considered that this removes any need for a provision in the draft Hague Principles referring to issues related to the principal contract being “determined by the chosen law assuming that the choice were valid”. The Article dealing with the scope of the chosen law is worded in line with this approach.<sup>20</sup> Accordingly, consent is to be determined by reference to the law that would apply if such consent existed (*i.e.*, the putative law), unless the party invoking the lack of consent can rely on the limited exception in Article 5(2). This exception is subject to two cumulative conditions: first, “under the circumstances it is not reasonable to apply the chosen law” and, second, no valid consent can be established on the basis of the law of the State where the party invoking this provision has its place of business. In this regard, the Working Group followed a well established choice of law rule in international instruments.<sup>21</sup>

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

---

<sup>20</sup> See Art. 8 draft Hague Principles and accompanying policy considerations, *infra* paras 37 *et seq.*

<sup>21</sup> For precedents, see Art. 10(3) of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* (and A. von Mehren’s Explanatory Report on this Convention, at paras 103 *et seq.*); Art. 10 *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*. See also P. Nygh *supra* note 6, pp. 93-97.

30. Moreover, when the present Article is read alongside the rule on autonomy of the choice of law,<sup>22</sup> issues of duress or misrepresentation fall within these issues of “consent”, but such grounds of challenge can be relied on to demonstrate the absence of consent if they specifically address the parties’ consent to the choice of law, which is to be considered independently from consent to the main contract. Thus, Article 5 would provide the greatest support to party autonomy by targeting the “consent” to the parties’ choice of law per se. This topic should also be addressed in the Commentary.

#### *Article 6 – Autonomy*

31. The Working Group considered that it is necessary to include a specific article on the autonomy of the parties’ choice of law. It was recognised that the parties’ choice of law should be treated as separate from the remainder of the contract, in order to achieve greater protection of party autonomy. In this respect, the Working Group drew upon analogies to forum selection and arbitration clauses which are widely understood as severable from the other elements of the contract.<sup>23</sup>

32. Accordingly, Article 6 requires that the parties’ choice of law should be subject to an independent assessment that is not automatically tied to the validity of the main contract. Thus, the parties’ choice of applicable law would not be affected solely by a claim that the main contract is invalid. Instead, that claim of invalidity of the main contract would be assessed according to the applicable law chosen by the parties,<sup>24</sup> provided that the parties’ choice is effective. Further, arguments which seek to impugn the consent of the parties to the contract would *not necessarily* undermine the consent of the parties to the choice of law. In this light, the present Article reinforces the policy underlying the preceding provisions in the draft Hague Principles.<sup>25</sup>

#### *Article 7 – Renvoi*

33. The provision proposed by the Working Group is one which is consistent with existing Hague Conventions which rule out the use of *renvoi* in the resolution of conflicts of law with a formulation that has now become traditional: “the term ‘law’ means the law in force in a State other than its choice of law rules”.<sup>26</sup> However, the parties may provide otherwise.

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

---

<sup>22</sup> See Art. 6 draft Hague Principles and accompanying policy considerations, *infra* paras 31-32.

<sup>23</sup> In particular, the Working Group referred to the existing *Hague Convention of 30 June 2005 on Choice of Court Agreements* which includes a provision dealing with the autonomy of choice of court clauses. For arbitration see, e.g., Art. 16(1) UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, Art. 23(1) UNCITRAL Arbitration Rules, Art. 23.1 LCIA Arbitration Rules, Art. 6(4) ICC Rules of Arbitration, s. 7 Arbitration Act 1996 (UK), Art. 178(3) Federal Act on Private International Law of 18 December 1987 (Switzerland), Art. 1053 Arbitration Act 1986 (Netherlands).

<sup>24</sup> Subject to the exception *in favorem validatis* under Art. 9(1) draft Hague Principles.

<sup>25</sup> Respectively Art. 4 (Formal validity of the choice of law) and Art. 5 (Consent) draft Hague Principles.

<sup>26</sup> J. Derruppé, *Le renvoi dans les conventions internationales*, *Juris-Classeur International*, fasc. 532-3 (1993), No 7 p. 3. See, e.g., Art. 12 of the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) >.

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

#### *Article 8 – Scope of the chosen law*

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

37. In order to formulate the provision, the Working Group referred to instruments previously drafted by the Hague Conference such as the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*,<sup>27</sup> and regional instruments such as the EC Regulation on the Law Applicable to Contractual Obligations (Rome I)<sup>28</sup> as a source of inspiration.

38. The Working Group agreed that the draft Hague Principles should provide further guidance to users by including a non-exhaustive list of issues which the applicable law will govern. In setting out the non-exclusive list of matters in this Article, the Working Group discussed at length whether pre-contractual obligations should be excluded from the scope of the applicable law. In spite of the different views set out during the discussions, the Working Group eventually agreed that the law chosen by the parties should also govern pre-contractual obligations.

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

39. The Working Group agreed that the law chosen by the parties may not be the exclusive law for determining the formal validity of the main contract. Therefore, under the present Article, the formal validity of the contract is not precluded from being demonstrated otherwise than by reference to the law chosen by the parties, if this is permitted by the private international law rules of the forum, or by the rules which fall to be applied by an arbitral tribunal. On this view, the present Article is a specific exception or limitation to the preceding draft rule on the scope of the chosen law.<sup>29</sup>

40. In formulating the proposed liberal regime, the Working Group followed the well-established principle of *favor negotii* which seeks to avoid formal invalidity as far as possible.<sup>30</sup> This implies that, in relation to formal validity only, the parties' contractual relationship may be determined by reference to connecting factors other than the law chosen by the parties. Those may include, for example depending on the venue, the law of either of the States where any of the parties or their respective agent is present when

---

<sup>27</sup> See Art. 12 of the Convention.

<sup>28</sup> See Art. 10 of the Rome I Regulation.

<sup>29</sup> See Art. 10 draft Hague Principles and accompanying policy considerations, *infra* paras 42 *et seq.*

<sup>30</sup> On this point, the Working Group referred to international instruments which, to different extents, enshrine this principle. See, e.g., Art. 11 Rome I Regulation; Art. 11 *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*.

the contract is concluded, the law of the State where either of the parties has its habitual residence at the time of conclusion or the law of the State where the contract was concluded. Nevertheless, once the law applicable to the contract is determined, any change in that law is without prejudice to the contract's formal validity.

#### *Article 10 – Assignment*

41. The Working Group recognised that situations involving the assignment of a contractual right to payment or performance did not deal directly with issues of choice of law. However, it determined that it was useful to examine how choice of law operates in cases involving assignment given the common occurrence of assignment in international commerce and the potential the laws chosen to govern different relationships to conflict.

42. The draft Hague Principles provide a set of principles that determine the role of the chosen law where the rights and duties of the parties are defined by two or more related contracts that are entered into by a different combination of parties and governed by different laws respectively. The provision formulated in the draft Hague Principles takes into account the approaches adopted in international and regional instruments,<sup>31</sup> as well as the domestic law of various jurisdictions.<sup>32</sup> In line with the nature of the draft Hague Principles, however, Article 10 only addresses the situation in which the law governing a particular contract has been chosen by the parties.

43. The Working Group also considered other situations where rights are determined by two different contracts between different parties such as subrogation, delegation, set-off, etc. However, after discussion, the Working Group agreed that these issues would be better addressed in the Commentary due to their complexity. The Commentary will also include illustrations of cases where the law applicable to rights exists under two or more related contracts.

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

##### *a) Exceptional application of overriding mandatory rules and public policy*

44. The Working Group unanimously recognised that considerations of public interest justify restricting party autonomy by overriding mandatory rules and public policy (*ordre public*).<sup>33</sup> These two limitations on party autonomy are jointly addressed under the present Article in the context of both international litigation and international arbitration. It was considered that Article 11 is likely to be sufficient to respond to any concerns of an abuse of the parties' choice of law for an international commercial contract.

45. There was unanimity within the Working Group that the primary goal of promoting party autonomy supports a generally restrictive approach to overriding mandatory rules and public policy. It was affirmed that any restriction on the application of the law chosen by the parties must be clearly justifiable and no wider than necessary to serve the objective pursued. Therefore, the draft Hague Principles emphasise the exceptional character of public policy and overriding mandatory rules. The Preamble refers to "limited

---

<sup>31</sup> See for e.g., *United Nations Convention on the Assignment of Receivables in International Trade* and Rome I Regulation.

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

<sup>33</sup> The Working Group referred, *inter alia*, to Recital (37) Rome I Regulation.



exceptions" to the principle of party autonomy. Moreover, the present Article refers to "manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum" (para. 3). The Working Group agreed that such exceptional character should be dealt with in greater detail in the Commentary, rather than in the article of the draft Hague Principles.

*b) Definition of overriding mandatory rules*

46. The Working Group agreed that overriding mandatory rules are rules which must be applied to the determination of a dispute between contracting parties irrespective of the law applicable to the contract. In preparing the present Article, the Working Group revealed some concerns about the detailed definitions of "overriding mandatory rules", or equivalent terms, adopted by the pre-existing international instruments.<sup>34</sup> Therefore, a proposal to include in the present Article a detailed definition of "overriding mandatory rules", with a view to emphasising the narrow character of this exception, was not adopted. In view of the complexity of the issue, the Working Group considered that it was desirable to elaborate on the definition in the Commentary.

*c) Third-country overriding mandatory rules*

47. Paragraph 2 of Article 11 deals with overriding mandatory rules of "another law", *i.e.*, the law of a country other than that of the forum or that of the law chosen by the parties ("third country"). The Working Group recognised that the issue of third-country overriding mandatory rules is one on which State practice and the views of commentators vary widely. It was accepted that the Working Group should not seek to formulate an exhaustive statement of the circumstances in which a legal system could require or permit its courts to apply or consider third-country overriding mandatory rules.<sup>35</sup> Accordingly, the Working Group unanimously adopted the open textured principle set out in the second paragraph of the present Article,<sup>36</sup> which relies upon the law of the forum (including other rules of private international law) for determining whether and under what circumstances third-country overriding mandatory rules may or must be applied or taken into account.

*d) Court proceedings relating to arbitration*

48. The Working Group considered that a court dealing with proceedings relating to arbitration is not in a different position from a court dealing with other civil proceedings, in that the court must invoke public policy and give effect to overriding mandatory rules of the forum, insofar as they apply to the subject matter of the proceedings before it. Moreover, it was agreed that the present Article should not assimilate the position of an arbitral tribunal with that of a court dealing with proceedings relating to arbitration. Accordingly, the principles set out for court proceedings under the present Article apply to all court proceedings, including proceedings relating to an arbitration (para. 4).

---

<sup>34</sup> In particular, the Working Group referred to Art. 9(1) Rome I Regulation.

<sup>35</sup> There was little enthusiasm within the Working Group for the specific provision concerning third-country overriding mandatory rules in Art. 9(3) Rome I Regulation.

<sup>36</sup> The Working Group noted that the non-binding nature of the draft Hague Principles enables the provisions addressing overriding mandatory rules and public policy to be more flexible or open textured than in a binding convention.

e) *Arbitration proceedings*

49. The Working Group rejected the alignment of principles governing the role of overriding mandatory rules and public policy in court and arbitration proceedings. Therefore, a separate paragraph was included to address the role of overriding mandatory rules and public policy in arbitration proceedings. Paragraph 5 of Article 11 was intended to reflect, *inter alia*, the fact that arbitral tribunals are not constrained by any “forum law” as such.

50. The Working Group recognised that the formulation of any principle in this area would be difficult in light of different legislative and philosophical approaches to the connection between arbitration proceedings and particular legal systems. Accordingly, it was decided that the role to be played by overriding mandatory rules and public policy of the legal systems which are connected to an arbitration should be principally left to be determined by the arbitral tribunal on a case-by-case basis. Therefore, paragraph 5 does not positively prescribe specific limits of overriding mandatory rules or public policy in arbitral proceedings. Nevertheless, the lack of specifications in this paragraph should not be understood as conferring an arbitral tribunal a general discretion to give effect to overriding mandatory rules or public policy. The words “required or entitled” in the text are intended to emphasise that the tribunal must carefully and properly justify its decision to derogate from the law or rules of law chosen by the parties. Such justifications would depend on the tribunal’s own view of the *legal* framework within which the arbitration is being conducted.