

**CHOIX DE LA LOI APPLICABLE EN MATIÈRE DE CONTRATS INTERNATIONAUX :  
PROJET DE PRINCIPES DE LA HAYE ET PLANIFICATION FUTURE**

*établi par le Bureau Permanent*

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**CHOICE OF LAW IN INTERNATIONAL CONTRACTS:  
DRAFT HAGUE PRINCIPLES AND FUTURE PLANNING**

*drawn up by the Permanent Bureau*

*Document préliminaire No 6 de février 2013 à l'attention  
du Conseil d'avril 2013 sur les affaires générales et la politique de la Conférence*

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of the Council of April 2013 on General Affairs and Policy of the Conference*

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## INTRODUCTION

1. The purpose of this Note is to inform the Council on General Affairs and Policy (the "Council") of progress made on the Choice of Law in International Contracts, in particular by the Special Commission which met from 12 to 16 November 2012. 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 "Project").

2. At its meeting in November 2012, the Special Commission adopted the "Draft Hague Principles on the Choice of Law in International Contracts" (the "Draft Hague Principles"), which are, together with the "Agreed additions to be inserted to the commentary in Preliminary Document No 1 of October 2012 for the attention of the Special Commission of November 2012 on Choice of Law in International Contracts", appended in Annex I. A report of the Special Commission meeting is appended in Annex II.

3. With a view to organising the preparation of an explanatory document on the Draft Hague Principles (the "Commentary"), the Permanent Bureau, at the end of 2012, contacted the members of the Working Group to inform them of the outcome of the Special Commission and re-launch preparatory work on the Commentary. Subject to approval by Council of the Draft Hague Principles, the Working Group will meet at the end of June 2013 to consolidate the draft text of the Commentary. This draft text will be distributed to all Members and observers for written consultation and will thereafter be finalised by the Working Group. If necessary, an additional meeting may be convened but this will be determined according to progress made. Finally, the Commentary, along with a report from the Permanent Bureau if required by Council, will be submitted to Council at its meeting in 2014.

4. In light of the above, the Council on General Affairs and Policy is invited to:

- endorse the Draft Hague Principles as approved by the November 2012 Special Commission meeting; and
- give a mandate to the Working Group to prepare a Commentary on the Draft Principles and proceed, together with the Permanent Bureau, with the subsequent steps as outlined above.

## **ANNEXES**

**Special Commission on Choice of Law in  
International Contracts  
(12-16 November 2012)**



**DRAFT HAGUE PRINCIPLES AS APPROVED BY THE  
NOVEMBER 2012 SPECIAL COMMISSION MEETING ON CHOICE OF LAW IN  
INTERNATIONAL CONTRACTS AND RECOMMENDATIONS FOR THE COMMENTARY**

**Draft Hague Principles on the Choice of Law in International Contracts**

***The Preamble***

1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.
2. They may be used as a model for national, regional, supranational or international instruments.
3. They may be used to interpret, supplement and develop rules of private international law.
4. 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 where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.
2. For the purposes of these Principles, a contract is international unless the parties have their establishments 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.
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 and trusts;
  - d) insolvency;
  - 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.
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 made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.

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

### ***Article 3 – Rules of law***

In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

### ***Article 4 – Express and tacit choice***

1. 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.

2. 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 5 – 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 6 – Agreement on the choice of law***

1. Subject to paragraph 2,

- a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to;
- b) if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in those terms applies; if under these laws different standard terms prevail, or if no standard terms prevail, there is no choice of law.

2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.

### ***Article 7 – Severability***

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

### ***Article 8 – Exclusion of 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 9 – Scope of the chosen law**

1. 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;
  - 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 legal presumptions;
  - g) pre-contractual obligations.
2. Paragraph 1 e) does not preclude the application of any other governing law supporting the formal validity of the contract.

### **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 the 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 (*ordre public*)**

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 the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.
4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.
5. These Principles shall not prevent an arbitral tribunal from applying or taking into account 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.

### **Article 12 – Establishment**

If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion.

**Agreed additions to be inserted to the commentary in Preliminary Document No 1 of October 2012 for the attention of the Special Commission of November 2012 on Choice of Law in International Contracts**

**General**

- Use of capital letters for "State"
- Illustrations will be required for all provisions

**Preamble**

- The function of interpretation is without prejudice to existing instruments
- Commentary should include a reference to the Vienna Convention on the Law of Treaties (with regard to interpretation)

**Article 1(1) – Scope of the Principles**

- Commentary should deal with online transactions and the circumstances of the parties' trade or profession

**Article 1(3)**

- Further detail required on excluded matters, including legal capacity vs authority, and internal operation of trusts

**Article 2(3) – Freedom of choice**

- Limitations of choice of law – clarification required on the timing of a modification of a choice
- In general: Provision is not intended to override procedural rules of the forum

**Article 2(4)**

- Certain States require a substantial connection with the chosen law

**Article 3 – Rules of law**

- The Commentary should address the following issues:
  - commercial need; recognised in arbitration; novelty for state court proceedings
  - choice of rules of law should be made with open eyes; commentary should present benefits and potential dangers in a balanced way
  - "generally accepted": criteria such as origin ("trusted source"); context; how widely spread
  - "set of rules": reasonably comprehensive in nature (examples for rules that are generally accepted but not a "set" of rules)
  - neutral and balanced: not imposed by market power, not one sided
  - address issues such as gap filling
  - drafting should take into account the flexibility to adapt to future developments
  - Clarify "law of the forum provides otherwise"

**Article 4 – Express and tacit choice**

- Non-oral modification clause
- A choice of court agreement is only one of many possible factors that may lead to tacit choice of law. Not determinative but may be relevant

**Article 5 – Formal validity of the choice of law**

- Clarify relationship between Article 4 (implied choice of law) and Article 5 (formal validity)

**Article 6 – Agreement on the choice of law**

- Illustrations on the battle of forms required
- Address further situations of possibly conflicting choices of law (e.g., when CISG and national law regime apply)
- Address the duty of the parties to plead and co-operate with regard to finding and comparing the applicable law



**Article 8 – Exclusion of *renvoi***

- Clarify that exclusion relates to conflict of law rules (not private international law in the broader sense)

**Article 9(1) – Scope of chosen law**

- Why are the issues listed in Article 9(1) expressly mentioned (while others are not)?
- Set out a comparative overview of the listed aspects of the contract regarding characterisation / qualification, in particular with regard to the different approaches in delimitating substance and procedure
- Relationship with the procedural rules of the forum
- The reference to "*dommages et intérêts / damage-intérêts*"

**Article 9(2)**

- The relationship between scope of the chosen law and formal validity

**Article 10 – Assignment**

- Additional illustrations of situations where the law applicable to the parties' rights is determined by two or more related contracts

**Article 11 – Overriding mandatory rules and public policy (*ordre public*)**

- Differences in definition of mandatory rules (*e.g.*, Rome I and others)
- Illustrations regarding the exceptional nature ("over-enforcement") of the overriding mandatory rules and the application of public policy

février / February 2013



**RAPPORT DE LA RÉUNION DE LA COMMISSION SPÉCIALE DE NOVEMBRE 2012  
SUR LE CHOIX DE LA LOI APPLICABLE EN MATIÈRE DE CONTRATS  
INTERNATIONAUX**

*établi par le Bureau Permanent*

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**REPORT OF THE NOVEMBER 2012 SPECIAL COMMISSION MEETING  
ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS**

*drawn up by the Permanent Bureau*

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## **I. INTRODUCTION<sup>1</sup>**

1. A Special Commission meeting was convened in The Hague from 12 to 16 November 2012, to review the work carried out by the Working Group on the Choice of Law in International Contracts project, embodied in its 2011 final *Draft Hague Principles on Choice of Law in International Contracts* (the "Draft Hague Principles", or the "Principles"). The Special Commission was tasked with the in-depth review of the Principles and their accompanying Commentary, contained in Preliminary Document No 1.<sup>2</sup> At the conclusion of the review, the Special Commission unanimously approved a revised form of the Principles, and made a number of recommendations to the Council on General Affairs and Policy of the Conference ("Council"), relating to the completion of the Principles and their accompanying Commentary.<sup>3</sup>

2. This Report is intended to provide a comprehensive review of the issues and policy discussed at the meeting of the Special Commission, and inform Council of progress made during the November 2012 Special Commission. All references to Articles and paragraphs relate to the revised Principles, as approved by the Special Commission, unless otherwise noted.

## **II. COMPOSITION OF THE SPECIAL COMMISSION**

3. The Special Commission meeting was attended by 119 experts from 42 Member States, as well as representatives from the European Union. Seven observers from non-Member States, and 11 observers from prominent international organisations, also participated.

4. Mr Daniel Girsberger (expert from Switzerland) was elected to serve as Chair of the Special Commission. Ms Yujun Guo (expert from the People's Republic of China) was elected to serve as Vice-Chair. It was agreed that a Drafting Committee would be formed, to assist with crafting proposed amendments. Its constitution was agreed as follows:

- Mr Neil Cohen, United States of America;
- Mr Hong-sik Chung, Republic of Korea;
- Mr Francisco Garcimartín Alférez, Spain;
- Ms Yujun Guo, People's Republic of China (in her role as Vice-Chair of the Special Commission);
- Ms Xiaoyan Liu, People's Republic of China;
- Mr José Antonio Moreno Rodríguez, Paraguay;
- Mr Jan Neels, South Africa;
- Mr Todd Quinn, Australia;
- Ms Geneviève Saumier, Canada (Chair); and
- Ms Karen Vandekerckhove, European Union.

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<sup>1</sup> The Permanent Bureau would like to express its gratitude to Mr Drossos Stamboulakis, Peter Nygh intern at the Hague Conference from August to December 2012, for assisting with the writing of this Report. The Permanent Bureau would also like to thank Ms Rosehana Amin, who was a part-time consultant (25% FTE) until December 2012, for her assistance with the Project.

<sup>2</sup> "Consolidated Version of the Preparatory Work Leading to the Draft Hague Principles on the Choice of Law in International Contracts", Prel. Doc. No 1 of October 2012, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Choice of Law in International Contracts".

<sup>3</sup> See "Draft Hague Principles as approved by the November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations for the Commentary", attached as Annex II, and also available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Choice of Law in International Contracts".

### **III. DELIBERATIONS OF THE SPECIAL COMMISSION**

#### **A. *The general nature of the Principles***

5. From the outset of proceedings, the Special Commission endorsed the fundamental aim of the Principles: the promotion of party autonomy.

6. A query was raised as to whether the Principles would better be termed as “Model Rules”. However, given the non-binding nature of the instrument, and the primary aim of promoting party autonomy, “Principles” was preferred. It was said that using the term “Principles” would reinforce their non-binding nature, allowing them to be more widely considered as a source of reference (where they could have broadest impact as a source of inspiration for law drafters and legislators). This was said to also allow the Principles to be applied flexibly, providing practical guidance for those involved in interpreting all kinds of rules of law: adjudicators (judges and arbitrators alike), legal practitioners and interested commercial parties.

7. It was emphasised that to give maximum effect to the Principles, national States, depending on their existing national law, may need to implement legislative reform that would support or mirror the Principles.

#### **B. *The fundamental principle of party autonomy***

##### **Article 2 – Freedom of choice**

8. The second sentence of Article 2(1), which relates to the choice of rules of law, was deleted, and a new provision, Article 3, was drafted to address such scenarios (see the discussion of Art. 3, below). Article 2(2) and 2(4) were unchanged. Article 2(3) was amended to improve its clarity, namely by agreement that:

- the paragraph be split into two sentences to separate the two distinct concepts contained in it: that a choice of law may be made at any time, and that this choice, once made, does not prejudice the rights of third parties;
- the words “made or” be prepended to “modified”, and the words “choice or” to “modification”, to clarify that parties’ freedom to choose extends to the original choice of law (and not only a modification of it); and
- the word “pre-existing”, prior to “rights of third parties”, be deleted, as it is redundant: third party rights, if any, would always “pre-exist”.

9. Some experts favoured introducing a limitation on the time during which parties could validly modify a choice of law, contrary to the original wording of “at any time”. It was said that a limitation period would provide greater certainty and predictability for adjudicators. Others indicated that it was unclear if this provision sought to override procedural rules of the forum; however, given the non-binding nature of the Principles, it was stressed that this would not and could not be the case. The general consensus was that the proposal to delete the words “at any time” would inadvertently change the focus of the sentence (as, at the time of its proposal, the Article consisted of only one sentence). In any event, rather than deleting these words, it was agreed that the Commentary would be expanded to clarify the general international practice with respect to when modifications of choice can occur, and noting that this usually is resolved by the local procedural law.

10. The Special Commission agreed that additional text would be added to the Commentary, to reflect that Article 2(3) places no limitations on the timing of when a choice of law can be made, and does not override any procedural rules of the forum.

11. It was also decided that as this Article governs the effects of the modification of a choice of law, the impact of this on formal validity is best addressed in this Article. On this basis, the original Article 9(2) was deleted as it was no longer considered necessary.

### **Article 3 – Rules of law (former Art. 2(1))**

12. Whether parties should be able to choose *any* rules of law, regardless of their legitimacy or fairness, proved to be the subject of much debate. A compromise solution was ultimately reached, whereby a new Article 3 (“Rules of law”) was inserted. This was done to underscore the novelty of this approach, unseen in any other instrument. During discussions, two very different positions predominated. The first, spearheaded by the European Union, was that the first sentence of the original Article 2(1) be struck out, removing any reference to rules of law (and the Commentary amended to reflect that the Principles intentionally did not address this point). However, many other delegations were in favour of retaining the original text of Article 2(1).

13. There were a number of arguments presented in favour of limiting, or removing entirely from the Principles, provisions allowing parties to choose rules of law. The primary concern was that allowing parties to choose *any* rules of law may lead to a proliferation of unfair unilateral rules of law, articulated by the party with greater bargaining power. This would have adverse effects on weaker or unsuspecting parties. It was also said that allowing parties to employ any and all rules of law would: make the task of judging more time-consuming and difficult, given the array of potential rules of law to be applied; reduce the certainty of outcome that contracting parties had when their dispute could only be governed by national laws; and was objectionable, on principle, as the role of gap-filling rules should be filled by national laws, and not rules of law (even where chosen by the parties).

14. The experts who favoured retaining Article 2(1) in its original form stressed that the fundamental purpose of the Principles is the promotion of party autonomy, which extends to the freedom to choose rules of law. Several experts noted that many national laws already contained provisions which prevent the application of unfair terms, and that parties transacting internationally in a commercial context should be considered capable of choosing the law or rules of law applicable to them. Additionally, it was said that if the Principles disallowed, or remained silent, as to whether parties could apply rules of law, this would: conflict with the promotion of uniform and harmonised choice of law principles; have no principled basis, as the choice of rules of law is widely accepted in the largely parallel arbitration choice of law context; and bring the Principles into conflict with modern prevailing international practice, as embodied in various UNCITRAL, arbitration and international sales of goods texts.

15. After significant discussion and various constructive proposals, a compromise solution was reached. The new Article 3, which only allows parties to choose rules of law that constitute a “set of rules”, which are “generally accepted” as “neutral and balanced”, addressed the concern of unequal bargaining power leading to the application of unfair or

inequitable rules of law. At the same time, it met the concern of many experts, that the Principles be forward looking, and, where possible, be drafted to allow for maximal party autonomy. Some experts indicated that it may be difficult to determine precisely what constitutes a “neutral and balanced” set of rules. The Special Commission noted that the Commentary would provide further guidance as to the meaning of the phrases utilised, namely:

- “set of rules” is meant to allow only choices of rules of law that are reasonably comprehensive in nature;
- “generally accepted” is meant to reflect criteria such as the origin of the rules of law (for example, if it is a trusted source), how widely dispersed and utilised the rules of law are, noting that the standard is highly context specific; and
- “neutral and balanced” relates to the obligations in the rules of law and their source, for example, whether they are one sided, or imposed by an imbalance in market power.

16. The Special Commission recommended that the Commentary be further developed in a number of respects, to clarify ambiguous matters and explain the significance of choosing rules of law. It was, in principle, agreed that the Commentary would reflect:

- that there may be a commercial need to choose rules of law, and that whilst this was a novelty in State court proceedings, it is recognised in arbitration;
- that allowing rules of law to be chosen presents benefits and dangers;
- a discussion of potential “gap filling” potentially required with rules of law; and
- examples of what was intended by the phrase “unless the law of the forum provides otherwise”.

17. It was noted that some of these clarifications would require very careful drafting by the Working Group. Thus, the Chair invited experts to submit written remarks to the Permanent Bureau for further consideration.

### ***C. Expression of party autonomy***

#### **Article 4 – Express and tacit choice (former Art. 3)**

18. The text of original Article 3 (now Art. 4) remains unchanged, save for the fact that its two component sentences have been split into two paragraphs. The major source of discussion was whether the second sentence needed to be in the Principles themselves, as opposed to the Commentary, on the basis that it was only one indication of whether a tacit choice of law had been made by the parties. It was recalled that the Working Group had intentionally included the second sentence because the choice of forum and choice of law are separate and independent choices but are often erroneously combined or confused in practice. It is anticipated that the second sentence will help clarify such situations.

19. To assist in the future interpretation of Article 4, it was agreed that the Commentary would record that a choice of court agreement is not determinative, but may be relevant as one of many possible factors that may lead to a tacit choice of law.

## **Article 5 – Formal validity of the choice of law (former Art. 4)**

20. Some discussion occurred as to the interrelationship of Article 5 with Articles 4, 6 and the then Article 9 (now deleted), which all touch upon formal validity to some extent.

21. It was proposed that Article 5 could perhaps be subsumed under another article, such as Article 4. An expert, and member of the Working Group, recalled that the Working Group considered the need for the articles to be distinct: Article 5 deals with the formal validity of the choice of law, for example, a requirement that a choice of law be contained in writing or supported by a notarised deed. Article 4, by contrast, aims to expressly state only that any additional formal requirement should not be imposed on a choice of law clause, which, fundamentally, is a contractual clause. It was noted that a number of international instruments, including the *United Nations Convention on Contracts for the International Sale of Goods* (1980) ("CISG") and the *Inter-American Convention on the Law Applicable to International Contracts*, treat these issues separately. On this basis, the general consensus favoured retaining separate articles to promote clarity in the Principles, with further clarification of the interrelation between Articles 4 and 5 to be dealt with in the Commentary.

## **Article 6 – Agreement on the choice of law (former Art. 5)**

### *Battle of forms*

22. A concern was raised that when parties both make choices of law, via the exchange of "standard term" contracts, the original Article 5 does not address which law applies. In this regard, rules in the Principles providing guidance would promote legal certainty, and in some situations, maximise party autonomy. This would be the case because, in practice, even if the standard terms share the same substantive solution as to the choice of law (*i.e.*, both terms indicate that the law of X governs the contract), an adjudicator may consider them invalid because of the mere fact that more than one approach is potentially applicable. This scenario, commonly referred to as the "battle of forms", was said to occur with some frequency in practice, and was canvassed as a potential issue by the Working Group, which noted that it may be too complex to easily resolve.

23. A special drafting group, led by the delegation of Switzerland, in consultation with the Drafting Committee, considered this matter. It was, in principle, agreed that it would be positive for the Principles to address this issue, and experts endeavoured to come to suitable drafting terms. Two options, one more concise than the other, were set out and presented to the Special Commission. The shorter text was preferred, and was widely considered an elegant, concise and comprehensive solution to the conflicts of laws in the battle of forms scenario, which has yet to be addressed in an international instrument.

24. It was agreed that the words "subject to paragraph 2" would be inserted in paragraph 1, to indicate that the determination of the choice of law, even in a battle of forms scenario, would still be subject to a "reasonableness" protection (outlined below).

25. To aid future understanding and encapsulate some of the further guidance that was expressed in the unsuccessful drafting option, it was agreed that the Commentary would be amended to contain illustrations on potential instances of the battle of forms, and how these situations would be resolved by the Principles.



*Establishment replaces place of business*

26. A concern was also raised as to the use of the phrase "place of business" in the original Article 5, on the basis that it may cause confusion where a corporation has multiple places of business; alternatives, such as "central administration", "principal place of business", "established place of business" and "establishment" were proposed. It was considered by some that one of these alternatives may bring clarity in such cases. A number of experts, however, indicated that in their opinion, the phrases "place of business" and "establishment" were equivalent, and that the Working Group's choice of the phrase "place of business" should be retained. It was noted that the Working Group had considered all relevant alternatives, but chose this phrase as it better reflected the prevailing practice in international instruments such as the CISG, and had readily equivalent French and Spanish language counterparts.

27. The term "establishment" eventually prevailed, and was amended uniformly throughout the Principles. The Special Commission also endorsed a new Article 12 that provides that where there is more than one establishment, the relevant establishment is the one with the "closest relationship to the contract at the time of its conclusion".

*A new "reasonableness" protection*

28. Article 6 is designed to "protect" the consent of the parties. That is, even if it is subsequently decided that a party / parties did not consent to a certain choice of law, determining whether there is consent will, for the most part, be resolved by that purported choice. A new exception flagged by the European Union was an additional protection of an overriding filter of reasonableness. This received broad support. Thus, the Article was amended to provide that if it would not be reasonable to apply the purportedly chosen law (for example, for reasons of duress or fraud), the law applicable will instead be that of each party's establishment, respectively. It was stressed that this concept of reasonableness should not import concepts of detrimental reliance, as may be the case in the common law.

29. It was agreed that, by way of background, the Commentary would be amended to canvass situations of possibly conflicting choices of law (for example, when the CISG and a national law regime have been chosen, and potentially conflict), and address what was described as the "duty of the parties" to plead and co-operate with the adjudicator with regard to finding and comparing the applicable law.

**Article 7 – Severability (former Art. 6)**

30. A proposal to replace the title of the original Article 6, "autonomy", with "severability" received unanimous support. Although the term "autonomy" was considered the most neutral term by the Working Group, the Special Commission was of the view that "severability" potentially had a more precisely defined meaning, relating only to the "survival" of the choice of law clause if the underlying contract was found to be invalid. This use of the term "severability" was said to accord more precisely with this meaning, as the same phrase is used to refer to this concept in: international arbitration; the choice of law field generally; and in the French language ("*séparabilité*").

31. A minor amendment, adding the words "the contract to which it applies", was approved, in a bid to clarify that the the choice of law clause applies to the "underlying" contract.

## **Article 8 – Exclusion of *renvoi* (former Art. 7)**

32. It was agreed that the title of “*renvoi*” should be replaced with “exclusion of *renvoi*”, on the basis that this phrasing better encapsulates what the provision seeks to achieve: providing that *renvoi* is always excluded unless parties expressly provide for the application of *renvoi* to the transaction. It was noted that this had to be done as there is an internationally recognised presumption that a choice of law by the parties relates to the substantive law only, excluding choice of law rules. It was also noted that “exclusion of *renvoi*” is the preferred phrase used in recent Hague Conventions.

33. It was agreed that the Commentary would explicitly discuss that an exclusion of *renvoi* in this context relates only to conflict of law rules, and not private international law in its broader sense.

## **Article 10 – Assignment**

34. An expert, and member of the Working Group, indicated that this Article was meant to provide clarification to issues that arise in the increasingly common multi-contract and multi-party situations. Although this Article relates only to assignment, it was agreed that the Commentary would include additional illustrations of situations where the law applicable to the parties’ rights is determined by two or more related contracts.

35. Assignment was said to be a problem of increasing practical importance. This Article aims to distinguish between the choice of law governing the assigned claim, and the choice of law governing the contract of assignment. It was noted that this Article does not deal with the relatively rare cases of *dépeçage* (that is, where the contract is subject to more than one law) in assignment situations. This provision was necessarily limited in scope to cases where a choice of law has been made; any attempt to purport to apply this provision in the absence of such choice would be outside the mandate of the Principles.

36. A query was also raised as to whether the word “mutual” was required in Article 10 *a*). After some consideration, the experts agreed that the word “mutual” would be retained as it refers to the law covering both rights and obligations of the creditor and assignee; deleting it would substantively change the meaning of Article 10.

### ***D. Limits of party autonomy***

## **Article 11 – Overriding mandatory rules and public policy (*ordre public*)**

### *Manifestly incompatible*

37. A proposal was made to delete the adverb “manifestly” from Article 11(3), such that a court could exclude a provision of the chosen law, on the basis that it was only “incompatible” with fundamental notions of public policy of the forum. The proposal was not successful. It was noted that the more stringent phrase, “manifestly incompatible”, was common to existing Hague Conventions, and that the exceptional nature of excluding a provision of the chosen law was best recognised by a more restricted notion, embodied in the phrase “manifestly incompatible”. To emphasise this point, it was agreed that additional paragraphs in the Commentary would be included to provide illustrations of the exceptional nature of mandatory rules and public policy, assisting in reducing their perceived over-application.

### *Applying foreign public policy*

38. Suggestions were made that Article 11(1), 11(2) and 11(3), respectively, be amended to remove references to “of the forum”, on the basis that it was unnecessary, or that the Principles should provide for adjudicators to consider foreign public policy and not only overriding mandatory provisions or the public policy of the forum, respectively. Neither proposal received significant support. It was noted that this would be too novel an approach for the framework of a non-binding instrument intended to be neutral and gain wide acceptance. It was also noted that the phrase “public policy” is traditionally understood as implicitly referring to the public policy *of the forum*. Thus, deleting the words “of the forum”, after “public policy”, as proposed, would have little practical effect: adjudicators would continue to apply only the public policy rules of the forum.

39. It was further stressed that if the Principles were to open up the possibility of applying foreign public policy, this should be explicitly provided for, as it would represent a significant and novel step for an international instrument. Some experts also suggested that broadening the concept of public policy beyond that of the forum may lead to an expansion of the exceptions to the principle of party autonomy. Although in principle broadening the concept of public policy was not necessarily disagreeable, the general consensus was that this was not the right time or place to include such an amendment to the Principles.

### *Deletion of original Article 11(4)*

40. The Special Commission agreed that the original version of Article 11(4), which relates to “arbitration proceedings”, should be deleted. Some experts noted that, in their opinion, this provision was not necessary and added little, and others were of the view that the Principles should not “intrude” into international arbitral law, which is governed by other instruments such as the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the *1985 UNCITRAL Model Law on International Commercial Arbitration* (amended in 2006). However, in light of the current and future importance and growth of international arbitration, it was agreed that the Commentary would be amended to discuss the intersection between arbitration and the Principles.

### *New Article 11(4)*

41. The new Article 11(4) was drafted in similar terms to Article 11(2), but refers to public policy (*ordre public*) instead of overriding mandatory provisions. Concerns were expressed that this paragraph was not necessary, and if it were to be included, the proposed drafting was too broad, generating uncertainty as to whether the public policy of another State could be applied. In response, it was indicated that the scope of the proposal would be narrowed, to its present form, to extend only to the public policy of the applicable law in the absence of a choice by the parties.

### *Other drafting considerations*

42. A suggestion was made that the first two paragraphs of Article 11 be merged together, to ensure the Principles remained concise. However, it was noted that this may have potentially unseen complications. The underlying sense of this Article was said to be that of a major standard, which refers the user of the Principles back to the law of each State to determine precisely when to apply either public policy or overriding mandatory provisions. The Special Commission agreed to retain the two distinct paragraphs, as this structure focuses attention on the basic standard of the Principles, and is useful, for didactic purposes, where the Principles might be used as a model for legislators.

43. A number of queries were raised as to the appropriateness of the imperative nature of directive phrases contained in various paragraphs of Article 11, such as “these Principles *shall not*”, and “the law of the forum *determines*”. It was considered, however, that the language should be considered in the context of non-binding Principles, and also noted that States considering implementing or drawing inspiration from the Principles can adapt the wording to their particular legal systems.

44. A number of queries were raised as to various proposals relating to amending Article 11(5). The phrase “applying or taking into account” was preferred. Despite the fact that it was used twice in this paragraph, it was considered the most concise and precise way to convey the intended meaning: that the first and second limbs, relating to overriding mandatory provisions and public policy, respectively, are to be treated separately.

## **E. Scope**

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

#### *Defining commercial activity*

45. Some experts queried whether the original Article 1(1) suitably encapsulates all – and only – instances of parties engaging in commercial activity in international contracts. It was noted, in this respect, that the phrase “in the exercise” of a “trade or profession” was inspired by that employed in the commentary to the Preamble of the *UNIDROIT Principles of International Commercial Contracts*, namely, “in the course of its trade or profession”. There was some concern that this phrasing may unintentionally extend to situations where a professional, such as an entrepreneur or member of a professional or industry group, enters into a contract for the purpose of engaging in his or her trade or practice. As a result, a new sentence was introduced at the end of Article 1(1) to indicate that consumer and employment contracts are expressly excluded from the Principles. It was agreed that the Commentary would also reflect that, pursuant to Article 1(1), parties are not required to have extensive experience or skill in their specific trade or profession for the Principles to apply.

46. It was agreed that the requirement for “two or more persons” was not necessary, as some rarer types of commercial contracts, for example, may only have one party. A reformulated sentence was agreed upon which avoided this potential issue.

#### *Electronic commerce*

47. A query was raised as to the interplay between the Principles and electronic commerce. It was said that the nature of parties to an electronic transaction may be harder to discern than those in “offline” transactions. Accordingly, it was agreed that the Article may need to refer to the substance of the contract to assist in determining if dealings were commercial. The Special Commission noted, in accordance with what the Working Group, in consultation with UNCITRAL, had also previously decided, that it was best to establish general principles to canvass a wide array of scenarios – including electronic commerce. It was nonetheless agreed that the Commentary would discuss the particular nature of online transactions.

### *Defining "internationality"*

48. The Special Commission unanimously adopted a revised Article 1(2), which reverted to an earlier concept of internationality, stemming from prior Hague Conventions. Three distinct proposals were debated during the proceedings. The first favoured leaving the paragraph in its original form. In support of this proposal, it was noted that the Working Group had discussed defining the concept of internationality at length, and had worked hard to reconcile predictability of solutions with the range of policy views held. This was said to make the provision more precise than earlier Conventions, to be in line with international practice as reflected in the UNIDROIT Principles, and had the advantage of covering a large number of contracts while leaving considerable discretion to adjudicators to have "regard to the circumstances". It was also explained that this approach was most in line with the promotion of party autonomy.

49. The second proposal, which ultimately prevailed, provided an open definition of "international contract", with a deletion of the original sub-paragraph in Article 1(2)(ii). A number of experts supported this approach, noting that despite the notable efforts of the Working Group, no convincing reasons existed to depart from the definition in the *1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods* and the *2005 Hague Choice of Court Convention*. Given the extensive debate which preceded the adoption of such definitions within the Hague Conference, it was said that any change to Article 1(2) would be unlikely to lead to greater legal predictability. It was also noted that the Working Group's reformulated Article 1(2) may lead to legal uncertainty – as judges would be obliged to investigate the circumstances to determine the place of business, despite the fact that the place of business is not a decisive factor in defining internationality.

50. The third approach proposed retaining the original paragraph in Article 1(2)(i), updating the reference from "place of business" to "establishment", and deleting the last phrase of Article 1(2)(ii) to only refer to the establishment which has the closest connection to the contract.

51. After further reflection and discussion, the second proposal was endorsed by the Special Commission. It favoured remaining with the prevailing practice in prior Hague Conventions, particularly as the original paragraph in Article 1(2)(ii) was deemed to be of lesser relevance in light of the new Article 12 (which assists in determining the relevant establishment).

### *Exclusions*

52. Two specific changes were made to the exclusions in Article 1(3). First, it was agreed that trusts would be excluded from a choice of law under the Principles by appending the words "and trusts" to Article 1(3) c). It was agreed that the Commentary would reflect that this sub-paragraph was meant to relate only to the internal administration of companies, other collective bodies, and trusts. Second, it was agreed that the phrase "insolvency proceedings" in Article 1(3) d) was potentially too narrow. To remedy this, the word "proceedings" was deleted, such that the reference would be only to the broader concept of "insolvency".

53. It was agreed that the Commentary would also be amended to provide further detail on the list of excluded matters generally (and why they were chosen to be expressly included), including the differences between legal capacity and authority.

*Establishment replaces place of business*

54. The reference to “place of business” was replaced with “establishment”, as per the discussion at paragraph 27 above.

**Article 9 – Scope of the chosen law (former Art. 8)**

55. The Special Commission fully endorsed the aim of this Article: indicating to users of the Principles that a choice of law is, insofar as possible, comprehensive. The use of an inclusive list of examples was said to assist with promoting party autonomy, as well as providing legal certainty by clarifying doubts that had arisen in practice as to how far a choice of law extended. The examples provided were not in themselves contentious, but discussions were entered into with the aim of clarifying the precise meaning of Article 1 c), d) and f). It was agreed that the Commentary should be expanded to justify why the particular examples in paragraph 1 were chosen to be expressly listed. A new Article 9(2) was also introduced, to consolidate in one Article the effects of a choice of law, including on the formal validity of the contract.

*New Article 9(2)*

56. The original Article 9(1) was replaced, in favour of the text of Article 9(2), a new paragraph introduced into the original Article 8. Through this text, the Special Commission intended to emphasise in clear terms that Article 8(1) e) did not “preclude” the application of other “governing” laws: that is, laws that a court or arbitral tribunal would be bound to apply in support of formal validity. The Drafting Committee indicated that it had discussed at length alternate drafting options, such as: whether it was preferable to use the word “governing” as opposed to “any other applicable law” or to use “exclude” instead of “prevent” (later amended to the current form, “preclude”). It was agreed that the Commentary would also provide guidance as to the hierarchy of applying laws to formal validity; that is, specifying what sources of law should be considered, in what order, to assist in supporting the formal validity of a choice of law.

*Damages and interest: Article 9(1) c)*

57. It was noted that there was a discrepancy between the use of the English phrase “damages and interest” and the French “*dommages et intérêts*” in the original Article 8. Despite the apparent linguistic similarity, in legal terms, the French phrase does not extend to a calculation of interest; it is, instead, equivalent to the notion of “damages” in English. The Special Commission agreed with the Working Group’s intention, that interest provisions should not be included in the Principles, as calculating interest is a complex legal field not necessarily governed by the choice of law of the parties. The English text was modified accordingly, by deleting the words “and interest”.

58. It was noted that the practice around the world varies: some French-speaking jurisdictions and the CISG utilise the phrase “*dommages-intérêts*” (with or without a hyphen); and the 2005 Hague Convention on Choice of Court Agreements, and other French-speaking jurisdictions, use the term “*dommages et intérêts*”. It was agreed that the Commentary would record that all these phrases were functionally equivalent, and limited only to damages, not interest.

*Prescriptions and limitation periods: Article 9(1) d)*

59. An observer suggested that referring to “prescription” as well as “limitation periods” was possibly redundant, and not widely used in international instruments. An expert noted, in response, that the term “prescription” was a reference to “liberal prescription”,

a civil law concept. This concept is largely recognised as equivalent to “limitation periods” under the common law. Some reference was made to the French and Spanish versions, as it was noted that the English expression “limitation period” was potentially so broad that its translation into other languages could include several notions such as “*déchéance*” and “*péremption*”. The Special Commission agreed with retaining both “prescription” and “limitation periods”, to ensure that parties’ choices of law would extend to all forms of limitation periods, irrespective of the terminology used. The text thus remained unchanged.

*Burden of proof and legal presumptions: Article 9(1) f)*

60. An expert noted that it would be useful to indicate that a reference to burden of proof should be extended to also include presumptions of law. This proposal received broad support and the addition of the words “and legal presumptions” was approved. In so doing, it was recalled that the concepts of the burden and standard of proof differ between legal jurisdictions, and that burden of proof is generally accepted to be part of substantive rather than procedural law. As a result, the Principles could safely address them as substantive law relating to the contract. It was said that dealing with this issue in a homogenous manner in the Principles would act to strengthen party autonomy. It was agreed that the Commentary would also comment on the few jurisdictions where the issue of burden of proof is considered to be a procedural matter, and, in those instances, the law of the forum and not the chosen law will apply.

## **Preamble**

61. Proposals were introduced to replace the reference to “general rules” with “general principles”, “general guidelines”, or removing the word “general” altogether. It was said that the term “rules” may suggest something in the way of a binding nature, contrary to the design of the Principles. It was agreed that “principles” was most consistent with the nature of the Principles, and that the word “general” should be retained as the Principles did not provide answers to all possible issues relating to a choice of law.

62. Further drafting changes were suggested, such as introducing the words “insofar as possible” in paragraph 3, or replacing the term “applied” by “used” in paragraph 4. The Special Commission agreed that such amendments would not be necessary, as a court will always first apply its own principles of interpretation, and the language was clear and precise in its original form. A suggestion was also made that the Commentary could indicate, for the purposes of interpreting the Principles, that reference should be made to the *1969 Vienna Convention on the Law of Treaties* (“Vienna Convention”). It was agreed that an express reference was not necessary, but that the Commentary would be amended to clearly establish that the Principles, although not formally a “treaty”, are to be interpreted in accordance with the Vienna Convention or any other existing instruments that are in force in a jurisdiction.

63. An expert proposed including an additional phrase clarifying that the Principles affirm party autonomy “to ensure predictability regarding the contract by the consent of the parties on the law that will be applied”. However, it was noted that predictability was only one goal of promoting party autonomy, and that the Working Group had drafted a list containing the advantages of promoting party autonomy, but after considerable discussion preferred the simple and clear drafting of the original Preamble. The Special Commission decided to leave paragraph 1 unchanged in this respect.

## ***F. Other matters***

### **Article 12 – Establishment (new)**

64. The term “establishment” was preferred by the Special Commission to the original term of “place of business”. It was agreed that the term “establishment” would be used uniformly throughout the Principles (see above, paras 27 and 54). To assist in situations where there is more than one establishment, a new Article 12 was agreed upon, which provides that the relevant establishment is the one with the “closest relationship to the contract at the time of its conclusion”.

65. Article 12 was intentionally placed as the final Article, as it was not considered appropriate for a definition to head the Principles, and a definition does not fall within the “scope” provisions of the first Article.

## **IV. CONCLUSION AND FUTURE STEPS**

66. The Special Commission drew to a successful close on the final day, with the unanimous endorsement of the Principles as amended during proceedings. The Chair thanked all participants for their active involvement in proceedings, and noted in particular, the diligent work of the Drafting Committee and those who presented and assisted with drafting proposals throughout the meeting. The Special Commission also expressed its gratitude to the experts who served on the Working Group for their painstaking research and drafting efforts in developing the Principles.

67. The Secretary General noted that the Permanent Bureau would present the amended Draft Principles and Recommendations for the Commentary (both set out in Annex I), and this report, to the April 2013 meeting of the Council on General Affairs and Policy of the Conference. It was noted that if Council approves the Draft Principles, it may provide a mandate to the Working Group to write a draft Commentary on the Hague Principles. The Working Group would then reconvene to complete the draft Commentary, including the issues identified by the Special Commission. The draft Commentary would then be distributed to all Members and observers for written consultation. Subsequently, the Working Group will incorporate the received comments and, with the assistance of the Permanent Bureau, finalise the draft Commentary. At this point, the final draft Principles and Commentary would be submitted to the following Council on General Affairs and Policy of the Conference for approval.