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ÉTUDE DE FAISABILITÉ SUR LE CHOIX DE LA LOI APPLICABLE EN MATIÈRE DE CONTRATS INTERNATIONAUX

RAPPORT SUR LES TRAVAUX EFFECTUÉS ET PLAN DE TRAVAIL SUGGÉRÉ POUR L'ÉLABORATION D'UN FUTUR INSTRUMENT

Note établie par le Bureau Permanent

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FEASIBILITY STUDY ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS

REPORT ON WORK CARRIED OUT AND SUGGESTED WORK PROGRAMME FOR THE DEVELOPMENT OF A FUTURE INSTRUMENT

Note prepared by the Permanent Bureau

Document préliminaire No 7 de mars 2009 à l'intention du Conseil de mars / avril 2009 sur les affaires générales et la politique de la Conférence

Preliminary Document No 7 of March 2009 for the attention of the Council of March / April 2009 on General Affairs and Policy of the Conference

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I. Introduction

1. The adoption of the *Convention of 30 June 2005 on Choice of Court Agreements* by the Hague Conference on Private International Law (the Hague Conference) marked a significant step in the work currently underway to promote party autonomy in international contracts on an international scale. Whereas the above-mentioned Convention guarantees the parties' freedom to choose a jurisdiction, it does not settle the issue of the choice of the applicable law in international contracts. It is this aspect of party autonomy that has been the subject of research by the Permanent Bureau since 2006.

2. Indeed, in 2006 the Permanent Bureau undertook a feasibility study on the development of an instrument on the choice of law in international contracts. Two comparative law studies were carried out: one described and analysed the existing rules generally applied in judicial proceedings[1] and the other focussed on the context of international arbitration.[2] Furthermore, a questionnaire (the "Questionnaire") was sent to the Members of the Organisation, to the International Chamber of Commerce and to a large number of centres and organisations involved in international arbitration. The purpose of this Questionnaire was to explore the current practice as to the use of choice of law clauses and to what extent they are respected as well as to identify possible improvements and any problems and lacunae in the current practice.[3] The responses to the Questionnaire from the three target groups were compiled and analysed in the Follow-up Note drawn up for the attention of the Council of April 2008 on General Affairs and Policy of the Conference (hereinafter "the Council of April 2008").[4]

3. On the occasion of this meeting of the Council, the Permanent Bureau was invited to continue further with the study of choice of law in international contracts between professionals, specifying that this study should focus on promoting party autonomy and on the possibility of drafting a non-binding instrument in this field, examining the form it might take, and working in collaboration with the international organisations concerned and interested experts.[5]

4. Within the framework of the fulfilment of this mandate, this Preliminary Document has a dual purpose. On the one hand it presents an overview of the developments which have taken place since the Council of April 2008 and, moreover, proposes a possible work programme for the development of a non-binding instrument on the law applicable to international contracts.

5. This Note is structured following this dual objective. Part II completes the information submitted for the attention of the Council of April 2008 and brings it up to date with the current juridical situation regarding the law applicable to international contracts, as well as a description of the consultations held by the Permanent Bureau during the year. Parts III and IV then present the preliminary analysis of the Permanent Bureau as to the working method recommended for development of a new instrument, together with a draft of the main issues to be considered during the development process.

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[1] T. Kruger, "Feasibility study on the choice of law in international contracts – overview and analysis of existing instruments", Prel. Doc. No 22 B of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, available on the website of the Hague Conference < www.hcch.net > under "Work in Progress" then "General Affairs".

[2] I. Radic, "Feasibility study on the choice of law in international contracts – special focus on international arbitration", Prel. Doc. No 22 C of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, *ibid.*

[3] "Questionnaire addressed to Member States to examine the practical need for the development of an instrument concerning choice of law in international contracts" of January 2007, drawn up by the Permanent Bureau.

[4] "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, available from the website of the Hague Conference < www.hcch.net > under "Work in Progress" then "General Affairs".

[5] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1 - 3 April 2008), *ibid.*

II. Recent developments in the field of the law applicable to international contracts

A. Introduction

6. In addition to the preparatory work carried out since 2006,[6] this Preliminary Document focuses on the recent developments in comparative law in the field of party autonomy, as well as on the consultations held by the Permanent Bureau since April 2008 to evaluate the need for a new non-binding instrument.

B. Developments in legislation and in case law

7. Party autonomy appears to be progressively gaining ground at the international level, even if there are limitations of variable size and complexity and some lacunae persisting in comparative law.

8. In June 2008, the European Community completed the "communitisation" of the *Rome Convention on the Law Applicable to Contractual Obligations.* Regulation No 593/2008 known as "Rome I"[7] was adopted. After it has entered into force in December 2009, this Regulation will replace the Rome Convention in the Member States of the European Community, except Denmark. In general terms, the Rome I Regulation consolidates the principle of party autonomy and in the absence of choice by the parties, provides a list of rules that are more specific that those contained in the Rome Convention.[8] It is clear that the adoption of the Rome I Regulation by the European Community is a new important factor in the consideration of the usefulness and, where appropriate, the type of instrument which might be developed at the international level on the law applicable to international contracts.

9. In addition, restrictions to party autonomy appear to persist still. This is the case in Latin America, for example. An excellent study on the law of international contracts carried out in Latin America, Portugal and Spain confirms that party autonomy (the ability to determine the applicable law) has limitations depending on the specific subject matter in some Latin American Member States of the Hague Conference.[9] The Inter-American Convention on the Law Applicable to International Contracts of 1994, which establishes the principle of party autonomy, has at present only been ratified by Mexico and Venezuela.[10] Restrictions to party autonomy equally persist in other regions of the world.

10. The differences in admissibility of party autonomy are a challenge for legal predictability in contractual relations at the international level. Despite the continuing growth in intercontinental commercial relations, there is no general global instrument on the law applicable to contracts, which is in contrast to the proliferation of instruments at

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[6] See notably the references to notes 2, 3 and 4 of this document.

[7] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, *OJEU* L 177/6 of 4 July 2008.

[8] For a detailed analysis, see, among the numerous recent publications, R. Wagner, "*Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung)"*, *IPRax* 2008, pp. 377 *et seq.*; B. Ubertazzi, *Il regolamento Roma I sulla legge applicabile alle obligazioni contrattuali*, Milano, Giuffrè Editore, 2008, p. 207; P. Lagarde and A. Tenenbaum, "*De la convention de Rome au règlement Rome I*", *RCDIP* No 4, 2008, pp. 727 *et seq*; F. Marrella, "The new (Rome I) European Regulation on the Law Applicable to Contractual Obligations: What has Changed?", *ICC International Court of Arbitration Bulletin*, Vol. 19, No 1, 2008, pp. 87-107.

[9] C. Esplugues Mota, D. Hargain and G. Palao Moreno (dir.), *Derecho de los contratos internacionales en Latinoamérica, Portugal y España*, Madrid-Buenos Aires-Montevideo, Edisofer-Editorial BdeF, 2008. As example, the chapter on Brazil states that party autonomy is not yet legislative reality in Brazil, such that some case law decisions mention the wish of some judicial authorities in favour of the choice of law in international contracts (pp. 137-138). See the Brazilian draft law which apparently incorporates, by modification of the present Introductory Law to the Brazilian Civil Code of 1942, party autonomy as a connecting factor in the field of contracts. *Cf*. Draft law No 269 of 16 September 2004, *Dispõe sobre a aplicação das normas jurídicas*, available for consultation on the website of the Brazilian Senate: < http://www.senado.gov.br/sf/publicacoes/diarios/pdf/sf/2004/09/16092004/29717.pdf > (last consulted on 16 March 2009).

[10] *Inter-American Convention on the Law Applicable to International Contracts*, signed in Mexico on 17 March 1994, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V) under the auspices of the Organization of American States.

the regional level. The question is to know, beyond the regional rules, whether the Hague Conference is invited to invest effort in encouraging party autonomy through a global instrument which would respond to the expectations of international business operators.

C. Recent consultations with interested parties in the field

11. The Permanent Bureau is attentive to the real needs of international business operators. Since April 2008, the Permanent Bureau has intensified dialogue with parties in the field who are potentially interested by the development of an instrument on the law applicable to international contracts.

12. The Permanent Bureau has been in regular contact with the international organisations working to encourage international coordination of the rules applicable to international contracts.

13. Firstly, the Permanent Bureau would like to thank its "sister" organisations - UNCITRAL and UNIDROIT – for the attention they have given to the multiple questions discussed throughout the year. The Permanent Bureau has benefited from the expertise of UNIDROIT and, in particular, that of the Working Group for the preparation of the third edition of the Principles of International Commercial Contracts. Working methods specifically designed for the development of a non-binding instrument, as well as the interactions between an instrument containing substantive rules and a future instrument on conflict rules applicable to international contracts, were considered. Similarly, the Permanent Bureau and UNCITRAL examined the synergies between the project currently underway at UNCITRAL on the revision of its Rules of arbitration and a future Hague Conference instrument.[11] It is desirable that this dialogue be maintained throughout the subsequent stages of the two projects.

14. Secondly, the Permanent Bureau consulted with the International Chamber of Commerce, the International Bar Association and other organisations involved in international commerce and international dispute resolution so as to better determine which instrument would respond to the practical needs of international business professionals. The Permanent Bureau is very grateful for having been invited to present its project on the occasion of numerous colloquia and seminars organised in these institutions and extends its highly appreciative thanks to the organisers, participants and other speakers for their comments. The ambition of the Permanent Bureau is indeed to associate the interested circles in the development of a future instrument on international contracts.

D. Preliminary conclusions

15. Promoting party autonomy in international contracts, not only at the national and regional levels, but also at the international level, corresponds to a real need for the actors in the field of international commerce. The consultations held within the framework of the fulfilment of the mandate conferred by the Council, and the development of the legislative framework and case law in the field of international contracts, confirm the significance of the almost universal recognition of choice of law in international contracts.[12]

16. In the light of this statement, what might be the contribution of an instrument developed by the Hague Conference? The Permanent Bureau considers that the development of a universal model of conflict rules applicable to contracts would indeed be desirable and therefore proposes some avenues of reflection as to the form and content that such a future Hague instrument in this field might have, as well as a suggested

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[11] For a current overview of the progress of the work, see the recent documents of Working Group II (Arbitration and Conciliation) of UNCITRAL, available from < http://www.uncitral.org/uncitral/fr/commission/working_groups/2Arbitration.html > (last consulted on 16 March 2009).

[12] This is deduced both as much from the responses to the Questionnaire of January 2007 ("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, No 5, p. 4) as from the direct consultations with international commerce practitioners and with the international organisations specialised in this field.

methodology for its development. The Permanent Bureau hopes that this information will be useful for the discussion on the Hague Conference work programme for the coming years (or on the future work programme), as well as for the resources devoted to the different projects currently underway at the Permanent Bureau.[13]

III. Proposed work programme for the development of a future instrument

A. Objectives

17. The main objective of a future instrument would be to establish a global model for conflict rules applicable to contracts. To this end, the work of the Conference would be required to be directed or steered by one leading idea: that of promoting the principle of party autonomy. The choice of law made by the parties would therefore constitute the *leitmotiv* of the future instrument.

18. This has in fact been a popular theme for the Conference for many years as the idea originally arose in 1980.[14] However, after investigative research carried out in 1983,[15] the Members of the Conference felt that the chances of ratification of a Convention on this topic would be very slight.[16] Today, the Conference should be in a position to give this project a new impulse by basing itself on a new methodology.

B. Methodology

19. The methodology to be followed for the future development of the instrument envisaged is intrinsically linked to the form that the future instrument might take. These two aspects will therefore now be discussed in succession hereunder.

Form of the future instrument

20. Although traditionally the Hague Conference only directs work that leads to conventions or protocols, several considerations justify an alternative procedure for the development of an instrument on international contracts.

21. It should be recalled here that international unification by way of instruments less binding than an international convention was already endorsed by the Member States of the Hague Conference in 1980.[17]

22. In addition, the idea of developing a non-binding instrument in view of unifying norms relating to the law applicable to international contracts is not at all a new one. In 1980, a Working Group formed by the Commission on Commercial Law and Practice of the International Chamber of Commerce presented to its National Committees a draft set of Directives on the law applicable to international contracts. At that time, this Commission felt that the disputes between parties in international commercial

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[13] See, for a general view, "Work programme of the Permanent Bureau for the next Financial Year (1 July 2009 – 30 June 2010)", Prel. Doc. No 2 of February 2009 for the attention of the Council of March / April 2009 on General Affairs and Policy of the Conference, available on the website of the Hague Conference < www.hcch.net > under "Work in Progress" then "General Affairs".

[14] Proposal of the Government of the Czech Republic, "Suggestions from certains Governments concerning the future work of the Conference", Prel. Doc. No 10 of January 1980, *Actes et documents de la Quatorzième session*, *tome I*, *Miscellaneous matters,* edited by the Permanent Bureau of the Conference, The Hague 1982, p. I-158, No 18.

[15] See H. van Loon, "Feasibility study on the law applicable to contractual obligations", Prel. Doc. E of December 1983, *Proceedings of the Fifteenth Session*, *tome I*, *Miscellaneous matters*, edited by the Permanent Bureau, The Hague 1986, No 36, p. 98.

[16] *Procès-verbal* No 2 of the First Commission, *Proceedings of the Fifteenth Session*, *tome I, Miscellaneous matters*, edited by the Permanent Bureau, The Hague 1986, pp. 199-200.

[17] "Recognizing that the use of certain methods of less binding effect than international conventions is in certain cases of a kind to promote the easier adoption and more wide-spread diffusion of common solutions, Grants that the Conference, while maintaining as it principal purpose the preparation of international conventions, may nevertheless use other procedures of less binding effect, such as recommendations or model laws, where, having regard to the circumstances, such procedures appear to be particularly appropriate." Final Act of the Fourteenth Session (25 October 1980), *Actes et documents de la Quatorzième session*, *tome I, Miscellaneous matters*, edited by the Permanent Bureau, The Hague 1982, p. I-63.

relationships "often give rise to questions concerning the law applicable to contracts" and "found it appropriate to recommend to arbitrators to consider the [envisaged] conflict rules for cases where the applicable law to contracts is in issue".[18] Although this idea was not considered further at the time, and its scope was limited to arbitration, it would now appear to be a suitable time, three decades later, to continue the work undertaken then, extending it to judicial litigation in international commerce.

23. Furthermore, the positive experiences of other organisations such as UNIDROIT or UNCITRAL in the field of international commerce justify embarking on such a route. It cannot be denied that the Principles, Model Laws and Good Practice Guides developed by these international organisations benefit from high credibility and usefulness ratings among the interested parties in the field. Strongly encouraged by this statement, the Hague Conference would appear to be called to put its reputation and its 115 years of experience to the benefit of the consolidation of conflict rules for contracts.

24. Other arguments also call for the need for a non-binding instrument. To begin with, it is today almost impossible to obtain a voluntary agreement on the part of States on the necessity of a binding instrument. Many States, already bound by a regional instrument, do not feel the need to invest their efforts in a project of international proportions. They also feel that some specific substantive law conventions are sufficient to regulate any problems that may arise. However, it could be that the development of a non-binding instrument constitutes a preliminary stage which, in a more distant future, might facilitate the adoption of a veritable international convention on this topic within the Hague Conference. In other words, the adoption of a non-binding instrument could form part of a convention process aimed at identifying the rules on which a convention on the choice of law could be considered.

25. Secondly, an instrument of this type could be developed initially without the restrictions and compromises that are inherent to treaty negotiation. Hence, the instrument would progressively evolve outside a conventional setting, thanks to the objectivity and scientific quality of the experts involved together with the solutions retained. Furthermore, the absence of any obligatory force of the future instrument would avoid all risk of conflict of norms. For example, there would be no direct interference with the Rome Convention[19] or with the Rome I Regulation within the European Community, or with the Hague Conventions on the Law Applicable to Agency, to Contracts for International Sales, or to Securities held with an Intermediary.[20] In fact, the vocation of the future instrument would be principally to become a constant source of inspiration for the progressive development of uniform rules in the field of the law applicable to international contracts.

Proposed working method

26. If the Council confirms its preference for a non-binding instrument, an *ad hoc* working method is required. Based on information collected regarding experience, it seems that the method used by UNIDROIT for the development and the reform of the UNIDROIT Principles of International Commercial Contracts is appropriate for the development of a parallel instrument in the field of the law applicable to international contracts.

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[18] O. Lando, "Conflict-of-Law Rules for Arbitrators", *Festschrift für Konrad Zweigert zum 70. Geburtstag,* J.C.B. Mohr (Paul Siebeck), Tübingen, 1981, p. 157.

[19] Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, entry into force: 1 April 1991, JOCE No C 27 of 26 January 1998, p. 34.

[20] *Hague Convention of 14 March 1978 on the Law Applicable to Agency*; the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*; and the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*.
See also para. 25 *in fine* below, as to the articulation of the future instrument with the "*acquis*" of the Hague Conference on contractual matters.

27. More specifically, the Permanent Bureau is considering the creation of a Working Group which would include a variety of experts from the field, representing the principal legal systems present at the international level. Under the supervision of the Permanent Bureau, the Working Group could meet several times in order to debate and draft a text which would contain a coherent set of rules relating to the choice of law in international commercial contracts. Once the drafting stage has been completed, it would be desirable to consult the Hague Conference Members and then to submit the text to the Council.

28. It could also be envisaged that a Special Commission meeting be convoked to enable the Members of the Hague Conference to examine the instrument. Despite the non-binding nature of the future instrument, its discussion during a Special Commission meeting would be justified by a possible role for the adopted instrument as legislative model for legislators of countries where regulation of the law applicable to international contracts does not exist, is fragmentary, or is simply awaiting reform.

IV. Possible draft future instrument

29. In accordance with the methodology proposed above, the progressive development of the future instrument, together with the central discussion of its form and substance, should be mainly conferred on the future Working Group which, with the assistance of the Permanent Bureau, would develop the text of the future instrument. At this very preliminary stage, the Permanent Bureau wishes to raise here only a few avenues of thought regarding the issues that will have to be considered during the development of the future instrument.

A. Aim and form of the instrument

30. As has already been evoked, the principal aim of the proposed instrument will be to establish a global model for conflict rules applicable to contracts. The instrument will in this way serve as a source of inspiration for professionals in the field of international commerce, whether they be drafters of contracts, business lawyers, arbitration litigation specialists or company legal professionals. As international arbitrators are moreover particularly able to assimilate a body of non-binding principles in the decision-making process, the immediate challenge for the proposed instrument will be to meet the expectations of this group. However, a non-binding instrument will not be applied directly by State courts because, as soft law, it will not form part of the legal order of the forum. The Permanent Bureau is perfectly aware of this restriction. However, from a strategic point of view, it could be envisaged that the instrument be used later as a source of inspiration for future binding instruments, whether at the national, regional or international level.

31. On the basis of a comparative study of soft law instruments, the Permanent Bureau feels that the instrument should take the form of a compilation of rules formulated in a similar way to “black letter rules” and accompanied by comments and illustrative examples which contribute to the comprehension of each rule.

32. This form is moreover chosen, among others, by the American Law Institute for the Restatements, or for its recent compilation on intellectual property (Principles of the Law, Intellectual Property, Principles Governing Jurisdiction, Choice of law, and Judgments in Transnational Disputes, 2008), or by UNIDROIT (UNIDROIT Principles of International Commercial Contracts).[21]

B. Scope of the instrument

33. As mentioned above, the mandate granted consists in examining the question of the law applicable to international commercial contracts. Application of the future

[21] In the same manner, one of the reference works in private international law, *Dicey and Morris Conflict of Laws,* follows a similar structure where the rule is announced and then followed by commentary, illustrative examples where necessary, and references to case law in the footnotes.

instrument will therefore depend on the existence of two elements: these are first the international character of the contract, and second, its commercial character.

34. The international contract is generally defined as a contract which possesses links with several legal systems. This can arise from the fact that the contracting parties are habitually resident in different States or that the place(s) of execution do(es) not coincide with the place where the contracting parties reside, etc.

35. It would therefore appear to be appropriate for the future instrument not to impose any specific criteria to define the international character of the contract.[22] Beyond this, the widest interpretation possible would be recommended so as to only exclude contracts for which all the elements of the contractual situation are located in one and the same country.

36. The limitation to commercial contracts (or contracts concluded between professionals) is in no way aimed at relaying the traditional distinction that exists in some legal systems between civil and commercial transactions.[23]

37. Despite a substantive scope which is wide *a priori*, it remains to be examined whether some contracts should not be completely excluded from the future instrument, or whether they should be the subject of specific provisions in this future instrument. For example, it would be relevant to raise this question for consumer contracts and employment contracts, which are subject to special rules, the majority of which are mandatory and aimed at protecting the consumer and employee respectively. More generally, the existence of a means of negotiation which is manifestly unbalanced between the parties could justify the exclusion or modulation of the future instrument's application.[24] Take, for example, the case of young authors or singer-songwriters who are ready to sign the first contract proposed to them by a publishing house or a record company. If this exclusion of the scope were to be considered, the concept of unbalanced power of negotiation should be interpreted in a restrictive manner.[25]

38. More generally, it remains to be determined whether parallel solutions to those included in the Hague Conventions on contractual matters should prevail or, on the contrary, whether any future debates on the instrument will deal with aspects already examined and decided upon in the context of these Conventions.

C. Freedom of choice by the parties

39. True to the objective of promoting party autonomy, development of the new instrument should be guided by a strengthening of the choice of law in international contracts.

40. A choice of law clause in the contract will without doubt be possible, and even encouraged by the future instrument. In this regard, it should be recalled that

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[22] See, in this respect, the notion of the "international character" of a situation used in Art. 3 of the *Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*.

[23] Compare, in connection with the criterion of definition of international commercial law, "Care should be taken here not to project the definition of domestic 'commerciality' onto the international relationship. The scope of international 'commerciality' is much wider. It unreservedly includes fields of activity that are qualified in domestic law as 'civil'", J. Béguin and M. Menjucq (dir.), *Droit du commerce international*, Litec Paris 2005, No 4, p. 5 [translation by the Permanent Bureau].

[24] For a definition of the weaker party, see, for example: "Rather than a permanent and invariable state of one of the contracting parties, valid whatever the personality of his or her partner, the position of weakness expresses a rupture of the balance between the parties to the contract, a disparity in the strength of the forces present within the contractual relationship.", F. Leclerc, *La protection de la partie faible dans les contrats internationaux*, Bruylant, Brussels, 1995, No 2 p. 2 [translation by the Permanent Bureau]; *adde*, P. Mayer, "*La protection de la partie faible en droit international privé*", *La protection de la partie faible dans les rapports contractuels : comparaisons franco-belges*, BDP tome 261, LGDJ Paris, p. 513.

[25] Compare, for example, with the protective measures provided in Section 315 of the "ALI Principles on Transnational Intellectual Property Disputes" for standard forum contracts of transfer or license of intellectual property rights.

development of this instrument responds to a real need to strengthen party autonomy at the international level.[26]

41. It must nevertheless be recognised that where the freedom of choice of law appears progressively to be won in international commercial relations, the big challenge will be to identify the extent and possible limitations of this freedom. In this regard, important questions will nevertheless have to be examined during development of the instrument such as the suitability of admitting the parties' ability to choose a set of non-State rules, such as the UNIDROIT Principles,[27] or the admission of the implicit choice of law.[28] To settle these questions, the future Working Group shall have to take into consideration both the rules applied by State courts and specific international arbitration rules.

D. Rules in the event of no choice by the parties

42. In order to cover those contracts which do not include a choice of law, the future instrument should provide rules which will be subsidiary with regard to the principle of party autonomy. These rules might serve notably as reference for arbitrators faced with a question of applicable law when the parties have not designated one.[29] The Permanent Bureau is conscious of the difficulty in adopting rules in the absence of a choice of law but feels, however, that the value gained by a complete instrument (aimed at both contracts with and without choice of law clause) merits the inclusion of subsidiary rules in the future instrument.

43. The questions to be examined might be multiple, depending on the case. For example, initially it would be necessary to decide whether an introductory *chapeau* might be useful to mention that the applicable rule in the absence of choice would be the law which presents the closest links with the contract. The suitability of a number of connecting factors which would be valid for each main type of commercial contract would then have to be considered.[30] Finally, the formulation of these connecting factors would have to be considered, as well as the possibility of an exception clause which would take priority over the specific connecting factors.

E. Other

44. In order for it to produce results, the future instrument would naturally have to provide reference points relating to residual questions on the law applicable to contracts, such as the exclusion of *renvoi*, or the inclusion of the public policy exception or of a specific provision on mandatory rules.

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[26] See the Conclusions and Recommendations adopted in 2008 by the Council on General Affairs and Policy of the Conference, cited above, note 5.

[27] This question is currently under discussion within UNCITRAL by the Working Group undertaking reform of its Arbitration Rules (Draft revised version of the UNCITRAL Arbitration Rules, Note by the Secretariat No A/CN.9/WG.II/WP.151/Add.1 (in particular the comments relating to Art. 33 of the Arbitration Rules), available for consultation from < www.uncitral.org >. This question was the subject of intense debates during negotiation of the Rome I Regulation. Art. 3 of Rome I leans towards a refusal of an applicable law clause in favour of non-State rules.

[28] See, for example, American Law Institute, *Restatement of the law, Second*, ALI publishers St. Paul 1971, Vol. 1, § 187, according to which: "[…] even when the contract does not refer to any state, the forum may nevertheless be able to conclude from its provisions that the parties did wish to have the law of a particular state applied. So the fact that the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular state may provide persuasive evidence that the parties wished to have this law applied. On the other hand, the rule of this Section is inapplicable unless it can be established that the parties have chosen the state of the applicable law. It does not suffice to demonstrate that the parties, if they had thought about the matter, would have wished to have the law of a particular state applied." See, for a recent application in Texas, *Sonat Exploration Co. v. Cudd Pressure Control, Inc.*, 271 S.W. 3d 228 Tex, 2008.

[29] For an overview of the different methods used in arbitration, see O. Lando, "Conflict-of-Law Rules for Arbitrators", cited above, note 18, pp. 164-169.

[30] Compare with Sections 189 to 197 of the *Restatement Second*, as described by S. Symeonides, in *American Private International Law*, cited above, No 490, pp. 226-227. The reference to a list of special contracts is also used within the European Community, notably in Art. 4 of the Rome I Regulation. For the context surrounding the adoption of this Regulation, see R. Wagner, cited above, note 28, pp. 381 *et seq*.

V. Conclusions

45. The usefulness of an international instrument on the choice of law in international contracts is outlined by the preparatory work and consultations which have been carried out by the Permanent Bureau of the Hague Conference over many years. Party autonomy in international contractual relations would be greatly strengthened by the adoption of such an instrument.

46. If, as the Permanent Bureau hopes it will, the Council on General Affairs and Policy of the Conference authorises the continuation of the work and pronounces its position on the specific format of the instrument as well as on the method of its development, the future considerations within the Working Group could begin on the basis of the proposals contained in this document with regard to the form and the content of the future instrument.

47. Taking into account the above, the Permanent Bureau proposes that the Council might envisage adopting a Conclusion formulated as follows:

– The Council invites the Permanent Bureau to continue its work on promoting party autonomy in the field of international commercial contracts. In particular, the Permanent Bureau is invited to 1) form a Working Group with experts in the fields of private international commercial law, international commercial law and international arbitration law and 2) to facilitate the progressive development of a draft non-binding instrument within this Working Group.

– The Permanent Bureau is invited to draw up a report on the state of progress of this work for the attention of the Council of 2010.