Trabajo publicado en: *Uniform Law Review-Revue de Droit Uniforme*, n° 4, 2012, pp. 655-679 (versión actualizada de "La autonomía de la voluntad, ¿un cheque en blanco?", en *El derecho internacional privado en los procesos de integración regional*, Diego P. Fernández Arroyo / Juan José Obando Peralta (Coordinadores), Jornadas de la ASADIP 2011, San José, Costa Rica, 24-26 de noviembre, ASADIP / Editorial Jurídica Continental, 2011, pp. 67-92).

Party Autonomy –a Blank Cheque?

Cecilia FRESNEDO DE AGUIRRE *

I. – WORK ON INTERNATIONAL CONTRACTS AT THE HAGUE CONFERENCE – ITS UTILITY AND THE OBSTACLES TO BE OVERCOME

1. ORIGINS AND PRESENT STATE OF WORK

The Hague Conference on Private International Law has, at the request of its Council on General Affairs and Policy, been studying the feasibility of developing an instrument in the field of international commercial contracts (hereinafter: the "draft/proposed/future Hague Principles") since 2006. The aim of its work is to promote party autonomy, in response to the observations made by international Organisations such as UNCITRAL on the need to consolidate the principle of choice of the applicable law at a global level.[1]

* Doctor of Law and Social Sciences, University of the Republic (Uruguay); full Professor of Private International Law, Uruguayan Catholic University; Assistant Professor, University of the Republic; UNIDROIT correspondent; Vice-President of ASADIP; Academic Secretary, Uruguayan Institute of Private International Law.

This article is an updated version of the paper submitted to the 2011ASADIP Meeting, entitled "La autonomía de la voluntad, ¿un cheque en blanco?" and included in *El derecho internacional privado en los procesos de integración regional*, San José, Costa Rica, ASADIP-Editorial Jurídica Continental (2011), 67-92.

1 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, "Elección de la ley aplicable a los contratos del comercio internacional. ¿Principios de La Haya?", in: J. Basedow / D.P. Fernández Arroyo / J. Moreno Rodríguez (coord.), *¿Cómo se codifica hoy el derecho comercial internacional?*, Asunción, CEDEP / Thomson Reuters / La Ley Paraguaya (2010), 341-363, 342.

Progress has been made in this matter. A first draft instrument was issued after the second meeting of the Working Group on Choice of Law in International Contracts (hereinafter: the Working Group), held from 15-17 November 2010, followed by a second draft after the Group's third meeting in June 2011.[2] The Council on General Affairs and Policy of the Conference, at its session held from 17 to 20 April 2012, "decided to establish a Special Commission to discuss the proposals of the Working Group and make recommendations as to the future steps to be undertaken." That Commission is to be convened before the end of 2012.

2. SUPPORT FOR THE PROPOSED HAGUE PRINCIPLES

The Uruguayan Institute of Private International Law (UIPIL) acknowledged the pertinence and usefulness of the task undertaken by the Hague Conference in a document approved at its plenary session of 23 March 2011 and submitted to the Asociación Americana de Derecho Internacional Privado (*American Association of Private International Law* – ASADIP) and the Hague Conference. That UIPIL backing had my full support at the time and it still does.

3. OVERCOMING RESISTANCE AGAINST PARTY AUTONOMY AND POSSIBILITIES TO BE EXPLORED

The UIPIL document stated that even if the Hague Conference achieved consensus on the proposed instrument, there is no guarantee that this will actually change the existing situation, since recognition of the principle of party autonomy differs from State to State.[3] This *de facto* situation may be difficult to unblock unless those States that resist party autonomy have a change of heart.

2 Full information regarding the drafting process is available on the Conference web site: <http://www.hcch.net>. The draft instrument agreed to at the second meeting of the Working Group is published as Annex IV in Prel. Doc. Nº 6 (Feb. 2011), "Choice of Law in International Contracts. Development process of the Draft Instrument", drawn up by the Permanent Bureau. The text of the draft instrument agreed to at the third meeting may be found in Annex I of Prel. Doc. Nº 4 (Jan. 2012).

3 Prel. Doc. Nº 6 (Feb. 2011), para. 20. Although I write this opinion from the Uruguayan point of view, it must be pointed out that Uruguay is not the only country to persist in its resistance to broad acceptance of party autonomy. On the contrary, resistance would seem to be even more widespread in Brazil. (I could not find the original of this citation. I would rather eliminate it.) See, in this connection, the Report of the Reporter of Commission II, Dr Ronald Herbert (Doc. OEA/Ser.K/XXI.4, 103).

My personal view is that, in order to achieve universal acceptance of the draft Hague Principles, our efforts should focus on finding solutions guaranteed to allay scepticism in regard of the text. It will not be enough only to guarantee, as the Hague Conference always does, the objectivity and scientific credentials of the experts involved and the soundness of the solutions adopted,[4] or to remedy any lack of information on the part of some States regarding the contents of the instrument. Nor will it suffice simply to overcome States' resistance to change and "modern" solutions.[5]

As I have stressed in previous articles,[6] I believe that the extent to which party autonomy is accepted stands in direct relation to the clash between strong, and opposing, commercial and economic interests.[7]Rather than dwell on this aspect here, I will focus on the values that should be taken into account when drafting any rule in this area. As Professor Opertti Badán wisely remarked in the June 2011ASADIP meeting in Asunción, referring to the established fact that party autonomy is still to some extent rejected in Latin America and to the reasons for that rejection, party autonomy cannot be judged purely from a technical standpoint because it puts values at stake. That is why we cannot give a blank check to party autonomy.

The values involved include guaranteed access to justice, which can be hindered in some cases precisely because of the parties' choice-of-forum clauses, and also, at times, bytheir choice-of-law clauses. We should also take into account the principle of good faith and fair dealing in international

4 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 347.

5 J. MORENO RODRÍGUEZ, "Los contratos y La Haya: ¿ancla al pasado o puente al futuro?, in: Basedow / Fernández Arroyo / Moreno Rodríguez (coord.), *supra* note 1, 245-339, 319, citing E. Hernández-Bretón.

6 C. FRESNEDO DE AGUIRRE, *La autonomía de la voluntad en la contratación internacional*, Montevideo, Fundación de Cultura Universitaria (1991), 124, 127-132, and *Idem*, "La autonomía de la voluntad en la contratación internacional", in: Comité Jurídico Interamericano, Secretaría General, OEA, *Curso de Derecho Internacional, XXXI* (2004), 323-390, 387.

7 This indisputable fact was recognised by H. MUIR WATT in an excellent article, "El equilibrio económico en los acuerdos de elección de foro", in: Basedow / Fernández Arroyo / Moreno Rodríguez (coord.), *supra* note 1, 129-150, where she concludes with a statement with which I concur and consider can be extended to choice of law, even though it refers to party autonomy in the choice of forum: "The starting point, then, consists in weighing up the different interests at stake and then in trying to achieve a more balanced regulation on the choice of forum by the parties." (The original is in Spanish; I translated it into English) The point is, how do we achieve this praiseworthy goal, at a time when legislative and jurisdictional tasks appear to be more and "privatised"?

contracts(Article 1.7 of the UNIDROIT Principles of International Commercial Contracts (hereinafter: the UNIDROIT Principles)), the need to achieve the ultimate goal of substantive justice in the case at hand (contemplated, among others, in Articles 2.1.19 to 2.1.22 of the UNIDROIT Principles, referring to contracts with standard clauses, surprising stipulations, conflict between standard and non-standard clauses, and battle of forms, as well as in Articles 3.10 (gross disparity), 4.6 (*contra proferentem* rule) and 7.1.6 (exemption clauses).[8]

If the draft Hague Principles succeed in guaranteeing that party autonomy will not invite abuse by the more powerful contract party,[9] they may indeed be welcomed also in those circles that are still resistant to the notion of party autonomy. José Moreno Rodríguez [10]points out that party autonomy may lead to abuses against the weaker contract party, and that this has historically been the argument raised to justify its rejection in Latin America, adducing the region's relatively fragile economies compared to those of its northern neighbours. While no doubt true, this is a difficulty that could be overcome if party autonomy were recognised within an adequate regulatory framework guaranteeing respect of fundamental values and principles based on the public interest and enshrined in supranational instruments on human rights.

II. – COMMENTS TO THE DRAFT HAGUE PRINCIPLES [11]

1. FORM OF THE INSTRUMENT

The proposal to elaborate a soft law instrument, structured along the lines of the UNIDROIT Principles, *i.e.*, a set of black letter rules supplemented by comments and illustrations to assist in their interpretation,[12] seems to me an

8 Regarding the UNIDROIT Principles, see the commentaries in C. FRESNEDO DE AGUIRRE, "De la conveniencia práctica de tener en cuenta los Principios de UNIDROIT sobre los Contratos Comerciales Internacionales en el ámbito jurídico uruguayo", in: *Estudios Jurídicos*, Nº 3 (2007), publication of the Law Faculty of the Universidad Católica del Uruguay, 123-162,and *Idem*, *Curso de Derecho Internacional Privado*, T. II, Vol. 2, Montevideo, Fundación de Cultura Universitaria (2009), 184-213.

9 F. POCAR, "La protection de la partie faible en droit international privé", in: *Recueil des Cours*, T. 188 (1984), 340-417, 361, refers to thisrisk as follows: "*On a remarqué que c'est justement l'autonomie des parties qui permet en premier lieu une possibilité d'oppression du faible par le fort*."

10 MORENO RODRÍGUEZ, *supra* note 5, 335 and FRESNEDO DE AGUIRRE, *supra* note 6.

11 Adopted by the Working Group on Choice of Law in International Contracts at its third meeting (28-30 June 2011).

12 Doc. Prel. Nº 6 (Feb. 2011), para. 15 and Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 4.

interesting and appropriate one. The non-binding instrument would differ from the UNIDROIT Principles in that it would also contain conflict rules, not (just) substantive rules, which could work perfectly well together.

However, the matter of the form of the instrument has not yet been definitively settled, the Hague Conference Council having decided at its last meeting (17-20 April 2012) that the Special Commission to be convened before the end of 2012 would discuss, among other issues, "the form of the non-binding instrument and the process through which the commentary shall be completed."

As stressed by the Working Group, the draft Hague Principles adopted in June 2011 are currently presented as "black letter rules" only. I strongly support the Group's view "that the Principles would very much benefit from a Commentary that would provide them with a context, and offer practical examples." [13]

2. PREAMBLE OF THE INSTRUMENT

In respect of paragraph (3) of the 2010 draft Preamble,[14] I believe the alternative wording in brackets [15]to be more appropriate, since it addresses the vexed question of whether conflict party autonomy is a "principle" or a legislative authorisation, which can be the rule or the exception, depending on the respective legal order.[16] This disparity was detected by the Hague Conference early on, in its preliminary studies on the matter. Language addressing the issue more cautiously, with due respect for both positions, such as the text in brackets –which does not qualify party autonomy as a principle – would surely enhance the instrument's chances of acceptance. However, the June 2011 version of the draft Principles states in paragraph (1) of the Preamble: "They affirm the principle of party autonomy with limited exceptions."

13 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 5.

14 "They affirm the principle of 'party autonomy', according to which the parties are free to choose the law or rules of law governing their contract." (Nov. 2010 draft version)

15 "They affirm the fundamental importance of party autonomy meaning the freedom of the parties to choose the law applicable to the contract that is subject to certain limitations."

16 This issue was intensively discussed at the ASADIP meeting in Asunción (Paraguay) on June 8, 2011, on the eve of the CLA. (CLA stands for "Conferencia Latinoamericana de Arbitraje". You can find more references to it at www.asadip.org Perhaps it can be translated as "Latin American Arbitration Conference".)

Paragraphs (2), (3) and (4) of the 2011 version of the Preamble are similar to some paragraphs in the UNIDROIT Principles and set forth important potential uses of the proposed Principles by the legal community.

3. SCOPE OF THE PROPOSED HAGUE PRINCIPLES (ARTICLE 1)

For the proposed Hague Principles to be applied, three elements mustbe present:[17] the existence of a contract, its international character and its commercial nature.

(A) INTERNATIONAL CHARACTER OF THE CONTRACT (ARTICLE 1(1) AND 1(2))

In order to define the international character of the contract, the Working Group opted for a negative formulation, so as to exclude only those situations involving no international element, such as contracts connected with one State only.[18] I went along with this proposal, but in the earlier version of this paper [19]I did point to theneed to take into account the criterion stated in Article 1(2) of the *Inter American Convention on the Law Applicable to International Contracts* (CIDIP-V, Mexico, 1994) (hereinafter: the 1994 Mexico Convention), which specifies generally recognised, concrete criteria to determine the international character of the contract: the parties should have their habitual residence or establishments in different States Parties, or if the contract has objective ties with more than one State Party. (The official English text of Article 1(2) in the OAS web page is: "It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party."). It is an alternative requirement, not an accumulative one. To some extent, these ideas were taken up in the 2011 version of the proposed Hague Principles.[20] The Working Group took the view

17 Prel. Doc. Nº 6 (Mar. 2010), *Choice of Law in International Contracts. Report on Work carried out and Perspectives for the Development of the Future Instrument*, Note submitted by the Permanent Bureau, para. 20.

18 Prel. Doc. Nº 6 (Mar. 2010), fn. 18, paras. 20-22.

19 See *supra*, asterisked footnote.

20 Art. 1(2) of the 2011 version states that "For the purpose of these Principles, (i) a contract is international unless the parties have their places of business in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State; (ii) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having

that the idea was to "exclude only entirely domestic contracts" from the scope of application of the proposed Principles.[21]

(B) COMMERCIAL NATURE OF THE CONTRACT (ARTICLE 1(1))

As to the issue of limiting or not limiting the scope of application of the proposed Principles to contracts of a commercial nature, the Working Group decided that the proposed Principles "will apply only to commercial contracts involving business-to-business transactions." [22]

(C) EXCLUSION OF EMPLOYMENT AND CONSUMER CONTRACTS (ARTICLE 1(1))

As a logical consequence of the requirement that contracts must be of a commercial nature in order to fall within the proposed Principles' scope of application, employment and consumer contracts do not qualify for inclusion since they are generally considered not to possess that commercial nature. The reason why the Working Group argued for the exclusion of such contracts was that they "are subject to specific rules, many of which are mandatory, designed to protect the consumer and employee."

While this is the customary solution in these matters, it is not necessarily the only solution, as will be seen below.

(D) OTHER POSSIBLE EXCLUSIONS ON SUBSTANTIVE GROUNDS

As I have previously suggested,[23] speaking not only from a personal conviction but also bearing in mind the UIPIL point of view and the exclusions contemplated in Articles 5 and 6 of the 1994 Mexico Convention, other formulae could also achieve a consensus. The exclusions in Article 2 of the *Buenos Aires Protocol on International Jurisdiction in Contractual Matters* (Mercosur, CMC/Dec. 1/94, de 6/4/1994) (hereinafter: Buenos Aires Protocol) and Article 2 of the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter: Choice of Court Convention) are a case in point, even

regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract."

21 Prel. Doc. Nº 4 (Jan. 2012), Annex III, para. 11.

22 *Ibidem*, para. 10. Art. 1(1) states: "These principles apply to choice of law in international contracts entered into by two or more persons acting in the exercise of their trade or profession." See also Prel. Doc. Nº 6 (Mar. 2010), Annex III, (ii).

23 In the earlier version of this article (see *supra*, asterisked footnote).

though the latter refer to choice of forum, whereas the proposed Hague Principles deal with choice of law. That said, as pointed out by the Permanent Bureau of the Hague Conference:[24] if we consider "the existing relationship between jurisdictional competence and applicable law, the proposed Hague Principles are coherent with the Hague Convention of 30 June 2005 on Choice of Court Agreements."

Whether or not certain types of contract are excluded from the proposed Hague Principles' scope of application, the principle of the specialty of the law will always apply. Thus, contracts that have been ruled by special provisions will fall into the scope of application of these provisions, without prejudice to the role that the proposed Hague Principles – as well as the UNIDROIT Principles – might play, be it complementary or subsidiary, in their regulation.

(E) UNEQUALNEGOTIATING POWER: EXCLUSION ORADEQUATETREATMENT?

It seems to be a generally accepted premise, even for fervent defenders of party autonomy, that "in cases of abusive advantage arising from contractual disparities, the State's intervention is advisable." [25] Differences arise when it comes to identifying the cases in which such "contractual disparities" [26] exist and finding remedies to neutralise them and restore the necessary fair balance between the contracting parties. I would argue that contractual disparities develop not only in consumer and employment contracts, but also in contracts entered into by businessmen,[27] and that international public policy and mandatory rules are not sufficient by themselves to remedy a lack of balance.

The Permanent Bureau of the Hague Conference has addressed the issue as to whether the existence of manifestly unequal negotiating power between

24 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 345, fn. 10.

25 MORENO RODRÍGUEZ, *supra*note5), particularly 307-308, 246*in fine*, and 335 (translation by the author of this article).

26 *Cf.* F. POCAR, *supra* note 9, 362. The author wonders which are the contracts requiring particular protection of the weaker party, and confesses to being at a loss to provide a one-size-fits-all answer, since it "*dépenddansune large mesure de la politiquelégislative de chaqueÉtatdans le domaine social et économique*" (at 368). I fully concur.

27 FRESNEDO DE AGUIRRE, *supra* note 6, 110-111 (first part), and 377 (second part). In this sense, POCAR, *supra* note 9), 370, mentions as an example of a provision that protects the weaker party, not because that party is a consumer but because of the way in which the contract is entered into – by way of general conditions –, paras. 10 and 12 of the Germanlaw on Standard Business Terms (*GesetzzurRegelung des Rechts derallgemeineGeschäftsbedingungen*) of 9December1976 "*… règlent le choix de la loi applicable et fixent le domaine d'application de la loi quant à n'importe quel contrat conclu au moyen de conditions générales*."

contract parties might justify exclusion of the application of the draft Hague Principles.[28] In my view, it would be better not to impose such a general exclusion, and rather to include provisions in the proposed Hague Principles capable of neutralising or correcting imbalances, and preventing abuse of the weaker party by the stronger party. The Working Group might draw inspiration from the relevant solutions offered by other instruments. A framework provision OK]making such abuse by means of party autonomy impossible might thus be included in the proposed Hague Principles.

For example, Article 4 of the Buenos Aires Protocol enables parties to choose a jurisdiction, "… provided that this agreement has not been obtained abusively."[29] Likewise, the *Inter American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments* (CIDIP-III, La Paz, 1984) provides in its Article 1(D) that the forum choice is valid "… provided that such jurisdiction was not established in an abusive manner and had a reasonable connection with the subject matter of the action." Commenting on the requirement in the latter text that an agreement may not be made in an abusive manner (to prevent the stronger contract party imposing its jurisdiction on the weaker party), Professor Solari[30] has stated that "[t]he tendency thus followed is the contemporary one, which leaves aside the competence prorogation if it was achieved on unbalanced grounds of the parties." And he adds: "… the understanding was that those cases where an actual negotiation capacity was absent had to be excluded from the scope of party autonomy."[31][Are these official translations?]. NO, I translated it myself, sorry.

I take the view that, always bearing in mind that the Jurisdiction Convention refers to indirect competence whereas the future Hague Principles refer to the law applicable to contracts, the solutions adopted in the inter-American sphere, which aim at avoiding the potentially adverse effects of unrestricted party autonomy, could usefully be taken into account by the

28 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 349.

29 The full text is as follows: "In disputes that arisein international contracts concerning civil or commercial matters, the courts of the State Party to whose jurisdiction the contracting parties have agreedin writing to submit, shall have jurisdiction, provided that thisagreement has not been abusively obtained." (I translated the original in Spanish)

30 M. SOLARI BARRANDEGUY, *Pactos Procesales de La Paz*, Montevideo, Fundación de Cultura Universitaria (1986), 50.

31 See other examples of legal and jurisprudence limitations on party autonomy in FRESNEDO DE AGUIRRE, *supra* note 6, 83-88 (first part), and 359-362 (second part).

Working Group in devising widely acceptable formulae and advancing towards the Hague Conference's goal of achieving universal recognition of party autonomy.

My contention to the effect that rules able to neutralise or correct imbalances with a view to preventing the party with the greater bargaining power to abuse the weaker party should be included in the proposed Hague Principles springs from a conviction that acceptance of conflict party autonomy assumes and implies the actual and effective existence of freedom to negotiate and to choose the law by both parties, and the need to avoid abusive impositions from one party on the other. The risk of abuse exists not only in international consumer and employment contracts, as is frequently pointed out, but also in all those contracts where a contract party's only freedom consists in deciding whether or not to adhere to general conditions unilaterally pre-established by the other party.[32] We should never lose sight of the fact that, as Fausto Pocar points out, party autonomy potentially puts the weak at risk of oppression by the strong.[33]

(F) OTHER ISSUES EXCLUDED FROM THE SCOPE OF APPLICATION (ARTICLE 1(3))

The 2010 version of the draft Hague Principles states that the Working Group will further examine whether certain issues such as arbitration, choice of forum agreements and capacity should or should not be excluded from the material scope of application of the proposed Principles.

I argued in the earlier version of this paper [34] that it would probably not be necessary to include rules on arbitration since special provisions already exist

32 Twenty years ago I stated, in FRESNEDO DE AGUIRRE, *supra* note 6, 102 (first part): "There are many cases where a party to the contract is not a consumer but a businessman, not an individual but a corporation, not ignorant but someone who perfectly understands the conditions included in the contract, yetcannot negotiate different conditions or word the agreement differentlybecause they [who?] the conditions are all the same in that field[???]See also FRESNEDO DE AGUIRRE, *supra* note 6, 370 (second part), and D. OPERTTI BADÁN / C. FRESNEDO DE AGUIRRE, *Contratos Comerciales Internacionales. Últimos Desarrollos Teórico – Positivos en el Ámbito Internacional*, Montevideo, Fundación de Cultura Universitaria (1997), particularly at 56-60.

33 Again, POCAR, *supra* note 9, states (at362): "… *la protection du faible doit tout premièrement consister, tant en droit matériel qu'en droit international privé, dans une restriction de la liberté de la partie la plus forte de déterminer la réglementation du rapport contractuel, dans la mesure nécessaire à compenser le déséquilibre existant entre les parties et à éviter qu'une d'elles puisse s'en prévaloir pour opprimer l'autre*."

34 See *supra*, asterisked footnote.

that deal with the matter. On the other hand, it would be useful to include clear rules on forum selection agreements, since these are key when addressing two issues: first, the need to guarantee access to justice, and secondly, the need to guarantee that the fundamental role reserved for mandatory rules of the forum makes sense. As for capacity to contract, I take the view that this should not be included in the draft Hague Principles, since it is an autonomous category ruled by its own provisions.

The 2011 version of the future Hague Principles excludes both these issues from its scope (in Article 1(3)(a) and (b)), in addition to others that are habitually excluded (Article 1(3)(c) to (f)).[35]

4. FREEDOM OF CHOICE (ARTICLE 2)

(A) POSSIBILITY TO CHOOSE STATE OR NON-STATE LAW (ARTICLE 2(1))

As pointed out by the Permanent Bureau of the Hague Conference,[36] it would be desirable for the future Hague Principles to admit the applicability of non-State rules. I claimed in the previous version of this paper [37] that I would not be against leaving this possibility open,[38] although I believe that such reference to non-State rules should be clearly demarcated[defined?included?], (perhaps "included" is the best wording) as the Permanent Bureau proposes. The Working Group that elaborated the Uruguayan *General Law on Private International Law* reached the same conclusion which found expression in Article 13(4): "Usages that are widely known and regularly observed in commercial traffic by the individuals involved, or that are generally accepted in that traffic, shall be applied when appropriate, as shall the general principles of international commercial law that are recognized by international organisations of which Uruguay is a Member State." [39] Such wording might be considered by the Working Group for the proposed Hague Principles.

35 See, for example, Art. 5 of the *Inter-American Convention on the Law Applicable to International Contracts* (CIDIP-V, Mexico, 1994).

36 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 353.

37 See *supra*, asterisked footnote.

38 FRESNEDO DE AGUIRRE, *supra*note 8, 123-1621 (first part) and 184-213 (second part).

39 This wording is stricter than that finally adopted in Art. 3(1) of the Rome I Regulation, which only admits the choice of one law, excluding the possibility to choose non-State rules. See, on the relevant Uruguayan draft: D. OPERTTIBADÁN / C. FRESNEDO DE AGUIRRE, "The latest trends in Latin American Law: The Uruguayan 2009 General Law on Private International Law", *Yearbook of Private International Law*, Vol. 11 (2009), Sellier, European Law Publishers, published in association with

The 1994 Mexico Convention also admits the application of "general principles of international commercial law recognised by international organisations" (second paragraph of Article 9), but broadens this possibility in its Article 10 to allow the application of "guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted." This is qualified in the final part of Article 10, which states that the only purpose of the provision is "to discharge the requirements of justice and equity in the particular case." [40]

This recognition of the parties' right to choose a non-State law, albeit within certain limits, answers the need to guarantee a reasonable degree of certainty and predictability.

However, whatever provision is ultimately adopted by the proposed Hague Principles, it should be so worded as to resolve the doctrinal controversies surrounding the meaning of Articles 9 and 10of the 1994Mexico Convention and the relationship between the two.[41]The 2010 draft Hague Principles used the following wording: "a contract is governed by the law or rules of law chosen by the parties," and added that "the choice may be made at any time." The reference to "rules of law" enables the parties to choose non-State law. The 2011 version is worded differently but retains the same basic message: "A contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law" (Article 2(1)). This is the logical outcome of the objective pursued by the future Hague Principles, which is the "promotion of the principle of party autonomy." [42]

Swiss Institute of Comparative Law printed in Germany, 305-337. [full references? Year missing] it is one book, year 2010 (ISBN (print) 978-3-86653-160-4, ISBN (eBook) 978-3-86653-917-4

40 See the analysis of these two articles by J. SAMTLEBEN, "Los Principios Generales del Derecho Comercial Internacional y la Lex Mercatoria en la Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales", in: D.P. Fernández Arroyo / N. González Martín (coord.), *Tendencias y Relaciones. Derecho Internacional Privado Americano Actual (Jornadas de la ASADIP2008)*, México, Editado por Universidad Nacional Autónoma de México / Editorial Porrúa / ASADIP (2010), 15-27, and in: Basedow / Fernández Arroyo / Moreno Rodríguez (coord.), *supra* note 1, 413-426.

41 SAMTLEBEN, *supra* note 4140, at 15. In this sense, J.A. MORENO RODRÍGUEZ / M.M. ALBORNOZ, "Reflexiones emergentes de la Convención de México para la elaboración del futuro instrumento de La Haya en materia de contratación internacional", in: <www.elDial.com>DC155D, published 29/03/2011, rightly recommend that SAMTLEBEN's statements be taken into account by the Hague Conference.

42 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 13.

The draft Hague Principles do not include a definition or restriction of the term "rules of law", so as to provide "the maximum support for party autonomy, regardless of the method of dispute resolution (court or arbitration)." Nevertheless, the Working Group "acknowledged that there are limits to the rules of law chosen by the parties. In particular, the chosen rules of law must be distinguished from individual rules made by the parties and must be a body of rules." [43]

The reference to "rules of law" allows parties "to choose, where available, industry or transaction specific rules," [44] which is both logical and consistent within the context of the future Hague Principles but, as with every other choice of law or rules of law, the choice must be the result of free agreement between both[?](the word "both" aims at pointing out that unilateral clauses choosing the law are not acceptable; that is why I would like to keep such word) contractual parties. If the choice is incorporated into the general conditions issued by one of the parties, the validity of the relevant clause may be placed in doubt. The court or arbitral tribunal will have to analyse whether it is abusive or not, and if it was actually freely consented to. The Working Group based its comments on the example offered – as so often – by maritime transport contracts and the Rotterdam Rules:[45] in maritime transport contracts as documented in bills of lading, one party unilaterally chooses the general conditions that it assumes will govern the contract, while the other party, let alone any third parties involved in the transaction, often has no negotiating power to influence those conditions.[46]

The Working Group recognised the need for "certain restrictions of the principle of party autonomy," "even in the field of international contracts." To me, what is important here is that the Group "recognised that contractual obligations derive their authority from the willingness of the State to compel their performance. It is on these bases that the Working Group considered that the principle of party autonomy should be subject to, and be reconciled with,

43 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 16.

44 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 18.

45 *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2008) – the "Rotterdam Rules" – Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 18, fn. 15.

46 See, on this matter, FRESNEDO DE AGUIRRE, *La autonomía ..., supra* note 6, and *Idem*, *Curso de Derecho Internacional ...*, 323-390.

overriding mandatory rules and public policy as eventually addressed by the draft Hague Principles." [47]

(B) DÉPEÇAGE, *MODIFICATION OF THE CHOSEN LAW AND THIRD PARTIES (ARTICLE 2(2) AND 2(3))*

Article 2(2) provides that "[t]he 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." Article 2(3) allows this choice to be modified at any time, but guarantees third parties' rights: "… without prejudice to the pre-existing rights of third parties," which I believe is indispensable.[48]

(C) NO CONNECTION REQUIRED (ARTICLE 2(4))

As to whether there should be a connection between the chosen law and the parties or their transaction, the 2010 version of the draft Hague Principles proposed two wordings, placed in brackets:(1) "no connection is required between the law chosen and the parties or their transaction;" and (2): "the parties may choose any law whether or not connected to them or to the transaction." The 2011 version retained the former (Article 1(4)).

Although this broad formula is not universally endorsed, the Permanent Bureau preferred it because "freedom of choice advocated by the future Hague Principles does not imply the requirement of a link or connection between the law chosen and the commercial operations or the parties." [49] It mentions the advantages of allowing the parties to choose a neutral law when they cannot agree on the law of one or the other party.[50] This argument is quite convincing and deals with a situation that arises quite frequently in practice. It must also be borne in mind that, as the Permanent Bureau points out, in case of *fraude à la loi* or other kinds of abuse, the law chosen by the parties could be neutralised by the public policy exception or by *lois de police*.

47 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 15. See also the text *infra*.

48 These rules are already contemplated in the Mexico Convention (Arts. 7 and 8).

49 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 353.

50 It also quotes several modern instruments that do not require such a link, among others, the 2005 Hague Convention on choice of forum agreements, the Rome I Regulation, the Mexico Convention, the new Section 1-301 of the Uniform Commercial Code.

5. EXPRESS AND TACIT CHOICE OF LAW(ARTICLE 3)

The solution agreed by the Working Group in 2011on this issue states, in the opening part of Article 3: "The choice of law, or any modification of the choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances." The matter of express choice poses no difficulty and is similarly drafted in most existing texts.[51] The Hague Conference does intend to promote the making of written express choices [or: that express choices should be made in writing], (I accept whatever phrase you consider linguistically better; perhaps the blue one is better) but proposes to take into account the growing use of electronic means of communication, using the formula in Article 9(2) [52] of the 2005 *United Nations Convention on the Use of Electronic Communications in International Contracts*; it also proposes to require that the clause be documented in writing or by any other medium if the information contained therein is accessible so as to be usable for subsequent reference.[53]

Although some existing texts recognise – more or less widely – a tacit choice of law,[54] there is no unanimity in that connection. I for one believe that, should the Working Group opt for its admission, it must be made clear that the supposedly tacit choice should unambiguously demonstrate the parties' will and exclude any possibility of a will being attributed to both or, worse, either party that they did not have.

The second part of Article 3 states that: "An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes

51 Such as, for example, Art. 7, first part, of the Mexico Convention: "The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express …" See also Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 24 and fn. 19.

52 "Article 9– Form requirements. (…) 2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference."

53 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 355. The Working Group states (Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 22, fn. 18): "An explicit choice is made or documented in writing or by any other means of data transmission or storage communication," and recommends that this idea and the formulation of provisions in other instruments on this matter should be referred to in the Commentary to this Principle.

54 Art. 7 of the Mexico Convention admits this in so far as it is "evident from the parties'behavior and from the clauses of the contract, considered as a whole." Art. 3(1) of the Rome I Regulation requires that the choice be "clearly demonstrated by the terms of the contract or the circumstances of the case."

under the contract, is not in itself equivalent to a choice of law." This, in my view, is adequate and, again, consistent with the rule in Article 7(2) of the 1994 Mexico Convention.[55] What is at stake is to respect the parties' will in those cases where they have only chosen the law applicable to their contract. Should they wish to choose the court or arbitral tribunal that will deal with any eventual differences, they will have to do so in accordance with the rules applicable to these issues.

Moreover, I would argue that the reverse situation, *i.e.*, a situation where the contract does include a choice-of-law clause but not a choice of jurisdiction or arbitration, should also be provided for. The wording could mirror that of Article 7(2) of the Mexico Convention, and state that "[s]election of a certain law by the parties does not necessarily entail selection of the jurisdiction."

Summing up, Article 3 admits not only express but also tacit choice of law. However, if there is no express choice, this must appear "clearly from the provisions of the contract or the circumstances."[56] The Working Group "expressly declined to accept a choice of court or arbitral tribunal as of itself a sufficient indicator of the parties' tacit choice of law under the Hague Principles."[57] This is nothing new: as mentioned earlier, other existing instruments have adopted this solution in the past.

6. FORMAL VALIDITY OF CHOICE OF LAW (ARTICLE 4)

I agree with the proposed wording (Article 4 of the 2011 version), which reads that the choice of law "is not subject to any requirement as to form unless otherwise agreed by the parties." This wording "accords with the principle of party autonomy," according to the Working Group.[58]

7. CONSENT *(ARTICLE 5)*

In my view, this issue and its regulation are absolutely central to the proposed instrument and to the general rule on which it is based –the admission of conflict party autonomy[?] (in Spanish we distinguish between "autonomía de la

55 "Selection of a certain forum by the parties does not necessarily entail selection of the applicable law."

56 The Working Group emphasised the fact that the parties' intention must appear "clearly" (Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 24).

57 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 25.

58 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 27.

voluntad conflictual", which I translated as "conflict party autonomy", which is the possibility of choosing the law applicable to the contract, and "autonomía de la voluntad material", which is the possibility of the parties to include substantive clauses into their contract. If you think it is not clear enough, we could just eliminate the word "conflict" and say only "party autonomy") regarding the law applicable to international commercial contracts –if the objective pursued by the Hague Conference is to be achieved, *i.e.*, "promoting the principle of party autonomy," [59] even in those States where it is not yet fully admitted or where its scope is not the same as in other countries.

The wording proposed in the2010 draft (paragraph (1))[60]was the same as that adopted in the Mexico Convention (Article 12(1))[61] and in the Rome I Regulation (Article10(1)).[62]

It would, in my view, be appropriate to retain the solution proposed in paragraph (2),[63]since it constitutes a guarantee for the party alleging that it did not consent to the choice of law clause included in the contract (or to the contract itself, or to any term thereof). It does not seem logical for the validity of the consent to be ruled by the law supposedly chosen by the parties, where the party whose consent is at stake indicates that it has not consented to it.[64]Again, the 2010draft follows the Mexico Convention (Article 12(2))[65] and

59 Doc. Prel. 4 (fn 14), para. 16. On this point, see also D. FERNÁNDEZ ARROYO, "La multifacética privatización de la codificación internacional del derecho comercial", in: Basedow / Fernández Arroyo / Moreno Rodríguez (coord.), *supra* note 1, 51-74, 67.

60 "The existence and material validity of the consent of the parties as to the choice of the applicable law shall be determined by the law that would apply [in accordance with the provisions of Article / para. XX] if the choice were valid."

61 "The existence and the validity of the contract or of any of its provisions, and the substantive validity of the consent of the parties concerning the selection of the applicable law, shall be governed by the appropriate rules in accordance with Chapter 2 of this Convention."

62 "The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid."

63 "Nevertheless, to establish that he did not consent to the choice of law, [to the contract itself, or to any term thereof,] a party may rely on the law of the State where he has his [habitual residence / principal place of business], if under the circumstances it is not reasonable to determine that issue according to the law specified in the preceding paragraph."

64 *Cf.* F. VISCHER, "The antagonism between legal security and the search for justice in the field of contracts", *Recueil des Cours*, T. 142 (1974), 339-396, 376. I said much the same in C. FRESNEDO DE AGUIRRE, "La Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales, aprobada en la Quinta Conferencia Especializada Interamericana sobre Derecho

the Rome I Regulation (Article10(2)).[66]To quote Moreno and Albornoz [67] with reference to the Mexico Convention: "Even when in the MC(Mexico Convention)[are the brackets part of the original citation? If not, they should be square] (OK, they should be squared) this condition is not expressly stated, the material provision that rules *a priori* the validity of the choice agreement is part of the spirit of the Convention. This ends the vicious circle and, besides, allows us to conclude that the MC implicitly recognises the *electio juris* agreement." In my opinion, this is not wholly acceptable. It might solve the problem of the vicious circle generated by the validity of the choice of law agreement being governed by the chosen law (Article 12 of the Mexico Convention), but the cost is too high, and moreover presumes the substantive validity of an agreement that might in fact be debatable/disputable/questionable~~it presumes the implied validity of an agreement the substantive validity of which is debatable~~. (I think that "disputable" is the best word here) Instead, to deny its validity likewise solves the vicious circle but also guarantees that nobody will be bound against their will, when the validity of the agreement is under discussion.

The 2011 version of the draft Hague Principles basically [68] retains the 2010 solutions in this matter, with some drafting differences.[69] The Working Group explained that the consent rule "primarily relies on the law that would apply if that consent existed (*i.e.*, the putatively chosen law) (…) unless the party invoking the lack of consent can rely on the limited exception in Article 5(2)."

Internacional Privado (CIDIP-V), México, 1994", *Anuario de Derecho Comercial* N° 7 (1996), 191-211, 206.

65 "Nevertheless, to establish that one of the parties has not duly consented, the judge shall determine the applicable law, taking into account the habitual residence or principal place of business."

66 "Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1."

67 MORENO RODRÍGUEZ / ALBORNOZ,*supra* note 39(citation translated by the author of this article.

68 Art. 5(2) eliminates the habitual residence criterion.

69 Art. 5: "1. The consent of the parties as to a choice of law is determined by the law that would apply if such consent existed. 2. Nevertheless, to establish that a party did not consent to the choice of law, it may rely on the law of the State where it has its place of business, if under the circumstances it is not reasonable to determine that issue according to the law specified in the preceding paragraph."

This provision, referring only to "consent" and not to the "existence and material validity of the choice of law", "intends to encompass all issues as to whether the parties have effectively made a choice of law." [70] Such simple and clear drafting should be[is?] ("is" is OK for me) acceptable, since it tackles the core issue of whether "the parties" (both of them) have consented to the choice of law.

8. AUTONOMY OF THE CHOICE OF LAW CLAUSE (ARTICLE 6)

I would say it is correct to grant autonomy to the choice of law clause,[71] so that if it is invalid, it will not necessarily affect the contract itself. This is the solution already incorporated in Article 3(d) of the 2005 Choice of Court Convention and also in various texts dealing with arbitration issues.[72] In Uruguay, the jurisprudence has successfully followed this criterion when the choice-of-law clause is not valid under Article 2403 *in fine* of the Civil Code.

9. *RENVOI* (ARTICLE 7)

The 2011 version of the draft Hague Principles introduced a specific principle on *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." This is the general solution adopted in all Hague Conventions. The Working Group stated that "the function of *renvoi* was considered to be of little utility." However, the door was left open for the parties to "expressly provide otherwise." [73] I believe this to be a balanced solution.[74]

70 Doc. Prel. Nº 4 (Jan. 2012), Annex III, paras. 28-29.

71 Art. 6: "A choice of law cannot be contested solely on the ground that the contract is not valid."

72 Art. 3. "(d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid." See also, for example, Art. 16(1) of the UNCITRAL Model Law on Arbitration, Art. 5 of the MERCOSUR Agreements on International Commercial Arbitration (CMC/Decs. Nºs 3 and 4/1998).

73 Doc. Prel. Nº 4 (Jan. 2012), Annex III, paras. 33-35.

74 See, in this connection, C. FRESNEDO DE AGUIRRE, "Una mirada actual sobre un viejo tema del derecho internacional privado: el reenvío", in: CEDEP / ASADIP (ed.), *Derecho internacional privado – derecho de la libertad y el respeto mutuo – Ensayos a la memoria de Tatiana B. de Maekelt*, Biblioteca de derecho de la globalización, Asunción (2010), 325-348.

10. SCOPE OF THE CHOSEN LAW (ARTICLE 8)

In principle, the law chosen by the parties governs all aspects of the contract. Article 8 lists seven such issues, but is by no means exhaustive. The Working Group [75] specifically stated that the general criterion was that "all aspects or issues related to the voluntarily agreed relationship between the parties" fall within the ambit of the law chosen by the parties.

Finally, some exceptions to this rule are expressly stated in Article 1(3).

11. FORMAL VALIDITY OF THE CONTRACT (ARTICLE 9)

Here, the Working Group followed the principle of *favornegotti*, seeking to avoid formal invalidity as far as possible. Hence the formal validity of the contract may be ruled not only by the law chosen by the parties, but also by other laws, such as the law applicable under private international law rules of the court or arbitral tribunal, or the law of the State "where any of the parties or their respective agent is present when the contract is concluded, the law of the State where either of the parties has its habitual residence at the time of conclusion or the law of the State where the contract was concluded." Any change in that law does not affect the formal validity of the contract.[76]

12. ASSIGNMENT (ARTICLE 10)

This is a very specific provision aimed at determining "the role of the chosen law where the rights and duties of the parties are defined by two or more related contracts that are entered into by a different combination of parties and governed by different laws respectively." I believe it was a good decision to address and shed some light on this complex matter.[77]

13. OVERRIDING MANDATORY RULES AND PUBLIC POLICY (ARTICLE 11)

I strongly adhere to the Working Group's unanimous statement that "considerations of public interest justify restricting party autonomy by overriding mandatory rules and public policy (*ordre public*)" and that these two

75 Doc. Prel. Nº 4 (Jan. 2012), Annex III, paras. 36-38.

76 Doc. Prel. Nº 4 (Jan. 2012), Annex III, paras. 39-40. This Principle was drafted as follows: "1. The contract is formally valid if it is formally valid under the law chosen by the parties, but this shall not exclude the application of any other law which is to be applied by a court or arbitral tribunal to support formal validity. 2. Any change in the applicable law shall be without prejudice to formal validity."

77 Doc. Prel. Nº 4 (Jan. 2012), Annex III, paras. 41-43.

limitations to party autonomy must apply in the context of both international litigation and international arbitration.[78] It is to be hoped that Article 11 will, in actual practice, prove "sufficient to respond to any concerns of an abuse of the parties' choice of law" for international commercial contracts, as the Working Group foresees.

(A) MANDATORY RULES (ARTICLE 11(1) AND 11(2)

It is my firm belief that the future Hague Principles must include a provision on mandatory rules – *lois de police* or rules of immediate application – as a guarantee against abuse and other operations to which conflict autonomy[official language?] (I refer here to my previous comment on "autonomía conflictual y material". If you prefer, I could say "party autonomy") unleavened by a minimum regulatory framework might give rise. I wholly agree with Mayer's (Pier Mayer) claim (quoted by the Permanent Bureau [79]) that the application of *lois de police* is "a necessary complement without which the resource to party autonomy could not be justified." The Permanent Bureau adds that this may refer to the *lois de police* of the forum or to foreign *lois de police* (when they have a tie with the circumstances). This position is reflected in the wording adopted by the Working Group in November 2010.[80] It would probably be useful also to include a conceptual definition of the *lois de police* such as that included in the November 2010 text,[81] in that it would unify the criteria to be used by the courts or arbitrators in identifying those *lois de police*. However, the Working Group concluded that it would also be a good idea "to elaborate on the definition in the Commentary." [82]

The 2011 version of the future Hague Principles addresses both aspects. Article 11(1) refers to overriding mandatory provisions of the law of the forum,

78 Doc. Prel. Nº 4 (Jan. 2012), Annex III, paras. 44.

79 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 361.

80 "Nothing in these Principles shall restrict the application of the overriding mandatory provisions of the law of the forum." And it goes on, albeit between brackets: "[For court proceedings, it shall be for the [private International law of the] forum State to decide when its courts may or must apply or take account of the mandatory provisions of another law [with which the [contract / situation] has a close connection].]"

81 "[Overriding mandatory provisions are provisions which are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation and which apply irrespective of the law chosen by the parties or otherwise applicable.]"

82 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 46.

while Article 11(2) refers to overriding mandatory provisions of another law.[83] It should be noted that the Working Group considered that it is the law of the forum (including other rules of private international law) that will determine "whether and under what circumstances third-country overriding mandatory rules may or must be applied or taken into account." [84] This is basically the same solution as that adopted in Article 11 of the Mexico Convention.

(B) PUBLIC POLICY (ARTICLE 11(3))

As to the possible development of international standards on the notion of public policy within the framework of the Hague Conference project,[85]it would be appropriate to take into account the Declaration [86] made by the Uruguayan Delegation at the time of signatureof the *Inter-American Convention on General Rules on Private International Law*of the *Inter-American Convention on General Rules on Private International Law*(CIDIP-II, Montevideo, 1979). This declaration – the only such to be made by any State – was made in connection with Article 5of that Convention, stating the scope of public policy obtaining in Uruguay. However, I would argue that the standard clause applied by the Hague Conference is equally acceptable, and less restrictive than the 1979 Uruguayan Declaration: "the application of one of the laws indicated by these

83 Art. 11: "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."

84 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 47.

85 Doc. Prel. (fn. 14), para. 7.

86 "The scope of public order: Uruguay wishes to state that it expressly ratifies the line of thought enunciated in Panama at CIDIP-I, reaffirming its genuine Pan American spirit and its clear and positive decision to contribute with its ideas and endorsement to the successful development of the legal community. This line of thinking and conduct has been evidenced in undoubtable form by the unreserved ratification by Uruguay of all the Conventions of Panama, approved by Law No.14,534 in 1976. In line with the foregoing, Uruguay gives its affirmative vote to the formula regarding public order. Nevertheless, Uruguay wishes to state expressly and clearly that, in accordance with the position it maintained in Panama, its interpretation of the aforementioned exception refers to international public order as an individual juridical institution, not necessarily identifiable with the internal public order of each state. Therefore, in the opinion of Uruguay, the approved formula conveys an exceptional authorisation to the various States Parties to declare in a nondiscretionary and well-founded manner that the precepts of foreign law are inapplicable whenever these concretely and in a serious and open manner offend the standards and principles essential to the international public order on which each individual state bases its legal individuality." See <http://www.oas.org/juridico/english/Sigs/b-45.html>.

Principles cannot be excluded unless it is manifestly incompatible with public policy." The wording is almost the same as that used in Article 5 of the Mexico Convention. In the end, the Working Group drafted a provision for the 2011 version of the future Hague Principles similar to Article 5 of the Mexico Convention, and it was this that prompted the Uruguayan Declaration on the grounds that the wording was not strict enough. Article 11(3) reads: "A court may only exclude application of a provision of the law chosen by the parties if and to the extent that such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum."

(C) COURT PROCEEDINGS RELATING TO ARBITRATION AND ARBITRATION PROCEEDINGS (ARTICLE 11(4) AND 11(5))

The Working Group drew a clear distinction between these two situations in Article 11(4) and 11(5) in the 2011 version of the draft Hague Principles.

Article 11(4) deals with court proceedings relating to arbitration and states that the provisions in Article 11(1), (2) and (3) "also apply" in such proceedings. The argument was that "a court dealing with proceedings relating to arbitration is not in a different position from a court dealing with other civil proceedings, in that the court must invoke public policy and give effect to overriding mandatory rules of the forum, insofar as they apply to the subject matter of the proceedings before it." [87] I agree with that reasoning.

The Working Group decided to include a separate paragraph (5) to address the role of overriding mandatory rules and public policy in arbitration proceedings, believing that principles governing the role of such mandatory rules in court should not be aligned with those obtaining to the role of such mandatory rules in arbitration proceedings. Thus, paragraph (5) reads that "arbitral tribunals are not constrained by any 'forum law' as such." [88] This enables arbitral tribunals to apply public policy and to apply or take 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." This reflects the Working Group's position that "the role to be played by overriding mandatory rules and public policy of the legal systems which are connected to an arbitration should be principally left to be determined by the arbitral tribunal on a case-by-case basis." This seems to be in keeping with the nature and framework of arbitration, yet it was no doubt wise on the part of the

87 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 48.

88 Doc. Prel. Nº 4 (Jan. 2012), Annex III, para. 49.

Working Group to advise that "the lack of specifications in this paragraph ((5)) should not be understood as conferring on an arbitral tribunal a general discretion to give effect to overriding mandatory rules or public policy," and that "the tribunal must carefully and properly justify its decision to derogate from the law or rules of law chosen by the parties. Such justifications would depend on the tribunal's own view of the legal framework within which the arbitration is being conducted." In my view, these explanations should be included in the commentaries to this Article.

14. SUBSIDIARY SOLUTIONS IN THE ABSENCE OF A VALID CHOICE BY THE PARTIES

On the question as to whether or not subsidiary rules should be included in the Principles to determine the rules applicable to the contract when there is no valid choice by the parties, I share [89] the opinion of the Hague Conference [90] that such rules should be included for the proposed Hague Principles to be complete.[91] Unfortunately, the Working Group decided otherwise.

As to the kind of subsidiary solutions that might be adopted, the Conference looked at several possibilities.[92] One criterion was the habitual residence of the party that must perform the characteristic obligation,[93] complemented by a list of specific contracts and the corresponding connecting factors for each of them, as in Article 4 of the Rome I Regulation.

The closest ties criterion was also considered, as an exception clause specifying that the subsidiary solution would not apply "when the characteristic obligation cannot be determined or when, due to the whole circumstances, the contractual situation shows closest ties with another legal system." The Conference argued, quoting Lagarde, that it favoured "a flexible localization that shall enable the judge or the arbitrator to adapt the solution to each case."

89 See the earlier version of this article.

90 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 358.

91 This idea was supported by the Argentinean representative at the ASADIP meeting in Asunción on 8 June 2011, which discussed the draft Hague Principles.

92 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 358-9.

93 This solution was originally included in the draft Inter-American Convention on the Law Applicable to International Contracts, but it ran into fierce opposition by the delegation of the United States of America and was ultimately dropped from the final text approved in Mexico in 1994.

This was an interesting proposal indeed although, as the Conference itself warned,[94] some characterisation of the closest ties should probably be included in order to improve certainty and predictability. Article 9(2) of the Mexico Convention could have been taken into account here. That Article gives guidelines to the court to determine the law of the State with which the contract has the closest ties, stating that it should do so by considering "all objective and subjective elements of the contract."

III. –CONCLUSIONS

The great task undertaken by the Hague Conference in drafting Principles on choice of law in international contracts deserves maximum support.

In order to achieve universal acceptance of the proposed Principles, the prevailing objections to party autonomy must be considered and solutions worked out to overcome them. This means addressing not only the technical issues involved, but also the values that are at stake.

The solutions adopted in the future Hague Principles should guarantee that party autonomy does not leave the door open to abuse by the more powerful contract party.

All in all, however, the draft Principles issued following the third meeting of the Working Group in June 2011successfully improve most of the core issues regarding international contracts.

94 OFICINA PERMANENTE DE LA CONFERENCIA DE LA HAYA, *supra* note 1, 360.