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CJI/RES. 249 (XCIV-O/19)

GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

MINDFUL that one of the purposes of the Inter-American Juridical Committee is to promote the progressive development and codification of international law and to examine the possibility of harmonizing the legislation of the countries of the Americas, where appropriate;

RECALLING that the OAS approved the Inter-American Convention on the Law Applicable to International Contracts in 1994 and that in 2015 The Hague Conference on Private International Law took said Convention into account in drawing up the Hague Principles on Choice of Law in International Commercial Contracts;

BEARING IN MIND that, nevertheless, there are still disparities in the law applicable to international commercial contracts in the countries of the Americas; and

RECOGNIZING the importance of having a Guide on the law applicable to international commercial contracts in the Americas to advance important aspects in this area in order to promote legal harmonization in the region and, as a result, stimulate economic integration, growth, and development in the hemisphere,

RESOLVES:

1. To approve the Guide on the Law Applicable to International Commercial Contracts in the Americas (CJI/doc.577/19 rev. l), attached hereto.

2. To thank the Rapporteur for this topic, Dr. José Antonio Moreno Rodríguez, for the significant effort he put into developing this issue and in preparing the Guide.

3. To request the Rapporteur for this topic to prepare, with support from the Department of International Law, a proposal for disseminating the Guide as widely as possible among the various stakeholders.

4. To transmit this resolution and the attached Guide to the policy-making bodies of the Organization for due attention and consideration.

This resolution was unanimously approved at the regular session held on February 21, 2019, by the following members: Drs. Mariana Salazar Albornoz, Luis García-Corrochano Moyano, José

Antonio Moreno Rodríguez, George Rodrigo Bandeira Galindo, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche-Gil, and Íñigo Salvador Crespo.

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* Limited

REPORT BY THE INTER-AMERICAN JURIDICAL COMMITTEE ON THE GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS

Completing a process launched in 2015, the second preliminary draft of the "Guide on the Law Applicable to International Commercial Contracts in the Americas" (draft Guide) is being presented in February 2019 to the meeting of the Organization of American States' (OAS) Inter-American Juridical Committee – hereafter CJI. Dr. José Antonio Moreno Rodríguez, a member of the aforementioned CJI, served as rapporteur for the draft Guide.

This draft Guide is the culmination of intensive research, consultations, and drafting activities, in line with guidelines received from the CJI at successive meetings. Accordingly, the rapporteur spent all this time working in close collaboration with the OAS Department of International Law – hereinafter DIL – headed by legal expert Dante Negro and with the benefit of the involvement of Jeannette Tramhel, Senior Legal Officer, who devoted a great deal of time to the project with assistance from various interns.

This second draft of the Guide benefited from significant input from jurists Diego Fernández Arroyo (Argentina, Sciences Po-Paris) and Geneviève Saumier (Canada, McGill U.-Montreal), as well as Anna Veneziano and Neale Bergman (both members of the Secretariat of the International Institute for the Unification of Private Law of Rome or UNIDROIT) and Luca Castellani, members of the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The American Bar Association Section on International Law provided valuable comments, as did Valerie Simard, on behalf of the Department of Justice Canada. Further input came from Gustavo Moser (Brazil, Counsel with the London Court of Arbitration), Anayansy Rojas (Costa Rica), and José Manuel Canelas (Bolivia). In addition, the draft benefited from a second round of comments received from Cecilia Fresnedo de Aguirre (Uruguay), Frederico Glitz (Brazil), and Nádia de Araujo (Brazil), who had already contributed to the first draft as well.

That first draft Guide was presented by the rapporteur at the Inter-American Juridical Committee's August 2017 meeting.

It was subsequently considered by UNCITRAL, UNIDOIT, and the Hague Conference on Private International Law, and by prominent regional and international legal experts. Numerous replies were received, with a variety of input and generally very positive comments on the document, notably those from Hans Van Loon (former Secretary General of the Hague Conference on Private International Law), Daniel Girsberger (Univ. of Lucerne, Chairman of the working group which drafted the Hague Principles), Marta Pertegás (Spain, U. of Antwerp, member of the Secretariat, who worked closely on the drafting of the Hague Principles), Luca Castellani (UNCITRAL), Anna Veneziano (UNIDROIT), and Joachim Bonell (UNIDROIT-retired).

Valuable input was also contributed by Jürgen Samtleben (Germany, former Director of the Max Planck Institute), Alejandro Garro (Argentina, Columbia University, New York), Paula All (Argentina, Univ. del Litoral and Vice Chair of ASADIP), Brooke Marshall (Australia, Max Planck Institute for Comparative and International Private Law, who helped draft the Hague Principles), Maria Blanca Noodt Taquela (Argentina, Univ. of Buenos Aires), Nádia de Araújo (Brazil, PUC-Rio de Janeiro), Cristian Giménez Corte (Argentina), Laura Gama (Brazil), Frederico Glitz (Brazil), Valerie Simard (Department of Justice Canada), Jaime Gallegos (Chile, U. of Chile), Ignacio Garcia (Chile), Francisco Grob D. (Chile - ICSID Secretariat), Antonio Agustin Aljure Salame (Colombia), Lenin Navarro Moreno (Ecuador), Elizabeth Villalta (El Salvador – former CJI member), Pedro Mendoza (Guatemala), Nuria González (Spain, UNAM-Mexico and Stanford Univ.-USA), Mercedes Albornoz (Argentina, CIDE-Mexico), Jan L. Neels (South Africa, University of Johannesburg), David Stewart (Georgetown, United States, former CJI member), Antonio F. Perez (United States, former CJI member), Soterios Loizou (King's College, London), Cecilia Fresnedo (Uruguay), Claudia Madrid Martes (Venezuela), and Eugenio Hernández Bretón (Venezuela-Baker McKenzie).

Several of the above-mentioned individuals are also distinguished arbitrators or arbitration-related academics. The following well-known speakers from the arbitration arena also provided comments on the document: Felipe Ossa (Chile), Francisco González de Cossío (Mexico), Alfred Bullard (Peru), Fernando Cantuarias Salaverry (Peru), Roger Rubio (Peru), and Dyalá Jiménez Figueres (Costa Rica, currently Minister of Trade).

Several of the legal experts mentioned above are also officers and members of the prestigious American Association of Private International Law (ASADIP), which brings together the region's top experts in the field. Hence, in a statement dated January 10, 2019, ASADIP expressed support for the draft Guide, pursuant to a November 9, 2018 mandate from the ASADIP General Assembly and supports efforts toward approval of the final document. ASADIP is committed furthermore to working to establish channels of cooperation with national authorities, in an effort to convince them of the importance of the Inter-American Juridical Committee's work in this field and of how tremendously important the Guide will be, not only for countries that do not yet have a specific regulation on the law applicable to international contracts, but also for those states that are promoting legislative reforms with a view to bringing their rules into line with the latest solutions in the field. ASADIP further stated that it would circulate the final document of the Guide as widely as possible in the academic and legal arenas.

It should be borne in mind that at its third plenary session, held on June 21, 2017, the OAS General Assembly itself had instructed "the Department of International Law to promote among member states further development of private international law, in collaboration with organizations and associations engaged in this area, including the United Nations Commission on International Trade Law, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), and the American Association of Private International Law (ASADIP)" (AG/RES. 2909 (XLVII-O/17). The various forms of assistance received from these organizations or their members were therefore in compliance with and in fulfillment of the aforementioned General Assembly mandate.

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This draft Guide draws on a number of background documents as well. In 2015, at the initiative of CJI member Dr. Elizabeth Villalta, which initiative the CJI approved, DIL sent to the governments of the Americas a questionnaire on the subject of international contracts ("Questionnaire on the Implementation of the Inter-American Conventions on Private International Law;" document CJI/doc.481/15).

Based on these responses, the CJI and DIL prepared a status report on the subject (report entitled "The Inter-American Convention on the Law Applicable to International Contracts and the Furtherance of its Principles in the Americas," document OEA/SG, DDI /doc.3/16; see also the document entitled "The law applicable to international contracts," document OEA/Ser.Q, CJI/doc.487/15 rev. 1).

CJI finally decided to move ahead with drafting a guide on the subject, to which end the DIL prepared a highly comprehensive synopsis that covered a range of topics to be addressed (Promoting international contracts law in the Americas – A guide to legal principles) document OEA/Ser.Q, CJI/doc.XX/16), including information highlighted by several jurists in the region who have been kind enough to pledge their assistance where their domestic law is concerned.

In addition, Dr. Villalta prepared a comparative analysis of the Mexico Convention (1994) and the Hague Principles, both concerning international contracts, which was also most useful as preparatory material ("The law applicable to international contracts," document CJI/doc.464/14 rev.1).

Drawing on all this input and with the unfailing support of the DIL, the aforementioned first draft Guide was prepared in Spanish by Dr. José A. Moreno Rodríguez as rapporteur. Likewise, with the efficient support of the DIL, the above-mentioned material was translated into English by the OAS translation team, for consideration at the August 2017 meeting of the CJI.

The question of a prospective guide to international contracts has been discussed at previous meetings of the CJI: at Washington, D.C., in March 2016, and at Rio de Janeiro in October 2016 and March 2017. At those meetings the CJI had the opportunity to consider the different preparatory materials contained in the appendices to the within draft Guide, including the enriched synopsis prepared by the DIL.

A great deal of time has gone into this document, which has been drafted with input provided by the states, several academics, the DIL, and members of the CJI. This final document is expected to contribute toward improving the legal regime applicable to international contracts in the Americas.

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The CJI has discussed the report presented and commented on the work done. A specific request was made for the Guide to be very explicit on the issues on which there is overwhelming consensus and on those on which differing solutions are proposed, with specific positions or recommendations set out in the Guide in the latter case.

The draft Guide presented on this occasion has fewer pages than was initially contemplated (bearing in mind the scope of the topic and that many guides adopted by universal codifying bodies are considerably longer). The CJI was sound in its guidance that the document not be too long and be as simple as possible.

We have sought to meet that objective with the draft Guide, which, apart from anything else, avoids excessive technicality, continual references, and even footnotes, except for those considered strictly necessary.

The draft Guide also relies consistently on the main instruments in force on the subject, including Rome I (the EU regulation) and, in particular, the Mexico Convention adopted within the framework of the OAS in 1994 and the Hague Principles adopted in 2015 by the Hague Conference on Private International Law. Provisions from those instruments, and even some comments on the Hague Principles are copied literally in the draft Guide, so as to maintain fidelity with them.

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The draft Guide contains a list of abbreviations, another list of terms in Latin and other languages used in the document, and then an explanatory introduction on the desired objectives (Part One), followed by its context and background (Part Two) which explains the main techniques of Private International Law and outlines the background to codification in the Americas and internationally, in the subject of contracts, notably the Treaty of Montevideo of 1889 and 1940, the 1928 Bustamante Code, the 1980 Rome Convention, the 1994 Mexico City Convention, and The Hague Principles of 2015.

Part Three describes the recent developments with the so-called uniform method, mostly based on the standardization efforts undertaken by UNIDROIT and UNCITRAL, in addition to efforts by the private sector and other developments in the arbitration arena.

Part Four describes the uniform method of interpreting international texts, both in terms of conflict of laws and uniform law.

Part Five pertains to the scope of the Guide, in terms of international commercial contracts with their corresponding classification and in terms of topics that are excluded, such as those related to capacity, family and inheritance relationships, insolvency, etc.

Part Six deals with the complex problem of non-State law and various related terminologies, such as uses, customs and practices, principles, and *lex mercatoria*.

Part Seven deals with the problem of party autonomy in international contracts; Part eight, express or tacit choice of law; Part Nine, formal validity of the choice of law; Part Ten, the law applicable to the choice of law clause; Part Eleven, the arbitration severability clause; and Part Twelve, other problems of law applicable to the field of international contracts, such as amending the chosen law and *renvoi*, among others.

Part Thirteen deals with the absence of choice of law by the parties; Part Fourteen, splitting of the law; Part Fifteen, flexibility to interpret international contracts; Part Sixteen, the scope of the applicable law; Part Seventeen, public policy (*ordre public*); and Part Eighteen, other issues, such as those related to the existence of other conventions, or to states with more than one legal system or territorial units.

Some of the lawyers consulted certainly proposed that the Guide should also include a summary of specific recommendations that could be made to legislators, judges, and the parties and their advisers on international contracts. It was thought that these could be included in the Guide as input that could prove highly valuable and of practical interest.

There were also suggestions to include a table comparing the Mexico Convention and the Hague Principles and to reconcile the official Spanish, English, and French texts of the Mexico Convention. Lastly, the document contains appendices with a table of laws, a table of cases, and a list of databases and other electronic sources used in preparing various parts of the draft Guide.

SUMMARIZED RECOMMENDATIONS

1.0 The purpose and objectives of this Guide should be taken into consideration by OAS Member States, in particular, by legislators in any review of the domestic legal regime on the law applicable to international commercial contracts, by adjudicatory bodies in the resolution of disputes involving such contracts, and by contracting parties and their counsel.

2.0 OAS Member States, regardless of whether they have or have not ratified, or do or do not intend to ratify the Mexico Convention, are encouraged to consider its solutions for their own domestic legislation, whether by material incorporation, incorporation by reference, or other mechanisms as applicable to their own domestic legal regimes, taking into consideration subsequent developments in the law applicable to international commercial contracts as expressed in the Hague Principles and as described in this Guide.

3.0 Legislators are encouraged, in the course of any reviews of their domestic legal regime on the law applicable to international commercial contracts and conflict of laws rules more generally, to consider the advances that have been made in the uniform law method and to consider the use of uniform law instruments together with conflict of laws rules as supplementary and complementary in the application and interpretation of private international law.

4.1 Legislators are encouraged, in the course of any reviews of their domestic legal regime on the law applicable to international commercial contracts and conflict of laws rules more generally, to consider the overarching goal of unification and harmonization of law within the process of global and regional integration.

4.2 Adjudicators, both in the public realm of the judiciary and in the realm of arbitration, are encouraged to consider the advantages of uniform interpretation in the international legal instruments that are used in the settlement of disputes concerning international commercial contracts and to take into account the development and dissemination of international jurisprudence in this regard.

4.3 Contracting parties and their counsel should remain informed of developments regarding uniform interpretation that may be applicable to their international contracts.

4.4 Contracting parties and their counsel should take into consideration that instruments applicable to their specific case may provide a different solution from those recommended in this Guide and that adjudicators in some jurisdictions may not follow the recommended liberal interpretation.

5.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to its scope of application and the determination of internationality, should incorporate solutions in line with the Mexico Convention, the Hague Principles and the UNIDROIT Principles, thereby excluding consumer and labor contracts while adopting a broad concept of internationality, and may further stipulate that the sole agreement of the parties may internationalize a contract, but that if no other international element is present, internal *ordre public* will prevail.

5.2 The domestic legislation may also replicate the provisions of the PECL, Article 1:107 and thereby make applicable by analogy agreements to amend or terminate contracts and unilateral promises and all other statements and actions that denote intent in a commercial setting.

5.3 The domestic legal regime on the law applicable to international commercial contracts may expressly exclude from its scope of application:

- family relationships and succession, arbitration and forum selection, and questions of company law, in accordance with the relevant provisions of the Mexico Convention and the Hague Principles;

- securities and stocks, in accordance with the relevant provisions of the Mexico Convention;
- capacity, insolvency, proprietary effects and agency, in accordance with the relevant provisions of the Hague Principles.

6.1 The domestic legal regime on the law applicable to international commercial contracts should recognize and clarify choice of non-State law.

6.2 Legislators, adjudicators and contracting parties are encouraged, in relation to non-State law, to read the Mexico Convention in light of criteria offered in the Hague Principles and HP Commentary, and to recognize, in light of the latter instrument, the distinction between choice of non-State law and the use of non-State law as an interpretive tool.

7.0 The domestic legal regime on the law applicable to international commercial contracts should affirm clear adherence to the internationally-recognized principle of party autonomy as iterated in the Mexico Convention and the Hague Principles and other international instruments.

8.1 The domestic legal regime on the law applicable to international commercial contracts should provide that a choice of law, whether express or tacit, should be evident or appear clearly from the provisions of the contract and its circumstances, consistent with the provisions of Article 7 of the Mexico Convention and Article 4 of the Hague Principles.

8.2 Adjudicators and contracting parties and their counsel are also encouraged to take these provisions into account in the interpretation and drafting of international commercial contracts.

9.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to formal validity of choice of law, should not contain any requirements as to form unless otherwise agreed by the parties, consistent with the provisions of Article 5 of the Hague Principles.

9.2 Adjudicators, in determining the formal validity of a choice of law, should not impose any requirements as to form, unless otherwise agreed by the parties or as may be required by applicable mandatory rules.

9.3 Contracting parties and counsel should take into account any mandatory rules as to form that may be applicable.

10.1 The domestic regime on the law applicable to international commercial contracts should provide that the question of whether parties have agreed to a choice of law is to be determined by the law that was purportedly agreed to by those parties, consistent with Article 6 of the Hague Principles and Article 12, paragraph 2, of the Mexico Convention.

10.2 Adjudicators, in determining whether parties have agreed to a choice of law, should take into account Article 6 of the Hague Principles and Article 12, paragraph 2 of the Mexico Convention.

11.1 The domestic legal regime should confirm that a choice of law applicable to international commercial contracts cannot be contested solely on the ground that the contract to which it applies is not valid, consistent with Article 7 of the Hague Principles.

11.2 Adjudicators, when granted interpretive discretion, are encouraged to follow the above-stated solution.

12.1 The domestic legal regime on the law applicable to international commercial contracts should:

- provide that a choice of law can be modified at any time and that any such modification does not prejudice its formal validity or the rights of third parties, consistent with Article 8 of the Mexico Convention and Article 2.3 of the Hague Principles;
- provide that no connection is required between the law chosen and the parties or their transaction, consistent with Article 2.4 of the Hague Principles;

- exclude the principle of *renvoi* to provide greater certainty as to the applicable law, consistent with Article 17 of the Mexico Convention and Article 8 of the Hague Principles;
- in relation to assignment of receivables, favor party autonomy to the maximum extent, consistent with Article 10 of the Hague Principles.

12.2 Adjudicators, when granted interpretive discretion, are encouraged to follow the above-stated solutions.

13.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to absence of an effective choice of law, should include the flexible criteria of the "closest connection", consistent with the provisions of Article 9 of the Mexico Convention.

13.2 Adjudicators should apply the flexible criteria of the "closest connection" in a liberal interpretative approach.

14.1 The domestic legal regime on the law applicable to international commercial contracts should admit the "splitting" of the law (*dépeçage*), consistent with the provisions of Articles 7 and 9 of the Mexico Convention and Article 2.2 of the Hague Principles.

14.2 Adjudicators, when granted interpretive discretion, are encouraged to admit *dépeçage*.

15.1 The domestic legal regime on the law applicable to international commercial contracts should recognize the need for flexible interpretation, consistent with the provisions of Article 10 of the Mexico Convention.

15.2. Adjudicators, when the circumstances so require in the resolution of a particular case, if so authorized, should apply rules, customs and principles of international commercial law as well as generally accepted commercial usage and practices in order to discharge the requirements of justice and equity, consistent with the provisions of Article 10 of the Mexico Convention.

16.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to the scope of the applicable law, should address interpretation of the contract, rights and obligations arising therefrom, performance and non-performance including the assessment of damages, prescription and its effects, consequences of invalidity, burden of proof and pre-contractual obligations, consistent with the provisions of Article 14 of the Mexico Convention and Article 9 of the Hague Principles. For greater certainty, it would be preferable to do so by way of explicit provisions.

16.2 The domestic legal regime on the law applicable to international commercial contracts should provide both that the law of the State where an international commercial contract is to be registered shall govern all matters concerning filing or notice, consistent with the provisions of Article 16 of the Mexico Convention; and, that the rules of other international agreements which may be specifically applicable to an international commercial contract should prevail, consistent with the provisions of Article 6 of the Mexico Convention.

17.1 The domestic legal regime on the law applicable to international commercial contracts should provide that neither a choice of law nor a determination of applicable law in the absence of an effective choice,

- shall prevent the application of overriding mandatory provisions of the forum or those of other fora, but that such mandatory provisions will prevail only to the extent of the inconsistency;
- shall lead to the application of law that would be manifestly incompatible with the public policy of the forum,

consistent with Article 18 of the Mexico Convention and Article 11 of the Hague Principles.

17.2 Adjudicators and counsel should take into account any overriding mandatory provisions and public policy as required or entitled to do so, consistent with Article 11 of the Hague Principles.

18.0 States with more than one legal system or different territorial units may wish to consider the provisions of Article 22 of the Mexico Convention and Article 1.2 of the Hague Principles and provide in the domestic legal regime on the law applicable to international commercial contracts that any reference to the law of the State may be construed as a reference to the law in the territorial unit, as applicable.

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ABBREVIATIONS

AAA/ICDR: International Arbitration Rules of the American Arbitration Association
ABA: American Bar Association
ALI: American Law Institute
ASADIP: American Association of Private International Law
CCQ: Civil Code of Quebec
CENTRAL: Center for Transnational Law
CIDIP: Inter-American Specialized Conferences on Private International Law
CISG: UN Convention on Contracts for the International Sale of Goods
CJEC: Court of Justice of the European Communities
CJEU: Court of Justice of the European Union
CJI: Inter-American Juridical Committee
CIF: Cost insurance freight
CLOUT: Case Law on UNCITRAL Texts
DCFR: Draft Common Frame of Reference
ECJ: European Court of Justice
EGPIL/GEDIP: European Law Institute, European Group of Private International Law
EU: European Union
European Convention: European Convention on International Commercial Arbitration
FIDIC: International Federation of Consulting Engineers
FIDIC Contract: Conditions of Contract for Works of Civil Engineering Construction
FOB: Free on board
GAFTA: Grain and Feed Trade Association
General PIL Rules Convention: Inter-American Convention on General Rules of Private International Law
Guide: Guide on the Law Applicable to International Commercial Contracts in the Americas
Hague Agency Convention: Hague Convention on the Law Applicable to Agency
Hague Principles: Principles on Choice of Law in International Commercial Contracts
Hague Sales Convention: Hague Convention on the Law Applicable to Contracts for the International Sale of Goods

HCCH: The Hague Conference on Private International Law
HP Commentary: Principles on Choice of Law in International Commercial Contracts Commentaries
IACAC: Inter-American Commercial Arbitration Commission
IACAC Rules: Rules of Procedure of IACAC
IBA: International Bar Association
ICC: International Chamber of Commerce
ICJ: International Court of Justice
ICSID: International Centre for Settlement of Investment Disputes
ICSID Convention: 1965 Convention on the Settlement of Investment Disputes between States and Other Nationals
IIL: Institute of International Law
INCOTERMS: International Commercial Terms
LINDB: Introductory Law to the Provisions of Brazilian Law
MERCOSUR: Southern Common Market
Mexico Convention: Inter-American Convention on the Law Applicable to International Contracts
Montevideo Convention: Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards
New York Convention: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OAS: Organization of American States
Panama Convention: Inter-American Convention on International Commercial Arbitration
PECL: Principles of European Contract Law
PIL: Private International Law
Rome Convention: Convention on the Law Applicable to Contractual Obligations
Rome I: Regulation on the Law Applicable to Contractual Obligations.
TFEU: Treaty on the Functioning of the European Union
TJSP: Tribunal de Justiça de São Paulo
Transjus: ASADIP Principles on Transnational Access to Justice
TST: Tribunal Superior do Trabalho (Superior Labor Court)
Tucson Draft: Draft Inter-American Convention on the Law Applicable to International Contracts
UCC: US Uniform Commercial Code
UCP: Uniform Customs and Practice for Documentary Credits
UIA: Union Internationale des Avocats
UNCITRAL: United Nations Commission on International Trade Law
UNCITRAL Model Law: UNCITRAL Model Law on International Commercial Arbitration
UNCTAD: United Nations Conference on Trade and Development
UNIDROIT: International Institute for the Unification of Private Law
UNIDROIT Principles: UNIDROIT Principles of International Commercial Contracts
UPICC: used by some to refer to the UNIDROIT Principles
UNILEX: Intelligent" database of international case law and bibliography on the UNIDROIT Principles and on the CISG
WTO: World Trade Organization

LATIN AND TERMS IN OTHER LANGUAGES

Animus
De facto
De jure
Dépeçage
Electio juris
Ex officio:
Favor negotii
Lex arbitri
Lex causae
Lex fori
Lex Mercatoria
Lingua franca
Lois de Police
Ius commune
Ordre public
Pactum de lege utenda
Renvoi
Voie directe

GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS

PART ONE

INTRODUCTION

I. Rationale

1. Various studies by the Inter-American Juridical Committee ("CJI") of the Organization of American States ("OAS") and the OAS Department of International Law indicate that major lacunae and disparities exist in the law applicable to international commercial contracts in states throughout the Americas.[1]

2. In 1994, the OAS adopted the *Inter-American Convention on the Law Applicable to International Contracts* ("Mexico Convention").[2] It was ratified by two States, Mexico and Venezuela, and its solutions have been incorporated into the domestic laws of Venezuela and Paraguay.[3]

3. The Mexico Convention was taken into account by the Hague Conference on Private International Law ("HCCH") in its preparation of the *Principles on Choice of Law in International Commercial Contracts* ("Hague Principles"), adopted in 2015.[4]

4. It is now over 20 years since the adoption of the Mexico Convention and, given that the Hague Principles incorporated subsequent developments that paved the way for clarification of certain matters and introduction of innovative solutions, the following questions might be considered. What is next for the Americas? Should calls be made only for additional ratifications of the Mexico Convention? Should the Convention be amended in light of new developments? Should a model law, or guidelines for drafting one, be prepared?

5. The CJI reviewed all of these options. It did so also in conjunction with responses to a questionnaire that had been circulated among OAS Member States[5] and recognized specialists in private international law.[6] Responses to that questionnaire reflected the perception that, evidently, the Hague Principles have advanced beyond the Mexico Convention and that the provisions of the former could be useful in amending the Inter-American instrument.

6. But would the process to revise the Mexico Convention be worth the effort? On one hand, an improved document might be better received by the legal community in the Americas and, in addition, would afford an opportunity to correct existing discrepancies between the four official language versions (English, French, Spanish and Portuguese), which have been seriously criticized, particularly by English-speaking jurists at the time of its adoption. On the other hand, negotiation and adoption of a convention is a highly complicated and costly process that requires political will and considerable resources. Other instruments, such as

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[1] The *Inter-American Convention on the Law Applicable to International Contracts* and the Furtherance of its Principles in the Americas. OEA/SG/DDI/doc. 3/16, 15 March 2016 ("2016 Contracts Paper").

[2] *Inter-American Convention on the Law Applicable to International Contracts.* Signed 17 March 1994 in Mexico City at the Fifth Inter-American Specialized Conference on Private International Law, entered into force 15 December 1996. Text accessible at: https://www.oas.org/juridico/spanish/tratados/b-56.html.

[3] Status accessible at: https://www.oas.org/juridico/english/sigs/b-56.html.

[4] *Principles on Choice of Law in International Commercial Contracts*. Approved 19 March 2015. Text accessible at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.

[5] For the sake of consistency, the terms "Member States" and "States" are capitalized throughout this Guide.

[6] A questionnaire was circulated in 2015 with a request for responses to Part A by OAS Member States and to Part B by academics in those States. 2016 Contracts Paper, *supra* note 1, Appendix A. Responses are discussed later in this Guide.

model laws or legislative guidelines, have been shown to be equally effective means of advancing harmonization in private international law.

7. Ultimately, rather than promoting additional ratifications of the Mexico Convention or embarking upon efforts to amend the instrument, the CJI concluded that at this stage it would be much more effective for States of the Americas to adopt or revise domestic laws for consistency with guidelines endorsed by the OAS, based on international rules and best practices recognized by the HCCH and other relevant international bodies.

II. Purpose and Objectives of Guide

8. The purpose of this Guide on the Law Applicable to International Commercial Contracts in the Americas ("Guide") is to advance important aspects of the law applicable to international commercial contracts in the Americas, to promote regional harmonization on the subject and thereby to encourage regional economic integration, growth and development.

9. In achieving that purpose, this Guide has several objectives, as follows:

   a. to propose a current statement of the law applicable to international commercial contracts for the Americas as based on the fundamental principles of the Mexico Convention and with the incorporation of subsequent developments in the field to date, particularly as codified in the Hague Principles;

   b. to promote greater understanding of the Mexico Convention and the principles on which it is founded, to rectify lack of information and misinformation about the instrument, and to clarify uncertainties and inconsistencies in the various language versions;

   c. to assist OAS Member States that are considering ratification of the Mexico Convention;

   d. to support efforts by OAS Member States to modernize their domestic laws on international commercial contracts in accordance with international standards;

   e. to provide assistance to contracting parties in the Americas and their counsel in drafting and interpreting international commercial contracts;

   f. to provide guidance to judges in the Americas, who may find the Guide useful both to interpret and supplement domestic laws, particularly on matters in international commercial contracts that are not addressed in such laws; and,

   g. to guide arbitrators in the exercise of their particular powers to apply, interpret and supplement the law applicable to international commercial contracts.

10. An explanation of today's internationally-accepted norms on the subject of international commercial contracts as relevant to the Americas is no small matter; one reason the Mexico Convention had encountered stiff resistance was the lack of information regarding its content and implications. The Guide may contribute towards overcoming this obstacle.

11. This is not a guide to the Mexico Convention, but rather, a *guide to the law applicable to international commercial contracts in the Americas*. However, given that the Mexico Convention as a high-quality instrument advanced by the OAS serves as an important point of departure, and given the close relationship to and relevance of the Hague Principles, both of these instruments will be heavily referenced throughout.

12. This Guide is limited to international commercial contracts; it excludes consumer and labor contracts, which present particular challenges beyond the scope of this Guide. Additional exclusions are listed and explained below in Part Five.

1.0 The purpose and objectives of this Guide should be taken into consideration by OAS Member States, in particular, by legislators in any review of the domestic legal regime on the law applicable to international commercial contracts, by adjudicatory bodies in the resolution of disputes involving such contracts, and by contracting parties and their counsel.

PART TWO

CONTEXTUAL BACKGROUND

I. Introduction

13. Part Two provides the contextual background that has led to many of the legal issues in international commercial contracts that this Guide seeks to address. It begins with an overview of private international law and the complementary approaches of conflict of laws and uniform law. This is followed by a review of key historical efforts to codify conflict of laws rules for international commercial contracts in both Europe and the Americas, beginning with the Montevideo Treaties of 1889 and concluding with more recently adopted instruments. A basic understanding of these developments is important because of the influence of these instruments on each other over time, as is illustrated throughout this Guide. Moreover, these instruments have had significant influence in the development of domestic legislation, as evidenced by the examples in the final section of Part Two and in other parts of this Guide. Therefore, as the jurisprudence on both sides of the Atlantic is also relevant to the interpretation of the various international instruments and domestic legislation, reference to key cases from Europe and elsewhere will be included in the discussions of adjudicative decisions in the Americas.

II. Private International Law: Conflict of Laws vs. Uniform Law

14. International contracts raise questions such as which law should govern the contract and whether the parties have the freedom or "party autonomy" to make that determination themselves. In a traditional private international law approach known as *conflict of laws*, the prevailing technique is to refer to conflict of laws *rules* or indirect rules to determine "which" law should be applied (i.e., a choice between the domestic laws of different States). Conflict of laws rules are to be contrasted with the *substantive* law applicable to a given legal situation.

15. Unification of private law, also known as the *uniform law method*,[7] seeks to find a solution that would harmonize substantive laws (i.e., so that at least in theory, the same rule would apply in every State that has implemented the uniform law) whereas the conflict of laws method is generally based on situating an international legal transaction within a given domestic legal framework. A uniform law would eliminate the need for conflict of laws rules, at least for those States and for those disputes covered by the uniform law.

16. However, the problems of conflict of laws are inescapable in a legally parceled world of nation States that will continue as such for some time to come. Therefore, the conflict of laws and the uniform law approach should not be viewed as antagonistic methods, but rather, as complementary. The need for universal substantive law to govern international relationships has gained important recognition but history evidences the difficulty in achieving this objective. Uniform law rules are unlikely to cover all potential problems of an international contract. This Guide addresses primarily conflict of laws matters in international commercial contracts, that is, which law, domestic or foreign, should apply to these contracts. Even though the Guide mentions uniform law initiatives, it does not refer to the substantive solutions therein contained in relation to contract formation, rights and obligations and termination, to name some examples.

III. Historical Efforts to Codify Conflict of Laws in International Commercial Contracts

17. Nationalist movements in Europe and the Americas put a hold on the development of the idea of a uniform or universal civil and commercial law (*ius commune* and *lex mercatoria*), which had gained particular strength during the Middle Ages. Nation States of the civil law tradition adopted civil and commercial codes, whereas those following an Anglo-Saxon

[7] In this Guide, "uniform law method" is used as short-hand for this process of the unification of private law. The key organizations known for this work will be mentioned later in the discussions.

tradition consolidated their laws based on legal precedent. This gave particular impetus to the use of conflict of laws rules for solving problems in private international law regarding which law to apply in international private relationships. In the second half of the 19th century, discussions were underway in Europe as to how to implement unified solutions by means of an international treaty. However, the Americas took the lead.

A. Montevideo Treaties

18. In 1889, nine private international law treaties were signed in Montevideo.[8] One of these, specifically the *Treaty on International Civil Law* ("1889 Montevideo Treaty"), addresses the determination of the law applicable to international contracts. However, its provisions regarding applicable law generated controversies and it said nothing about party autonomy, which is now a broadly accepted principle in private international law.

19. These early Montevideo Treaties remain in force for Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay. In 1940, new treaties were signed in Montevideo, but these were ratified only by Argentina, Paraguay, and Uruguay.[9] These treaties reaffirmed the earlier solutions in relation to applicable law ("1940 Montevideo Treaty"). They also provide that each State must determine whether it accepts the principle of party autonomy, a matter which, in the absence of clear provisions thereon in domestic legislation, remained highly controversial for decades in Paraguay and Uruguay.

B. Bustamante Code

20. Other States of the Americas, including Brazil, Chile, and Venezuela, did not join the Montevideo Treaties. Instead, they ratified the *Convention on Private International Law* with annexed *Code of Private International Law* in Havana in 1928.[10] Known as the "Bustamante Code", it governs various matters of private international law, including the law applicable to international contracts, and sets out a solution regarding applicable law that differs from that of the Montevideo Treaties. The instrument has also raised many questions as to whether it establishes the principle of party autonomy. The Bustamante Code has been ratified by several states in the Americas (albeit with extensive reservations.)[11]

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[8] 1) Treaty on International Civil Law of 12 February 1889; 2) Treaty on International Commercial Law of 12 February 1889; 3) Treaty on International Penal Law of 23 January 1889; 4) Treaty on International Procedural Law of 11 January 1889; 5) Convention on the Exercise of Liberal Professions of 4 February 1889; 6) Treaty for the Protection of Literary and Artistic Property of 11 January 1889; 7) Convention on Commercial and Industrial Trademarks of 16 January 1889; 8) Convention on Letters Patent of 16 January 1889; 9) Additional Protocol to Treaties on Private International Law of 13 February 1889. Information available at: http://opil.ouplaw.com/page/Treaties-Montevideo.

[9] 1) Treaty on Political Asylum and Refuge of 4 August 1939; 2) Treaty on Intellectual Property of 4 August 1939; 3) Convention on the Exercise of Liberal Professions of 4 August 1939; 4) Treaty on International Commercial Navigation Law of 19 March 1940; 5) Treaty on International Procedure Law of 19 March 1940; 6) Treaty on International Penal Law of 19 March 1940; 7) Treaty on International Commercial Law (other than maritime) of 19 March 1940; 8) Treaty on International Civil Law of 19 March 1940; 9) Additional Protocol to Treaties on Private International Law of 19 March 1940. Information available at: http://opil.ouplaw.com/page/Treaties-Montevideo.

[10] *Convention on Private International Law,* with annexed *Code of Private International Law.* Adopted 20 February 1928 at the Sixth Pan-American Congress held in Havana, Cuba, entered into force 25 November 1928. 86 LNTS 111. Information available at: http://www.oas.org/en/sla/dil/inter_american_treaties_A-31_Bustamente_Code_signatories.asp.

[11] Brazil has ratified this Code; however, according to Brazilian scholars it is virtually ignored and rarely mentioned in judicial decisions. According to Article 2 of the Treaty to which the Code is attached, only certain or special reservations are allowed. Therefore, the generally accepted interpretation by scholars in Venezuela, based on the law of treaties, is that the Code only applies to those states that ratified it without reservation (Cuba, Guatemala, Honduras, Nicaragua, Panama and Peru) and those that ratified it only with certain limited reservations (Venezuela, Brazil, Dominican Republic, Haiti, and Bahamas). Accordingly, it would not apply in Bolivia, Chile, Costa Rica, Ecuador and El Salvador. These latter states ratified the Bustamante Code with generic reservations "as long as not contradicting internal legislation", which equates

C. Rome Convention and Rome I

21. In 1980, almost a century later than the Montevideo Treaties of 1889, a treaty was signed in Europe to regulate conflict of laws in international contracts. The *Convention on the Law Applicable to Contractual Obligations*, known as the "Rome Convention", accompanied by an official report to assist with its interpretation, entered into force in 1991.[12] As of 2008, following the transfer of certain legislative powers to the European Union, with some modifications and additions, the Rome Convention has been substituted by the European Union ("EU") *Regulation on the Law Applicable to Contractual Obligations*, known as "Rome I".[13] This regulation covers matters of law applicable to international contracts, outlines the principle of party autonomy and the limits thereof, and also provides criteria to determine the applicable law where no choice of law has been made by the parties.

22. The importance of these two instruments is due not only to their adoption by the EU[14] but also because of the influence in the Americas (in the first configuration as the Rome Convention) on the drafting of the Mexico Convention and, more recently on the preparation of a global instrument, the Hague Principles.

IV. Mexico Convention

23. In the Americas in the mid-20th century, there were controversies over the Montevideo Treaties and the Bustamante Code. These instruments contained provisions that differed from one another and also raised questions regarding, for instance, party autonomy and absence of choice of law. Moreover, some States of the Americas, including all those of Anglo-Saxon tradition, had not ratified either treaty.

24. Establishment of the OAS in 1948 raised great expectations that this situation would finally be resolved. After careful evaluation, OAS Member States decided against the idea of preparing a general code like the Bustamante Code, and, instead, chose to work towards gradual and progressive codification in specific topics within private international law.

25. The realization of this intent began in 1975 when OAS Member States took steps to harmonize and codify substantive law and choice-of-law rules in a number of different topics in private international law.

26. This was achieved primarily through the Inter-American Specialized Conferences on Private International Law ("CIDIP"), diplomatic conferences organized pursuant to Article 122 of the *Charter of the OAS*. To date seven CIDIPs have been held, which have resulted in the adoption of 26 international instruments (including conventions, protocols, uniform documents, and one model law) on various topics. The instruments were designed to create an effective legal framework for judicial cooperation between States in the Americas and to add legal certainty to cross-border transactions in civil, family, commercial and procedural matters. The most recent of these conferences was CIDIP-VII, held in 2009.

27. In recent years, several matters in the field of private international law have been undertaken by the CJI, which, in turn, has sent any such proposed instrument to the Permanent Council for consideration by that political body and its Committee on Juridical and Political Affairs and eventual consideration and approval by the OAS General Assembly. By this method,

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to no ratification (although some tribunals, for example in Costa Rica, have been known to apply the Code). In Venezuela, the Bustamante Code is not applied in respect of these states. During the years that followed, some states within the region did make efforts to include in their domestic legislation express recognition of the principle of party autonomy, as occurred, for example, with the rules of private international law of the Peruvian Civil Code of 1984, Article 2095.

[12] *Convention on the Law Applicable to Contractual Obligations.* 19 June 1980, Rome. 19 ILM 1492; [1980] OJ L266/1.

[13] *Regulation of the European Parliament and of the Council on the law applicable to contractual obligations*. (17 June 2008) 593/2008/EC, [2008] OJ L177/6. Rome I is binding on all European Union Member States other than Denmark, where the Rome Convention remains applicable.

[14] *Id*., see note above with regard to Denmark.

without incurring the costly mechanism of a specific diplomatic conference in the form of a CIDIP, the final instrument nevertheless receives endorsement by the Member States by means of a political process.[15]

28. The Mexico Convention was formally adopted in 1994 at CIDIP-V in all four official languages of the OAS (English, Spanish, French and Portuguese), the texts of which are all equally authentic. It was signed by Bolivia, Brazil, Mexico, Uruguay, and Venezuela, ratified by Venezuela and Mexico and entered into force on December 15, 1996.[16] To date, no reservations or declarations have been made.

29. The topic of international contracts had initially been considered in 1979 at CIDIP-II. It was subsequently included on the agenda for CIDIP-IV held in 1989 and was assigned to Committee II, which considered a study prepared by the Argentinian jurist Antonio Boggiano and a draft convention that had been prepared by the delegation of Mexico.[17] As general consensus was not reached on a formal instrument, delegates adopted a set of principles for future deliberation and recommended that the OAS General Assembly convene a meeting of experts. These principles served as the basis for a draft convention and report, which were prepared by the Mexican jurist Jose Luis Siqueiros and approved by the CJI in 1991.[18]

30. This draft convention and report were reviewed at the meeting of experts held in Tucson, Arizona, November 11 to 14, 1993.[19] The meeting resulted in the adoption of a revised new *draft Inter-American Convention on the Law Applicable to International Contracts* (the "Tucson Draft"), which formed the basis for the deliberations at CIDIP-V, held in Mexico City, March 14 to 18, 1994. The preparatory work had included the circulation of a questionnaire to OAS Member States as well as extensive review of other relevant instruments on the topic.[20] As CIDIP-V was attended by 17 Latin American states, and the United States and Canada, the resulting text is said to represent the consensus of a large number of states from both the civil law and common law traditions.

31. The Mexico Convention was approved comprising 30 articles that address party autonomy in the choice of applicable law and the limits thereof, criteria to be used where no choice of applicable law has been made, and public policy, as well as other matters. With the 1980 Rome Convention as a source of inspiration, the Mexico Convention went further in areas such as the admittance of non-State law and openness to the law of a non-contracting State.

32. Although the low rate of ratification (i.e., solely by Mexico and Venezuela) alone is not indicative of its achievements, it was considered worthwhile to examine the possible reasons. Accordingly, when the question was put to States and academics in a survey conducted by the CJI in 2015, a number of responses cited the following reasons, among others:

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[15] By way of example, in 2011 the CJI included the topic of simplified companies on its agenda, in 2012 it adopted a resolution by which a draft Model Law on the Simplified Corporation was approved and forwarded to the Permanent Council. Annual Report of the [CJI] to the 43rd Regular Session of the General Assembly, OEA/Ser.G/CP/doc.4826/13, 20 February 2013. Ultimately, in 2017 the OAS General Assembly took note and adopted a resolution on the *Model Law on the Simplified Corporation* (AG/RES. 2906 (XLVII-O/17)).

[16] Status at *supra* note 3.

[17] Informe del Relator de la Comisión II Referente al Tema de Contratación Internacional. CIDIP-IV, Volumen I, Actas y Documentos CIDIP-IV. Secretaria General, OEA, Washington DC 1991, page 447.

[18] Tema 1: Contratación Internacional Proyecto de Convención Interamericana sobre Ley Aplicable en Materia de Contratación Internacional – Comité Jurídico Interamericano. CIDIP-V, OEA/Ser. K/XXI.5 – CIDIP-V/12/93, December 28, 1993.

[19] Tema 1: Contratación Internacional. Informe de la Reunión de Expertos sobre Contratación Internacional. CIDIP-V, OEA/Ser. K/XXI.5 – CIDIP-V/14/93, December 30, 1993 ("Report on Experts' Meeting").

[20] Informe del Relator de la Comisión II Referente al Tema de Contratación Internacional, *supra* note 17.

a. language inconsistencies between the official texts, particularly in English and Spanish, are problematic;

b. novel and controversial choice of law principles presented challenges at that time. The first of these, party autonomy, at least in 1994, represented a radical shift from the traditional approach of conflict of laws predominant in several civil law states;

c. the "closest connection" or "proximity principle" was an unfamiliar concept without clear guidelines as to its application;

d. the references to "general principles of international commercial law" and "*lex mercatoria*" were problematic as the language was considered too broad and the scope unclear;

e. lack of local champion or political will; and,

f. it was perceived that among states there was a general lack of awareness of the Mexico Convention and its potential benefits.[21]

It has also been suggested that perhaps the Mexico Convention made a somewhat forced attempt at synthesis between civil and common law, which did not lead to a satisfactory outcome.

33. Notwithstanding the low levels of ratification, these responses from OAS Member States and academics from within the region confirmed that the Mexico Convention has made valuable contributions to the development of the law of contract in the hemisphere. In the more than twenty years since its adoption, many of its principles, in particular the principle of party autonomy, have gained acceptance throughout the region and become enshrined in the domestic laws of a number of OAS Member States. This has been achieved in various ways, consideration of which will be discussed throughout the Guide to assist with decisions regarding the way forward.

V. Hague Principles

34. The Hague Conference on Private International Law ("HCCH") originated with a first diplomatic conference in 1893. Its history can be divided roughly into two eras: initially, from 1893 until World War II, the Conference met on six occasions. At a seventh session held in 1951, it was established by statute as an intergovernmental organization. Since then, the Conference has met generally every four years in diplomatic sessions and, in addition, occasionally in extraordinary sessions. Although its name would suggest otherwise, the HCCH has become a permanent organization. Its purpose is "the progressive unification of private international law", which it achieves mainly by negotiating, and servicing, multilateral treaties on issues of jurisdiction of courts and authorities, of applicable law, of recognition and enforcement of foreign decisions, and of cross-border judicial and administrative cooperation." Its membership of 82 States plus the EU includes 14 OAS Member States.[22] Moreover, several other States of the Americas have joined one or more of the Hague Conventions.

35. The work of HCCH differs from that of other organizations, such as the United Nations Commission on International Trade Law ("UNCITRAL"), in that rather than advancing toward substantive unification, HCCH prepares private international law texts in keeping with the traditional *conflict of laws* approach. It is considered the leading world organization in this field. HCCH works on such varied matters as international protection of children, family law, property rights, international legal cooperation, international litigation, and international commercial and financial law.

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[21] See 2016 Contracts Paper, *supra* note 1.

[22] Argentina (1972), Brazil (2001), Canada (1968), Chile (1986), Costa Rica (2011), Ecuador (2007), Mexico (1986), Panama (2002), Paraguay (2005), Peru (2001), Suriname (1977), United States (1964), Uruguay (1983) and Venezuela (1979). Current status of HCCH membership is accessible at: https://www.hcch.net/en/states/hcch-members.

36. The suggestion of an instrument on applicable law to international contracts was first proposed at the HCCH by the delegation of the United States in 1972. The 1955 *Convention on the Law Applicable to International Sales of Goods* and 1986 *Convention on the Law Applicable to Contracts for the International Sale of Goods* ("Hague Sales Conventions")[23] and the 1978 *Convention on the Law Applicable to Agency* ("Hague Agency Convention")[24] had limited success based on the number of ratifications. Yet their impact on other instruments – for example, through the acceptance of freedom of choice of law by the parties (party autonomy) – has been significant on instruments such as the Rome Convention and Rome I, addressed below.

37. Feasibility studies carried out between 2005 and 2009 indicated that perhaps a different type of instrument might be successful. Accordingly, it was decided to prepare a non-binding instrument, i.e., a *soft law* instrument,[25] whose primary purpose would be to promote party autonomy as a criterion for choice of applicable law.

38. To prepare such an instrument, a working group was created in 2009, composed of 15 experts and observers from public and private international institutions, which included UNCITRAL, International Institute for the Unification of Private Law ("UNIDROIT") and the International Chamber of Commerce ("ICC").[26] Among the members of the working group were six jurists from or working in the Americas. In 2012, the Council on General Affairs and Policy established a Commission to review the working group's proposals and make recommendations. In November 2012, a Special Commission, a conference with over 100 national experts, proposed the draft Hague Principles and delegated to the working group responsibility for the preparation of a commentary and illustrations.

39. In March 2015, the final version of the *Principles on Choice of Law in International Commercial Contracts* ("Hague Principles") was formally adopted. It is the first global legal instrument on choice of law in international contracts. The particular significance of the Hague Principles is that it broadly establishes within a global instrument the principle of party autonomy and accords status to non-State law in a text on conflict of laws. As noted above, HCCH membership includes 14 OAS Member States, many of them represented at the Special Commission meeting,[27] and the working group included representatives from the region; accordingly, it can be said that the Hague Principles reflect incorporation of the positions of many States from the Americas. The Hague Principles have received endorsement by UNCITRAL[28] and by nongovernmental organizations such as the ICC.[29]

40. The Hague Principles apply only to choice of law in international commercial contracts; they do not cover cases where no choice has been made. The preamble describes and explains the spirit of the instrument and is followed by 12 principles, or "black-letter" rules, each of

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[23] *Convention on the Law Applicable to International Sales of Goods.* Adopted 15 June 1955, entered into force 1 September 1964. 510 UNTS 147; *Convention on the Law Applicable to Contracts for the International Sale of Goods.* Adopted 22 December 1986, not yet entered into force. (1985) 24 ILM 1575.

[24] *Convention on the Law Applicable to Agency.* Adopted 14 March 1978, entered into force 1 May 1992. (1977) 16 ILM 775.

[25] For discussion on soft law, see para. 57 below.

[26] ICC is a global network of over 6 million members in more than 100 countries. Members include many of the world's largest companies, SMEs, business associations, banks, law firms and local chambers of commerce. It works "to promote international trade, responsible business conduct and a global approach to regulation." https://iccwbo.org/about-us/.

[27] The first meeting of the Special Commission on the Choice of Law in International Contracts took place on November 16, 2012; the report is accessible at: https://assets.hcch.net/docs/735cb368-c681-4338-ae8c-8c911ba7ad0c.pdf.

[28] Endorsement of texts of other organizations: Principles of Choice of Law in International Commercial Contracts, in Report of [UNCITRAL], 48th Session 29 June -16 July 2015, A/70/17, at page 45. See also: UNCITRAL Endorses the Hague Principles. https://www.hcch.net/en/news-archive/details/?varevent=414.

[29] https://iccwbo.org/media-wall/news-speeches/icc-appeals-to-authorities-to-strengthen-legal-certainty-for-international-contracts-by-implementing-the-newly-approved-hague-principles/.

which is accompanied by explanatory commentaries with illustrations where necessary. These 12 principles address scope of application, party autonomy in choice (express or tacit) of applicable law (whether or not the law is of the State of the contracting parties or that of a third State), formal validity of that choice, and public policy as overriding freedom of choice, among other matters.

41. Given the difficulties of drafting an international convention, the Hague Principles follow the same soft law approach and drafting technique of the *UNIDROIT Principles of International Commercial Contracts* ("UNIDROIT Principles").[30] And, as with that instrument, the Hague Principles are intended to serve as a model for legislators and those who draft contracts and as a guide for use in judicial and arbitral interpretation. The two instruments are, in fact, complementary: while the UNIDROIT Principles address substantive matters of contract law (such as contract formation, interpretation, effects, and termination), the Hague Principles address matters relevant to the choice of law (such as the law of one or more States, or a choice of non-State law).

VI. Recent Legislation in the Americas on Conflict of Laws in International Commercial Contracts

42. This Guide does not address the numerous ways by which international law is incorporated into a domestic regime as this varies significantly from one State to another; moreover, some States, such as Venezuela, do not incorporate (or "implement") international law into their domestic law. Generally speaking, however, States seeking to harmonize their domestic law with the Mexico Convention and the Hague Principles may incorporate these provisions either into general laws on private international law or into laws that specifically govern the law applicable to international contracts.

43. One option is recourse to "*material incorporation*," which entails full transcription of the treaty into a domestic legal text as was done by Paraguay. Its Law No. 5393 of 2015, "Law Applicable to International Contracts" has 19 articles. Articles 1 to 10 and Articles 13 and 14 on choice of law basically reproduce the Hague Principles with small modifications. Articles 11, 12, 15, and 16 address primarily those situations where a choice of law has not been made and reproduce almost verbatim the corresponding provisions of the Mexico Convention. Lastly, Article 17 on public policy is aligned with the solution provided by the Hague Principles and Article 18 addresses the legislation that must be revoked as a result of this law.

44. Another option is recourse to legislative "*incorporation by reference*." This is the route that was taken by Uruguay when in a domestic law it adopted the rules of interpretation of different articles of the Montevideo Treaty on International Civil Law.[31]

45. A third option was taken by *Venezuela*, which ratified the Mexico Convention[32] and, in 1998, enacted a Law on Private International Law in force since February 6, 1999.[33] This law includes three Articles (29 to 31) which replicate the main contents of the Mexico Convention and provide that possible lacunae be supplemented by its principles.

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[30] *2016 UNIDROIT Principles of International Commercial Contracts*. Text accessible at: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016. See discussion below at Part Three, Section III.B on the progressive development of these principles.

[31] In regard to that particular treaty, there had been consensus between academia and parliamentarians on the benefits of its provisions. By contrast, as regards the Mexico Convention, the situation in Uruguay has been different; no similar consensus exists and as a result, parliamentary approval of the instrument has been rejected twice. Furthermore, a draft General Law on Private International Law also has failed to gain parliamentary approval, the main reason being its incorporation of party autonomy following the Mexico Convention.

[32] Published in Special Official Gazette No. 4.974, September 22, 1995.

[33] Official Gazette No. 36.511, August 6, 1998.

46. *Mexico* has ratified the Mexico Convention, which is considered part of the internal rules of private international law that govern international contracts by States not parties to that Convention, even though there is no specific legislative or jurisprudential indication in this regard. Venezuela took a different approach and incorporated the content of the Mexico Convention directly into its domestic rules of private international law.

47. *Argentina*, the *Dominican Republic* and *Panama* very recently modified their legislation governing international contracts. Argentina has substituted its Civil Code and its Commercial Code by a new unified Civil and Commercial Code (CCC), which contains an entire chapter on private international law that includes several provisions on international contracts.[34] In November, 2018, a commission created by the government submitted a draft proposal to the Ministry of Justice for the reform of the CCC. Significantly, the draft proposes to substitute the current text of Article 2651(d) with the following: "the choice of law may include a choice of non-State law generally accepted as a neutral and balanced set of rules."[35] In the Dominican Republic, its new Private International Law contains provisions on international contracts.[36] In Panama, the new Code of Private International Law also contains provisions on the matter.[37] Among these texts, that of the Dominican Republic appears to have been most influenced by the Mexico Convention, although it departs from fundamental aspects, such as determination of applicable law in the absence of choice of law by contracting parties.

2.0 OAS Member States, regardless of whether they have or have not ratified, or do or do not intend to ratify the Mexico Convention, are encouraged to consider its solutions for their own domestic legislation, whether by material incorporation, incorporation by reference, or other mechanisms as applicable to their own domestic legal regimes, taking into consideration subsequent developments in the law applicable to international commercial contracts as expressed in the Hague Principles and as described in this Guide.

PART THREE

ADVANCES IN THE UNIFORM LAW METHOD IN RECENT DECADES

I. New Scenario in Favor of the Uniform Law Method

48. Until recently, in the field of international commercial contract law, conflict of laws instruments were overwhelmingly prevalent; today, however, the uniform law method is gaining ground. Many factors are contributing to this trend. For example, party autonomy, or the ability of the parties to choose the law that will govern in the event of a dispute, is being consolidated as a principle of the law applicable to international commercial contracts. This often leads parties to seek to avoid the conflict of laws mechanism altogether through detailed stipulations in their agreements or clear choices as to the governing law even at times where these laws are not part of domestic law; frequently, these are references to uniform law instruments.

49. Various efforts today at the global, regional and local levels in both the public and private spheres are resulting in an ever-expanding web of instruments, all with the shared aim to develop uniform law. This phenomenon is not limited to normative rules; efforts are also underway to create uniformity among interpretative techniques and to reconcile understandings of the technical operation of different legal systems.

[34] The CCC has been approved by Law 26.994 of October 7, 2014 and entered into force August 1, 2015.
[35] The proposal is still under discussion. Text of the proposal accessible at: http://www.pensamientocivil.com.ar/system/files/2018/11/Legislacion3875.pdf.
[36] Law 544 of 2014.
[37] Law 61 of 2015 (replaced Law 7 of 2014). Official Gazette, October 8, 2015. No 27885-A.

50. In addition, arbitration is being consolidated as an accepted method of resolving commercial disputes that provides arbitrators with suitable tools for reaching appropriate solutions to cross-border problems, beyond mere concern for mechanical application of domestic laws in accordance with a conflict of laws system.

II. Tools Used to Achieve Unification and Harmonization

51. The terms *unification* and *harmonization* are often used interchangeably. Strictly speaking, unification implies the adoption of common legal norms by more than one State or region, whereas harmonization denotes greater flexibility; it does not necessarily refer to uniform texts, but rather, to the alignment of legal criteria based on common foundations, model laws, or uniform principles. Both conflict of laws rules and substantive laws can be subject to unification and harmonization.

52. The *international treaty* or *convention* is the instrument traditionally used by States to adopt common standards in an effort towards unification by building upon existing solutions or creating new ones.[38] Indeed, there have been many successful treaty instruments, several of which will be discussed in this Guide. But a drawback of the treaty format is the difficulty in securing ratification. Difficult negotiations between States of different legal traditions or with divergent policy objectives often require compromise and concessions that result in a final text that is less than apt or even inoperable, which unsatisfied parties ultimately refuse to ratify. In an effort to obtain ratifications, mechanisms such as *reservations* are often used, which foster the illusion of unity while ultimately subverting unification. Moreover, drafters usually exclude those issues on which there is no consensus. Although treaties continue to abound, they have their limitations.

53. The international treaty may pose limitations due to the relative inflexibility of this form in responding to changes in commercial practices, which often evolve quite rapidly, or when the treaty has not been drafted to account for such changes.

54. Conventions on commercial law subjects frequently seek to codify as law certain commercial usages, customs, or practices. But when conventions are drafted by State governments rather than by members of the community whose practices are supposedly thereby to be established, sometimes such conventions fail to gain acceptance precisely because they do *not* reflect community practices or perceptions. At the same time, however, the role of the State is also to safeguard the interests and rights of those who are not part of the dominant voice within the mercantile community.

55. Another mechanism was devised - still within the context of international treaties – of *uniform laws*, examples of which include the *Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes* (Geneva, 1930) and the *Convention Providing a Uniform Law for Cheques* (Geneva, 1931).[39] These two conventions set out uniform laws that the contracting states agreed to introduce into their legislation. Today this mechanism has been largely discarded; since a uniform law is designed to be incorporated in its entirety into domestic law, it is seen to impinge on the sovereign authority of a state to legislate.

56. To remedy this difficulty, the concept of the *model law* was devised - an instrument drafted by an eminent organization that subsequently recommends its adoption. The *UNCITRAL Model Law on International Commercial Arbitration* ("UNCITRAL Model Law") is an

[38] An example is the term "party autonomy" which can be found in the 1955 Hague Sales Convention and thereafter gained considerable use such that it became a common term to express the principle in many subsequent instruments.

[39] *Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes*, Jun. 7, 1930, Geneva, 143 UNTS 257; and *Convention Providing a Uniform Law for Cheques*, Jan. 1, 1934, Geneva, 143 UNTS 355.

example here.[40] However, meaningful unification often is not achieved by this method either, since national legislators may revise, adapt, or even disregard the provisions within a model law. The more general the subject matter, the greater is the likelihood that this will occur.

57. Additional *soft law* methods exist the aim of which is harmonization. *Soft law* is an expression used to refer to a wide variety of materials that, contrary to *hard law* texts, are not necessarily expected to be formally adopted by States via treaty ratification or legislation, but nonetheless can have great influence on the practice and development of the law. One such method might be referred to as a type of *statement of the law*, also called "*principles.*" Soft law also includes *legislative guides* that offer examples of draft text in the form of rules and regulations; it also includes other types of *guides* and similar instruments.

58. In summary, the law of international commercial contracts may derive from State or non-State law and within the latter category, the source may include various types of soft law instruments. State (or "domestic") law, in accordance with the internal regime of each individual State for the implementation or application of international law, may also include or refer to soft law instruments.

III. Relevant Global Instruments of Uniform Law for International Commercial Contracts

59. The following section will review two of the main global instruments of uniform law for international commercial contracts, the *UN Convention on Contracts for the International Sale of Goods* ("CISG")[41] and the UNIDROIT Principles, as well as regional efforts to develop uniform laws on the subject, private sector initiatives, and influences from the world of arbitral instruments.

A. UN Convention on Contracts for the International Sale of Goods

60. Known widely by its English acronym, UNCITRAL was established in 1966 with its object being "the promotion of the progressive harmonization and unification of the law of international trade." Its general mandate is to reduce and eliminate barriers created by disparities in domestic laws that govern international trade and commerce.

61. One of its well-known products, the CISG, was adopted in 1980 and entered into force in 1988. The CISG unifies the substantive law on the international sale of goods of its contracting states and covers aspects of the formation of contracts for the international sale of goods, substantive rights of the buyer and seller, and matters related to fulfillment and non-fulfillment of those obligations. Many of these issues are common to contracts in general; in fact, many provisions applicable to contracts governed by the civil codes of several states are drawn from the provisions of the CISG.

62. The CISG is widely accepted with current membership at 89 States worldwide. It is in force across much of Latin America, with the exception of Bolivia, Belize, Guatemala, Nicaragua, Panama, Suriname and Venezuela. In the Caribbean, it is in force in Cuba and the Dominican Republic.[42]

63. Despite wide acceptance of the CISG, parties to a contract may exclude its application or, subject to limitations, abrogate or vary the effect of its provisions (Article 6).[43] As the CISG

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[40] *UNCITRAL Model Law on International Commercial Arbitration.* Adopted 21 June 1985, with amendments adopted in 2006. Text accessible at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[41] *United Nations Convention on Contracts for the International Sale of Goods.* Concluded 11 April 1980, entered into force 1 January 1988. 1489 UNTS 3.

[42] Status of CISG Membership accessible at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[43] Some commentators have stated that contracting parties often do exclude application of the CISG. The actual rate of parties' opting out of the CISG has been the object of several investigations with different results obtained in light of different methodologies. Recent comprehensive studies have been carried out by Gustavo Moser. (See Moser, Luiz Gustavo Meira. Rethinking choice of law in cross border sales,

recognizes the principle of party autonomy, this exclusion or variation of CISG provisions may be achieved by choosing the law of a non-contracting State or the internal domestic substantive law of a contracting State (for example, the Civil and Commercial Code).

64. Conversely, even if it has not been ratified by the State of the contracting parties involved in a dispute, the CISG may be applied as an expression of non-State law when adjudicators are authorized to apply uniform law.[44] However, this is a debated issue.

65. In addition to its wide adoption as a binding international convention and source of non-State law, the CISG has also inspired legislative initiatives to further the development of contract law at the nation State level. In the Americas, a prime example is Argentina.[45] In addition, in some States such as Brazil[46] and El Salvador[47], the CISG has been used by judges as a source to interpret domestic law.

66. Judicial and arbitral interpretations of the CISG also serve to advance its influence. Hundreds of cases, including judicial decisions and arbitral awards, have been made available on the UNCITRAL website.[48]

B. UNIDROIT Principles of International Commercial Contracts

67. Known also as the "Rome Institute", UNIDROIT was created in 1926 under the auspices of the League of Nations. Its purpose is to modernize and harmonize the framework of private law, with a primary focus on commercial law. UNIDROIT currently has 63 Member States, including 13 from among the OAS membership.[49]

68. UNIDROIT's efforts are directed towards development of material solutions, i.e., a quest for *uniform substantive law*, and only exceptionally towards *conflict of laws rules*. During its existence of over 90 years, UNIDROIT has generated over 60 texts that include conventions

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international commerce and arbitration, Volume 27, Ingeborg Schwenzer (ed.), Eleven International Publishing, The Hague 2018, p. 25-32.) Moser states: "Whilst the rate of CISG opt-out cannot be overlooked and should be further discussed and investigated, a commonality to note among all these studies is that such rate appears to be linked to 'lack of familiarity' with the CISG and perhaps a 'fear of the unknown'. However, the claim that the CISG is 'widely excluded' is not supported by empirical evidence." (P. 31 – footnotes omitted). Anecdotal evidence indicates that opting out is often related to dependency patterns without full consideration of the underlying reasons. The current general trend appears to be towards more use of the CISG and less opting out.

[44] The CISG can be applied as an expression of "general principles of international trade" (see, for example, *Steel Bars Case*, ICC Arbitration Case No. 6653, 26 March 1993, text accessible at http://cisgw3.law.pace.edu/cases/936653i1.html. It can also be applied as an expression of "general standards and rules of international contracts" (see, for example, *Printed Banknotes Case*, ICC Arbitration Case No. 9474, February 1999, http://cisgw3.law.pace.edu/cases/999474i1.html). Moreover, the CISG can be applied as an expression of "trade usages" (see, for example, *Cowhides Case*, ICC Arbitration Case No. 7331, 1994, http://cisgw3.law.pace.edu/cases/947331i1.html; *Hotel Materials Case*, ICC Arbitration Case No. 7153, 1992, http://cisgw3.law.pace.edu/cases/927153i1.html). Originally cited in Emery, Cyril Robert and Salasky, Julia, Arbitration and UNCITRAL's Sales Conventions (March 1, 2013). Slovenska arbitražna praksa, Vol. 2, No. 1, pp. 28-34, 2013, https://ssrn.com/abstract=2394516.

[45] http://www.sbm.com.ar/assets/pdf/prensa/nuevo_codigo/final_the_new_CCiv_com_Argentina_and_the_cisg4.pdf.

[46] See *Diário de Justiça do Estado do Rio Grande do Sul* (DJE), Appellate Court of the State of Rio Grande do Sul, Case No. 70072362940, 12th Chamber, 16 February 2017.

[47] See *Juzgado Segundo de lo Civil y Mercantil de San Salvador,* Second Civil and Commercial Court of San Salvador, February 28, 2013, Ruling No. PC-29-12.
http://www.cisgspanish.com/wp-content/uploads/2013/08/ElSalvador28feb2013.pdf.

[48] See discussion below in Part Four, Uniform Interpretation, and the Appendix, Databases and Electronic Sources.

[49] Argentina (1972), Bolivia (1940), Brazil (1940), Canada (1968), Chile (1951), Colombia (1940), Cuba (1940), Mexico (1940), Nicaragua (1940), Paraguay (1940), United States (1964), Uruguay (1940), Venezuela (1940). Current UNIDROIT Membership accessible at: https://www.unidroit.org/about-unidroit/membership.

and draft model laws or guides that result from "studies", as they are officially known, on a wide range of subjects.

69. From among these efforts, the UNIDROIT Principles constitute one of its most significant accomplishments. They were first published in 1994, although work on the subject had begun in the 1970s. The 1994 edition consists of a preamble and rules (or articles) on general contract provisions, contract formation, validity, interpretation, content, performance and non-performance. These rules are accompanied by detailed commentary, including illustrations, all of which form an integral part of the whole. Given that the same 13 OAS Member States were members of UNIDROIT at the time of the adoption of the UNIDROIT Principles in 1994, that work can be assumed to reflect the consensus reached with direct or indirect involvement of these States.

70. In 2004, a revised and enlarged version was published, with the addition of five chapters on agents, third party rights, damages, assignment of rights, transfer of obligations, assignment of contracts, and limitation periods. The 2010 edition, in turn, addressed new topics on joint and several obligations and the invalidity of contracts covering unlawful or immoral subject matter. The most recent version is the 2016 edition that better takes into account matters on long-term contracts, which may be relevant in both international commercial contracts and foreign investment contracts.

71. To support the use of the UNIDROIT Principles, in 2013 UNIDROIT approved *Model Clauses for the Use of the UNIDROIT Principles*. They are "primarily based on the use of the UNIDROIT Principles in transnational contract and dispute resolution practice, i.e. they reflect the different ways in which the UNIDROIT Principles are actually being referred to by parties or applied by judges and arbitrators" and are offered as model clauses for parties wishing to make reference to the UNIDROIT Principles in different contexts: as the rules of law governing the contract; as terms incorporated into the contract; as a tool to interpret and supplement the CISG when the latter is chosen by the parties; as a tool to interpret and supplement the applicable domestic law, including any international uniform law instrument incorporated into that law.[50]

72. Judicial and arbitral interpretations of the UNIDROIT Principles also serve to advance their influence. Many of these court decisions and arbitral awards have been compiled in the UNILEX database.[51]

73. In their drafting technique, the UNIDROIT Principles were influenced by the "Restatements" prepared by the American Law Institute ("ALI"), an organization of eminent jurists in the United States of America ("United States") that organizes, summarizes, and "restates" predominant trends in jurisprudence in various fields of domestic law. Although similar in appearance to the rules contained in codes of civil law jurisdictions, these Restatements do not share that same legal status in the United States.[52]

74. Therefore, rather than the word "*Restatement*", the term "*Principles"* was selected to thereby capture the non-State character of the instrument. Evidently, the drafters wished to immunize the UNIDROIT Principles from possible semantic connotations suggestive of the world's predominant civil law and common law systems. Hence, they did not refer to them as a Code, which denotes legislative sanction, nor as a Restatement. Taking advantage of the vagueness of the term, they referred to them as *"Principles"* Technically, however, most of the legal norms are expressed as precise rules, not principles in a broader and more general sense.

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[50] *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*. https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses.

[51] See discussion below in Part Four, Uniform Interpretation, and the Appendix, Databases and Electronic Sources.

[52] However, although the aim is to describe rules adopted by courts, at times they also offer suggestions that would amount to changes in the law.

75. The UNIDROIT Principles aim to play a fundamental role in various contexts. For legislators, they may be a source of inspiration for reforms in the area of contract law. In fact, the UNIDROIT Principles were taken into account in the revision of the Argentine Civil and Commercial Code, the law of obligations in Germany, and contract law in the Republic of China and in African countries, among others.[53]

76. For contracting parties subject to different legal systems or who speak different languages, the UNIDROIT Principles can serve as guidelines for drafting their contracts and as a neutral body of law (akin to a "*lingua franca"*). This may be done in different ways. For instance, the UNIDROIT Principles may serve as a terminological source. In civil law systems, the terms *debtor* and *creditor* are used, whereas in common law, the terms *obligor* and *obligee* are preferred with the terms *debtor* and *creditor* used only when monetary payments are involved. To bridge this gap, the UNIDROIT Principles use the terms *obligor* and *obligee* "to better identify the party performing and the party receiving performance of obligations…irrespective of whether the obligation is nonmonetary or monetary."[54] Also, the UNIDROIT Principles may serve as a checklist for parties to ensure that they have included in their international contracts all provisions that may be relevant.

77. Moreover, parties to international contracts may refer directly to the UNIDROIT Principles as applicable law. The choice of the UNIDROIT Principles may be combined with the choice of domestic law to cover supplementary issues, considering that the Principles may not alone be sufficient in all instances and may need to be complemented by a more comprehensive regime as is usually provided by the national law. But the reverse is also possible: the UNIDROIT Principles can serve as "means of interpreting and supplementing domestic law." If entitled to do so, adjudicators may also apply the UNIDROIT Principles in situations in which the parties have not made a choice of law, rather than having recourse to the conflict of laws mechanism.

78. For some legal theorists, the UNIDROIT Principles are considered as the centerpiece in the debate on *lex mercatoria*. Others consider them a codification of general principles and the *lex mercatoria*. In fact, this was an intended use of the Principles as contemplated by their drafters, who anticipated that they would be used by judges or arbitrators called upon to make determinations based on indefinite "international uses or customs" or "general international commercial principles."[55]

79. For courts and arbitral tribunals, the UNIDROIT Principles may provide the necessary criteria to interpret and supplement existing international instruments, such as the CISG, as well as national laws both in the international and domestic contexts.

C. Unification of Contract Law within the Process of Regional Integration

80. Over roughly the same period, a group of academics known as the Commission on European Contract Law – many also involved in drafting the UNIDROIT Principles – began efforts to develop a uniform law instrument; although nongovernmental, the group included representatives from all Member States of the EU. Its efforts have resulted in a body of work known generally as the *Principles of European Contract Law* ("PECL").[56] Several provisions of the PECL are identical or very similar to those of the UNIDROIT Principles. In addition to rules, commentary, and illustrations, the PECL contain valuable notes on

[53] See Estrella Faria, J.A., The Influence of the UNIDROIT Principles of International Commercial Contracts on National Laws. (2016) 21 Uniform L. Rev. 238.
[54] UNIDROIT Principles, Article 1.11, Comment 4.
[55] *Lex mercatoria* and general principles is discussed below in Part Six on non-State law.
[56] https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/; Cf. Ole Lando and Hugh Beale (eds.), Principles of European Contract Law Parts I and II. Kluwer Law International, 2000.

European comparative law. The PECL have now been invoked by many courts and arbitration tribunals but have not received any formal recognition by the EU.[57]

81. Another academic initiative has resulted in the *soft law* instrument known as the *Draft Common Frame of Reference* ("DCFR"), the drafting technique of which was very similar to that used for the PECL.[58] The European Parliament welcomed the presentation of the DCFR in 2008 and, while recognizing it as "merely an academic document" with the next steps as "a highly political exercise", pointed out that in the future, the document may range "from a non-binding legislative tool to the foundation for an optional instrument in European contract law."[59]

82. These two initiatives, the PECL and the DCFR, may lead to the development of additional instruments in the future that might include the possibility of choosing the PECL as the applicable law, which Rome I does not currently permit. In its preamble, Rome I acknowledges the possibility of incorporation by reference and, should the [EU] adopt rules of substantive law, the possibility to choose those rules.[60]

83. In the Americas, by comparison, efforts towards a process of regional integration have not advanced any uniform law initiatives, although some efforts have been made.[61] Noteworthy is Article 1 of the *Treaty of Asunción* (which establishes the Southern Common Market - "MERCOSUR"), which contains text that aims in this direction but to date has not been realized.[62]

D. Private Sector Harmonization Initiatives

84. Harmonization is promoted not only by public organizations; many initiatives in the private sector also contribute towards this end.

85. One type of instrument is referred to as *standardized terms*. Notably, the ICC advances several normative instruments that can be incorporated into agreements by reference.[63] Examples include the *International Commercial Terms* or "INCOTERMS"[64] and the *Uniform Customs and Practice for Documentary Credits* or "UCP".[65] Although instruments such as these are usually satisfactory and sufficiently neutral in form and substance, they provide only a partial solution owing to their limited scope. Moreover, they presume the existence of an overarching legal framework that governs the contract. Nonetheless, both the

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[57] See discussion in, Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11.07.201. COM(2001) 398 Final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0398.

[58] Von Bar, Clive, Schulte-Nölke et al. (eds.), Principles, Definitions and Model Rules of European Private Law — Draft Common Frame of Reference (DCFR), 2008.

[59] European Parliament resolution of 3 September 2008 on the common frame of reference for European contract law. Official Journal of the European Union, C 295 E/91. 4.12.2009.

[60] Perambulatory paragraphs 13 and 14, respectively. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM/2011/0635 final - 2011/0284 (COD). Text accessible at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52011PC0635.

[61] Examples include the *Principles of Latin American Contract Law*, an initiative that involves jurists from the region; text accessible at: http://pldc.uexternado.edu.co/. A recent newcomer to the field of codification is the Organization for the Harmonization of Business Law in the Caribbean ("OHADAC"), whose work to prepare *OHADAC Principles on International Commercial Contracts* could contribute towards garnering support from Caribbean states; text accessible at: http://www.ohadac.com/.

[62] *Treaty establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay* (Common Market of the South [MERCOSUR]) 2140 UNTS 257. Article 1 refers to the commitment by States Parties "to harmonize their legislation in relevant areas in order to strengthen the integration process."

[63] For information on the ICC, see *supra* note 26 and see: https://iccwbo.org/about-us/.

[64] For information on INCOTERMS, see:
https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/.

[65] For information on the UCP, see:
http://store.iccwbo.org/icc-uniform-customs-and-practice-for-documentary-credits.

INCOTERMS and the UCP are considered by many to be highly successful, in part, because they are specialized and narrowly focused, and in part, because the organization that promulgates them has the ability to modify them in response to changed commercial circumstances.

86. Another tool is the *standard contract* accepted within a specific economic sector. One example thereof is the *Conditions of Contract for Works of Civil Engineering Construction* (1987), prepared under the auspices of the International Federation of Consulting Engineers ("FIDIC"), commonly known as the "FIDIC Contract." Another example includes the standard international forms of contract from the Grain and Feed Trade Association ("GAFTA"), which are widely used in international trade for agricultural products. In the financial field, the use of the *Global Master Repurchase Agreement* published by the International Capital Market Association stands out internationally, as does the *ISDA Master Agreement for Derivative Contracts* published by the International Swaps and Derivatives Association.[66]

87. Model contracts also are developed by intergovernmental and nongovernmental organizations; one example is the *Model Contract for the International Commercial Sale of Goods*, prepared by the International Trade Centre.[67]

88. These standard contracts may present problems within a general framework of contract law. As they usually are prepared by or for business entities operating in the world's largest commercial centers, they may be of limited use in other applications. Moreover, in most cases the content is unilaterally formulated, of unilateral benefit and the drafting is inevitably influenced by legal concepts of the respective countries of origin.

89. Also available are "*codes of conduct*," prepared either by private entities or intergovernmental organizations and that constitute compilations of rules in specific subjects or industries. They are characterized by flexibility, voluntary compliance and self-governance, rather than state regulation. An example here is the *International Code of Advertising and Marketing Communication Practice* also developed by the ICC.[68] An example from Factors Chain International is the *Code of International Factoring Customs*.[69]

90. Bar associations, such as the International Bar Association ("IBA"), the American Bar Association ("ABA"), and the Union Internationale des Avocats ("UIA"), also formulate "*private soft law rules."* An example thereof is the IBA's *Rules on the Taking of Evidence in International Arbitration*, which are used worldwide.[70]

91. Other nongovernmental organizations such as the American Law Institute, the European Law Institute, the European Group of Private International Law ("EGPIL/GEDIP") and the American Association of Private International Law ("ASADIP") together with the academic community, have also collaborated in various codification efforts that have been undertaken over the years by UNCITRAL, UNIDROIT, HCCH and the OAS. Some have even

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[66] See http://fidic.org/; https://www.gafta.com; https://www.icmagroup.org; https://www.isda.org.

[67] International Trade Centre, Geneva 2010. Model Contracts for Small Firms: Legal Guidance to Doing International Business. Chapter 3. International Commercial Sale of Goods. http://www.intracen.org/itc/exporters/model-contracts/.

[68] *Advertising and Marketing Communication Practice* (Consolidated ICC Code) 2011. Text accessible at: https://iccwbo.org/publication/advertising-and-marketing-communication-practice-consolidated-icc-code.

[69] Sommer, H.J., Factoring, International Factoring Networks and the FCI Code of International Factoring, in (1998) 3 Uniform L. Rev 685-691. https://doi.org/10.1093/ulr/3.2-3.685; https://fci.nl/en/solutions/factoring/model-law-for-factoring.

[70] International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 2010 edition. https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx.

advanced their own soft law proposals, such as the ASADIP *Principles on Transnational Access to Justice* ("Transjus").[71]

E. Arbitral Texts and Law Applicable to International Commercial Contracts

92. The 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention") was concluded within the United Nations framework and now has 159 State parties from across all continents.[72] Although the instrument antedates the establishment of UNCITRAL, it is now within the scope of the Commission's Working Group on international arbitration. The New York Convention does not directly address the matter of the law applicable to an international contract submitted to arbitration; however, it does recognize the parties' choice of law governing the validity of the arbitration clause, as well as that governing the arbitration procedure. It also establishes that, in the absence of a choice of law by the parties, the law of the seat of the arbitration will be the "law of the arbitration."

93. Moreover, UNCITRAL has issued the *Secretariat Guide on the Convention on the Recognition and Enforcement of Arbitral Awards* (2016) and a *Recommendation* regarding the interpretation of Article II, paragraph 2 and Article VII, paragraph 1 of [said convention].[73] These soft law instruments are useful tools to interpret and supplement the New York Convention.

94. The UNCITRAL Model Law (1985), with amendments as adopted in 2006, was inspired by the New York Convention. It establishes a regime to govern the various stages of an arbitration: from the agreement; to the composition, competence, and scope of intervention by the arbitration tribunal; to recognition and execution of the arbitral award. Amendments were introduced in 2006 that relaxed the formalities of the arbitration agreement for provisional or interim measures. The Explanatory Note by the UNCITRAL Secretariat is a useful tool to interpret and supplement the UNCITRAL Model Law.

95. Unlike the New York Convention, the UNCITRAL Model Law specifically does address the substantive law applicable to contracts submitted to arbitration. Article 28 endorses the principle of party autonomy as to "such rules of law as are chosen by the parties" including "any designation of the law or legal system of a given State." It also addresses situations where no choice of law has been made and includes a general statement that refers to the necessity of arbitrators to apply the terms of the contract and to take into account, in all cases, relevant usages.

96. The New York Convention has been ratified or acceded to by nearly all States of the Americas[74] and the UNCITRAL Model Law has promoted harmonization by inspiring legal reforms throughout the continent.[75] Through the creation of a common legal framework, UNCITRAL has encouraged various States to incorporate these model provisions into their

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[71] Text approved by the ASADIP Assembly in Buenos Aires on 12 November 2016. http://www.asadip.org/v2/?page_id=231.

[72] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards.* Signed 10 June 1958, entered into force 7 June 1959. 330 UNTS 3. Current status accessible at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[73] Text of UNCITRAL arbitral documents accessible at: http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html.

[74] The exceptions are Belize, Grenada, Saint Kitts and Nevis, Saint Lucia and Suriname.

[75] UNCITRAL Model Arbitration Law. Current status accessible at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. According to the website, legislation based on the Model has been adopted in the following OAS Member States: Canada (federally and all provinces and territories), Chile, Costa Rica, Dominican Republic, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Peru, United States (certain states only), and Venezuela. Argentina has also advanced new legislation (Arbitration Law, enacted 26 July 2018). Apparently, Uruguay has also approved legislation to adopt the Model Law. http://ciarglobal.com/uruguay-aprobado-por-el-senado-el-proyecto-de-ley-de-arbitraje-comercial-internacional/.

domestic legislation as well as to modernize arbitration practice in accordance with international standards. This effort has contributed significantly towards advancing acceptance of the principle of party autonomy throughout the region and recognition of the utility of global instruments of uniform law for international commercial contracts.

3.0 Legislators are encouraged, in the course of any reviews of their domestic legal regime on the law applicable to international commercial contracts and conflict of laws rules more generally, to consider the advances that have been made in the uniform law method and to consider the use of uniform law instruments together with conflict of laws rules as supplementary and complementary in the application and interpretation of private international law.

PART FOUR

UNIFORM INTERPRETATION

I. Conflict of Laws and Uniform Law Texts

97. Many resources and considerable efforts are required to develop harmonized conflict of laws and uniform law texts. But it is not enough for international and domestic provisions to be similar. The intended goal of harmonization by means of international instruments may be defeated if provisions are interpreted solely from a domestic and not from a comparative perspective.

98. To address this challenge, in recent years there has been an increase in the practice of including instructions in uniform law instruments whereby courts are encouraged to take into account their international nature and the need to promote their uniform enforcement. One example of this is Article 7.1 of the CISG, which states that "(i)n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." That provision in turn inspired Article 1.6 of the UNIDROIT Principles, which contains similar language.

99. Various conflict of law instruments also refer to the need to take into account their international nature and the desire to ensure uniform interpretations. An example is the Rome Convention (Article 18). Although Rome I contains no such provision, since it is a regulation, its uniform interpretation is obligatory, based on Article 288 of the *Treaty on the Functioning of the European Union* ("TFEU"). This is an important difference from uniform interpretation in other regions. In this regard, the Court of Justice of the EU contributes towards uniform interpretation of Rome I through its so-called "preliminary rulings" made at the request of a court of an EU Member State.

100. In the Mexico Convention, the preamble expresses the desire to "continue the progressive development and codification of private international law" and the "advisability of harmonizing solutions to international trade issues," and that, in light of the need to foster economic interdependence and regional integration, "it is necessary to facilitate international contracts by removing differences in the legal framework for them."

101. The objectives expressed in these perambulatory statements can be realized in those States that decide to ratify the instrument or, alternatively, incorporate its solutions into their domestic laws. But such formal acts alone are not enough; there must also be uniform interpretation of the formally adopted provisions. By way of guidance in that regard, Article 4 of the Mexico Convention provides as follows: "For purposes of interpretation and application of this Convention, its international nature and the need to promote uniformity in its application shall be taken into account."

102. Although the Hague Principles do not contain a provision similar to that of the Mexico Convention, given the soft law nature of the former instrument, the harmonization objective is evident throughout the document in that it contains provisions that can be adopted by parties around the world in the exercise of party autonomy. Furthermore, paragraphs 2, 3, and 4 of the preamble state that "they may be used as a model for national, regional, supranational or international instruments" and "may be used to interpret, supplement and develop rules of private international law" and "may be applied by courts and by arbitral tribunals." It is anticipated that widespread use of the Hague Principles will thereby lead to uniformity of interpretation in accordance with its rules. As the word "develop" used by the Hague Principles is not found in other texts such as the CISG (Article 7(1), the UNCITRAL Model Law (Article 2(A)(1) or the Mexico Convention (Article 4), its use suggests the possible impact of the Hague Principles on archaic and unpredictable domestic rules of private international law, a statement which may be considered "revolutionary."

103. Uniform interpretation of international texts is also facilitated through the collection and dissemination of judicial decisions and arbitral rulings.[76]

II. Domestic Laws

104. The matter of uniform interpretation is usually not dealt with expressly in domestic private international laws. However, in *Venezuela*, Article 4 of the Mexico Convention is recognized as a generally accepted principle of private international law, which also has been replicated in the Venezuelan domestic legislation on private international law. In *Argentina*, Article 2595 of the new Civil and Commercial Code makes a reference to the "dialogue among sources" which involves an effort in comparative law.

105. Legislators can acknowledge and foster the objective of harmonization, either by means of the inclusion of perambulatory language or adoption of an express rule to that effect. An example of the first method would be the law of Paraguay, which, in its "Statement of Motives" expressly notes that the final text of the Hague Principles "was reproduced almost entirely by the law." An example of the second method would be the introduction of text in line with Article 4 of the Mexico Convention, such as a provision similar to Article 2.A of the UNCITRAL Model Law, as amended in 2006, which provides: "(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

4.1 Legislators are encouraged, in the course of any reviews of their domestic legal regime on the law applicable to international commercial contracts and conflict of laws rules more generally, to consider the overarching goal of unification and harmonization of law within the process of global and regional integration.

4.2 Adjudicators, both in the public realm of the judiciary and in the realm of arbitration, are encouraged to consider the advantages of uniform interpretation in the international legal instruments that are used in the settlement of disputes concerning international commercial contracts and to take into account the development and dissemination of international jurisprudence in this regard.

4.3 Contracting parties and their counsel should remain informed of developments regarding uniform interpretation that may be applicable to their international contracts.

4.4 Contracting parties and their counsel should take into consideration that instruments applicable to their specific case may provide a different solution from those recommended in this Guide and that adjudicators in some jurisdictions may not follow the recommended liberal interpretation.

[76] For discussion regarding online databases, see Appendix, Databases and Electronic Sources.

PART FIVE

SCOPE OF APPLICATION OF GUIDE

I. Applicable Law[77]

106. One of the key questions in the course of any private cross-border transaction is which substantive law will apply thereto. The scope of this Guide extends to international commercial contracts in which parties have made a choice of applicable law and where they have not made a choice (or their choice has been ineffective). This is consistent with the scope of the Mexico Convention, which addresses both situations, by comparison with the Hague Principles, in which the scope of application is limited only to those situations where a choice of law has been made.

107. Choice of forum (or a "forum selection clause"), which is distinct from the choice of law applicable to the contract, is not within the scope of this Guide. In the field of arbitration, forum selection is addressed by the New York Convention and in disputes before courts, the Hague *Convention on Choice of Court Agreements*[78] may provide guidance.

II. "Contract" in Comparative Law

108. The concept of "contract" is not homogenous across the world. Yet despite the conceptual differences between various substantive laws, in the context of conflict of laws rules, the concept of "contract" (or "contractual obligations") is universally used and generally understood as referring to a voluntary arrangement between two or more parties that is enforceable by law as a binding legal agreement (or a binding legal obligation).

109. Certain relationships that would generate contractual responsibilities under some legal regimes would be considered beyond the contractual sphere in other regimes. This can be illustrated with the example of free-of-charge transport of persons. In some legal systems, the driver's responsibility for the safety of these persons is a non-contractual duty, while in others it constitutes a contractual obligation. Another example is that of commonly used instruments of foreign trade – such as bills of exchange and unilateral promises – which are deemed to be contractual in some states including the United States, but not in others. Moreover, in some legal systems, responsibility in certain matters such as these can be both contractual and non-contractual at the same time.

110. The issue of the concept of "contract", rather than being merely academic, is eminently practical; it determines the situations that are or are not covered by the legal provisions governing international contracts. This problem can be addressed in two ways. Using the traditional conflict of laws approach, the solution would be found within the applicable domestic law. But this approach presents insurmountable disadvantages when the results are incompatible.

111. The alternative approach is to turn to uniform law for a solution. Although the UNIDROIT Principles provide no guidance on this issue, the PECL state in Article 1:107 that the Principles are applicable by analogy to agreements to amend or terminate contracts, to

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[77] The expression *"derecho aplicable"* is used in the Spanish version of the Mexico Convention, rather than *"ley applicable"*, which would be the literal translation of the English expression *"applicable law."* In English, *"law"* is a broader term than the Spanish *"ley"* in that, in addition to legislation, it also includes judicial precedent, custom and other manifestations. When the HCCH Secretariat discussed this topic and offered an unofficial translation of the Hague Principles, it concluded that the term *"ley aplicable"* was more widespread in Spain, while in most other Spanish-speaking countries *"derecho aplicable"* is more commonly used.

[78] *Convention on Choice of Court Agreements.* (30 June 2005). Text accessible at: https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf.

unilateral promises, and to all other statements and actions that denote intent. Neither the Rome Convention nor Rome I is clear on the point.[79]

112. This is in part because donations are considered contracts in civil law states but not under common law systems. However, under the law in the United States a promise can generate obligations if there has been reliance on the promised donation under certain circumstances and with exceptional consequences.[80] The Rome Convention includes donations not made under family law, as noted in the official commentary.

113. During negotiations of the Mexico Convention, it was agreed that the term "international contracts" included the concept of "unilateral declarations of intent."[81] However, under Article 5 of the final text, unilateral acts – such as debt securities, for example – are not included. Non-commercial contracts, such as donations, are also excluded, given that the inter-American text only addresses commercial undertakings.[82]

III. International "*Commercial*" Contract

114. The scope of this Guide is limited to international *commercial* contracts. Although in some legal systems a distinction is made between "civil" and "commercial" types of activities, that is not the intention here; rather, it is to exclude "consumer contracts", which are frequently subject to mandatory rules within the ambit of consumer protection legislation, and "employment contracts", which are usually subject to special rules under labor laws.

IV. *"International"* Commercial Contract

A. Background

115. The determination of when a contract is international presents challenges that have been addressed in different ways. (1) One approach considers whether or not the contracting parties habitually reside or are domiciled or established in different States.[83] (2) An alternative focus is on the transfer of goods from one State to another or that the offer and acceptance take place in two different States, or that the place of formation of the contract takes place in one State and performance in another. (3) A broader position considers that the existence of any foreign element internationalizes the contract. There are also mixed

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[79] For example, both exclude bills of exchange, checks, and promissory notes. They also exclude negotiable instruments to the extent that the obligations under such instruments arise out of their negotiable character, which is determined by the law of the forum. However, they can be taken into consideration in interpreting the tacit or implicit intent of the parties in order to determine the applicable law (Article 1, paragraph 2.d, of Rome I; and Article 1, paragraph 2.c, of the Rome Convention). The official commentary also states that the Rome Convention covers the offers, acceptances, promises of contracts, notifications of contract termination, cancellations of debt, denouncements, and declarations of termination. Not addressed is a unilateral commitment that is not related to a contract, such as the recognition of non-contractual debt, or a unilateral act constituting, transferring, or extinguishing a real right. The CJEU has stated that "…the concept of 'contractual matter', which appears in Article 5 (1) of the Rome Convention, cannot be understood as referring to a situation in which there is no commitment that has been freely assumed by one party vis-à-vis the other.." (in reference to the criterion of jurisdiction in contractual matters in Reg. 44/2001). *Frahuil SA v Assitalia SpA*, CJEU, February 5, 2004, Case C-265/02. It has also stated that "... a legal obligation [is] freely consented to by one person with respect to another ...". *Petra Engler v. Janus Versand GmbH*, CJEU, January 20, 2005, Case C-27/02. Text of cases accessible at: https://eur-lex.europa.eu.
The underlying relationship to the promise in a letter of exchange may be of contractual origin, but even the law applicable to a negotiable instrument should not be confused with the law applicable to the underlying contract. The distinction between contractual and negotiable aspects of a juridical relationship is used to illustrate the exclusion made by Article 1(2)(b) of the Rome I instrument to differentiate negotiable aspects of the obligations evidenced in a letter of exchange, cheque or promissory note (which are not governed by Rome I) and contractual aspects (which are so governed).

[80] The doctrine known as "promissory estoppel", explained in section 90 of the Restatement (Second) of Contracts.

[81] Report on Experts' Meeting, s*upra* note 19.

[82] These and other exclusions are considered below in Section V.

[83] Article 4, Rome I, *supra* note 13.

criteria, such as those followed, for example, in *the Convention relating to a Uniform Law on the International Sale of Goods*.[84]

116. Recent regulatory instruments for both international commercial contracts and international arbitration use the word *international* in a very broad sense. In general, it is enough for the parties to be established or to have residence in different jurisdictions, or for the place of performance or of the purpose of the contract to be outside the State where the parties are established (but see discussion below, concerning "establishment"). The international classification generally only excludes those arrangements in which all the relevant elements are connected to a single State. A similar approach is taken by the Hague Principles, discussed below.

117. Neither the Montevideo Treaties nor the Bustamante Code address this issue. Similarly, neither the Rome Convention nor Rome I address this issue, at least not directly; both instruments merely refer, in Article 1.1, to contractual obligations in situations involving a conflict of laws.

B. Mexico Convention

118. The inter-American instrument does expressly state "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" (Article 1, paragraph 2). Thus, the Mexico Convention offers two alternative approaches: one relating to the place of residence or establishment of the *parties*, and another focused on the *contract* itself and on its *objective connections* with more than one State. Given that the two possibilities are connected by the conjunction "or," the contract is considered international if either condition is met. The definition includes three terms that are examined in the following paragraphs.

1. "Habitual Residence"

119. The Mexico Convention uses the term "*habitual residence*" rather than other terms that have created controversies in international contracting. One such problematic term is "*domicile*", which in some systems demands an *animus* or intent to establish oneself in the place in addition to the habitual nature of the residence.

120. The Mexico Convention does not address particular situations, such as an alternative residence in a different State or a change of residence after entering into a contract.[85] The Hague Principles do expressly address this issue; Article 12 states that the relevant establishment "is the one which has the closest relationship to the contract at the time of its conclusion."

2. "Establishment"

121. For corporate entities, the Mexico Convention uses the word "*establishment*" but fails to make clear whether this refers to the *main* establishment. The English translation of Article 1 has been criticized because here the term "*establishment*" was used as a direct translation of the Spanish "*establecimiento*" instead of "*principal place of business*", which is the concept generally known in English-speaking legal systems and which was used in Article 12.

122. The challenge of finding an appropriate term arises out of differences between legal traditions. The debate has been ongoing for some time in different forums and during the drafting of various international instruments. In some legal systems, the place where a

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[84] *Convention relating to a Uniform Law on the International Sale of Goods.* Concluded 1 July 1964, entered into force 18 August 1972. 834 UNTS 107. Text accessible at: https://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964.

[85] However, those issues may be resolved by reference to other instruments. For example, Rome I which uses the expression "habitual residence" for both natural persons and corporate entities, states that the relevant point is "the time of conclusion of the contract" (Article 19 (3)). As regards the habitual residence of a natural person acting in the course of his business activity, it is "his principal place of business" (Article 19(1)).

business is incorporated may be chosen for specific reasons such as, for example, tax-planning purposes. Under such circumstances, although the place of incorporation could be considered the business *establishment*, it may not necessarily correspond to the *principal* place of business.

123. According to the report from the Tucson meeting that had preceded CIDIP-V and adoption of the Mexico Convention, it was requested that the text address those situations in which one party had commercial establishments in more than one State, in which case the international status of the contract would be determined on the basis of the establishment with the closest connections to the contractual obligation for which the applicable law was being determined.[86] However, the proposal was not included in the final text.

124. Twenty years later, the suggestion has been expressly endorsed in Article 12 of the Hague Principles (see discussion below). This could serve as interpretative assistance or as a model for legislators in light of the silence of the inter-American instrument on this point.

3. "Objective Ties/ Closest Connections"

125. The Mexico Convention states that a contract is considered international "if the contract has *objective ties* with more than one State Party" (Article 1, paragraph 2). This was a direct translation of the Spanish term "*contactos objetivos*" and here again there are language problems; as has been suggested, the expression "closer/closest connection" should have been used to remain consistent with the English terminology of other international instruments (for example, the Rome Convention). Objective ties exist when a contract is concluded (signed) in one jurisdiction and performed in another or when the goods are located in different jurisdictions.

C. Hague Principles

126. The instrument provides that "a contract is international unless each party has its establishment 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" (Article 1.2).

127. Thus, the Hague Principles adopt an approach opposite to that of the Mexico Convention. Here a contract is considered international *unless* the stipulated provisions are met, whereas under the Mexico Convention, the contract is considered international *if* the stipulated provisions are met. Although the definitions and approach are inverse, the result is (or should be) the same.

128. Although the Hague Principles also use the term "*establishment*", in the accompanying commentaries, ("HP Commentary") (12.3) clarifies that this refers to any place "in which the party has more than a fleeting presence" and that the term includes "a center of administration or management, headquarters, principal and secondary places of business, a branch, an agency, and any other constant and continuous business location. The physical presence of the party, with a minimum degree of economic organization and permanence in time, is required to constitute an establishment. Hence, the statutory seat of a company alone does not fall within the notion of establishment." The HP Commentary (12.3) further clarifies that a party with its main establishment in a State and business activities in another State that are carried out exclusively over the internet is not to be considered established in the latter location.

129. As explained in the HP Commentary (12.4), the Hague Principles do not use the term *habitual residence* to include natural persons acting within their sphere, especially consumers and employees. For natural persons who pursue commercial or professional activities, the criterion to determine establishment is the same as is used for corporate entities.

130. As already noted above, the Hague Principles provide that "If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which

[86] Report on Experts' Meeting, *supra* note 19.

has the closest relationship to the contract at the time of its conclusion" (Article 12). That provision applies to both natural persons and corporate bodies and is in line with the solution offered by Article 10(a) of the CISG.

131. Moreover, the establishment of a business is determined *at the time the contract is concluded*. According to the HP Commentary, this respects the legitimate expectations of the parties and provides legal certainty.

D. Relevance of Parties' Choice to Internationality

132. Uncertainty remains with regard to the effect of a choice of law by the parties on the determination of the internationality of the contract. The preliminary work for the Mexico Convention discarded the idea that such a choice could alone determine "internationality."[87] However, the final text of the Mexico Convention has given rise to doubts on that point. Some experts are of the opinion that the choice of the parties alone is enough to internationalize a contract. Others consider that the reference in Article 1, paragraph 2 to "objective ties" to more than one State Party was made in order to prevent such a choice by the parties alone from rendering an agreement "international."

133. The HP Commentary explains that the negative definition in Article 1.2 excludes only purely domestic situations, in order to confer the broadest possible scope of interpretation to the term "international." However, it also states that "the parties' choice of law is not a relevant element for determining internationality" and that "the parties may not establish internationality solely by selecting a foreign law." By contrast, Rome I does allow the internationalization of a contract simply by reason of the parties' choice. However, that choice may not contravene the mandatory law of the state where all the relevant elements of the contract are located (Article 3.3. That solution makes sense in that it respects both principles – party autonomy and mandatory law – with emphasis on the former but also recognition of the constraint imposed by the latter.

134. An overarching approach to the determination of whether a contract is considered "international" would be to adopt the criterion set out in Comment 1 to the Preamble of the UNIDROIT Principles. Although the term "international" is not defined, the comment states that "the concept of 'international' contracts" must be interpreted in the broadest sense possible. Moreover, this interpretation is to be done in such a way "so as ultimately to exclude only those situations where no international element at all is involved, i.e. where all the relevant elements of the contract in question are connected with one country only." This approach, consistent with that taken in the Hague Principles as noted above, appears to be an emerging trend as evidenced also in both domestic law and commercial arbitration as discussed below.

135. When no international element is present, the justification for party autonomy in respect of domestic contracts is not present (because there is no uncertainty regarding applicable domestic law, or no need for a neutral third law). The approach in Rome I (and in Quebec, for example) is to allow the designation of a foreign law but essentially only for non-mandatory issues.

E. Internationality in Domestic Laws

136. *Argentina's* new Civil and Commercial Code, in force since August 2015, does not define international contracts in its provisions on private international law. Judicial interpretation in cases decided prior to the new Code considered a contract international "if its function is to bring into contact two or more national markets, or if there exists a real connection of

[87] Report on Experts' Meeting, *supra* note 19. The original proposal had followed the European approach that any contract involving a conflict of laws was international, which was rejected at the Tucson Meeting of Experts; a choice of law was not enough to internationalize a contract – it had to have "objective ties" to more than one state. (See also CJI/SO/II/doc.6/91).

signing or performance abroad"[88] and, that "a contract is national when all its elements are in contact with a specific legal system, whereas for our private international law of domestic origin, a contract is international when it is signed and carried out in different States."[89]

137. Similarly in *Brazil*, the relevant legislation has no general definition for international contracts, with the exception of the CISG. Judicial interpretations on the issue vacillate.

138. *Chilean* legislation adopts a more restrictive approach to internationality. A literal interpretation of Article 16 of Chile's Civil Code and Article 113 of its Commercial Code would lead to the result that a contract would [only] be considered international if it had been signed in another State and by its terms was to be carried out in Chile. By analogy, a contract signed in one State for implementation in another would also be international, even in the absence of a definition of internationality in the contract. However, the judiciary has opted for a broader interpretation. According to recent judgments from Chilean courts, a contract would also be international if it was concluded between parties domiciled or with establishments in various States,[90] if the goods or property object of the contract are located in another State, or "in which the parties are of different nationalities and the merchandise will transit between two States".[91]

139. The new *Panamanian* Code of Private International Law (2015) includes economic criteria to determine the international status of a contract.

140. *Paraguay* took the approach imbued by the UNIDROIT Principles. Article 2 of the Paraguayan Law Applicable to International Contracts provides that "the applicability of this law to international contracts shall be interpreted in the broadest fashion possible, and only those in which all the relevant elements have ties to a single State shall be excluded." Given the breadth of that language, it is necessary to ask whether the choice of the parties alone is enough to "internationalize" the contract. Although that would appear to be permissible under the Paraguayan law, if there are no other international elements, *ordre public* would be used to assess potential constraints on that choice so that the contract would be considered as domestic.

141. The *Venezuelan* Law on Private International Law stipulates in Article 1, in addition to its sources, the scope of its application, which is limited to "factual situations related to foreign legal provisions." The law does not qualify the type of connections the undertaking may have with foreign legal systems, therefore, some scholars have suggested that *any* foreign element is sufficient for a contract to be considered international, including the nationality of the parties. Economic criterion have also been considered acceptable; a 1997 decision by the Political and Administrative Chamber of the then Supreme Court of Justice states that "the international nature of the agreement must be established in its broadest sense. Thus, attention must be paid to all the possible factors – both objective and subjective – relating to

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[88] The phrase is a quotation by the court from the author, Boggiano, in Private International Law (1978), pp. 471 and 517, in *Sagemüller, Francisco v. Sagemüller de Hinz, Liesse et al*. Second Bench of the Second Civil and Commercial Chamber of Paraná (Entre Ríos), August 10, 1988, cited in Fallos DIPr, Jurisprudencia Argentina de Derecho Internacional Privado, 18 May 2007. http://fallos.diprargentina.com/2007/05/sagemller-c-sagemller-de-hinz.html. The case concerned sale of shares of a corporation incorporated in Argentina, by a contract of sale executed (signed) in Germany with payment made in Switzerland.

[89] Third Bench of the National Commercial Chamber, October 27, 2006.

[90] *Marlex v. European Industrial Engineering*, Supreme Court, July 28, 2008, Ruling No. 2026-2007; *Exequatur Cubix v. Markvision*, Supreme Court, August 20, 2014, Ruling No. 10890-2014.

[91] *Cruz Barriga v. Integral Logistics Society*, Supreme Court, August 25, 2010, Ruling No. 1699-2009. Decree Law 2.349, which establishes rules on international contracts for the public sector, defines the international nature of the contracts in relation to the main business center of the contractual counterpart of the State of Chile, without requiring that the contract has been concluded abroad: The cited standard refers to the ".... international contracts related to business and operations of patrimonial character that the State or its organisms, institutions and companies celebrate with organisms, institutions or international or foreign companies, whose main center of business is abroad."

the parties and the relationship that is in dispute, be they legal (nationality, domicile, place of signature) or economic (overseas transfers of money, conveyance of goods and services)."[92] Most Venezuelan scholars have discarded the possibility of internationalizing the contract by the mere selection of foreign law; on the contrary, it has been understood that internationality is a requisite for the exercise of party autonomy.

F. Internationality in Commercial Arbitration

142. The international character of an arbitration may lead to the internationalization of a contract if the ample powers of the arbitrators regarding the applicable law to the substance of the dispute are considered.

143. The UNCITRAL Model Law stipulates in Article 1 (3) that "An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."

144. These provisions combine the criteria of the international status of the contract and the international status of the parties and adds a third criterion, whereby the parties are given the freedom to mutually decide that the matter covered by the arbitration agreement is "international." Thus, the internationalization of the arbitration (and hence of the underlying contractual relationship) at the decision of the parties is permitted by the UNCITRAL Model Law. However, this issue seems to be more theoretical than emerging in practice.

145. A total of 82 States have enacted legislation based on the UNCITRAL Model Law, including 13 OAS Member States.[93] Most of those States have included the definition contained in Article 1(3).

146. Some States have what may be referred to as "dual arbitration legislation"; one set of rules to govern domestic arbitration that differs from those applicable to international arbitration. Care should be taken to review both the domestic and international arbitration rules to see if the parties are permitted to choose the international rules by agreement.[94] *Paraguay*, *Chile*, *Costa Rica*[95] and *Colombia* are examples of States with such dual regimes. *Colombia* has gone beyond the internationality criteria of the UNCITRAL Model Law and has included an economic criterion according to which the arbitration is understood to be international when "the controversy submitted to arbitration affects the interests of international trade" (Article 62(c) of Law 1563 of 2012). This is no longer based on the UNCITRAL Model Law but on the procedural code of French Civil Law (Article 1504). Other States, too, such as *Peru*, have not excluded that internationality could be determined by sole will of the parties (Decree 1071 of 2008).

G. Trend in Favor of a Broad Interpretation of Internationality

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[92] *Embotelladoras Caracas et al. v. PepsiCola Panamericana*, Political and Administrative Chamber of the Supreme Court of Justice, October 9, 1997.

[93] See *supra* note 75.

[94] The UNCITRAL Model Law provides in Article 3 (c) that an arbitration is international if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. Whether or not the state in question has enacted similar provisions is the first question, but even so, such a declaration would not circumvent public policy.

[95] In recent arbitral jurisprudence of Costa Rica, there has emerged a tendency to apply as a supplementary source to the domestic law, Alternative Conflict Resolution and Promotion of Social Peace (Law 7727 of 1997), principles from the Law on International Commercial Arbitration (Law 8937 of 2011), which is based on the UNCITRAL Model Law.

147. Both the Mexico Convention and the Hague Principles contain ample criteria to determine internationality. This is also the case with the UNIDROIT Principles. Consistent with this trend, many States in the region have already enacted arbitration laws with a similarly broad concept of internationality.

> 5.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to its scope of application and the determination of internationality, should incorporate solutions in line with the Mexico Convention, the Hague Principles and the UNIDROIT Principles, thereby excluding consumer and labor contracts while adopting a broad concept of internationality, and may further stipulate that the sole agreement of the parties may internationalize a contract, but that if no other international element is present, internal *ordre public* will prevail.
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> 5.2 The domestic legislation may also replicate the provisions of the PECL, Article 1:107 and thereby make applicable by analogy agreements to amend or terminate contracts and unilateral promises and all other statements and actions that denote intent in a commercial setting.

V. Exclusions

148. International instruments on the law of international commercial contracts vary considerably as to the matters excluded from their scope of application. The Mexico Convention and the Hague Principles exclude similar matters but they do so in different ways. The Mexico Convention expressly excludes from its scope of application the matters listed in Article 5.[96] By comparison, by the language of its title and in its preamble, the Hague Principles are limited to international *commercial* contracts and further delimited by language in Article 1; they do not apply to consumer transactions or employment contracts.

A. Capacity

149. By operation of Article 5(a), the Mexico Convention does not determine the law applicable to "questions arising from the marital status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties."[97]

150. The terms "status" and "capacity" are treated differently in comparative law. Some systems use the word "status," while others use the term "*de facto* capacity." In this regard, private international law generally applies the law of persons (on the basis of domicile or nationality) or the law of the venue (*lex fori*).

151. There are also differences regarding "*de jure* capacity." This terminology, which is unknown in some systems, is related to what under other legal regimes is referred to as restrictions or bans on the disposal of property. This matter is subject to the regime of the person (nationality, domicile or other applicable). This regime establishes restrictions for arbitrary, discriminatory or similar reasons.

152. Article 1.3(a) of the Hague Principles excludes matters related to "the capacity of natural persons." As the HP Commentary (1.25) explains, this exclusion means that the provisions "determine neither the law governing the capacity of natural persons, nor the legal or judicial mechanisms of authorization, nor the effects of a lack of capacity on the validity of the choice of law agreement."

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[96] In addition, Article 6 of the Mexico Convention expressly provides that its provisions "shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention."

[97] Similarly, Article 4(a) of the CISG provides that the CISG does not govern the validity of the contract or of any of its provisions. It also does not govern the validity of any usage.

B. Family Relationships and Succession

153. Article 5(b) of the Mexico Convention excludes "contractual obligations intended for successional questions, testamentary questions, marital arrangements or those deriving from family relationships."

154. The Hague Principles contain no such similar exclusion as the instrument applies exclusively to international commercial contracts; scope of the instrument is limited by the language of its title and preamble, and is further delimited by Article 1 to apply "to international contracts where each party is acting in the exercise of its trade or profession."

C. Securities and Stocks

155. Article 5, paragraphs (c) and (d), of the Mexico Convention exclude obligations deriving from securities and from securities transactions. Some, but not all, legal systems deem these obligations to be contractual in nature.[98] Moreover, there are inter-American conventions on the subject of securities (bills of exchange, promissory notes, checks, invoices).[99] The Hague Principles do not contain a similar provision.[100]

D. Arbitration and Forum-Selection Agreements

156. Article 5(e) of the Mexico Convention excludes "the agreements of the parties concerning arbitration or selection of forum." Moreover, there are inter-American conventions on international commercial arbitration and validity of arbitral awards.[101]

157. Similarly, Article 1.3(b) of the Hague Principles states that "these Principles do not address the law governing arbitration agreements and agreements on choice of court." The HP Commentary (1.26) explains that this exception primarily refers to material validity or contractual aspects of such agreements, which include questions concerning fraud or mistake, among others. It is further noted that "in some States these questions are considered procedural and governed by the *lex fori* or *lex arbitri* [while] in other States these questions are characterized as substantive issues to be governed by the law applicable to the arbitration or choice of court agreement."

E. Questions of Company Law

158. Article 5(f) of the Mexico Convention excludes from its scope of application "questions of company law, including the existence, capacity, function and dissolution of commercial companies and juridical persons in general." There is an inter-American convention also on this topic.[102]

159. Likewise, Article 1.3(c) of the Hague Principles provides that they do not address the law governing "companies or other collective bodies and trusts." The HP Commentary (1.27) explains that the term "collective bodies" is used "in a broad sense so as to encompass both corporate and unincorporated bodies, such as partnerships or associations." The HP Commentary (1.29) emphasizes that the exclusion is confined to internal matters (such as organization, administration and dissolution) and does not extend to contracts that these entities conclude with third parties or agreements between shareholders.

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[98] Examination of the treatment of this subject in other legal systems is beyond the scope of this Guide.

[99] *Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices*, adopted at CIDIP-I in 1975; *Inter-American Convention on Conflict of Laws concerning Checks*, adopted at CIDIP-I in 1975; and another adopted at CIDIP-II in 1979. Text and status of these conventions is accessible at: http://www.oas.org/en/sla/dil/private_international_law_conferences.asp.

[100] Article 2(d) of the CISG excludes from its scope sales of stocks, shares, investment securities, negotiable instruments or money.

[101] *Inter-American Convention on International Commercial Arbitration*, adopted at CIDIP-I in 1975; *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, adopted at CIDIP-II in 1979. Text and status of these conventions accessible at aforementioned website, *supra* note 99.

[102] *Inter-American Convention on Conflict of Laws concerning Commercial Companies*, adopted at CIDIP-II in 1979. Text and status of these conventions accessible at aforementioned website, *supra* note 99.

F. Insolvency

160. The Mexico Convention contains no provisions on this matter. Article 1.3(d) of the Hague Principles expressly excludes its application to the law governing insolvency. According to the HP Commentary, the term is to be interpreted broadly, encompassing liquidation, reorganization, restructuring, or administration proceedings. The exclusion refers to the effects that the initiation of insolvency proceedings may have on contracts such as specific provisions for invalidating certain contracts or giving specific powers to the administrators of collective processes.[103]

G. Proprietary Effects

161. The Mexico Convention contains no provisions on this matter. The scope of application of the Hague Principles excludes the law governing the proprietary effects of contracts. As explained in the HP Commentary (1.31), the Hague Principles "only determine the law governing the mutual rights and obligations of the parties, but not the law governing rights in rem" i.e., they do not address matters such as whether the transfer actually conveys property rights without the need for further formalities, or whether the purchaser acquires ownership free of the rights and claims of third parties. Such matters are typically governed by domestic laws specific to conveyances. [104]

H. Agency

162. Article 1.3(f) of the Hague Principles excludes "the issue of whether an agent is able to bind a principal to a third party." As noted in the HP Commentary (1.32), the exclusion "refers to the *external* aspects of the agency relationship, i.e., to issues such as whether the principal is bound on the grounds of an implied or apparent authority or on the grounds of negligence, or whether and to what extent the principal can ratify an act of the agent" [emphasis added]. Therefore, the Hague Principles are applicable to *internal* aspects of the agency – in other words, "to the agency or mandate relationship between the principal and the agent, if it otherwise qualifies as a commercial contract."

163. The Mexico Convention leaves this topic open to interpretation. Article 15 of the Convention states: "The provisions of Article 10 shall be taken into account when deciding whether an agent can obligate its principal or an agency, a company or a juridical person." As will be seen below in Part Six, Article 10 of the Mexico Convention affords a high level of interpretative flexibility in searching for fair solutions in specific cases according to internationally accepted usage, practices, and principles.

5.3 The domestic legal regime on the law applicable to international commercial contracts may expressly exclude from its scope of application:

- family relationships and succession, arbitration and forum selection, and questions of company law, in accordance with the relevant provisions of the Mexico Convention and the Hague Principles;
- securities and stocks, in accordance with the relevant provisions of the Mexico Convention;
- capacity, insolvency, proprietary effects and agency, in accordance with the relevant provisions of the Hague Principles.

[103] Treatment of this subject under the Mexico Convention is beyond the scope of this Guide.

[104] Similarly, Article 4(b) of the CISG provides that the CISG does not govern the effect which the contract may have on the property in the goods sold.

PART SIX

NON-STATE LAW IN INTERNATIONAL COMMERCIAL CONTRACTS

I. The Terms "*Non-State Law*" and "*Rules of Law*"

164. The term "*non-State law*" is often used in a very broad sense that covers a variety of principles and rules that range from universal principles on human rights and general principles of law, to customs, usages and practices, standard definitions of trade terms (for example, INCOTERMS), private law codifications or restatements (for example, the UNIDROIT Principles) and *lex mercatoria* (however defined), all of which have little if anything in common except that they do not emanate from any source from within the State itself to create binding or "positive" law within their respective ambit.

165. More importantly, most of these products are, by their very nature (such as customary law) or because of their subject (such as principles on human rights) or their limited scope (such as usages and practices), incapable of serving as applicable law of a contract (or *lex contractus*). Yet in a discussion over the possibility of choosing as the law governing international contracts, non-State "rules of law"[105] in lieu of a particular national "law", it seems preferable to resort to the less all-embracing term of "rules of law" which has the advantage of being used already in the arbitral world.

166. An early example of the use of the term *rules of law*, is the 1965 *Convention on the Settlement of Investment Disputes between States and Other Nationals* ("ICSID Convention").[106] It states that the tribunal "shall decide a dispute in accordance with such rules of law as may be agreed by the parties" (Article 42). Several states in the region are parties to the ICSID Convention and accept the Centre's jurisdiction. Subsequently, the term "rules of law" has been incorporated into other arbitration laws and regulations, for example, the UNCITRAL Arbitration Rules (Article 33 in the 1976 version; Article 35 as revised in 2010).[107] The expression has also been used in Article 28(1) of the UNCITRAL Model Law, which has been adopted or used as the basis for arbitral legislation in numerous States of the Americas. According to the UNCITRAL commentary on this Article, "rules of law" is understood more broadly than "law" and includes rules "that have been elaborated by an international forum but have not yet been incorporated into any national legal system."[108]

II. Types of Non-State Law

A. Customs, Usages and Practices

167. Comparative law also uses other terms to refer to non-State law, such as customs, usages and practices, principles and *lex mercatoria*. These terms are far from being homogeneous.

168. The term "customs" is generally reserved these days for use in public international law so as to avoid confusion with the legal term of art – "customary international law", although in the Mexico Convention, "customs" was included in a series along with and alternate to "usage" (Article 10). In many legal systems of Latin America, following the French, Italian and Spanish approach, a distinction is made between *customs* (with normative force and the source of rights to fill in gaps where the law is silent) and *usages* (which serve to interpret or

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[105] Non-State rules of law as used herein could be considered as a type of "sub-set" of non-State law.

[106] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Mar. 18, 1965, Washington, 17 UST 1270, TIAS 6090, 575 UNTS 159.

[107] *UNCITRAL Arbitration Rules (1976)*, adopted by the UN General Assembly on December 15, 1976. UN Doc. A/RES/31/98; *UNCITRAL Arbitration Rules (as revised in 2010)*, adopted by the UN General Assembly on December 6, 2010. UN Doc. A/RES/31/98; Texts accessible at: https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

[108] As stated therein, it is not an official commentary and was prepared by the UNCITRAL Secretariat for information purposes only.

clarify the will of the parties, with normative force only in some cases). The difference in this nomenclature is that it is not necessary to prove the normative force of usages, as is required for customs.

169. Commercial understandings arising from contractual practices that had traditionally been called "customs" are now, in some recent instruments of uniform law, called "usages." According to this emerging nomenclature, "customs" arise from state practice while "usages" emerge from private action; however, some jurisdictions still adhere to the traditional approach. "Usages" is also broader than "customs," in that it covers not only practices that are generally accepted in a particular trade or sector, but also those considered by the parties as presumed expectations.[109]

170. In many jurisdictions while "usages" refers to conduct established by third and other parties of international commerce, the term "practices" is limited to past conduct of the contracting parties themselves. In some jurisdictions these terms are defined by legislation.[110]

171. "Usage" is used in uniform law instruments, such as the CISG (Articles 8(3) and Article 9) and the UNIDROIT Principles. This is also the case with the term "practices". Thus, for example, Article 1.9 of the UNIDROIT Principles states that "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves." This language is identical to that of the CISG (Article 9(1)) and in line with the subjective approach proposed in Article 8(3) thereof.

172. Although usages can be proven, institutionalization by an organization – whether governmental or otherwise – helps to establish a common understanding of expressions that are frequently used in international commercial contracts. One well-known example emanates from the ICC, a global association that has institutionalized usages in several of its own regulatory instruments, the most recognized of which are the INCOTERMS, a set of rules that cover standard terms used in international trade, such as the abbreviations FOB and CIF.[111] Many of the INCOTERMS have become "part of the daily language of commercial trade" and are regularly incorporated into international contracts.

173. Sometimes these terms are also referenced by other international instruments. For example, the Treaty of Asunción that created MERCOSUR uses the terms FOB and CIF (Annex 2, General Regime of Origin, Articles 1 and 2). Although the Treaty does not define these terms, their meaning is sufficiently clear as common terms that have become institutionalized by the ICC. In this way, this international treaty offers formal recognition of the non-legislated source.

174. Moreover, INCOTERMS have been incorporated into various domestic laws.[112]

B. Principles

175. Usage is specific to the activity at hand but, once it acquires general acceptance, it becomes a *general principle* or *principle*. As a usage becomes more widespread, it will have greater

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[109] As the element of obligation required in customary public international law (known as *opinio juris*) is not necessary, presumed expectations of the parties are enough for the emergence and observation of "usages."

[110] For example, the US Uniform Commercial Code, Section 1-303 distinguishes between *course of performance* (a term that is not easy to translate into Spanish, but which is closely linked to the contract and prevails over the following two terms), *course of dealing* or prior practices between the parties and *usage of trade* or uses.

[111] FOB is the abbreviation of "Free on Board", which refers to the point after which the seller is no longer responsible for the goods (the risk of loss of or damage to the goods and the responsibility for cost of transport passes when the goods are "on board the vessel." INCOTERMS 2010). CIF stands for "Cost, Insurance, Freight", which means that the seller must pay these costs up to the named destination.

[112] For instance, Article 51 of the Venezuelan law of DIPr of 1998; Article 2651 of the Argentine Civil and Commercial Code; Article 51 of the Draft Law of DIPr of Uruguay; Articles 852 et seq. of the Commercial Code of Bolivia (which refer to INCOTERMS) and Article 1408 (which refers to Documentary Credits); and Article 3 of Resolution 112/2007 of the Directorate of National Taxes and Customs of Colombia.

affinity with general principles with the result being a reduction in the burden of proof that is generally required for a usage.

176. The concept of *general principles of law* appears in early texts such as the Austrian Civil Code of 1811 and other legal texts to codify private law in both Europe and Latin America. Numerous contemporary judgments by the Court of Justice of the European Communities ("CJEC"), and now the Court of Justice of the EU ("CJEU"), also refer to "general principles of *civil* law" [emphasis added].[113]

177. Of course, principles are recognized by Article 38 of the Statute of the International Court of Justice ("ICJ") as a source of international public law, using the expression "the general principles of law recognized by civilized nations." But the expression also has been adapted for use in international commercial contracts, such as those governing oil and gas investments in the Middle East, some of which have been the subject of landmark arbitrations in the course of the past century.[114]

178. In those and other cases settled through arbitration, similar expressions have also been used, including the following: general principles of private international law; generally admitted principles; general principles of law and justice; general principles of law that should govern international transactions; broadly accepted general principles that govern international commercial law; general principles of law applicable to international economic relations; general principles of law included in the *lex mercatoria*; and rules of law. Likewise, the Institute of International Law ("IIL") at its meeting in Athens in 1979 to consider the *Proper Law of the Contract in Agreements between a State and a Foreign Private Person* used expressions such as the following: general principles of law, common principles of domestic laws, principles applicable to international economic dealings, and international law, without expressing any preference.[115]

179. The expression *general principles* is also used in this sense in certain uniform law instruments. As provided in Article 7(2) of the CISG, matters are to be settled "in conformity with the general principles on which it is based." On occasion it is used as a synonym for "rules without the force of law", as in the UNIDROIT Principles.

180. The term *principles* may refer, broadly, to public law, to both public and private law and, specifically, to private or civil law. *Principles* is also used to refer to concepts of a more general nature (such as contractual freedom or good faith) and, on occasion, is qualified by

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[113] Possible examples: *Audiolux SA e.a. v Groupe Bruxelles Lambert SA*, CJEU, October 15, 2009, Case C-101/08; *Federal Republic of Germany v Council of the European Union*, CJEU, October 5, 1994, Case C-280/93. In another case, the European Court of Justice ("ECJ") utilized "a general principle of civil law" that "each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder." *Société Thermale d´Eugénie-Les Bains*, ECJ, July 18, 2007, Case C-277/95. In yet another, the Court mentioned that "one of the general principles of civil law," the principle of "full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract." *Annelore Hamilton v Volksbank Filder eG*, ECJ, April 10, 2008, Case C-412/06, at para. 42. In another, the Court invoked "the principles of civil law, such as those of good faith or unjust enrichment." *Pia Messner v Firma Stefan Krüger*, ECJ, September 3, 2009, Case C-489/07, at para. 26. Text of cases accessible at: https://eur-lex.europa.eu.

[114] "General principles of private international law" (*Saudia Arabia v Arabian American Oil Co. (ARAMCO),1958);* "general principles of law" (*Libya v Texaco and Liamco, 1977; Aminoil v Kuwait, 1982; Framatome v Iran, 1982);* "generally admitted principles" (ICC Case 2152/1972); "general principles of law and justice" (ICC Case 3380/1980); "general principles of law that govern international transactions" (ICC Case 2291/1975); "general principles adopted by international arbitral jurisprudence" (ICC Case 3344/1981); "amply admitted general principles that govern international commercial law" (ICC Case 3267/1979); "general principles of law applicable to international economic relationships" (ICSID Case, *Asia v Republic of Indonesia,* 1983); "general principles of law comprised within" (ICC Case 3327/1981); "rules of law" (ICC Case 1641/1969).

[115] ILI, Session of Athens 1979, The Proper Law of the Contract in Agreements between a State and a Foreign Private Person (September 11, 1979).

the word "fundamental," which suggests ties to abstract basic values, such as those enshrined in the national constitutions of various States. Despite this terminological divergence, at present the term *principles* is the one used most often in various contexts and with different connotations.

C. Lex Mercatoria

181. In international trade, principles arise from the generalization of usages by traders after which these usages become institutionalized in rules prepared by public and private international organizations. In turn, these norms ultimately become recognized by various state and arbitral entities charged with conflict resolution. The result is referred to as *lex mercatoria* or *new lex mercatoria* emulating the law of merchants which emerged in the Middle Ages.

182. A landmark decision by the House of Lords in the United Kingdom established that *lex mercatoria* (or the "new" *lex mercatoria* as invoked therein) constituted general principles of law.[116] Recent relevant decisions from the Americas include a ruling by the Appellate Court of Rio Grande do Sul, a Brazilian state court, which referred to non-State law such as *lex mercatoria*[117] and another ruling by the Supreme Court of Justice in Venezuela.[118] Nevertheless, deliberations over *lex mercatoria* continue, with intense debates over terminology, its sources, and whether it constitutes an autonomous legal regime that is independent of domestic legal systems.

III. Non-State Law in the Mexico Convention and the Hague Principles

A. Background – the Rome Convention

183. Doubts existed as to whether under the Rome Convention (Article 3), in accordance with party autonomy, the options available to the parties included the choice of non-State law. Thus, in the draft Rome I that was presented by the European Commission, it was proposed that non-State law could be chosen. In particular, the proposed language was intended to authorize choice of the UNIDROIT Principles, the PECL, or a possible future instrument on the topic.[119] Nevertheless, the legislature ultimately decided to reject that proposed wording, perhaps envisaging a future European instrument in this regard. Instead, perambulatory paragraph 13 states that Rome I "does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention" (consider also perambulatory paragraph 14). This means that such choice must be embedded in, if permitted under, the chosen State law. Accordingly, Rome I only allows *incorporation by reference* and does not permit choice of non-State law. That applies at least in proceedings before state courts, given that arbitration is subject to its own rules, which are normally open to non-State law.

184. Incorporation by reference allows the chosen rules – in this case, the non-State law – to be considered, but with domestic law as a backdrop at all times, to be determined, as applicable, through the conflict provisions of private international law. The provisions of that domestic

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[116] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH and Others v. Shell International Petroleum Company Limited* (H. L.) (July 1988) 27 ILM 1032.

[117] Proceedings No. 70072362940, Judgment of February 2017. As to the law governing the contract, the Court of Appeal noted that according to Art. 9(2) of the Introductory Law to Brazilian Civil Code, Danish law as the law of the place of the conclusion of the contract would be applicable. However, the Court held that, whenever as in the case at hand the contract is pluri-connected, the traditional *lex loci celebrationis rule* should be disregarded in favor of a more flexible approach leading to the application of the CISG and the UNIDROIT Principles as an expression of the so-called "new *lex mercatoria*". Text accessible at http://www.unilex.info.

[118] Supreme Court of Justice on *lex mercatoria*. Text accessible at: http://www.tsj.gov.ve/decisiones/scc/diciembre/172223-RC.000738-21214-2014-14-257.HTML.

[119] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) /* COM/2005/0650 final - COD 2005/0261.

law, even when limited to the internal *ordre public*, shall have prevalence when there is a mere incorporation by reference.

B. Mexico Convention

185. The Mexico Convention went beyond the Rome Convention. It shows an openness toward non-State law that can be traced back to the preparatory work.[120] Although the instrument is not explicit on this point, Jose Luis Siqueiros, who prepared the early draft, wrote in a subsequent article that the instrument speaks of *derecho aplicable* rather than *ley aplicable*, not because it is a better expression, but essentially to make it clear that the intention is to cover international usages, principles of international trade, *lex mercatoria*, and similar expressions.[121] Siqueiros's opinion is backed by other renowned jurists who participated in the negotiations of the Mexico Convention, including the United States delegate Friedrich Juenger and the Mexican Leonel Pereznieto Castro.[122]

186. However, the inter-American instrument is not free of the terminological chaos that characterized the time during which it was drafted. Its Article 9, paragraph 2, refers to "the general principles of international commercial law recognized by international organizations." Similarly, Article 10 refers to "the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted." The scope of those Articles is explained later in this Guide.[123]

187. Several of the terms used in those articles are problematic. It is unclear which "international organizations" are being referred to in Article 9 and whether the term is intended to be restricted to intergovernmental organizations, such as UNCITRAL or UNIDROIT, or to include nongovernmental entities like the ICC. Other expressions used in Article 10, such as customs, usage, and practices, also are undefined.

C. Hague Principles

1. Terminology

188. Article 3 of the Hague Principles uses the expression *rules of law* to refer to non-State law. This decision was made by the working group that drafted the instrument with the deliberate goal of capitalizing on extensive developments in the doctrine, jurisprudence, and legislation that had taken place in connection with the expression since its initiation in the sphere of arbitration, as described above.

189. But the text of Article 3 that was ultimately adopted further specifies that the rules of law that are chosen must be "generally accepted on an international, supranational or regional level as a neutral and balanced set of rules."

190. This is a change from the proposal by the working group, which had chosen not to restrict the scope of the expression *rules of law* and to leave it to the discretion of the parties or, as applicable, the interpreting body. It had also been agreed that the parties would be allowed to select, when available, rules of a specific sector that could cover the parties' legitimate

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[120] OEA/Ser. K/XXI.5, CIDIP-V/doc.32/94 rev. 1, March 18, 1994, p. 3; OEA/Ser.K/XXI.5, CIDIP V/14/93, December 30, 1993, pp. 28, 30.

[121] José Luis Siqueiros, Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos Internacionales, in Contratación Internacional, Comentarios a los Principios sobre los Contratos Comerciales Internacionales del UNIDROIT, México, Universidad Nacional Autónoma de México, Universidad Panamericana, 1998, p. 222.

[122] List of Participants. OEA/Ser.K/XXI.5/ CIDIP-V/doc.31/94 rev. 1, 16 March 1994. See: Friedrich K. Juenger, The UNIDROIT Principles of Commercial Contracts and Inter-American Contract Choice of Law, in: Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos Internacionales, in Contratación Internacional, *id*., at p. 235. Leonel Perenznieto Castro, Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos, in Contratación Internacional, *id*., at pp. 210-212.

[123] See discussion in Part Thirteen.

expectations. The suggestion that the rules chosen would have to pass an "examination of legitimacy" to assess their nature and characteristics had been rejected.

2. Criteria to Determine the Legitimacy of Non-State Law

191. In a decision that has not escaped criticism, Article 3 was finally approved with changes to the working group's proposal and the introduction of criteria to determine the legitimacy of non-State law. The HP Commentary indicates that the criteria should be jointly understood in relation to one another, as explained below.

a. Neutral and Balanced Set of Rules

192. The requirement for a *neutral and balanced set of rules* attempts to address the concern that unequal negotiating power could lead to the imposition of unfair or unequal rules. Thus, the HP Commentary (3.11) states that the source must be "generally recognized as a neutral and impartial body, one that represents diverse legal, political, and economic perspectives."

193. The HP Commentary (3.10) notes that they must be a set of rules "that allow for the resolution of common contract problems in the international context" and not merely a small number of provisions.

194. The chosen rules of non-State law must be distinguished from individual rules made by the parties themselves. The HP Commentary (3.4) explains that the parties cannot make a conflicts choice by merely referring to a set of rules contained in the contract itself, or to one party's standard terms and conditions, or to a set of local industry-specific terms. For example, if a group of banks agree on certain general conditions to govern particular services that the banks provide, those conditions cannot be chosen as the applicable rules of law. According to those attributes (that the rules of law be a set of rules, that the set must be neutral and must be balanced), an instrument such as the UNIDROIT Principles or the CISG would qualify to be chosen as non-State law.[124] By contrast, unilaterally drafted contractual clauses or conditions clearly do not qualify as non-State law that can be chosen as applicable law. Examples such as the FIDIC Contract or GAFTA Rules (explained above) constitute non-State law that gather together usages and principles in specific commercial sectors but that nevertheless fail to meet the requirement of constituting a sufficiently complete and appropriate body of rules for choice as applicable law through exercise of party autonomy.

b. Generally Accepted Set of Rules

195. The requirement of a *generally accepted set of rules* is intended to dissuade the parties from choosing vague or unclear categories as rules of law. Examples of generally accepted sets of rules include the UNIDROIT Principles and the CISG, when not ratified or applicable *per se*. Examples of regional instruments that meet the criteria for a set of rules as established by the Hague Principles include the PECL. There have been interesting initiatives in the Americas undertaken by academics that, if generalized acceptance thereof is gained, may eventually also qualify.[125]

3. Choice of Non-State Law and Gap-filling

196. The need for "gap-filling" may arise when parties have chosen a law or set of rules that do not address a particular matter. The HP Commentary (3.15) clearly states that while other instruments such as the UNIDROIT Principles and the CISG may address gap-filling, the Hague Principles "do not provide gap-filling rules." The HP Commentary therefore cautions

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[124] This could lead to an interesting situation; a possible conflict between the CISG and the Mexico Convention may arise when, while the relevant jurisdiction has excluded the application of the CISG by virtue of rules of private international law according to articles 1(1)(b) and 95 of the CISG, application of the Mexico Convention, namely its article 9, would lead to CISG application. The CISG Digest 2016 Edition refers to a few possibly relevant cases on article 95, although a clear interpretative trend has yet to be established. See http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf.

[125] Examples include the *Principles of Latin American Contract Law*, and the *OHADAC Principles on International Commercial Contracts*, *supra* note 61.

parties designating certain rules of law to govern their contract to "be mindful of the potential need for gap-filling and [that they] may wish to address it in their choice of law." By way of example, parties may choose the UNIDROIT Principles and, for all unforeseen matters, the application of a domestic law.

IV. Non-State Law in Domestic Laws of the Americas

197. In *Brazil* there have been various attempts to introduce reforms over the years. The most recent proposal to reform the Introductory Law to the Provisions of Brazilian Law ("LINDB") would include a new Article 9, the first paragraph of which would acknowledge party autonomy (discussed below in Part 7) and the second paragraph of which would recognize non-State law. The proposed Bill 4905 remains at an impasse in the Congress.[126]

198. *Panama* recognizes non-State law and even refers to the UNIDROIT Principles as a complementary source. The Code of Private International Law provides that: "The parties may use the principles on international commercial contracts regulated by [UNIDROIT] as complementary provisions to the applicable law or as a means of interpretation by the judge or arbiter, in contracts or undertakings of international commercial law" (Article 86 of Law 61 of 2015).

199. The *Paraguayan* Law Applicable to International Contracts openly allows the use of non-State law. Its Article 5 (titled "rules of law"), is based on Article 3 of the Hague Principles and provides "in this Law, references to law include rules of law of non-State origin that are generally accepted as a set of neutral and balanced rules." It does not include the requirement in the Hague Principles that the rules of law must enjoy a general level of international, supranational, or regional acceptance to avoid controversies over which sets of rules of law would meet that requirement. Its Article 12 echoes the language of Article 10 of the Mexico Convention and thereby offers the court broad powers of interpretation in this regard.

200. In *Uruguay*, the draft amendments regarding private international law provide that these are open to non-State law (Articles 13 and 51).[127] These provisions would incorporate an approach accepted not only in doctrine but also in practice. For example, the UNIDROIT Principles are well-known, taught in schools, used in the negotiation of international contracts and are on occasion referred to in the jurisprudence.

201. The *Venezuelan* Law on Private International Law includes in Articles 30 and 31 rules similar to Articles 9 and 10 of the Mexico Convention. Under these provisions as interpreted, it is possible to apply non-State law either as selected by the parties or in the absence of choice. However, this is only applicable in disputes before courts; the law does not apply to arbitration. Relevant to court adjudication is the aforementioned decision of the Supreme Court of Justice of Venezuela that expressly invoked *lex mercatoria*.[128] More broadly, Articles 10 and 15 of the Mexico Convention are applicable in Venezuela as generally accepted principles of private international law.

202. In addition to the foregoing, in several other States of the Americas, non-State law has been called upon in the interpretation or reinterpretation of domestic laws. For example, the

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[126] Article 9. The international contract between professionals, businessmen and traders is governed by the law chosen by the parties, and the agreement of the parties on this choice must be express. 1.The choice must refer to the entire contract, but no connection between the law chosen and the parties or the transaction is required.

2. In the lead sentence ("caput"), the reference to the law also includes the indication, as applicable to the contract, of a set of international, optional or uniform legal rules, accepted internationally, supranational or regional as neutral and fair, including *lex mercatoria*, provided they are not contrary to public policy [unofficial translation from the Portuguese].

[127] The Draft General Law on Private International Law was approved by the House of Representatives (956 of 2016) October 7, 2016 but has not yet achieved approval by the Senate.

[128] Supreme Court of Justice on *lex mercatoria*. http://www.tsj.gov.ve/decisiones/scc/diciembre/172223-RC.000738-21214-2014-14-257.HTML (also cited earlier above).

UNIDROIT Principles have been cited for that purpose in important decisions that have been issued by the judiciary in Argentina, Brazil, Colombia, Paraguay, Venezuela, and others.[129]

V. Non-State Law in Arbitration

203. In arbitration, the expression *rules of law* is used in the UNCITRAL Model Law in Article 28(1), the 1976 UNCITRAL Arbitration Rules (Article 33), and the current 2010 Rules (Article 35); similar expressions are used in other sets of arbitral rules. The domestic laws on arbitration in a number of Latin American States also use the expression "rules of law."[130] The consequence of these provisions, generally speaking, is that if contracting parties choose arbitration as a dispute settlement mechanism, they may choose as the governing law "rules of law", which include soft law instruments such as the UNIDROIT Principles. On the other hand, with the exception of Panama, Paraguay, and Venezuela, if the contracting parties have not selected arbitration and the dispute is before the courts, the choice of law can only be from among the domestic law of States and cannot include reference to such "rules of law" or non-State law.

204. From among Latin American domestic laws, that of Panama deserves special mention: not only is it open to non-State law, it also provides that in international arbitration, account must be taken of "the UNIDROIT Principles" thereby legitimizing that body of non-State provisions.[131]

205. A unique aspect of the Peruvian arbitration legislation is its provisions that in the event of gaps, the arbitral tribunal may resort, at its discretion, to principles as well as uses and customs in the field of arbitration (Article 34(3)); even in procedural matters, the law provides for the possibility of the application of non-State law.

206. The *Inter-American Convention on International Commercial Arbitration* ("Panama Convention"), adopted at CIDIP I in Panama City in 1975,[132] states in Article 3 that when no agreement exists between the parties, reference should be made to the *Rules of Procedure of the Inter-American Commercial Arbitration Commission* ("IACAC Rules").[133] Those rules, in turn, provide in Article 33.3 that in all such cases the arbitration tribunal is to take into account "usages of the trade applicable to the transaction." Thus, the application of these rules regarding procedural aspects of arbitration influences the application of substantive rules such as those mentioned above.

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[129] See UNILEX database (www.unilex.info). The matter has been dealt with on a world-wide basis by the Academy of Comparative Law at its Fukuoka Congress in 2018; acting as General Reporters were Professors Alejandro Garro and José A. Moreno Rodríguez (The UNIDROIT Principles as a common frame of reference for the uniform interpretation of national laws, https://aidc-iacl.org/general-congress).

[130] For example, see the following: In *Brazil*, Article 2 of Law 9307 of 1996 on Arbitration; in *Colombia*, Article 208.1 of Law 1818 of 1998 - Conciliation and Arbitration (possibly superseded by Law 1563 of 2012); in *Costa Rica*, Article 22 of Law 7727 of 1997 - Alternative Conflict Resolution and Promotion of Social Peace and Article 28 of Law 8937 of 2011 - Law of International Commercial Arbitration; in *Chile* Article 28.4 of Law 19.971 of 2004 - International Commercial Arbitration; in *El Salvador*, Articles 59 and 78 of Legislative Decree 914 of 2002 - the Law on Mediation, Conciliation, and Arbitration; in *Guatemala*, Article 36.3 of Law 67 of 1995 - Law of Arbitration; in *Nicaragua*, Article 54 of Law 540 of 2005 - Mediation and Arbitration; in *Peru*, Article 57.2 of Law 1071 of 2008 - Law of Arbitration; in the *Dominican Republic*, Article 33.4 of Law 489 of 2008 - Commercial Arbitration; in *Paraguay*, Article 32 of Law 1879 of 2002 - Arbitration and Mediation; and in *Venezuela*, the last part of Article 8 of the Law of Commercial Arbitration of 1998.

[131] National and International Arbitration in Panama, Law 131 of 2013.

[132] *Inter-American Convention on International Commercial Arbitration*, adopted at CIDIP I in Panama City, signed 1 January 1975 and entered into force 16 June 1976.

[133] *Rules of Procedure of the Inter-American Commercial Arbitration Commission.* As amended and in effect April 1, 2002. Text accessible at: https://www.adr.org/sites/default/files/Inter-American%20Commercial%20Arbitration%20Commission%20Rules-%20English.pdf.

207. Also, MERCOSUR's Arbitral Agreement of 1998, ratified by Argentina, Brazil, Paraguay and Uruguay, recognizes in Article 10 the applicability of "private international law and its principles" and of the "law of international trade."[134] The latter expression has been understood by scholars as an acceptance of non-State law.

208. Cases in which non-State law has been invoked in arbitration in the Americas can be found in the UNILEX database.[135]

6.1 The domestic legal regime on the law applicable to international commercial contracts should recognize and clarify choice of non-State law.

6.2 Legislators, adjudicators and contracting parties are encouraged, in relation to non-State law, to read the Mexico Convention in light of criteria offered in the Hague Principles and HP Commentary, and to recognize, in light of the latter instrument, the distinction between choice of non-State law and the use of non-State law as an interpretive tool.

PART SEVEN

PARTY AUTONOMY IN CHOICE OF LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS

I. General Considerations

209. The principle of party autonomy accords to the parties to an international commercial contract the freedom to choose the law by which the contract shall be governed. This Guide does not address the parties' power to select the arbitral or state jurisdiction that would have competence in the event of a dispute, in accordance with another application of the principle of party autonomy (at the global level, the matter is addressed by the New York Convention and the Hague Choice of Court Convention). The focus of this Guide is on the problems of applicable law.

210. Party autonomy is one of the pillars of the modern law of contract and enjoys a high level of acceptance in private international law. The basis for this principle is that the parties to a contract are in the best position to determine which law is the most suitable to govern their transaction instead of leaving that determination to the adjudicator, should a dispute arise. That strengthens the legal certainty that is required to encourage commercial transactions and is also intended to reduce state interventionism in favor of private initiative.

211. Party autonomy includes choice of substantive law (material autonomy) and choice of conflict of laws rules (conflictual autonomy). In some systems the first depends on the law chosen; in other words, the choice of law determines whether parties may (or may not) exercise material autonomy.

212. Although party autonomy is perhaps the most widely-accepted principle in contemporary private international law, disagreements still exist regarding its modalities, parameters, and limitations. These include, for example, as regards the method of choice – which could be explicit or tacit – whether a connection is required between the chosen law and the domestic laws of the State of the parties to the contract; whether non-contractual issues can be included in the choice of law; which State, if any, can impose limitations on choice; and whether non-State rules can be chosen. Those issues are addressed at different points in this Guide.

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[134] *Acuerdo Sobre Arbitraje Comercial Internacional del MERCOSUR*. Decision by MERCOSUR Council No. 03/98 of 23 July 1998. Text accessible at:
http://www.sice.oas.org/Trade/MRCSRS/Decisions/dec0398.asp.

[135] See UNILEX database (www.unilex.info).

II. Evolution of the Principle of Party Autonomy

213. The principle of party autonomy was not expressly included in the rules for private international law contained in the European codes of the nineteenth-century. In South America, Chile's Civil Code of 1857 and Argentina's of 1869 were among the first in the world to include rules for private international law; both are silent on the matter of party autonomy in international contracts[136] which is understandable since, at the time, the principle was not yet widely accepted. The Montevideo Treaties raise multiple questions regarding party autonomy. The 1889 Treaty is silent on the subject, which has led some commentators to claim – highly questionably – on that basis that party autonomy is accepted. The principle is generally expressed in Article 166 but only refers to "*derecho dispositivo*" (supplementary rules) and does not preclude application of mandatory rules. But the Code does not recognize the principle, as evidenced in Articles 185 and 186, which only apply "in the absence of express or implied choice."

214. In the negotiations that preceded the 1940 Treaty there were clashes between the delegation of Argentina, which supported the express admission of party autonomy, and that of Uruguay, which called for its rejection. The text of the 1940 Treaty reflects a compromise; although party autonomy ultimately was not included, Article 5 of the additional protocol reads as follows: "The applicable jurisdiction and law according to the corresponding Treaties may not be modified by the parties' wishes, except to the extent authorized by that law." Thus, the solution of the 1940 Treaty is to allow each State, in the exercise of its sovereignty, to determine on an independent basis the jurisdiction and law applicable to international contracts. If the State whose law is applicable recognizes party autonomy, it will be accepted. Thus, by granting the parties the right to select the jurisdiction where the contract is performed, the parties are indirectly permitted to choose the governing law.

215. By comparison, party autonomy does not appear to be included in the articles of the Bustamante Code, even though its drafter stated, in a later doctrinal work, that the Code did recognize the principle.[137] The discussion on this issue remains open.

216. Meanwhile, the principle of party autonomy was included in various other treaties on private international law. As further evidence of its international recognition, the IIL at its meeting in Basel in 1991 adopted a resolution favoring party autonomy in matters of private international law.[138] Article 2.1 of that resolution provides that parties are free to agree on

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[136] Article 1545 of the Chilean Civil Code accepts party autonomy in contractual matters in general. It does not specify if the acceptance refers to international contracts. In recent years the leading interpretation has been that it does. On the other hand, although article 1462 states that a promise to submit, in Chile, to a jurisdiction not recognized by Chilean laws is null due to a vice of purpose ("la promesa de someterse en Chile a una jurisdicción no reconocida por las leyes chilenas, es nula por el vicio del objeto"), years ago the jurisprudence has determined that the law refers solely to choice of forum agreements and not the laws themselves. In any case, it would only exclude the jurisdiction of States that are not recognized as such by Chile and not all foreign States. As an example: *Exequátur State Street Bank and Trust Company*, Supreme Court, May 14, 2007, Ruling No. 2349-05; or *Mauricio Hochschild S.A.C.I. v Ferrostaal A.G.*, Supreme Court, January 22, 2008, Ruling No. 3247-2006). The new Argentinean Civil and Commercial Code expressly recognizes party autonomy in international contracts (Article 2651).

[137] Sánchez de Bustamante, Antonio, Derecho internacional privado, La Habana, Cultural, S.A., 3a. ed., 1947, Tomo II, pp. 188 y 196-197. The Bustamante Code does recognize the possibility of choice of law in adhesion contracts and in the interpretation of the contract. In the first of these, such recognition has been made in a "timid and inexplicable" manner. See, Romero, Fabiola, Derecho aplicable al contrato internacional, en: Liber amicorum, Homenaje a la obra científica y académica de la profesora Tatiana B. de Maekelt, Caracas, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, Fundación Roberto Goldschmidt, 2001, Tomo I, pp. 203 at p. 243.

[138] International Law Institute, Session of Basel, 1991. The Autonomy of the Parties in International Contracts Between Private Persons or Entities. Seventh Commission Rapporteur, Eric Jayme. http://www.idi-iil.org/app/uploads/2017/06/1991_bal_02_en.pdf.

the law that is to apply to their contracts, while Article 3.1 states that the applicable law derives from the consent of the parties. Within the EU, party autonomy has been enshrined in several instruments, such as the Rome Convention, since superseded by Rome I (Article 3.1).

217. The principle has also been considered by some to be covered by the provisions of several charters and declarations setting out fundamental human rights, such as Article 17 and Article 29.1 of the 1948 *Universal Declaration of Human Rights*, although this position has not been generally accepted.

III. Party Autonomy in the Mexico Convention and the Hague Principles

218. Despite the reticence toward the principle that existed at that time in some states of the Americas, party autonomy was broadly endorsed by the Mexico Convention. It is expressly stated in Article 7, paragraph 1, that: "The contract shall be governed by the law chosen by the parties" and in Article 2 that: "The law designated by the Convention shall be applied even if said law is that of a State that is not a party."

219. The Hague Principles also expressly endorse party autonomy in Article 2.1 which states that "A contract is governed by the law chosen by the parties." Already during the preparatory work, HCCH had determined that the chief aim of the document would be to promote the dissemination of the principle of party autonomy around the world, something that had been identified as "a need" by organizations such as UNCITRAL and UNIDROIT. As noted in the HP Commentary (2.3), "Article 2 reflects the Principles' primary and fundamental purpose of providing for and delineating party autonomy…" General recognition of the principle is evidenced by answers to the questionnaire that had been circulated by HCCH in 2007, results of which also recorded the existence of anachronisms in some regions of Africa and Latin America.[139]

A. Main Contract, Choice of Law and Choice of Forum

220. Assuming acceptance of the autonomy of parties to make a choice of law, the question arises as to "where" they may make that choice. Parties may make a choice of law either within the "main contract" or they may enter into a separate agreement for that purpose.

221. The HP Commentary (1.6) uses the term "main contract" to refer to the primary contractual agreement between the parties. Examples thereof include a contract for the sale of goods, the provision of services, or a loan. As noted in the HP Commentary, the parties' choice of law agreement must be distinguished from that main contract.

222. The "choice of law" agreement should also be distinguished from the "choice of forum" agreement. As described in the HP Commentary (1.7), these include clauses or agreements on jurisdiction, forum selection, choice of venue, or choice of court of law, all of which are synonymous for agreements between the parties on the venue (generally a court of law) that would resolve any conflict that may arise out of the main contract.

223. The "choice of law" agreement and "choice of forum" agreement should also be distinguished from agreements on arbitration. These are agreements between the parties to submit their conflicts to an arbitral tribunal. As noted in the HP Commentary (1.7) although such clauses or agreements (collectively known as "dispute-resolution agreements") are often combined in practice with choice of applicable law agreements, their purpose is different.

B. Choice of Non-State Law

224. Assuming acceptance of the autonomy of parties to make a choice of law, the question arises as to "what" they may choose and whether this includes "non-State law." The Mexico Convention clearly permits the use of non-State law if no choice has been made. In the absence of a choice or if the choice proves ineffective, under Article 9 a court shall also take

[139] See at https://www.hcch.net.

into account "the general principles of international commercial law recognized by international organizations." These would include, for example, the UNIDROIT Principles.

225. However, the Mexico Convention does not provide that parties may choose non-State law. In the absence of a specific provision, one school of thought considers that such a choice would not be viable. That position is based on Article 17 which states that: "For the purposes of this Convention, 'law' shall be understood to mean the law current in a State, excluding rules concerning conflict of laws." According to that interpretation, the chosen law must be that of a State, even one that is not a party to the Mexico Convention, as long as the choice is one of "State" law. Another school of thought, including those that adhere to the opinions of drafters Siqueiros and Juenger, is that under Article 7 parties can choose non-State law on the basis of Articles 9 and 10.[140]

226. By contrast, the Hague Principles provide in Article 3 that the parties may choose non-State law, if it meets certain requirements.

227. In the discussions of the Working Group that prepared the draft Hague Principles, three options for the choice of non-State rules were considered: (1) reserving it for the arbitral venue, (2) allowing the choice of non-State law regardless of the dispute settlement mechanism, (3) omitting all references to non-State law, thereby leaving it open to interpretation by judges and arbiters. The first option would have equated to maintaining the status quo. Indeed, although most current arbitration rules provide the option of choosing non-State law as the legal framework for an international contract (for examples, see the discussion above on non-State law, arbitration), by contrast, most courts of law do not allow the choice of non-State law. In other words, unless the parties choose to include an arbitration clause in the contract, they will be subject to the law of a specific State. The third option would have permitted the arbitration tribunal or courts of the State to make the determination. On one hand, it could be argued that this option is most consistent with the principle of party autonomy. However, this would mean that the court or arbitral tribunal would be interpreting the Hague Principles to determine whether the parties' choice of law (or choice of rules of law) clause complied with Article 3, an interpretative process that would not involve recourse to party autonomy. On the other hand, absence of a concrete response to the problem would give rise to uncertainties. Ultimately, the Working Group chose the second option. In other words, the Hague Principles allow the choice of non-State law, regardless of the method of conflict resolution.

C. The Hague Principles as a Tool for Interpreting the Mexico Convention in Choice of Non-State Law

228. As outlined above, the Mexico Convention embraces the principle of party autonomy quite broadly. It has also been noted that the Mexico Convention clearly permits a court to take non-State law into account in the absence of an effective choice, but that it stops short of providing that a party may choose non-State law. As noted above, one school of thought is that, therefore, under the principle of party autonomy, non-State law could be chosen as the applicable law.

229. In that regard, the Hague Principles provide major interpretative assistance in determining what is meant by non-State law for it to be eligible to be chosen as the applicable law. As was explained above, the law must be a set of rules, the set must be neutral and must be balanced (e.g., UNIDROIT Principles or the CISG). By contrast, unilaterally drafted contractual clauses or conditions clearly do not qualify (e.g. FIDIC Contract or GAFTA Rules, explained above).

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[140] Those who adhere to the first school question the veracity of that interpretation and maintain that Articles 9 and 10 do not apply in cases where there has been a choice, but rather, to assist courts in the determination of applicable law in the absence of an effective choice. They also maintain that Article 7 does not include the choice of non-state law among possible options because under Article 17, "law" is defined "to mean the law current in a State."

230. This does not mean that international usages, practices, and principles cannot be taken into account in interpreting or supplementing the contract. But this is a separate topic from that of the applicable law that may be chosen by reason of the principle of party autonomy. In other words, one issue is the use of non-State law as an interpretive tool; the other is choice of non-State law as the law that shall govern the contract. In the latter case, the Hague Principles offer helpful criteria on eligibility.

IV. Party Autonomy in Domestic Laws

231. This next section includes a brief overview of party autonomy in the domestic laws of the region, intended not to interpret but simply to report on the present status. Currently, it seems that there is only one State where the principle is rejected outright (Uruguay, although the matter is not free from controversy) and one where its admissibility is still somewhat unclear (Brazil). Insofar as the inclusion in domestic law of specific provisions to permit parties to choose non-State law, this still appears to be the exception; to date it would appear that only Mexico, Panama and Paraguay have taken such steps.

232. In *Argentina*, the new Civil and Commercial Code expressly recognizes party autonomy in international contracts (Article 2651). Subparagraph (d) of the aforementioned Article allows incorporation by reference of non-State law.

233. The *Bolivian* Civil Code (Article 454) enshrines the principle of freedom of choice. This principle is accepted in Bolivia as confirmed in a recent ruling by the Bolivian Constitutional Court.[141] Although the case concerned a domestic contract, the ruling affirmed the right of parties to choose the law that best suits their juridical relationship as long as it does not conflict with public order.[142] The interpretation that would appear to follow is that this right is applicable also in the case of international contracts with certain exceptions, such as contracts with the Bolivian government or contracts by international investors.[143]

234. In *Brazil*, the LINDB currently contains no express provision on this matter. There have been efforts over the years to introduce changes; the latest proposal to amend the LINDB, Bill 4.905, is currently at an impasse in the Congress. It would introduce a new Article 9 the first paragraph of which would acknowledge party autonomy.[144] It is allowed in arbitration or whenever the CISG – which was ratified and is in force in Brazil – is applied. Judicial decisions are contradictory, with some accepting party autonomy and others rejecting it.[145]

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[141] Constitutional judgment 1834/2010-R, October 25, 2010.

[142] The Tribunal cites Article 454 of the Civil Code and the comment on this article by Carlos Morales Guillén, a renowned Bolivian Civil Code commentator, who in turn cites other authors. The doctrine of the basic principles of party autonomy, which stems from consent, can be summarized as follows: "1) Individuals are free to contract and discuss, on an equal basis, the conditions of the agreement; determine the content of its purpose; combine different types of contracts provided by law or create completely new ones; 2) they can choose the most convenient [law] (original Spanish is "legislacion") to their legal relationship; or they can discard the application of any [law[(original in Spanish is "ley") of a supplementary nature; 3) the ritual forms are not recognized and the solemn forms are to be exceptional; 4) the effects of the contract are those that the parties have wanted to give to it, and the rules of interpretation do not give the judge the power to impose his criterion over the intention of the parties (*sic*)" (Morales Guillén, Carlos, Civil Code, 1997, citing Planiol and Ripert and Pérez Vives).

[143] 2016 Contracts Paper, *supra* note 1, response from Bolivia.

[144]Article 9. The international contract between professionals, businessmen and traders is governed by the law chosen by the parties, and the agreement of the parties on this choice must be express. 1. The choice must refer to the entire contract, but no connection between the law chosen and the parties or the transaction is required.

[145] It has been accepted, for example, in the following: TJSP, DJe 30 nov.2011, Apel. Cív. 9066155-90.2004.8.26.0000; TJSP, j. 06 jun.2008, Apel. Cív. 9202485-89.2007.8.26.0000; and rejected in others, for example: TJSP, j. 19 fev.2016, Apel. Cív. 2111792-03.2015.8.26.0000; TJSP, DJe 09 jan.2012, Apel. Cív. 0125708-85.2008.8.26.0000.

235. *Canada* recognizes party autonomy. In the province of Quebec (Canada's only civil law jurisdiction), the principle is codified within Article 3111 of the Civil Code of Quebec ("CCQ"). The principle is also recognized in Canada's common law jurisdictions. There are limitations relating to consumer rights and employment contracts in both Quebec and common law jurisdictions.[146]

236. In *Chile*, some uncertainty surrounds the recognition of party autonomy; however, a systematic reading of certain provisions of the Civil and the Commercial Codes,[147] has led to a doctrinal position that the principle is accepted and judicial interpretations have confirmed it.[148] On the other hand, although Article 1462 says that a promise to submit, in Chile, to a jurisdiction not recognized by Chilean laws is null due to a vice of purpose, the judiciary has understood that this rule refers to jurisdiction and not to applicable law.[149] Party autonomy in the choice of law has also been validated in the rules that govern international contracting within the public sector.[150] This legal validation of choice of law for the public sector, has in turn, reinforced its judicial recognition in relation to private entities, which are governed by the principle of party autonomy.

237. In *Colombia*, in the matter of international arbitration, with the exception of contracts involving the State (Article 13 of Law 80 of 1993), parties are free to choose the law applicable to the merits (Article 101 of Law 1563 of 2012). Outside of this scope, in matters governed by domestic law, parties have the freedom to choose foreign law to govern their contractual relationship so long as this is not contrary to domestic *ordre public*. In cases of *exequatur*, judicial interpretations have been more flexible and courts have found that the conflict of laws rules are not "obligatory binding guidelines."[151]

238. In the *Dominican Republic*, its recently adopted Private International Law acknowledges party autonomy in Articles 58 to 60 (Law 544 of 2014).

239. In *El Salvador*, the principle of party of autonomy is recognized by the judiciary and has been upheld by the Supreme Court, particularly by its Constitutional Chamber on the basis of Article 23 of the Constitution, which guarantees freedom of contract.[152] Courts have also relied on Civil Code provisions that state "Every contract legally concluded, is mandatory for the contracting parties and only cease their effects between the parties by the mutual consent or for legal reasons" (Article 1416).

240. In *Guatemala*, Article 31 of the Law on the Judicial Branch provides that: "Legal undertakings and businesses shall be governed by the law to which the parties have submitted themselves, except when that submission is contrary to express prohibitive laws or to the *ordre public*." Although this provision does not specify whether it applies to domestic or international contracts, as in other Latin American States, in the absence of special rules for international contracts, in certain cases the rules for domestic contracts are applied. Use of the term "law" (*ley*) suggests that the choice of non-State law is disallowed.

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[146] For example, Quebec's CCQ, Articles 3117-18; Saskatchewan's Consumer Protection and Business Practices Act, SS 2014, c. C-30.2, sections 15 and 101(2); and Ontario's Employment Standards Act, 2000, SO 2000, c. 41, s. 5.

[147] Such as Article 113 of the Commercial Code and Article 16 of the Civil Code, together with Article 1545 of the Civil Code ("all contracts legally entered into are law for the parties…").

[148] For example: *Raimundo Serrano Mac Auliffe Corredores S.A*, Supreme Court, November 30, 2004, Ruling No. 868-2003; *Exequatur Cubix v. Markvision*, Supreme Court, August 20, 2014, Ruling No. 10890-2014.

[149] For example: *Exequatur State Street Bank and Trust Company; Mauricio Hochschild S.A.C.I. v Ferrostaal A.G*., *supra* note 136.

[150] Article 1 of Decree Law 2.349 of 1978.

[151] Supreme Court of Justice, Civil Chamber, Judgment of November 5, 1996, Exp. 6130, M. P.: Carlos Esteban Jaramillo Schloss.

[152] Diario Oficial No. 50 Tomo 394, March 13, 2012. Accessible at http://www.jurisprudencia.gob.sv.

241. *Jamaica* follows the common law it inherited from the United Kingdom. According to case law, international contracts are governed by the law that the parties choose.[153]

242. *Mexico* signed and ratified the Mexico Convention; however, the principle of party autonomy was already enshrined in its domestic legislation beforehand (Article 13, Section V of the Federal Civil Code).

243. In *Panama*, the new Code of Private International Law (Law 61 of 2015) provides in Article 72 as follows: "The parties' autonomy of choice regulates and governs international contracts, with the sole limitation of the *ordre public* and violations of the applicable law." However, non-State law may only be incorporated by reference. This is because Article 87 provides: "It is valid for the parties to agree on, in commercial contracts, the general usages and customs within commercial activity and the regular international practices known to the parties as commercial operators or economic agents within their international relations. The usages, customs, and practices of international trade are a source of law and are binding as of the time of the agreement or of the natural activity of trade." Likewise, Article 86 stipulates: "The parties may use the principles on international commercial contracts regulated by [UNIDROIT] as complementary provisions to the applicable law or as a means of interpretation by the judge or arbiter, in contracts or undertakings of international commercial law."

244. In *Paraguay*, given the deficiencies between the texts of the Civil Code and the Montevideo Treaties used as its source, doubts existed regarding the admissibility of the principle of party autonomy until 2013, when the Supreme Court of Justice ruled favorably on it.[154] To ensure greater certainty, however, it was necessary to enact a law to settle the issue definitively. Accordingly, the first part of Article 4 of Paraguay's new Law Applicable to International Contracts, which copies almost verbatim Article 2 of the Hague Principles and echoes Article 7 of the Mexico Convention, provides that "a contract is governed by the law chosen by the parties…" (Article 4.1). Furthermore, Article 5, based on Article 3 of the Hague Principles, expressly recognizes non-State law.

245. In *Peru*, the most relevant rule is perhaps Article 2095 of the Civil Code, which establishes that contractual obligations are governed by the law expressly chosen by the parties. Thus, although party autonomy is recognized whereby parties can choose a foreign law, they cannot make a choice of non-State law (see also Article 2047).

246. In the *United States*, the principle of party autonomy was initially rejected in the First Restatement of Conflict of Laws of 1934 (as noted above, although the Restatement is not a "code", it is a highly persuasive academic text), despite court decisions to the contrary. It was included eventually in the Second Restatement of 1971 (section 187(2)). Around the same time, the Supreme Court of the United States clearly acknowledged the principle in the case of *Bremen v. Zapata*, although that case dealt with selection of forum, not choice of law.[155] However, the status of the principle across the United States is not as simple as it might appear. The rules of the First Restatement continue to be applied in a number of United States domestic states. Even when, in those domestic states in which the party autonomy rules of the Second Restatement have been adopted, their precise application requires an understanding of First Restatement methods.[156] Moreover, it should be noted that

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[153] *Vita Foods Products Inc. v Unus Shipping Co. Ltd.,* [1939] 1 All E.R. 513; and *DYC Fishing Limited v Perla Del Caribe Inc.,* [2014] JMCA Civ. 26, §§ 42-44, citing *R v International Trustee for the Protection of Bondholders,* [1937] 2 All E.R. 164 and *Bonython v Commonwealth of Australia,* [1951] AC 201.

[154] Acuerdo y Sentencia No. 82 of March 21, 2013, in *Reconstitución del Expte. Hans Werner Bentz v. Cartones Yaguareté S.A. s/ Incumplimiento de contrato*.

[155] *The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 92 S. Ct. 1907 (1972). As the case has had "negative treatment" by some, its authority has been questioned.

[156] More detailed analysis is required, which is perhaps beyond the scope of this Guide; it would require a description of Section 187 and 188, since 187 in many cases involves a prior determination of the state whose law would be chosen under 188.This is because section 188 provides that the jurisdiction whose law

a new draft Restatement of Conflict of Laws is currently underway.[157] In addition, for sales of goods not governed by the CISG, Article 2 of the Uniform Commercial Code ("UCC"), as supplemented by Article 1 thereof, will apply. Under the UCC, the parties are free to choose the domestic state or sovereign nation whose laws will govern their transaction, as long as the transaction bears a reasonable relation to the state or country selected: "Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."[158]

247. In *Uruguay*, Article 2399 of the Appendix to the Civil Code provides as follows: "Juridical undertakings are governed, as regards their existence, nature, validity, and effects, by the law of the place where they are executed (i.e., performed), and additionally in accordance with the rules of interpretation set forth in Articles 34 to 38 of the Civil Law Treaty of 1889." Pursuant to that Article, whether or not party autonomy will be respected will be determined in accordance with the law of the place of execution of the international contract in question. In addition, Article 2403 of that same Appendix provides that: "the rules of legislative and judicial competence contained in this title may not be modified by the will of the parties. That may only be exercised within the margin established by the applicable law."

248. In *Venezuela*, the Law on Private International Law merely states that a contract shall be subject to the law chosen by the parties, without indicating the time and method of that choice.[159] That gap is filled by the provisions of the Mexico Convention, pursuant to which, within the Venezuelan system of private international law, party autonomy enjoys a broad framework of application.

V. Party Autonomy in Arbitration

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will be selected is determined on the basis of an analysis of the jurisdiction which has the most significant relationship to the transaction and the parties, taking into account the contacts of each potentially relevant jurisdiction (such as place of negotiation, place of contracting, place of performance, location of the subject matter of the contract, and the place of incorporation, domicile, residence or nationality of the parties). These contacts are to be evaluated in light of a set of factors found in Section 6 of the Second Restatement, which include interstate or international interests, individual governmental interests, justified expectations of the parties, common basic policies of the field of law, and procedural and other administrative concerns of the parties and the court. The determination of the jurisdiction with the most significant relationship then plays a role in the evaluation of a choice of law agreement. In particular, only the fundamental interests of the state whose law would otherwise be applicable is capable of invalidating party autonomy on the ground of what other jurisdictions might view as overriding public policy. In addition, section 187 purports to limit party autonomy where the state of the chosen law bears no substantial relation to the parties or the transaction.

The Second Restatement reflects a shift in U.S. practice during the 1960's-1980's. Territorial conceptions based on where "vested rights arose" dominated U.S. choice-of-law thinking before the 1960's. Since then, a majority of states for transitory actions (e.g., contracts, et al) have adopted multifactorial methodologies that focus on state interests, multilateral order policies, and justified individual expectations, among other things. The complexity of these new systems and their indeterminate results, coupled with the direct attention that gives to the justified expectation of parties, may have created support for recognition of party autonomy in the U.S. To fully understand U.S. law and practice requires a deeper explanation of common law, the Restatements (as noted above), and the historical trajectory of the so-called "choice-of-law revolution" in the U.S. It should also be noted that for international cases, the principles of the Restatement 3rd of Foreign Relations Law are also relevant, although Section 6 of the Restatement 2nd of Conflict of Laws expressly refers to "international" order policies and thus intersects with the Restatement of Foreign Relations Law. So a foreign lawyer would need to be aware of this intersection as well. As both of these Restatements are in the process of review, the concepts as summarized in these decades-old U.S. documents are not set in stone.

[157] American Law Institute, Restatement of the Law Third Conflict of Laws (Preliminary Draft No. 3) October 3, 2017.

[158] UCC § 1-301(a).

[159] Venezuelan Law on Private International Law (1998).

249. As was noted above, this Guide does not address the power of the parties to choose the arbitral or State jurisdiction that would have competence in the event of a dispute (forum selection); however, that is a separate matter from and does not preclude the matter of a choice by the parties of the applicable law to the substance of a contract with an arbitration clause.

250. The principle of party autonomy underlies the New York Convention, Panama Convention, and the *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* ("Montevideo Convention").[160] Of the 35 OAS Member States, nearly all have ratified or acceded to the New York Convention,[161] 19 have ratified the Panama Convention,[162] and 10 have ratified the Montevideo Convention.[163]

251. Although none of these instruments directly address the question of applicable law, party autonomy is recognized both regarding the validity of the arbitral clause, the arbitral process itself and the recognition of the award, particularly given that one of the grounds for nullity is that the arbitration was not carried out in accordance with the agreement of the parties. It is also understood or may be inferred that clauses regarding the choice of law applicable to the merits of the matter must be respected.

252. By contrast, the 1961 *European Convention on International Commercial Arbitration* ("European Convention") does provide expressly in Article VII that "the parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute."[164] Similarly, MERCOSUR's Arbitral Agreement of 1998, ratified by Argentina, Brazil, Paraguay, and Uruguay, expressly provides that "the parties may choose the law that is to apply in resolving the controversy."[165]

253. In investment arbitration, the principle of party autonomy has been enshrined in the ICSID Convention, which has been ratified by several states in the Americas. By the provisions of Article 42, parties may agree on the "rules of law" that they wish, but in the absence of such an agreement, the arbitral tribunal shall apply the law of the State and the rules of international law that it deems applicable.

254. In turn, the UNCITRAL Model Law includes the principle of party autonomy (Article 28(1)) and the commentary notes that this is important, given that several domestic laws do not clearly or fully recognize that power. Consistent with that recommendation, throughout Latin America today there are numerous arbitral laws that do provide for party autonomy, both in the choice to submit to international arbitration and to choose the law that will apply to the resolution of their dispute through that mechanism.[166]

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[160] *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, adopted at Montevideo at CIDIP-II, signed 8 May, 1979 and entered into force 14 June 1980.

[161] See *supra* note 72.

[162] http://www.oas.org/juridico/english/sigs/b-35.html.

[163] http://www.oas.org/juridico/spanish/firmas/b-41.html.

[164] *European Convention on International Commercial Arbitration.* Concluded 21 April 1961 and entered into force 7 January 1964. Text accessible at: https://www.arbitrationindia.com/geneva_convention_1961.html.

[165] Article 10, *supra* note 134.

[166] This is the case, for example, in *Chile* (Article 28 of Law 19.971 of 2004 on international commercial arbitration); in *Colombia* (Article 101 of Law 1563 on national and international arbitration); in *Guatemala* (Article 36.1 of the Arbitration Law); in *Panama* (Article 3 of Decree Law 5 of 1999, establishing the general regime of arbitration, conciliation, and mediation), replaced by Law 131 of 2013; in *Peru* (Article 57 of Decree 1071, which regulates arbitration; in Peru for contracts with the State, arbitration is mandatory (Article 45.1 of the Law of State Contracting, Law 30225).); in *Brazil* (Article 2 of Law 9307 of 1996); in *Costa Rica* (Article 28 of Law 8937 on international commercial arbitration); in *Mexico* (Article 1445 of the Commercial Code); and in *Paraguay* (Article 32 of Law 1879 of 2002, on arbitration and mediation).

7.0 The domestic legal regime on the law applicable to international commercial contracts should affirm clear adherence to the internationally-recognized principle of party autonomy as iterated in the Mexico Convention and the Hague Principles and other international instruments.

PART EIGHT

CHOICE OF LAW: EXPRESS OR TACIT

I. Express Choice of Law

255. Parties may choose the law applicable to their contracts expressly or tacitly. Party autonomy assumes that the parties have effectively exercised their desire to make that choice.

256. Express choice clearly arises from the agreement and may be verbal or written. Sometimes express choice is made with reference to an external factor, such as the location of the establishment of one of the parties. The HP Commentary to Article 4 of the Hague Principles provides the example of parties entering into a contract that "shall be governed by the law of the State of the establishment of the seller."

II. Tacit Choice of Law

A. Formulas in Comparative Law

257. At times, a choice of law may not be so clear. The intention is not to try to ascertain the hypothetical will of the parties. A restrictive interpretation suggests that the adjudicator should be limited to verifying the choice of law as reflected in the contractual terms, excluding any inquiry into other outside circumstances. This is how Article 2(2) of the 1955 Hague Sales Convention is interpreted.[167]

258. Under a broad interpretation, the judge will not only examine the express terms of the contract but will also take into account the circumstances of the case or "the conduct of the parties." This is provided for in the 1978 Hague Agency Convention (Art. 5 (2)) and the 1986 Hague Sales Convention (Art.7 (1)).[168]

259. The Rome Convention followed almost verbatim the Hague Agency Convention by providing in Article 3(1) that the choice "must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case." In their official commentary to the Rome Convention, Giuliano and Lagarde stated that tacit intent is certain, for example, when the parties choose a contract type governed by a particular legal system, or when there is a previous contract specifying the choice of law, or when there is reference to the laws or provisions of a specific country, or when a contract forms part of a series of transactions and a system of law was chosen for the agreement on which the others rest.[169]

260. Rome I continues to allow tacit choice (despite some proposals to eliminate it), provided that it is "expressly or clearly demonstrated by the terms of the contract or the circumstances of the case" (Article 3.1). The change in terminology from that of the Rome Convention has to do, above all, with strengthening the English version (as well as the German version), with the requirement that a tacit choice must be "clearly demonstrated," and not just "demonstrated with reasonable certainty." This does not aim to change the spirit of the prior rule; rather, it is simply to bring the English and German versions into line with the French text of the Rome Convention.

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[167] *Supra* note 23.

[168] *Supra* notes 24 and 23.

[169] Report on the Convention on the law applicable to contractual obligations (Rome Convention) by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, accessible at: http://aei.pitt.edu/1891/1/Obligations_report__Guiliano_OJ_C_282.pdf.

B. Tacit Choice in the Mexico Convention

261. Article 7, paragraph 1, of the inter-American instrument states that "The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole." Toward that end, all of the contract's points of contact must be considered, such as place of formation and performance, language, currency, and forum or place of arbitration—to cite a few examples.

262. The issue of the choice of applicable law was subject to intense debate in the discussions leading up to the Mexico Convention. It is clear from the language of the Article that the conduct of the parties and the clauses of the contract are indices to be considered cumulatively by the court and that they must enable the court to reach a conclusion that is "evident." Otherwise, Article 9 will be applied as if there had been an absence of choice. That is, the Mexico Convention does not accept a hypothetical choice; a clear and obvious intention to choose the applicable law is required. For example, if the parties to the contract refer to the specific rules of a particular state in the choice of law clause and their behavior is consistent with the content of that clause, the court may consider that the choice of the law of that State is "evident."

C. Tacit Choice in the Hague Principles

263. According to Article 4 of the Hague Principles, "A choice of law […] must be made expressly or appear clearly from the provisions of the contract or the circumstances." This allows for the choice of law to be express or tacit, so long as it is clear.

264. The issue was subject to intense scrutiny also during discussions of the Hague Working Group.[170] Given the lack of consensus in comparative law, it was thought that parties should be encouraged to be explicit in their choice of law. For greater certainty, the decision was made to adopt the formula that the choice of law "should be made expressly, or follow clearly from the provisions of the contract or the circumstances." Most of the experts expressed concern that the standard of "manifestly clear intentions" would be very high, in particular for certain States that require lower standards for other substantive aspects of the contract. Therefore, if there has been no express indication, a choice may be inferred if it appears "clearly from the provisions of the contract or from the circumstances."

265. The HP Commentary (4.13) explains that the specific circumstances of the case may indicate the parties' intent with respect to the choice of applicable law. Their behavior and other factors related to the conclusion of the contract may be particularly relevant. This principle may also be applicable in the case of related contracts. Thus, if the parties have systematically made an express choice to use the law of a particular State to govern their contracts in prior dealings and the circumstances do not indicate any intention to change this practice, the adjudicator may conclude that the parties had the clear intent for the contract under consideration to be governed by the law of that same State, even though an express choice does not appear therein.

266. The HP Commentary (4.14) also says that tacit choice must be clear from the provisions of the contract or from the circumstances, and therefore the choice must be clear from the existence of conclusive evidence. The HP Commentary (4.9) states that it is widely accepted that the use of a model form used generally in the context of a specific legal system may signal the parties' intent for the contract to be governed by that system, although there is no express statement to that effect. The example provided is a marine insurance contract in the form of a Lloyd's policy. Given that this contract model is based on English law, its use by the parties may indicate their intent to subject the contract to that legal system. The same occurs when the contract contains terminology characteristic of a specific legal system or

[170] *Supra* note 27.

references to domestic provisions evidencing that the parties had that legal system in mind and intended to subject the contract to it (4.10).

III. Forum Selection and Tacit Choice of Law

267. According to Article 7, paragraph 2 of the Mexico Convention, "Selection of a certain forum by the parties does not necessarily entail selection of the applicable law." In the deliberations leading up to the Mexico Convention, the U.S. delegation—whose standing on this point did not prevail—advocated that the choice of forum should be considered a tacit choice of applicable law. This position coincides with a solution historically enshrined in the common law and, in argument it can be advanced that, even if the rules state otherwise, there is a *domestic tendency* of the courts to apply their own law. Obviously this could be an important element, but, ultimately, the *choice* of forum should not be the determining factor in deciding that the *law* of the forum should be applied.

268. The solution of the inter-American instrument coincides with that of the second sentence of Article 4 of the Hague Principles. According to the HP Commentary (4.11) on that provision, "the parties may have chosen a particular forum for its neutrality or specialization." In this regard, a Luxembourg court ruled, in application of Article 3.1 of the Rome Convention, that "The selection of Luxembourgian courts, in the absence of any other connection to this country, is not sufficient to infer a tacit reference to Luxembourgian law". Obviously, the parties' agreement to select a forum in order to attribute jurisdiction to a specific court may be one of the factors that should be taken into account in determining whether the parties wished for the contract to be governed by the law of that forum, especially where that forum has been given exclusive jurisdiction. By contrast, non-exclusive jurisdiction clauses must surely be given less weight in determining the law which the parties 'tacitly' have chosen to govern their contract because bringing proceedings in the forum named in a non-exclusive clause is merely optional. Although perambulatory clause 12 of Rome I refers to exclusive jurisdiction clauses, the Hague Principles do not, leaving open the possibility that non-exclusive clauses will be given disproportionate weight in determining a tacit choice of law.

IV. Tacit Choice of Law and Domestic Laws

269. In *Argentina*, according to Article 2651 of the Civil and Commercial Code, choice of law may be express or be certain and evident from the terms of the contract or the circumstances of the case. In other words, tacit choice requires reasonable certainty or "evidence" that that choice is real, according to the circumstances of the case. Subparagraph (g) of that Article provides that "The selection of a certain national forum does not necessarily entail choice of the applicable domestic law of that country," which is consistent with the provisions of the Mexico Convention (Article 7) and the Hague Principles (Article 4) discussed above.

270. In *Canada*, in the province of Quebec, the CCQ takes the terms of the contract as the sole indicator of tacit choice. Certainty is required so that it can be determined that a tacit but true choice has been made (Article 3111).

271. In *Chile*, Article 1560 of the Civil Code recognizes tacit choice in the absence of an express choice and requires that "the intention of the contracting parties must be established by or evidenced from more than the literal words."

272. In *Paraguay*, Article 6 (express or tacit choice) of the Law Applicable to International Contracts transcribes Article 4 of the Hague Principles in this regard.

V. Arbitration and Tacit Choice of Law

273. Article 28(1) of the UNCITRAL Model Law provides that, "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." The UNCITRAL Arbitration Rules of 2010 refer to the rules of law "designated by the parties" as applicable to the substance of the dispute.

274. It follows from these texts that the express designation of applicable law is not required. Nevertheless, because the new rules use the word "designate," the expectation is that there is an unambiguous choice of law.

275. The reference to "the rules of law designated by the parties" prior to the "agreement" on the applicable law, is an invitation for the arbitral tribunals to see whether there has been any indirect indication by the contracting parties as to the governing rules. For instance, even if the parties have not expressly agreed on the law applicable to their contract, there may be references to various provisions of a legal system, which could indicate that they were choosing it as the applicable law. In Peru, this matter has been clarified in Article 57 of Legislative Decree No. 1071, which delves into the meaning of the term "designate" (indicar) as follows: "(…) It will be understood that any designation of the law or legal order of a particular State, unless otherwise expressed, refers to the substantive laws of that State and not to its conflict of laws rules." According to this provision, a designation by the parties in their contract permits an interpretation such that there has been tacit agreement on the application of the substantive law of the referenced State. In such a case, the law of that State will be applied without reference to its conflict of laws rules. In addition, depending on the wording of the clause, it may be that it does not govern extra-contractual claims, in which case the tribunal must determine the applicable law.

276. The Hague Principles also address the issue in the context of arbitration. According to the second sentence of Article 4, the selection of an arbitral tribunal is not sufficient to indicate, by itself, that the parties have made a tacit choice of applicable law. The HP Commentary (4.11) states that the parties may have chosen a tribunal because of its neutrality or specialization. Nevertheless, an arbitration agreement that refers disputes to a clearly specified forum may be one of the factors in determining the existence of a tacit choice of applicable law.

> 8.1 The domestic legal regime on the law applicable to international commercial contracts should provide that a choice of law, whether express or tacit, should be evident or appear clearly from the provisions of the contract and its circumstances, consistent with the provisions of Article 7 of the Mexico Convention and Article 4 of the Hague Principles.
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> 8.2 Adjudicators and contracting parties and their counsel are also encouraged to take these provisions into account in the interpretation and drafting of international commercial contracts.

PART NINE

FORMAL VALIDITY OF CHOICE OF LAW

277. The choice of applicable law may be made by the parties within the "main" contract or by a separate agreement (see above in Part Seven, III.A.) Either way, according to Article 5 of the Hague Principles, "a choice of law is not subject to any requirement as to form unless otherwise agreed by the parties." Thus, it is not necessary for the choice to be made in written form, before witnesses, or using specific language, unless the parties have otherwise so agreed, which they may do, for instance, in a memorandum of understanding.

278. The HP Commentary (5.3) states that "Article 5 is not a conflict of laws rule (which refers to a domestic legal system), but rather a substantive rule of private international law [that] can be justified on several grounds. First, the principle of party autonomy indicates that, in order to facilitate international trade, a choice of law by the parties should not be restricted by formal requirements. Secondly, most legal systems do not prescribe any specific form for the majority of international commercial contracts, including choice of law provisions (see Article 11 of the CISG; Articles 1(2) (first sentence) and 3.1.2 of the UNIDROIT Principles). Thirdly, many private international law codifications employ comprehensive

result-oriented alternative connecting factors in respect of the formal validity of a contract (including choice of law provisions), based on an underlying policy of favoring the validity of contracts (*favor negotii*)."

279. Although the Mexico Convention does not contain a specific provision similar to that of the Hague Principles, its Article 13 recognizes the principle of *favor negotii* (favoring the validity of contracts); accordingly, on this issue, it can be concluded that the same result follows from the inter-American instrument. The same interpretation is affirmed by Rome I, Article 11(1) of which contains a provision similar to that of Article 13 of the Mexico Convention.

280. The HP Commentary (5.4) also states that "the fact that the Principles are designed solely for commercial contracts obviates the need to subject the choice of law to any formal requirements or other similar restrictions for the protection of presumptively weaker parties, such as consumers or employees." However, a weaker party includes anyone who lacks bargaining power, which can also include merchants and small businesses. This is especially true in the case of adhesion contracts that include predetermined choice of law clauses; the situation is compounded in cases of a monopolistic offer where there is no freedom to consent to a choice of law clause included at the behest of one party.

281. The HP Commentary (5.5) makes it clear that Article 5 of the Hague Principles "concerns only the formal validity of a choice of law. The remainder of the contract (the main contract) must comply with the formal requirements of at least one law whose application is authorized by the applicable private international law rule." Thus, if the parties enter into a contract and agree for that contract to be governed by the law of a State under which the main contract is formally valid, the contract will be valid if the applicable private international law provisions recognize the principle of party autonomy.

282. The Hague Principles constitute strong advocacy for change. This is particularly true in Latin America, where written form is a requirement in many domestic laws. Generally, no distinction is made between the formal requirement for the main contract and that for the choice of laws clause. The Paraguayan law on international contracts is an exception. Its Article 7 is an exact replication of Article 5 of the Hague Principles.

9.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to formal validity of choice of law, should not contain any requirements as to form unless otherwise agreed by the parties, consistent with the provisions of Article 5 of the Hague Principles.
9.2 Adjudicators, in determining the formal validity of a choice of law, should not impose any requirements as to form, unless otherwise agreed by the parties or as may be required by applicable mandatory rules.
9.3 Contracting parties and counsel should take into account any mandatory rules as to form that may be applicable.

PART TEN

LAW APPLICABLE TO THE CHOICE OF LAW AGREEMENT

I. The Problem

283. An international contract sets out the parties' rights and obligations. A choice of law may or may not be made by the parties, whether in the main contract or separately. When a choice of law is made, the law governing the main contract is derived from the parties' choice but the question arises as to which law will serve as the basis to assess the validity and consequences of that choice of law agreement.

II. Existing Proposals

284. Various alternatives have been proposed to address this issue. One option is to apply the *lex fori* (law of the place of litigation) to the choice of law clause, which may, nevertheless, frustrate the parties' intent. Another option is to apply the law that would have governed in the absence of a choice. But this raises the very uncertainties that the parties intended to avoid by including the choice of law clause in the contract. A third option is to apply the law selected in the choice of law clause. The latter is the solution proposed by Article 10(1) of the Hague Sales Convention and Article 116(2) of the *Swiss Private International Law Act*,[171] to cite two examples. Nevertheless, this solution creates problems in those cases where the choice was not properly agreed upon.

285. Article 3.5 of Rome I provides that consent is determined by the law that would be applied if that agreement existed (the third option). This is consistent with the aim of giving the greatest possible effect to the intent of the parties; presupposing that the agreement exists is in line with respect for the principle of party autonomy. See also the Mexico Convention, Article 12, paragraph 1.

286. A similar approach is taken by Article 6.1 of the Hague Principles, given that as a rule it accepts that "whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to…" Nevertheless, Article 6.2 provides that "The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in [this Article]." As noted in the HP Commentary (6.4), this is similar to Article 12, paragraph 2 of the Mexico Convention, which states "…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." This corresponds to Article 10.2 of Rome I.

287. The HP Commentary (6.7) on this last provision underscores its exceptional nature. Duress, fraud, mistake, or other defects of consent are some of the grounds parties can invoke to demonstrate the absence of an "agreement." But it is pointed out (6.28) that this requires that two concurrent conditions be met: first, "under the circumstances, it would not be reasonable to make that determination under the law specified in Article 6.1"; and second, "no valid agreement on the choice of law can be established under the law of the State in which a party invoking this provision has its establishment." This can occur in cases of duress or fraud, as well as in situations of silence in the formation of the contract. To illustrate the latter, the example is given of an offer stipulating that the law of a specific state will govern. If silence equals acceptance according to the law of that state but not under the law of the place where the party receiving the offer has its establishment, it would not be reasonable for that party to be bound by the contract.

III. The "Battle of Forms" Problem

288. The Hague Principles constitute the first international instrument to address the issue known as the "battle of forms" regarding choice of law (Articles 2.1.19 to 2.1.22 of the UNIDROIT Principles do so in relation to substantive law.) It is common for parties to international contracts to use standard forms or general conditions. The Hague Principles do not contain any restrictions in this regard. On the contrary, they do not require that the parties' choice of law agreement comply with any particular formalities (see Part Nine, above).

289. If the standard forms used by both parties designate a law, or if only one such form includes a choice of law clause, Article 6.1(a) can be used to determine whether there has, in fact, been an "agreement" on the matter.

290. As the HP Commentary (6.10) indicates, it frequently happens that the standard forms used by each party are different and they can also differ with respect to the choice of law. This situation is commonly referred to as a "battle of forms." In such cases, the tribunals often avoid or circumvent this issue, or simply apply the law of the forum (*lex fori*).

[171] Switzerland's Federal Code on Private International Law (CPIL), December 18, 1987.

291. The question is answered in Article 6.1(b) of the Hague Principles, which states the following: "If the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law." This approach, known as the "Knock-out Rule", is also reflected in the UNIDROIT Principles, whereas the CISG leaves interpretive discretion to judges and arbitrators on how to best address a battle of the forms scenario (the UCC does the same.)

292. In any case, the exception established in Article 6.2 always governs. Under this provision, the law of the State in which one of the parties has its establishment prevails if, in view of the circumstances, it would not be reasonable to find consent according to the aforementioned rules.

IV. Under Domestic Laws

293. Article 8 of the *Paraguayan* Law Applicable to International Contracts replicates the provisions offered by the Hague Principles. Generally, domestic laws of other States do not contain provisions that specifically address this issue.

10.1 The domestic regime on the law applicable to international commercial contracts should provide that the question of whether parties have agreed to a choice of law is to be determined by the law that was purportedly agreed to by those parties, consistent with Article 6 of the Hague Principles and Article 12, paragraph 2, of the Mexico Convention.

10. 2 Adjudicators, in determining whether parties have agreed to a choice of law, should take into account Article 6 of the Hague Principles and Article 12, paragraph 2, of the Mexico Convention.

PART ELEVEN

SEVERABILITY OF THE CHOICE OF LAW CLAUSE

294. The term *severability*, in the within context, refers to the concept whereby the invalidity of an international contract does not necessarily affect the choice of law agreement. For example, if a contract of sale is invalid, the choice of law clause contained within that contract or as separately agreed remains unaffected. Moreover, the effectiveness or invalidity (regardless of whether substantive or formal) of the contract must be evaluated according to the law chosen in the agreement in which it was selected. It should be noted that severability is not the same as *dépeçage*, which is addressed below in Part 14.

295. Severability can be interpreted as flowing from Article 12, paragraph 1, of the Mexico Convention, which provides that: "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." That provision clearly indicates that the validity of the choice of law should be assessed according to the rules contained in Chapter 2. Because party autonomy is enshrined therein, if a choice of law was made, that law will govern all matters related to the validity of the consent of the parties concerning that choice. However, according to paragraph 2 of Article 12, "…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."

296. The Hague Principles refer explicitly to severability. Article 7 states that, "A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid." Thus, if the choice of law agreement is not affected, the allegation of the invalidity of the main contract must be examined in accordance with the law chosen by the parties.

297. The HP Commentary (7.2) provides the example of a contract invalidated on the grounds of mistake, which does not necessarily invalidate the choice of law agreement unless that agreement is also affected by the same defect. Another example is that of a corporation that enters into a contract which, according to the corporate law of its home state, should have been subject to shareholder approval. Nevertheless, this would not automatically invalidate the choice of law agreement, which must be considered separately. For the application of this provision, it does not matter whether the clause has been provided for in the main contract or in a separate agreement. If it is alleged that the parties did not enter into a contract, the principle of severability only takes effect if it is demonstrated that there was a valid choice of law agreement.

298. The HP Commentary (7.8) also indicates that the substantive or formal invalidity of the main contract does not automatically mean that the choice of law agreement is null and void; it can only be declared null and void for reasons affecting it specifically. The nullity of the main contract may or may not affect the parties' choice of law, but it depends on the specific circumstances. For instance, arguments focused on invalidating the consent of the parties in the main contract do not presume to challenge their consent to the choice of law agreement, unless there are circumstances that demonstrate the absence of consent in both agreements.

299. An example is given (7.9) of a contract that contains an agreement that it is governed by a law under which the contract is considered invalid due to lack of consent. The lack of consent cannot be said to extend to the choice of law agreement. "As a result, that law applies to determine the consequences of invalidity, notably the entitlement to restitution when the contract has been performed, in whole or in part."

300. It is a different case when the defect affects both the main contract and the choice of law agreement. The examples given in the HP Commentary (7.10) are the invalidity of the contract due to bribery or because one of the parties lacked capacity. This would invalidate both agreements.

301. An example from the Americas of a provision explicit to severability is Article 9 of the Paraguayan law on international contracts, drawn upon Article 7 of the Hague Principles.

302. Severability had its origins in arbitration, where it is a widely accepted principle that contributed to the development of this dispute settlement mechanism; it is enshrined in the UNCITRAL Model Law (Article 16(1)). By the application of this principle, invalidity of the main contract does not necessarily invalidate the arbitration clause. Even though this solution inspired the severability rule in the Hague Principles, it should be noted that severability of the arbitration clause has effects different from those of the severability of a choice of applicable law clause. The principle of severability has been enshrined in the domestic laws that govern international commercial arbitration in many States in the Americas.[172]

11.1 The domestic legal regime should confirm that a choice of law applicable to international commercial contracts cannot be contested solely on the ground that the contract to which it applies is not valid, consistent with Article 7 of the Hague Principles.

11.2 Adjudicators, when granted interpretive discretion, are encouraged to follow the above-stated solution.

[172] Among them: Peru (Article 41.2 of Legislative Decree 1071), Bolivia (Article 44.I of Law 708), Brazil (Article 8 of Law 9307), Chile (Article 16.1 of the Law 19.971), Colombia (Article 79.2 of Law 1563), Costa Rica (Article 16.1 of Law 8937), Cuba (Article 13 of Decree Law 250), Ecuador (Article 5 of Law 000.RO/145), El Salvador (Article 30 of Decree 914), Guatemala (Article 21.1 of Decree 67 of 1995), Honduras (Article 39 of Decree 161 of 2000), Mexico (Article 1432 of the Commercial Code), Nicaragua (Article 42 of Law 540), Panama (Article 30 of Decree Law 5), Paraguay (Article 19 of Law 1879), Dominican Republic (Article 11 of Law 489 of 2008), Venezuela (Article 7 of the Commercial Arbitration Law).

PART TWELVE

OTHER CHOICE OF LAW PROBLEMS IN INTERNATIONAL COMMERCIAL CONTRACTS

I. Modification of the Choice of Law

303. Article 8, paragraph 1, of the Mexico Convention provides that: "The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, that modification shall not affect the formal validity of the original contract nor the rights of third parties."

304. An express provision such as that is important. An earlier decision by a European court held that the parties' choice of law is not admissible if it was made after the conclusion of the contract.[173] The result of that highly questionable ruling was changed by the Rome Convention and similar provisions were incorporated into Rome I, Article 3.2, in terms similar to those of Article 8 of the inter-American instrument, mentioned above.

305. Consistent with the Mexico Convention, Article 2.3 of the Hague Principles indicates that: "The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties."

306. As stated in the HP Commentary (2.10), the provision is a consequence of the principle of party autonomy and HP Commentary 2.12 clarifies that third party rights cannot be affected. In the example provided, if a third party provides a guarantee and the choice of law is later amended so as to impose greater liability on one of the contracting parties, although the modification is effective as between the contracting parties, such a change will not affect the responsibility of the guarantor. For greater certainty, it would be preferable for this to be clearly expressed in the instrument, rather than left by way of deference to domestic laws.

307. The HP Commentary (2.13) also makes it clear that as the Hague Principles "do not generally seek to resolve what are commonly considered to be procedural issues… if the choice or modification of the choice of law occurs during the dispute resolution proceedings, the effect…may depend on the *lex fori* or the rules governing the arbitration proceedings."

308. Solutions similar to those provided in the Mexico Convention, Rome I, and the Hague Principles with respect to modification of the choice of law may be found in recent domestic legislation of various states.[174] In *Argentina*, Article 2651 of the Civil and Commercial Code provides that "… (a) The parties may at any time agree that the contract shall be subject to a law other than that to which it was previously subject, whether by a prior choice or the application of other provisions of this Code. Nevertheless, that modification shall not affect the validity of the original contract or the rights of third parties." This provision is consistent with the criterion of Article 8 of the Mexico Convention, although the Argentine Code provides that the modification cannot affect the "validity of the original contract," while the Mexico Convention and the Hague Principles refer to the "formal validity of the original contract." Both instruments safeguard "the rights of third parties." For its part, Article 4.3 of the *Paraguayan* law on international contracts mirrors the solution set forth in the Hague Principles.

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[173] *Assael Nissim v. Crespi*. Supreme Court (Italy). Judgment of June 28, 1966, No. 1680. This judgment was called into question at the time by Italian scholars, as discussed in the commentary on Article 3 in Giuliano and Lagarde's Official Report on the Rome Convention, *supra* note 169.

[174] Examples include the following: Article 9 of Japan's 2006 Code of Private International Law and Article 1210(3) of the Civil Code of Russia.

II. Connection of the Chosen Law to the Contract

309. Historically, it was considered that the law chosen by the parties should have some connection either to the parties or to the transaction. This might have originated under the influence of doctrines such as *localization* in the 19th century. Even today, in some domestic legal systems as will be discussed below, the law chosen must be substantially related to the parties or the transaction, or there must be another reasonable ground for the parties' choice of law.

310. The Mexico Convention does not expressly address this point, although interpretations have been put forth that, by virtue of the principle of party autonomy enshrined therein, the application of a "neutral" law can be chosen freely.

311. By comparison, the issue has been addressed expressly in the Hague Principles. Article 2.4 of the Principles states that, "No connection is required between the law chosen and the parties or their transaction." The HP Commentary (2.14) states that "this provision is in line with the increasing delocalization of commercial transactions." It states further that "The parties may choose a particular law because it is neutral as between the parties or because it is particularly well-developed for the type of transaction contemplated (e.g., a State law renowned for maritime transport or international banking transactions)."

312. Rome I is silent with respect to the connection requirement (Article 3), except for two types of contracts: contracts for the carriage of passengers (Article 5.2) and insurance contracts covering small risks (Article 7.3). This silence is interpreted to mean that a connection is generally not necessary, except for the two types of contracts mentioned.

313. The laws of *Argentina* (Article 2651, Civil and Commercial Code), *Cuba* (Article 17, Civil Code), *Mexico* (Article 13, Section V, Federal Civil Code) and *Venezuela* (Article 29, Venezuelan Law on Private International Law) are also silent on this point. The interpretation in these jurisdictions tends to be that no connection would be required.

314. *Chilean* legislation is also silent on the need for a connection with the chosen law. Despite extensive discussions, the prevailing doctrine appears inclined towards acceptance of full conflictual and material autonomy, based on the literal wording of Article 1545 of the Civil Code, which does not establish requirements of any kind for such autonomy, at least for contracts concluded in Chile. The only recognized requirements are that said election was made in good faith, without fraud, and without violating either the rules of public policy and public order in Chile, or the rules of exclusive application of domestic law.

315. In *Canada*, under the broad application of the principle of party autonomy, it is understood that no connection to the choice of law is required. This is the current state of the law in Canada on the basis of a key court decision[175] and, in Quebec, on Article 3111 of the Civil Code.

316. In *Paraguay*, Article 4.4 of its Law Applicable to International Contracts, which reflects the Hague Principles, is explicit in stating that, "no connection of any kind between the chosen law and the parties or their transaction is required."

317. In *Panama*, an earlier version of the Code of Private International Law did expressly require a connection between the law chosen and the economy of the transaction (Article 75 *in fine*); but after enactment of the new Code in 2015, this provision is no longer found (Article 69) (see para. 378, below).

318. In the *United States*, the requirement of a connection between the law chosen and either the parties or the contract is determined at the domestic state level and varies from state to state. In those states that follow the Second Restatement, there is still a requirement that the law chosen must be substantially related to the parties or the transaction, or that there must be

[175] *Vita Food Products v. Unus Shipping*, *supra* note 153.

another reasonable ground for the parties' choice of law.[176] However, some states have relaxed this requirement by statute.[177] And in the context of international commercial contracts, some courts have recognized that a different approach that does not require a connection may be appropriate.[178]

319. With respect to arbitration, this issue has not been clarified in the UNCITRAL Arbitration Rules or Model Law. Arbitral decisions have been made that, under a broad interpretation of the principle of party autonomy, would allow the parties to choose any law to govern their contract, even if it is not obviously related to the dispute.[179] Nevertheless, arbitrators must act with considerable caution in this area, given that failure to acknowledge public policy issues connected to the case can be the basis for setting aside an award or preventing its enforcement, pursuant to Article V(2)(b) of the New York Convention. This requirement flows from the general duty of arbitrators to issue awards that can be enforced.

III. *Renvoi*

320. The doctrine of *renvoi* concerns the following questions: Does the application of a specific domestic law also include its private international law provisions? If so, those provisions may refer the matter back to another law. And so on.

321. Article 17 of the Mexico Convention provides that: "For the purposes of this Convention, 'law' shall be understood to mean the law current in a State, excluding rules concerning conflict of laws." This is consistent with Article 20 of Rome I and could be considered as the absolutely prevailing position in the doctrine of private international law on the issue of *renvoi*.

322. Along the same lines but with a slight variation, Article 8 of the Hague Principles states that, "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." The HP Commentary (8.2) explains that this "avoids the possibility of an unintentional *renvoi* and therefore conforms to the parties' likely intentions." It goes on to note that, nevertheless, in accordance with the principle of party autonomy, parties are allowed—by way of exception—"to include in their choice of law the private international law rules of the chosen law, provided they do so *expressly*."

323. In *Argentina*, Article 2651 of the Civil and Commercial Code states that "When the application of a national law is chosen, it shall mean that the domestic law of that country has been chosen excluding its conflict of laws rules, unless otherwise agreed." Accordingly, the parties may agree that their reference to a specific law includes its conflict of laws rules. If the parties do not make such an agreement, it is understood that the law chosen is the domestic law of that State.[180]

324. In *Brazil*, the solution is similar to that of the Mexico Convention. Article 16 of the LINDB provides that, in the determination of the applicable law, "no reference by it to another law" shall be taken into account. Likewise, *renvoi* is generally not accepted in Brazil in other matters of private international law.

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[176] Restatement (Second) of Conflict of Laws, Article 187(2)(a). Note that a Third Restatement is currently underway, as mentioned above. See *supra* note 157.

[177] See for example, NY Gen. Oblig. Law § 5-1401(1).

[178] See for example, *Bremen v. Zapata*, *supra* note 155 (giving deference to a choice-of-forum clause choosing a jurisdiction where no connection existed (England) and assuming the English court would apply English law).

[179] See for example, ICC Case No. 4145 of 1984.

[180] Moreover, Article 2596 establishes, with respect to *renvoi*, that "When a foreign law is applicable to a legal relationship, the private international law of that country is also applicable. If the applicable foreign law refers back to Argentine law, the rules of domestic Argentine law are applicable. When the parties to a legal relationship choose the law of a particular country, the domestic law of that State is understood to have been chosen, unless expressly stated otherwise."

325. In *Canada*, specifically in Quebec, the Civil Code prohibits *renvoi* stating that "Where, under the provisions of this Book, the law of a foreign State is applied, the law in question is the internal law of that State, but not its rules governing conflict of laws" (Article 3080).

326. In *Chile*, the argument until 1989 was that the legislation supported *renvoi* and the doctrine had been accepted in a decision by the Supreme Court.[181] Although the legislation has been modified, it has not resulted entirely in the elimination of *renvoi*.

327. In *Paraguay*, Article 10 of the Law Applicable to International Contracts mirrors Article 8 of the Hague Principles.

328. In *Peru*, the legislation includes a rule that avoids *renvoi* (Article 2048, Civil Code of 1984).

329. In *Venezuela*, with respect to *renvoi*, Article 4 of the Venezuelan Law on Private International Law provides that: "When the relevant foreign law declares the law of a third State applicable that, in turn, is declared relevant, the domestic law of that third State shall be applied. When the relevant foreign law declares Venezuelan law applicable, that law shall be applied. In cases not provided for in the two paragraphs above, the domestic law of the State that the Venezuelan conflict of laws rules declares relevant shall be applied." This rule is considered useful, according to the preamble to the law, "…in furtherance of the principle of legal certainty." The preamble states that Article 4 allows *renvoi* "…when it tends to unify the national solution and the foreign law solution, or when, as frequently occurs in simple *renvoi*, both are inevitably divergent."

330. Although Article 4 of the Venezuelan Law is the general rule and, apparently, has no exceptions, scholars have interpreted it such that, in the matter of international commercial contracts, the solution of the Mexico Convention to exclude *renvoi* is the prevailing one in Venezuela. The rules regulating contracts, in accordance with the preamble to the law, seek to incorporate the most relevant guidelines of the inter-American convention. Therefore, it is considered that the provisions of the law are subject to an interpretation that is in keeping with the Mexico Convention and, accordingly, *renvoi* should be understood to be excluded in relation to contractual obligations. In order to justify this exclusion, Article 2 of the Venezuelan law is also used, which is a rule to apply foreign law in accordance with the principles of said law and, in turn, to realize the purpose of the Venezuelan conflict rules. In contractual matters, these principles represent respect for party autonomy and in the absence of choice, application of the law most closely connected to the contract.

331. In the area of arbitration, in the UNCITRAL Model Law there is also a presumption against *renvoi* (Article 28.1).

IV. Assignment of Receivables

332. The Mexico Convention does not address issues that could arise in relation to choice of law in the context of assignment of receivables.

333. This is addressed in the Hague Principles which state in Article 10 that "In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor: (a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs mutual rights and obligations of the creditor and the assignee arising from their contract; (b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs (i) whether the assignment can be invoked against the debtor; (ii) the rights of the assignee against the debtor; and (iii) whether the obligations of the debtor have been discharged." This is consistent with the *UN Convention on the Assignment of Receivables in International Trade (New York, 2001)* (Articles 28 and 29) and the UNCITRAL *Model Law on Secured Transactions* (2016) (Articles 84 and 96).[182]

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[181] *Tschumi Case*. Supreme Court, Law and Jurisprudence Magazine, XLII, part 2, section 1, page 331.

[182] *UN Convention on the Assignment of Receivables in International Trade*. Adopted 12 December 2001, not yet entered into force. Text accessible at:

334. As explained in the HP Commentary, the objective of the provision is to give the greatest possible effect to the parties' intent with respect to choice of law when expressed in a contract of assignment of receivables. Nevertheless, given the complexity of the situations that arise in such transactions, the provision reflects the need to clarify which law is applied when there are two or more coexisting contracts (for instance, one contract between the creditor and the debtor and another contract between the creditor and the assignee), in which the parties to each one have chosen different applicable laws.

335. Although voluntary assignment and contractual subrogation have the same effect, that is, the replacement of the old with a new creditor by agreement, the Hague Principles do not cover other situations such as legal and conventional subrogation or set-off. While these topics are addressed in Rome I (Articles 14 and 15, and Article 17, respectively), the Hague Principles focus instead on assignment, which is very common in international commercial practice.

336. Although the issue is generally not addressed in domestic law, one exception is that of Paraguay; Article 14 of the *Paraguayan* law mirrors Article 10 of the Hague Principles.

12.1. The domestic legal regime on the law applicable to international commercial contracts should:
- provide that a choice of law can be modified at any time and that any such modification does not prejudice its formal validity or the rights of third parties, consistent with Article 8 of the Mexico Convention and Article 2.3 of the Hague Principles;
- provide that no connection is required between the law chosen and the parties or their transaction, consistent with Article 2.4 of the Hague Principles;
- exclude the principle of *renvoi* to provide greater certainty as to the applicable law, consistent with Article 17 of the Mexico Convention and Article 8 of the Hague Principles;
- in relation to assignment of receivables, favor party autonomy to the maximum extent, consistent with Article 10 of the Hague Principles.

12.2 Adjudicators, when granted interpretive discretion, are encouraged to follow the above-stated solutions.

PART THIRTEEN

ABSENCE OF CHOICE OF LAW BY THE PARTIES

I. The Problem

337. By the exercise of party autonomy, parties can choose the law applicable to their contract. Nevertheless, they often fail to do so. The reasons for this may be due to simple oversight, or the contracting parties may not have considered it necessary, or they may have discussed it but not come to an agreement. It may also be that the parties intentionally avoided discussing the matter because they knew it would be difficult to reach an agreement or out of fear that such discussions might prevent conclusion of the contract. A similar issue arises when the parties have exercised their autonomy and made a choice of law but that choice is subsequently ineffective.

338. In the absence of an effective choice of law by the parties, the question arises as to which law should be applied—a question that can arise during enforcement of the contract or in the course of litigation. Clarity in this respect can help to prevent disputes and, in the event of legal action, clarity can also help to orient the parties in the assertion of their positions and provide the adjudicator with guidance in issuing a decision.

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http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables.html;
UNCITRAL Model Law on Secured Transactions. Text accessible at:
http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html.

339. If the contract does not contain a choice of law clause, in the Americas as in Europe, in court proceedings the applicable law will be determined on the basis of objective criteria laid down by the conflict of laws rules. The following paragraphs provide an overview of the different connecting factors under various international instruments and adopted by states.

III. Solutions of the Montevideo Treaties and the Bustamante Code

340. Review of the solutions presented by these earlier instruments provides some context for the current approach in the absence of a choice of law. Article 37 of the 1940 Montevideo Treaty uses as a connecting factor the *place of performance* of the contract to govern issues related to formation, characterization, validity, effects, consequences, and performance. Article 33 of the 1889 Montevideo Treaty was the original source of this provision.

341. This approach raises problems when the place of performance is in more than one State. Moreover, the place of performance may not be known at the time the contract is concluded or could change later on. These and other problems were to be resolved through the *presumptions* established in Article 38 of the 1940 Montevideo Treaty, in relation to contracts "on specific and individually identified things," contracts "on specific types of things" and "referring to fungible things," and contracts "for the provision of services." At the same time, Article 40 of the 1940 Montevideo Treaty provides that the law of the *place of conclusion* of the contract will be applicable to those contracts for which the place of performance cannot be determined at the time of conclusion.

342. These solutions, nevertheless, have led to additional challenges. As an international contract and the obligations arising therefrom often have more than one place of performance, it becomes impossible to determine which law to apply, unless a *specific service or "characteristic"* and its respective place of performance is chosen. However, this solution also creates discrepancies in its practical application. For instance, does it refer to the physical place of performance, or to the domicile, habitual residence, or establishment of the obligor of the characteristic performance? Furthermore, determining the characteristic performance can become uncertain in cases of swap agreements, distribution agreements, and in complex contractual relationships generally, given that international contracts tend to be complex. Worse yet, the solution tends to favor application of the law of parties that are dominant in the provision of goods and services in international transactions.

343. Consequently, the approach set forth in the Montevideo Treaties in the absence of choice have created controversies, even though this approach is still defended by respected scholars from within the region. Critics say that the adjudicator is not granted the flexibility to determine whether there are closer connections than those provided in advance by the legislator nor are the solutions offered by these treaties clearly presented. This criticism is considered controversial by some who maintain that flexibility can be derived from the Additional Protocols to the Treaties of 1889 and 1940, and subsequently, by the *Inter-American Convention on General Rules of Private International Law*, ("General PIL Rules Convention") particularly Article 9.[183]

344. The solutions provided in the Bustamante Code in the absence of choice are also unsatisfactory. It provides that contracts shall be governed by the law that, where appropriate, is common to the parties to determine capacity and, in the absence thereof, that of the place of conclusion (Article 186). However, it is unlikely for there to be a law common to the parties to determine capacity, given that in international commercial contracts, a party's "domicile" - a criterion that in Latin America at times prevails over "nationality" - is almost always different for each party. Therefore, as the criterion of a *law common to the parties to determine capacity* will rarely be met, the criterion of *place of conclusion* is widely used instead, with its attendant challenges as noted above. Concerning

[183] *Inter-American Convention on General Rules of Private International Law*, adopted at Montevideo at CIDIP-II signed 8 May 1979 and entered into force 10 June 1981.

requirements as to formalities, the law of the place of conclusion and performance of the contract (Article 180) apply cumulatively, which is also a questionable solution.

III. Approach in Europe and the United States

345. The Rome Convention adopted the *closest connection* formula in the absence of a choice of law; later, a set of guidelines was derived for arriving at an understanding of *characteristic performance* that coincides with that formula, which generated considerable criticism and disparities.

346. The reforms that generated Rome I resulted in rather rigid rules as to which law applies in different scenarios in order to determine characteristic performance (Article 4). Nevertheless, the solutions are complicated, and one must refer to the perambulatory clauses of Rome I in an attempt to resolve issues of interpretation. Such detailed rules diminish the value of broad or flexible formulas. Given the rich variety of commercial life, it becomes unlikely that a mechanical rule appropriate for one type of contract will be appropriate for another. For this reason, the adjudication of contracts should be characterized by flexibility.

347. This flexibility existed in English law until 1991 (when the Rome Convention came into effect in England) with use of the *proper law of the contract* formula, which is similar in concept to that of the closest connection test before the search for characteristic performance. Along these same lines, in the United States, while it is necessary to take a state-by-state approach to conflict of laws analysis, those domestic states that follow the Second Restatement have adopted for non-sale of goods contracts the flexible formula of the closest connection or *most significant relationship*.[184]

348. With that as an overview, specific examples of this approach from various domestic laws will be provided below.

IV. Absence of Choice in the Mexico Convention

A. Principle of Proximity

349. The Mexico Convention aims above all to recognize and promote the principle of party autonomy. Nevertheless, in the absence or ineffectiveness of a choice, there must be a way to determine the applicable law. In this regard, Article 9, paragraph 1 provides that: "If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties [connections]." This is known as "the proximity principle."

B. Objective and Subjective Elements

350. In making that determination, "The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties [connections]. …" (Article 9, paragraph 2, first sentence). This provision is consistent with Article 11 when it refers to "… State with which the contract has close [connections]."

351. Another interpretation has been advanced that a determination of the "closest connection" must also evaluate all the possible circumstances, as well as the territorial circumstances related to the conclusion, performance, domicile or establishment, dispute resolution clause, currency, prior negotiations, and others. These are the *objective* connections that are to be considered together with the *subjective* ones that arise from different clauses and circumstances before, during, and after the conclusion of the contract and which indicate the legitimate expectations of the parties.

C. Principles of International Bodies

[184] Restatement (Second) of Conflict of Laws of 1971 (Sections 145, 188). For sales of goods not governed by the CISG, Section 1-301(b) of the UCC provides that when the parties have not made an effective choice, the UCC (as codified in that state) 'applies to transactions bearing an appropriate relation to this state.'

352. In making its determination, a court shall also take into account "the general principles of international commercial law recognized by international organizations" (Article 9, paragraph 2, second sentence).

353. During the process of drafting the inter-American instrument, the United States delegation proposed the formula of *the closest connection*, the intention being that it would lead to a transnational, non-State law, rather than to a domestic law.[185] Around the same time, the UNIDROIT Principles, some two decades after their inception and drafting, were coming into the limelight. It was the opinion of Friedrich Juenger, member of the United States delegation, that the reference to "general principles" should clearly lead to the UNIDROIT Principles.[186]

354. After considerable discussions during CIDIP-V, a compromise was reached.[187] Regarding the rule that was ultimately adopted, one interpretation is that the role of *lex mercatoria* or non-State law has been reduced to that of an auxiliary element that, together with the objective and subjective elements of the contract, help the adjudicator to identify the law of the State with the closest connection to the contract. Another interpretation, in line with Juenger´s advocacy, favors the application of non-State law in absence of choice.[188] Juenger even stated afterward literally the following: "…even in countries that fail to ratify the Convention, its provisions can be considered an expression of inter-American policy that judges ought to consult in rendering their decisions. Once courts as well as arbitrators begin to rely on them, the Principles can furnish the necessary legal infrastructure for this Continent´s ever-increasing economic and legal integration".[189]

V. Absence of Choice in the Hague Principles

355. The Hague Principles apply only when parties have made a choice of law; application of law in the absence of or an ineffective choice fall outside their scope. Noteworthy, however, is that the Hague Principles use the term *closest relationship* when determining the relevant establishment, in Article 12.

VI. Absence of Choice in Domestic Laws

356. As explained above, the Mexico Convention establishes that if the parties to a contract fail to choose the applicable law (or make an ineffective choice), the law that has the closest connection to the contract will apply. In the aforementioned survey that was conducted in 2015, OAS Member States were asked whether their domestic legislation was consistent with this provision. Out of the eleven States that responded, seven States replied in the

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[185] "If the parties have not selected the applicable law, or if this election proves ineffective, the contracts shall be governed by the general principles of international commercial law accepted by international organizations." Juenger, Friedrich K., *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*. The American Journal of Comparative Law, Volume 42, Number 2, Spring 1994, 381 at page 391.

[186] *Id*. See also Juenger, Friedrich K., Conflict of Laws, Comparative Law and Civil Law: The *Lex Mercatoria* and Private International Law, 60 La. L. Rev. 1133 (2000), at p. 1148. The relevance of this opinion is highlighted by José Siqueiros, the original drafter of the Mexico Convention, since the former was the one who had proposed the compromise solution. Siquieros, J.L., Los Principios de UNIDROIT y la Convención Interamericana sobre el Derecho Aplicable a los Contratos Internacionales, in Contratación Internacional, Comentarios a los Principios sobre los Contratos Comerciales Internacionales del UNIDROIT, México, Universidad Nacional Autónoma de México, Universidad Panamericana, 1998, p. 223.

[187] Juenger, *supra* note 185.

[188] There had also been discussion as evidenced in the preparatory works that the term *international organizations* incorporates all of the elements of *lex mercatoria*. Report of the Rapporteur of the Commission I on the Law Applicable to International Contractual Arrangements; OEA/Ser.K/XXI.5; CIDIP-V/doc.32/94 rev.1. This was prior to the development of this idea in more recent times.

[189] Juenger, *supra* note 185, p. 236.

affirmative.[190] Although many States still adhere to the traditional approach as evidenced in the overview that follows, change is underway and new reforms, together with recent jurisprudence, is indicative of a new direction for conflict of laws in the Americas. This is also consistent with a similar trend in recent court decisions emerging from Europe.[191]

357. One exception is *Argentina*, where the new Civil and Commercial Code, unlike the Mexico Convention, adheres to the formula of place of performance (Article 2652). If that cannot be determined, the applicable law will be that of the domicile of the obligor of the characteristic performance, and in its absence, that of the place of conclusion. This is the same criterion that the Argentine courts had been using previously. Nevertheless, because the formula leaned toward "current" domicile, the provision left open the possibility that the applicable law could be changed unilaterally. An analogous solution in the Rome Convention created so many problems that Rome I relegates it to a secondary level, after establishing a number of strict rules on applicable law.

358. In *Brazil*, Article 9 of the LINDB provides that in order to qualify and govern obligations, the law of the State in which they are entered into—in other words, of the place where the contract is signed—is applied. Paragraph 2 of the same Article provides that the obligation arising from the contract is considered to be established in the place where the offeror resides. However, in a recent court decision, the traditional connecting factors were apparently rejected in favor of the more flexible principle of proximity.[192] As Brazilian labor jurisprudence uses different criteria, the value of this decision as influential is questionable; however, two more recent decisions likewise invoke the principle of proximity and reject the traditional connecting factor of the place of conclusion of the contract. In both instances, the court applied the CISG together with the UNIDROIT Principles as an expression of the "new *lex mercatoria*." The decisions considered the inadequacy of the results of the traditional conflict of law rule of the place of conclusion of the contract and the appropriateness of uniform law rules to govern a multi-jurisdictional relationship.[193]

359. In *Canada*, in the civil law province of Quebec, the CCQ provides that "if no law is designated in the act or if the law designated invalidates the juridical act, the courts apply the law of the State with which the act is most closely connected in view of its nature and the attendant circumstances."[194] According to the case law applicable in Canada's common law jurisdictions, in the absence of an express or implied choice of law by parties to a contract, courts will apply the law which has the closest and most substantial connection to the contract.[195]

360. In *Chile*, the Civil and Commercial Codes do not contain specific provisions on the issue. Based on the prevailing territorial approach, in the absence of a choice by the parties (and even against their express agreement), judges will apply the local law if the goods subject to the contract are located in Chile. Otherwise (if the goods subject to the contract are not in

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[190] Argentina, Bolivia—with provisos—, Canada, Jamaica, Mexico, Panama, and Paraguay. Article 804 of the Bolivian Commercial Code states that contracts executed in another State and performed in Bolivia are governed by Bolivian Law. See 2016 Contracts Report, Appendix A, *supra* note 1.

[191] See the decisions rendered by the Belgian Cour de Cassation in 2009 and the two French decisions rendered by the Court d´Appel of Reims in 2012 and the Cour de Cassation in 2015, all reported in the UNILEX database.

[192] Superior Court of Labor (Tribunal Superior do Trabalho), DEJT, October 15, 2010, Ruling No. 186000-18.2004.5.01.0034.

[193] *Noridane Foods S.A. v. Anexo Comercial Importacao e Distribuicao Ltda*. Court of Appeal of Rio Grande do Sul, February 14, 2017, Ruling No. 70072362940, and March 30, 2017. http:///www.unilex.info. See also above, for more recent cases from Brazil.

[194] CCQ, Article 3112. Consider also Article 3113 which provides that "a juridical act is presumed to be most closely connected with the law of the State where the party who is to perform the prestation which is characteristic of the act has his residence or, if the act is concluded in the ordinary course of business of an enterprise, has his establishment."

[195] *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443.

Chile), in accordance with Article 16 of the Civil Code, the contract will be governed by the law of the place of conclusion (prevailing doctrine) or by that of the place of performance. In commercial matters, however, Article 113 of the Commercial Code contains a rule similar to that of the aforementioned Article 16 of the Civil Code, but establishes an exception for the case in which "the parties have agreed otherwise", a clear allusion to party autonomy, since no additional requirements are established.

361. In the *United States*, in the absence of an effective choice of law, the court in a domestic state that follows the Second Restatement will examine the most significant relationship to determine the applicable law. Specific points of contact will be considered, which must be evaluated according to their relative importance with respect to a particular issue.[196] For sales of goods not governed by the CISG, the court will apply the UCC as codified in that state if the transaction bears an appropriate relation to that state.

362. *Guatemala* follows the principle of *lex loci executionis* (Article 31 of the Judicial Branch Law). Accordingly, if the legal transaction or act must be performed in a place other than the one where the agreement was concluded, all matters concerning its performance are governed by the law of the place of performance.

363. In *Mexico*, as it is party to the Mexico Convention, if the parties to a contract fail to choose the applicable law, or the choice is ineffective, the law with the closest connection to the contract will apply. However, in principle, the treaty applies only to cases between Mexico and Venezuela. For other cases, the Federal Civil Code provides in Article 13, Section V that "except as provided in the preceding sections, the legal effects of the acts and contracts shall be governed by the law of the place where executed, unless the parties have designated another applicable law."

364. In *Panama*, the Code of Private International Law establishes that in the absence of a choice of law "the judge shall apply the law of the place of performance of the obligation and, when this cannot be determined, the judge shall apply the law of the State with the closest connection to the international contract and, failing that, the law of the forum" (Article 69 of Law 61 of 2015, subrogating Law 7 of 2014). The proximity principle enters here as one of the components of the conflict of laws rules that contains cascading connection points; e.g., in the first instance, it would be the place of compliance and only if this cannot be determined then, as a second instance, one would apply the law of the State with the closest connections.

365. In the *Dominican Republic*, in the absence of a choice, the new Private International Law provides that the applicable law is that with which the contract has the closest connection, in line with the identical language of Article 9 of the Mexico Convention (Law 544 of 2014, Article 60). In making that determination, the new law stipulates that "… [the court] shall consider all the objective and subjective elements that arise from the contract to determine the law of the State with which it has the closest ties; and the general principles of international commercial law recognized by international organizations" (Article 61).

366. In *Paraguay*, Article 11.1 of the Law Applicable to International Contracts replicates Article 9 of the Mexico Convention, which adopts the flexible formula of the "closest or most significant connection" and rules out other controversial and restrictive methods, such as the place of performance of the obligation. Notably, the Paraguayan law does not replicate the provisions of the Mexico Convention whereby a court shall also take into account "the general principles of international commercial law recognized by international organizations" (Article 9, second paragraph). This language is excluded because it is already clear (Article 3) that the reference to law therein can be understood also to include non-State law, which means that if adjudicators find the case to be more closely connected to transnational law than to a domestic law, they will apply it directly, whether or not it comes from an international body (such as UNIDROIT).

[196] Restatement (Second) of Conflict of Laws, sections 6, 187 and 188. See *supra* note 156.

367. The *Peruvian* Civil Code provides that, in the absence of a choice, the law applicable to the contractual obligations will be the law of the place of its performance, and if the obligations must be performed in different States, it will be the law of the principal obligation; in the event that this cannot be determined, the law of the place of conclusion of the contract will apply (Article 2095).

368. In *Venezuela*, the Law of Private International Law adopts in its Article 30 the provisions of Article 9 of the Mexico Convention verbatim; thus, in the absence of choice, or when it is ineffective, the law with which the contract is most closely connected shall be applied, for which the objective and subjective elements of the contract will be taken into account, as well as the general principles of international commercial law accepted by international organizations. The Supreme Court stated that the closest connection formula conduces to take into account the *lex mercatoria*, which is comprised of commercial customs and practices.[197]

VII. Absence of Choice in Arbitration

369. Arbitrators are in a different position than judges as arbitration laws usually confer upon arbitrators broader discretion.

A. Texts of Arbitration Conventions

370. The New York Convention does not address the issue of the applicable law in the absence of the parties' choice of law.

371. In the Americas, the Panama Convention does offer a solution. It refers to the IACAC Rules, specifically Article 30, which states: "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable." The rule is identical to that of the UNCITRAL Model Law, discussed below, and it is similar to the approach taken by the European Convention.

372. The MERCOSUR Arbitral Agreement of 1998 grants arbitrators the same authority as that of the parties. Article 10 states that: "The parties may choose the law to be applied to resolve the dispute based on private international law and its principles, as well as on international commercial law. If the parties failed to specify their choice of law, the arbitrators will rule in keeping with those same sources."[198] The instrument is open to the selection of uniform law when it refers to "international commercial law" and secondly, that the reference is to private international law "and its principles", which is thereby not limited to conflict of laws rules but also includes uniform law.

B. UNCITRAL Model Law

373. By comparison, the UNCITRAL Model Law does contain provisions to address the issue. When the parties have not chosen the substantive law, "…Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable" (Article 28(2)).

374. The unofficial UNCITRAL commentary states that here the powers of the arbitral tribunal adhere to traditional guidelines. This is because (at least in principle) the arbitrators are bound to apply the rules of private international law.[199] This situation brings about

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[197] *Banque Artesia Nederland, N.V. v. Corp Banca, Banco Universal C.A.*, Civil Chamber of the Supreme Court of Justice, December 2, 2014, Ruling No. 0738. The Supreme Court held that, in accordance with the Venezuelan Private International Law (Articles 29, 30, and 31), if the parties to an international contract have not expressly chosen the law applicable, judges may apply the "closest connection" criterion. To this end, the judges need to take into account all objective and subjective elements of the contract to determine the law with which it has the closest ties, as well as the general principles of international commercial law recognized by international organizations. This includes, the Supreme Court held, the *lex mercatoria*, which is composed of commercial customs and practices (see in www.unilex.info).

[198] *Supra* note 134.

[199] See also discussion on *voie directe.*

uncertainties due to the lack of a national forum of the arbitrators. The provisions of Article 28(1) of the UNCITRAL Model Law have not been included by all States in their domestic legislation and instead, provisions are included whereby arbitrators have been given the freedom to choose the law that they deem appropriate (e.g., see Article 57(2) of the Peruvian arbitration legislation).

375. The UNCITRAL Model Law (and the domestic legislation that follows it) adheres to more traditional criteria on this issue. Nevertheless, these instruments may be interpreted broadly, both in theory and in the practice of arbitration, in a way that does not result in "domestic" perspectives. The provision of Article 28(2) appears to constrain the arbitrator, who is not allowed the freedom to choose the applicable law, and supposedly prevents him or her from applying non-state law. Nevertheless, it has been argued that an arbitrator who disregards this provision does not jeopardize his or her award, due to the absence in the UNCITRAL Model Law of provisions for oversight by State courts of the reasoning that led to the determination of the applicable law. However, while it is true that there is no judicial control in this matter in the annulment remedy or the New York Convention, it is necessary to consider this aspect within the provisions regarding public policy. This is discussed at length in Part 17, below.

C. Approaches for Applying Conflict of Laws Rules

376. There are major differences regarding the approach that should be used in an arbitral matter to determine the applicable law in the absence of an effective choice by the parties. The provisions of the Mexico Convention can serve as an effective guide also for international arbitrations seated in jurisdictions within the Americas. Some States have opted for the direct route and have omitted reference to the rules of conflict of laws. The arbitration rules of many institutions have done the same, which serves as a basis for the arbitrators applying the Mexico Convention in the effective use of these powers. In the absence of such provisions, the following approaches have been used in comparative law.

1. Conflict of Laws Rules of the Place of Arbitration

377. Originally, the trend as reflected in awards granted was to give priority to the conflict of laws rules of the place of arbitration. In fact, an old resolution of the IIL adopted in 1959 stated that "The rules of choice of law in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the dispute."[200] This approach received tacit support for a long time, especially in the common law world. Indeed, the Restatement (Second) of Conflict of Laws of the United States notes that the selection of the seat of the arbitration presumes a "demonstration of the intent for the local law of the country to govern the contract in its entirety" (§ 218, comment b).

378. However, the determination of the seat is often fortuitous, especially when the decision is made by the arbitral tribunal or an arbitral institution rather than by the parties. At other times, the parties choose the seat for additional reasons other than its conflict of laws rules, such as the political neutrality of the country, its proximity, or the logistical services it offers. Thus, as reflected in recent awards, there appears to be an emerging trend that upon determining the law applicable to the substance of the case, the arbitrator will set aside the conflict of laws rules of the forum.[201]

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[200] Article 11.

[201] Ad Hoc Arbitral Tribunal, Award of October 10 1973, V Yearbook Comm. Arb. (1980), 143 (148); ICC Award 2637 of 1975, in: Collection of ICC Arbitral Awards 1974-1985, 13 (15); ICC Award 1422 of 1966, in: Collection of ICC Arbitral Awards 1974-1985, 185 (186). Award in *Sapphire International Petroleum Ltd. v. The National Iranian Oil Company* (1964), 13 ICLQ 1011. ICC Award 3540 of 1980, VII Yearbook Comm. Arb. (1982), 124 (127). Cairo Regional Center for International Commercial Arbitration, Partial Award, 23 of June 2000, number 120/1998, in: Eldin (ed.), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration (2000), 25 (28). ICC Award 3540 of 1980, VII Yearbook Comm. Arb.

2. Conflict of Laws Rules of Another Jurisdiction

379. One position is to advocate for the application of the law of the State of the arbitrator on the basis that the arbitrator has better knowledge of his or her own law. Nevertheless, the position is unconvincing. It suggests that arbitrators are unable to apply conflict of laws rules other than their own—a position that has long been rejected. In addition, the State of the arbitrator may have no connection to the dispute, apart from it being his or her country of origin, which would create a connection to the dispute even more tenuous than that of the seat of the arbitration. This approach also raises the practical problem of the determination of the arbitrator's country of origin—that is, whether the determining factor should be the arbitrator's nationality, citizenship, domicile, or residence. Moreover, in practice, an arbitration tribunal tends to be composed of arbitrators from different States.

380. A different position would be to give effect to the law of the State whose courts would have had jurisdiction in the absence of an arbitration agreement. This approach has not prevailed either because arbitration is not comparable to the dispute resolution mechanism of a State. Moreover, in some cases, conflicts of jurisdiction may arise due to differences in State rules in this regard.

381. Another suggested approach is the application of the law of the State where the award will be executed. This is impractical because it is unpredictable, in addition to the fact that the award may be enforced in more than one State. In any case, awards often reflect the solutions that arbitrators find based on the arguments put forward by the parties, in order not to surprise the parties too much with their solutions.

3. Cumulative Application of the Rules of All States with a Connection

382. Under this approach, arbitrators should perform a comparative exercise to determine whether there is any conflict between the legal systems connected to the case. This approach has the advantage of being consistent with the transnational nature of international commercial arbitration, in addition to being more in line with the expectations of the parties. It also reduces the possibility of challenges alleging that the wrong law was applied, in those rare instances in which a challenge is possible.

383. Nevertheless, this mechanism—which is quite costly—is only useful when the rules are similar or convergent, or at least aim toward the same outcome, unless, of course, one finds it sufficient to "adopt the law that appears most frequently as the applicable law." This means that the persuasive value of this approach is inversely proportional to the number of applicable laws that arise from the application of the various sets of conflict of laws rules. Additionally, the approach leaves broad discretion for arbitrators to decide which conflict of laws rules are connected with the dispute and, therefore, must be taken into account.

D. Application of General Principles or Non-State Law

384. An alternative to the conflict of laws approach is the application of "general principles" of private international law, which also takes a comparative approach, but with less attention on the connection between these rules and the contractual relationship in dispute. Towards that end, there is a tendency to turn to international conventions for guidance as to these general principles, especially the Rome Convention and now Rome I, regardless of whether the parties are subject to that regulation.

385. Use of this approach has been limited because it increases the uncertainty of the conflict of laws analysis by requiring a two-part analysis, but without producing noticeable benefits. This approach requires first, identification of which State has the "closest connections" to a dispute. Secondly, it is necessary to identify the conflict of laws rules of that State. Ultimately, those conflict of laws rules have to be applied in order to choose the substantive law, which in turn entails carrying out another potentially complex analysis.

(1982), 124 (128). ICC Award 4434 de 1983, in: Collection of ICC Arbitral Awards 1974-1985, 458, 459; ICC Award 2730 of 1982, in: Collection of ICC Arbitral Awards 1974-1985, 490 (491).

386. Nevertheless, in applying the provisions of the Mexico Convention using a liberal interpretation, the closest connection may not necessarily lead to a domestic law but rather, to *lex mercatoria* or other forms of non-State law. Application of uniform law instruments such as the UNIDROIT Principles might be preferable to the conflict of laws approach, the complexities of which have been outlined above.

387. Applying non-State law before domestic law may be helpful under different scenarios. For instance, it is possible that the potentially applicable local law does not offer a viable solution to resolve the matter. An example would be the interest payable on a loan, often not addressed in Islamic law. Another example might be the lack of a legal framework for contracts concluded online. Or, sometimes the laws of the parties provide opposing solutions and the use of the conflict of laws rules alone would not determine the outcome. In such cases, the application of non-State law offers a neutral method of resolving the dispute, without treading on the sensitivities of the eventual "loser." Likewise, if the law of the two parties or of the States with which the contract is connected and the non-State law contains the identical solution, the adjudicator may resort directly to non-State law without having to declare a "winner." On occasion, an approach that leads to the choice of a domestic law can be considered unsatisfactory by an arbitral tribunal because it would require application of a domestic law, designed for domestic commerce, to an international transaction. However, in any procedure of this nature, before making a decision it is necessary to hear the position of the parties.

388. The issue has been addressed in the domestic legislation of some states. For example, in *France*, the new Code of Civil Procedure provides that the arbitral tribunal may resolve disputes according to the rules of law that the parties have chosen or, failing that, according to those it deems appropriate, taking into account in all cases commercial practices.[202] A review of that new Code reveals that the relevant articles establish the existence of an autonomous legal system for international arbitration.[203] Other States have taken similar initiatives.[204] In *Mexico*, Article 1445 of the Commercial Code provides that if the parties have not indicated the law, the arbitral tribunal, taking into account the characteristics and connections of the case, will determine the applicable law. In *Peru*, not only does the legislation provide for *voie directe*, it also expressly authorizes the arbitrators to apply "rules of law" that they deem appropriate (see discussion on *voie directe*, below).

389. Contrary to widely-held but erroneous concerns that the transnational rules method, which involves the application or taking into account of non-State law, will lead to greater uncertainty, predictability of the outcome is better ensured using this method rather than the classic conflict of laws approach. Parties that have not taken the precaution of choosing the law applicable to their contract may be more surprised by the application of an unknown domestic law than by the application of a non-State set of rules that reflects broad consensus.

390. As has been described above, while traditionally arbitrators have resorted to the conflict of laws rules of the place of arbitration or the arbitrator´s State, more recently there is a tendency to apply the conflict of laws rules of all States with a connection to the case at hand or, alternatively, the conflict of laws rules which the arbitrators themselves in each given case consider relevant, or even to allow the arbitrators to disregard conflict rules altogether and determine the applicable substantive law they consider to be appropriate "directly" or "*en voie directe*", discussed below.

E. Use of *Voie Directe*

[202] As amended by Decree 2011-48 of 2011, Article 1511.
[203] *Id*.
[204] The arbitrators' autonomy is also enshrined in the *Belgian* Code of Civil Procedure (Article 1700); the *Dutch* Code of Civil Procedure (Article 1054); and the *Italian* Code of Civil Procedure (Article 834).

392. The term "*voie directe*" or "direct method" is well known in the language of arbitration. It enables the arbitrators to choose the law without the need to refer to any conflict of laws rule. In the application of this mechanism, the arbitrator will probably also consider principles of private international law, at least in his or her internal reasoning, but without the obligation to provide an explanation or legal basis. This is despite the fact that, under most arbitration rules the award should, in the absence of a different agreement by the parties, "contain the reasons on which it is based."

393. The direct method should not be seen as arbitrary and, in any case, concepts that form part of the conflict of laws approach, such as "closest connection" or "place of performance", can be used as a point of reference. In particular, when the outcome of the case differs depending on which law is applied, arbitrators would not choose the law applicable to the dispute according to the expected outcome. Accordingly, the expected outcome will not always lead the arbitrators to choose the same method. Depending on the circumstances of each case, the method that appears to be the most solidly supported will vary.

394. The direct method that now has been incorporated into the UNCITRAL Arbitration Rules of 2010 (Article 35) is considered one of the major advances over the prior rules of 1976. It is also an advancement with respect to the UNCITRAL Model Law, which did not provide for this approach in Article 28(2).

395. When amendments to the UNCITRAL Arbitration Rules were discussed, different points of view were expressed on whether or not an arbitral tribunal had the discretion to designate "rules of law" in the absence of an effective choice of law by the parties. It was decided that the rules should be consistent with Article 28(2) of the UNCITRAL Model Law, which refers to the arbitral tribunal applying the "law" rather than the "rules of law" determined to be applicable.[205]

396. It is necessary to expressly address the question as to the relationship between this latter "direct" method and the application of non-State law as the law applicable to the substance of the dispute. Even when using the "direct" method the arbitral tribunals will usually apply a particular domestic material law. Yet exceptionally they also may – and actually more often do - resort to non-State law. This occurs especially in cases of a so-called "implied negative choice", i.e. when it can be inferred from the circumstances that the parties intended to exclude the application of any domestic law (e.g. where one of the parties is a State or a government agency and both parties during lengthy negotiations made it clear that neither of them would accept the application of the other's domestic law or that of a third State; or where the parties expressly chose as the applicable law no further defined "general principles of international commercial law"; "principles of natural justice"; "the *lex mercatoria*", or the like; or where the parties referred to non-existing "laws" such as "European law", "Latin American law" or "Principles and Rules of the ICC"; or, finally, where the parties chose as the law governing their contract the INCOTERMS or the UCPs, etc.). Yet the same result is often achieved also in so-called multi-connected cases, i.e. when the contract is silent as to the applicable law but presents connecting factors with a multitude of States, none of which is predominant enough to justify the application of the respective domestic law to the exclusion of all the others. As demonstrated by the numerous arbitral awards reported in the database UNILEX, in cases like those, arbitral tribunals worldwide are more often no longer insistent on the application of a particular domestic law as the law applicable to the substance of the dispute, but rather prefer to resort to a balanced, comprehensive, and internationally recognized set of rules of law such as the UNIDROIT Principles.

397. It is noteworthy to contrast the solution of the UNCITRAL Model Law (*voie indirecte*) with the most innovative solution adopted in the UNCITRAL Arbitration Rules in Article 35(1)

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[205] See page 33 of Explanatory Note by the UNCITRAL Secretariat at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

(*voie directe*). While the former authorizes the arbitrators to choose the rules of private international law that they deem most convenient in order to determine the law applicable to the contract, the second authorizes them to choose, directly, the law applicable to the contract. This latter solution has been adopted in the rules of most arbitration institutes (such as those of the ICC and the American Arbitration Association ("AAA"), among others). Consequently, when the parties decide that the arbitration will be conducted according to certain arbitration rules, they adopt the second solution (*voie directe*) rather than the first (*voie indirecte*). Depending on whether or not the State in which the arbitration is being carried out has either adopted the UNCITRAL Model Law or amended its domestic law accordingly, it is foreseeable that the second solution *(voie directe)* may have greater practical application.

398. The *voie directe* method has been incorporated into the modern arbitration laws of several States,[206] including many in the Americas.[207]

13.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to absence of an effective choice of law, should include the flexible criteria of the "closest connection", consistent with the provisions of Article 9 of the Mexico Convention.
13.2 Adjudicators should apply the flexible criteria of the "closest connection" in a liberal interpretative approach.

PART FOURTEEN

Dépeçage OR "SPLITTING" OF THE LAW

I. Meaning of *Dépeçage*

399. In private international law, the French term *dépeçage*, or "splitting" of the law, refers to the division of the contract so that different parts can be governed by different laws. There are numerous reasons why contracting parties may wish to do so. For example, in an international sales contract the majority of contractual obligations might be governed by the law of a single State, yet it would be preferable that the conditions under which the seller must obtain inspection certificates be governed by the law of the State(s) of the final destination of the goods, or that the deadline for the purchaser to report any defect in the goods conveyed be governed by the law of the place of delivery. Another example is that of a clause that provides for the payment of capital and interest, at the creditor's option, in one State or more, in the currency of a particular State. In that case, the parties will often agree that the law of the State in which payment is to be made will govern matters related to the sum to be paid and the form of payment.

[206] It is recognized, for instance, in the laws of *France* (Article 1511 of the Code of Civil Procedure, amended in 2011); the *Netherlands* (Article 1054(2) of the Code of Civil Procedure); *Spain* (Spanish Arbitration Act, Article 34(2)); *Austria* (Article 603(2) of the Code of Civil Procedure, RGBI. Nr. 113/1895 as amended by the 2013 Amendment to the Arbitration Act, BGBI. Nr. 118/2013; and *Slovenia* (Article 32(2) of the Arbitration Act of April 28, 2008).

[207] In Latin America, *voie directe* is enshrined in the laws of *Colombia* (Article 101 of the National and International Arbitration Statute of 2012); *Mexico* (Article 1445 of the Commercial Code and 628 of the Code of Civil Procedure of Mexico City, Federal District, *ad contrario*) and *Peru* (Article 57 of Legislative Decree 1071 of 2008). In Peru, not only does the legislation provide for *voie directe*, it also expressly authorizes the arbitrators to apply "legal rules" that they deem appropriate, without providing reasons or applying conflict of laws rules. The major arbitration centers of Peru also follow this approach. See Article 21 of the Arbitration Rules of the Chamber of Commerce of Lima and Article 7 of the Arbitration Rules of Amcham Peru.

400. *Dépeçage* is a manifestation of the principle of party autonomy; it does not fall within the 19th century doctrines of localization. In fact, Ronald Herbert, one of the Uruguayan negotiators of the Mexico Convention, has said that the provision for it within that instrument could be profoundly at odds with the Montevideo Treaties.[208]

401. Scholarly opinions that oppose *dépeçage* rely on arguments such as its minimal advantage in view of the risks that *dépeçage* entails because of technical problems that could arise from discrepancies in the knowledge and application of the different laws chosen. It is also considered to be a weapon in the hands of the stronger party to the detriment of the weaker party, because aspects of the applicable law that may favor the stronger party can be manipulated.

402. Nevertheless, even those who oppose *dépeçage* must admit that certain issues, such as those related to the form of the contract and capacity, may be governed more appropriately by different laws and the mandatory rules of the forum. They may concede that this matter relates to the approach of correctly classifying each issue (form of contract and capacity) into the only category that corresponds to it.

403. Those who argue in favor of *dépeçage* point out that party autonomy is available to parties for the improved regulation of their interests, if deemed appropriate. Thus, the principle serves the intent of the parties, and mandatory rules or public policy are available to prevent it from being used by the stronger party against the weaker one. Overriding mandatory rules and the *ordre public international* limit the risk of abuse through *dépeçage* by the stronger party but of course the stronger party can still use *dépeçage* to its advantage so as to avoid the application of simple mandatory rules and public policy that would normally apply as part of the chosen law.

404. There are two possible situations for the use of *dépeçage*. One is where legislation specifically provides that the parties may choose more than one law to govern the contract, as is provided in certain domestic codifications (see below, Section III). Another is where there has been a partial choice of applicable law and the rest of the contractual obligations are left to be determined objectively. Rome I expressly permits this partial choice, specifying that the parties may choose the law applicable to part of the contract only (Article 3.1). The Mexico Convention follows along the same lines. A third situation may occur if the law that the parties have chosen does not cover all issues that may arise. For example, if a contract is governed by the CISG, there are matters that the CISG itself excludes under Article 4, such as validity of the contract and effects on property to the goods sold. In accordance with Article 7(2) of the CISG, "questions concerning matters governed by the CISG which are not expressly settled in it are to be settled in conformity with general principles…" but issues not addressed by the CISG will have to be governed by the supplementary law that the parties have chosen and, in the absence of such a choice, it will be necessary to determine the applicable law, in which case, two different laws may govern the contract. [209]

II. *Dépeçage* in the Mexico Convention and the Hague Principles

405. The Mexico Convention states in Article 7 that the choice of law "…selection may relate to the entire contract or to a part of same." Hence, it enshrines voluntary *dépeçage*. Involuntary *dépeçage* is provided for in Article 9 of the Mexico Convention, paragraph 3 of which states: "Nevertheless, if a part of the contract were separable from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract." This can occur, for instance, should an adjudicator decide to apply either the rules of a third State connected to the contract or mandatory rules or policies.

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[208] Herbert, Ronald, La Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales, RUDIP, Año 1 - Nº 1, p. 91.

[209] The Bustamante Code uses *dépeçage* to regulate separately the different issues of the contractual relationship (for instance, Articles 169-172, 176, 181 and 183).

406. The Hague Principles provide in Article 2.2 that: "The parties may choose (a) the law applicable to the whole contract or to only part of it; and (b) different laws for different parts of the contract." Because the Hague Principles include non-State law within the meaning of "law," as provided in Article 3, non-State sources also can be chosen.

407. Reasons for the multiplicity of choices (for instance, that a clause about the exchange rate be subject to another legal system) and the corresponding risks (contradiction and inconsistency in determining the rights and obligations of the parties) are discussed in the HP Commentary (2.6). If there is a partial choice, and no indication that the law will govern the rest of the contractual relationship, "the law that will apply to that remainder will be determined by the court or the arbitral tribunal according to the rules applicable in the absence of a choice" (2.7). The HP Commentary (2.9) also says that, "in practice, such partial or multiple choices [of law] may concern the contract's currency denomination, special clauses relating to performance of certain obligations, such as obtaining governmental authorizations, and indemnity/liability clauses."

III. *Dépeçage* and Domestic Laws

408. *Argentina* allows for total or partial voluntary *dépeçage*, whether express or tacit, by stating that choice of law "may refer to the entire contract or parts thereof." (Civil and Commercial Code, Article 2651, first paragraph *in fine*).

409. In *Brazil* there is provision for *dépeçage* in its LINDB in Article 9, paragraph 1.

410. In *Canada*, in the province of Quebec, the Civil Code specifically provides that the parties may choose more than one law to govern the contract (Article 3111(3)).

411. In *Chile*, the doctrine discusses the acceptance of *dépeçage* in its Civil Code based on the tenor of Article 16, third paragraph, which establishes that "the effects of contracts granted in a foreign country, to be fulfilled in Chile, will be in accordance with Chilean laws." While the traditional position supports the doctrine of *dépeçage*, another interpretation is that the correct meaning of the cited provisions of Article 16 is that if the contract is to be fulfilled in Chile, it will be regulated in everything else by Chilean law. Accordingly, if the legal consequences (the "effects") are determined under Chilean law, it matters that it and not another law determines the requirements or substantive conditions that the actions must meet.

412. In *Colombia*, without expressly authorizing it, the legislation does not prohibit *dépeçage*. It is accepted by interpretation within a particular context, as evidenced in Article 13 of Law 80 of 1993 on Public Procurement and in Article 20 of the Civil Code.

413. In *Panama*, Article 70 of Law 61 of 2015 specifically allows *dépeçage* by establishing that a contractual relationship may be governed by "two or more laws provided that the nature of the international legal transaction allows so and the divisibility of the applicable law regulates a certain obligation or situation of the legal business." However, this same article states that *dépeçage* cannot be allowed if "it prevents the execution of the contract's business object or leads to fraud or damage to one of the parties."

414. In *Paraguay*, the new Law Applicable to International Contracts transcribes in Article 4.2 the provisions of Article 2.2 of the Hague Principles.

415. In the *Dominican Republic*, reference can be made to Law 544 of 2014, Article 58, paragraph 2. It provides that "the choice of the applicable law may refer to the entire contract or to a part of thereof."

416. In *Venezuela*, the parties can choose a legal system for each part of the contract or for only one part, as voluntary *dépeçage* is permitted. Although Article 29 of the Law on Private International Law does not refer expressly to the possibility of *dépeçage*, it can be inferred from the reference to the law applicable to "conventional obligations" rather than simply to "international contracts," thereby following the Mexico Convention, which has been ratified by Venezuela. Therefore, given that the contract is the source of "obligations," each one of

the obligations arising from a contract may be subject, by the intent of the parties, to a different law. This interpretation is reinforced by the application of the principles contained in the Mexico Convention to interpret the norms of the Law and to integrate its gaps.

IV. *Dépeçage* and Arbitration

417. The arbitration forum has its peculiarities and the issue of *dépeçage* is not addressed expressly in either the UNCITRAL Model Law or the UNCITRAL Arbitration Rules. According to scholarly doctrine, *dépeçage* is widely accepted pursuant to the principle of party autonomy, which openly prevails in this context.

418. The use of *dépeçage* could enable parties to avoid public policy rules, as long as they are not affected by the respective laws of the State of the potential forum with the authority to set aside or enforce the award. See the discussion on public policy below in Part 17.

419. A different issue is the law applicable to the arbitration clause. This clause is considered a contract itself, and different positions have been advanced as to the law that should be applicable to it, such as the law of the seat of the arbitration, the law of the main contract, or the law favoring the validity of the arbitration clause.

14.1 The domestic legal regime on the law applicable to international commercial contracts should admit the "splitting" of the law (*dépeçage*), consistent with the provisions of Articles 7 and 9 of the Mexico Convention and Article 2.2 of the Hague Principles.
14.2 Adjudicators, when granted interpretive discretion, are encouraged to admit *dépeçage*.

PART FIFTEEN

FLEXIBLE INTERPRETATION IN INTERNATIONAL COMMERCIAL CONTRACTS

I. Rationale

420. Provisions for "flexible" solutions grant authority to the adjudicator to mitigate the harshness of strict application of law. In matters involving international contracts, such provisions can be of particular help to find an appropriate resolution of the case. This is, in part, because many domestic legal systems are ill-equipped to regulate international transactions. For instance, a buyer's refusal to accept goods is normally much more onerous in an international sales transaction. In such circumstances, even while recognizing that the buyer is entitled to this right, it would be desirable to impose certain obligations on the buyer, such as the safekeeping or resale of the goods.

421. International transactions commonly involve additional complicating factors. Among others, these can include the long distance between buyer and seller; extra requirements, such as import and export licenses the issuance of which is dependent on various authorities; or prohibitions against the transfer of foreign currency. In these cases, the adjudicator cannot act subserviently or mechanically to blindly apply provisions designed primarily for domestic situations in the resolution of an international dispute.

422. Moreover, judges are generally not well prepared to apply foreign domestic laws. It is unrealistic to expect the local judiciary to be equally trained in the application of both domestic and foreign law.

423. As a consequence, it is often impossible for legal advisors to issue an opinion as to the interpretation and application of domestic law on a complex question in a transboundary matter or to predict how a local court will rule. Some domestic codes or laws may be so old, or may have undergone so many amendments, that it is impossible to know whether one is working with an accurate text. The problem is exacerbated in States plagued by judicial

corruption, which thereby makes it difficult to predict outcomes based on case law or judicial precedents of dubious origins.

424. Adjudicators frequently resort to escape clauses in seeking justice in an individual case and to concepts of private international law such as classification, *renvoi*, *ordre public*, among others; they may even invoke constitutional or human rights and do so directly (rather than via the public policy exception). Some decisions from European courts are illustrative in that regard.[210]

425. When contracting parties do choose the law of a third State, they do so mainly with the intent to find a neutral solution, despite rarely having in-depth knowledge of that law. The subtleties of rules as distilled by case law can come as a surprise to a foreign party. This issue arose in a well-known interim arbitral award where the tribunal decided not to apply a peculiar jurisprudential interpretation of the text of a domestic law as the parties were experienced international business people and to find otherwise "would be inconsistent with commercial reality."[211]

426. This entire issue, of course, warrants careful examination. A case-by-case analysis is essential with a focus on the legitimate interest of the parties. If a party does desire strict application of a law to a specific case, it should express this and thereby preclude the possibility that the adjudicator would consider other laws or a non-State law. Otherwise, the adjudicator should have sufficient discretion to reach an appropriate decision in light of the circumstances of the contract and the international environment in which the relationship has developed.

III. Authority for Flexible Interpretations in International Transactions

427. For reasons given above, domestic laws should preferably be interpreted from a broad or flexible perspective to arrive at the appropriate resolution of cases involving transboundary transactions. The authority to do so derives from various sources.

428. First, the fact that domestic laws already contain what might be considered "flexible" provisions should be taken into account. These may be derived from principles contained, for instance, in national constitutions or international human rights treaties. National courts have both a duty and the authority to uphold these principles.

429. Secondly, many legal systems have the same general principles in common that can be broadly – but consistently – interpreted by adjudicators. Examples include the principles of *good faith*, *force majeure*, and *hardship*. In this regard, comparative law has proven to be very effective as an auxiliary interpretive tool. Domestic laws that include principles like *good faith* can be interpreted, firstly, in light of international solutions like those provided by the UNIDROIT Principles.[212]

430. Comparative construction becomes even more valuable in an international context. One reason is because it is impossible to dissociate law from the language of its expression. Terms such as *cure*, *reliance*, *consideration*, *misrepresentation* or *frustration*, call for a broad interpretation, particularly when one of the parties does not come from the common law tradition. The same can be said of the terms *cause*, *conversion*, or *obligations of means and result*, which have not been developed in the common law system.

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[210] For example, the German Constitutional Chamber handed down a historic judgment in this regard in 1971, in which constitutional rights were invoked in the reinterpretation of its private international law *Spanier Entscheidung,* Entscheidungen des Bundesverfassungsgerichts, May 1971. On several occasions the European Court of Justice has based its decision on the European Convention on Human Rights; it has ruled that the scope of the public policy exception to the duty to recognize the civil judgments of other member States should be interpreted in keeping with the Convention (*Krombach v. Bamberski,* 2000, Case C-7/98, ECR I-1935).

[211] ICC Arbitration No. 10279, January 2001.

[212] Comparison of their interpretation by other courts can be seen, for example, in the UNILEX database that compiles relevant cases in this regard (www.unilex.info).

431. The flexibility described in this section relates to flexibility in applying principles of domestic law that are ill-suited for international transactions; it does not contemplate the right of the judge or arbitrator to disregard the terms of the parties' actual bargain. Whereas a flexible approach is often a foundation of the laws of States that are code based and where flexibility and good faith take a central role given the reality of a code-based system, in common law jurisdictions although the outcome may be no different, the underlying principles are different.[213]

IV. Flexibility when Applying "Customs" or "Usages"

432. In transactions governed by domestic laws, parties can include "customs" or "usages" (see discussion above at Part Six, II.A). They can do so expressly, through the use of incorporation by reference, for example, to the ICC INCOTERMS. In many systems, they can also do so tacitly. This would be the case of a custom that is not specific to the parties, but is widely known and accepted, which should be understood as included within what the parties intended. In this regard, commercial practices can be considered internalized within the contract as an expression of the will of the parties. In this way, "customs" prevail over supplementary provisions of domestic laws.

433. This is also desirable in international commercial contracts. Customs that have been included implicitly should prevail over a contrary supplementary provision in the law chosen or applied by adjudicators to the extent of the inconsistency with usual practice. The CISG (Article 9(2)) and the UNIDROIT Principles (Article 1.9) provide that customs are applicable even when the parties were unaware of their existence, as long as they are widely known and regularly observed in the commerce in question and the parties should have known of them.

IV. Flexibility when Applying "Principles"

434. Frequently, parties to an international commercial contract include a reference to general principles, whether as supplementary to the domestic law chosen or as directly applicable to any possible dispute. In addition, principles provide flexible interpretative tools in both the domestic and the international order. Many domestic systems accept principles such as good faith or equity in the interpretation of specific legal provisions in order to reach fair outcomes. The same occurs in international commercial contracts when adjudicators avail themselves of such principles in order to achieve appropriate results.

V. Pioneering Role of the OAS in Favor of Flexibility

435. Advanced decades ago, Article 9 of the General PIL Rules Convention provides that: "The different laws that may be applicable to various aspects of one and the same juridical relationship shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case."[214]

436. The provision introduces flexibility concerning problems that arise from the simultaneous application of several laws to a specific case. Article 9 provides two criteria: to carry out the legislative policies underlying each of the norms and to achieve equity in the specific case. It should be interpreted broadly; if considered only within its narrow literal terms, the rule would only operate in cases of *dépeçage*. But if interpreted broadly, the rule becomes relevant in virtually any case where different laws are applied to different aspects, legal relationships and categories.

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[213] The United States, for example, has the principle of *stare decisis*, and "flexibility" principles, such as the theory of estoppel, are often applied through case law. Courts in the United States have also implied a duty of good faith in the performance of contracts outside the UCC, but good faith is limited to specific duties in the contract. Careful consideration should be given to the difference between code-based and common law realities, particularly when dealing with the United States where "flexibility" principles take a secondary role the applicable rules of interpretation.

[214] *Supra* note 183.

437. The General PIL Rules Convention has been ratified by several States within the region (Argentina, Brazil, Colombia, Guatemala, Paraguay, Ecuador, Mexico, Peru, Uruguay, and Venezuela). It has not been ratified by any State from the common law tradition, despite the fact that the solution offered by this Convention was derived from formulas that had been proposed by common law jurists.

VI. Flexible Formula of the Mexico Convention

438. The Mexico Convention also contains a flexible formula that can be applied in the determination of the applicable law. It provides in Article 10 that, "In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case." Although the analogous wording of the aforementioned Article 9 had been suggested by common law jurists, Article 10 of the Mexico Convention was proposed by Gonzalo Parra Aranguren, President of the Venezuelan delegation, who hailed from the civil law tradition.[215]

439. Discussions have been raised as to whether Article 10 has a merely supplementary role; however, the text clearly indicates its applicability when justice so requires. Moreover, the Mexico Convention provides that, for purposes of its application and interpretation, "its international nature and the need to promote uniformity in its application shall be taken into account." This provides solid authority that interpretation should also be done according to this broad approach.

440. The understanding in the deliberations prior to the adoption of the Mexico Convention was that Article 10 points to *lex mercatoria*.[216] Although to this day, doubts remain over the interpretation of that expression, (see discussion above Part Six, II. C), that issue is separate from that herein over the value of the flexible formula.

VII. Flexible Formula in Domestic Laws

441. Only a few States have legislation in place with provisions similar to those of Article 10 of the Mexico Convention. There is no equivalent to those provisions in *Canada*, *Chile*, *Colombia*, or *Guatemala*, although those States do have laws that include flexible norms applicable to arbitral matters.

442. In Argentina, provisions have been included into the new Civil and Commercial Code in this regard. Article 2653 provides that, exceptionally, at the request of a party and taking into account all the objective and subjective elements that arise from the contract, the judge is empowered to apply the law of the State with which the relationship presents the closest connections. This provision is not applicable when the parties have made a choice of law. This rule reiterates, with particular reference to contracts, the general provision contained in Article 2597.

443. In *Paraguay*, Article 12 of the Law Applicable to International Contracts is a verbatim copy of Article 10 of the Mexico Convention.

444. The Civil Code of *Peru* refers to the application of the principles and criteria established in private international law doctrine (Article 2047).

445. In the *Dominican Republic*, the new Private International Law provides that: "In addition to the provisions of this article, the guidelines, customs, and principles of international commercial law, and the generally accepted commercial usages and practices will be applied where appropriate" (Law 544 of 2014, Article 61, paragraph 2).

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[215] Inter-American Convention on the Law Applicable to International Contracts, OAS Doc. OEA/Ser.K/XXI.5 (Mar. 17, 1994). See also: "La Quinta conferencia Especializada Interamericana sobre Derecho Internacional Privado (CIDIP V), México, 1994)", Revista de la Fundación Procuraduría General de la República, Caracas, pp. 219-220.

[216] Report on Experts' Meeting, *supra* note 19.

446. In *Venezuela*, Article 31 of the Law on Private International Law mirrors Article 10 of the Mexico Convention.

VIII. Flexible Formula in Arbitration

447. Article 28(4) of the UNCITRAL Model Law states that "in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." This formula had originally been included in the European Convention (Article VII), in the UNCITRAL Arbitration Rules of 1976 (Article 33)), and remains in the current 2010 Rules (Article 35(3)).

448. In the deliberations of the Working Group that drafted Article 28 of the UNCITRAL Model Law, it was made clear that the tribunal was to take these into account *in all cases* [emphasis added]. Thus, the arbitral tribunal is granted a wide margin of discretion in the resolution of particular cases, "divorcing" it from a specific national system.[217]

449. These provisions reclaim the spirit of the historic origins of arbitration and aim to place it in the international context in which it is developing. The application of a rule like this one leads to a cosmopolitan approach. This was acknowledged, for instance, by an arbitral tribunal seated in Costa Rica.[218] In an arbitration seated in Argentina—despite the fact that both parties had designated Argentine law as applicable—the arbitral tribunal turned to the UNIDROIT Principles as international commercial usages and practices that reflect the solutions of different legal systems and international contract practices. It stated that, as such, and in accordance with Article 28(4) of the UNCITRAL Model Law, those Principles should prevail over any domestic law.[219]

450. Are the arbitrators operating *contra legem* in these cases? The answer is clearly no. When a party chooses an applicable substantive law and a jurisdiction that adopted the UNCITRAL Model Law, it is also selecting Article 28(4) with its flexible formula. In addition, Article 2

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[217] UNCITRAL (1975). Report of the Secretary General on the UNCITRAL Arbitration Rules. Volume VII. [online] Yearbook of the United Nations Commission on International Trade Law. Accessible at: http://www.uncitral.org/pdf/english/yearbooks/yb-1976-e/vol7-p157-166-e.pdf.

[218] Ad hoc arbitral award in Costa Rica, 30.04.2001 / UNILEX, citing other ICC awards in this regard. "Not only national statutes and jurisprudence are applicable to this case, but also regulations of international trade that are essentially conformed by the principles and usages generally admitted in commerce which the parties agreed upon in the tenth clause of the letter of intent stating that they would act, amongst themselves, on the basis of good faith and proper customs and with regard to the most sound commercial practices and friendly terms." This statement enables the Tribunal to use such rules as has been done by the ICC International Court of Arbitration in similar cases (Cf. Awards 8908 of 1996 and 8873 of 1997; International Court of Arbitration Bulletin, vol. 10/2-Fall-1999, p. 78 ss.)."

[219] Ad hoc arbitral award of 10.12.1997 / UNILEX. Notwithstanding the fact that both parties had based their claims on specific provisions of Argentinean law, the Arbitral Tribunal decided to apply the UNIDROIT Principles. It held that the UNIDROIT Principles constituted usages of international trade reflecting the solutions of different legal systems and of international contract practice, and as such, according to Art. 28(4) of the UNCITRAL Model Law on International Commercial Arbitration, they should prevail over any domestic law. On the merits of the case, the Arbitral Tribunal rejected the Buyer's argument that the contract was avoided on account of fault or mistake and held that the communication the Buyer had sent to the Sellers, informing them of the discovery of the hidden debts, could not be considered a proper notice of avoidance according to Art. 3.14 of the UNIDROIT Principles, as not only was there no indication of the intention to avoid the contract but its content even led the Sellers to believe that the Buyer wanted to stick to the contract, though in a modified version. Moreover, the Arbitral Tribunal held that the Buyer's subsequent conduct (in particular its proposal to terminate the contract by agreement; the payment of another installment of the price; the entering into negotiations with a view to modifying the contract) amounted to a confirmation of the contract according to Art. 3.12 of the UNIDROIT Principles (in this connection the Arbitral Tribunal expressly referred also to the Comment to Art. 3.12). As to the request for a price reduction, the Arbitral Tribunal granted a reduction of only 65% of the hidden debts. One reason for this decision was that the contract had been drafted by the Buyer so that its provisions, including the one containing the Sellers' warranty as to hidden debts, according to Art. 4.6 of the UNIDROIT Principles, had to be interpreted in a sense more favorable to the Sellers.

of the 2006 amendment emphasizes its international origin and the need to promote the uniformity of its application. It can be argued that a provision like this one imposes a legal mandate on arbitrators that favors a broad interpretation.

451. Moreover, even in arbitration, parties frequently choose domestic laws over a non-State law in order to minimize the risk of challenges in the forum of the legal action or the eventual place of performance. It has been argued that arbitrators can mitigate the unfair consequences of this by referring or resorting to the flexible formula.

452. Nevertheless, the arbitrator must also be extremely careful when the parties have based their arguments solely on a law that they themselves have chosen, in order not to jeopardize due process. A good arbitrator should ensure that the parties have had, where appropriate, the opportunity to discuss the potential scope and relevance of the international usages or principles that would be applicable to the case in view of what may expressly or implicitly emerge from the contract.

453. Also, consideration should be given as to any legal requirement for the arbitrators to base their decisions in law, in order to avoid possible allegations of arbitrariness. Disregard by arbitrators of the choice of law made by parties could be seen as an excess of powers.

454. The arbitration laws of several Latin American States contain analogous language to that of the UNCITRAL Model Law.[220] In addition to the UNCITRAL Arbitration Rules, there are other arbitration rules that also provide a flexible formula. The 2012 ICC Rules of Arbitration provide that "The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages," a provision which remains in the new 2017 edition.[221] A similar provision is contained in the 2009 AAA International Arbitration Rules.[222] In Latin America, the same formula is enshrined in the rules of several arbitration centers.[223]

15.1 The domestic legal regime on the law applicable to international commercial contracts should recognize the need for flexible interpretation, consistent with the provisions of Article 10 of the Mexico Convention.
15.2 Adjudicators, when the circumstances so require in the resolution of a particular case, if so authorized, should apply rules, customs and principles of international commercial law as well as generally accepted commercial usage and practices in order to discharge the requirements of justice and equity, consistent with the provisions of Article 10 of the Mexico Convention.

[220] A mandate to address in all cases the contractual stipulations and relevant commercial usages can be found in *Bolivia* (Articles 54 and 73 of Law 1770); *Costa Rica* (Article 22 of Decree Law 7727 of 1997); *Chile* (Article 28.4 of Law 19.971 of 2004); *Guatemala* (Article 36.3 of Decree Law 67 of 1995); *Mexico* (Article 1445 of the Commercial Code); *Nicaragua* (Article 54 of Law 540 of 2005); *Panama* (Decree Law 5 of July 8, 1999, now partly replaced by National and International Law of Arbitration in Panama, Law 131 of 2013 ; Peru (Article 57.4 of Decree 1071 of 2008); *Paraguay* (Article 32 of Law 1879 of 2002); *Dominican Republic* (Article 33.4 of Law 489 of 2008); and *Venezuela* (Article 8 of the 1998 Commercial Arbitration Law.) In *Brazil* the Arbitration Law stipulates that the parties may authorize arbitrators to take account of general principles of law, usages and customs, and international commercial rules (Law 9307 of 1996, Article 2). In *Ecuador*, the Arbitration and Mediation Act of 1997 does not refer to "commercial usages," but it does establish that in arbitrations based on law the arbitrators must pay attention to *universal legal principles*, which could, where appropriate, encompass the principles of international commercial law.

[221] 2012 ICC Rules of Arbitration, Article 21; 2017 edition.

[222] American Arbitration Association, 2009 International Arbitration Rules, Article 28.2

[223] For instance, the Rules of the Arbitration Center of Mexico (2009); the Chamber of Commerce of Santiago (2012); the Chamber of Commerce of Caracas (2012); Article 35 of the Arbitration Rules of the Arbitration and Mediation Center of Paraguay (2010), and Article 21.2 of the Arbitration Rules of the Chamber of Commerce of Lima (2017).

PART SIXTEEN

SCOPE OF THE APPLICABLE LAW

I. Overview

455. The scope of the applicable law is to be distinguished from the scope of the instrument. The latter was discussed above, in Part Five, in regards to the Mexico Convention and the Hague Principles, and concerns those matters that fall within the scope of these instruments, either by inclusion or exclusion. By contrast, in this Part Sixteen consideration is given to the scope of the applicable law, whether the decision as to the applicable law has been made by way of an effective choice of law by the parties or otherwise, and the aspects that will be governed by that applicable law.

456. These international instruments all make express reference to the scope of the applicable law: the Mexico Convention, the Hague Principles, and Rome I all include in slightly different language that the law applicable to the contract shall govern its interpretation and they outline the rights and obligations of the parties (not included in Rome I), contract performance and consequences of breach, and consequences of nullity or invalidity. The Hague Principles add two additional topics: burden of proof and pre-contractual obligations.

457. The list is not exhaustive, as the texts state that the applicable law "shall govern *principally*…" (Mexico Convention, Article 14, first sentence) or "*in particular*" (Rome I, Article 12.1) or "shall govern *all aspects* of the contract between the parties, including but not limited to…" (Hague Principles, Article 9.1) [emphasis added].

458. As noted in the HP Commentary (9.4), these issues are among the most important for any contract. The concept shared by these three instruments is that the chosen law shall govern the main aspects of the contract. As pointed out in the HP Commentary (9.2) "this approach ensures legal certainty and uniformity of results and reduces the incentive for forum-shopping." The law applicable to any aspect of the contractual relationship will be that chosen by the parties, regardless of the court or arbitral tribunal that adjudicates the dispute.

459. By virtue of inclusion on the lists, these aspects should be considered as "contractual," which is not the case for all of these aspects in all legal systems. Specification of these aspects as ones to be governed by the law applicable to the contract reduces the likelihood of their being otherwise classified as non-contractual and the uniformity of outcomes is thereby encouraged.

460. This, of course, does not prevent the parties from choosing different legal systems to govern different parts of the contract (*dépeçage*), or even to make a choice of law applicable solely to one or more of the matters mentioned in Article 9.1, for example, interpretation of the contract (for discussion on *dépeçage*, see above Part Fourteen).

II. Specific Aspects

A. Interpretation

461. Interpretation of the contract is included in the list of all three instruments (Mexico Convention, Article 14(a); Hague Principles, Article 9(1)(a); and Rome I, Article 12.1(a)). The appropriate or chosen law, as explained in the HP Commentary (9.5), "determines what meaning is to be attributed to the words and terms used in the contract…using the canons of interpretation and construction of [that] law."

B. Rights and Obligations of the Parties

462. Whereas under the Mexico Convention the scope of the applicable law extends to "the rights and obligations *of the parties*" (Article 14(b), under the language of the Hague Principles, it extends to "the rights and obligations *arising from the contract*" (Article 9(1)(b)). As explained in the HP Commentary (9.5), the scope should extend only to contractual rights

and obligations. It is conceivable that additional non-contractual rights and obligations may also arise between contracting parties and that would not be governed by the law chosen to govern the contract. This aspect is not included among those listed in Rome I.

C. Performance and Consequences of Breach

463. Under the Mexico Convention, scope of the applicable law extends to "the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of injury [i.e., loss] to the extent that this may determine payment of compensation" (Article 14 (c)). Rome I includes among its list in Article 12.1 "performance," clause (b) while the following clause (c) extends the scope of application, "within the limits of the powers conferred on the court by its procedural law," to "the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law." However, Article 12.2 provides that "in relation to the manner of performance and the steps to be taken in the event of defective performance, regards shall be had to the law of the country in which performance takes place."

464. Similarly, the Hague Principles stipulate "performance and the consequences of non-performance, including the assessment of damages" (Article 9(1)(c)).

465. In the Mexico Convention, translation from the Spanish term "*daño*" into English would be better read as "loss" or "damage" rather than "injury" in the given context.

466. The HP Commentary (9.6) explains that this means the law chosen extends to govern matters such as the standard of diligence, the place and time of performance or the extent to which the obligation can be performed by a person other than the party liable. The law chosen by the parties also governs matters related to non-performance, such as compensation and the determination of its amount, specific performance, restitution, reduction for failure to mitigate a loss, or the validity of penalty clauses.

D. Satisfaction of Contractual Obligations

467. Under the Mexico Convention, the scope of the applicable law extends to "the various ways in which the obligations can be performed, and prescription and lapsing of actions" (Article 14(d). Similar language in Rome I provides "the various ways of extinguishing obligations, and prescription and limitation of actions" (Article 12.1(d) and in the Hague Principles, "the various ways of extinguishing obligations, and prescription and limitation periods" (Article 9(1)(d). As has been noted already several times, the language in both the Mexico Convention and Rome I is based on the Rome Convention.

468. In the Mexico Convention, translation from the Spanish term "*extinción*" was incorrectly translated into English as "performed" (which in Spanish would be "*cumplido*"), when the correct word would be "satisfied." The preparatory reports on the inter-American instrument contain the observation that the Commission approved clause (d) "providing that obligations, in the English version, should be "satisfied" rather than "performed".[224]

469. As explained in the HP Commentary (9.8), "The chosen law determines the commencement, computation, extension of prescription and limitation, and their effects, i.e., whether they provide a defense for the debtor or they extinguish the creditor's rights and actions. The law chosen by the parties governs these issues irrespective of their legal classification under the [law of the forum], [thus ensuring] harmony of results and legal certainty."

[224] Report of the Rapporteur of the Commission I on the Law Applicable to International Contractual Arrangements; OEA/Ser.K/XXI.5; CIDIP-V/doc.32/94 rev. 1. A fulsome discussion on the importance of the distinction between these two terms in English legal systems is beyond the scope of the Guide; in brief, "satisfied" is broader than "performed" and can include payment obligations under the contract while the latter term can be limited to refer to obligations other than payment.

E. Consequences of Nullity or Invalidity

470. Under the Mexico Convention, scope of application of the chosen law extends to "the consequences of nullity or invalidity of the contract" (Article 14(e)). Whereas the language of Rome I refers to "the consequences of nullity of the contract" (Article 12.1(e), the Hague Principles refer to the "validity and the consequences of invalidity of the contract" (Article 12(1)(e).

471. Validity of the contract is addressed under the Mexico Convention in the provisions contained in Articles 12 and 13 of Chapter III. These have been discussed above in Parts 9 and 11. By contrast, in the Hague Principles the matter is included in this provision, which extends the scope of application of the law chosen by the parties also to the validity of the contract. The HP Commentary (9.9) makes no distinction between the terms "null" "void" or "invalid". On that interpretation, but only insofar as the consequences are concerned, the scope of application of the chosen law under all three instruments would be the same.

472. The HP Commentary also points out that "it may be the case that the choice of law clause is valid, whereas the main contract to which it applies is not valid" and notes that "in such a case, the consequences of the nullity of the contract are still governed by the law chosen by the parties."

F. Registration of Contracts

473. The Mexico Convention provides that "The law of the State where international contracts are to be registered or published shall govern all matters concerning publicity in respect of same" (Article 16). It should be noted that translation of the Spanish term "la publicidad" into English would be better read as "filing" or "notice" rather than "publicity", which in English has a very different meaning.

G. Other Aspects

474. The Hague Principles also extend the scope of the chosen law expressly to the "burden of proof and legal presumptions" Article 9.1 (clause f); and to "pre-contractual obligations" (clause g). These matters are delicate due to the divergences in different laws and in the consideration of them as either procedural or substantive. Given the difficulty in advocating for legal regime change, at times it may be more effective to identify the divergences between procedural and substantive laws and to recommend strategies for addressing or mitigating those divergences. For example, when so authorized, contracting parties may agree that certain presumptions should govern their contracts and agree to define procedural rules to govern their contractual rights and any dispute arising from those rights.

475. The HP Commentary (9.11) explains that "legal presumptions and rules determining the burden of proof contribute to clarifying the parties' obligations and thus are inextricably linked to the law governing the contract. Furthermore, a uniform characterization of these issues ensures harmony of results and legal certainty." They are therefore different from other procedural issues[225] that are usually excluded from the scope of the chosen law. The solution is consistent with Article 12(g) of the 1986 Hague Sales Convention and Article 18.1 of Rome I.

476. With respect to prior negotiations, the HP Commentary (9.12) states that "once a contract is concluded between the parties, the obligations that arose out of dealings prior to its conclusion are also subject to the law applicable to the contract. However, even before the contract is concluded, the parties may choose the law applicable to the contractual negotiations and therefore to the pre-contractual liability based, for example, on an unexpected breakdown of such negotiations." It has been noted that this is a rather theoretical case.

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[225] Some scholars do not consider issues such as burden of proof as strictly "procedural." For example, in *Venezuela*, the burden of proof is subject to the *lex causae* (Article 38 of the Private International Law).

16.1 The domestic legal regime on the law applicable to international commercial contracts, in relation to the scope of the applicable law, should address interpretation of the contract, rights and obligations arising therefrom, performance and non-performance including the assessment of damages, prescription and its effects, consequences of invalidity, burden of proof and pre-contractual obligations, consistent with the provisions of Article 14 of the Mexico Convention and Article 9 of the Hague Principles. For greater certainty, it would be preferable to do so by way of explicit provisions.
16.2 The domestic legal regime on the law applicable to international commercial contracts should provide both that the law of the State where an international commercial contract is to be registered shall govern all matters concerning filing or notice, consistent with the provisions of Article 16 of the Mexico Convention; and, that the rules of other international agreements which may be specifically applicable to an international commercial contract should prevail, consistent with the provisions of Article 6 of the Mexico Convention.

PART SEVENTEEN

PUBLIC POLICY

I. The Concept of Public Policy (*Ordre Public*)

477. The concept of public policy, also referred to as "*ordre public*", is one of the most controversial in comparative law. The confusion arises in part from the terminological discrepancies between different civil law systems and the common law system, each with their own nomenclatures. Disagreements also arise in defining the principle and the criteria for determining its application in a given case.

478. Public policy serves as a mechanism to preclude the possibility of contracts that conflict with the basic values of a community. Public policy may seek to safeguard fundamental interests of the State, such as those related to political institutions or monetary regulation. It also may seek to protect the well-being of the inhabitants and proper functioning of the economy, for example, through laws that ensure freedom of competition. It may also aim to protect parties who at times may find themselves in a weak position in contractual relationships, such as employees and consumers. The fundamental values public policy seeks to protect may not only derive from domestic law but also from international law applicable in the forum, such as certain human rights provisions of global or regional treaties. At the same time, if taken to an extreme, public policy could potentially undermine party autonomy and choice of law rules with the associated risks of uncertainty and instability in relation to international transactions. Thus, a balance is required.

479. In private international law, public policy has two facets. One comprises the *overriding mandatory rules* of the forum that must be applied irrespective of the law indicated by the conflict of laws rule. The other precludes application of the law indicated by the conflict of laws rule if the result would be *manifestly incompatible* with the public policy of the forum. In its *first* facet, public policy is manifested through *mandatory rules* applied directly to the international case, without any consideration of the conflict of laws rules that may point to a different solution. Many States have these types of provisions that, functioning as a *sword*, are applied directly to cross-border issues, without regard for the intent of the parties or any other conflict of laws rule. In its *second* facet, public policy serves as a *barrier* or *shield* that bars the application of law that would otherwise be applicable under the conflict of laws rule.

480. Both facets of public policy are applicable, whether or not there has been an effective choice of law made by the parties. Although the conflict of laws rule may authorize party autonomy, the choice of law made by the parties cannot run counter to the public policy of the forum. Similarly, in the absence of a choice, if the conflict of laws rule leads the

adjudicator to the application of a law that contradicts public policy, public policy will prevail. The use of both facets of public policy and as provided for in private international law instruments is discussed in the paragraphs below.

II. Overriding Mandatory Rules (*Lois de police*)

A. Interpretation

481. Domestic or international mandatory rules apply directly in an international case irrespective of the law that would be applicable according to choice of law by the parties or conflict of laws rules. These are rules that limit party autonomy. In other words, parties cannot circumvent them by contractual agreement.

482. Mandatory rules do not necessarily take any particular form and can be found in any number of instruments. These rules may be set forth in economic or public law policy, or in instruments designed to protect weaker parties in contractual relationships.

483. It may be useful, for purposes of facilitating international commerce and enhancing certainty with respect to international commercial contracts, for mandatory rules to be codified or legislated. This would help avoid surprising parties to international contracts with a mandatory rule that is unwritten and not well known. Mandatory rules are applied directly, whereas the use of public policy exceptions to deny the application of the law chosen by the parties or determined by conflict of laws rules is generally defensive; public policy usually has a corrective function.

484. Various modern private international law instruments, including all of the HCCH conventions on choice of law matters over the past decades, contain this distinction between public policy and mandatory rules (for instance, Articles 16-17 of the 1978 Hague Agency Convention; Articles 17-18 of the 1986 Hague Sales Convention, and Article 11 of the Hague *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*[226]).

485. There is also a difference in terminology with respect to mandatory rules. For instance, French law refers to *lois de police* or *règles de droit impératives*. The concept of "laws of immediate application" is close to that of mandatory rules, in the sense that it concerns material or substantive rules that are primarily intended to be applied directly to international transactions. The distinction between them would be that "laws of immediate application" do not originate as local rules that require extraterritorial application in specific cases, but rather, they are rules designed to govern directly in international cases. There are also other terms related to mandatory rules in comparative law such as "self-limiting clauses" in laws (*norme autolimitate*), "spatially conditioned internal rules," "localized rules," and "*norme di applicazione necesaria*," all of which pertain to the positive aspect of public policy, equivalent to mandatory rules.

486. In the common law tradition, the phrase *mandatory rules* was introduced relatively recently in England with the promulgation of the *Unfair Contract Terms Act* of 1977 and the *Sale of Goods Act* of 1979, after centuries of referring to illegality or *public policy*. The term *mandatory rules* includes both mandatory laws in the domestic sphere and public security laws that are absolutely binding internationally.

487. The Rome Convention uses the expression "mandatory rules*"* (Article 7), while Rome I refers to "provisions that cannot be derogated from by agreement" (Article 8.1). However, that latter phrase from Rome I is in relation to individual employment contracts while the expression from the Rome Convention is in relation to *lois de police*. Perambulatory clause 37 of Rome I distinguishes between "overriding mandatory provisions" and "provisions that

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[226] *Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary.* Adopted 5 July 2006, entered into force 1 April 2017. Text accessible at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=72.

cannot be derogated from by agreement" and suggests that the former should be construed more restrictively.

B. Mandatory Rules in the Mexico Convention, Hague Principles and Rome I

488. The Mexico Convention refers expressly to this issue in Article 11, paragraph 1, by indicating that "the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements."

489. The Hague Principles similarly include the terminology of mandatory rules. Article 11.1 states: "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."

490. This issue was the subject of intense debate in the meetings of the HCCH Working Group; its members expressed some concerns regarding the detailed definition of *mandatory rules* or equivalent terms adopted by preexisting international instruments. Consequently, the proposal to include a definition was rejected.

491. As explained in the HP Commentary (11.17) a mandatory rule is not required to take a specific form, it need not be a provision of a constitutional instrument or law and it need not expressly state that it is mandatory and overriding. However, the HP Commentary (11.16) describes two requisite characteristics that serve "to emphasize the importance of the provision within the relevant legal system and to narrow the category." The first is their *mandatory nature* in the sense that it is not open to derogate from them. The second is that they are *overriding* in the sense that a court must apply them.

492. The HP Commentary (11.18) makes clear that the impact of overriding mandatory rules is limited; application of the law that would otherwise apply is constrained only to the extent of the incompatibility. The rule does not invalidate the rest of the applicable law, which "must be applied to the greatest possible extent consistently with the overriding mandatory provisions."

C. Application of Mandatory Rules of a Foreign State

493. Some modern bodies of law authorize the adjudicator to consider the mandatory rules of another legal system not referred to by the conflict of laws rules. This authority is conferred in the 1978 Hague Agency Convention (Article 16), which inspired the Rome Convention and Rome I, Article 9.3 of which provides: "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

494. This provision may have its roots in adjudication. In a 1966 decision from the Netherlands, it was stated "that, although the law applicable to contracts of an international character can, as a matter of principle, only be that which the parties themselves have chosen, 'it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract.[227] Nevertheless, European case law on the issue is quite limited. More recently, in 2016, the European Court of Justice ("ECJ") held that Article 9(3) of Rome I does not prevent a Member State court from taking the overriding mandatory provisions of the law of another Member State (other than the place of performance) into account as matters of fact (that is, indirectly).[228] In the field of arbitration, in a well-known case it was

[227] *Alnati*. Netherlands Supreme Court. May 13, 1966, (1967) 56 Rev. cri. dr. internat. priv. 522 (Annot. A.V.M. Struycken).
[228] *Hellenic Republic v Nikiforidis*, ECJ, October 19, 2016, Case C-135/15.

decided that the public policy of a third State and the location of the headquarters or seat of incorporation of a business entity must be considered with regard to the determination of incapacity or the authority to enter into an agreement. This is because lack of capacity is grounds to deny enforcement of an award.[229]

495. The Mexico Convention also leaves it to the discretion of the forum "to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties [connections]" (Article 11).

496. Similarly, the Hague Principles (Article 11.2) provide that: "The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law." This flexible and open approach leaves it to the forum to determine whether it is possible to apply the overriding mandatory rules of a third State. Current practice and opinions of States with regard to the usefulness of provisions of this type vary widely. As stated in the HP Commentary (11.19), the Hague Principles seek to accommodate this diversity by deferring the matter to the private international law of the forum.

III. Manifest Incompatibility

A. Interpretation

497. While public policy rules are applied directly within a State to domestic transactions, the "public policy" doctrine in private international law prevents application of foreign law in an international transaction if the result would be manifestly incompatible with the public policy of the forum.

498. In this way, public policy in the context of international contractual relationships is a defense mechanism such that the adjudicator is not required to apply the foreign law that would otherwise have been applicable according to conflict of laws rules. Similarly, the adjudicator is not required to enforce a foreign judgment when that would offend public policy. Thus, the public policy mechanism has a corrective function. However, not all mandatory provisions of the forum's law which the parties must respect in a purely domestic context, necessarily apply in an international context.

499. That is the reason why some legal systems call this public policy in private international law *international* public policy.[230]

500. For their part, all of the HCCH conventions after World War II include public policy as a hurdle to the application of the law as indicated by the conflict of laws rules of the respective convention. While the 1955 Hague Sales Convention referred only to "public policy" (Article 6), later Hague conventions incorporated the word "manifest" (in reference to the infringement of public policy), thereby implicitly adopting the terminology of "international public policy." The term "manifest" has also been incorporated into inter-American conventions, including those on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Article 2.h), on Letters Rogatory (Article 17), on General PIL Rules Convention (Article 5), and the Mexico Convention (Article 18). At MERCOSUR, the term has been incorporated into the Protocol on Jurisdictional Cooperation and Assistance in Civil,

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[229] *Videocon Power Limited, Rep. v. Tamil Nadu Electricity Board.* Madras High Court, December 2004. 2005 (3) ARBLR 399 Madras, 2004 (5) CTC 668.

[230] For example, *Peru* (Article 2049 of the Civil Code and Articles 63(1)(f) and 75(3)(b) of the Arbitration Law); *Panama*, Article 7 of Law 61 of 2015; *Dominican Republic*, Article 7 of Law 544 of 2014; *France* (Articles 1514 and 1520 (5) of the French Code of Civil Procedure (amended by Article 2 of Decree 2011-48 of 2011); *Portugal* (Article 1096 (f) of the Portuguese Code of Civil Procedure of 1986); as well as the arbitration laws of *Paraguay* (Articles 40(b) and 46(b)) and those of *Algeria* and *Lebanon*. *Romania* and *Tunisian* laws refer to "public policy as understood in private international law," while in Canada, the Civil Code of *Quebec* provides for "public order as understood in international relations" (Article 3081).

Commercial, Labor and Administrative Matters (Article 20(f)) and the Protocol on Precautionary Measures (Article 17).[231]

501. It is preferable to use this established terminology of "manifest" incompatibility above others that are overly broad and insufficiently descriptive, such as "international public policy" or "truly international public policy" as proposed in some scholarly works; this approach would also be consistent with the Hague Convention and inter-American instruments.

502. International public policy may also reflect corporate responsibility to respect core internationally recognized human rights, as emerging, for instance, from the UN *Guiding Principles on Business and Human Rights*.[232] Domestic norms may also reflect human rights principles; however, courts and arbitral tribunals should be mindful of internationally recognized human rights norms that may inform public policy or mandatory rules.

B. Manifest Incompatibility in the Mexico Convention and the Hague Principles

503. The Mexico Convention states that, "Application of the law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum" (Article 18). This provision was based on the Rome Convention, according to which the Member States of the EU can refuse to apply foreign law "manifestly incompatible" with the public policy of the forum. Rome I maintains this earlier provision of the Rome Convention in Article 21.

504. Similarly, the Hague Principles provide that, "A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum" (Article 11.3).

505. The HP Commentary (11.23) outlines three requirements for this provision to apply. First, the policy of the forum "must be of sufficient importance to justify its application *to the case in question*" [emphasis added]. Secondly, "the chosen law much be obviously inconsistent with that policy." Thirdly, "the manifest incompatibility must arise in the application of the chosen law to the dispute before the court." The HP Commentary explains further (11.25) that "any doubt as to whether application of the chosen law would be incompatible with the forum's fundamental policies must be resolved in favor of the application of the [chosen law]."

506. As stated in the HP Commentary (11.26 and see emphasized phrase above), "it is the result of applying the chosen law in a particular case rather than the chosen law in the abstract that must be assessed for compliance with public policy." Evaluation must be carried out in each particular situation as to whether there is manifest infringement. However, the HP Commentary (11.26) also clarifies that the court is not restricted to consideration of the outcome of the dispute between the parties, "but may have regard to wider considerations of public interest." In that regard, it provides the following example: "a court may refuse on public policy grounds to enforce a contract, valid under the law chosen by the parties, based on a finding that the choice was designed to evade sanctions imposed by a United Nations Security Council resolution, even if non-enforcement would benefit financially a person targeted by those sanctions and even if the other party was not party to the evasion."

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[231] *Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters of MERCOSUR*, May. 27, 1992, Las Leñas, accessible at: https://iberred.org/sites/default/files/mercosurprotocololasleas3_0.pdf; and *Protocol on Precautionary Measures of MERCOSUR*, Dec. 1, 1994, Ouro Preto, accessible at: https://iberred.org/sites/default/files/mercosurprotolomedcaut_0.pdf.

[232] UNHRC. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*. A/HRC/17/31, endorsed by the UNHRC, resolution 17/4 of 16 June 2011.

IV. Public Policy at a Regional Level

507. Public policy at a regional level reflects the fundamental shared values of States within an area of integration. If the rule-making authority is not exclusively held by nation States but is instead distributed across different levels—such as at both the national and regional levels— the question arises as to whether the conflict of laws rules should refer at all times to the private law of a State and whether the fundamental notions of public policy should be extracted solely from laws of nation States.

508. In the EU, judges are bound to take account of the European Convention on Human Rights[233] which serves as one of the basis for public policy within the EU. The CJEU has affirmed this in the oft-cited case of *Krombach* of 2000.[234]

509. Moreover, the EU is a supranational organization whose law is directly binding on its Member States. In each one of those States, EU law applies directly within the domestic legal system. In the event of conflict, EU law prevails over domestic law. Basic principles of EU law, such as the free movement of goods and people, or freedom of competition, have become part of the public policy of EU Member States. Accordingly, in a landmark judgment the CJEU held that the "defense of competition" enshrined in the Treaty of Rome is a fundamental provision for the workings of the free market within the EU. The CJEU found that, "Where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in [Article 85] of the Treaty."[235]

510. In another case the CJEU held that specific provisions of EU law can also be mandatory. Consequently, the provisions of minimum protection established in a Council Directive must be considered European public policy and, therefore, will prevail over a contrary result derived from the conflict of laws rules. The EU thus continues to broaden the scope of mandatory rules with a view to harmonizing the legal system and especially the internal market.[236]

511. Rome I addresses this issue expressly in Article 3.4 which states: "Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement."

512. There is no analogous provision that addresses public policy in the Mexico Convention, the Hague Principles, or any regulatory text in the Americas. Perhaps this is because there is no similar supranational law as there exists for the EU. Intergovernmental law emanating from the organs of MERCOSUR must be incorporated into the domestic legal systems of its Member States, like that of any other treaty. This raises the question of whether the issue is essentially a matter of "national" public policy. In 1998, the Austrian Supreme Court held in two cases that EU law directly applicable to the Member States is, given its supremacy, automatically part of Austrian national public policy, (although some might consider this to be a minority view).[237]

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[233] *Convention for the Protection of Human Rights and Fundamental Freedoms.* (Council of Europe) 213 UNTS 222, ETS No 5, UN Reg No I-2889.

[234] *Krombach v. Bamberski*, *supra* note 210.

[235] *Eco Swiss China Time Limited v. Benetton International NV*. CJEU, June 1, 1999 (judgment, reference for a preliminary ruling) Case C-126/97, [1999] ECR I-3055, [1999] 2 All ER (Comm) 44, [2000] 5 CMLR 816, (1999) XXIV YB Com Arb 629, EuZW 1999, 565.

[236] *Ingmar GB Ltd v. Eaton Leonard Technologies Inc*., CJEU, 2000, Case C-381/98, 2000 ECR I-9305.

[237] International Law Association, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2000), cases cited at p. 20.

513. This is consistent with the view expressed by the majority of the Permanent Review Tribunal of MERCOSUR. It held that mandatory rules correspond fundamentally to two types of interests subject to protection: first, the so-called public policy of direction—that is, the authority of the State to intervene in matters affecting its sovereignty or economic activity, as with regulations on currency or the defense of competition, for example; second, there is the so-called public policy of protection, which each State normally establishes and regulates in order to safeguard the rights of weaker parties in contractual relationships, such as consumers. This protection is established on the understanding that there are scenarios in which the contractual relationship is not the product of free will, but rather of other factors. Thus, the scope of its public policy of direction or protection as exceptional limits to party autonomy depends upon each State. The tribunal ultimately held that, where appropriate, specific abuses or violations of mandatory rules or principles will be adjudicated by the intervening national judge.[238]

V. Mandatory Rules and Public Policy in Domestic Laws

514. In *Argentina*, the new Civil and Commercial Code reflects the distinction between public policy as a barrier and as internationally mandatory rules. Article 2651 provides that: "The public policy principles and internationally mandatory rules of Argentine law are applied to the legal relationship, regardless of the law governing the contract; the contract is also governed, in principle, by the internationally mandatory rules of those States that have significant economic ties to the case." The first limit is set by the public policy principles that inform the Argentine legal system, to which the parties are bound when the contractual case is decided before a national court. The second limit consists of the *lois de police* or internationally mandatory rules of Argentine law, because they exclude any other rule of restrictive interpretation (since they do not apply in the event of doubt). Therefore, "the internationally mandatory rules of Argentine law" are applied to the legal relationship, irrespective of the law governing the contract. In addition, the internationally mandatory rules of the chosen law also act as a limit to the autonomy.

515. In *Brazil*, the legislation provides that laws, acts and judgements of another State, or any autonomous declarations, will not be effective in Brazil if offensive to national sovereignty, public order and morality (LINDB, Article 17).

516. In *Canada*, the supremacy of overriding mandatory rules of the forum (*lex fori*) is generally accepted. In the civil law province of Quebec, Article 3081 of the CCQ states that "The provisions of the law of a foreign State do not apply if their application would be manifestly inconsistent with public order as understood in international relations." In common law provinces, public policy can also be invoked to limit the effect of the law chosen by the parties or that is applicable pursuant to the application of conflict of law rules. Canadian courts have construed the public policy exception narrowly and it has rarely been invoked with success.[239]

517. *Chile* has no express provision on the matter, although the natural inclination of the courts tends to be to apply Chilean rules, even when many of them are not mandatory, *sensu stricto*. Due to the territorialist interpretation in Chile, the contradiction need not be "manifest" in order to exclude the foreign law, given the weight the courts have given Article 16 of the Civil Code, which favors this approach. In principle, any contradiction (even if apparent) leads Chilean adjudicators to give priority to the domestic law; however, recent decisions emanating from the judiciary indicate some evolution in this regard.

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[238] Permanent Tribunal of Review of MERCOSUR, Advisory Opinion No. 1 of 2007.

[239] *Block Bros. Realty Ltd. v. Mollard*, [1981] B.C.J. No. 4, 122 D.L.R. (3d) 323 (C.A.); *Canadian Acceptance Corporation Ltd. v. Matte and Matte*, [1957] S.J. No. 41 (Sask. C.A.).

518. In *Costa Rica*, the new Code of Civil Procedure, Law 9342, states in Article 3.1 that procedural rules are *ordre public* and of mandatory application and in Article 3.5 that these rules cannot be waived.[240]

519. In *Colombia*, there are important judicial decisions that provide guidance for the determination of public policy and that make a clear difference between its application in the domestic and international contexts.[241]

520. In *Guatemala*, in addition to rejecting the application of a law incompatible with the public policy of the forum, Article 31 of the Judiciary Branch Law contains an additional provision that is applicable when the agreement is counter to express prohibitory laws. Article 4 of this Law, although not a rule of private international law, contains a general provision applicable to all contracts. This Article establishes that "Acts contrary to mandatory rules and express prohibitory laws are fully null and void, unless they provide for a different effect in the case of contravention."

521. In *Paraguay*, Article 17 of the Law Applicable to International Contracts adapts Article 11 of the Hague Principles. The provision reads: "Overriding mandatory rules and public policy. 1. The parties' choice of law shall not prevent the judge from applying overriding mandatory provisions of Paraguayan law that, according to this law, must prevail even when a foreign law has been chosen by the parties. 2. The judge may consider the overriding mandatory rules of other States closely tied to the case, taking account of the consequences of their application or non-application. 3. The judge may exclude the application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy."

522. In *Panama*, reference may be made to Law 61 of 2015, Article 7.

523. In the *Dominican Republic*, reference may be made to Law 544 of 2014, Article 7.

524. In *Peru*, the Civil Code provides that the law applicable to international contracts will determine the mandatory rules and the limits of party autonomy. Article 2049 of the Peruvian Civil Code establishes that the provisions of the pertinent foreign law according to the rules of private international law will be excluded if their application is incompatible with international public policy or with ethics and morals.

525. In *Uruguay*, Article 2404 of Law 16.603 of 1994 is consistent with the declaration of Uruguay of 1979 made with respect to Article 5 of the Convention on General Rules and which states: "…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."[242]

526. In *Venezuela*, despite the fact that the Draft Law on Private International Law (1963-1965) established the consideration of the mandatory rules of third States by ordering the judge in contractual matters to apply, "…in all cases, the provisions of the law of the place of the performance regulated therein for economic and social reasons of general interest" (Article

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[240] Code of Civil Procedure, Law 9342. Article 3.1: "Orden público y aplicación en el tiempo. Las normas procesales son de orden público y de aplicación inmediata." Article 3.5 *ibidem*: "las normas procesales son indisponibles e irrenunciables."

[241] See, for instance, (i) *García Fernandes Internacional Importaçâo e Exportaçâo AS v. Prodeco - Productos de Colombia*, Colombian Supreme Court of Justice (Corte Suprema de Justicia de Colombia), Civil Chamber, August 6, 2004, Ruling No. 77 (Motion to execute a Portuguese Ruling); (ii) Colombian Constitutional Court (Corte Constitucional de Colombia), May 26, 2005, Ruling No. T-557; (iii) *Industria y Distribuidora Indistri SA v. SAP Andina y Del Caribe CA*, Superior Court of Bogota District (Tribunal Superior del Distrito de Bogotá, D.C.), Civil Chamber, March 10, 2010, Ruling No. 20100015000. More recent cases are the following: Colombian Supreme Court of Justice, June 24, 2016, Ruling No. SC8453-2016, and February 8, 2017, Ruling No. SC5207-2017.

[242] Uruguay declaration made at the time of signature. Text accessible at: http://www.oas.org/juridico/english/sigs/b-45.html.

32), the enacted law is silent with respect to the matter. That silence necessarily raises the question of whether the mandatory rules of third States can be considered when the matter falls outside the scope of the Mexico Convention. On this point, the judge may resort, by application of Article 1 of the Law on Private International Law, to the generally accepted private international law principle contained in the Convention, as it is undeniably important to apply these rules in order to decide the specific case (see Article 10 of the Venezuelan law.) As in Peru, the Venezuelan law contemplates *order public* without considering the possibility of protecting, within this institution, the essential principles of the legal system of third States.

527. In the *United States*, there are certain points of intersection with the approach taken under the Hague Principles and Mexico Convention. Under the First Restatement, there was a traditional public policy exception based on the concept that if the foreign law is offensive to the basic morality of the forum, its application would be considered unjust. This is still the approach taken in some domestic state jurisdictions within the United States. Under the Second Restatement, a version of this approach survives, but with overriding exceptions as outlined in sections 6, 187 and 188.[243]

VI. Public Policy and Arbitration

528. The controversy of mandatory rules and the applicable law is one of the most difficult in arbitration. Because of the deambulatory character of arbitration, and because arbitrators are not judges or State officials, one cannot speak of a national law of the forum (or *lex fori*). *Lex fori* contains provisions of private international law relative to classification, connecting factors and public policy.

529. In the absence of *lex fori*, there are two fundamental consequences. On one hand, there is no competent national law or law that the arbitrator should apply as a principle—unless the parties have chosen the law of the place of arbitration, but that results from the application of a law pertaining to international arbitration rather than from a particular *lex fori*. On the other hand, there is no foreign law in international arbitration. All domestic laws have the same value and none has a privileged status. Consequently, the arbitrator does not have to be certain that purely national concepts are respected. The key question is not whether an arbitrator should take account of the mandatory rules, but rather how the arbitrator determines what constitutes a mandatory rule for purposes of the specific dispute. By way of illustration, the *Peruvian* arbitral law expressly recognizes "international public order" as grounds for annulment of an arbitral award (Article 63(1)(f)) as well as a cause of non-recognition of a foreign award (Article 75(3)(b)), which provides interesting criteria to interpret the source of public order of the New York Convention when it is to be applied in Peru.

530. When arbitrators consider that they are not bound by specific rules of the forum, or national laws, they sometimes opt to directly apply non-State law (or internationally recognized principles, or *lex mercatoria*), which in one of its facets consists of a public policy independent of national laws. This public policy allows arbitrators to penalize bribery, arms trafficking, drug trafficking, or human trafficking irrespective of the provisions of the local laws. The ICC Case 1110/1963, in which a single arbitrator, Judge Lagergren, refused to hear the case because the object of the contract involved the bribery of public servants, is emblematic in this regard.

531. Public policy as a ground for refusing to recognize or enforce foreign judgments and awards is provided for in Article V(2) of the New York Convention and in Article 36 of the UNCITRAL Model Law. On this point, interpretation tends to be quite restrictive, or as *international public policy.* In several States, the policy of the courts is to give effect to arbitral awards to the greatest extent possible rather than provide incentives for litigation in the courts. In a recent decision from *Peru* concerning recognition of a foreign arbitral

[243] See *supra* note 156.

award, the court defined restrictively the international public order as "the set of principles and institutions that are considered fundamental in the social organization of a State and that inspire its legal system."[244]

532. There are relatively few cases in which this public policy provision of the New York Convention has been used to deny the enforcement of an award. In many of these cases this was the result of anachronistic arbitration laws, such as the outdated English law of 1950, and certain serious violations that truly warranted the denial of enforcement. In short, this tendency not to set aside arbitral awards on the basis of merely localist arguments on the pretext of alleged "public policy" arising from national rules, obviously contributes to the valid circulation of arbitral decisions.

533. Given the difficulty of this issue, it is hardly surprising that the question of public policy in arbitration was one of the "most sensitive" issues addressed in the drafting of the Hague Principles. Article 11.5 of the Principles states that, "These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so." The Principles thus take a "neutral" position, reflecting the peculiar situation of arbitral tribunals, which, unlike national courts, have the obligation to issue a final judgment capable of enforcement; and to that end, they can be led to consider the laws of the jurisdictions in which enforcement is sought.

534. The HP Commentary (11.31) states that Article 11(5) "does not confer any additional powers on arbitral tribunals and does not purport to give those tribunals an unlimited and unfettered discretion to depart from the law" that is applicable in principle. On the contrary, tribunals might be required to take account of public policy and mandatory rules, and where appropriate ascertain the need for them to prevail in the specific case. Some provisions, like Article 34(2) of the UNCITRAL Arbitration Rules, or Article 41 of the ICC Rules, are interpreted to obligate the arbitrator to endeavor to render an "enforceable award." The HP Commentary (11.32) states that determining "whether a duty of this kind requires the tribunal to have regard to the overriding mandatory provisions and policies of the seat, however identified, or of the places where enforcement of any award would be likely to take place," is a controversy on which Article 11.5 of the Hague Principles does not express any view. It is emphasized that the tribunal should be careful in its analysis of this issue.

535. In fact, the "obligation" of arbitral tribunals is to ensure to the maximum extent -albeit not as a general imperative- the effectiveness of their awards. An issue also arises regarding the consideration of the public policies that may come into play. Should they be raised mainly as a responsibility of the parties? This is a sensitive issue because it may be arguable if *ex officio* arbitrators can introduce controversial issues that have not been raised by the parties during the development of the case, such as the application of public policy rules of a law different from the *lex contractus*. Obviously, in such a case an award cannot be made without first having been submitted to the parties for discussion.

17.1 The domestic legal regime on the law applicable to international commercial contracts should provide that neither a choice of law nor a determination of applicable law in the absence of an effective choice,
- shall prevent the application of overriding mandatory provisions of the forum or those of other fora, but that such mandatory provisions will prevail only to the extent of the inconsistency;
- shall lead to the application of law that would be manifestly incompatible with the public policy of the forum, consistent with Article 18 of the Mexico Convention and Article 11 of the Hague Principles.
17.2 Adjudicators and counsel should take into account any overriding mandatory provisions and public policy as required or entitled to do so, consistent with Article 11 of the Hague Principles.

[244] *Stemcor UK Limited v. Guiceve S.A.C.*, Superior Court of Justice of Lima, First Civil Chamber with Commercial Specialization, April 28, 2011.

PART EIGHTEEN

OTHER PROVISIONS

I. Prevalence of Other International Agreements

536. The Mexico Convention states in Article 6 as follows: "The provisions of this Convention shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention." During the course of translation from Spanish into English, the intended meaning has been lost. It may be better read as follows: "The rules of this Convention shall not be applicable to contracts specifically governed by other international conventions in force among the States Parties to this Convention." Rome I contains a somewhat similar provision in Article 23. It stipulates that, with certain exceptions, "[Rome I] shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict of laws rules relating to contractual obligations."

537. The Mexico Convention also addresses the relationship between it and other international agreements on the same subject. It states that: "This Convention shall not affect the application of other international conventions to which a State Party to this Convention is or becomes a party, insofar as they are pertinent, or those concluded within the context of integration movements" (Article 20). Once again, during the course of translation from the Spanish text into the English, some words were omitted and the intended meaning was lost. The provisions may be better read as follows: "This Convention shall not affect the application of other international conventions containing rules on this same subject to which a State Party to this Convention is or becomes a party, if they are concluded within the framework of integration processes." Rome I contains a similar provision in Article 25(1).

II. States with More than One Legal System or Different Territorial Units

A. International Conventions

538. The Mexico Convention does expressly state that "In the case of a State which has two or more systems of law applicable in different territorial units with respect to matters covered by the Convention: (a) any reference to the laws of the State shall be construed as a reference to the laws in the territorial unit in question; (b) any reference to habitual residence or place of business in that State shall be construed as a reference to habitual residence or place of business in a territorial unit of that State" (Article 22).

539. As noted in the preparatory works of the instrument, Article 22 establishes that each territorial unit should be considered a State for purposes of determining the applicable law according to the Mexico Convention. In other words, the reference to the law of the State will be considered a reference to the law in force in the respective territorial unit.[245] Rome I uses language similar to that of the above-cited report, providing that, "Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation" (Article 22.1). A similar provision is contained in the Rome Convention (Article 19), as well as in the 1986 Hague Sales Convention (Article 19).

540. The Mexico Convention also provides that "A State within which different territorial units have their own systems of law in regard to matters covered by this Convention shall not be

[245] Report of the Rapporteur of the Commission I on the Law Applicable to International Contractual Arrangements; OEA/Ser.K/XXI.5; CIDIP-V/doc.32/94 rev.1.

obliged to apply this Convention to conflicts between the legal systems in force in such units." (Article 23). The same solution is found in Rome I (Article 22.2), the Rome Convention (Article 19), and the 1986 Hague Sales Convention (Article 20).

541. Lastly, the Mexico Convention expressly allows for the possibility for States that have two or more territorial units with different legal systems to declare, at the time of signature, ratification, or accession, whether this Convention will extend to all its territorial units or to only one or more of them (Article 24). The instrument has been ratified only by Mexico and Venezuela, neither of which made any declaration to that effect at the time of signature or ratification.

542. The HP Commentary (1.22) points out that the Hague Principles "do not address conflicts of law among different territorial units within one State" but that this does not prevent "extending the scope of application of their application to intra-State conflicts of laws." Moreover, "the fact that one of the relevant elements of the contractual relationship is located in a different territorial unit within one State does not constitute internationality of the contract."

B. Domestic Laws

543. In *Canada*, in the province of Quebec the CCQ provides that "Where a State comprises several territorial units having different legislative jurisdictions, each territorial unit is regarded as a State. Where a State comprises several legal systems applicable to different categories of persons, any reference to the law of that State is a reference to the legal system prescribed by the rules in force in that State; in the absence of such rules, any such reference is a reference to the legal system most closely connected with the situation" (Article 3077).

18.0 States with more than one legal system or different territorial units may wish to consider the provisions of Article 22 of the Mexico Convention and Article 1.2 of the Hague Principles and provide in the domestic legal regime on the law applicable to international commercial contracts that any reference to the law of the State may be construed as a reference to the law in the territorial unit, as applicable.

APPENDICES

APPENDIX A

THE MEXICO CONVENTION AND THE HAGUE PRINCIPLES COMPARATIVE TABLE

Mexico Convention	Hague Principles
Purpose and Objective	
• Preamble: REAFFIRMING their desire to continue the progressive development and codification of private international law among member States of the Organization of American States; REASSERTING the advisability of harmonizing solutions to international trade issues; BEARING in mind that the economic interdependence of States has fostered regional integration and that in order to stimulate the process it is necessary to facilitate international contracts by removing differences in the legal framework for them, • Article 1, para. 1: This Convention shall determine the law applicable to international contracts. • Article 4: For purposes of interpretation and application of this Convention, its international nature and the need to promote uniformity in its application shall be taken into account.	• Preamble: 1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions. 2. They may be used as a model for national, regional, supranational or international instruments. 3. They may be used to interpret, supplement and develop rules of private international law. 4. They may be applied by courts and by arbitral tribunals.
Scope of Application of the Instrument	
• Article 1, para. 3: This Convention shall apply to contracts entered into or contracts to which States or State agencies or entities are party, unless the parties to the contract expressly exclude it. However, any State Party may, at the time it signs, ratifies or accedes to this Convention, declare that the latter shall not apply to all or certain categories of contracts to which the State or State agencies and entities are party. • Article 3: The provisions of this Convention shall be applied, with necessary and possible adaptations, to the new modalities of contracts used as a consequence of the development of international trade.	• Article 1.1: These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.

Definitions I: "International Contract"	
● Article 1, para. 2: 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.	● Article 1.2: For the purposes of these Principles, a contract is international unless each party has its establishment 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.
Definitions II: "Establishment"	
● Article 1, para. 2: 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.	● Article 1.2: For the purposes of these Principles, a contract is international unless each party has its establishment 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. ● Article 12: If a party has more than one establishment, the relevant establishment for the purpose of these Principles is the one which has the closest relationship to the contract at the time of its conclusion.
Definitions III: "Principles of International Law"	
● Article 9, para. 2: The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations. ● Article 10: In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.	● Article 3: The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.
Issues Not Covered by the Instrument	
● Article 1, para. 2 and 4: 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. Any State Party may, at the time it ratifies or accedes to this Convention, declare the categories of contract to which this Convention will not apply.	● Article 1.1: These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts. ● Article 1.3: These Principles do not address the law governing: a) the capacity of natural persons;

• Article 5: This Convention does not determine the law applicable to: a) questions arising from the marital status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties; b) contractual obligations intended for successional questions, testamentary questions, marital arrangements or those deriving from family relationships; c) obligations deriving from securities; d) obligations deriving from securities transactions; e) the agreements of the parties concerning arbitration or selection of forum; f) questions of company law, including the existence, capacity, function and dissolution of commercial companies and juridical persons in general.	b) arbitration agreements and agreements on choice of court; c) companies or other collective bodies and trusts; d) insolvency; e) the proprietary effects of contracts; f) the issue of whether an agent is able to bind a principal to a third party.
Rules for Determining the Applicable Law: Choice of Law by the Parties	
• Article 7, para. 1: The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.	• Preamble para. 1: This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions • Article 2.1: A contract is governed by the law chosen by the parties.
Rules for Determining the Applicable Law: Express or Implied Choice of Law	
• Article 7: The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same. Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.	• Article 4: A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.

Rules for Determining the Applicable Law: Law that May be Chosen by the Parties	
• Article 2: The law designated by the Convention shall be applied even if said law is that of a State that is not a party. • Article 4: For purposes of interpretation and application of this Convention, its international nature and the need to promote uniformity in its application shall be taken into account. • Article 7, para 1: The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same. • Article 9, para. 2: The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations. • Article 10: In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case. • Article 17: For the purposes of this Convention, "law" shall be understood to mean the law current in a State, excluding rules concerning conflict of laws.	• Article 2.1: A contract is governed by the law chosen by the parties. • Article 2.4: No connection is required between the law chosen and the parties or their transaction. • Article 3: The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.
Rules for Determining the Applicable Law: Formal (and Substantive) Validity of Choice of Law Clause	
• Article 12: 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. Nevertheless, to establish that one of the parties has not duly consented, the judge shall determine the applicable law, taking into	• Article 5: A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties.

account the habitual residence or principal place of business.	
Rules for Determining the Applicable Law: Severability of Choice of Law Clause	
● Article 12: 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. 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.	● Article 7: A choice of law cannot be contested solely on the ground that the contract to which it applies is not valid.
Rules for Determining the Applicable Law: Applicability to All or Part of the Contract	
● Article 7, para 1: The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.	● Article 2.2: The parties may choose: a) the law applicable to the whole contract or to only part of it; and b) different laws for different parts of the contract.
Rules for Determining the Applicable Law: Amendments	
● Article 8: The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, that modification shall not affect the formal validity of the original contract nor the rights of third parties.	● Article 2.3: The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.
Rules for Determining the Applicable Law (Absence or Ineffective Choice of Law): Closest Ties and General Principles of International Commercial Law	
● Article 9: If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties. The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into	

account the general principles of international commercial law recognized by international organizations. Nevertheless, if a part of the contract were separable from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract. ● Article 10: In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the resolution of a particular case.	
Rules for Determining the Applicable Law : Mandatory Rules, Public Policy & "Ordre Public"	
● Article 11: Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties. Article 18: Application of the law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum.	● Article 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. 3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (ordre public) of the forum. 4. The law of the forum determines when a court may or must apply or take into account the public policy (ordre public) of a State the law of which would be applicable in the absence of a choice of law. 5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.
Existence and Validity of Contract Itself: Validity as to Substance	

• Article 12, para. 1: 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.	• Article 9.1: The law chosen by the parties shall govern all aspects of the contract between the parties, including, but not limited to: e) validity and the consequences of invalidity of the contract;
Existence and Validity of Contract Itself: Validity as to Form	
• Article 13: A contract between parties in the same State shall be valid as to form if it meets the requirements laid down in the law governing said contract pursuant to this Convention or with those of the law of the State in which the contract is valid or with the law of the place where the contract is performed. If the persons concerned are in different States at the time of its conclusion, the contract shall be valid as to form if it meets the requirements of the law governing it as to substance, or those of the law of one of the States in which it is concluded or with the law of the place where the contract is performed.	• Article 9.1: The law chosen by the parties shall govern all aspects of the contract between the parties, including, but not limited to: e) validity and the consequences of invalidity of the contract; • Article 9.2: Paragraph 1e does not preclude the application of any other governing law supporting the formal validity of the contract.
Scope of the Applicable Law	
• Article 14: The law applicable to the contract in virtue of Chapter 2 of this Convention shall govern principally: a) its interpretation; b) the rights and obligations of the parties; c) the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of injury to the extent that this may determine payment of compensation; d) the various ways in which the obligations can be performed, and prescription and lapsing of actions; e) the consequences of nullity or invalidity of the contract.	• Article 9.1: The law chosen by the parties shall govern all aspects of the contract between the parties, including, but not limited to: a) interpretation; b) rights and obligations arising from the contract; c) performance and the consequences of non-performance, including the assessment of damages; d) the various ways of extinguishing obligations, and prescription and limitation periods; e) validity and the consequences of invalidity of the contract; f) burden of proof and legal presumptions; g) pre-contractual obligations

Scope of the Applicable Law: Considerations Concerning Agency	
● Article 15: The provisions of Article 10 shall be taken into account when deciding whether an agent can obligate its principal or an agency, a company or a juridical person.	● Article 1.3: These Principles do not address the law governing: f) the issue of whether an agent is able to bind a principal to a third party.
Scope of the Applicable Law: Considerations Concerning Public Notice	
● Article 16: The law of the State where international contracts are to be registered or published shall govern all matters concerning publicity.	
General Provisions and Other Considerations: Rules of Private International Law	
● Article 17: For the purposes of this Convention, "law" shall be understood to mean the law current in a State, excluding rules concerning conflict of laws.	● Preamble, para. 3: The Principles may be used to interpret, supplement and develop rules of private international law. ● Article 8: 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.
General Provisions and Other Considerations: Other International Agreements	
● Article 6: The provisions of this Convention shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention. ● Article 20: This Convention shall not affect the application of other international conventions to which a State Party to this Convention is or becomes a party, insofar as they are pertinent, or those concluded within the context of integration movements.	
General Provisions and Other Considerations: States with Two or More Territorial Units or Systems of Law	
● Article 22: In the case of a State which has two or more systems of law applicable in different territorial units with respect to matters covered by the Convention: a) any reference to the laws of the State shall be construed as a reference to the laws in the territorial unit in question; b) any reference to habitual residence or place of business in that	

State shall be construed as a reference to habitual residence or place of business in a territorial unit of that State. ● Article 23: A State within which different territorial units have their own systems of law in regard to matters covered by this Convention shall not be obliged to apply this Convention to conflicts between the legal systems in force in such units.	

APPENDIX B

INTER-AMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS
Reconciliation between the Spanish, English and French Texts

(PART 1 – English)

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CONVENCIÓN INTERAMERICANA
SOBRE DERECHO APLICABLE A LOS CONTRATOS INTERNACIONALES
La reconciliación entre los Textos Español, Inglés y Francés

(PARTE 1 - Inglés)

COMMENTARY:
Article 30 states that the English, French, Portuguese and Spanish texts are equally authentic.
Legibility – Level 1: Recommended reading in order to clarify meaning and/or for improved consistency between the texts.
Legibility – Level 2: Although not required, suggested reading for clarification.
Differences in Meaning: In three instances the meaning is clear but different as between the language versions, or unclear in more than one language.
Note: Minor differences in language that do not hamper understanding have not been highlighted. Annotations have not been provided. It was thought these suggested readings could be helpful to promote the use of the texts to further advance the development of the law applicable to international contracts in the Americas.

COMENTARIO:
El artículo 30 establece que los textos en español, francés, inglés y portugués son igualmente auténticos.
Legibilidad - Nivel 1: Se recomienda la lectura para aclarar el significado y/o mejor la consistencia entre los textos.
Legibilidad - Nivel 2: Aunque no es necesario, lectura sugerida para aclaración.
Diferencias en Significado: En los tres casos el significado es claro, pero hay diferencias entre las versiones lingüísticas, o poco clara en más de un idioma.
Nota: Las pequeñas diferencias de lenguaje que no dificulten la comprensión no se han puesto de relieve. No se han proporcionado anotaciones. Se pensaba estas lecturas sugeridas podrían ser útiles para promover el uso de los textos para seguir avanzando en el desarrollo del derecho aplicable a los contratos internacionales en las Américas.

ORIGINAL SPANISH	ORIGINAL ENGLISH	DIL RECOMMENDED READING
CONVENCIÓN INTERAMERICANA SOBRE DERECHO APLICABLE A LOS CONTRATOS INTERNACIONALES	**INTER-AMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS**	**INTER-AMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS**
Suscrita en México, D.F., México el 17 de marzo de 1994, en la Quinta Conferencia Especializada Interamericana sobre Derecho Internacional Privado (CIDIP-V)	*Signed at Mexico, D.F., Mexico, on March 17, 1994, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V)*	*Signed at Mexico, D.F., Mexico, on March 17, 1994, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V)*

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Estados Partes de esta Convención, REAFIRMANDO su voluntad de continuar el desarrollo progresivo y la codificación del derecho internacional privado entre Estados miembros de la Organización de los Estados Americanos; REITERANDO la conveniencia de armonizar las soluciones de las cuestiones relativas al comercio internacional; CONSIDERANDO que la interdependencia económica de los Estados ha propiciado la integración regional y continental, y que para estimular este proceso es necesario facilitar la contratación internacional removiendo las diferencias que presenta su marco jurídico, HAN CONVENIDO aprobar la siguiente Convención:	The States Parties to this Convention, REAFFIRMING their desire to continue the progressive development and codification of private international law among member States of the Organization of American States; REASSERTING the advisability of harmonizing solutions to international trade issues; BEARING in mind that the economic interdependence of States has fostered regional integration and that in order to stimulate the process it is necessary to facilitate international contracts by removing differences in the legal framework for them, HAVE AGREED to approve the following Convention:	The States Parties to this Convention, REAFFIRMING their desire to continue the progressive development and codification of private international law among member States of the Organization of American States; REASSERTING the advisability of harmonizing solutions to international trade issues; BEARING in mind that the economic interdependence of States has fostered regional integration and that in order to stimulate the process it is necessary to facilitate international contracts by removing differences in the legal framework for them, HAVE AGREED to approve the following Convention:
CAPITULO PRIMERO **Ámbito de aplicación**	**CHAPTER I** **Scope of Application**	**CHAPTER I** **Scope of Application**
Artículo 1 Esta Convención determina el derecho aplicable a los contratos internacionales.	**Article 1** This Convention shall determine the law applicable to international contracts.	**Article 1** This Convention shall determine the law applicable to international contracts.

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Se entenderá que un contrato es internacional si las partes del mismo tienen su residencia habitual o su establecimiento en Estados Partes diferentes, o si el contrato tiene contactos objetivos con más de un Estado Parte. Esta Convención se aplicará a contratos celebrados o en que sean parte Estados, entidades u organismos estatales, a menos que las partes en el contrato la excluyan expresamente. Sin embargo, cualquier Estado Parte podrá declarar en el momento de firmar, ratificar o adherir a esta Convención que ella no se aplicará a todos o a alguna categoría de contratos en los cuales el Estado o las entidades u organismos estatales sean parte. Cualquier Estado Parte podrá, al momento de firmar, ratificar o adherir a la presente Convención, declarar a qué clase de contratos no se aplicará la misma.	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. This Convention shall apply to contracts entered into or contracts to which States or State agencies or entities are party, unless the parties to the contract expressly exclude it. However, any State Party may, at the time it signs, ratifies or accedes to this Convention, declare that the latter shall not apply to all or certain categories of contracts to which the State or State agencies and entities are party. Any State Party may, at the time it ratifies or accedes to this Convention, declare the categories of contract to which this Convention will not apply.	It shall be understood that a contract is international if the parties thereto have their habitual residence or ~~establishments~~ **principal place of business** in different States Parties or if the contract has objective ~~ties~~ **connections** with more than one State Party. This Convention shall apply to contracts entered into **by States or State agencies or entities** or contracts to which ~~States or State agencies or entities~~ **they** are party, unless the parties to the contract expressly exclude it. However, any State Party may, at the time it signs, ratifies or accedes to this Convention, declare that the latter shall not apply to all or certain categories of contracts to which the State or State agencies and entities are party. Any State Party may, at the time it **signs**, ratifies or accedes to this Convention, declare the categories of contract to which this Convention will not apply.
Artículo 2 El derecho designado por esta Convención se aplicará aun cuando tal derecho sea el de un Estado no Parte.	**Article 2** The law designated by the Convention shall be applied even if said law is that of a State that is not a party.	**Article 2** The law designated by the Convention shall be applied even if said law is that of a State that is not a party.

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Artículo 3 Las normas de esta Convención se aplicarán, con las adaptaciones necesarias y posibles, a las nuevas modalidades de contratación utilizadas como consecuencia del desarrollo comercial internacional.	**Article 3** The provisions of this Convention shall be applied, with necessary and possible adaptations, to the new modalities of contracts used as a consequence of the development of international trade.	**Article 3** The ~~provisions~~ **rules** of this Convention shall be applied, with necessary and possible adaptations, to the new modalities of ~~contracts~~ contracting used as a consequence of the development of international trade.
Artículo 4 Para los efectos de interpretación y aplicación de esta Convención, se tendrá en cuenta su carácter internacional y la necesidad de promover la uniformidad de su aplicación.	**Article 4** For purposes of interpretation and application of this Convention, its international nature and the need to promote uniformity in its application shall be taken into account.	**Article 4** For purposes of interpretation and application of this Convention, **regard shall be had to** its international nature and the need to promote uniformity in its application. ~~shall be taken into account~~.
Artículo 5 Esta Convención no determina el derecho aplicable a: a) las cuestiones derivadas del estado civil de las personas físicas, la capacidad de las partes o las consecuencias de la nulidad o invalidez del contrato que dimanen de la incapacidad de una de las partes; b) las obligaciones contractuales que tuviesen como objeto principal cuestiones sucesorias, cuestiones testamentarias,	**Article 5** This Convention does not determine the law applicable to: a) questions arising from the marital status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties; b) contractual obligations intended for successional questions, testamentary questions**,** marital arrangements or those	**Article 5** This Convention does not determine the law applicable to: a) ~~questions~~ **issues** arising from the ~~marital~~ **civil** status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties; b) contractual obligations ~~intended for~~ **essentially related to** successional and ~~questions~~ testamentary **matters,** marital

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regímenes matrimoniales o aquellas derivadas de relaciones de familia; c) las obligaciones provenientes de títulos de crédito; d) las obligaciones provenientes de la venta, transferencia o comercialización de títulos en los mercados de valores; e) los acuerdos sobre arbitraje o elección de foro; f) las cuestiones de derecho societario, incluso la existencia, capacidad, funcionamiento y disolución de las sociedades comerciales y de las personas jurídicas en general.	deriving from family relationships; c) obligations deriving from securities; d) obligations deriving from securities transactions; e) the agreements of the parties concerning arbitration or selection of forum; f) questions of company law, including the existence, capacity, function and dissolution of commercial companies and juridical persons in general.	arrangements or those deriving from family relationships; c) obligations deriving from ~~securities~~ **negotiable instruments**; d) obligations deriving from ~~securities transactions~~ **the sale, transfer or marketing of securities in securities markets**; e) the agreements of the parties concerning arbitration or selection of forum; f) ~~questions~~ **issues** of company law, including the existence, capacity, function and dissolution of commercial companies and juridical persons in general.
Artículo 6 Las normas de esta Convención no se aplicarán a aquellos contratos que tengan una regulación autónoma en el derecho convencional internacional vigente entre los Estados Partes de esta Convención.	**Article 6** The provisions of this Convention shall not be applicable to contracts which have autonomous regulations in international conventional law in force among the States Parties to this Convention.	**Article 6** The ~~provisions~~ **rules** of this Convention shall not be applicable to contracts ~~which have autonomous regulations~~ **specifically regulated** in international conventional law in force among the States Parties to this Convention.
CAPITULO SEGUNDO	**CHAPTER II**	**CHAPTER II**

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Determinación del derecho aplicable	**Determination of applicable law**	**Determination of applicable law**
Artículo 7 El contrato se rige por el derecho elegido por las partes. El acuerdo de las partes sobre esta elección debe ser expreso o, en caso de ausencia de acuerdo expreso, debe desprenderse en forma evidente de la conducta de las partes y de las cláusulas contractuales, consideradas en su conjunto. Dicha elección podrá referirse a la totalidad del contrato o a una parte del mismo. La selección de un determinado foro por las partes no entraña necesariamente la elección del derecho aplicable.	**Article 7** The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same. Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.	**Article 7** The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same. Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.
Artículo 8 En cualquier momento, las partes podrán acordar que el contrato quede sometido en todo o en parte a un derecho distinto de aquel por el que se regía anteriormente, haya sido o no éste elegido por las partes. Sin embargo, dicha modificación no afectará la validez formal del contrato original ni los derechos de terceros.	**Article 8** The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, that modification shall not affect the formal validity of the original contract nor the rights of third parties.	**Article 8** The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, that modification shall not affect the formal validity of the original contract nor the rights of third parties.
Artículo 9	**Article 9**	**Article 9**

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Si las partes no hubieran elegido el derecho aplicable, o si su elección resultara ineficaz, el contrato se regirá por el derecho del Estado con el cual tenga los vínculos más estrechos. El tribunal tomará en cuenta todos los elementos objetivos y subjetivos que se desprendan del contrato para determinar el derecho del Estado con el cual tiene vínculos más estrechos. También tomará en cuenta los principios generales del derecho comercial internacional aceptados por organismos internacionales. No obstante, si una parte del contrato fuera separable del resto del contrato y tuviese una conexión más estrecha con otro Estado, podrá aplicarse, a título excepcional, la ley de este otro Estado a esta parte del contrato.	If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties. The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations. Nevertheless, if a part of the contract were separable from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract.	If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ~~ties~~ **connections**. The Court ~~will~~ **shall** ~~take into account~~ **have regard to** all objective and subjective elements of the contract to determine the law of the State with which it has the closest ~~ties~~ **connections**. It shall also ~~take into account~~ **have regard to** the general principles of international commercial law recognized by international organizations. Nevertheless, if a part of the contract were separable from the rest and if it had a closer ~~tie~~ **connection** with another State, the law of that State could, exceptionally, apply to that part of the contract.
Artículo 10 Además de lo dispuesto en los artículos anteriores, se aplicarán, cuando corresponda, las normas, las costumbres y los principios del derecho comercial internacional, así como los usos y prácticas comerciales de general aceptación con la	**Article 10** In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of	**Article 10** In addition to the provisions in the foregoing articles, the ~~guidelines~~ **rules**, customs, and principles of international commercial law as well as generally accepted commercial usage and practices shall apply in order to discharge the

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finalidad de realizar las exigencias impuestas por la justicia y la equidad en la solución del caso concreto.	justice and equity in the particular case.	requirements of justice and equity in the **resolution of a** particular case.
Artículo 11 No obstante lo previsto en los artículos anteriores, se aplicarán necesariamente las disposiciones del derecho del foro cuando tengan carácter imperativo. Será discreción del foro, cuando lo considere pertinente, aplicar las disposiciones imperativas del derecho de otro Estado con el cual el contrato tenga vínculos estrechos.	**Article 11** Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties.	**Article 11** Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements. ~~It shall be up to~~ ~~t~~The forum **has the discretion when it considers it relevant** ~~to decide when it applies~~ **to apply** the mandatory provisions of the law of another State with which the contract has close ~~ties~~ **connections**.
CAPITULO TERCERO **Existencia y validez del contrato**	**CHAPTER III** **Existence and Validity of the Contract**	**CHAPTER III** **Existence and Validity of the Contract**
Artículo 12 La existencia y la validez del contrato o de cualquiera de sus disposiciones, así como la validez sustancial del consentimiento de las partes respecto a la elección del derecho aplicable, se regirán por la norma que corresponda conforme a esta Convención de acuerdo con los términos de su Capítulo Segundo. Sin embargo, para establecer que una parte no ha consentido debidamente, el juez	**Article 12** 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. Nevertheless, to establish that one of the parties has not duly consented, the judge	**Article 12** 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. Nevertheless, to establish that one of the parties has not duly consented, the judge

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deberá determinar el derecho aplicable tomando en consideración la residencia habitual o el establecimiento de dicha parte.	shall determine the applicable law, taking into account the habitual residence or principal place of business.	shall determine the applicable law, taking into account the habitual residence or principal place of business **of that party**.
Artículo 13 Un contrato celebrado entre partes que se encuentren en el mismo Estado será valido, en cuanto a la forma, si cumple con los requisitos establecidos en el derecho que rige dicho contrato según esta Convención o con los fijados en el derecho del Estado en que se celebre o con el derecho del lugar de su ejecución. Si las personas se encuentran en Estados distintos en el momento de la celebración del contrato, éste será válido en cuanto a la forma si cumple con los requisitos establecidos en el derecho que rige según esta Convención en cuanto al fondo o con los del derecho de uno de los Estados en que se celebra o con el derecho del lugar de su ejecución.	**Article 13** A contract between parties in the same State shall be valid as to form if it meets the requirements laid down in the law governing said contract pursuant to this Convention or with those of the law of the State in which the contract is valid or with the law of the place where the contract is performed. If the persons concerned are in different States at the time of its conclusion, the contract shall be valid as to form if it meets the requirements of the law governing it as to substance, or those of the law of one of the States in which it is concluded or with the law of the place where the contract is performed.	**Article 13** A contract between parties in the same State shall be valid as to form if it meets the requirements laid down in the law governing said contract pursuant to this Convention or ~~with~~ those of the law of the State in which the contract is ~~valid~~ **concluded** or ~~with~~ the law of the place where the contract is performed. If the persons concerned are in different States at the time of its conclusion, the contract shall be valid as to form if it meets the requirements of the law ~~governing it~~ **which, in accordance with this Convention, governs** as to substance, or those of the law of one of the States in which it is concluded or ~~with~~ the law of the place where the contract is performed.
CAPITULO CUARTO **Ámbito del derecho aplicable**	**CHAPTER IV** **Scope of the applicable law**	**CHAPTER IV** **Scope of the applicable law**
Artículo 14	**Article 14**	**Article 14**

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El derecho aplicable al contrato en virtud de lo dispuesto en el Capítulo Segundo de esta Convención regulará principalmente: a) su interpretación; b) los derechos y las obligaciones de las partes; c) la ejecución de las obligaciones que establece y las consecuencias del incumplimiento del contrato, comprendiendo la evaluación del daño en la medida que pueda determinar el pago de una indemnización compensatoria; d) los diversos modos de extinción de las obligaciones, incluso la prescripción y caducidad de las acciones; e) las consecuencias de la nulidad o invalidez del contrato.	The law applicable to the contract in virtue of Chapter 2 of this Convention shall govern principally: a) its interpretation; b) the rights and obligations of the parties; c) the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of injury to the extent that this may determine payment of compensation; d) the various ways in which the obligations can be performed, and prescription and lapsing of actions; e) the consequences of nullity or invalidity of the contract.	The law applicable to the contract ~~in~~ **by** virtue of Chapter 2 of this Convention shall govern principally: a) its interpretation; b) the rights and obligations of the parties; c) the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of ~~injury~~ **loss** to the extent that this may determine payment of compensation; d) the various ways in which the obligations ~~can be performed~~ **are extinguished, including** ~~and~~ prescription and lapsing of actions; e) the consequences of nullity or invalidity of the contract.
Artículo 15 Lo dispuesto en el artículo 10 se tomará en cuenta para decidir la cuestión acerca de si un mandatario puede obligar a su mandante o un órgano a una sociedad o a una persona jurídica.	**Article 15** The provisions of Article 10 shall be taken into account when deciding whether an agent can obligate its principal or an agency, a company or a juridical person.	**Article 15** The provisions of Article 10 shall be taken into account when deciding whether an agent can obligate its principal or an agency, a company or a juridical person.
Artículo 16 El derecho del Estado donde deban	**Article 16** The law of the State where international	**Article 16** The law of the State where international

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inscribirse o publicarse los contratos internacionales regulará todas las materias concernientes a la publicidad de aquéllos.	contracts are to be registered or published shall govern all matters concerning publicity.	contracts are to be registered or published shall govern all matters concerning ~~publicity~~ **filing or notice**.
Artículo 17 Para los efectos de esta Convención se entenderá por "derecho" el vigente en un Estado, con exclusión de sus normas relativas al conflicto de leyes.	**Article 17** For the purposes of this Convention, "law" shall be understood to mean the law current in a State, excluding rules concerning conflict of laws.	**Article 17** For the purposes of this Convention, "law" shall be understood to mean the law ~~current~~ **in force** in a State, excluding rules concerning conflict of laws.
Artículo 18 El derecho designado por esta Convención sólo podrá ser excluido cuando sea manifiestamente contrario al orden público del foro.	**Article 18** Application of the law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum.	**Article 18** ~~Application of~~ The law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum.
CAPITULO QUINTO **Disposiciones generales**	**CHAPTER V** **General Provisions**	**CHAPTER V** **General Provisions**
Artículo 19 Las disposiciones de esta Convención se aplicarán en un Estado Parte a los contratos concluidos después de su entrada en vigor en ese Estado Parte.	**Article 19** In a State Party, the provisions of this Convention shall apply to contracts concluded subsequent to its entry into force in that State.	**Article 19** In a State Party, the provisions of this Convention shall apply to contracts concluded subsequent to its entry into force in that State.
Artículo 20 Esta Convención no afectará la aplicación de otros convenios internacionales que contengan normas sobre el mismo objeto en los que un Estado Parte de esta Convención es o llegue a ser parte, cuando se celebren dentro del marco de los	**Article 20** This Convention shall not affect the application of other international conventions to which a State Party to this Convention is or becomes a party, insofar as they are pertinent, or those within the context of integration movements.	**Article 20** This Convention shall not affect the application of other international conventions **containing rules on the same subject** to which a State Party to this Convention is or becomes a party~~, insofar as they are pertinent, or those within the~~

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procesos de integración.		~~context of~~ **if they are concluded within the framework** of integration ~~movements~~ **processes**.
Artículo 21 En el momento de firmar, ratificar o adherir a esta Convención, los Estados podrán formular reservas que versen sobre una o más disposiciones específicas y que no sean incompatibles con el objeto y fin de esta Convención. Un Estado Parte podrá retirar en cualquier momento la reserva que haya formulado. El efecto de la reserva cesará el primer día del tercer mes calendario siguiente a la fecha de notificación del retiro.	**Article 21** When signing, ratifying or acceding to this Convention, States may formulate reservations that apply to one or more specific provisions and which are not incompatible with the effect and purpose of this Convention. A State Party may at any time withdraw a reservation it has formulated. The effect of such reservation shall cease on the first day of the third calendar month following the date of notification of withdrawal.	**Article 21** When signing, ratifying or acceding to this Convention, States may formulate reservations that apply to one or more specific provisions and which are not incompatible with the ~~effect~~ **object** and purpose of this Convention. A State Party may at any time withdraw a reservation it has formulated. The effect of such reservation shall cease on the first day of the third calendar month following the date of notification of withdrawal.
Artículo 22 Respecto a un Estado que tenga en cuestiones tratadas en la presente Convención dos o más sistemas jurídicos aplicables en unidades territoriales diferentes: a) cualquier referencia al derecho del Estado contempla el derecho en la correspondiente unidad territorial; b) cualquier referencia a la residencia habitual o al establecimiento en el Estado se entenderá referida a la residencia habitual o al establecimiento en una unidad territorial	**Article 22** In the case of a State which has two or more systems of law applicable in different territorial units with respect to matters covered by the Convention: a) any reference to the laws of the State shall be construed as a reference to the laws in the territorial unit in question; b) any reference to habitual residence or place of business in that State shall be construed as a reference to habitual residence or place of business in a territorial unit of that State.	**Article 22** In the case of a State which has two or more systems of law applicable in different territorial units with respect to matters covered by the Convention: a) any reference to the laws of the State shall be construed as a reference to the laws in the territorial unit in question; b) any reference to habitual residence or place of business in that State shall be construed as a reference to habitual residence or place of business in a territorial unit of that State.

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del Estado.		
Artículo 23 Un Estado compuesto de diferentes unidades territoriales que tengan sus propios sistemas jurídicos en cuestiones tratadas en la presente Convención no estará obligado a aplicar las normas de esta Convención a los conflictos que surjan entre los sistemas jurídicos vigentes en dichas unidades territoriales.	**Article 23** A State within which different territorial units have their own systems of law in regard to matters covered by this Convention shall not be obliged to apply this Convention to conflicts between the legal systems in force in such units.	**Article 23** A State within which different territorial units have their own systems of law in regard to matters covered by this Convention shall not be obliged to apply this Convention to conflicts between the legal systems in force in such units.
Artículo 24 Los Estados que tengan dos o más unidades territoriales en las que se apliquen sistemas jurídicos diferentes en cuestiones tratadas en la presente Convención podrán declarar, en el momento de la firma, ratificación o adhesión, que la Convención se aplicará a todas sus unidades territoriales o solamente a una o más de ellas. Tales declaraciones podrán ser modificadas mediante declaraciones ulteriores, que especificarán expresamente la o las unidades territoriales a las que se aplicará la presente Convención. Dichas declaraciones ulteriores se transmitirán a la Secretaría General de la Organización de los Estados Americanos y surtirán efecto	**Article 24** If a State has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or to only one or more of them. Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall take effect	**Article 24** If a State has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or to only one or more of them. Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall take effect ninety days after the date of their receipt.

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noventa días después de recibidas.	ninety days after the date of their receipt.	
CAPITULO SEXTO **Cláusulas finales**	**CHAPTER VI** **Final Clauses**	**CHAPTER VI** **Final Clauses**
Artículo 25 Esta Convención está abierta a la firma de los Estados miembros de la Organización de los Estados Americanos.	**Article 25** This Convention shall be open to signature by the member States of the Organization of American States.	**Article 25** This Convention shall be open to signature by the member States of the Organization of American States.
Artículo 26 Esta Convención está sujeta a ratificación. Los instrumentos de ratificación se depositarán en la Secretaría General de la Organización de los Estados Americanos.	**Article 26** This Convention shall be subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.	**Article 26** This Convention shall be subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.
Artículo 27 Esta Convención quedará abierta a la adhesión de cualquier otro Estado después que haya entrado en vigencia. Los instrumentos de adhesión se depositarán en la Secretaría General de la Organización de los Estados Americanos.	**Article 27** This Convention shall remain open for accession by any other State after it has entered into force. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.	**Article 27** This Convention shall remain open for accession by any other State after it has entered into force. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.
Artículo 28 Esta Convención entrará en vigor para los Estados ratificantes el trigésimo día a partir de la fecha en que haya sido depositado el segundo instrumento de ratificación. Para cada Estado que ratifique esta	**Article 28** This Convention shall enter into force for the ratifying States on the thirtieth day following the date of deposit of the second instrument of ratification. For each State ratifying or acceding to the	**Article 28** This Convention shall enter into force for the ratifying States on the thirtieth day following the date of deposit of the second instrument of ratification. For each State ratifying or acceding to the

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Convención o se adhiera a ella después de haber sido depositado el segundo instrumento de ratificación, la Convención entrará en vigor el trigésimo día a partir de la fecha en que tal Estado haya depositado su instrumento de ratificación o adhesión.	Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.	Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.
Artículo 29 Esta Convención regirá indefinidamente, pero cualquiera de los Estados Partes podrá denunciarla. El instrumento de denuncia será depositado en la Secretaría General de la Organización de los Estados Americanos. Transcurrido un año, contado a partir de la fecha de depósito del instrumento de denuncia, la Convención cesará en sus efectos para el Estado denunciante.	**Article 29** This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in force for the denouncing State.	**Article 29** This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in force for the denouncing State.
Artículo 30 El instrumento original de esta Convención, cuyos textos en español, francés, inglés y portugués son igualmente auténticos, será depositado en la Secretaría General de la Organización de los Estados Americanos, la que enviará copia auténtica de su texto para su registro y publicación a la Secretaría de las Naciones Unidas, de conformidad con el artículo 102 de su Carta constitutiva. La Secretaría General de la Organización de los Estados	**Article 30** The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward an authenticated copy of its text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of	**Article 30** The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward an authenticated copy of its text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of

ORIGINAL SPANISH	ORIGINAL ENGLISH	DIL RECOMMENDED READING
Americanos notificará a los Estados miembros de dicha Organización y a los Estados que hayan adherido a la Convención, las firmas, los depósitos de instrumentos de ratificación, adhesión y denuncia, así como las reservas que hubiera y el retiro de las últimas.	American States shall notify the Member States of the Organization and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession and denunciation, as well as of reservations, if any, and of their withdrawal.	American States shall notify the Member States of the Organization and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession and denunciation, as well as of reservations, if any, and of their withdrawal.
EN FE DE LO CUAL los plenipotenciarios infrascritos, debidamente autorizados por sus respectivos Gobiernos, firman esta Convención. HECHO EN LA CIUDAD DE MÉXICO, D.F., MÉXICO, el día diecisiete de marzo de mil novecientos noventa y cuatro.	IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, do hereby sign the present Convention. DONE AT MEXICO, D.F., MEXICO, this seventeenth day of March, one thousand nine hundred and ninety-four.	IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, do hereby sign the present Convention. DONE AT MEXICO, D.F., MEXICO, this seventeenth day of March, one thousand nine hundred and ninety-four.

APPENDIX C

TABLE OF LEGISLATION[246]

- Inter-American Treaties and Conventions
    - Treaty on International Civil Law, February 12, 1889, Montevideo
        - Articles 33, 38, and 40
    - Treaty on International Civil Law, March 19, 1940, Montevideo
        - Article 37
    - Convention on Private International Law, February 20, 1928, Havana, Cuba ("Bustamante Code")
        - Articles 169-172, 176, 180-181, 183-184 and 186
    - Inter-American Convention on the Law Applicable to International Contracts, March 15, 1994 ("Mexico Convention")
        - Articles 1(2), 3(1), 4, 5, 5(b), 5(c), 5(d), 5(e), 5(f), 6, 7, 7(1)(2), 8(1), 9(1), 9(2), 10, 11, 11(1), 12, 12(1)(2), 13, 14, 14(a),14 (b),14(c), 15, 16, 17, 18, 20, 22, 22(1), 23, 24
    - Inter-American Convention on Commercial Arbitration, January 30, 1975, Panama
    - Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, Montevideo
    - Rules of Procedure of the Inter-American Commission on Commercial Arbitration (as amended and in effect April 1, 2002)
        - Article 30
    - Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes, and Invoices, January 30, 1975, Panama
    - Inter-American Convention on Conflict of Laws concerning Checks, January 30, 1975, Panama and May 8, 1979, Montevideo
    - Inter-American Convention on Conflict of Laws concerning Commercial Companies, May 8, 1979, Montevideo
    - Inter-American Convention on General Rules of Private International Law, May 8, 1979, Montevideo
        - Articles 3, 5, 9, 33.3
    - Treaty establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Common Market of the South [MERCOSUR]), March 26, 1991 ("Treaty of Asuncion")
        - Article 1
        - Agreement on International Commercial Arbitration of 1998, Article 10
        - Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters of MERCOSUR, May 27, 1992
        - Protocol on Precautionary Measures of MERCOSUR, Dec. 1, 1994
    - Charter of the OAS
        - Article 122

- Other Inter-American References
    - Principles of Latin American Contract Law
    - OHADAC Principles on International Commercial Contracts
    - ASADIP Principles on Transnational Access to Justice

[246] Resource constraints did not permit more precise citations.

- International Treaties, Conventions, Model Laws and Principles
    - Convention on the Law Applicable to Contractual Obligations, June 19, 1980, Rome ("Rome Convention")
        - Articles 3, 3(1), 7, 18, 19
    - Regulation of the European Parliament and of the Council on the law applicable to contractual obligations, June 17, 2008, Rome ("Rome I")
        - Articles 1(2)(b), 3(1),3(2), 3(3), 3(4), 4, 5(2), 7(3), 8(1), 9(3), 10(1)(2), 11(1), 12(1),12(1)(a)(b)(c), 14, 15, 17, 18(1), 20, 21, 22 (2), 23, 25(1)
    - Principles on Choice of Law in International Commercial Contracts, March 19, 2015 ("Hague Principles")
        - Articles 1, 1.2, 1.3(a)(b)(c)(d)(f), 2.1, 2.2, 2.3, 2.4, 3, 4, 4.2, 5, 6.1, 6.2, 7, 7.1, 8, 9.1, 9.1(a)(b)(f)(g), 10, 11.1, 11.2,11.3, 11.5, 12
        - HP Commentary
            - 1.6, 1.7, 1.25, 1.26, 1.27, 1.29,1.31, 1.32, 2.3, 2.6, 2.7, 2.9, 2.10, 2.12, 2.13, 2.14, 3.4, 3.10, 3.11,3.15, 4.11, 5.3, 5.4, 5.5, 6.1, 6.4, 6.7, 6.10, 6.28, 7.2, 7.8, 7.9, 7.10, 8.2, 9.2, 9.4, 9.5, 9.6, 9.8, 9.9, 9.11, 9.12, 11.16, 11.17, 11.18, 11.19, 11.22, 11.23, 11.25, 11.26, 11.31, 11.32, 12.3, 12.4
    - Convention on the Law Applicable to International Sales of Goods, June 15, 1955. ("1955 Hague Sales Convention")
        - Articles 2.2, 6
    - Convention relating to a Uniform Law on the International Sale of Goods, July 1, 1964 ("1964 Sales Convention")
    - Convention on the Law Applicable to Contracts for the International Sale of Goods, December 22, 1986 ("1986 Hague Sales Convention")
        - Articles 10(1), 12 (g), 17, 18, 19, 20
    - Convention on the Law Applicable to Agency, March 14, 1978 ("Hague Agency Convention")
        - Articles 16, 17
    - Convention on Choice of Court Agreements, June 30, 2005
    - Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006
    - UNIDROIT Principles of International Commercial Contracts (2016 revision and prior)
    - UNIDROIT Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts
    - Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7, 1930, Geneva
    - Convention Providing a Uniform Law for Cheques, January 1, 1934, Geneva
    - UN Convention on Contracts for the International Sale of Goods ("CISG")
        - Articles 1(2), 4, 6, 7(1), 7(2), 8(3), 9, 9(1), 9(2), 10(a)
    - UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention")
        - Article V(2)(b)
    - UN Convention on the Assignment of Receivables in International Trade, December 12, 2001
    - UNCITRAL Model Law on International Commercial Arbitration (1985)
        - Articles 1(3), 2(A)(1), 16.1, 28, 28.1, 28.2, 28.4, 36
    - UNCITRAL Arbitration Rules (1976) and as revised in 2010
        - 1976: Article 33
        - 2010: Articles 34(2), 35
    - UNCITRAL Model Law on Secured Transactions (2016)
    - Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965 ("ICSID Convention")

        - Article 42
    - UNHRC. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, June 16, 2011 ("Ruggie Principles")
    - Universal Declaration of Human Rights, 1948
        - Articles 17 and 29.1
    - Statute of the International Court of Justice, Article 38
    - European Convention on International Commercial Arbitration, April 21, 1964
    - Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950
    - Treaty on the Functioning of the EU, December 13, 2007 ("TFUE")
        - Articles 85, 288
    - Principles of European Contract Law, (Parts I & 11, 1999), (Part III, 2003) ("PECL")
        - Article 1:107
    - Draft Common Frame of Reference, 2008 ("DCFR")

- Other International References

    - AAA, International Arbitration Rules (2009)
        - Article 28.2
    - FCI, Code of International Factoring Customs
    - FIDIC, Conditions of Contract for Works of Civil Engineering Construction (1987)
    - IBA, Rules on the Taking of Evidence in International Arbitration
    - ICC, International Commercial Terms or "INCOTERMS"
    - ICC, Rules of Arbitration (2012 and 2017)
        - Articles 21, 41
    - ICC, Uniform Customs and Practice for Documentary Credits or "UCP".
    - ICC, Advertising and Marketing Communication Practice
    - ILI, The Proper Law of the Contract in Agreements between a State and a Foreign Private Person, September 11, 1979
    - ILI, The Autonomy of the Parties in International Contracts Between Private Persons or Entities, 1991
    - ITC, Model Contract for the International Commercial Sale of Perishable Goods

- Argentina
    - Civil and Commercial Code of Argentina of 2014
        - Articles 255, 2561, 2595, 2596, 2651 and 2652
    - Civil Code of Argentina of 1869
- Bolivia
    - Constitution of the Republic of Bolivia
        - Article 320.II
    - Commercial Code of Bolivia
        - Articles 852 et seq.
    - Civil Code of Bolivia
        - Article 454
    - Law 1770 of 1997
        - Articles 54 and 73
    - Law 708 of 2015
        - Article 44.I
- Brazil
    - Introductory Law to the Provisions of Brazilian Law ("LINDB")

        - Articles 9, 9(2), 16 and 17
    - Civil Code of Brazil of 1916
        - Article 13
    - Bill 4905 (draft before Congress)
    - Law 9307 of 1996
        - Article 2
- Canada
    - Civil Code of Quebec (“CCQ”)
        - Articles 3076, 3077, 3080-3081, 3109, 3111-3112, 3117-3118
    - Saskatchewan: Consumer Protection and Business Practices Act, SS 2014, c. C-30.2, sections 15 and 101(2)
    - Ontario: Employment Standards Act, 2000, SO 2000, c. 41, s. 5
- Chile
    - Civil Code of Chile of 1857
        - Article 135
    - Civil Code of Chile
        - Articles 16, 1462 and 1545
    - Commercial Code of Chile
        - Articles 113 and 141
    - Decree Law 2.349 of 1978
        - Article 1
    - Law 18.802 of 1989
    - Law 19.971 of 2004
        - Articles 16.1, 28 and 28.45
- Colombia
    - Civil Code of Colombia
        - Article 20
    - Commercial Code of Colombia
        - Articles 1328 and 1408
    - Law 1818 of 1998
        - Article 208.1
    - Law 80 of 1993
        - Article 13
    - Law 1563 of 2012
        - Articles 62, 79.2 and 101
    - Resolution 112 of 2007 issued by the Colombian Tax and Customs Authority
        - Article 3
- Costa Rica
    - Law 7727 of 1997 -Alternative Conflict Resolution and Promotion of Social Peace
    - Law 8937 of 2011 - Law of International Commercial Arbitration
    - Law 9342 of 2016 - Code of Civil Procedure
- Cuba
    - Civil Code of Cuba
        - Article 17
    - Decree Law 250 of 2007
        - Article 13
- Dominican Republic
    - Law 489 of 2008
        - Articles 11 and 33.4
    - Law 544 of 2014 on Private International Law
        - Articles 7, 58, 58(2), 59, 60 and 61(2)
- Ecuador
    - Law 000.RO/145 of 1997 on Arbitration and Mediation
        - Article 5

- El Salvador
    - Constitution of the Republic of El Salvador
        - Article 23
    - Civil Code of El Salvador
        - Article 1416
    - Decree 914 of 2002 - Law on Mediation, Conciliation, and Arbitration
        - Articles 30, 59 and 78
- Guatemala
    - Decree 2 of 1989 - Law on the Judiciary Branch
        - Article 4 and 31
    - Decree 67 of 1995 - Arbitration Law of Guatemala
        - Articles 21.1, 36.1 and 36.3
- Honduras
    - Decree 161 of 2000
        - Article 39
- Mexico
    - General Regulation of International Contracts
    - Federal Civil Code
        - Article 13, Section V
    - Commercial Code
        - Article 1423,1432 and 1445
    - Code of Civil Procedure of Mexico City, Federal District
        - Article 628
    - Rules of the Arbitration Center of Mexico (2009)
- Nicaragua
    - Law 540 of 2005
        - Article 42 and 54
- Panama
    - Law 7 of 2014 - Code of Private International Law
    - Law 61 of 2015 - Code of Private International Law
        - Articles 7, 26, 27, 43, 69, 70, 72, 86 and 87
    - Law 5 of 1999 - Arbitration, conciliation, and mediation
        - Article 3 and 30
    - Law 131 of 2013 - National and International Arbitration in Panama
- Paraguay
    - Law 5393 of 2015 – Law Applicable to International Contracts
        - Articles 1, 2, 3, 4, 4.2, 4.3, 4.4, 5, 6, 7, 8, 9, 10, 11.1, 12, 13, 14, 15, 16, 17 and18
    - Law 1879 of 2002
        - Articles 3, 19, 32, 40(b) and 46(b))
    - Arbitration Law of Paraguay
        - Articles 40(b) and 46(b)
    - Arbitration Rules of the Arbitration and Mediation Center of Paraguay (2010)
- Peru
    - Decree 1071 of 2008
        - Article 34(3), 41(2), 57(2), 57(4), 63(1)(f) and 75(3)(b)
    - Civil Code of Peru
        - Article 2047, 2048, 2049 and 2095
    - Arbitration Rules of the Chamber of Commerce of Lima (2017)
    - Arbitration Rules of Amcham Peru
- United States
    - ALI, First Restatement of Conflict of Laws of 1934
    - ALI, Second Restatement of Conflict of Laws of 1971
        - Sections 6, 145,187(2), 188, 288 (comment b)

- ALI, Third Restatement of Conflict of Laws (preliminary draft 2017)
- US Uniform Commercial Code ("UCC")
- - Section I-301.
- NY Gen. Oblig. Law § 5-1401(1)

- Uruguay
  - Draft Law of DIPr of Uruguay
    - Article 13 and 51
  - Civil Code of Uruguay
    - Article 2399 and 2403 of the Appendix
  - Law No. 16.603 of 1994
    - Article 2404
- Venezuela
  - Law on Private International Law (Official Gazette No. 36.511, 6 August 1998)
    - Articles 1, 2, 4, 8, 10, 29, 30 and 31
  - Commercial Arbitration Law (Official Gazette No. 36.430, 7 April 1998)
    - Articles 7 and 8

- Others
  - Austria - Civil Code of 1811
  - Austria - Code of Civil Procedure, as amended by the Arbitration Act of January 13, 2006
    - Article 603(2)
  - Belgium - Code of Civil Procedure
    - Article 1700
  - France - Code of Civil Procedure (as amended by Decree 2011-48 of 2011
    - Article 1496, 1504, 1514, 1520(5), 1511
  - Germany - Code of Civil Procedure
    - Article 9
  - Italy - Code of Civil Procedure
    - Article 834
  - Japan - Code of Private International Law of 2006
    - Article 1096(f)
  - Netherlands - Code of Civil Procedure
    - Article 1054, 1054(2)
  - Portugal - Code of Civil Procedure of 1986
    - Article 1096(f)
  - Russia - Civil Code
    - Article 1210(3) and 1210(4)
  - Slovenia - Arbitration Act of April 28, 2008
    - Article 33(2)
  - Spain - Arbitration Act
    - Article 34(2))
  - Switzerland - Private International Law Act
    - Article 116(2), 187(1)
  - United Kingdom
    - Unfair Contract Terms Act of 1977
    - Sale of Goods Act of 1979

APPENDIX D

TABLE OF CASES[247]

- International
    - Audiolux SA e.a. v. Groupe Bruxelles Lambert SA, CJEU, October 15, 2009, Case C-101/08
    - Federal Republic of Germany v. Council of the European Union, CJEU, October 5, 1994, Case C-280/93
    - Société Thermale d´Eugénie-Les Bains, ECJ, July 18, 2007, Case C-277/95
    - Annelore Hamilton v. Volksbank Filder eG, ECJ, April 10, 2008, Case C-412/06
    - Pia Messner v. Firma Stefan Krüger, ECJ, September 3, 2009, Case C-489/07
    - Channel Tunnel Group Ltd. and France Manche SA v. Balfour Beatty
    - Hellenic Republic v. Nikiforidis. ECJ, October 19, 2016, Case C-135/15
    - Krombach v. Bamberski, 2000, Case C-7/98
    - Eco Swiss China Time Limited v. Benetton International NV, CJEU, June 1, 1999, Case C-126/97
    - Ingmar GB Ltd. v. Eaton Leonard Technologies Inc., CJEU, 2000, Case C-381/98
    - Frahuil SA v. Assitalia SpA, CJEU, February 5, 2004, Case C-265/02
    - Petra Engler v. Janus Versand GmbH, CJEU, January 20, 2005, Case C-27/02
    - Permanent Tribunal of Review of MERCOSUR, Advisory Opinion No. 1, 2007
    - Council of the Common Market, MERCOSUR, Decision No. 3, 1998
    - Sapphire International Petroleum Ltd. V. The National Iranian Oil Company (1964), 13 ICLQ 1011
    - Asia v. Republic of Indonesia, ICSID Case, 1983
    - Saudia Arabia v. Arabian American Oil Co. (ARAMCO), 1958
    - Libya v. Texaco and Liamco, 1977
    - Aminoil v. Kuwait, 1982
    - Framatome v. Iran, 1982
    - Hotel Materials Case, ICC Arbitration Case No. 7153, 1992
    - Steel Bars Case, ICC Arbitration Case No. 6653, 26 March 1993
    - Cowhides Case, ICC Arbitration Case No. 7331, 1994
    - Printed Banknotes Case, ICC Arbitration Case No. 9474, February 1999
    - Additional ICC Cases: 1110/1963; 1422/1966; 1641/1969; 2152/1972; 2291/1975; 2637/1975; 3267/1979; 3380/1980; 3540/1980; 3327/1981; 3344/1981; 2730/1982; 4145/1984; 4434/1983; 10279/2001
    - Ad hoc arbitral award in Costa Rica, 30.04.2001 / UNILEX
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- Argentina
    - Sagemüller, Francisco v. Sagemüller de Hinz, Liesse et al., Second Bench of the Second Civil and Commercial Chamber of Paraná (Entre Ríos), August 10, 1988
    - Third Bench of the National Commercial Chamber, October 27, 2006
- Bolivia
    - Constitutional judgment 1834/2010-R, Constitutional Court of Bolivia, October 25, 2010
- Brazil
    - Superior Court of Labor (Tribunal Superior do Trabalho) ("TST"), DEJT, October 15, 2010, Ruling No. 186000-18.2004.5.01.0034
    - Noridane Foods S.A. v. Anexo Comercial Importação e Distribuição Ltda, Court

[247] Only a few key cases have been cited in this Guide to illustrate particular points. Resource constraints did not permit more precise case citations.

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    - Voges Metalurgia Ltda. v. Inversiones Metalmecanicas I.C.A. – IMETAL I.C.A, Court of Appeal of Rio Grande do Sul, March 30, 2017, Ruling No. 4-25.2016.8.21.7004192500
    - Court of Justice of Sao Paulo (Tribunal de Justiça de São Paulo) ("TJSP"), DJE, November 30, 2011, Ruling No. 9066155-90.2004.8.26.0000
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    - Imperial Life Assurance Co. of Canada v. Colmenares, Supreme Court of Canada, [1967] SCR 443
    - Block Bros. Realty Ltd. v. Mollard, [1981] B.C.J. No. 4, 122 D.L.R. (3d) 323 (C.A.)
    - Canadian Acceptance Corporation Ltd. v. Matte and Matte, [1957] S.J. No. 41. (Sask. C.A.)
- Chile
    - Tschumi Case, Supreme Court, Law and Jurisprudence Magazine, XLII, part 2, section 1, page 331
    - Exequatur State Street Bank and Trust Company, Supreme Court, May 14, 2007, Ruling No. 2349-05
    - Mauricio Hochschild S.A.C.I. v. Ferrostaal A.G., Supreme Court, January 22, 2008. Ruling No. 3247-2006
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  - DYC Fishing Limited v. Perla Del Caribe Inc., Supreme Court Civil Appeal of Jamaica, [2014] JMCA Civ. 26, §§ 42-44, citing R. v. International Trustee for the Protection of Bondholders, [1937] 2 All E.R. 164
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  - India - Videocon Power Limited, Rep. v. Tamil Nadu Electricity Board. Madras High Court, December 2004. 2005 (3) ARBLR 399 Madras, 2004 (5) CTC 668
  - Italy - Assael Nissim v. Crespi, Supreme Court, Judgment of June 28, 1966, No. 1680
  - Luxembourg - District Court of Luxembourg, Judgments of July 7, 1988 and March 17, 1990
  - Netherlands - Alnati, Netherlands Supreme Court, May 13, 1966
  - United Kingdom - Deutsche Schachtbau- und Tiefbohrgesellschaft mbH and Others v. Shell International Petroleum Company Limited. (H. L.) (July 1988), 27 ILM 1032

APPENDIX E

DATABASES AND ELECTRONIC SOURCES

To assist with the uniform interpretation of international texts, two of the three international organizations dedicated primarily to the development of private international law maintain online databases that contain judicial decisions and arbitral rulings. As already noted above, UNCITRAL has created a system to collect Case Law on UNCITRAL Texts ("CLOUT"), which can be accessed in print or over the internet (www.uncitral.org/uncitral/en/case_law.html). A similar system exists at UNIDROIT - the Intelligent" database of international case law and bibliography on the UNIDROIT Principles and on the CISG - and the related database is known as UNILEX (www.unilex.info). HCCH also maintains a bibliography that is available on the HCCH website.

There are also other databases that contain information relevant for comparative law and uniform interpretation. One is the Pace Law Albert H. Kritzer CISG Database, maintained by Pace University in the United States (www.iicl.law.pace.edu/cisg/cisg). Another database, maintained by the Center for Transnational Law ("CENTRAL") at Cologne University in Germany, has a method for the progressive codification of new cross-border commercial law. For that purpose, an open list of principles dealing with commercial law was prepared, which is kept easily accessible over the internet and constantly updated with the addition of judicial and arbitral jurisprudence, doctrine, and other relevant information (www.trans-lex.org). There are also a handful of regional CISG databases. One example is as follows: diprargentina.com, base de datos de la U. Carlos III - Pilar Perales.

The official texts and current status of the Inter-American private international law instruments are accessible at the OAS website:

http://www.oas.org/en/sla/dil/private_international_law_conferences.asp

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