Informational Meeting
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Guide on the Law Applicable to International Commercial Contracts in the Americas

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Organization of American States
I. MANDATE
II. BACKGROUND
   a. “problem” - why did CJI consider Guide necessary?
   b. “process” - development of Guide
III. KEY HIGHLIGHTS
IV. CONTRIBUTIONS TOWARDS ECONOMIC DEVELOPMENT
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I. MANDATE

INTERNATIONAL LAW
AG/RES. 2930
(Adopted June 27, 2019)

To thank the Inter-American Juridical Committee (CJI) for forwarding the Guide on Law Applicable to International Commercial Contracts in the Americas..., to take note thereof, and to urge it to disseminate [the Guide] as widely as possible through its Technical Secretariat.
II. BACKGROUND – “the problem”

Which law should govern?

...or “choice of law”
II. BACKGROUND – “the problem”

Which law should govern?

Choice-of-laws rules (State A)

Choice-of-laws rules (State B)

…or “choice of law”
Which law should govern?

...party autonomy!
II. BACKGROUND – “the problem”

Why is this important?

I am risk averse!!
II. BACKGROUND – “the process”

1994 Inter-American Convention on the Law Applicable to International Contracts ("Mexico Convention")
- ratified by Mexico and Venezuela

2014 CJI considers options:
- encourage ratification? (but law had developed, e.g., HCCH Principles)
- re-open convention? - new legal instrument?

2014-2017 CJI undertakes:
- series of studies, consultations w Member States and experts
- decides on a Guide

2017-2019 Guide is developed:
- Rapporteur prepares first draft
- circulated to >40 experts
- UNCITRAL, HCCH, UNIDROIT, ASADIP
- Rapporteur and DIL prepare second draft
- circulated to smaller subset of experts

2019 CJI:
- Guide is adopted
“Council noted the publication of the OAS Guide on the Law Applicable to International Contracts in the Americas and welcomed the Permanent Bureau’s cooperation with the OAS in this regard.”

HCCCH, March 2019
III. KEY HIGHLIGHTS

18 Summarized Recommendations

1 – 6

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 – 16

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 - 18
IV. CONTRIBUTIONS: ECONOMIC DVPMT

Declaratory and Aspirational

Greater legal certainty
Greater legal harmonization

Promotes cross-border business investment
Facilitates dispute resolution

Other related areas of law
IV. CONTRIBUTIONS: ECONOMIC DVPMT

We recognize party autonomy!

A level playing field!!

At last!!
Inter-American Juridical Committee

Guide on the Law Applicable to International Commercial Contracts in the Americas
V. SUMMARIZED RECOMMENDATIONS

1.0 The purpose and objectives of this Guide should be taken into consideration by OAS Member States, in particular, by legislators considering reform 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 Legislator}s 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.
V. SUMMARIZED RECOMMENDATIONS

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.
V. SUMMARIZED RECOMMENDATIONS

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.
V. SUMMARIZED RECOMMENDATIONS

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.
V. SUMMARIZED RECOMMENDATIONS

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.
V. SUMMARIZED RECOMMENDATIONS

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.
Plan for Dissemination

- Availability online in English and Spanish
- Official print publication in English and Spanish
- Presentations
  - American Bar Association, Section on International Law, April 2019 - panel discussion
  - ASADIP Conference, November 2019 - panel discussion
- Acknowledgements from UNIDROIT, HCCH, ASADIP, etc.
- Promotion
  - through bar associations, judiciary, chambers of commerce
  - in law schools and moot competitions
  - citations by academics, references in articles and decisions

Support from Permanent Missions for Dissemination

- Spread the word
- Encourage use of Guide
- Send DIL your ideas and suggestions
- Introductions to bar associations and other relevant organizations
Thank you!