

# Introduction

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, UNIDROIT, 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 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 should 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.