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LAW APPLICABLE TO INTERNATIONAL CONTRACTS

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. MANDATE

At the 84th regular session of the Inter-American Juridical Committee, held in the city of Rio de Janeiro, Brazil, on March 10 to 14, 2014, I presented the topic "Inter-American Convention on the Law Applicable to International Contracts (the 1994 Convention of Mexico City)," in compliance with Article 99 of the Charter of the Organization of American States, as an initiative for the progressive development and codification of International Law.

On that occasion, it was decided it would be useful to review some of the Private International Law conventions signed under the *aegis* of the Inter-American Specialized Conferences on Private International Law (the CIDIP process), in order for the Organization's Member States to take advantage of and benefit from some of the innovative solutions proposed in those Conventions.

The Inter-American Convention on the Law Applicable to International Contracts was taken as the reference for this review and analysis, since it represents a significant step forward in harmonizing the legal systems of the States that make up the Inter-American System (*common law* and *civil law*), unifying the provisions governing conflicts of laws in contractual matters on the basis of modern solutions adapted to the constant changes of international trading practices.

During the debate on this topic among the Members of the Inter-American Juridical Committee and given the importance of the issue for the codification and progressive development of Private International Law, it was agreed that it would remain on the Committee's agenda as "Law Applicable to International Contracts."

At the 85th regular session of the Inter-American Juridical Committee, held in the city of Rio de Janeiro, Brazil, on August 4 to 8, 2014, it was decided it would be useful to present *a questionnaire* to the States – and, in addition, to experts, legal practitioners, and academics – on their interest in the Inter-American Private International Law conventions and, most particularly, the Inter-American Convention on the Law Applicable to International Contracts.

This Rapporteur's Report presents the *questionnaire* for distribution to the Organization's Member States, along with a series of thoughts on the progress made with this issue, given that several countries in the region – such as the Dominican Republic, Panama, and Paraguay – have recently enacted modern laws on the topic.

II. CONSIDERATIONS

Rapporteur's Report CJI/doc.464/14, "Law Applicable to International Contracts," which I presented at the 85th regular session of the Inter-American Juridical Committee, held in the city of Rio de Janeiro, Brazil, on August 4 to 8, 2014, described the May 2013 presentation to the Congress of the Republic of Paraguay of a bill for the law applicable to international contracts. The aim of that bill was to equip Paraguay with a law containing a set of norms embodying the principles regarding the law applicable to crossborder contracts, which were taken from the Principles on Choice of Law in International Commercial Contracts, recently adopted by the Hague Conference on Private International Law, and from the Inter-American Convention on the Law Applicable to International Contracts (Convention of Mexico City of 1994), which was a source of inspiration for the Hague Principles.

The Paraguayan bill is now a reality, after the President of the Republic of Paraguay signed it into law on January 15, 2015, as Law No. 5.393 on the Law Applicable to International Contracts. In doing so he announced that Paraguay was adopting a piece of legislation that contained the principles on the law applicable to crossborder contracting that were recently adopted at the Hague Conference on Private International Law, given that Paraguay's regime for international contract law was out of date and that this new law was a part of the policy of facilitating investment and trade in goods and services with the rest of the world.

This bill, as stated by one of its drafters, Dr. José Antonio Moreno Rodríguez: "was inspired by the Hague Principles on Choice of Law in International Commercial Contracts published by the Hague Conference on Private International Law".

This instrument addresses the applicable law when the parties have a choice of law, and one of its main sources was the Convention of Mexico City on the Law Applicable to International Contracts, adopted by the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V) of the Organization of American States (OAS).

The Convention of Mexico City, reproduced almost *verbatim*, was also the inspiration for the provisions contained in the Paraguayan law for situations in which no choice of law was made, a matter that was not addressed by the Hague Principles.

In several of the "whereas clauses" of its preamble, Paraguay's recently adopted Law No. 5.393 on the Law Applicable to International Contracts states:

> With this law proposal, we intend to provide Paraguay with a body of law which contains the "Principles" on applicable law to cross-border contracting, principles which were recently proposed by The Hague Conference of Private International Law, maximum codifying organ in the field.
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> It shall be taken into account that our country counts with an anachronistic regime in matters of applicable law to contracting for cross-border commerce, situation that must be reverted, which is fundamental for a Mediterranean country like Paraguay. A large proportion of the current norms contained in the Civil Code, are inspired in ancient treaties or nineteenth century codes, which contradict the commercial necessities of today's world.
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> The Principles afore mentioned, among other uses, shall serve as an inspiration to national legislators for the elaboration of laws which unify the regulation on the matter, which is highly desirable to achieve major predictability in international commercial relationships.
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> It is known that Paraguay has had active participation in the elaboration of such instrument, as in official representation of the country before the special committee created in The Hague for such matter, and through participation of a conational in the Group of Experts whom for many years elaborated the "Principles" project.
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> The present law proposal basically reproduces the approved text at the mentioned The Hague Conference, which results highly recommendable, along with some convenient modifications, in order to synchronize it with the Mexico Convention of 1994 on applicable law to international contracts, approved by Inter-American Specialized Conferences on Private International Law (CIDIP's) of the Organization of American States, whose text served as an inspiration in the elaboration of the abovementioned "Hague Principles". As a matter of fact, the Mexico Convention can be incorporated via ratification or via the adoption of a law which captures the regulation's spirit- as it has already occurred in Latin America.
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> This law proposal incorporated the virtues of the Mexico Convention, also capturing the advancements of the approved instrument in The Hague.
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> Currently possessing one of the most antique regimes of the world on cross-border contracting matters, accordant to what was

> previously pointed, Paraguayan law will –with this new body of law- become forward-looking. This law can even inspire others, which may be dictated in the world, given that it sets a path on how to embody The Hague principles in a legislative text.
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> It is important to say that this law proposal, if approved, will have a great impact in the world, and Paraguay will be counting with the most modern law in the matter.

An analysis of the Republic of Paraguay's recently adopted Law No. 5,393 on the Law Applicable to International Contracts reveals that most of its provisions were taken from the Inter-American Convention on the Law Applicable to International Contracts (1994 Convention of Mexico City) and from the Hague Principles on Choice of Law in International Commercial Contracts.

Analyzing the Hague Principles on Choice of Law in International Commercial Contracts, chiefly as regards the selection of applicable law, it can be seen that the universal system for the codification of Private International Law took its inspiration from the regulations set forth in the Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention), as was noted in the feasibility studies conducted by the Hague Conference on Private International Law into the choice of applicable law in international contracts, given that the 1994 Convention of Mexico City served as the basis for drafting the Hague Principles on Choice of Law in International Commercial Contracts.

Similarly, many of the Hemisphere's most innovative and groundbreaking laws for international contracts – among them, Venezuela's Law on Private International Law of 1998 –are based on the Mexico City Convention on the Law Applicable to International Contracts, through the inclusion of its main principles.

In consideration whereof, it would be useful for the States of the Inter-American System to have innovative laws on this matter, with which they could meet the new challenges posed by international contracting. It must be borne in mind that the situation has changed substantially since 1994, when the forward-looking Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention) was adopted. Modern legal frameworks that reflect new forms of crossborder contracting must now be enacted, as Paraguay has done with its Law No. 5,393 on the Law Applicable to International Contracts.

Thus, the preamble to Paraguay's recently adopted law indicates how the Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention) can be adopted by the legislations of the Inter-

American System's Members by stating that it may be incorporated by ratification, or by the enactment of a law that reflects the spirit of its provisions.

That was how Venezuela incorporated the guiding principles of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention) into its Law on Private International Law of 1998: not material incorporation by *verbatim* copying of the Convention's articles, but by using it as a source of law for producing modern domestic international contracting legislation. In that way, the Convention complements the new law and, in addition, becomes a basic element for interpreting the law and applying solutions in accordance with it.

Thus, should a country decide against the ratification of the Inter-American Convention on the Law Applicable to International Contracts (Convention of Mexico City), it can use it as a starting point through the incorporation of its guiding principles, as Venezuela did with its Law on Private International Law of 1998 and, more recently, as Paraguay did with its Law No. 5,393 on the Law Applicable to International Contracts of 2015. In this way, the states that make up the Inter-American System can equip themselves with modern domestic laws that are capable of meeting the new challenges of international contracting.

On October 15, 2014, the Dominican Republic enacted its Law No. 544-14 on Private International Law, the preamble of which contained the following clauses:

> That the provisions of private international law contained in the Civil Code and in special laws must be completely replaced by a new legal instrument that responds to the nation's current and future needs, in line with the agreements, conventions, and treaties signed and ratified by the Dominican Republic;
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> That this new legal instrument, while not diverging from the French juridical tradition that is consubstantial to our legal system, cannot ignore the developments occurring within the Inter-American Specialized Conference and the contributions of the Hague Conference on Private Law, above all because of the Dominican Republic's recent adoption of several of their conventions;
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> That it is necessary for the State to enact provisions for efficiently regulating civil relations, such as divorce between foreigners, respecting the autonomy of choice and in line with international treaties.

Regarding the determination of the law applicable to a contract, the Dominican Republic's Law No. 544-14 on Private International Law of October 15, 2014, states that contracts shall be governed by the law chosen by the parties

by means of an express agreement, which leads to the conclusion that it is based on the principle of autonomy of choice.

In the absence of an express agreement, the choice of applicable law shall be indicated in an evident fashion by the conduct of the parties and by the clauses of the contract taken as a whole.

The section dealing with contracts of the Republic of Panama's Law of May 8, 2014, enacting the Code of Private International Law – another of the hemisphere's new laws based on the principle of autonomy of choice – states that the parties' autonomy of choice shall regulate and govern international contracts, with the sole limitations of public order and fraud under the applicable law, and that the Inter-American Convention on the Law Applicable to International Contracts (the Mexico City Convention of 1994), as regards the determination of applicable law, refers to the broadest possible application of the principle of autonomy of choice.

In addition, many of the Hemisphere's States have used the CIDIP process as a source of law in planning amendments to their domestic legislation. The CIDIP's have been a constant reference point for doctrine, jurisprudence, and legislative amendments in the domestic laws of the countries of the Americas, to the extent that many of the solutions in its conventions have been taken as a reference in model laws and as guiding principles for lawmakers in the field of Private International Law.

With all these contributions, it would be useful for the OAS Member States to refer again to the Inter-American Convention on the Law Applicable to International Contracts as a unifying element of Private International Law on the topic of cross-border contracting. Thereby, it would help to bring State's laws into line with the demands of the contemporary world, standardizing the conflict of law provisions applicable to contracting, and taking as their foundation modern solutions adapted to the constant changes in international commercial practice.

Accordingly, it would be advisable for regional experts and academics to conduct a thorough analysis of how to make use of and benefit from the innovative solutions proposed in the Inter-American Convention on the Law Applicable to International Contracts. This instrument, in addition, incorporates the provisions of both common law and civil law, given that when it was negotiated, Canada and most of the Caribbean states that joined the OAS after 1990 were already Members of the Organization, and a meeting of experts involving top-level academics was held to develop its legal and structural bases.

The discussion held within the plenary of the Inter-American Juridical Committee concluded that a questionnaire should be prepared, for distribution to the States, experts, legal practitioners, and academics, in order for them to indicate whether there is any interest in reviewing the Inter-American

Conventions produced by the CIDIP process, particularly the Inter-American Convention on the Law Applicable to International Contracts, known as the Convention of Mexico City of 1994.

That *questionnaire* is of major importance at the present time because this year marks the fortieth anniversary of the Inter-American Specialized Conferences on Private International Law, which began in Panama City in 1975 and established the CIDIP process.

Accordingly, as one of the Rapporteurs for this topic, I present the following *questionnaire* in order for the Secretariat for Legal Affairs, through its Department of International Law, to distribute it among the Member States of the Organization of American States.

III. *QUESTIONNAIRE*

QUESTIONNAIRE ON THE IMPLEMENTATION OF THE INTER-AMERICAN CONVENTIONS ON PRIVATE INTERNATIONAL LAW

1. Is there any indication that the Hague Principles on Choice of Law in International Contracts use, as one of their main sources, the Inter-American Convention on the Law Applicable to International Contracts, known as the Convention of Mexico City of 1994?

2. The general trend visible at the global level that of enshrining the principle of autonomy of choice in the selection of applicable law in international contractual relations, and the Inter-American Convention on the Law Applicable to International Contracts assigns a key role to that principle. Is that one of the fundamental aspects of the Convention?

3. The Mexico City Convention's enshrining of the principle of autonomy of choice for selecting applicable law in international contracts could lead to its rejection because of the possibility of causing disadvantages or imbalances for the weaker party in a contractual relationship. If that were the case, could this be overcome through the enforcement of the provisions related to mandatory requirements and public order contained in Articles 11 and 18 of the Inter-American Convention on the Law Applicable to International Contracts?

4. In the event of a failure to choose or an ineffective choice, the Inter-American Convention on the Law Applicable to International Contracts provides that the applicable law shall be that with which the contract has the closest ties. For the Latin American countries with *civil law* traditions, does this flexibility demand a major change of mentality, and could adapting to it foster fear and insecurity?

5. Could the failure to make use of the most characteristic performance principle for determining the applicable law affect the enforcement of the

Inter-American Convention on the Law Applicable to International Contracts?

6. Is taking into account the General Principles of International Commercial Law accepted by international organizations (UNIDROIT Principles) in determining objective and subjective elements an innovative aspect of the Inter-American Convention on the Law Applicable to International Contracts?

7. Is the fact that the Inter-American Convention on the Law Applicable to International Contracts refers to the *lex mercatoria* important for the regulation of Private International Law?

8. The Inter-American Convention on the Law Applicable to International Contracts excludes the topic of consumer contracts from its scope of application, and it is therefore unsuited and insufficient for protecting the region's consumers. What other matters regulated by the Inter-American Convention on the Law Applicable to International Contracts would not be appropriate for the Hemispheric Law of the Americas Region?

9. Would it be useful to undertake an appropriate dissemination effort of the benefits that the Inter-American Convention on the Law Applicable to International Contracts provided for crossborder contracting in order to encourage its ratification by the OAS Member States - given that it represents a significant step forward in harmonizing the legal systems of the States that make up the Inter-American System (*common law* and *civil law*) and that it unifies the provisions for conflicts of law in contracting by basing itself on modern solutions that are adapted to the constant changes in international commercial practice?

10. Could the dissemination effort described in the previous question be used in connection with other Inter-American Private International Law Conventions of importance for bolstering cross-border trade in the region or for strengthening regional integration processes, to enable the OAS Member States to take advantage of and benefit from the innovative solutions proposed in those conventions?

11. Given the progress that has been made in arbitration in recent years due to current conditions having changed since the adoption of the Convention in 1994, would an appropriate information and dissemination effort on the contents and innovative solution mechanisms of the Inter-American Convention on the Law Applicable to International Contracts be received positively in the countries of the Inter-American System,?

12. Venezuela's 1998 Law on Private International Law bases some its provisions on the Inter-American Convention on the Law Applicable to International Contracts. Does that mean that the spirit of its provisions remains up-to-date in contemporary international contracting?

13. Similarly, the Republic of Paraguay's Law No. 5,393, on the Law Applicable to International Contracts, enacted on January 15, 2015, uses the Inter-American Convention on the Law Applicable to International Contracts as one of its main sources. Does that mean that the spirit of its provisions remains up-to-date?

14. The Dominican Republic's Law No. 544-14 on Private International Law of October 15, 2014, states that, as regards the determination of applicable law, a contract shall be governed by the law chosen by the parties by means of an express agreement and that, in the absence thereof, the determination shall be indicated in an evident fashion by the conduct of the parties and by the clauses of the contract taken as a whole. Thus, does this law reflect the spirit of the Inter-American Convention on the Law Applicable to International Contracts?

15. The Republic of Panama's Law of May 8, 2014, adopting the Code of Private International Law, stipulates that Party Autonomy shall regulate and govern international contracts, with the sole limitations of public order and fraud under the applicable law. Hence, does this law reflect the spirit of the provisions of the Inter-American Convention on the Law Applicable to International Contracts?

16. Would it be useful to urge the States of the Americas to ratify the Inter-American Convention on the Law Applicable to International Contracts? If not, could it be incorporated by means of its guiding principles, through the enactment of laws that reflect the spirit of its provisions, as has occurred in several countries of Latin America, particularly Venezuela and Paraguay?

17. Could the principles set out in the Inter-American Convention on the Law Applicable to International Contracts be used as a source by the lawmakers of the Americas in drafting legislation to standardize the regulations governing international contracting in the region?

18. Forty years after the first Specialized Conference on Private International Law, which was held in Panama City and which created the CIDIP process that has worked for the harmonization of Private International Law in the Hemisphere, would it be useful to review the many other conventions produced by that process in order to secure additional ratifications or to incorporate their provisions by the enactment of laws that reflect their spirit?

19. Is there any complementarity between the Inter-American Specialized Conferences on Private International Law (the CIDIP process) and the Hague Conference on Private International Law, or are the processes mutually exclusive?

20. In order to publicize the Inter-American Conventions on Private International Law produced by the CIDIP process, so that the OAS Member States can confirm the innovative solutions that they provide in the area of contemporary Private International Law, would it be advisable to adopt a follow-up mechanism to ensure uniformity in their interpretation and execution, thereby making use of the spirit contained in its their provisions and keeping the Region's States from preferring the universal codifying body?

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QUESTIONNAIRE ON THE IMPLEMENTATION OF THE INTER-AMERICAN CONVENTIONS ON PRIVATE INTERNATIONAL LAW

(presented by Drs. Ana Elizabeth Villalta Vizcarra and David P. Stewart)

Part A: **The Mexico City Convention (For Governments)**

1. There is increasing acceptance at the international level of the principle of party autonomy in the choice of applicable law in international commercial contracts. The 1994 Inter-American Convention on the Law Applicable to International Contracts (known as the Mexico City Convention) embraces that principle. Is your domestic law consistent with that principle?
2. The Convention also provides that, if the parties to a contract do not choose the applicable law (or make an ineffective choice), the applicable law shall be the one with which the contract has the closest ties. Is your domestic law consistent with that rule?
3. A novel aspect of the Inter-American Convention on the Law Applicable to International Contracts is that it takes into account the general principles of international commercial law (UNIDROIT principles), as well as *lex mercatoria*. Are references to them important for your country's legislation?
4. If your country has not yet signed or ratified the Mexico City Convention, what specific issues or problems prevent that from occurring? Are any amendments to the Convention needed to resolve those issues or problems?
5. Would it be useful for the OAS to convene a meeting of government and private experts to discuss the Convention, its provisions and the benefits which would be achieved by widespread ratification and implementation among OAS Member States? Would your government send a representative?
6. Would it be useful to disseminate the potential benefits to OAS Member States of the Inter-American Convention on the Law Applicable to International Contracts and of other inter-American conventions on private international law that promote cross-border trade in the region and regional integration processes, so that the OAS Member States can take advantage of and benefit from the novel solutions put forward in those conventions?

Part B: For Academics and Expert Practitioners

1. Why has the 1994 Inter-American Convention on the Law Applicable to International Contracts ("the Mexico City Convention") not (yet) been