

FURTHERANCE OF THE LAW OF INTERNATIONAL CONTRACTS IN THE AMERICAS: A GUIDE TO THE LEGAL PRINCIPLES

(Presented by Drs. José Antonio Moreno Rodríguez and Ana Elizabeth Villalta Vizcarra)

MANDATE

The Inter-American Juridical Committee (“the Committee”) decided at its 88th Regular Session held in Washington, D.C. April 4-8, 2016, “to have the Rapporteurs draft a guide on principles, to be presented at the next session, with the support of the Department of International Law as the technical secretariat of the Committee”¹.

BACKGROUND

At the 84th Regular Session of the Committee, Dr. Elizabeth Villalta had introduced a new topic and document entitled "Private International Law" (CJI/doc.446/14), which considered several of the instruments that had emanated from the Inter-American Specialized Conferences on Private International Law (“CIDIP”), in particular the *Inter-American Convention on the Law Applicable to International Contracts* (“Mexico Convention”). She briefed the plenary on her participation in a meeting of the American Society of Private International Law (“ASADIP”) where she had observed an interest on the part of private international law experts in the Mexico Convention and in having support from the Committee for the review and dissemination of CIDIP instruments. The Committee agreed that a study of the Mexico Convention would be useful, that consultations should be held with states and experts and practitioners, and changed the title of the new mandate to “Law applicable to international contracts.”²

At the 85th Regular Session, co-rapporteurs Dr. Villalta and Dr. Gélin Collot presented additional reports, entitled “Law Applicable to International Contracts,” (CJI/doc.464/14) and “Inter-American Convention on Law Applicable to International Contracts” (CJI/doc.466/14 rev.1). After discussions of these reports, the Committee adopted the proposal that “the rapporteurs consult the States, including practitioners and academics, about the interest that represents such legal instruments, and that they come up with pertinent questions for the Secretariat to distribute in the form of a questionnaire.”³

At the 86th Regular Session, Dr. Villalta presented a new version of her paper (CJI/doc. 464/14 rev.1) and the first version of the questionnaire for member states. At the suggestion of the plenary, the draft questionnaire was made shorter and was circulated by the secretariat to OAS Member States and academics.⁴ At the 87th Regular Session, Dr.

¹ CJI, 88th Regular Session, Summary Minutes (internal document).

² Annual Report of the IAJC to the General Assembly 2014, OEA/Ser.Q CJI/doc.472/14, 25 September 2014.

³ Annual Report 2014, *supra*.

⁴ The questionnaire was sent to the OAS Permanent Missions; it contained one part for response by the government and a second part for response by academics.

Villalta presented a new document entitled “Law Applicable to International Contracts” (CJI/doc.487/15) in which she reviewed responses to the revised questionnaire that had been received to that date. The secretariat was requested to send out a reminder to those States that had not yet responded.⁵

At the 88th Regular Session, Dr. Villalta presented an updated report and analysis that included the additional responses that had been received (CJI/doc.487/15 rev.1). The Committee also had available to it a background paper prepared by the secretariat entitled, “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). The Committee appointed Dr. José Antonio Moreno Rodríguez, a newly elected member of the Committee with expertise in the field of private international law, as co-rapporteur for the topic.

DECISION ON A GUIDE

At its 87th Regular Session held in Rio in August 2015, the Committee held a Roundtable on Private International Law with experts in the field; this dialogue was continued with another group of experts at its 88th Regular Session held in Washington, 2016. Results of these fruitful discussions were taken into consideration by the Committee, as evidenced by several of the decisions taken in regard to topics in private international law on the Committee’s agenda.

Within that context, on the topic of international contracts the Committee considered the documents that it had before it and the oral report of the rapporteur, Dr. Villalta, who provided a summary of the findings noted above. After fulsome discussion, and taking into account the documents and careful analysis of the rapporteur together with the inputs from the experts group, the Committee agreed that the next step would be to have the co-rapporteurs draft a guide on principles.

COLLABORATION

As has already been noted, several organizations have and continue toward the furtherance of principles important to the law of international contract. The work is frequently both sequential and contemporaneous. Work on the guide will be carried out respecting the principle of collaboration and reaching out for support from the wider legal community.

Moreover, OAS Member States have repeatedly encouraged such collaboration:

*To [...] instruct the Department of International Law to promote a greater spread of private international law among member states, in collaboration with other organizations and associations that work in this area, to include the United Nations Commission on International Trade Law, the Hague Conference on Private International Law, and the American Association of Private International Law.*⁶

In support of the within initiative, responses to the questionnaire described above were encouraged through the membership of ASADIP and several members were asked for supplemental information by the rapporteurs directly. The rapporteur, Dr. Moreno, has brought this initiative to the attention of UNCITRAL, UNIDROIT, and the Hague Conference and follow-up by the technical secretariat is ongoing.

PURPOSE AND OBJECTIVE OF GUIDE

⁵ Annual Report of the IAJC to the General Assembly 2015, OEA/Ser.Q CJI/doc.495/15, 8 September 2015.

⁶ International Law, AG/RES/2886 (XLVI-0/16, para.(i) 3.

The purpose of the Guide is to further the development of the law of international contracts in the Americas. In order to do so, the guide seeks to address the following:

- 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;
- to compile and disseminate these as a set of principles on the law of international contract for the Americas, based on the Mexico Convention and with the incorporation of subsequent developments in the field to date;
- to serve OAS Member States in their efforts to adopt domestic legislation in the field of the law of international contracts through the illustration of the use of these principles and their incorporation into domestic laws;
- to serve legislators, contracting parties, lawyers, members of the judiciary, and all other persons engaged in the field of the law of international contracts in the Americas.

It is important to clarify that the objective of this initiative is to provide a guide to the law of international contracts in the Americas; it is not a guide to the Mexico Convention. Of course, as that convention comprises the backbone in this area, it serves as the primary starting point. Given the recent adoption by the Hague Conference of the *Principles on Choice of Law in International Commercial Contracts* and their close relationship and relevance to the Mexico Convention,⁷ these will be referenced heavily as well.

PROGRESS TO DATE

The Department of International Law, under the direction of the rapporteurs, has developed an embellished outline for the guide. A first draft of the first three chapters of the text has been prepared in English. Progress continues on preparing the text for the remaining chapters.

⁷ For details, see the aforementioned document, “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). The Hague Principles apply only to choice of law in international commercial contacts. Thus, the scope is more limited than the Mexico Convention which contains substantive provisions in addition to choice of law rules. As provided in the preamble, they are intended to serve as a “model for national, regional, supranational or international instruments” and as a guide to “interpret, supplement and develop rules of private international law.” Accordingly, in the preparation of this Guide, firstly, insofar as choice of law is concerned, the discussions will fully illustrate the consistency between the Mexico Convention and the Hague Principles in the treatment of this subject. Secondly, the scope of this Guide extends beyond choice of law to also consider substantive provisions. And finally, these two instruments demonstrate consistency with each other and a reflection of the collaborative and contemporaneous efforts made by different entities to advance the field of private international law.

