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FIRST DRAFT GUIDE TO INTERNATIONAL CONTRACTS IN THE AMERICAS

(Presented by Dr. José Antonio Moreno Rodríguez)

In response to the initiative of Dr. Elizabeth Villalta, approved by the Inter-American Juridical Committee, the OAS Department of International Law sent a questionnaire to the governments of the Americas on the subject of international contracts, "Questionnaire on the implementation of the Inter-American Conventions on Private International Law", document OEA/Ser.Q, CJI/doc.481/15. Based on the replies, Dr. Villalta and the Department of International Law drafted a report on the state of the issue entitled "The Inter-American Convention on the Law Applicable to International Contracts and the Furtherance of its Principles in the Americas," document OEA/Ser.Q DDI/doc.3/16; see also "Law Applicable to International Contracts", document OEA/Ser.Q, CJI/doc.487/15 rev. 1.

The Inter-American Juridical Committee has decided to move ahead with drafting a guide on the subject, to which end the Department of International Law prepared a highly comprehensive synopsis that covered a range of topics to be addressed, "Furtherance of the Law of International Contracts in the Americas: A guide to the legal principles", document OEA/Ser.Q, CJI/doc. 510/16, 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 (Law Applicable to International Contracts, CJI/doc.464/14 rev. 1).

Drawing on all this input and with the unfailing support of the Department of International Law, particularly its director, Dante Negro, and Jeannette Tramhel and her team, I have written this first draft of an eventual guide with a view to its possible adoption by the Inter-American Juridical Committee. Likewise, with the efficient support of the Department of International Law, the above material has been translated into English for consideration at the August 2017 meeting of the Inter-American Juridical Committee.

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

It is not the intention that the draft be approved by the Committee at its August 2017 meeting. However, it is hoped that the Committee will express an opinion on the draft in general terms, and that its members will offer specific observations on different issues addressed therein.

If approval is given for this endeavor to continue, in the near term that would entail collecting the views of numerous experts in the region on the work done. The document will also be submitted to the world's highest codifying bodies in this area (UNCITRAL, UNIDROIT, and the Hague Conference), so that it can be enriched with their comments or even given some kind of endorsement or other form of institutional support, bearing in mind that the OAS guide is intended to operate in harmony with the universal texts on such matters. Informal contacts have already been made to that end and very well received.

Where appropriate, those comments will be incorporated in the final text of the guide and submitted, in turn, to the Inter-American Juridical Committee for consideration at a meeting next year.

The draft guide presented on this occasion has fewer pages than was initially thought (bearing in mind that most guides adopted by universal codifying bodies are considerably longer). In my opinion, the Committee and, in particular, its Chair and Dr. Villalta, were sound in their guidance that the document not be too long and be as simple as possible.

We have sought to meet that objective with the draft, which, apart from anything else, avoids excessive technicality, continual references, and even footnotes which introduce complexities in certain guides that have been subjected to criticism for that very reason.

The 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 guide, so as to maintain fidelity with them.

I will provide more details in person about the work done and other matters at the coming meeting of the Inter-American Juridical Committee, for which I am also preparing a PowerPoint presentation that I will forward to you in due course.

PART ONE

INTRODUCTION

I. Rationale

1. The Inter-American Juridical Committee (CJI) of the Organization of American States (OAS) has decided to prepare this Guide for international contracts in the Americas.
2. Different studies prepared by the CJI and the Department of International Law of the OAS have shown that in different countries of the Americas, major lacunae exist in the law on international contracts.
3. In due course, to remedy this, in 1994, the Inter-American Convention on the Law Applicable to International Contracts (the "Mexico Convention") was adopted at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V) of the OAS. However, only two countries, Mexico and Venezuela, ratified it. The latter country also incorporated several of the provisions of the Mexico Convention in the international contracts section of its own law on private international law.
4. The Mexico Convention was formally adopted in two languages: English and Spanish. One problem identified were the defects of its official English translation. In fact, the Convention has not been incorporated by any English-speaking common law country.
5. Despite its small number of ratifications, the document was taken into account in preparing the *Principles* of the Hague Conference on Private International Law on choice of law in international contracts, adopted in 2015 by that eminent global organization.
6. Different provisions of the inter-American instrument have been incorporated nearly verbatim in the Paraguayan law on international contracts (Law 5393, of 2015). Earlier, it had also been the inspiration for the contract regulation provisions of the 1998 Venezuelan Law on Private International Law.
7. It is now over 20 years since the adoption of the Mexico Convention and, of course, the Hague Principles also incorporated subsequent developments that paved the way for clarification of certain matters or the introduction of innovative solutions. This raises the following questions: What's next for the Americas? Should we call 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? Since the enactment of the new Paraguayan law on the law applicable to international contracts, support for implementing the last suggestion has been gaining ground.
8. Following the distribution of a questionnaire among the OAS member states, and among recognized specialists on private international law, the CJI of the OAS reviewed all these options. The replies reflect the perception that, evidently, the Hague Principles have had more impact than the Mexico Convention and the provisions of the former could be useful in amending the inter-American document.
9. However, considering that the Mexico Convention, prepared in 1994, has only been ratified by two countries, the real question is whether the process of achieving a new revised convention would be worth the effort. One possible answer is that an improved document might be better received by the legal community in the Americas and, in

addition, this would afford an opportunity to correct the English translation of the original instrument, which was criticized by English-speaking jurists at the time.

10. But the negotiation and adoption of a convention is a highly complicated and costly process, whereas other types of instruments, such as *model laws* or *legislative guidelines*, have been shown to be viable means of harmonizing solutions of private international law. Ultimately, it would be much more effective for states of the Americas to adopt national laws consistent with practices endorsed by the OAS and the Hague Conference, generally applicable to international transactions, rather than promoting the adoption of treaties such as the Mexico Convention and any amendment thereof, which would affect only the contracting parties of the States that have ratified it.

II. Objectives of this Guide

11. This Guide has different objectives. It was first conceived as a *legislative guide* that might be useful to OAS member states in their efforts to modernize their domestic legislation in keeping with the fundamental principles of the Mexico Convention. Evidently, it might also inspire any regional integration efforts in this area.

12. Subsequently, the Guide's objectives were amplified. Since this Guide explains the different provisions of the Mexico Convention, it was thought that it might also be useful to countries possibly considering ratification of the inter-American instrument.

13. Another aim of the Guide is to provide an official text that might pave the way for greater willingness on the part of the region's countries to receive the solutions of the Mexico Convention, whether by ratifying it or by adopting a law incorporating its provisions.

14. This Guide may of course be highly useful to contracting parties that refer to them in drafting their agreements, taking account of matters addressed herein.

15. The Guide should also be useful to judges in their interpretive work. Many international contract-related matters are not covered in national private international law regimes of different States. Hence, although many countries adopt the principle of party autonomy, this Guide illustrates different derivations of that principle not developed in national law. For example, the Guide discusses what happens when the parties voluntarily change the applicable law subsequent to its selection.

16. No less important is the function this Guide may fulfill for arbitrators. Many regulations allow arbitrators great discretion in the area of private international law, since, unlike domestic judges, they do not have a forum whose rules they must follow in this subject. Therefore, this Guide has many advantages. First it explains today's internationally-accepted solutions in the subject of international contracts. This is no small thing since one reason why the Mexico Convention has encountered stiff resistance is the lack of information regarding its content and implications. Guidelines may overcome this obstacle.

17. Secondly, the Guidelines are an instrument available to legislators that take into account recent developments reflected in The Hague Principles, and also cover matters

not expressly addressed therein, but on which the Mexico Convention contains provisions, specifically on where no choice of law has been made.

18. Lastly, the Guidelines may provide judges, arbitrators, and parties with a powerful interpretative tool, given the troubling uncertainties that still persist in the area of international contracts. The instrument sets out solutions contained in both The Hague Principles and the Mexico Convention, explaining their complexities.

PART TWO

GENERAL CONCEPTS

III. Private International Law and Uniform Law

19. The private international law discipline has been subject to major development in the last 200 years with the consolidation of nation-states. Among other matters, the subject addresses issues of applicable law in private *inter-national* legal transactions. In some federal systems, such as those in North America, the conflict of laws discipline also addresses issues arising in the application of the law of different states within the Union. Since the integration processes of recent decades, private international law has also addressed issues of applicable law that may arise between community law and the potentially impacted national law.

20. In the traditional private international law approach, known as *conflict of laws*, the prevailing technique is to refer to *conflict of laws rules* or *indirect rules* which, although not applying directly to the case, indicate which law should be applied in analyzing the merits.

21. To that end, conflict of laws rules are based on *connecting factors.* In international contracts, the applicable law will be determined based on *personal* aspects, such as domicile, residence, or nationality; or *property* aspects, i.e., where the movable and immovable property is situated; or *circumstances of the fact or act*, such as proximity, place of occurrence, or place of performance. For example, if the conflict of laws rule indicates that the formalities of the contract are governed by the law of the place where the contract was concluded, this becomes the connecting factor. This is also the case with the latest domicile of the originator, if the conflict of laws rule establishes this as the connecting factor.

22. Conflict of laws rules are to be contrasted with *substantive* or *material* rules regarding the substantive law applicable to a given legal situation, which need not be invoked. This *uniform law* approach is also known as universal or transnational.

23. Whereas the conflict of laws method is based on the *location* of the international legal transaction under a given national law, uniform law is based on solutions reflecting substantive, transnational, or *universal* norms.

IV. Early codification of private international law in the Americas

24. The concept of universal law had gained particular strength in the Middle Ages, and, in the modern age, uniform private civil and commercial law (*ius commune* and *lex mercatoria*) arose.

25. Nationalist movements in Europe and the Americas ended the development of the universal law concept. Throughout the jurisdictions of civil law tradition, nation-states adopted civil and commercial codes, whereas the countries of Anglo-Saxon tradition consolidated their autochthonous law based on legal precedent.

26. That, in turn, gave particular impetus to private international law as a discipline for solving the conflict of law puzzle at times when national solutions seeking to address the issue were disconcertingly contradictory.

27. The German jurist Savigny was highly influential in the mid-19th century with his idea of unifying these formulae in an international treaty binding on all nations that ratified it. While discussions were under way as to how to implement this idea in Europe, the Americas took the lead.

28. One of the *1889 Treaties of Montevideo*, signed in that city, specifically the *Treaty on International Civil Law*, addresses the question of choice of law applicable to international contracts. However, it incorporated highly controversial solutions where no choice of law had been made and said nothing about party autonomy, which is now a broadly accepted principle in private international law. These early Treaties of Montevideo remain applicable between Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay.

29. In *1940*, new treaties were signed in Montevideo, ratified only by Argentina, Paraguay, and Uruguay. They reaffirmed the earlier solutions where no choice of applicable law has been made. These treaties also provide that each State itself must determine whether it accepts the principle of party autonomy, a matter which, in the absence of clear provisions thereon in domestic legislation, became highly controversial in Brazil, Paraguay, and Uruguay.

30. Many other States of the Americas, such as Brazil, Chile, and Venezuela, have not incorporated the Treaties of Montevideo. Instead, they ratified the 1920 *Bustamante Code*, adopted at the Sixth Pan-American Congress, held in Havana, Cuba, in 1928. This Code governs different matters of private international law, including the law applicable to international contracts, setting out a solution differing from that of the Treaties of Montevideo where no choice of applicable law has been made. The instrument has also raised many questions as to whether it establishes the principle of party autonomy. The Bustamante Code has been ratified by Bahamas, Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela.

V. European regulation of conflict of laws in international contracts

31. A treaty in this subject was signed in Europe only in 1980. This is the Convention on the Law Applicable to Contractual Obligations, also known as the *Rome Convention,* accompanied by an official report prepared by jurists Giuliano and Lagarde, of great

value for the interpretation of its provisions. The Convention entered into force in 1991.

32. Today, the instrument, with some changes, has become Regulation (EC) 593/2008, known as *Rome I*, and is binding on nearly all European Union countries.

33. Rome I virtually reproduces the provisions of the earlier convention, with some modifications and additions. It has 29 articles, preceded by 46 *preambulatory clauses* that assist its interpretation. It covers matters of law applicable to international contracts, establishing the principle of party autonomy or freedom to choose the applicable law, and the limits thereof, as well as establishing criteria where no choice of applicable law has been made.

34. The Rome Convention became relevant not only because it was adopted by the European bloc, but also because of its impact on the project to prepare the Mexico Convention in the Americas and, more recently, together with the solutions of Rome I, on the preparation of an instrument addressing at the global level the question of the law applicable to international contracts, i.e., the Hague Principles.

VI. Unification of law today

35. Many factors are contributing to this trend. For example, party autonomy, i.e., the ability of the parties to choose that law to govern in cases of conflict of law, is being consolidated as a principle of the law applicable to international contracts.

36. This is often leading parties to seek to avoid the *conflict of laws* mechanism through detailed stipulations in their agreements or clear choices of the law to govern them.

37. Arbitration is also being consolidated as a normal method of resolving commercial disputes, providing their arbitrators with suitable tools for reaching appropriate solutions to cross-border problems, beyond mere concern for mechanical application of national laws in accordance with a conflict of law system.

38. In addition, an ever-expanding web is being spun of rules resulting from global, regional, and local processes implemented in the public and private spheres whose aim is to unify substantive legal rules.

39. However, the phenomenon is not occurring at the normative level alone. Efforts are also under way to create uniform interpretative techniques and to reconcile understandings of the technical operation of the different legal systems, to that end taking advantage of the contributions of comparative law.

VII. Unification and harmonization tools

40. The terms unification and harmonization are often used interchangeably. However, strictly speaking, *unification* implies the adoption of common legal norms in more than one country or region; whereas *harmonization* denotes greater flexibility, since it does not necessarily refer to uniform texts, but rather alignment of legal criteria based on common foundations, model laws, or uniform principles.

41. In addition, unification and harmonization may refer to both *conflict of laws* norms and to substantive or *uniform* norms.

42. *International treaties*, as instruments by which States traditionally adopt common standards, are most appropriate for achieving unification, but their drawback is the difficulty of their ratification, given the peculiarities of each country; as well as their inflexibility in adjusting to changes in commercial activity, which would, in turn, require a cumbersome treaty modification process.

43. It should be noted that difficult negotiations between countries of different legal traditions often involve compromise and, that, as a result, the treaty's final text will contain concessions which, in addition to being less than apt, mean that unsatisfied parties ultimately refuse to ratify it. In efforts to obtain ratifications, different mechanisms are devised, such as *reservations*, which ultimately subvert unification and create an illusion of unity. In addition, drafters usually exclude topics for which there is no consensus, meaning that although treaties continue to abound, they are very limited in scope.

44. Moreover, many international commercial conventions seek to set down in law commercial uses, customs, or practices. But they are not drafted by members of the community whose uses they supposedly establish, but rather by States, and, not infrequently, conventions fail to gain acceptance precisely because they do not reflect the practices or perceptions of the dominant commercial community.

45. Another mechanism devised, the *uniform law*, such as the *Geneva Law for Bills of Exchange and Promissory Notes* (1930) and the *Geneva Law for Cheques* (1931), today is often disregarded because it impinges on the sovereign authority of States to legislate, since uniform laws are conceived for integral incorporation of the proposed text.

46. To remedy this difficulty, the concept of the *model law* was devised, drafted by eminent organizations that recommend them. However, often meaningful unification is not achieved through their use, since national legislators may correct them, adapt them, or even disregard their solutions. The more general the subject matter, the greater the likelihood that this will occur.

47. Additional *soft law* methods exist whose aim is harmonization, such as *legislative guides* setting out desirable regulations, as well as *guides,* such as this instrument, among others.

48. International organizations have echoed the needs for unification of norms governing cross-border commercial activity, as is discussed below.

VIII. United Nations Commission on International Trade Law

49. Known globally by its English acronym (UNCITRAL), the organization was created in 1966 and now has 60 member states from the different continents elected by the UN General Assembly.

50. UNCITRAL was conceived to reduce or eliminate international trade barriers created by disparities of national law. Its general mandate is to further the progressive harmonization and unification of international commercial law, in different areas, such as electronic commerce, transport, insolvency, secured transactions, and international

payments, among others. This Guide makes frequent reference to the following UNCITRAL instruments:

A. 1980 Convention on Contracts for the International Sale of Goods (Vienna Convention)

51. Preparation of a uniform law for the international sale of goods began in 1930 in another organization known by the acronym UNIDROIT. The initial draft convention was presented in 1964, at the Hague Conference on Private International Law, which adopted two conventions: one on the international sale of goods and the other on preparing contracts for the international sales of goods. These texts were widely criticized at the time for reflecting primarily the Western European legal traditions. Work subsequently done by UNCITRAL, in which the topics of the two earlier conventions were combined, included modifications that were able to achieve greater acceptance by countries with different legal systems.

52. This resulted in the *United Nations Convention on Contracts for the International Sale of Goods* (1980), also known as the *1980 Vienna Convention* or *CISG*. Its original signatories included States from all geographic regions, of differing levels of economic development and differing legal systems. Today, the CISG is widely accepted, and has been ratified by 85 countries worldwide. The CISG is in force in all countries of the Americas except Bolivia, Venezuela, Suriname, Panama, Nicaragua, Belize, Guatemala, and Costa Rica. In the Caribbean, it is in force in Cuba and Dominican Republic.

53. The CISG is a uniform law treaty which, in its 101 articles, summarizes principles, rules, and uses applicable to the contract at the epicenter of international commerce. It governs aspects of formation of contracts for the international sale of goods, as well as substantive rights of the buyer and seller and matters related to fulfillment and non-fulfillment of those rights.

54. Under Article 6 of the CISG, the parties may exclude its application or, subject to limitations, abrogate or vary the effect of its provisions. Since the CISG recognizes the principle of party autonomy, this may be achieved by, for example, choosing the law of a non-contracting State or the domestic substantive law of a contracting State (for example, the Civil and Commercial Code of that State) as applicable to the contract.

55. The Vienna Convention may be applied, even if it has not been ratified, as an expression of transnational law or *lex mercatoria* when judges are authorized to apply universal law. In addition, not only has this convention been adopted by a large number of countries, but it has also inspired notable subsequent initiatives to prepare uniform contract legislation. Over 800 decisions applying it have been reported. And an estimated two-thirds of world commerce is–or may be, if the parties do not voluntarily exclude it–governed by this convention.

56. Many court decisions and arbitral awards citing the Vienna Convention may be consulted on UNCITRAL's web site: www.uncitral.org, click on CLOUT.

B. UNCITRAL arbitration texts

57. The 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, also known as the *1958 New York Convention*, was established in the United Nations framework and has now been ratified by over 150 countries from all five continents. The instrument antedates the establishment of UNCITRAL, but is now within the scope of the Commission's group working on arbitration topics.

58. Although the New York Convention does not directly cover the topic of the law on international contracts submitted to arbitration, it recognizes the importance of the parties' choice of the law governing the validity of the arbitration clause, as well as that governing arbitration procedure. By analogy, it is understood that the clauses on the choice of law applicable to the merits must also be observed.

59. Inspired by and with the New York Convention as background, the model law on arbitration was prepared and adopted by UNCITRAL in 1985, partially modified in 2006, and today many of its solutions are followed by several countries of different continents.

60. That model law was presented as an instrument to guide processes to reform and modernize national legislation in this area in the quest to institute a uniform system reflecting the global consensus on the most important aspects of the use of this dispute resolution mechanism.

61. The instrument governs the different stages of arbitration procedure, from the arbitration agreement, the composition, competence, and scope of intervention of the arbitration tribunal, to recognition and execution of the arbitral award. Article 28 of UNCITRAL's model law covers the law applicable to contacts submitted to arbitration, and establishes the principle of full party autonomy, including choice of law of a non-contracting state, as well situations where no choice of law has been made, and to the effect of uses applicable to the case.

62. In 2006, UNCITRAL adopted a group of amendments to the original instrument that, in particular, modernize formal arbitration agreement requirements and establish a fuller legal regime for precautionary measures in support of arbitration.

63. The New York Convention has been ratified by nearly all countries of the Americas, and the model law has been copied or its provisions have inspired much legislation in the Hemisphere.

IX. International Institute for the Unification of Private Law (UNIDROIT)

64. Also known as the Rome Institute, or more widely as UNIDROIT (its French acronym), this organization was created under the auspices of the League of Nations, in 1926, between the two World Wars. UNIDROIT's purpose is to modernize and harmonize the international commercial law framework, focusing on private law and, only exceptionally, on public law, when related to private law or in cases of unclear distinction between the two.

65. UNIDROIT's member states include 13 OAS member states (Argentina in 1972; Bolivia in 1940; Brazil in 1940; Canada in 1968; Chile in 1951; Colombia in 1940;

Cuba in 1940; Mexico in 1940; Nicaragua in 1940; Paraguay in 1940; United States in 1964; Uruguay in 1940; and Venezuela in 1940).

A. The work of UNIDROIT

66. The organization's unification efforts are directed towards substantive or material solutions, i.e., in a quest for *uniform law,* and only exceptionally towards matters of *conflict of laws* in keeping with the traditional private international law system. In its over 75 years of existence, UNIDROIT has been highly productive, generating over 60 texts of conventions, and draft model laws, or "studies", as they are officially known, on the sale of goods, land transport of goods, restitution of stolen or illegally exported cultural property, factoring, international financial leasing, transnational civil procedure, capital markets, and agricultural production contracts, to cite some examples. From among these efforts, its *Principles* of contract law have been an extraordinary worldwide success.

B. UNIDROIT's principles of contract law

67. In the 1970s, UNIDROIT began its work on the "general" part of contracts, ultimately published in 1994 as the *UNIDROIT Principles of International Commercial Contracts*.

68. The 13 OAS member states now members of UNIDROIT were members of the organization prior to the publication of the 1994 Principles. Therefore, the results of that work reflect the consensus reached with the direct and indirect involvement of these States.

69. The 1994 edition of the UNIDROIT Principles consists of a preamble and 119 rules or articles, divided into seven chapters, on general contract provisions, and contract formation, validity, interpretation, content, and performance and non-performance. The rules they contain, highlighted in bold, are accompanied by detailed commentary, including illustrations, which form an integral part of the Principles.

70. The 1994 edition had official English, French, and Italian versions. Subsequently, full versions of it were prepared in 14 languages.

71. In 1999, alternative model clause texts were adopted, which may be used by parties wishing to submit their agreements to them, with or without supplemental choice of national law.

72. In 2004, a revised and enlarged version of the Principles was published, adding five chapters on agents, third party rights, damages, assignment of rights, transfer of obligations, assignment of contracts, and limitation periods. The 2004 edition has 185 articles, 65 more than the previous version, and two paragraphs were added to the preamble.

73. For its part, the 2010 edition of the UNIDROIT Principles, which has 211 articles, added new topics on joint and several obligations and the invalidity of contracts covering unlawful or immoral subject matter.

74. Lastly, the enlarged 2016 version includes long-term contract-related matters, which may be relevant in both international commercial contracts and foreign investment contracts.

75. Different court decisions and arbitral awards related to the UNIDROIT Principles have been compiled in the UNILEX database: www.unilex.info.

C. The Restatements Methodology

76. Since they first appeared at the international level, it has not been possible to assign the UNIDROIT Principles to any traditional category of prepared instrument. They are not agreement clauses or model agreements. They do not refer to specific categories of contract; rather they contain rules applicable to international commercial contracts in general. They can even apply to domestic contracts if the parties so agree, and within the limits of the respective national legal system.

77. Traditionally, efforts to unify international commercial law had been channeled essentially through binding instruments such as international treaties, but changing circumstances have shown that in many cases, these are not appropriate instruments for adequate unification, nor are uniform laws or model laws.

78. Hence the perceived need to have recourse to *non-legislative means* for that purpose. In fact, that phenomenon had been taking place in one or another way through the development of international customary law, for example, through mass use of model clauses or contracts designed by economic circles based on commercial practices and specific types of transactions or specific aspects of them.

79. But some voices advocated for going further and preparing something such as a *Restatement* of contract law. The *Restatements*, outcomes of the efforts of the American Law Institute (ALI), an eminent organization of academics of the United States of America, organize, summarize, and restate in rules similar to those of Civil Codes, the predominant trends in jurisprudence in different areas of North American law.

80. These had led, since the first decade of the 20th century, to greater accessibility of United States law, since until that time it had been expressed essentially as legal precedents, whose management had become chaotic. Hence the wisdom of compiling a document, prepared essentially by academics, which condensed the law into rules drafted like articles of Codes, in many cases accompanied by commentary and illustrations.

81. The UNIDROIT Principles are steps in that direction and have had the merit of merging in a single text acceptable solutions of the world's principal legal systems: civil law and common law. The latter, markedly jurisprudential or casuistic, had already been subject to monumental systematization efforts. This while civil law had experienced almost a reverse process, where the courts had developed and replaced Codes and laws – in many cases outdated – also enriched by doctrinal contributions.

82. Rather than the word *Restatement,* or *Reformulación,* its Spanish translation, the term *Principles* was adopted, seeking thereby to connote the non-State character of the

instrument. Clearly, however, most of their legal norms technically are precise *rules,* not *principles* in a broader and more general sense. Evidently, the drafters of the UNIDROIT Principles wished to immunize them 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*. By referring to them as *principles*, they took advantage of the vagueness of the term.

D. Purposes of the UNIDROIT Principles

83. Although, in principle, they are of only persuasive value, the aim—an aim that has met with considerable success–was for the UNIDROIT Principles to play a fundamental part in a variety of contexts.

84. For legislators, they may be a source of inspiration for reforms in the area of contract law. In fact, special account was taken of the UNIDROIT Principles in efforts to revise the Argentine Civil Code, the law of obligations in Germany, and contract law in the Republic of China and in African countries, among others.

85. Moreover, parties subject to different legal systems or speaking different languages can use the UNIDROIT Principles as guidelines for drafting their contracts, making reference to a neutral body of law (akin to a "*lingua franca"*). This may be done in different ways. Thus, the Principles may serve as a terminological source. For example, in civil law systems, the terms debtor and creditor are used, whereas in common law, the words *obligor* and *obligee* are used, the terms *debtor* and *creditor* being used only when monetary payments are involved. The UNIDROIT Principles may also serve as a *checklist* used by the parties to ensure that they have included in their international contracts all provisions that may be relevant, among other possible functions.

86. Some consider the UNIDROIT Principles a thematic area of the debate on the *lex mercatoria,* and could become its centerpiece, even though those individuals do not identify with it. Others consider them a codification of general principles and the *lex mercatoria*. In fact, this was the intended use of their drafters, who also conceived of the UNIDROIT Principles for use when judges or arbitrators are called on to judge based on indefinite "international uses or customs" or "general international commercial principles." Different court decisions and arbitration awards in this area may be found in UNILEX.

87. The UNIDROIT Principles may provide courts and arbitration tribunals with criteria for interpreting and supplementing existing international instruments, such as the Convention on Contracts for the International Sale of Goods and others on specific subjects in the contract area. The UNILEX database contains many court decisions and arbitration awards in this area. UNCITRAL also formally endorsed the 2010 UNIDROIT Principles at its 45th session, in 2012.

88. Another aim of the designers of the UNIDROIT Principles was that the parties refer directly to them as applicable law. To avoid difficulties, it was suggested that the

choice of the UNIDROIT Principles be combined with a national law covering supplementary issues. But the reverse may also occur: local law is supplemented by the Principles, or contrasted with them.

89. The UNIDROIT Principles may also be applied where the parties have not made a choice of law, rather than having recourse to the often unpredictable conflict of law mechanism of private international law. Many decisions appearing in the UNILEX database may be applicable when parties invoke the law deemed relevant by the arbitrators.

X. Contractual unification in integration processes

90. Europe has replicated the UNIDROIT experience of systematization of contract law: the European Commission adopted the *Principles of European Contract Law* (PECL). Part I of this instrument was published in 1995; Parts I and II were published together in 1999; and Part III in 2003. Different provisions of the PECL are identical or very similar to those of UNIDROIT, which is also explained by the fact that several of their drafters worked at the same time and even in parallel on preparing the UNIDROIT Principles. In addition to rules highlighted in bold, commentary, and illustrations, the PECL contain valuable European comparative law notes on the different matters covered by the instrument.

91. The European Commission also provided a *soft law* document known as the *Common Frame of Reference,* the drafting technique of which is very similar to that of the PECL. The first draft of the Common Frame of Reference was published in December 2007, and new versions appeared in February and in late 2009.

92. The PECL have now been invoked by many courts and arbitration tribunals. In the future, the above-mentioned European efforts may produce regulations that include the possibility of selecting the PECL as applicable law, which the Rome I Regulation does not now permit.

93. By comparison, the integration processes in the Americas have not made progress in substantive unification of contract law. This is so even though it is one of the objectives of the Southern Common Market (MERCOSUR), as may be gathered from Article 1 of the Treaty of Asunción, establishing the bloc. That goal then has not been met.

XI. Codification in the private sphere

94. The legal and regulatory approximation process is being promoted not only by public organizations. In the private sphere, many initiatives are also under way, notable among them, at the global level, is the work of the International Chamber of Commerce (ICC), a nongovernmental organization with headquarters in Paris, with over 7,000 members in some 130 countries. The ICC proposes many normative instruments for incorporation by private parties availing themselves of their party autonomy in their agreements, such as occurs for example with the INCOTERMS rules (standard trade terms used in international commerce) and rules on documentary letters of credit. These documents have, in turn, been endorsed by UNCITRAL.

95. Although these instruments are often satisfactory and sufficiently neutral in form and substance, they provide only a partial solution owing to their limited scope. This is because they presume the existence of a more general contract regulatory framework. Therefore, even when accepted in some commercial sectors, such as banking, they may conflict with basic local principles and regulations in the obligations and contracts areas.

96. Standard contracts accepted in some economic circles also exist, such as 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*; or the standard international forms of contract of the Grain and Feed Trade Association for agricultural products, also widely used in foreign trade. Model contracts are also proposed by intergovernmental and nongovernmental organizations, such as the Model Contract for the International Commercial Sale of Perishable Goods of UNCTAD/WTO's International Trade Centre, while the World Bank and European finance organizations have guidelines in this area.

97. Frequently, these instruments are not a satisfactory option, since in general they are prepared by companies or business associations operating in the world's largest commercial and industrial centers, so that, in most cases, their content is unilaterally formulated and of unilateral benefit, and their drafting is inevitably influenced by legal concepts of the respective countries of origin.

98. Also to be mentioned are "Codes of Conduct," prepared in private circles and in intergovernmental organizations, which are systematic compilations of rules in the area to which they refer. There are characterized by flexibility, voluntary compliance with their principles, and self-regulation, regardless of state regulation. The International Chamber of Commerce also has instruments of this type, such as the International Code of Advertising Practice and the International Code of Sales Promotion; while Factors Chain International has prepared the Code of International Factoring Customs (IFC).

99. Bar associations, such as the International Bar Association (IBA), the American Bar Association (ABA), and the Union Internationale des Avocats (UIA), also actively promote the formulation of private rules, such as rules of ethics, conflict of interest rules, and the IBA's Rules on the Taking of Evidence in International Arbitration, widely used worldwide.

100. This is also the case with distinguished organizations such as the American Law Institute, the European Law Institute, and the American Association of Private International Law (ASADIP), which have collaborated with the academic community in different codification efforts by UNCITRAL, UNIDROIT, The Hague Conference on Private International Law, and the OAS.

PART THREE

MODERN REGULATION OF PRIVATE INTERNATIONAL LAW ON CONTRACTS

I. OAS efforts to codify private international law

101. In the Americas, in the mid-20th century, major dissatisfaction was being expressed with the Montevideo Treaties and the Bustamante Code. Not only did these instruments propose solutions differing from one another, but serious questions were also raised regarding flaws and inconsistencies in the areas of party autonomy and absence of choice of law. To make matters worse, some States of the Americas, including all those of Anglo-Saxon tradition, had not ratified either of these treaties.

102. The establishment of the Organization of American States (OAS) in 1948 created great expectations that this situation would finally be resolved. After careful evaluations, the OAS decided against the idea of preparing a general code like the Bustamante Code, and, instead, chose to work towards gradual codification of specific matters in the area of private international law.

103. Realization of this intent began in 1975 with the First Inter-American Specialized Conference on Private International Law (CIDIP), organized pursuant to Article 122 of the OAS Charter, where treaties were adopted on topics such as arbitration and international commercial and procedural law.

104. Thus far, seven CIDIPs have been held, resulting in the adoption of 26 international instruments (including conventions, protocols, uniform documents, and model laws), in the areas of both *conflict of law in private international law* and *uniform law*. An example of the latter is the Model Inter-American Law on Secured Transactions, adopted in 2002, at CIDIP-VI.

II. Mexico Convention

105. The *Inter-American Convention on the Law Applicable to International Contracts* (hereinafter *Mexico Convention*) was adopted in 1994, at the Fifth Specialized Conference on Private International Law (CIDIP-V). Its signatories were Bolivia, Brazil, Mexico, Uruguay, and Venezuela. It was ratified by Venezuela and Mexico and entered into force on December 15, 1996. No reservations or declarations were entered.

106. The topic of international contracts was first considered in 1979, at CIDIP-II, held in Montevideo. Subsequently, it was included on the agenda for CIDIP-IV, held in 1989, and was assigned to Committee II, which considered a study prepared by the Argentina jurist Boggiano, and a draft convention prepared by the delegation of Mexico was presented. As general consensus was not reached on a formal instrument, a group of principles was adopted for future deliberations, as well as a resolution that recommended that the OAS General Assembly convene a meeting of experts. These principles also served as the basis for a draft convention and report, which were entrusted by the Inter-American Juridical Committee to the Mexican jurist Siqueiros. The Committee approved the draft convention and report in July 1991.

107. The draft convention and report were again reviewed at a meeting of experts held in Tucson, Arizona, November 11 to 14, 1993. At that meeting a new revised version was approved of the *draft Inter-American Convention on the Law Applicable to International Contracts.*

108. The Tucson draft was the basis for the deliberations of CIDIP-V, held March 14 to 18, 1994, in Mexico City. The preparatory work included the distribution of a questionnaire to the OAS member states, as well as exhaustive analysis of other relevant instruments in this area.

109. CIDIP-V was attended by 17 Latin American countries, and United States and Canada. The outcome of its deliberations represents the consensus of a large number of States of the civil law and common law traditions.

110. The Mexico Convention has 30 articles covering matters such as its scope of application; party autonomy in choice of applicable law, and the limits thereof; criteria to be used where no choice of applicable law has been made, and, as an innovation, the possibility of applying the law of a non-contracting State.

111. The inspiration for the inter-American instrument and several of its provisions was the text of the 1980 Rome Convention, although the Mexico Convention went further in areas such as its openness to the law of a non-contracting State.

112. The modernity of the Mexico Convention's solutions has been much commended. However, the document has not been ratified by many countries, which may be attributed to the lack of information regarding its content and the modalities by which its solutions could be applied in the countries of the Hemisphere. One of the main objectives of this Guide is to disseminate the solutions of the inter-American instrument and its possible mechanisms for incorporation in domestic law.

113. In fact, beyond ratification of the treaty, countries might have recourse to "incorporation by reference," as did Uruguay when in a law it adopted the rules of interpretation of different articles of the Montevideo Treaty on International Civil Law. Another option would be to have recourse to "material incorporation," which entails full transcription of the treaty into a domestic legal text. Venezuela took yet another path: it incorporated the guiding principles of the Mexico Convention in its 1998 Law on Private International Law, so that they are of residual application. It should be noted that the convention instrument was not transcribed verbatim, but was taken as the basis for domestic regulation of the international contract area. In turn, the provisions not incorporated verbatim or included in its principles make use of the entire content of the other principles of the Mexico Convention for interpretation of its meaning or to supplement the rules contained in autonomous legislation. A similar path was taken for a Uruguayan draft law on private international law.

114. The Mexico Convention may also be of use in integration processes. MERCOSUR, for example, does not have an instrument such as the Rome I Regulation that governs the law applicable to international contracts. The solutions of the Mexico Convention might be the inspiration for a convention text in the region aligned with them.

III. Hague Conference on Private International Law

115. In the 19th century, Italian jurist Mancini, in keeping with the teachings of Savigny, promoted the establishment of a diplomatic conference to prepare private international law convention instruments. Although the idea did not gain traction at the time, it was taken up again in the Netherlands by the Flemish internationalist Asser, under whose auspices a first diplomatic conference was convened in The Hague, in 1893. Earlier, the Americas had taken the lead in the codification process, notable outputs of which are the Montevideo Treaties of 1889.

116. Today, the Hague Conference on Private International Law, composed of 81 States and the European Union, is governed by a Statute established by an international treaty. Its purposes are the partial and progressive codification of private international law and the establishment of international legal cooperation mechanisms.

117. There are two eras in the meetings of the Hague organization. From 1893 to World War II, the Conference met on six occasions. After World War II, in 1951, a seventh Session was convened, at which its current Statute was adopted. Since 1956, the Conference has met generally every four years, with various Special Sessions.

118. Although its name would suggest otherwise, the Hague Conference has become a permanent organization. Today, projects are discussed at plenary sessions that in principle take place every four years, following preparations promoted by the Permanent Bureau of the Conference, and usually must be ratified by a specific number of States to enter into force.

119. The work of the Hague Conference differs from that of other organizations, such as UNCITRAL, for example, in that, rather than advancing toward substantive unification, the Conference has been characterized by preparing private international law texts in keeping with the traditional *conflict of law* system, it being considered the leading world organization in this area. The Hague Conference works on such varied matters as international protection of minors, the family, and property rights; international legal cooperation and international litigation; and international commercial and financial law.

120. Fourteen States of the Americas are members of the Hague Conference: Argentina, Brazil, Chile, Costa Rica, Ecuador, Mexico, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela) as well as Canada and United States. The Hague Conference also recognizes the American Association of Private International Law (ASADIP) as a private observer institution.

IV. Hague Principles

A. Background

121. In the early 1980s, the success of the Rome Convention led the Hague Conference on Private International Law to consider preparing feasibility studies on the possibility of adopting a similar instrument at the global level. This undertaking was dismissed upon consideration of possible difficulties of obtaining mass ratification of the proposed document, with ensuing failure of the project. However, the matter was

recently revisited and the feasibility studies carried out from 2005 to 2009 indicated that perhaps a different type of instrument might be successful and effective.

122. Accordingly, it was decided to prepare a non-binding instrument, i.e., a *soft* law instrument, whose primary purpose would be to promote party autonomy as a criterion for choice of applicable law.

123. For its preparation, in 2009 a working group was created composed of 15 experts, as well as observers from public and private institutions, such as UNCITRAL, UNIDROIT, the International Chamber of Commerce, and others. Among the members of the working group were five jurists from the Americas, who were later joined by a Cypriot academic based in the United States.

124. In 2012, the Council on General Affairs and Policy of the Hague Conference decided to establish a Commission to review the working group's proposals and make recommendations for future steps. Gathered in November 2012, the Special Commission, a diplomatic conference with over 100 national delegations and observers, proposed rules for the Hague Principles, delegating to the Working Group responsibility for preparing commentary and illustrations. The 2013 Council Session gave preliminary approval to the document, while the commentary and illustrations prepared by the working group received provisional endorsement at the 2014 Council Session. Lastly, in March 2015, the final version of the Hague Principles, with their commentary and illustrations, was formally adopted.

125. The formal name of the document is the Principles of The Hague *on Choice of Law in International Commercial Contracts*. This is the first legal instrument at the global level to regulate choice of law in cross-border transactions.

126. The Hague Principles have had marked impact on the law implementing them as enacted in Paraguay (Law 5393, of 2015), and on amendments to Australian legislation in this area. Even prior to their final adoption, they had already been invoked in Argentine case law (D.G. Belgrano S.A. c/ Procter & Gamble Argentina S.R.L., National Commercial Court of Appeals, Chamber A, 2013 | MJJ80903).

127. One source used in their preparation was the Mexico Convention, frequently mentioned in the commentary on the Principles. Like the inter-American instrument, The Hague Principles admit recognition of the law of a non-contracting state.

V. Content of the Hague Principles

128. The Hague Principles consist of a preamble and 12 articles, accompanied by commentary on each article. They were completed and formally adopted on March 19, 2015, and received the support of UNCITRAL at the Commission's 48th Session, in July 2015.

129. The Hague Principles consist of a preamble describing and explaining the spirit of the instrument, and 12 articles on its scope of application, party autonomy in making the choice (express or tacit) of the law applicable to their contracts, whether or not the law of a contracting state, the formal validity of that choice, and public policy as overriding freedom of choice, among other matters.

130. The Hague Principles only cover cases where the parties have chosen the applicable law, and do not cover cases where no choice has been made. At the time, it was considered that the latter situation might be the subject of future work of the Hague Conference, which might also have to determine what type of instrument would be most appropriate to govern matters not related to choice of law.

131. The Hague Principles follow the drafting technique of the UNIDROIT Principles on contract law. Thus, both instruments have a preamble, rules highlighted in bold, and commentary and illustrations where deemed necessary. The success of the drafting technique of the UNIDROIT Principles on contract law led the Hague Conference to use the same technique, having considered the difficulties of drafting an international treaty. The Hague Principles, like the UNIDROIT Principles, are expected to provide guidance for legislators and contract-writers, and will assist in judicial and arbitral interpretation.

132. These two instruments are, in fact, complementary. The UNIDROIT Principles cover substantive matters of contract law, such as–among other matters—contract formation, interpretation, effects, and termination. The Hague Principles, on the other hand, cover issues as to which law will govern the contract: the law of one or more States, or–if applicable—even non-State law, such as, for example, the UNIDROIT Principles.

133. The instrument is of tremendous importance, not only because it represents the organization promoting it and the global scope sought, but, since it broadly establishes the principle of party autonomy, it accords citizenship status to a non-State law in a text on *conflict of laws*.

VI. Recent legislation in the Americas on international contracts

134. The countries wishing to harmonize their rules with those of the Mexico Convention and the Hague Principles may incorporate their solutions in general laws on private international law or in laws issued specifically to govern the law applicable to international contracts.

A. Paraguay

135. This is precisely the case with Paraguayan Law No. 5393, of 2015, on the law applicable to international contracts. In its rationale section, the Paraguayan law mentions that its designer was a member of the working group of the Hague Conference on Private International Law and later a representative formally designated by the Ministry of Foreign Affairs of Paraguay to the Special Commission which, at a diplomatic session, adopted the text of the Hague Principles, reproduced nearly verbatim in the new Paraguayan law on international contracts. According to the rationale, such reproduction is highly advisable, with appropriate adjustments, for alignment also with the 1994 Mexico Convention on the law applicable to international contracts, whose text in turn was the inspiration for the aforesaid Hague Principles.

136. Therefore, according to the rationale, this regulation incorporates the benefits of the Mexico Convention as well as the advances contained in the instrument recently

adopted in The Hague, bearing in mind that the above-mentioned principles should serve as inspiration, among other applications, for national legislators in preparing laws unifying the regulation of this area, which is highly desirable for achieving greater certainty in international commercial relations.

137. The final text of the Paraguayan law has 19 articles. Part I (Articles 1 to 10, and also Articles 13 and 14), on choice of law, basically reproduce the Hague Principles with small modifications. The law's following articles (Articles 11 and 12, 15, and 16) cover primarily situations where choice of law has not been made, and reproduce almost verbatim the corresponding provisions of the 1994 Mexico Convention. Lastly, Article 17, on public policy, is aligned with the solution of the Hague Principles, and Article 18 covers the texts that must be revoked as a result of this law.

B. Other regulations in the Americas

138. Mexico has ratified the Mexico Convention and adopted it for general regulation of international contracts (___).

139. Venezuela also ratified the Mexico Convention (published in Special Official Gazette No. 4.974, of September 22, 1995), and, in 1998, enacted a Law on Private International Law, which entered into force in 1999 (February 6, 1999) (Official Gazette No. 36.511, August 6, 1998).

140. In addition, in the Americas, Argentina, Dominican Republic, and Panama very recently modified their legislation governing international contracts. Argentina totally revised its Civil and Commercial Code, and included in the new Civil and Commercial Code different provisions on private international law, among them those referring to international contracts. The Dominican Republic's Law No. 544, of 2014, on private international law also contains regulations on international contacts. The same is true for the new Panamanian Private International Law Code (Law No. 7, of March 8, 2014, published in Official Gazette No. 27.530). Among these texts, the Dominican regulations are those most influenced by the Mexico Convention.

PART FOUR

SCOPE OF APPLICATION OF THIS GUIDE

141. This guide essentially deals with the law applicable to international contracts related to commercial activities. The contemporary instruments that exist contain a number of differences regarding which matters are included and which are excluded, as described below.

VII. Problems of applicable law

142. In private cross-border transactions, three key topics come into play: first, the question what substantive law will apply thereto; second, which forum – judicial or arbitral – will hear any disputes that arise; and third, issues related to the execution of any ruling or award that may be adopted.

143. The Mexico Convention addresses the first of these topics: that is, the substantive law that applies to controversies (Article 1). It thus addresses the problem both when a choice of applicable law has been made and when it has not.

144. This contrasts with The Hague Principles, which address the problems of applicable law only when a choice of law has been made, as can be seen in paragraph 1 of the preamble.

145. The expression *derecho aplicable* is used in the Spanish version of the Mexico Convention, and not *ley aplicable*, which would be the literal translation of the English expression "applicable law." The English "law" is a broader term than the Spanish *ley*, in that it covers other manifestations of law such as custom and precedent, and not merely legislative texts. When the Secretariat of the Hague Conference 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 most of the other Spanish-speaking countries more commonly used the phase *derecho aplicable*.

VIII. Applicability to *Contracts*

146. Notions of contract are not standardized across the world. Under some legal regimes, certain relationships are deemed to generate "contractual" responsibilities; whereas, under others, those same situations are considered beyond the contractual sphere. This is the case, for example, with the free-of-charge conveyance of persons. In some systems, the driver's responsibility for any accidents that might occur is non-contractual, while in others it constitutes a "contractual" duty of safety. There are even some systems where responsibility in given matters can be contractual and non-contractual at the same time.

147. Similarly, commonly used instruments of foreign trade – such as bills of exchange and unilateral promises – are deemed to be contractual in countries including the United States, while the same does not apply in other legal systems.

148. The issue, rather than merely academic, is eminently practical, in that it determines the situations that are or are not covered by the legal provisions governing international contracts.

149. This problem can be tackled in two ways. From the viewpoint of the private international law governing conflicts, the solutions of domestic law indicated by the point of connection would apply. This presents insurmountable disadvantages when the result is incompatible. The other alternative is to identify a solution autonomously, at the universal level.

150. The UNIDROIT Principles provide no guidance on this topic, but the Principles of European Contract Law (PECL) do. Article 1:107 thereof indicates they are applicable by analogy to agreements to amend or terminate contracts, to unilateral promises, and to all other statements and actions that denote intent.

151. However, neither the 1980 Rome Convention nor the Rome I Regulation is clear on the point. For example, both the 1980 Rome Convention and the Rome I Regulation 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 venue. 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 the Rome I Regulation; and Article 1, paragraph 2.c, of the 1980 Rome Convention).

152. 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. This does not occur with 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.

153. Donations are considered contracts in civil-law countries but, in principle, are not under common-law systems. Nevertheless, they can be considered contracts in U.S. law, when reliance has been placed on the promised donation (*reliance*, section 90 of the Restatement of Contracts) under certain circumstances and with exceptional consequences. The same does not occur in English law. The Rome Convention includes donations not made under family law, as noted in the official commentary.

154. As regards the Mexico Convention, the report of the rapporteur of Committee I of the Fifth Inter-American Specialized Conference on Private International Law in 1994 (OEA/Ser.L/XXI.5) indicates that Committee I agreed that the term "international contracts" included the concept of "unilateral declarations of intent." The unilateral acts referred to in Article 5 of the Mexico Convention – such as debt securities, for example – are not included. Noncommercial contracts, such as donations, are also excluded, given that the inter-American text only addresses commercial undertakings. These exclusions and others are dealt with below (___).

IX. *International nature* of the contract

155. This guide deals with international contracts; this gives rise to such questions as the following: when is a contract *international*; what role is played by the parties' established places of business, their nationalities, or the location where the contract is signed and executed?

156. In the Americas, neither the Montevideo Treaties of 1889 and 1940 nor the Bustamante Code addressed this issue. Doctrine has proposed at least three criteria: (1) One *subjective* position takes into account the contracting parties' establishment in different countries; (2) Another *objective* criterion focuses on the transfer of goods from one country to another; thus, for a contract to be deemed *international*, Article 1504 of the French Code of Civil Procedure requires that it involve interests of international trade; (3) A broader position holds that the existence of any foreign element *internationalizes* the contract.

157. Recent regulatory instruments for both international contracts and international arbitration use the word *international* in a very broad sense. In general, it is enough for the parties to be established in different jurisdictions, or for the location where the

contract or competition is to be executed to be outside the State where the parties are established. The *international* classification generally only excludes those arrangements in which all the relevant elements are connected to a single State.

158. Neither the Rome Convention nor the Rome I Regulation addresses this matter directly. They merely refer, in Article 1.1 both instruments, to contractual obligations that entail a conflict of laws.

A. Mexico Convention

159. The inter-American instrument does expressly state, in Article 1, paragraph 2, "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."

160. 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 ties* with more than one State. Given that the two possibilities are connected by the conjunction "or," the contract is considered *international* if either of the conditions are met. The following paragraphs examine the terminology used in the aforesaid provision of the Mexico Convention.

1. Habitual residence

161. Different systems consider human beings to be subjects of law as physical persons, natural persons, or other nomenclatures. The Mexico Convention uses the term *habitual residence* and not others that have created controversies in international contracting, such as that of *domicile*, which in some systems demands an *animus* or intent to establish in the place in addition to the habitual nature of the residence. The instrument fails to clarify certain particular situations, such as alternative residence in different places, or what happens when a person changes his residence after entering into a contract.

162. Those issues are resolved in the Rome I Regulation, Article 19 of which uses the expression "habitual residence" for both natural persons and corporate entities. It states that a person's habitual residence is the one he has at the time the contract is signed. As regards the habitual residence of a natural person acting in the course of his business activity, it shall be his principal established place of business.

163. The Hague Principles also expressly address this issue, stating that the relevant establishment is the one with closer ties to the contract at the time of signing (Article 12 – see provision and commentary below __).

2. Establishment

164. For corporate entities, the Mexico Convention uses the word *establishment.* It fails to make clear whether it refers to the main establishment, and the English translation of Article 1 has been criticized because it speaks of *establishment* instead of *principal place of business,* as the concept is generally known in English-speaking legal systems.

The latter expression is used in the English-language version of Article 12 of the Mexico Convention.

165. Attention must be paid to the fact that the place where a company incorporates may be chosen for different reasons such as, for example, tax-planning purposes. Although such a place could be considered its *establishment*, it does not necessarily correspond to its *principal* place of business. The challenge of finding an appropriate term arises from differences between legal traditions, and the debate has been pursued in different forums for some time as well as during the drafting of various international instruments.

166. Regarding the habitual residence of a corporate entity, Article 19 of the Rome I Regulation defines it as the place of its central administration at the time the contract is signed. Thus, Recital 39 of this instrument states that for the sake of legal certainty, there should be a clear definition of habitual residence for companies; otherwise, the parties would be unable to foresee the law applicable to their situation.

167. According to the report from the Tucson meeting that preceded the discussions that led to the Mexico Convention's adoption, 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 ties to the contractual obligation for which the applicable law was being determined (OEA/Ser.K/XXI.5). The proposal was not included in the final text of the Mexico Convention. It is expressly adopted by Article 12 of The Hague Principles (see ___ below), which could therefore serve to provide interpretative assistance in light of the inter-American instrument's silence on the point.

3. Objective ties

168. The Mexico Convention also states, in Article 1, second paragraph, that a contract is considered international "if the contract has objective ties with more than one State Party." Here again there are language problems with the Mexico Convention: the English-language version uses the term "objective ties" and, as has been suggested, the expression "closer/closest connection" should have been used to remain consistent with the English usage of other international instruments (for example, the Rome Convention of 1980).

4. The Hague Principles

169. Article 1.2 of that instrument provides as follows: "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."

170. Thus, the Hague Principles adopt an approach that is different to that of the Mexico Convention, by offering a definition that is negative and broad. However, the sense remains the same. According to The Hague Principles, the contract is considered international *except when* all its relevant elements are related to a single State. In

contrast, under the Mexico Convention, a contract is considered international *if* the parties have their residence or establishment in different States or *if* the contract has objective ties with more than one State.

171. The Hague Principles also use the term *establishment*, but the commentary clarifies that this refers to any place in which the party has more than a fleeting presence. According to the commentary, the term includes a center of administration or management, headquarters, principal and secondary places of business, branches, agencies, and any other constant and continuous business locations. The physical presence of the party, with a minimum degree of economic organization and permanence in time, is required to constitute an establishment.

172. Hence, the statutory seat of a company alone does not fall within the notion of *establishment*. The commentary to The Hague Principles further determines that a party with its main establishment in a State and commercial activities in another State that are carried out exclusively over the internet is not to be considered established in the latter location.

173. The Hague Principles do not use the term *habitual residence* to refer to the center of operations of natural persons, considering that the term is more related to relations of consumption or employment. For natural persons who pursue commercial or professional activities, the criterion to determine establishment is the same as is used for corporate entities.

174. In line with the solution offered by Article 10(a) of the CISG, Article 12 of The Hague Principles provides: "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." That provision applies to both natural persons and corporate bodies.

175. Moreover, according to Article 12 of The Hague Principles, the "establishment" of a company is determined at the time the contract is finalized. According to the commentary, this respects the legitimate expectations of the parties and provides legal certainty.

5. Parties' choice and internationality

176. The commentary to The Hague Principles indicates 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 excludes situations in which the simple fact that the parties have chosen the applicable law can be a relevant issue.

177. The preliminary work for the Mexico Convention discarded the idea that the choice of the parties alone could determine "internationality" (CJI/SO/II/doc.6/91; OEA/Ser.K/XXI.5).

178. However, 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, however, understand the reference in Article 1.2 of

the Mexico Convention to "objective ties" to more than one State Party was made in order to prevent the parties' choice alone from rendering an agreement "international."

179. In turn, the Rome I Regulation does allow the internationalization of a contract simply by reason of the parties' choice. However, that may not affect the upholding of the *ordre public* of the country where all the relevant elements of the contract are located (Recital 15). That solution makes sense in that it respects both principles – that of autonomy of choice and that of the *ordre public* – emphasizing the former but also recognizing the constraint imposed by the latter.

180. An alternative to the language used in The Hague Principles and the Mexico Convention would be adopt the criterion set out in Comment 1 to the Preamble of the UNIDROIT Principles of contractual law. Although it does not define the term "international," the official comment states that it must be interpreted in the broadest sense possible.

6. Domestic laws

181. The UNIDROIT formula was followed in the *Paraguayan* law governing international contracts. Article 2 of the Paraguayan law (international status of the contract) 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 solution, it is necessary to ask whether the choice of the parties alone is enough to "internationalize" the contract. That is feasible under the Paraguayan law, although, if there are no other international elements, the *ordre public* measure used to assess potential constraints on that choice will be domestic, and not the broader *ordre public* measure that governs international contracting.

182. In contrast, *Chilean* legislation adopts a restrictive approach to internationality. A literal interpretation of Article 16 of Chile's Civil Code and Article 113 of its Commercial Code would mean that a contract is considered international when it was signed in another country and its terms carried out in Chile. By analogy, a contract signed in one country for implementation in another would also be international.

183. The *Venezuelan* Law on Private International Law stipulates, in Article 1, in addition to the system of 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 ties the undertaking may have with foreign systems, and so one group of thought holds that any foreign element of foreignness is enough for it to be considered international, including the nationality of the parties. However, an economic criterion was upheld by the Political and Administrative Chamber of the then Supreme Court of Justice, in a judgment dated October 9, 1997. The judgment 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 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)."

184. The new *Panamanian Code of Private International Law* uses economic criteria to determine the international status of a contract (Article 2.3, Law No. 7 of 2014).

185. *Argentina's* new Civil and Commercial Code, in force since August 2015, does not define international contracts in its provisions relating to private international law. Neither were there any relevant regulations before. One very influential doctrine, based on Articles 1205 to 1214 of the Vélez Sarsfield Civil Code that was previously in force, held that a contract could be deemed international if there was a real connection of signing or performance abroad. At the same time, the Argentine jurisprudence has ruled that a contract is international "if its functional synallagma brings into contact two or more national markets, or if there exists a real connection of signing or performance abroad," as noted by the second bench of the Second Civil and Commercial Chamber of Paraná (Entre Ríos) on August 10, 1988, in the case of *Sagemüller, Francisco v. Sagemüller de Hinz, Liesse et al.* In turn, the third bench of the National Commercial Chamber, on October 27, 2006, held 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."

7. Commercial arbitration

186. In the third paragraph of Article 1, the UNCITRAL Model Law on International Commercial Arbitration stipulates: "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."

187. Regarding the identification of an arbitration as "international," Article 1.3 of the UNCITRAL Model Law on Arbitration combines the criteria of the international status of a dispute 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 admissible by the Model Law.

188. A total of 75 States have enacted legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration, including 12 OAS member states. Most of the States that have adopted legislation based on the Model Law

included the definition contained in Article 1.3. (for example, see provision set out in Article 3 of Paraguay's Law No. 1879 of 2002)

X. Exclusions

189. Not all the issues related to the law that applies to international commercial contracts are covered by the provisions of the relevant international instruments. Thus, the Mexico Convention, the Rome Convention, the Rome I Regulation, and The Hague Principles expressly exclude certain matters.

A. Capacity

190. Article 5.a of the Mexico Convention states that the instrument 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."

191. The terms "status" and "capacity" are treated differently in comparative law. Some systems speak of "status," while others use the term "de facto capacity." In this regard, private international law generally applies the law of persons or the law of the venue (*lex fori*). The topic is excluded from the provisions of the Mexico Convention.

192. There are also differences regarding "*de jure* capacity." This terminology, which is unknown to some systems, is related to what under other legal regimes is referred to as restrictions or bans for the disposal of property. This matter is commonly governed by the law of the place of the provision in question (*lex causae*), given that it is an issue of the *ordre public*.

193. Article 1.3.a of The Hague Principles excludes matters related to "the capacity of natural persons." The official commentary explains that the exclusion means that the provisions determine neither the law governing the capacity of natural persons, nor the legal or judicial mechanisms of contract authorization, nor the effects of a lack of capacity on the validity of the choice of law agreement. This is strengthened by the terms of Article 6.2 of The Hague Principles, which upholds the right of domicile or "establishment" (to use its terminology) for matters related to consent (including the issue of capacity) if, under the circumstances, it would be unreasonable to determine the question by applying the law chosen by the parties.

194. Similarly, Article 1.2.a of the Rome I Regulation excludes from its scope "questions involving the status or legal capacity of natural persons, without prejudice to Article 13." This same article states that when a contract is entered into by persons located in the same country, natural persons with capacity under that country's laws may only invoke their incapacity under the laws of another country if, at the time the contract is signed, the other part was aware of that incapacity or had ignored it through negligence on its part.

B. Matters of family ties and succession

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

196. The Hague Principles contain no such provision, on account of the specific statement given in the instrument that it applies exclusively to commercial contracts.

197. In turn, Article 1.2.b of the Rome I Regulation excludes "obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations." Obligations arising out of matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects are also excluded from the scope of the Rome I Regulation (Article 1.2.c). According to Recital 8, the instrument understands family relationships to cover parentage, marriage, affinity, and collateral relatives. Relationships with comparable effects to marriage and other family relationships, according to the same recital, should be interpreted in accordance with the law of the venue.

198. Article 1.2.c of Rome I also excludes obligations arising from wills and successions.

C. Securities and stocks

199. Article 5.c of the Mexico Convention excludes "obligations deriving from securities" from its scope of application. Likewise, Article 5.d of the Mexico Convention excludes "obligations deriving from securities transactions." These matters are expressly excluded since some systems deem them to be contractual in nature, and it was decided that they should not be covered by the provisions of that inter-American instrument.

200. The Hague Principles do not contain a similar provision.

201. Article 1.2.b of Rome I expressly excludes "obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character." Under Preambulatory 9, the scope of application of Rome I also excludes bills of lading, to the extent that the obligations under such instruments arise out of their negotiable character.

D. Arbitration and venue-selection agreements

202. Article 5.e of the Mexico Convention excludes "the agreements of the parties concerning arbitration or selection of forum."

203. In turn, Article 1.3.b of The Hague Principles states that they do not address the law governing "arbitration agreements and agreements on choice of court."

204. Similarly, Article 1.2.e of the Rome I Regulation excludes from its scope "arbitration agreements and agreements on the choice of court."

205. The arbitration clause entails matters of a contractual nature, such as whether it was properly agreed on or if, for example, it involved error or deceit. In some systems those

problems are deemed procedural and, consequently, are subject to the law of the venue (*lex fori*) or the law applicable to arbitration (*lex arbitri*). In other systems they are treated as substantive matters, to be governed by the law applicable to the arbitration agreement or to the choice of venue agreement. The Hague Principles state that they do not prefer either of those solutions.

E. Questions of company law and relating to corporate entities

206. Article 5.f of the Mexico Convention states that its scope of application does not cover the law applicable to "questions of company law, including the existence, capacity, function and dissolution of commercial companies and juridical persons in general."

207. Likewise, under Article 1.3.c of The Hague Principles, they do not apply to the incorporation and organization of "companies or other collective bodies and trusts." The commentary 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 under common-law systems.

208. The commentary also notes that The Hague Principles shall apply to contracts entered into with third parties, and between partners or participants in such entities such as, for example, an agreement among shareholders. Article 1.3 excludes all matters related "to the incorporation and organization of" companies and other collective bodies and trusts, which are topics that are regulated in several countries by specific provisions of private international law relating to matters of the law of companies, other collective entities, and trusts.

209. Like the Mexico Convention and The Hague Principles, the scope of application of the Rome I Regulation also excludes questions "governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organization or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body" (Article 1.2.f). The exclusion also applies to corporate representation, specifically to whether an intermediary can bind the body he represents in relation to a third party, and the possibility of a body binding the company, partnership, or corporate entity (Article 1.2.g).

210. Article 1.2.h of the Rome I Regulation also excludes "the constitution of trusts and the relationship between settlors, trustees and beneficiaries."

F. Insolvency

211. Neither the Mexico Convention nor the Rome I Regulation addresses this point. Article 1.3.d of The Hague Principles expressly excludes its application to insolvency proceedings. According to the 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. In this regard, specific provisions are established in the rules governing insolvency, such as invalidating certain contracts or giving specific powers

to the administrators of collective processes. In general, The Hague Principles do not determine the law that applies to how to proceed with contracts in the event of insolvency, nor do they address the capacity of the liquidator to enter into new contracts on behalf of the insolvent body.

G. Property rights

212. The Mexico Convention contains no provisions on this matter. The scope of application of The Hague Principles excludes the law governing the effects of contracts involving property. As an example, they refer to a contract dealing with the sale of an asset. Thus, the Principles cover the personal obligation of the seller to convey the asset and the personal obligation of the buyer to pay, but they do not address such matters as whether its conveyance effectively confers property rights without the need for further formalities, or whether the purchaser acquires ownership free of the rights and claims of third parties.

H. Mandate

213. 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 commentary, 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. In contrast, the 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.

214. 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 (___), 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.

215. The Paraguayan law governing international contracts does not address this issue. However, its Article 12 echoes the formulation given in Article 10 of the Mexico Convention, applicable to most cases, and so the Paraguayan courts also have broad powers of interpretation in this regard.

216. In turn, the Rome I Regulation expressly excludes from its scope of application "the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party" (Article 1.2.g).

PART FIVE

UNIFORM INTERPRETATION

XI. Harmonization in conflictualist and uniform-law texts

217. It is not enough for provisions to be similar. When international uniform-law conventions are adopted, the harmonization sought may be defeated if their provisions are interpreted in accordance with domestic notions and not from a comparative perspective. Interpretation must therefore be autonomous, regardless of any national peculiarities that might be inconsistent with the uniformity sought.

218. As a result, recently there has been an increase in the practice of including instructions in uniform-law instruments whereby the courts are required to take into account their international nature and the need to promote their uniform enforcement. One example of this is the formula used in Article 7 of the CISG, part one of which provides: "In 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.

219. Various conflict of laws instruments also refer to the need to take into account their international nature and the desire to ensure uniform interpretations. In Europe, such is the case with the 1980 Rome Convention on the Law Applicable to Contractual Obligations (Article 18). Rome I contains no such provision, but interpreters have called for its interpretation along those lines.

XII. Mexico Convention

220. The preamble to the Mexico Convention 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."

221. Such preambulatory statements can be made a reality in the countries of the Americas that decide to ratify the convention in question or, alternatively, incorporate its solutions into their domestic laws. At the same time, however, such formal acts of adoption alone are not enough. There must also be a uniform interpretation of the formally adopted provisions. Accordingly, 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."

XIII. Harmonizing objective of The Hague Principles

222. Although The Hague Principles do not contain a provision similar to Article 4 of the Mexico Convention, on account of their soft law nature, a harmonizing objective is clear throughout the document, in that it contains provisions that can be adopted by parties around the world in exercising autonomy of choice. Furthermore, paragraphs 2, 3, and 4 of the preamble to The Hague Principles state, as relevant, that "they may be used as a model for national, regional, supranational or international instruments,"

"they may be used to interpret, supplement and develop rules of private international law," and that they "may be applied by courts and by arbitral tribunals."

XIV. Databases and harmonization

223. The main codifying bodies of private international law, both *conflictualist* and uniform-law alike, maintain on-line databases containing various judicial and arbitral rulings on comparative law.

224. Thus, to assist the uniform interpretation of its texts, UNCITRAL has created a system for reporting judgments that make use of them, known by the abbreviation "CLOUT," which can be accessed in print or over the internet (www.uncitral.org/uncitral/en/case_law.html). (select language)

225. A similar system exists at UNIDROIT and the related database is known as UNILEX. The Hague Conference also has data on how The Hague Principles have been interpreted, above all – at this first stage – in doctrine (www.unilex.info).

226. Likewise, the OAS Department of International Law maintains a page to assist the uniform interpretation of matters related to arbitration (http://www.oas.org/en/sla/dil/international_commercial_arbitration.asp). (select language)

227. There are also other databases with valuable information, such as the one maintained by Pace University in the United States on the CISG and related matters (www.iicl.law.pace.edu/cisg/cisg).

228. 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).

XV. Harmonization in national laws

229. Paraguay's Law No. 5393 of 2015, on the law applicable to international contracts, contains no provision similar to that of Article 4 of the Mexico Convention. However, the harmonizing objective is clearly stated in the instrument's explanatory preamble.

230. One alternative legislators could consider would be to adopt an express provision, such as the one set out in the UNCITRAL Model Law on Arbitration, as amended in 2006, Article 2.A of 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."

PART SIX

NON-STATE LAW IN INTERNATIONAL CONTRACTING

I. The term *rules of law* and non-State law

231. Non-State law is recognized in the national constitutions of several American States when, for example, they admit universal principles related to human rights. In fact, several of the region's countries also accept the jurisdiction of the Inter-American Court of Human Rights, which applies those principles.

232. Likewise, several countries in the region accept the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID). There, the application of non-State law is admitted by means of the expression "rules of law" used in Article 42 of the 1965 Washington Convention that created the ICSID.

233. The term "rules of law" was subsequently adopted by various arbitration laws and regulations, inspired by the model regulations proposed by UNCITRAL in its 1976 Arbitration Rules (Article 33), updated in 2010 (Article 35). The expression was also expressly adopted in Article 28 of the 1985 Model Law (as amended in 2006), which has been copied or used as the basis for arbitral legislation in numerous countries of the Americas. According to the official UNCITRAL commentary on Article 28 of the Model Law, the term *rules of law* is to be understood more broadly than the term *law*, and includes those "that have been elaborated by an international forum but have not yet been incorporated into any national legal system."

II. Other references to non-State law

234. Comparative law also uses other expressions to refer to non-State law.

A. Customs

235. The term "customs," which refers to practices that acquire legitimacy through repetition, is nowadays generally reserved for public international law, although the Mexico Convention uses it as an equivalent of "usage" (Article 10).

B. Usage and practices

236. Universal international trade instruments directly use the word "usage"; this is the case, for example, with the CISG (Article 8.3) or the UNIDROIT Principles of International Commercial Contracts (Article 1.9).

237. Thus, in the private arena, the commercial understandings arising from contractual practices were previously called "customs" and now, generally, "usages." According to that nomenclature, custom arises from the State's practice and the conviction that it is legitimate, while usage arises from private action.

238. "Usage" is therefore broader than "custom," in that it covers not only practices that are generally accepted in trade or in a sector, but also those held by the parties as assumed expectations. The feeling of obligatory force present in custom in public international law (known as *opinio necessitates*) is therefore not necessary. Thus, the assumed expectations of the parties in usage are enough for the emergence and observation of obligations.

239. This is reflected in prestigious universal instruments with the term *practices*, which specifically refers to the previous behavior of the parties among themselves. 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 solution is in line with that used in the 1980 Vienna Convention on Contracts for the International Sale of Goods (Articles 8.3 and 9.1).

240. Usage can be proven, but usages institutionalized by different organizations help establish a common understanding of expressions that are frequently used in international commercial contracts.

241. Thus, in the private arena, some global institutions such as the International Chamber of Commerce (ICC) have institutionalized usages in regulatory instruments that are often incorporated into contracts; this is the case, for example, with the rules governing the INCOTERMS, which cover standard terms used in international trade: for example, FOB ("Free on Board"), used in maritime transport, whereby the seller meets his obligation of delivery once the merchandise has passed over the rail of the ship named by the purchaser on the date established; or CIF ("Cost, Insurance, Freight"), whereby the seller must contract for transportation and pay for the corresponding insurance. The Treaty of Asunción, which created the Southern Common Market (MERCOSUR), in Annex 2, on the General Regime of Origin, uses the terms FOB and CIF (Articles 1 and 2). It does not clarify their meaning or scope, but the reference is clearly to the usual terms that the ICC has institutionalized. In this way, it offers formal recognition of those non-legislated sources.

C. Principles

242. Usage is specific to the activity at hand but, once it acquires general acceptance, it becomes a *general principle* or *principle*. If usage is more widespread, it will have greater affinity with general principles and the burden of proving that it is generally known will be reduced.

243. The idea of general principles of law appears in the Austrian Civil Code of 1811 and in various other legal texts codifying private law in both Europe and Latin America. Numerous contemporary judgments by Court of Justice of the European Communities (CJEC) refer to "general principles of civil law."

244. Principles are also recognized by Article 38 of the Statute of the International Court of Justice as a source of international public law, using the expression "the general principles of law recognized by civilized nations." The expression has been adopted in international contracts, such as those governing hydrocarbons in the Middle East, which led to landmark arbitration disputes over the course of the past century.

245. In those cases, and in others settled through arbitration, other expressions were also used: 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 prestigious Institute of International Law, meeting in Athens in 1979,

used such expressions as “general principles of law,” “common principles of domestic laws,” “principles applicable to international economic dealings,” and “international law,” without expressing a preference for any.

246. In addition to the terminological divergence, at present the term *principles* is used in different contexts and with different connotations. On occasions it is used as a synonym of rules without the force of law, as in the UNIDROIT Principles. The word “principles” is also used to refer to rules of a more general nature (such as contractual freedom or good faith) and, on occasions, they are qualified as “fundamental,” which suggests their ties to abstract basic values, such as those enshrined in the national constitutions of different States.

D. *Lex mercatoria*

247. In international trade, principles arise from the generalization of traders’ usages and their institutionalization in rules prepared by public and private international organizations, which are ultimately recognized by different state and arbitral agencies charged with conflict resolution.

248. This is also known as the *lex mercatoria* or the new *lex mercatoria*, as invoked in a famous English case *(Deutsche Schachtbau- und Tiefbohrgesellschaft mbH)* that was settled by the English Court of Appeal in 1998. It was a landmark decision in that it established that the *lex mercatoria* constituted general principles of law. Recently, the Supreme Court of Rio Grande do Sul also described non-State law as *lex mercatoria* (Proceedings No. 70072362940, judgment of February 2017).

249. However, the discussion on the *lex mercatoria* entails intense controversies related to terminology, to its sources, and to whether it constitutes an autonomous judicial regime that is independent of other domestic legal systems.

E. Non-State law in the Mexico Convention and The Hague Principles

1. Mexico Convention

250. This instrument goes further than Rome does. The Rome Convention gave rise to questions regarding whether autonomy of choice extended to non-State law (Article 3). In the draft of the Rome I Regulation presented by the European Commission, it was proposed that a non-State law could be chosen. In particular, the proposed language was intended to authorize choice between the UNIDROIT Principles, the Principles of European Contract Law (PECL), or a possible future community instrument on the topic (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). Nevertheless, the legislature decided to reject the wording proposed by the European Commission. Instead, Recital 13 states that the Rome I Regulation “does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.” (see ___ below)

251. This is not the case with the Mexico Convention. That instrument shows an openness toward non-State law that can be traced back to the preparatory work

(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).

252. However, the inter-American instrument is not free of the terminological chaos that characterized the time at 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 (___).

253. First of all, it should be noted that the terms used in those articles are problematic. For example: which "international organizations" are being referred to in Article 9? Are they restricted to governmental agencies, such as UNCITRAL or UNIDROIT, or do they also include nongovernmental entities like the ICC? What is the scope of the other words and expressions used in Article 10, such as customs, usage, and practices?

254. In this connection, in addition to the remarks made above in this guide, it would be very useful to re-read the Mexico Convention in light of the solutions offered in The Hague Principles and the commentary.

2. The Hague Principles

255. Article 3 of the Principles use 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 the vast development in terms of doctrine, jurisprudence, and regulations that has taken place in connection with the expression since its adoption in the sphere of arbitration.

256. The final text of Article 3 of the Principles also states that the solutions chosen must be "generally accepted on an international, supranational or regional level as a neutral and balanced set of rules."

257. This is a change from the working group's proposal, which chose 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 was also agreed that the parties would be allowed to validly select, when available, rules of a specific sector that could cover the parties' legitimate expectations. In addition, the idea that the rules chosen would have to pass an "examination of legitimacy" to assess their nature and characteristics was rejected.

258. However, in a solution 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 commentary on the Principles states that the criteria should be jointly understood in relation to one another, as explained below.

a. A neutral and balanced set of rules

259. 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 commentary on the Principles states that the rules must be

generally recognized as having been issued by a neutral and impartial body: i.e., one that represents diverse legal, political, and economic perspectives.

260. The commentary on the Principles notes that they must be a set of rules that allow the resolution of common contract problems in the international context and not merely a small number of provisions.

261. The chosen rules of non-State law must be distinguished from individual rules made by the parties. The commentary on the Principles explains that the parties cannot refer 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 banks agree on certain general conditions to govern particular services that they provide, they cannot be chosen as the applicable law.

b. A generally accepted set of rules

262. 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. Generally accepted sets of rules include, for example, the UNIDROIT Principles of International Commercial Contracts and the 1980 Vienna Convention on Contracts for the International Sale of Goods, even in cases when they have not been ratified. The commentary on The Hague Principles states that even if the Vienna Convention is ratified and the parties choose it as "rules of law," no reservations made against it by the States shall apply.

263. Regional rules that meet the criteria established by The Hague Principles include, for example, the Principles of European Contract Law (PECL).

c. Selection of non-State law and gap-filling

264. The Hague Principles state that they do not provide gap-filling rules. Parties designating certain "rules of law" to govern their contract should therefore be mindful of the potential need for gap-filling and may wish to address it in their choice of law. Thus, they may select the UNIDROIT Principles and, for all unforeseen matters, the application of a domestic law.

F. Countries of the Americas

265. The *Paraguayan* law of international contracts is the first in the world to allow the use of non-State law in the judicial arena. 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 regulations would meet that requirement.

266. *Panama* recognizes non-State law and even refers to the UNIDROIT Principles as a complementary source. Article 86 of Law No. 61 of October 7, 2015, replacing Law No. 7 of 2014 and adopting the Code of Private International Law of the Republic of Panama, provides as follows: "The parties may use the principles on international

commercial contracts regulated by the International Institute for the Unification of Private Law (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."

267. In *Peru*, Article 2047 of the Civil Code states that the principles and criteria enshrined in the doctrine of private international law are complementarily applicable in regulating legal relationships that involve several legal systems; in other words, their applicability is recognized.

268. The draft amendments regarding private international law in the *Uruguayan* system are open to non-State law (Articles 13 and 51).

269. Non-State law is also called upon in the interpretation or reinterpretation of local laws in Latin American jurisdictions; this is the case, for example, with important decisions issued since 2010 by leading Colombian judicial venues that have cited the UNIDROIT Principles for that purpose (cited in www.unilex.info). Recent references have also been made to non-State law, such as the UNIDROIT Principles, in decisions of the Venezuelan Supreme Court (1997), of the Paraguayan Supreme Court and superior courts, and Argentine superior courts (cited in UNILEX). Likewise, in 2011, Brazil's Court of Accounts made use of the UNIDROIT Principles of International Commercial Contracts to provide comparative support for a decision it had reached (judgment cited in UNILEX). The UNILEX database also contains other cases in which non-State law has been invoked in arbitration.

8. Arbitration

270. In the world of arbitration, the expression *rules of law* is used in the UNCITRAL Model Law on Arbitration (Article 28.1), in the 1976 UNCITRAL Arbitration Rules (Article 33), and in the current Article 35 of the 2010 Rules; in turn, it is similar to provisions in various sets of arbitral rules.

271. In Latin American laws, the expression "rules of law" is used in Articles 54 and 73 of Bolivia's Law 1770 on Arbitration and Conciliation; Article 22 of Costa Rica's Decree Law 7,727 of 1997, creating the Law on Alternate Conflict Resolution and Promotion of Social Peace; Article 28.4, of Chile's Law 19,971 on 2004, on International Commercial Arbitration; Article 36.3 of Decree Law 67-95, creating Guatemala's Law of Arbitration; Article 54 of Nicaragua's Law 540 of 2005, "On mediation and arbitration"; Article 57.4 of Peru's Legislative Decree 1,071 of 2008, establishing the "Law of Arbitration"; Article 33.4 of the Dominican Republic's Law 489-08 on Commercial Arbitration; Article 32 of Paraguay's Law 1,879 of 2002, on "Arbitration and Mediation"; Article 208.1 of Colombia's Decree 1818 of 1998, on "Conciliation and Arbitration"; Articles 59 and 78 of El Salvador's Legislative Decree 914/02, establishing the "Law on Mediation, Conciliation, and Arbitration"; and Article 2 of Brazil's Law 9307/96 on Arbitration.

272. Among Latin American laws, a law in Panama deserves a 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 of International Commercial Contracts," thereby investing that body of non-State provisions with naturalization papers (Law No. 131/2013, "on National and International Arbitration in Panama").

273. At the regional level, MERCOSUR's Arbitral Agreement of 1998, which has been ratified by all the full members of the bloc (Argentina, Brazil, Paraguay and Uruguay – Decision No. 3/98 of the Council of the Common Market, MERCOSUR), recognizes, in Article 10, the applicability of "private international law and its principles" and of the "law of international trade." Likewise, the MERCOSUR countries and several other Latin American nations have ratified instruments of the Organization of American States (OAS) that are open to non-State law, such as the 1975 Panama Convention on arbitration. Thus, Article 3 of the Inter-American Convention on International Commercial Arbitration (CIDIP I, held in Panama City in 1975) states that when no agreement exists between the parties, reference should be made to the Rules of Procedure of the Inter-American Commercial Arbitration Commission which in turn establish, in Article 30.3, that in all such cases, the arbitration tribunal is to take into account "usages of the trade applicable to the contract."

PART SEVEN

AUTONOMY OF CHOICE IN SELECTING THE APPLICABLE LAW

I. General Considerations

274. The principle of autonomy of choice establishes that private parties may voluntarily bind themselves through contracts and determine the contents thereof. Regarding the substantive provisions of a contract, two different applications of the principle can be seen: at the *internal level*, "freedom of contract" within the constraints of the domestic *ordre public*; whereas with respect to *private international law*, it is related with the contacting parties' power to select the law that is to govern them, with the applicable restrictions of the *ordre public*.

275. One issue not addressed in this guide is the parties' power to select the arbitral or state jurisdiction that would have competence in the event of a dispute, in accordance with the principle of autonomy of choice. This guide focuses on the problems of applicable law.

276. Autonomy of choice is one of the pillars of modern contracting and currently 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 the most suitable law to govern their transaction, instead of that determination being made ahead of time by the legislature, through general rules, or by a court, if a dispute arises. That strengthens the legal certainty that must prevail in commercial transactions and is also intended to reduce state interventionism to encourage private initiative.

277. Although autonomy of choice 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 selection - which could be explicit or tacit - whether a connection is required between the chosen law and the domestic laws 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.

1. Evolution of the principle of autonomy of choice

278. Nineteenth-century European codes do not expressly include the principle of autonomy of choice in their rules for private international law. In South America, Chile's Civil Code of 1855 and Argentina's of 1869 were among the first in the world to include rules for private international law: the former rejected the principle of autonomy of choice, while the latter was silent on the matter, which is understandable since, at the time, the principle was not yet widely accepted.

279. In the United States, the first *Restatement of Conflict of Laws* of 1934 (a highly persuasive academic text) rejected the principle of autonomy, despite the fact that the courts refused to follow that solution. Eventually, it was included in the second *Restatement of Conflict of Laws* of 1971 (section 187). In the case of *Bremen v. Zapata,* decided in 1972, the United States Supreme Court clearly acknowledged the principle.

280. In turn, the Montevideo Treaties of 1889 and 1940 raise multiple questions, including regarding autonomy of choice. The Treaty on International Civil Law of 1889 is silent on the point, which has led some commentators – highly questionably – to claim that it accepted the principle.

281. In the negotiations that preceded the Treaty on Civil Law of 1940, there were clashes between the delegations of Argentina, which supported the express admission of autonomy of choice, and of Uruguay, which called for its rejection. The text of the 1940 Treaty reflects a transactional solution. Although autonomy was ultimately 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."

282. Thus, the solution of the 1940 Treaty was to allow each State, in the exercise of its sovereignty, to determine on an exclusive basis the jurisdiction and law applicable to international contracts. If the State whose law is applicable recognizes autonomy of choice, it will be accepted. Thus, by granting the parties the possibility of selecting the location where the contract is executed, they are indirectly permitted to select the law they wish.

283. In turn, autonomy of choice does not appear to be included in the articles of the Bustamante Code, even though its drafter stated, in a later doctrinal work, that it did recognize the principle. The discussion on this issue remains open.

284. To date, at least two Latin American countries (Brazil and Uruguay) appear to reject the principle of autonomy of choice, or at least its admissibility remains unclear. Both Brazil and Uruguay are members of the Southern Common Market (MERCOSUR), which in its early stages accepted the autonomy of the parties in selecting venues, with the signature of the 1994 Protocol of Buenos Aires on international jurisdiction in contracts, ratified by Brazil, Argentina, Paraguay, and Uruguay. However, while MERCOSUR broadly admits that parties may choose the judge or arbiter, this is not the same as the selection of the applicable law.

285. The principle of autonomy of choice regarding applicable law in cross-border contracting has been included in various treaties on private international law, and it is held to be covered by the provisions of several charters and declarations setting out fundamental human rights, such as Article 29.1 of the 1948 Universal Declaration of Human Rights, which refers to the free and full development of personality.

286. In turn, the influential Institute of International Law, meeting in Basel in 1991, adopted a resolution favoring autonomy of choice in matters of private international law. Article 2.1 of that resolution provides that parties are free to agree on 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.

287. Within the European Union, autonomy of choice is enshrined in several community instruments, such as the 1980 Rome Convention, since superseded by the Rome I Regulation (Article 3.1).

2. Autonomy of choice in the Mexico Convention and The Hague Principles

288. In spite of the reticence that existed toward the principle in some countries of the Americas, autonomy of choice was broadly endorsed by the Mexico Convention, with Article 7, paragraph 1, providing that: "The contract shall be governed by the law chosen by the parties." Article 2 of the Mexico Convention states that: "The law designated by the Convention shall be applied even if said law is that of a State that is not a party."

289. Article 2.1 of The Hague Principles also expressly establishes autonomy of choice by providing that "A contract is governed by the law chosen by the parties." As early as the preparatory work, The Hague Conference on Private International Law had determined that the document's chief aim would be to promote the spread of the principle across the world, something that had been identified as "a need" by organizations such as UNCITRAL and UNIDROIT. Autonomy of choice "stands at the heart of the draft of The Hague Principles," on the basis of its "almost universal recognition." That recognition can be seen in the questionnaire answers submitted to the Hague Conference in 2007, which also recorded the existence of anachronisms in the opposite sense in some regions of Africa and Latin America.

290. In the discussions of the Working Group that prepared the draft of The Hague Principles, three options for the selection of non-State rules were made available: (1) reserving it for the arbitral venue, (2) allowing the selection of state law regardless

of the dispute settlement mechanism, (3) omitting all references to non-State law in the Principles, thereby leaving it open to interpretation by judges and arbiters.

291. The first option would have equated to maintaining the status quo. Indeed, most of the current regulations related to arbitration afford the option of choosing non-State law as the legal framework for an international contract. This can be seen in the arbitral provisions of several regulations (for example, Article 35 of the UNCITRAL Rules of 2010) and laws (for example, Article 28 of the UNCITRAL Model Law on Arbitration) which use the terminology *rules of law*, thereby enabling the parties to select them.

292. In contrast, 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 final option allows the arbitration tribunal or courts of the State to make the determination. It could be held, on the one hand, that this option is the best fit for the principle of the autonomy of the parties. On the other hand, however, by failing to offer a concrete response to the problem, it gives rise to uncertainties.

293. The group finally chose the second option. In other words, to allow the choice of non-State law, regardless of the method for resolving conflicts.

3. Main contract and the choice of the applicable law

294. The Hague Principles use "main contract" to refer to the parties' primary agreement, which could cover the sale of goods, the provision of services, or a loan, for example.

295. The commentary notes that the parties may choose the applicable law in the main contract or enter into a separate agreement for that purpose.

296. These agreements should also be distinguished from "clauses (or agreements) on choice of jurisdiction," "clauses (or agreements) on choice of venue," and "clauses (or agreements) on choice of court of law," terms which are synonyms for referring to agreements between the parties on the venue (generally a court of law) that would resolve any conflicts. Agreements on choice of applicable law should also be distinguished from "clauses (or agreements) on arbitration," which cover agreements between the parties for submitting their conflicts to an arbitral tribunal. Although those clauses or agreements (collectively known as "conflict-resolution agreements") are often in practice combined with those governing the choice of applicable law, their purpose is different.

297. The Hague Principles, and this guide, solely address agreements on the choice of applicable law and not the other conflict-resolution agreements.

4. Selection of non-State law

298. In Europe, doubts existed as to whether under the Rome Convention, in accordance with autonomy of choice, the parties' options included the selection of non-State law. This was also discussed during the deliberations that preceded the Rome I Regulation,

when the idea was finally rejected. Thus, Rome I only allows *incorporation by reference* (Recital 13) and not the selection 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 (see ___ above)

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

300. The Mexico Convention is not explicit on this point. Its drafter Siqueiros wrote in an article on doctrine 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 regulations cover international usages, the principles of international trade, the *lex mercatoria,* and similar expressions. Siqueiros's opinion is backed by other renowned jurists who participated in the Mexico Convention negotiations, including the U.S. delegate Juenger and the Mexican Pereznieto Castro. Control

301. According to this interpretation, the parties may select non-State law to govern their contractual relationship in the exercise of autonomy of choice.

302. The Mexico Convention clearly admits the use of non-State law if no selection is made. Article 9 refers to "principles of international commercial law recognized by international organizations" in the absence of a choice, such as the UNIDROIT Principles of contractual law. Likewise, Article 10 of the inter-American instrument refers to the international "guidelines, customs, and principles" that tribunals must take into account.

303. Since the Mexico Convention does not specifically establish the possibility of selecting non-State law through autonomy of choice, a line of doctrinal thought deems that it is not viable. That position is based on Article 17 of the instrument, according to which the chosen law must be that of a State, even one that is not a party to the Mexico Convention. Article 17 provides, textually, 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."

304. The Hague Principles are explicit in providing (Article 3) that the parties may select non-State law (see above ___).

5. The Hague Principles as a tool for interpreting the Mexico Convention in the selection of non-State law

305. The Mexico Convention embraces the principle of autonomy of choice broadly, and one widely held interpretation maintains that, under that principle, non-State law can also be chosen as the applicable law.

306. The Hague Principles provide major interpretative assistance in determining what is meant by non-State law for it to be selected as the applicable law. Those guidelines were explained above (___).

307. Clearly, according to those indications, a body of rules such as the UNIDROIT Principles of contractual law – or the 1980 Vienna Convention on Contracts, even if not ratified – qualify to be chosen as non-State law.

308. By contrast, unilaterally drafted contractual clauses or conditions clearly do not qualify as non-State law that can be chosen as applicable law, such as the FIDIC Rules of the International Federation of Consulting Engineers that apply to construction contracts, or the GAFTA Rules for the sale of agricultural products drafted by an international industry association. Those are examples of 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 selection as applicable law through autonomy of choice.

309. This does not mean that international usages, practices, and principles cannot be taken into account in interpreting the parties' wishes or preparing the contract, even for corrective purposes (this issue is examined further below, at ___). But this is a separate topic from that of the applicable law that may be chosen by reason of the principle of autonomy of choice.

6. Autonomy of choice in domestic law

310. In *Argentina*, the new Civil and Commercial Code expressly establishes autonomy of choice in international contracts (Article 2651).

311. As regards non-State law, as provided for in Article 2651.d of the Argentine Code, the parties may incorporate by reference and, in that way, the contents of the contract may include: (1) generally accepted usages and practices, (2) international commercial customs, and (3) the principles of international commercial law. Importantly, the parties must be clear and precise in identifying those usages, practices, customs, and principles, given that the incorporation must be made expressly. The Argentine Code does not allow the choice of non-State law as applicable law.

312. The *Bolivian* Civil Code (Article 454) enshrines autonomy of choice. Although the article refers to domestic contracts, there are opinions in doctrine that it can be extended to international contracting. Constitutional judgment 1834/2010-R of October 25, 2010, endorses the opinion that the parties may choose the law that best suits their juridical relationship. In its reply to the questionnaire, the Bolivian government notes that if the parties choose principles such as those of UNIDROIT or the *lex mercatoria*, that will be respected (___).

313. In *Brazil*, the Introductory Law to the Provisions of Brazilian Law (LINDB) contains no express provision on this matter. In contrast, the 1916 Civil Code did expressly allow for autonomy of choice (Article 13). Autonomy of choice is admissible at arbitration or when the Vienna Convention on Contracts – ratified and in force in Brazil – is applied. Judicial decisions are contradictory, with some admitting autonomy (e.g., 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 others rejecting it (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). Bill 4,905, currently before the Brazilian Congress, provides for autonomy in Article 11 ("Contractual obligations shall be governed by the law chosen by the parties. That choice may be express or tacit, and may be amended at any time, provided the rights of third parties are respected (...)." It is silent regarding the choice of non-State law.

314. *Canada* allows autonomy of choice. In Quebec (Canada's only civil law jurisdiction), the principle is codified by Article 3111 of the Civil Code of Quebec (CCQ). The principle is also recognized in Canada's common-law jurisdictions. In Quebec there are limitations relating to consumer rights and employment contracts (Article 3117-18 CCQ), while there are no such constraints in the common-law provinces.

315. In *Chile*, controversy exists regarding the admissibility of autonomy of choice; however, a systematic reading of provisions 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…") has led the doctrine that the principle is admissible to be maintained. Autonomy in the choice of law has also been validated by the terms of Article 1 of Decree Law No. 2,349 of 1978, which establishes rules for international contracting within the public sector.

316. In *Colombia,* although autonomy of choice is accepted, if it is used to select a foreign legal regime as the applicable law for obligations performed in Colombia, the jurisprudence and doctrine have been ambiguous and rulings have tended to find that it is not possible, particularly when it is a Colombian judge who hears the case. In cases of exequatur, interpretations have been more flexible and in such cases the courts have found that the conflict of laws rules are not "obligatorily binding guidelines" (Supreme Court of Justice, Civil Chamber, Judgment of November 5, 1996, Exp. 6130, M. P.: Carlos Esteban Jaramillo Schloss.) At the same time, it has been accepted that in practice, contracting parties can include foreign laws in their contracts when they copy the provisions thereof in the agreement, which will be upheld within the confines of the *ordre public* and of the imperative provisions referred to above.

317. In international commercial or mercantile contracts, a question also arises regarding the applicability or otherwise of autonomy of choice in selecting the applicable law for agreements to be executed in Colombia. First, there is a part of the doctrine that holds that the expression "shall be governed" is imperative and therefore excludes the possibility of choosing and applying a law other than Colombian law in an international contract that is executed in the country. Second, under the general principle whereby autonomy of choice prevails in commercial dealings and due to the existence of specific rules that expressly discard its exercise (such as Article 1328 of the Commercial Code regarding contracts of commercial agency), another part of the doctrine can find no reason to exclude, from mercantile contracts in general, the exercise of that autonomy, even when the contract is executed in Colombia, on the grounds that it is a complementary provision.

318. In the *United States,* autonomy of choice was first recognized decades ago. Section 187(2) of the *Second Restatement of the Law of Conflicts of Laws* clearly confirms the principle.

319. 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*." With the use of the term "law" (*ley*), it is understood that the selection of non-State law is disallowed.

320. *Jamaica* follows the common law it inherited from the United Kingdom. According to customary law, international contracts are governed by the law that the parties choose (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).

321. *Mexico* follows the solution given in the Mexico Convention. The principle of autonomy was already enshrined in legislation before Mexico signed and ratified that convention (Article 13, section V, of the Federal Civil Code).

322. In turn, Law No. 61 of October 7, 2015, replacing Law No. 7 of 2014 and adopting the Code of Private International Law of the Republic of Panama, 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."

323. Non-State law may only be incorporated by reference. Thus, 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 the International Institute for the Unification of Private Law (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."

324. In *Paraguay*, given the deficiencies of the texts of the Civil Code and the Montevideo Treaties used as the source, doubts existed regarding the admissibility of the principle of autonomy until 2013, when the Supreme Court of Justice ruled favorably on it (Agreement and Judgment No. 82 of March 21, 2013, in *Reconstitución del Expte. Hans Werner Bentz v. Cartones Yaguareté S.A. s/ Incumplimiento de contrato)*. To ensure greater certainty, however, it was necessary to enact a law to settle the issue definitively.

325. The first part of Article 4 of Paraguay's new law on international contracts, which copies almost textually 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). Likewise, Article 5, based on Article 3 of The Hague Principles, expressly recognizes non-State law (see __ above).

326. In *Peru*, Article 2047 of the Civil Code provides as follows: "The applicable law for regulating juridical relations associated with foreign legal systems shall be determined in accordance with the relevant international treaties ratified by Peru and, in the absence thereof, in accordance with the provisions of this Code. Also applicable, on a complementary basis, are the principles and criteria enshrined by the doctrine of private international law." Autonomy of choice is recognized, but non-State law is not.

327. In turn, the *Dominican Republic's* recently adopted Law 544 of 2014, on Private International Law, admits autonomy of choice in Articles 58 to 60.

328. 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, 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, autonomy of choice depends on the legislation 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."

329. 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. That silence is resolved through the provisions of the Mexico Convention, with which, in the Venezuelan system of private international law, the parties' autonomy enjoys a broad framework of application.

7. Autonomy of choice in arbitration

330. Autonomy of choice also relates, in another of its facets, to the selection of the arbitral forum. The principle underlies the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention of 1958"), the Inter-American Convention on International Commercial Arbitration ("Panama Convention of 1975"), and the 1979 Montevideo Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards. Of the 35 OAS member states, 28 have ratified the New York Convention, 19 have ratified the Panama Convention, and 10 have ratified the Montevideo Convention.

331. Although these instruments do not directly address the problem of applicable law, autonomy of choice is present in its solutions both regarding the validity of the arbitral clause and in relation to the arbitral process itself and the recognition of the award; it is also understood that the clauses regarding the selection of the law applicable to the merits of the matter must be respected. In Europe, the 1961 Geneva Convention on

Arbitration 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."

332. Within the Southern Common Market (MERCOSUR), the Agreement on International Commercial Arbitration (Decision of the Common Market Council No. 3/98), ratified by Argentina, Brazil, Paraguay, and Uruguay, expressly provides that "the parties may choose the law that is to apply in resolving the controversy" (Article 10).

333. As regards investment arbitration, the principle of autonomy of choice is enshrined in Article 42 of the 1965 Washington Convention that established the International Center for Settlement of Investment Disputes (ICSID), which has been ratified by several countries in the region.

334. In the legislative sphere, Article 28.1 of the UNCITRAL Model Law on Arbitration establishes the principle, and the official commentary notes that this is important, given that several national laws do not clearly or fully recognize that power.

335. In Latin America, numerous arbitral laws establish both the autonomy for appealing to international arbitration and the autonomy of the parties to choose the law that applies to the resolution of their dispute through that mechanism. This is the case, for example, in Chile, in Article 28 of Law 19971 on international commercial arbitration; in Colombia, in Article 101 of Law 1,563 on national and international arbitration; in Guatemala, in Article 36.1 of the Arbitration Law; in Panama, in Article 3 of Decree-Law 5 of 1999, establishing the general regime of arbitration, conciliation, and mediation; in Peru, in Article 57 of Decree 1071, which regulates arbitration; in Brazil, in Article 2 of Law 9,307 of 1996; in Costa Rica, in Article 28 of Law 8,937 on international commercial arbitration; in Mexico, in Article 628 of the Code of Civil Procedure of the Federal District; and in Paraguay, in Article 32 of Law 1,879 of 2002, on arbitration and mediation.

PART EIGHT

CHOICE OF LAW: EXPRESS OR TACIT

I. Express choice of law

336. Parties may select the law applicable to their contracts expressly or tacitly. Party autonomy assumes that the parties have effectively desired to make that selection.

337. Express choice clearly arises from the agreement, and may be verbal or written. Sometimes express choice is made with reference to an external factor. The 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." If the seller has its establishment in a specific place at the time of entry into the contract, the law of that place will govern the contract.

II. Tacit choice of law

A. Formulas in comparative law

338. **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 the solution of Article 2(2) of the 1955 Hague Convention on the Law Applicable to International Sales of Goods is interpreted.**

339. **Under a broad interpretation, the judge will not only examine the express terms of the contract but will also take account of the circumstances of the case. This is provided for in the 1978 Hague Convention on the Law Applicable to Agency.**

340. **The 1980 Rome Convention takes the middle ground, by providing in Article 3(1) that the choice "**must be expressed 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 selected for the agreement on which the others rest.**

341. **The Rome I Regulation 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 terminology change with respect to the Rome Convention of 1980 has to do above all with strengthening the English version (as well as the German version), phrased 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 regulation; rather, it is simply to bring the English and German versions into line with the French text of the Rome Convention.**

B. Tacit choice in the Mexico Convention

342. The issue of the selection of applicable law was subject to intense debate in the discussions leading up to the inter-American convention. Ultimately, the preferred language was for tacit choice to be "clear," rather than resorting to terms such as "evident" or "unequivocal."

343. 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."

344. To that end, all of the contract's points of contact must be considered, such as place of execution and performance, language, currency, and forum or place of arbitration—to cite a few examples.

C. Tacit choice in the Hague Principles

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

346. The issue of tacit acceptance was also addressed in the discussions of the Working Group of the Hague Conference. Given the lack of consensus in comparative law, the parties are encouraged to be explicit with respect to the law to which any dispute between them will be subject. To offer 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 their 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."

347. The commentary on the Hague Principles explains that the specific circumstances of the case may indicate the parties' intent with respect to the selection 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 their prior dealings, and the circumstances do not indicate that they had the intent to change this practice in the current contract, the adjudicator may conclude that the parties have the clear intent for that contract to be governed by the law of that State, even though said express choice does not appear therein.

348. The commentary on the Hague Principles also says that tacit choices 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 commentary 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 thing occurs when the contract contains terminology characteristic of a specific legal system or references to national provisions evidencing that the parties had that legal system in mind and intended to subject the contract to it.

III. Forum selection and tacit choice

349. According to Article 7, additional clause 2, of the Mexico Convention, "Selection of a certain forum by the parties does not necessarily entail selection of the applicable law."

350. In the deliberations leading up to the Mexico Convention, the U.S. delegation—whose position on this point did not prevail—advocated that the selection of the judge should be considered the tacit choice of applicable law. This position coincides with a solution historically enshrined in the common law. U.S. delegate Juenger had expressed in subsequent scholarly work that, even if the rules state otherwise, there is a *domestic trend* of the courts to apply their own law. Obviously this could be an important element, but, ultimately, the selection of a judge should not be the determining factor in deciding that the law of the judge's jurisdiction should be applied.

351. The solution of the inter-American instrument coincides with that of Article 4(2) of the Hague Principles. According to the commentary on that provision, the parties can have chosen a specific 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" (District Court of Luxembourg, judgments of July 7, 1988 and March 17, 1990). 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. This is expressly stated in preambulatory clause 12 of the Rome I Regulation, which provides that: "An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated."

IV. Arbitral sphere and tacit choice

352. Precisely in the arbitral context, 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 Rules of 2010 refer to the rules of law "designated by the parties" as applicable to the substance of the dispute.

353. 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 selection of law.

354. 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 is any indirect indication by the contracting parties of the rules governing them. 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 selecting it as applicable law. It should also be kept in mind that bilateral investment treaties that provide for arbitration often contain references to the law applicable to the substance of the dispute. 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.

355. 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 also not sufficient to indicate, by itself, that the parties have made a tacit choice of applicable law. The commentary 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.

V. Tacit choice and national legislation

356. 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. Article 2651(g) of the Code provides that "The selection of a certain national forum does not necessarily entail selection of the applicable domestic law of that country," coinciding with the solution provided in Article 7, paragraph two, of the Mexico Convention.

357. In *Canada*, the Civil Code of Quebec 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 (Art. 3111).

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

PART NINE

FORM OF CHOICE OF LAW

359. The applicable law may be selected within the contract entered into by the parties, or it may be selected in a separate agreement. One way or the other, 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."

360. It is not necessary for it to be done in written form, before witnesses, or using specific language, unless the parties state—for instance in a memorandum of understanding—that the choice of law clause must be stated in writing in the contract to be concluded.

361. The commentary on the Hague Principles states that Article 5 is not a conflict of laws provision (that refers to a national legal system), but rather a substantive provision that is justified for various reasons. First, the principle of party autonomy indicates that, in order to facilitate international trade, the choice of applicable law by the parties should not be restricted by procedural requirements. Second, most legal systems do not require a specific form for most international commercial contracts,

including for choice of law provisions (for instance, Article 11 of the CISG; Articles 1(2) (first sentence) and 3.1.2 of the UNIDROIT Principles). Third, many private international law codes use alternative outcome-oriented points of connection in reference to the formal validity of contracts (including choice of law provisions), based on the underlying principle of favoring the validity of contracts (*favor negotii*).

362. Although the Mexico Convention does not address this issue, Article 13 establishes the principle of *favor negotii* (favoring the validity of contracts), which must be considered in the interpretation of the issue. It should be considered that the same solution follows from the inter-American instrument. The same is affirmed by the Rome I Regulation, Article 11(1) of which contains a regulation similar to that of the Mexico Convention.

363. The commentary on the Hague Principles also states that the fact that the Principles are designed solely for commercial contracts makes it unnecessary to subject the choice of law to procedural requirements or other similar restrictions for the protection of supposedly weaker parties, such as consumers or workers.

364. The commentary makes clear that Article 5 of the Hague Principles refers only to the formal validity of the choice of law. The rest of the contract (the main contract) must meet the procedural requirements of at least one legal system that is allowed to be used under the applicable private international law provision.

365. Thus, if the parties enter into a contract and agree to be governed by the law of a State under which the main contract is formally valid, the instrument will be valid if the applicable private international law provisions accept the principle of party autonomy.

366. Article 7 of the Paraguayan Law on international contracts is an exact copy of Article 5 of The Hague Principles.

PART TEN

LAW APPLICABLE TO THE CHOICE OF LAW AGREEMENT

I. Existing solutions

367. In an international contract, the parties' rights and obligations are stipulated. A law may or may not be selected in the agreement, whether in the main contract or separately.

368. When a law is chosen (*pactum de lege utenda* or *electio juris*) a vicious circle is created. The law governing the main contract is derived from the parties' choice; nevertheless, the question arises of what law will serve as the basis to assess the validity and the consequences of that choice of law agreement (*de lege utenda*).

369. Various solutions have been proposed with respect to the issue. One option is to apply the *lex fori* 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 the selection. But this raises the very uncertainties meant to be avoided by including the 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 Convention on the Law Applicable to International Sales of Goods and Article 116(2) and by the Swiss Private International Law Act, to cite two examples. Nevertheless, this solution creates problems in cases where the selection was not properly agreed upon.

370. Article 3.5 of the Rome I Regulation provides that consent is determined by the law that would be applied if that agreement existed. This is consistent with the aim of giving the greatest possible effect to the intent of the parties.

371. Article 12 of the Mexico Convention deviates from this solution, stating in the second part: "…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."

372. Article 6(1) of the Hague Principles takes an intermediate stance, 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]."

373. The commentary on this last provision nevertheless 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." Two conditions must be met in this case: first, that in view of the circumstances, it was not reasonable to infer consent according to the law chosen; and second, that there is no valid agreement

according to the law of the State in which the affected party 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. With respect to the latter, the example is given of a party making an offer stipulating that the law of a specific country will govern. If silence equals acceptance according to the law of that country, but not under the law of the place where the party accepting the offer has its establishment, it is not reasonable for that party to be bound by the contract.

II. The "battle of forms" problem

374. The Hague Principles are the first international instrument regulating this issue known as the "battle of forms." It is very common for parties to international contracts to use model 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 have any particular form (see above __).

375. If the standard forms used by both parties designate a law, or if only one of them 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.

376. As the commentary indicates, it frequently happens that the standard forms used by each party 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*).

377. 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."

378. In any case, the exception established in the final part of Article 6 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.

III. National laws

379. In *Canada*, with respect to the existence and formal validity of the contract, the law of Quebec is consistent with the Mexico Convention, allowing for alternative connection factors to validate the instrument (Articles 3109 and 3111 of the Civil Code of Quebec). In other provinces there are no clear precedents, but similar results should be expected.

380. Article 8 of the Paraguayan Law copies the form of the Hague Principles.

PART ELEVEN

SEVERABILITY OF THE CHOICE OF LAW CLAUSE

381. The term *severability,* in the within context, refers to the concept whereby the invalidity of an international contract does not affect the choice of law agreement. In other words, if a contract of sale, for instance, is invalid, the choice of law clause contained within that contract or as separately agreed remains unaffected. Moreover, the effectiveness or invalidity of the main contract should in principle be evaluated according to the law chosen in the agreement in which it was selected.

382. The choice of law agreement, then, is severable from the main contract that contains the rights and obligations of the parties. The choice remains effective in principle, even if the main contract is invalid.

383. Severability is addressed 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."

384. The provision clearly indicates that the validity of the choice of law should be assessed according to the provisions contained in Chapter 2 of the Mexico Convention. Because party autonomy is enshrined therein, if a choice was made, the law chosen will govern in matters related to the validity of the consent.

385. Notably, according to paragraph 2 of that provision, "…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."

386. 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 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.

387. The commentary 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 country, should have been subject to shareholder approval. Nevertheless, this would not automatically invalidate the choice of law agreement, which must be considered separately.

388. 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. Now, 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.

389. The commentary also indicates that the substantive or procedural validity 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.

390. The example is of a contract that contains an agreement that it is governed by a law under which it is considers it 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 nullity, notably the entitlement to restitution when the contract has been performed, in whole or in part.

391. It is a different case when the defect affects both the main contract and the choice of law agreement. The examples given in the commentary are the invalidity of the contract because of bribery or because one of the parties lacked capacity. This will invalidate both agreements.

392. Severability in arbitration agreements is a widely accepted principle in the arbitration world, enshrined in the most important regulations and in the UNCITRAL Model Law (Article 16(1)).

PART TWELVE

OTHER CHOICE OF LAW PROBLEMS

I. Changing the chosen law

393. 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."

394. An express provision is important in this regard. For instance, in Italy, the Supreme Court once held that, "The parties' choice of law will not be admissible when it has been made subsequent to the conclusion of the contract" (Judgment of 1966, No. 1.680, in re: *Assael Nissim v. Crespi*). 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. This solution has been altered in Europe with the Rome Convention, which allows the parties, by joint agreement, to change the law applicable to the contract when they so desire. That solution has been incorporated into Article 3 (2), of Rome I, in terms similar to Article 8 of the inter-American instrument.

395. 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."

396. As stated in the commentary on the Principles, the provision is a consequence of the principle of party autonomy. It clarifies that third party rights cannot be affected, it being preferable for this to be clearly expressed in the instrument rather than deferred to the national laws. In the example provided, if a third party provides a guarantee and the law is later amended to impose greater responsibility on the guarantor, such change will not affect the guarantor.

397. The commentary also makes clear that the procedural issues that may arise with the modification—in the event that it occurs after a claim has been filed—will depend on the procedural law of the place where litigation takes place or the provisions governing the arbitration proceedings.

398. Solutions similar to those provided in the Mexico Convention, the Rome I Regulation, and The Hague Principles with respect to changing the chosen law are found in recent regulations such as Article 9 of Japan's 2006 Code of Private International Law and Article 1210(3) of the Civil Code of Russia.

399. 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 of Article 2651 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."

400. For its part, Article 4.3 of the Paraguayan Law on international contracts mirrors the solution set forth in the Hague Principles.

II. Connection of the chosen law to the contract

401. Under the influence of doctrines such as *localization*, which originated in the 19th century, it was considered that the law chosen should be connected to the dispute. Even today, in some systems, such as in the United States, 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 (*Restatement (Second) of Conflict of Laws*, Article 187(2)(a).

402. The solution is different in Canada, where, in application of the broad principle of party autonomy, it is understood that no connection is required to the law chosen. This is based on Article 3111 of the Civil Code of Quebec, and the case of *Vita Food Products v. Unus Shipping* [1937] UKPC 7, a decision of the Privy Council that is binding on the Supreme Court of Canada.

403. 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.

404. 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 commentary states that this solution is in line with the increasing delocalization of commercial transactions. 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).

405. The Rome I Regulation 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 the connection is generally not necessary, except for the two types of contracts mentioned.

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

407. Article 4.4 of the Paraguayan Law on international contracts, copying 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."

408. The new *Panamanian* Private International Law Act does expressly require a connection between the law chosen and the economy of the transaction, or should be derived from a law known to the parties (Article 75 *in fine*).

409. With respect to *arbitration* matters, this issue is not decisively settled in the Model Law or in the UNCITRAL Rules. There are known arbitral awards, including one in an ICC case, in which the principle of party autonomy, under a broad interpretation, would allow the parties to choose any law to govern their contract, even if it is not obviously related to the dispute (ICC Case No. 4145 of 1984). Nevertheless, arbitrators must act with considerable caution in this area, given that the 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.

III. *Renvoi*

410. *Renvoi* was described at one time as the broadest and most fervently discussed issue in private international law. Does the application of a specific national law also include its private international law provisions? If so, those provisions many times refer the solution back to another law, and that is the problem presented by *renvoi*.

411. 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 the Rome I Regulation.

412. This could be considered as the absolutely prevailing position in the doctrine of private international law on the issue of *renvoi*. Along the same lines, 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 commentary explains that this prevents the possibility of unintentional *renvoi*, and therefore, adheres to the apparent intent of the parties. Nevertheless, in accordance with the principle of party autonomy, parties are allowed—by way of exception—to include the rules of private international law of the chosen legal system, provided that they do so *expressly*.

413. Article 10 of the Paraguayan Law on international contracts, copied from Article 8 of the Hague Principles, stipulates 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."

414. In *Argentina*, Article 2651 of the Civil and Commercial Code adopts the criterion of Article 17 of the Mexico Convention, stating 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 choice of law rules, unless otherwise agreed."

415. Under the *Argentine* Civil Code, the parties may agree that their reference to a specific law includes its choice of law rules. If the parties do not make such an agreement, it is understood that the law chosen is the domestic law of that State. This situation is provided for in Chapter 1 (General provisions). 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."

416. In *Brazil,* the solution is similar to that of the Mexico Convention. Article 16 of the Law of Introduction to the Rules of Brazilian Law provides that, in the determination of the applicable law, "no reference by it to another law" shall be taken into account (*na determinação da lei aplicável, não se deverá levar em conta* "*qualquer remissão por ela feita a outra lei*").

417. In *Venezuela*, with respect to *renvoi*, Article 4 of the Venezuelan Private International Law Act 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."

418. The inclusion of 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."

419. Although Article 4 of the Venezuelan Law is the general rule and, apparently, has no exceptions, scholars have interpreted that the solution of the Mexico Convention to exclude *renvoi* is the prevailing one. Article 2 of the Private International Law Act is cited in support of the exception, and to accomplish the objectives of the Venezuelan rules of conflict contained therein. 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 held that the provisions of the law are subject to interpretation in keeping with the convention and, accordingly, *renvoi* should be understood to be excluded in relation to contractual obligations.

IV. Assignment of Receivables

420. The Mexico Convention does not address this issue. Article 10 of the Hague Principles states: "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."

421. The commentary states that 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 the assignment of receivables. Nevertheless, given the complexity of the situations that arise in transactions such as the assignment of receivables, 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 selected different applicable laws.

422. Unlike Rome I, the Hague Principles do not cover other situations such as legal and conventional subrogation (Articles 14 and 15) or set-off (Article 17), focusing instead on assignment, which is very frequent in international commercial practice.

423. Article 14 of the Paraguayan Law mirrors Article 10 of the Hague Principles.

PART THIRTEEN

ABSENCE OF CHOICE OF LAW BY THE PARTIES

I. The problem

424. In the exercise of party autonomy, the parties should choose the law applicable to their contractual relationships. Nevertheless, they often fail to do so. The reasons for

this may include 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 point, for instance, because they knew it would be difficult to reach an agreement or out of the fear that discussing it would prevent the conclusion of the contract. At times, the parties' choice of law is also ineffective.

425. These cases raise the question of what law to apply—a problem that can arise in the enforcement of the contract or during litigation. Clarity in this respect can, then, help prevent disputes. In the event of a legal action, it can also help orient the parties in the assertion of their positions and, in turn, provide judges with certain guidance in issuing their decisions.

II. The solutions of the Treaties of Montevideo and the Bustamante Code

426. For cases not governed by party autonomy, Article 37 of the *Treaty on International Civil Law of 1940* adopts the formula of the *place of performance* of the contract to govern issues related to formation, characterization, validity, effects, consequences, and performance.

427. This solution raises problems when the place of performance is in more than one State. In addition, that place may not be known at the time the contract is concluded, or it could change later. These and other problems were meant to be resolved through the *presumptions* established in Article 38 of the instrument, 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 Treaty makes the law of the *place of conclusion* of contracts applicable for those that cannot determine the place of performance at the time of formation.

428. The solutions, nevertheless, have been seriously challenged. In fact, international contracts and the obligations arising from them have more than one place of performance. It is therefore impossible to determine which law to apply, unless a *specific service or "characteristic"* and its respective place of performance is selected.

429. This solution has also created 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 debtor of the characteristic performance? Furthermore, determining the characteristic performance becomes extremely uncertain in cases of swap agreements, distribution agreements, and in complex contractual relationships generally, given that complexity is the tendency of international contracts. Worse yet, the solution favors the application of the law of parties that are dominant in the provision of goods and services in international transactions.

430. Consequently, the system set forth in the Treaties of Montevideo in the absence of choice is highly unsatisfactory. The adjudicator is not granted the flexibility to determine whether there are closer connections than those provided in advance by the legislature; nor are the solutions offered by these treaties clearly presented.

431. The solutions provided in the *Bustamante Code* in the absence of choice are also unsatisfactory. The instrument declares that contracts shall be governed by the law that, where appropriate, is common to the parties in terms of their capacity and, in its absence, that of the place of conclusion (Article 186). The same approach is taken with respect to validity, effects, and interpretation (Article 184).

432. Moreover, it is unlikely for there to be a law common to the parties to determine capacity, given that in international contracts the parties' domicile—the prevailing criterion in Latin America over nationality—is almost always different. Therefore, the criterion of a law, common to the parties relevant to capacity will rarely be met, and as a consequence, the criterion of place of conclusion is widely favored. As to forms, the law of the place of conclusion and performance of the contract (Article 180) apply cumulatively, which is also a questionable solution.

III. The principle of proximity in Europe and the United States

433. Europe did not have treaties regulating international contracts prior to the 1980 Rome Convention. The Convention adopted the *closer connection* formula, although it later provides a set of guidelines for arriving at an understanding of *characteristic performance* that coincides with that formula, which generated considerable criticism and disparities.

434. The European reform through the Rome I Regulation of 2008 details in rather rigid rules which law applies in different scenarios in order to reach characteristic performance (Article 4). Nevertheless, the solutions are complicated, to the point that the *preambulatory* c*lause* preceding the Rome I Regulation attempts to clarify them in order to resolve issues of interpretation.

435. The detailed rules diminish the importance 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 regulation of contracts should be characterized by flexibility.

436. This flexibility existed in English law until 1991 (when the Rome Convention went into effect in England) with the *proper law of the contract* formula, the idea of which is similar to that of the closer connection test before the search for a characteristic performance. Along these same lines, the *Restatement (Second) of Conflict of Laws* of 1971 (Sections 145, 188) in the United States adopts the flexible formula of the closer connection or *most significant relationship*.

IV. Mexico Convention

A. Principle of Proximity

437. **The approach of the Mexico Convention aims above all to recognize and support the autonomy of the parties. Nevertheless, in the absence or ineffectiveness of a choice, there has to be a way to determine the applicable law. On this point, Article 9, paragraph 1 incorporates the principle of proximity, providing 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.**"**

438. **Other references to the principle of proximity are the abovementioned notions of *proper law of the contract* and *most significant relationship*. The Hague Principles use the term *closest relationship* when referring to the establishment in Article 12. Nevertheless, this instrument does not regulate cases of absence of choice; the issue is outside the scope of the Principles, as they only refer to issues concerning party autonomy, its ramifications, and its limits.**

B. Objective and subjective elements

439. The first sentence of Article 9, paragraph 2, of the Mexico Convention states that, "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. …" This provision is consistent with Article 1, paragraph 2, according to which, "a contract is international … if the contract has objective ties with more than one State Party," and with Article 11 when it refers to "… State with which the contract has close ties."

440. A determination of the "closest ties," 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 to be considered together with the subjective ones that arise from different clauses and circumstances before, during, and after the contract, and which indicate the legitimate expectations of the parties.

C. Principles of international bodies

441. The second sentence of Article 9, Paragraph 2, of the Mexico Convention indicates that the Court "shall also take into account the general principles of international commercial law recognized by international organizations."

442. Juenger, who was the U.S. negotiator in the drafting of the inter-American instrument, proposed the formula of ***closest ties,*** intending for it to lead to a transnational, non-state law, rather than a national law. He had in mind the applicability of the UNIDROIT Principles of Contract Law that—some two decades after their inception and drafting—were coming to light in 1994, the same year the inter-American instrument was adopted.

443. Indeed, this solution of the Mexico Convention is the result of a compromise among its negotiators in view of the U.S. delegation's position that the UNIDROIT Principles of Contract Law should be applied directly in the absence of a valid choice of law. In Juenger's opinion, it is clear that the Mexico Convention's reference to "general principles" clearly leads to the UNIDROIT Principles. Siqueiros, the architect of the Mexico Convention, underscores the relevance of Juenger's opinion in favor of applying the UNIDROIT Principles because his delegation proposed the compromise formula.

444. There had also been discussion as evidenced in the preparatory works that the idea of *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 all the development of this idea in more recent times, the issue having been addressed much more specifically in the Hague Principles.

V. Solutions in Domestic Laws in the Americas

445. Given that the Mexico Convention establishes that if the parties to a contract fail to select the applicable law (or make an ineffective choice), the law that has the closest connection to the contract will apply. In a recent survey, the States were asked whether their national legislation was consistent with this provision. Seven States replied in the affirmative (Argentina, Bolivia—with provisos—, Canada, Jamaica, Mexico, Panama, and Paraguay).

446. In Argentina, Article 2652 of the Civil and Commercial Code makes reference to the issue, stating that, "In the absence of the parties' choice of law, the contract is governed by the laws and customs of the country of performance. If it is not designated, or does not result from the nature of the relationship, the place of performance is understood to be the current domicile of the debtor of the performance most characteristic of the contract. In the event that the place of performance cannot be determined, the contract is governed by the laws and customs of the country of conclusion. The perfection of contracts between absent parties is governed by the law of the place from which the accepted offer originates."

447. The Argentine legislature has opted for strict points of connection, following the regulatory tradition already used in the previous Civil Code and rejecting a flexible methodology like the one followed by the Mexico Convention. The principle of flexibility tends to create a certain amount of fear and may be one of the reasons for which it was not followed by the new Civil and Commercial Code.

448. The new Civil and Commercial Code of Argentina, unlike the Mexico Convention, expressly includes the theory of characteristic performance. Article 2652 of the Code adheres to the formula of place of performance. If that cannot be determined, the applicable law will be that of the domicile of the debtor of the characteristic performance, and in its absence, that of the place of conclusion. This is the criterion that the Argentine courts had been using. Nevertheless, because the formula leaned toward "current" domicile, the provision left open the possibility that the applicable law could be changed unilaterally. Apart from that, an analogous solution has created so many problems in the 1980 Rome Convention, that the Rome I Regulation relegates it to a secondary level, after establishing a number of strict rules on applicable law. Also, unlike the Mexico Convention, the Argentine Code does not allow the judge to apply non-state law in the absence of the parties' intent; the adjudicator may only resort to local "laws and customs," whether of the place of performance or the place of conclusion.

449. In Brazil, Article 9 of the Law of Introduction to the Rules of Brazilian Law provides that in order to qualify and govern obligations, the law of the country 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.

450. The principle of proximity was used in a recent court judgment in Brazil (TST, *DEJT* 15 out.2010, RR nº 186000-18.2004.5.01.0034). The same principle is found in Article 3 of the Protocol of San Luis on civil liability in traffic accidents, ratified in Brazil (Decree No. 3.856, of July 3, 2001).

451. "…The applicable law with which the contract has the closest ties," is a provision of private international law established in the Bustamante Code, which was ratified by *Bolivia* on January 15, 1931. As previously mentioned, this provision is applicable only to international contracts between private parties. It cannot be applied to international contracts to which the State is a party, due to a constitutional prohibition against submitting to a foreign forum or jurisdiction (Constitution, Article 320.II).

452. In *Canada,* the principle of proximity is enshrined in Article 3112 of the Civil Code of Quebec. It is also established precedent that is taken into account in other Canadian jurisdictions (*Imperial Life Assurance Co of Canada v. Colmenares*, [1967] SCR 443).

453. The Civil and Commercial Codes of *Chile* do not contain any similar provision. Based on the prevailing territorial approach, in view of the silence of the parties (and even against their express agreement), judges will apply the local law if the goods are located in Chile. Otherwise (if the goods are not in Chile), in accordance with Article 16 of the Civil Code, it is determined whether the contract will be governed by the law of the place of conclusion (prevailing doctrine) or by the place of performance.

454. In the *United States,* section 188 of the Restatement (Second) of Conflict of Laws adopts the examination of the most significant relationship to determine the applicable law. It specifies the points of contact to be considered in the absence of an effective choice of law by the parties, which must be evaluated according to their relative importance with respect to a particular issue.

455. In *Guatemala*, Article 31 of the Judiciary Act follows the principle of *lex loci executionis*. 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.

456. *Mexico* adopted the inter-American instrument, which provides the solution that, 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.

457. Article 69 of Law No. 61 of October 7, 2015, Subrogating Law No. 7 of 2014 which adopts the Code of Private International Law of the Republic of *Panama* establishes, in the pertinent part that: "In its absence [i.e., 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."

458. In the absence of a choice, Article 60 of the new Law 544 of 2014 on Private International Law of the *Dominican Republic* allows for the closest connection to be used, in line with Article 9 of the Mexico Convention, and in identical wording. Concerning the parameters that the court should consider in determining the applicable law, Article 61 establishes 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." Paragraph 1 of the same article stipulates that "If part of the contract is severable from the rest of the contract and is more closely connected to another State, the law of that other State may be applied, as an exception, to that part of the contract."

459. Article 11.1 of the Paraguayan Law on 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 notions such as the place of performance of the obligation.

460. Notably, the Paraguayan Law does not replicate the last part of the Mexico Convention, whereby "the general principles of international commercial law recognized by international organizations" (Article 9, second paragraph) are taken into account. The exclusion of this language from the Paraguayan Law is due to the fact that it already makes clear (Article 3) that the reference to law therein can also be understood to include non-state law, which means that if adjudicators find the case to be more closely connected to transnational law than to a national law, they will apply it directly, whether or not it comes from an international body (such as UNIDROIT).

461. Article 2095 of the *Peruvian* Civil Code provides that, in the absence of a selection, 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 countries, 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.

VI. Solutions in arbitration matters

G. Conventional texts

462. The New York Convention does not shed any light on the applicable law in the absence of the parties' choice of law, even by analogy. In the Americas, Article 3 of the Panama Convention regulates the applicable law in the absence of choice of law, but it does so indirectly, referring to other bodies of law, namely the Rules of Procedure of the Inter-American Commission on Commercial Arbitration (IACAC). The provision to which the Convention refers is Article 30 of the Rules, 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." Like the

European Convention, the solution provided by the Panama Convention refers to conflict of laws rules to determine the applicable law in the absence of choice of law.

463. The MERCOSUR International Commercial Arbitration Agreement grants arbitrators the authority to determine the applicable law based on private international law and its principles, as well as on international commercial law. Article 10 of the Agreement establishes 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." It should be stressed that the agreement does not refer to "conflictualist" rules, but rather refers directly to general principles in order to determine the applicable law in the absence of a choice.

H. UNCITRAL Model Law

464. When the parties have not chosen the substantive law, Article 28(2) of the Model Law refers to the applicability of "the law determined by the conflict of laws rules." The provision states that: "… (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

465. The official UNCITRAL commentary on the Model Law state that here the powers of the arbitral tribunal adhere to traditional guidelines. This is because (at least in principle) the arbitrators are bound to applying the conflictualist techniques of private international law. In those cases, what is known as "second degree conflict" tends to arise between the conflict of laws rules rather than between substantive provisions.

466. The Model Law (and the regulatory bodies that follow it) adheres to more traditional or "conflictualist" criteria on this issue. Nevertheless, these regulatory instruments tend to be interpreted extensively, both in theory and in the practice of arbitration, in a way that does not result in localist perspectives. The provision of Article 28(2) appears to bind the arbitrator, who is not allowed to freely choose the applicable law, and supposedly prevents him or her from applying non-state law. Nevertheless, an arbitrator who disregards this provision does not jeopardize his or her award, due to the absence in the Model Law system of oversight by State courts of the reasoning that leads to the determination of the applicable law. Hence, various awards have alluded to the broad powers or even the discretion of arbitrators to choose the applicable law.

I. Approaches for determining applicable law in the absence of a choice

467. There are major disparities on this point. The formula of the Mexico Convention can serve as an effective guide for international arbitrations seated in jurisdictions of the American hemisphere. In the absence of effective regulations, the following solutions have been found in comparative law:

1. Conflict of laws rules of the place of arbitration

468. An original trend reflected in the awards was to give priority to the conflict of laws rules of the place of arbitration. In fact, an old resolution of the Institute of International Law (adopted in Neuchâtel in 1959), stated in Article 11 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."

469. This approach received tacit support for a long time, especially from the common law world. Indeed, the *Restatement (Second) of Conflict of Laws* of the United States provides 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).

470. Often the determination of the seat ends up being fortuitous, when done by the arbitral tribunal or an arbitral institution rather than the parties. Other times, the parties choose the seat for reasons wholly unrelated to its conflict of laws system, such as the political neutrality of the country, its proximity, or the logistical services it offers. In recent awards, it has often been held that, upon determining the law applicable to the substance of the case, the arbitrator can set aside the application of the conflict of laws rules of the forum.

2. Application of other rules

471. The law of the arbitrator's country has sometimes been applied in awards. This solution is based on the fact 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, it may be that the arbitrator's country has no connection to the dispute, apart from being his or her country of origin, thus creating a connection to the dispute that is even more fortuitous 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. Finally, in practice, the reality is that the tribunal tends to be composed of arbitrators from different countries.

472. On other occasions, the argument has been made in favor of giving effect to the rules of the State whose courts would have had jurisdiction in the absence of an arbitration agreement. Nevertheless, this criterion has not prevailed, because arbitration is not comparable to a State dispute resolution system, and in many cases conflicts of jurisdictions arise due to differences in state rules.

473. The application of the law of the State where the award will be executed has also been suggested. This is impractical because it is unpredictable, in addition to the fact that the award may be enforced in more than one country.

3. Cumulative application of the conflict of laws rules of all States with a connection

474. According to this approach, arbitrators should perform a comparative exercise to determine whether there is any conflict between the legal systems related to the case.

475. 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 the application of the wrong law, in those rare instances in which a challenge is possible.

476. Nevertheless, this mechanism—which is quite costly—is only useful when the conflict of laws 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 conflicts of law are tied to the dispute and, therefore, must be taken into account.

J. Deriving the solution from general principles or non-national sources

477. Alternatively, the application of "general principles" of private international law also takes a comparative approach, but with less attention on the connection between these rules and the contractual relationship in dispute.

478. To that end, there is a tendency to turn to international conventions, especially the 1980 Rome Convention on the law applicable to contractual obligations (now the Rome I Regulation), regardless of whether the parties are the subjects of that regulation.

479. The 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 identifying which country has the "closest ties" to a dispute. The issue is potentially complex because then it is necessary to identify the conflict of laws rules of that country. This is not necessarily a simple task, because ultimately those conflict of laws rules have to be applied in order to select the substantive law, which in turn entails carrying out another potentially complex analysis.

480. Nevertheless, accepting the ramifications of the inter-American formula of the Mexico Convention, the closest connection would not be to a national law; rather, it would be to *lex mercatoria* or rules of law. Instruments like the UNIDROIT Principles, well-known in the international sphere, could be used before resorting to complicated "conflictualist" examinations, which is the concern expressed in the above paragraph.

481. Turning to rules of law before a national law is advisable in different scenarios. For instance, it could be that the potentially applicable local law is so poorly developed that it is incapable of providing a solution in the matter, as occurred with the issue of interest that was not regulated in Islamic law. Another example is when the laws of the parties provide opposing solutions, and the use of the conflict of laws rules alone would determine the outcome. In this case, the non-state law is the neutral method of resolving the dispute, without harming the sensibilities 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 court may resort directly to non-state law without having to declare a "winner." On occasion, the selection of a national legal system can also be seen by an arbitral tribunal as unsatisfactory, because it involves the application to an international transaction of a national law designed for domestic commerce.

482. The new Article 1511 of the French 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 account in all cases of commercial practices. The explanatory report emphasizes that Article 1511 and other related articles establish the existence of an autonomous legal system for international arbitration. The arbitrators' authority to apply non-state law is also enshrined in Article 1700 of the Belgian Code of Civil Procedure; Article 1054 of the

Dutch Code of Civil Procedure; and of Article 834 of the Italian Code of Civil Procedure.

483. Contrary to an extended idea based on an abstract view of the transnational rules method (which leads to the application of non-state law), the predictability of the outcome is better ensured using this method rather than classic conflictualism. Parties that have not taken the precaution of choosing the law applicable to their contract may be more surprised by the application of a rule that is not generally accepted in comparative law than by the application of another that reflects a broadly adopted legislative movement.

K. *Voie directe*

484. The term "*voie directe*" is well-known in the language of arbitration, and has also been invoked in awards. The direct method consists of the arbitrators choosing the law without the need to refer to any conflict rule. In the application of this mechanism, the arbitrator will probably also apply 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 in spite of the fact that the arbitrator must provide a reasoned explanation for his or her decision, in accordance with the legitimate expectations of the parties. Indeed, different arbitration rules provide that the award should, in the absence of a different agreement by the parties, "contain the reasons on which it is based."

485. Direct choice should not be seen as arbitrary, and in any case ideas that form part of the conflictual system, such as closest connection or place of performance, can be taken as a reference. In particular, when the outcome of the case differs depending on what law is applied, arbitrators should not be suspected of having chosen the law applicable to the dispute according to the expected outcome. This consideration does not lead the arbitrators to always select the same method. Depending on the circumstances of each case, the method that appears to be the most solidly supported will vary.

486. Modern arbitration laws use the *voie directe* method. It is recognized, for instance, in the laws of France (Article 1496 of the Code of Civil Procedure), 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, as amended by the Arbitration Act of January 13, 2006), Slovenia (Article 32(2) of the Arbitration Act of April 28, 2008); Germany (limited *voie directe*, Article 1051(2) of the Code of Civil Procedure), and Switzerland (Article 187(1) of the Federal Private International Law Act). 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 628 of the 2009 Code of Civil Procedure of the Federal District) and Peru (Article 57 of Legislative Decree 1071 of 2008).

487. The direct method now incorporated into Article 35 of the UNCITRAL Arbitration Rules is one of the major advances with respect to the prior rules of 1976. It is also an

advancement with respect to the Model Law, which did not provide for it in Article 28(2).

488. When the amendments to the UNCITRAL Arbitration Rules were discussed, different points of view were expressed with respect to whether the arbitral tribunal had the discretion to designate "rules of law" when the parties omitted to make a choice of law. It was decided that the rules should be consistent with Article 28(2) of the Model Law, which refers to the arbitral tribunal applying the "law" rather than the "rules of law" determined to be applicable.

PART FOURTEEN

DÉPEÇAGE OR "SPLITTING" OF THE LAW

I. Concept

489. In private international law, the French term *dépeçage*, or "splitting" of the law, refers to the division of the contract so that different parts of the contract can be governed by different law.

490. The law may be split, for instance, when a contract of sale is subject to the law of a country with the exception of its guarantee clause, which is governed by another law. Another example, also in an international contract of sale, is when the deadline for the purchaser to report any defect in the goods conveyed is governed by the law of the place of their delivery. Another situation is that of a clause that provides for the payment of capital and interest, at the creditor's option, in one or more country, in the currency of the chosen country. In that case, the parties will often agree that the law of the chosen country will govern matters related to the sum to be paid and the form of payment.

491. *Dépeçage* is derived from the principle of party autonomy. It does not fall within the 19th century doctrines of localization, and in fact, Herbert, the Uruguayan negotiator of the Mexico Convention, has said that the solution of this instrument could appear to be profoundly at odds with the Treaties of Montevideo.

492. The scholarly opinions against *dépeçage* point to arguments such as its minimal advantage in view of the risks that *dépeçage* entails because of the technical problems that could arise 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, as aspects of the applicable law that may favor the stronger party can be manipulated.

493. Nevertheless, even those who oppose *dépeçage* must admit that issues such as those related to the form of the contract and capacity may be governed by other laws.

494. Arguments in favor note that autonomy is an instrument available to the parties for the improved regulation of their interests, if deemed appropriate. The principle serves the intent of the parties, and mandatory rules or public policy, prevent it from being used by the stronger party against the weaker one.

495. There are two possible approaches with respect to *dépeçage*. First, the parties may choose one or more laws to govern their contracts, as allowed by certain domestic codifications, such as Article 3111(3) of the Civil Code of Quebec (1991), and Article 1210(4) of the Civil Code of Russia. Second, there can also be a partial selection of the applicable law, leaving the rest of the contractual obligations to be determined objectively. The Rome I Regulation expressly permits this partial selection, 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.

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

496. Article 7, paragraph 1, of the Mexico Convention states 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, when the adjudicator decides to apply the rules of third countries connected to the contract or public policy rules.

497. Article 2.2 of the Hague Principles provides 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 category of "law," it can be chosen as well.

498. The reason for the multiplicity of choices (for instance, that one clause on 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 commentary on the Hague Principles. 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.

499. The commentary also says that, in practice, partial or multiple choices of law may refer to, for instance, the contract's currency denomination, special clauses relating to performance of certain obligations, such as obtaining governmental authorizations, and indemnity/liability clauses. The example is given of the purchase of shares in a corporation, in which a third party has guaranteed the buyer's payment obligations. Here the parties may agree, for instance, that the obligations of the seller and the buyer are governed by the law of a State, and the guarantee obligations by a different law, namely that of the guarantor's principal place of establishment. Another illustration is that of an international sales contract where the different contractual obligations may

be governed by a particular law, except that the conditions under which the seller must obtain inspection certificates will be governed by the law of the various States of final destination of the goods.

III. *Dépeçage* and national laws in the Americas

500. In *Argentina*, the first paragraph *in fine* of Article 2651 of the Civil and Commercial Code 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."

501. In *Brazil* there is no provision that expressly allows for *dépeçage*; however, it is recognized in scholarly doctrine. *Colombia,* also without expressly authorizing it, does not prohibit *dépeçage*, and it is accepted by an interpretation of context, as evidenced in Article 13 of Law 80 of 1993 on Public Procurement and in Article 20 of the Civil Code.

502. In *Paraguay*, Article 4.2 of the new law on international contracts transcribes the solution of Article 2.2 of the Hague Principles.

503. In *Venezuela*, the parties can choose a legal system for each part of the contract or choose a law for just part of it, as voluntary *dépeçage* is permitted. Although Article 29 of the Private International Law Act does not refer expressly to the possibility of *dépeçage*, it can be inferred from the Act's reference to the law applicable to "conventional obligations" rather than simply to "international contracts," just as the Mexico Convention (ratified by Venezuela) does. Therefore, accepting 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.

IV. *Dépeçage* and arbitration

504. Because arbitrations have no forum, *dépeçage* raises a particular problem in this sphere. The issue is not addressed expressly in either the Model Law or the UNCITRAL Arbitration Rules, although according to scholarly doctrine, *dépeçage* is widely accepted pursuant to the principle of autonomy, which openly prevails in this context.

505. The use of *dépeçage* could enable the 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.

PART FIFTEEN

CORRECTIVE FORMULA

I. Appropriate solutions for an international case

506. Equitable formulas grant authority to the adjudicator to mitigate the harshness of strict application of law. In matters involving international contracts, these formulas

aim to find a fair solution to the case, in accordance with the trans-border nature of the transaction.

507. Various national 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 this case, even while recognizing that the buyer is entitled to this right under the circumstances, it would be desirable to impose certain obligations the buyer, such as the safekeeping or resale of the goods.

508. International transactions commonly involve particular factors, such as the distance between the buyer and the seller, or the presence of certain requirements such as import and export licenses that depend on the authorities, or the existence of prohibitions against the transfer of foreign currency, among others. Therefore, the adjudicator in these cases cannot act subserviently or mechanically to blindly apply local tools to resolve the dispute.

509. Moreover, judges are generally not well prepared to apply foreign domestic laws. It is unrealistic to expect local courts to be equally trained to apply domestic and international law, considering that only their own practice, case law, and scholarly works can be properly handled by judges within their jurisdiction.

510. In addition, it is often impossible to issue an opinion as to how a complex question will be answered in a national law, or to predict how a local court will rule. Some 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 various countries plagued by judicial corruption, making it difficult to predict outcomes due to case law precedents of dubious origins.

511. Adjudicators frequently refer to *escape clauses* in seeking justice in an individual case, manipulating concepts of private international law such as classification, *renvoi*, public policy, and others, or even invoking *constitutional or human rights*. The Constitutional Chamber of the German Court handed down a historic judgment in this regard in 1971, invoking constitutional rights in the reinterpretation of its private international law. On at least one occasion, the European Court of Justice based its decision on the European Convention on Human Rights, for instance, when it 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*, Case C-7/98, (2000) ECR I-1935).

512. In addition, when the parties choose the law of a third country, they do so mainly with the intent to find a neutral solution, despite rarely having in-depth knowledge of its content. The subtleties of the rules as they are distilled by the case law can come as a surprise to a foreign party. This issue was addressed, for instance, in a well-known interim award of January 2001, issued in ICC arbitration No. 10279. In that case, the tribunal decided not to apply a peculiar jurisprudential interpretation of the text of a national law, finding that they were dealing with experienced international

businesspeople, and that to find otherwise "would be inconsistent with commercial reality."

513. This entire issue, of course, warrants careful examination. A case-by-case analysis would be essential, concentrating on the legitimate interest of the parties. If a party chose a national law because it desired a rigid solution for a specific case, it should express this and thereby exclude 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 develops.

II. A broad-brush interpretation for international transactions

514. In trans-border transactions, it would be desirable for national laws to be interpreted from an expanded or corrective viewpoint in order to arrive at a fair resolution of the case.

515. The fact that national laws contain formidable corrective rules should be taken into account. They may be derived from principles contained, for instance, in national constitutions or human rights treaties, and the national courts have both the duty and the authority to apply them.

516. In addition, domestic laws are the constant subject of a comparative construction, such as when local norms like good faith are interpreted in light of solutions like the ones provided by the UNIDROIT Principles, as can be seen in the UNILEX database that compiles relevant cases from Colombia and Paraguay, for instance.

517. Different legal systems have general principles that can be broadly interpreted by adjudicators, such as *good faith, force majeure,* and *hardship.* In this regard, comparative law has proven to be very effective as an auxiliary interpretive tool.

518. This comparative construction holds even more firmly in international contractual arrangements, due to additional reasons. It is impossible to dissociate law from the language of its expression. For instance, regarding the terms *cure*, *reliance*, *consideration, misrepresentation* or *frustration*, a *broad-brush* interpretation is called for when one of the parties does not come from the common law tradition. Inversely, 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.

519. In addition, in situations where there are different potentially applicable laws, foreign languages, or different currencies, to cite a few examples, the solution generally cannot emerge from a purely national context.

III. Corrective value of customs

520. In transactions governed by national laws, the parties can expressly include customs, such as when they adopt the INCOTERMS of the ICC. They can also do so tacitly. This would be the case of a custom not referred to by the parties, but widely known and accepted, which should be understood as included within what they intended. In this regard, commercial practices can be considered internalized in the

contract as an expression of the will of the parties. Customs acquire a corrective value in domestic laws.

521. This is also applicable in international contractual arrangements. Implicitly included customs 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 Vienna Convention (Article 9.2) and the UNIDROIT Principles (Article 8.1) 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 about them.

IV. The corrective value of principles in international contractual arrangements

522. Not infrequently, the parties refer in their international contracts to general principles, whether as supplements to the national law they choose or as directly applicable to the dispute.

523. In addition, principles may have a very important corrective value, in both the domestic and the international order. Many national systems accept principles such as good faith or equity in the interpretation in order to reach fair decisions. The same occurs in international contractual arrangements when adjudicators avail themselves of such principles in order to rule fairly.

V. Pioneering role of the OAS with respect to corrective formulas

524. Many years ago, the OAS openly agreed that adjudicators could resort to the escape mechanism in order to "meet the demands of equity in the specific case," beyond the application of "national laws."

525. In fact, Article 9 of the Inter-American Convention on General Rules of Private International Law (IACGRP II, Montevideo, 1979) 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."

526. The instrument has been ratified by various countries of the region (Argentina, Brazil, Colombia, Guatemala, Paraguay, Ecuador, Mexico, Peru, Uruguay, and Venezuela). It has not been ratified by any common law country, in spite of the fact that the solution adopted by the Convention is derived from formulas that had been proposed by *common law* jurists.

VI. Corrective formula of the Mexico Convention

527. The Mexico Convention of 1994 contains a solution consistent with that of the aforementioned instrument, providing 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."

528. The wording of the analogous Article 9 of the Convention of 1979 was suggested by common law jurists. Nevertheless, this version of Article 10 of the Mexico Convention was proposed by Parra Aranguren, President of the Venezuelan delegation, who hailed from the civil law tradition.

529. Discussions have been raised as to whether Article 10 has a merely supplementary role. Nevertheless, the text clearly indicates its corrective function when required by justice in the specific international case. 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." The interpretation should also be done correctively according to this broad-brush approach.

530. The understanding in the deliberations prior to the Mexico Convention was that this Article 10 leads to *lex mercatoria* (Report of the Meeting of Experts on International Contractual Arrangements, Tucson, Arizona - OEA/Ser.K/XXI.5). To this day, doubts remain among academics with respect to the expression. Nevertheless, this issue is separate from the value of the corrective formula as such, and this guide aims to clarify in different places the terminological issue related to *lex mercatoria*, and "customs, usage, and principles", which are the terms used in Article 10.

VII. National legislation

531. There is no equivalent to Article 10 of the Mexico Convention in *Canada, Chile, Colombia,* or *Guatemala*, although those countries do have corrective norms applicable to arbitral matters.

532. Article 12 of *Paraguay's* law on international contracts is a verbatim copy of Article 10 of the Mexico Convention.

533. Article 86 of the new *Panamanian* Private International Law Act, curiously located in Chapter II, which is entitled "international statute of limitations," states that the UNIDROIT Principles "may be agreed to in a supplemental manner or as a means of interpretation to be used by the judge.", (while stating inadvertently that the institution is "known by the English acronym", while UNIDROIT is a French acronym for the name of the Institute) The provision does not make it clear, but it is referring to The UNIDROIT Principles of Contract Law.

534. Article 61, Paragraph II of the *Dominican Republic's* new Law 544 of 2014 on 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."

535. The Civil Code of *Peru* refers to the application of the principles and criteria established in private international law doctrine (Article 2047).

536. In *Venezuela*, Article 31 of the Private International Law Act mirrors Article 10 of the Mexico Convention.

VIII. The corrective formula in arbitration

537. Article 28(4) of the UNCITRAL Model Law states that, in all cases, the terms and conditions of the contract, the commercial usages, and practices applicable to the transaction must be taken into account. This formula had originally been included in the European Convention on International Commercial Arbitration of 1961 (Article VII) and included in the UNCITRAL Arbitration Rules of 1976 (Article 33)), and remains in the current 2010 Rules (Article 35(3)).

538. In the deliberations of the Working Group that drafted Article 28 of the UNCITRAL Model Law, it was clear that *in all cases* the arbitral tribunal will take account of the stipulations of the contract and the commercial usages applicable to the case. Thus, the arbitral tribunal is granted a wide margin of discretion in the resolution of particular cases, "divorcing" it from a specific national system (Report of the Secretary General on the UNCITRAL Arbitration Rules A/CN.9/97, April 1973).

539. 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, independent of the intent of the parties and prevailing over the determinations of choice of law rules. This was acknowledged, for instance, by an arbitral tribunal seated in Costa Rica (Ad hoc arbitral award in

Costa Rica, 30.04.2001 / UNILEX, citing other ICC awards in this regard). In an arbitration seated in Argentina—despite the fact that both parties designated Argentine law as applicable—the arbitral tribunal turned to the UNIDROIT Principles as international commercial usages and practices, reflecting the solutions of different legal systems and international contract practices, stating that, as such, and in accordance with Article 28(4) of the Model Law UNCITRAL on International commercial arbitration, they should prevail over any domestic law (Ad hoc arbitral award of 10.12.1997 / UNILEX).

540. Are the arbitrators operating *contra legem* in these cases? The answer is clearly no. When a party chooses an applicable substantive law and a Model Law jurisdiction, it is also selecting Article 28(4) with its corrective powers. In addition, Article 2 of the 2006 amendment of the Model Law emphasizes its international origin and the need to promote the uniformity of its application. A provision like this one imposes a legal mandate on arbitrators in favor of a broad interpretation.

541. In addition, even in arbitration, parties frequently select 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. Arbitrators can mitigate the unfair consequences of this by using their corrective powers.

542. Nevertheless, the arbitrator must also be extremely careful when the parties have based their arguments solely on a law that they have selected, in order to not 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 uses of the principles that would be applicable to the case in view of what may expressly or implicitly emerge from the contract.

IX. National laws and rules of arbitration

543. In Latin American arbitration laws, an analogous mandate to address *in all cases* the contractual stipulations and relevant commercial usages can be found in Articles 54 and 73 of Law 1770 of Bolivia; Article 22 of Decree Law 7727 of 1997 of Costa Rica; Article 28.4 of Law 19.971 of 2004 of Chile; Article 36.3 of Decree Law 67-95 of Guatemala; Article 54 of Law 540 of 2005 of Nicaragua; Articles 26, 27, and 43 of Decree Law No. 5, of July 8, 1999 of Panama; Article 57.4 of Legislative Decree 1071 of 2008 of Peru; Article 32 of Law 1879 of 2002 of Paraguay; Article 33.4 of Law 489-08 of the Dominican Republic; and Article 8 of Venezuela's 1998 Commercial Arbitration Act.

544. For its part, Brazil's Arbitration Act [*Lei de Arbitragem*] (Ley 9307/96) stipulates that the parties may authorize arbitrators to take account of general principles of law, usages and customs, and international commercial rules (Article 2 §2).

545. Ecuador's 1997 "Arbitration and Mediation Act" 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.

546. In addition to the UNCITRAL Rules, other arbitration rules also provide a corrective formula. Article 21 of the 2012 rules of the International Chamber of Commerce provides that "The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages." This provision was not amended by the new ICC rules of arbitration of 2017. Article 28.2 of the 2009 International Arbitration Rules of the American Arbitration Association (AAA/ICDR) contains a similar provision. Among the Latin American arbitration rules, the same formula is enshrined in the Rules of the Arbitration Center of Mexico (2009); the Chamber of Commerce of Santiago (2012); the Chamber of Commerce of Lima (2008) and Article 35 of the Arbitration Rules of the Arbitration and Mediation Center of Paraguay (2010), among others.

PART SIXTEEN

SCOPE OF THE APPLICABLE LAW

547. Different international instruments, such as the Mexico Convention, The Hague Principles, and the Rome I Regulation, make express reference to the scope of their application to specific issues such as the interpretation of the contract; the rights and obligations of the parties; contract performance and consequences of breach; forms, and consequences of nullity. The Hague Principles add two additional topics: burden of proof and pre-contractual obligations.

548. The list is not exhaustive, as the texts state that they refer to them "principally" (Article 14, first sentence of the Mexico Convention) or "in particular" (Article 9.1 of the Hague Principles; Article 12.1 Rome I Regulation).

549. The commentary on the Hague Principles indicates that these issues are among the most important for any contract. Their inclusion on the lists ensures legal certainty and uniformity of results, as the incentive for forum-shopping is reduced. 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.

550. In addition, the fact that these issues are included on such lists means that they should be considered "contractual," which is not the case in all systems. By specifying that they are, the danger of them being classified differently is avoided, and the uniformity of outcomes is therefore encouraged.

551. This, of course, does not prevent the parties from selecting different legal systems to govern different parts of the contract (*dépeçage*), or even to opt for one of them solely for one or more of the points mentioned in Article 9.1, for instance, to the interpretation of the contract. (see above __)

A. Interpretation

552. Articles 14(a) of the Mexico Convention, 9.1(a) of The Hague Principles, and 12.1(a) of the Rome I Regulation refer to the interpretation of the contract. The

appropriate or chosen law will govern the interpretation of all the terms used in the agreement.

B. Rights and obligations of the parties

553. Article 14(b) of the Mexico Convention states that its application extends to "the rights and obligations of the parties." In the same regard, Article 9.1 of the Hague Principles extends application to "the rights and obligations arising from the contract."

C. Performance and consequences of breach

554. Article 14(c) of the Mexico Convention extends application to "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." Article 12.1(b) of the Rome I Regulation establishes that the applicable law will govern "performance," while clause (c) extends its 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."

555. Similarly, Article 9.1(c) of the Hague Principles stipulates application to "performance and the consequences of non-performance, including the assessment of damages."

556. The commentary on the Hague Principles states that this applies, for instance, to 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

557. Article 14(d) of the Mexico Convention makes it applicable to "the various ways in which the obligations can be performed, and prescription and lapsing of actions." Similarly, Article 12.1(d) of the Rome I Regulation provides that the applicable law extends to "the various ways of extinguishing obligations, and prescription and limitation of actions." At the same time, according to Article 9.1 of the Hague Principles, "the various ways of extinguishing obligations, and prescription and limitation periods" are included.

558. In the English version of the Mexico Convention ("*...d) the various ways in which the obligations can be performed…*") the term "*extinción"* was incorrectly translated as "*performed*" (which in Spanish would be "*cumplido*"), when the correct word would be "*satisfied.*" In fact, 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" (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)

559. The chosen law determines the commencement, computation, extension of prescription and limitation, and their effects in proceedings, 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 uniformity of results.

E. Consequences of nullity or invalidity

560. Article 14(e) of the Mexico Convention extends it to "the consequences of nullity or invalidity of the contract." Article 12.1(e) of the Rome I Regulation provides that the applicable law regulates "the consequences of nullity of the contract." Similarly, Article 9.1(e) of the Hague Principles extends it to the "validity and the consequences of invalidity of the contract."

561. The validity of the contract is discussed in ___. This part focuses on the consequences of the nullity or invalidity of the contract, "for example, the obligation of restitution or payment of damages."

562. The commentary of the Hague Principles makes clear that the chosen law governs regardless of the term that is used to describe the result ("null" or "invalid"). It additionally states that Article 9(1)(e) is closely linked to Article 7 (severability of the choice of law clause). According to Article 7, it may be the case that the choice of law clause is valid, whereas the main contract to which it applies is not valid. Article 9 clearly establishes that, in such a case, the consequences of the nullity of the contract are still governed by the law chosen by the parties.

F. Other Aspects

563. Article 9.1 of the Hague Principles extends, in addition, expressly to the "burden of proof and legal presumptions" (clause f); and to "pre-contractual obligations" (clause g).

564. The commentary 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. Other procedural issues are usually excluded from the scope of the chosen law. The solution is consistent with Article 12(g) of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods and Article 18(1) of the Rome I Regulation.

565. With respect to prior negotiations, the commentary states that once the parties have concluded the contract, the obligations that arose out of dealings prior to its conclusion are also subject to the chosen law. However, it also makes clear that even before the contract is concluded, the parties may choose the law applicable to the contractual negotiations and therefore to pre-contractual liability. In the event that the parties choose this option, the chosen law would govern, for example, the consequences of an unexpected breakdown of such negotiations.

PART SEVENTEEN

ORDRE PUBLIC

I. The concept of public policy

566. The principle of party autonomy is limited by *public policy*. Public policy is one of the most controversial concepts 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.

567. Public policy serves as a mechanism that aims to work as a barrier to contracts that go against the basic values of a community. Public policy seeks to safeguard fundamental interests of the State, such as those related to political institutions or the monetary regulations of the States, for example. It also seeks to protect the wellbeing of the inhabitants and the proper functioning of the economy, for instance, through regulations that ensure freedom of competition. At times, it aims to protect parties who may find themselves in a weak position in contractual relationships, like workers and consumers.

568. In private international law, public policy has *two facets*. In one, public policy is *a mechanism that prevents the application of the law indicated by the conflict of laws rule*.

569. The conflict of laws rule may authorize party autonomy. Nevertheless, the parties' choice of law cannot run counter to the jurisdictional public policy. 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.

570. Public policy in this first facet serves as a barrier or *shield* that bars the application of law that would otherwise be applicable under the conflict of laws rule.

571. In its second 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 countries have these types of provisions that, functioning as a *sword*, are applied directly to trans-border issues, without regard for the intent of the parties or any other conflict of laws rule.

572. These concepts are provided in modern private international law instruments. Below, first discussed is the use of public policy as a mechanism that prevents the application of the law indicated by the conflict of laws rule.

II. Public policy at the international level and "*manifest*" infringement

573. A forum´s public policy rules are applied directly within its territory to domestic transactions, for purposes of safeguarding fundamental values. In private international law as well, the "public policy" doctrine prevents application of foreign law that would

otherwise have been applicable according to the adjudicator's conflict of laws rules because the use of that foreign law would violate fundamental societal values.

574. Used in this way, public policy in the international sphere of private relationships is a *defense* mechanism that allows the adjudicator to not apply the foreign law that would have been appropriate according to the conflict of laws rules and, in turn, allows the adjudicator to decline to enforce a foreign judgment when it is offensive to public policy. Thus, the public policy mechanism has a corrective function.

575. Some legal systems call this public policy in private international law *international public policy*, for instance, Article 2049 of the Civil Code of Peru; Articles 1514 and 1520 (5) of the French Code of Civil Procedure (amended by Article 2 of Decree 2011-48 of January 13, 2011); Article 1096 (f) of the Portuguese Code of Civil Procedure of 1986; as well as the arbitration laws of Algeria, Lebanon, and Paraguay (Articles 40(b) and 46(b)). Along these lines, Romania and Tunisian laws refer to "public policy as understood in private international law," while the Civil Code of Quebec provides for "public order as understood in international relations" (Article 3081).

576. For their part, all of the conventions of the Hague Conference on Private International Law after World War II include public policy as a hurdle to their application. While Article 6 of the 1955 Convention on the sale of goods spoke only about public policy, 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 word *manifest* has also been incorporated into inter-American conventions, including the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Article 2.h), the Inter-American Convention on Letters Rogatory (Article 17), the Inter-American Convention on General Rules of Private International Law, the Mexico Convention of 1994 on the law applicable to international contracts, and, in the context of MERCOSUR, the Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters (Article 20(f)) and the Protocol on Precautionary Measures (Article 17).

577. It is preferable to use this broad terminology of "manifest" infringement above others that are insufficiently broad, such as "international public policy," or "truly international public policy" as proposed in some scholarly works.

III. *Manifest* infringement in the Mexico Convention and in the Hague Principles

578. Article 18 of 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 16 of the Mexico Convention is rooted in its predecessor, the Rome Convention of 1980, according to which the Member States of the Union can refuse to apply foreign law "manifestly incompatible" with the public policy of the forum. The word "manifest" is also found in Regulation 44/2001 of the European Union on international jurisdiction and in the current Regulation 1215/2012 of the European Parliament, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. For its part, the Rome I Regulation includes the provision of the Rome Convention, in Article 21.

579. In addition, Article 11.3 of 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."

580. The commentary indicates that the problem of defining "fundamental notions of public policy" was the subject of extensive debate during the meetings of the team that drafted the instrument. It is practically impossible to include precise directives on the matter, except with respect to the restrictive nature of the exception to party autonomy that resorting to public policy entails. Any doubt regarding the incompatibility of its application with the fundamental provisions of the forum must, then, be resolved in favor of the application of the chosen law.

581. The commentary also states that 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. It must be evaluated in each particular situation whether there is a specific infringement.

582. The commentary also clarifies that the tribunal needs not consider the outcome of the dispute between the parties, but may have regard to wider considerations of public interest. For 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.

IV. Are the conflict of laws rules a form of public policy?

583. The French case of *Bisbal* (1959) held that the French conflict of laws rules can be waived by the parties. This is consistent with the principle of party autonomy, although it is not absolute. A case by case analysis is required to determine whether the conflict of laws rule is mandatory, in view of a higher interest that may be "manifestly infringed" if disregarded.

V. Effects of public policy

584. When the adjudicator finds the foreign law inapplicable because it contravenes public policy, the adjudicator may declare the law of the forum of the adjudication applicable. The adjudicator may also turn to solutions based on transnational or non-state law, if these solutions would be most suitable for the regulation of trans-border relations. The Mexico Convention opens the door to this possibility through the application of Article 10.

585. Now, if the aim is to enforce a foreign judgment or award, and the adjudicator verifies the infringement of public policy pursuant to his or her applicable rules of private international law, then the adjudicator will proceed to immediately denying its enforcement.

VI. *Lois de police* or overriding mandatory rules

586. In addition to the corrective function of public policy, there are certain rules that are designed to be applied directly in an international case irrespective of the law that would be applicable law according to the conflict of laws rules. These are *mandatory rules* or *internationally mandatory rules*, which cannot be set aside by the intent of the parties.

587. These rules are set forth in economic or public law policy, as well as in other instruments designed to protect weaker parties in contractual relationships. In other words, they correspond to the aforementioned distinction of direction and public policy of protection.

588. It is essential for mandatory rules to be written rather than created by case law or customary law. The latter are normally part of the public policy that has a defensive function in contrast to mandatory rules, which are applied directly.

589. Various modern private international law instruments, including all of the Conventions of the Hague Conference on choice of law matters of the past fifty years, contain this distinction between public policy that serves a corrective function and mandatory rules (for instance, Articles 16-17 of the 1978 Hague Convention on the Law Applicable to Agency; Articles 17-18 of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, and Article 11 of the 2006 Hague Securities Convention).

590. There is also a terminological differentiation in this area. For instance, French law refers to *lois de police* or *régles de droit impératives*. The concept of "laws of immediate application" is close to that of mandatory rules, in the sense that it deals with material or substantive rules that are mainly intended to be applied directly to international transactions. The distinction between them would be that they 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 categories 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.

591. In the common law tradition, the phrase *mandatory rules* was only recently introduced in England with 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.

592. The Rome Convention uses the expression "mandatory rules" (Article 7), while the Rome I Regulation also refers to "provisions that cannot be derogated from by agreement," indicating that that phrase should be interpreted more restrictively (Article 8.1), according to preambulatory clause 37.

VII. Mandatory rules in the Mexico Convention, the Hague Principles, and the Rome I Regulation

593. 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."

594. 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."

595. This issue was also the subject of intense debate in the meetings of the Working Group that drafted the Hague Principles. 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.

596. A mandatory rule is not required to take a specific form (in other words, it need not be a provision of a constitutional instrument or law) or expressly state that it is mandatory and overriding.

597. Moreover, the mandatory provision may be drafted in a manner that states, for instance, that it will apply even if there is an agreement otherwise, or the intent is to apply a different law; or it can directly state that it is a mandatory or public policy rule.

598. The commentary of the Hague Principles makes clear that the mandatory provisions will prevail only when they are incompatible with the chosen or applicable law. It does not invalidate the rest of the applicable law, which must be applied to the greatest possible extent consistently with the overriding mandatory provisions.

VIII. Application of mandatory foreign laws

599. 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 Rome Convention and the Rome I Regulation, 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."

600. A 1958 decision of the House of Lords (Case of *Ragazzoni/Sethia*) is cited as an antecedent to this provision. That decision took account of the mandatory regulation prohibiting the export of jute to South Africa in a contract governed by English law. Nevertheless, the European case law on the issue is quite limited. In the arbitration context, the well-known 2004 case of *Power Limited, Rep. v. Tamil Nadu Electricity Board* held that the public policy of a third country that is a corporation's business headquarters or seat of incorporation must be considered with regard to incapacity or the authority to enter into an agreement. This is because lack of capacity is grounds to deny the enforcement of an award (New York Convention, Article V.1(a)).

601. 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."

602. 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."

603. This flexible and open approach leaves it to the chosen forum to determine whether it is possible to apply the mandatory provisions of a third country. The current practice and opinion of States with regard to the usefulness of provisions of this type vary widely. As stated in the commentary, the Principles seek to accommodate this diversity by delegating the matter to the private international law of the forum.

IX. Regional or community public policy

604. A community or regional public policy refers to the fundamental shared values in areas of integration among States. If the regulatory authority is not exclusively held by the nation-States, but is instead distributed across different levels—such as the regional level—it is difficult to understand why the conflict of laws rules should always refer to the private law of a State, and why the notion of public policy should be limited to being extracted from local laws.

605. In Europe, judges are bound to take account of the European Convention on Human Rights, which serves as the basis for a European or community public policy. The Court of Justice of the European Union (CJEU) has affirmed this, for instance, in the oft-cited case of *Krombach* (C-7/98) of 2000.

606. Moreover, the European Union is a supranational organization whose community law is directly binding on its member States. In each one of those States, community law has been incorporated into the domestic legal system. In the event of conflict, European law prevails over domestic law. Basic rules of European community law, such as the free movement of goods and people, or freedom of competition, have been made part of the public policy of the member States of the European Union. Accordingly, the landmark judgment of the CJEU in the case of *Eco Swiss China Time v. Benetton*

(1999) held that the "defense of competition" rule enshrined in Article 85 of the Treaty of Rome is a fundamental provision for the workings of the market within the European Union. The Court therefore 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."

607. The case of *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.,* decided by the European Court of Justice in 2000 (matter C-381/98), held that specific provisions of community law can also be mandatory. This means that 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 European Union thus continues to broaden the scope of mandatory rules in the common market with a view to harmonizing the community legal system and especially the internal market.

608. Article 3.4 of the Rome I Regulation deals with this issue expressly. It 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." There is no analogous provision or provision addressing community public policy in the Mexico Convention, the Hague Principles, or any regulatory text in the Americas.

609. 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 the European community law rule directly applicable to the member States is, given its supremacy, automatically part of Austrian national public policy (___).

610. This is consistent with the view expressed by the majority of the Permanent Review Tribunal of MERCOSUR in Advisory Opinion No. 1 of 2007. That opinion 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 in the understanding that there are scenarios in which the contractual relationship is not the product of free will, but rather of other factors. The scope of its public policy of direction or protection as exceptional limits to party autonomy depends upon each State. The Advisory Opinion ultimately held that, where appropriate, specific abuses or violations of mandatory rules or principles will be adjudicated by the intervening national judge.

X. Public policy in national laws

611. In *Argentina*, Article 2561 of the new Civil and Commercial Code reflects the distinction between public policy as a barrier and as internationally mandatory rules. The article 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."

612. 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.

613. In *Canada*, the supremacy of the internationally mandatory rules of the forum (overriding mandatory rules of the *lex fori*) is generally accepted. They are referred to in Article 3076 of the Civil Code of Quebec. Nevertheless, there are no clear precedents on the issue in the common law provinces, where public policy can also be invoked to limit the effect of the parties' choice of law. Express references to the mandatory rules of a third country appear only in Article 3079 of the Civil Code of Quebec.

614. *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 local law.

615. In *Colombia,* there is no provision for the potential application of a mandatory rule from another forum. Not applying the chosen law when it is contrary to Colombia's public policy is provided for in the country's civil and commercial laws.

616. In *Guatemala*, in addition to rejecting the application of a law incompatible with the public policy of the forum, Article 31 of the Judiciary Act contains an additional provision for when the agreement is counter to express prohibitory laws. Article 4 of the Judiciary Act, 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."

617. In *Paraguay,* Article 17 of the law on 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."

618. 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.

619. In *Venezuela*, despite the fact that the Draft Private International Law Act (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 32), Venezuelan 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 we are outside the scope of the Mexico Convention. On this point, the judge may resort, in application of Article 1 of the Private International Law Act, 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.

XI. Public policy and arbitration

620. The controversy of mandatory rules and the applicable law is one of the most difficult in arbitration. Because of the movable nature of arbitration, and because arbitrators are not judges or state officials, we cannot speak of a national law of the forum (or *lex fori*). *Lex fori* contains provisions of private international law relative to classification, connection factors, public policy, and legal fraud.

621. In the absence of *lex fori*, there are two fundamental consequences. At 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 national laws have the same value and none has a privileged status. Consequently, the arbitrator does not have to make certain that purely national concepts are respected. Not bound by any specific rules of the forum or national laws, arbitrators sometimes opt for a transnational or non-state law, which entails a public policy independent of the national laws. 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.

622. When arbitrators consider that they are not bound by specific rules of the forum, or national laws, they sometimes directly opt to apply non-state law (or internationally recognized principles, or *lex mercatoria*), which in turn gives rise to 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. ICC Case 1110/1963, in which a single arbitrator refused to hear the case because the object of the contract involved the bribery of public servants, is emblematic in this regard.

623. 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, the interpretation tends to be quite restrictive. In several countries, 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.

624. 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 cases this was the result of anachronistic arbitration laws, such as the outdated English law of 1950, and certain serious acts that truly warranted the denial of enforcement. In short, this tendency to not set aside arbitral awards thanks to merely localist arguments on the pretext of alleged "public policy" arising from national rules, obviously contributes to the valid circulation of arbitral decisions.

625. Given the difficulty of this issue, it is hardly surprising that the question of public policy in arbitration has been 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; and to that end, they can be led to consider the laws of the jurisdictions in which the decision may be enforced.

626. The commentary on the Hague Principles states that Article 11(5) does not confer additional powers on arbitral tribunals or purport to grant them full and unlimited discretion to deviate from the law that is applicable in principle. On the contrary, the tribunals should 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 commentary 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.

PART EIGHTEEN

OTHER PROVISIONS OF THE MEXICO CONVENTION AND THE HAGUE PRINCIPLES

I. Registration of Contracts

627. According to Article 16 of the Mexico Convention "The law of the State where international contracts are to be registered or published shall govern all matters concerning publicity in respect of same." The English version of the text should read "notice or notification" rather than "publicity."

II. Prevalence of other International Agreements

628. Article 6 of the Mexico Convention states 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." The Rome I Regulation contains a similar provision in Article 23.

The Mexico Convention also regulates the relationship between it and other international agreements that contain provisions on conflicts of law. On this point, it establishes 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). Article 25, paragraph 1 of the Rome Convention regulates the issue similarly.

III. States with more than one legal system or different territorial units

629. The Hague Principles do not contain any provisions referring to the situation of States that have two or more territorial units with different legal systems. Nevertheless, the commentary does make clear that the fact that one of the relevant elements of the contractual relationship is located in a different territorial unit within one State does not make the contract international.

630. The Mexico Convention does expressly regulate the issue. Article 22 of the Mexico Convention establishes 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."

631. As noted in the report presented within the framework of the preparatory works of the instrument, Article 22 establishes that each territorial unit should be considered a country for purposes of determining the applicable law according to the 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 (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).

632. Article 22, paragraph 1 of the Rome I Regulation 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." A similar provision is contained in the 1980 Rome Convention (Article 19), as well as in the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (Article 19).

633. Similarly, Article 23 of the inter-American instrument reads as follows: "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."

634. The same solution is found in Article 22, paragraph 2 of Rome I, as well as in the Rome Convention (Article 19) and the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (Article 20).

635. The commentary on the Hague Principles clarifies that they do not address conflicts of law among different territorial units within one State, such as, for instance, in Australia, Canada, the United States of America, Nigeria, or the United Kingdom. Nevertheless, it also establishes that the Principles do not prevent lawmakers or other users from extending the scope of application of the Principles to intra-State conflicts of laws.

636. 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 the convention will extend to all its territorial units or to only one or more of them (Article 24). Considering that the only countries that ratified the Mexico Convention were Mexico and Venezuela—which do not have more than one legal territorial unit—Article 24 has not yet been applied.

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