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The New OAS Guide on International Contracts and International Arbitration

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The Guide on the Law Applicable to International Commercial Contracts in the Americas (the "Guide") was recently approved by Resolution 249 of 2019 of the Inter-American Juridical Committee (CJI) of the Organization of American States (OAS).

The instrument particularly takes into account the OAS Mexico Convention of 1994 "on the law applicable to international contracts" and the Hague Principles "on the choice of law for international contracts," approved by the Hague Conference on Private International Law in 2015. UNCITRAL, the ICC, the IBA and other organizations related to the arbitral world intervened in the Working Group that drafted these Principles. When dealing with applicable law in arbitration, the Guide focuses in particular on the 1958 New York Convention, and the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Arbitration, among other arbitral instruments.

I acted as *Rapporteur* for the Guide, benefiting from significant input from several jurists and organizations. The document was submitted to the United Nations Commission on International Trade Law ("UNCITRAL"), the International Institute for the Unification of Private Law ("UNIDROIT") and the Hague Conference on Private International Law, as well as to the ABA Section on International Law, the American Association of Private International Law and the Department of Justice Canada. It received comments from prominent experts of the arbitral world.

The Guide has several objectives. Among others, it seeks to support efforts by the OAS Member States to modernize their domestic laws on the subject. Furthermore, the Guide can provide assistance to contracting parties in the Americas and their counsel in drafting and interpreting international contracts. In addition, it can serve as guidance to judges and arbitrators, who may find the Guide useful both to interpret and supplement domestic laws.

The Guide is preceded by a *summary of specific recommendations* to legislators, adjudicators, and the parties and their advisors on international contracts.

The Guide itself contains an explanatory *introduction* (*Part One*), followed by its *context and background* (*Part Two*). *Part Three* describes the recent developments with *uniform law*, mostly based on the standardization efforts undertaken by UNIDROIT and UNCITRAL, in addition to efforts by the private sector and other developments in the arbitration arena. *Part Four*, in turn, describes the *uniform method of interpreting international texts*. Adjudicators are encouraged to

consider its advantages and to take into account the development and dissemination of international jurisprudence in this regard.

Part Five pertains to the scope of the Guide, in terms of international commercial contracts with their corresponding classification and in terms of topics that are excluded, such as those related to capacity, family and inheritance relationships, insolvency, etc.

Part Six deals with the complex problem of *non-State* law and various related terminologies, such as uses, customs and practices, principles, and *lex mercatoria*. The Guide adopts the expression "rules of law", as equivalent to non-State law and other terms referring to the matter. This, in order to take advantage of the extraordinary casuistic and doctrinal developments in the world of arbitration with regards to this expression.

The Guide follows the Hague Principles, according to which the rules of law must be "generally accepted on an international, supranational or regional level as a neutral and balanced set of rules". In the current state of affairs, the applicability of the UNIDROIT Principles as non-State law if chosen by the parties clearly emerges from the Hague Principles and the Guide. The same applies to the UNCITRAL (Vienna) Convention on Contracts for the International Sales of Goods of 1980 that can be chosen even if not applicable to the case at hand under its own terms.

Part Seven of the Guide deals with the problem of *party autonomy* in international contracts. Disagreements still exist regarding modalities, parameters, and limitations of the principle. These include, for example, as regards the method of choice – which could be explicit or tacit – whether a connection is required between the chosen law and the domestic laws of the State 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 in the Guide.

Part eight of the Guide refers to express or tacit choice of law, stressing that, one way or another, the choice should be evident or appear clearly from the provisions of the contract and its circumstances.

Part Nine, regarding formal validity of contracts, advocates against any requirements as to form, unless otherwise agreed by the parties or as may be required by applicable mandatory rules.

Part Ten refers to the law applicable to the choice of law clause. In principle, the Guide favors the applicability of the law chosen by the parties. However, it admits that the law of the State in which a party has its establishment may prevail under certain circumstances. The Guide also refers to the innovative provision of the Hague Principles addressing the issue of choice of law when the standard terms submitted respectively by the parties coincide or differ.

Part Eleven deals with *separability*, whereby the invalidity of an international contract does not necessarily affect the choice of law agreement. Moreover, the effectiveness or invalidity (regardless of whether substantive or formal) of the contract must be evaluated according to the law chosen in the agreement in which it was selected. This separability principle is aligned with the Hague Principles and with the UNCITRAL Model Law.

Part Twelve deals with *other problems of law applicable* to the field of international contracts. It advocates that a choice of law can be modified at any time and that any such modification does not prejudice its formal validity or the rights of third parties. It also provides that no connection is

required between the law chosen and the parties or their transaction. This is still a requirement in some systems, such as the US in its Restatement (Second) of Conflict of Laws. However, a tendency exists towards its abandonment, as reflected in recent international instruments, among them the Mexico Convention and the Hague Principles.

The Guide also deals with *renvoi*, or the matter if the application of a specific domestic law also includes its private international law provisions. If so, those provisions may refer the matter back to another law. In this case, the Guide advocates for the exclusion of *renvoi*, to provide greater certainty as to the applicable law, consistent with the Mexico Convention and the Hague Principles.

Part Thirteen deals with the *absence of an effective choice of law* by the parties. In this case, the Guide advocates the solution of the *closest connection* contained in the Mexico Convention, and discards others such as the "place of performance" contained in the Montevideo Treaties. The Guide advocates that if adjudicators find that transnational rules are more appropriate and thus more closely connected to the case than national law, they will apply them directly. In this regard, the Guide clarifies an interpretative problem related to the Mexico Convention.[1)]

With respect to arbitration, there are major differences regarding the approach that should be used to determine the applicable law in the absence of an effective choice by the parties. The Guide exposes the different approaches in comparative law and shows how the Mexico Convention can serve as an effective guide for international arbitrations seated in jurisdictions within the Americas.

Part Fourteen deals with *dépeçage*, or "splitting" of the law, so that different parts of the contract can be governed by different laws. According to the Guide, when granted interpretive discretion, adjudicators are encouraged to admit *dépeçage*.

Part Fifteen refers to the flexibility to interpret international contracts, to mitigate the harshness of a strict application of the law. In the Americas, a flexible formula has been accepted for many years through Article 9 of the 1979 OAS Inter-American Convention on General Rules of Private International Law, ratified by several countries in the region. The Mexico Convention also contains a flexible formula that can be applied in the determination of the applicable law. In the arbitral world, Article 28(4) of the UNCITRAL Model Law, copied in many arbitral regulations in the Americas, also includes a flexible formula, explained in the Guide.

Part Sixteen of the Guide refers to the *scope of the applicable law*, and the *aspects that will be governed by that applicable law*. Specification of these aspects reduces the likelihood of their being otherwise classified as non-contractual and the uniformity of outcomes is thereby encouraged.

Part Seventeen of the Guide deals with *public policy*. This highly contested notion lacks consensus in regard to the various terms used to refer to it and its relevance and applicability. Also, certainly, there is a lack of effective communication among academics and practitioners. Moreover, this obscure subject is rendered even more opaque by the imprecision, diversity and confusion of the vocabulary used.

In line with the Hague Principles and the Mexico Convention, the Guide attempts to clarify this mess and to simplify the terminology. It addresses the two facets of public policy in the international context. One comprises the *overriding mandatory rules* of the forum that must be

applied irrespective of the law indicated by the conflict of laws rule. The other precludes application of the law indicated by the conflict of laws rule if the result would be *manifestly incompatible* with the public policy of the forum.

The Guide notes that the question of public policy in arbitration was one of the "most sensitive" issues addressed in the drafting of the Hague Principles. In line with them, the Guide does not advocate for "any additional powers on arbitral tribunals and does not purport to give those tribunals an unlimited and unfettered discretion to depart from the law" that is applicable in principle. On the contrary, tribunals might be required to take account of public policy and mandatory rules, and where appropriate ascertain the need for them to prevail in the specific case.

Part Eighteen of the Guide addresses other issues, such as those related to the existence of other conventions, or states with more than one legal system or territorial units.

By way of example, George Bermann's recent lecture at the Hague Academy on "International Arbitration and Private International Law" appears in a more than 600 pages book. This publication is sufficient testimony of the complexities, obscurities and gaps existent in relation to international contracts and arbitration. The Guide represents an important step forward in addressing the matter in an effective way.

References

?1 13. During the process of drafting the inter-American instrument, the United States delegation proposed the formula of *the closest connection*, the intention being that it would lead to a transnational, non-State law, rather than to a domestic law. Around the same time, the UNIDROIT Principles, some two decades after their inception and drafting, were coming into the limelight. It was the opinion of Friedrich Juenger, member of the United States delegation, that the reference to "general principles" should clearly lead to the UNIDROIT Principles. After considerable discussions during CIDIP-V, a compromise was reached. Regarding the rule that was ultimately adopted, one interpretation is that the role of *lex mercatoria* or non-State law has been reduced to that of an auxiliary element that, together with the objective and subjective elements of the contract, help the adjudicator to identify the law of the State with the closest connection to the contract. Another interpretation, in line with Juenger´s advocacy, favors the application of non-State law in absence of choice. See the discussion in the OAS Guide, Numbers 353-354.