Acknowledgement and disclaimer

This study was prepared by Jae Sung Lee, a legal officer with the UNCITRAL Secretariat engaged in work related to security interests and electronic commerce as well as various other technical assistance projects. Participation of Jae Sung Lee in this project was made possible through funding provided by the Ministry of Justice of the Republic of Korea.

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요 약

본 보고서는 아태경제협력체(APEC)에서 2009 년부터 추진중인 비즈니스 환경 개선사업(Ease of Doing Business)의 일환으로 대한민국 법무부가 주도한 멕시코 및 미얀마의 계약분쟁해결 관련 법제개선사업을 위하여 작성되었으며, 세계은행(World Bank)에서 발표하는 기업환경지수 중 계약분쟁해결(Enforcing Contracts) 분야에서 2015 년 57 위를 차지한 멕시코의 관련 법제정비 과정에 있어 참고가 될 수 있는 국제적인 논의를 담고 있다. 나아가 작년에 이어 APEC 회원국이 아닌 미얀마로 사업이 확대된 바, 2015 년 동 순위에서 185 위를 차지한 미얀마에 대해서도 살펴본다.

제 1 장은 아태경제협력체에서 추진중인 비즈니스 환경 개선사업과 함께 그 근간을 이루고 있는 계약분쟁해결분야에 대한 세계은행의 평가방식을 살펴보았다. 이를 통해, 멕시코 및 미얀마의 계약분쟁해결 관련 법제의 현주소를 파악하고, 어떤 부분에 있어 문제점이 드러나고 있는지를 알아보았다.

계약분쟁해결과 관련된 법제 정비에 있어 국제적인 논의를 반영할 필요가 있기 때문에, 제 2 장은 관련 규범을 논의하는 유엔국제상거래법위원회 (UNCITRAL)에 대해 살펴보았다. 세계은행에서 발표하는 계약분쟁해결 관련 순위는 편의상 사법적 절차를 통한 계약집행의 효율성만을 비교하고 있다. 하지만, 각국 경제에서 국제거래가 차지하는 비중이 늘어나는 상황에서 국제물품거래를 규율하기 위한 법제를 갖추고 있는지, 나아가 분쟁해결절차로서 상사중재가 원활히 이루어질 수 있는 법제를 갖추고 있는지 여부도 살펴보아야 할 필요성이 있을 것이다. 또한 최근 급성장하고 있는 전자상거래를 뒷받침할 수 있는 법제 구비여부도 살펴보았다.

제 3 장은 유엔국제상거래법위원회에서 그간 채택한 규범 중 계약분쟁해결과 밀접한 관련이 있는 국제물품매매협약(CISG), 외국중재판정의승인및집행에관한협약 (New York Convention), UNCITRAL 중재모델법, 중재규칙, 국제계약에있어서전자적의시표시의사용에관한협약 (Electronic Communication Convention), UNCITRAL 전자상거래모델법 등에 대해 살펴보았다. 나아가 이들 규범을 채택한 국가들과 그렇지 않은 국가들의 계약분쟁해결 순위를 비교 분석하였으며, 계약분쟁해결 방법의 일환으로 상사중재가 갖는 장점들을 나열하고, 이를 뒷받침하기 위한 법제가 갖추어야 할 여러 요소들에 대해 UNCITRAL 중재모델법을 통해 분석하였다.

제 4 장 은 멕시코의 정치, 경제, 법률 환경에 대해 간단히 살펴본 후, 계약분쟁해결 분야에서 각국의 순위를 분석하였다. 나아가 개선할 수 있는 부분을 모색하기 위해 각국의 계약분쟁해결관련

사법제도 및 상사중재관련 법제 및 실무를 분석해보았다. 이를 토대로 본 보고서는 다음과 같은 사항을 권고한다.

국제거래와 더불어 이들 국가들에 있어 전자상거래의 중요성도 부각되고 있다. 멕시코경우 UNCITRAL 전자상거래모델법 및 Electronic Communication Convention 의 규정을 바탕으로 한 전자상거래기본법을 갖추고 있다.

중재 분야에 있어서는, 세 국가 모두 New York Convention 당사국인 만큼 법원 차원에서 중재 합의를 존중하고, 나아가 외국 중재판정이 특별한 차별없이 승인 나아가 집행될 수 있도록 조치를 취할 것을 권고한다. 관련 사례가 나오기를 기대해본다.

모두 상사중재를 활성화하기 위한 여러가지 방안들이 강구되고 있는 바, 중재가 효율적인 분쟁해결절차로 자리잡기 위한 관련 법제 정비, 중재기관 설립, 중재인 및 법원 관련자들에 대한 교육 등 노력이 뒷받침 되어야 할 것이다. 이를 통해 각국의 상사중재제도에 대한 신뢰 구축이 우선 과제라고 평가된다.

Parts I and II

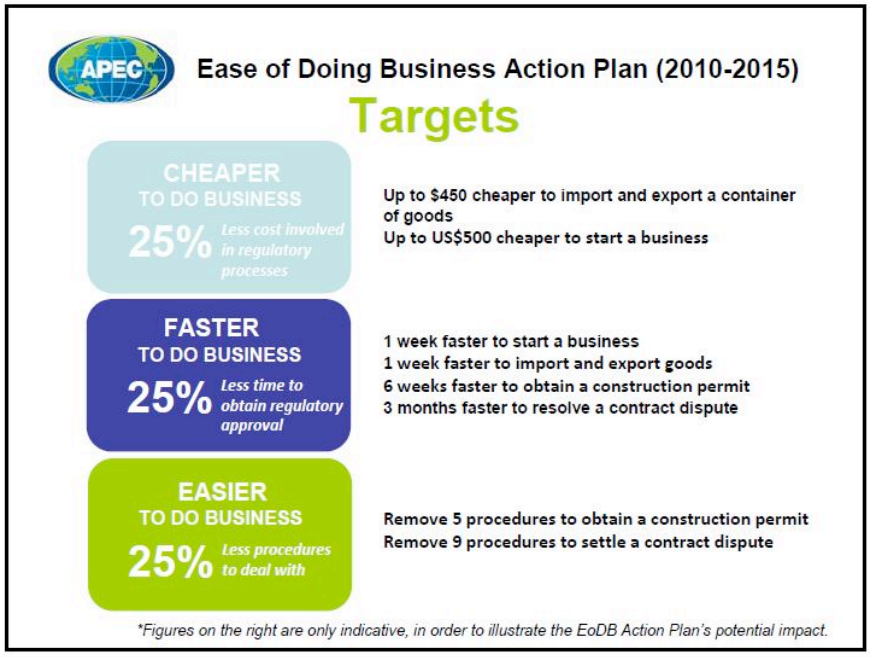
APEC EoDB Action Plan and UNCITRAL

I. APEC EoDB Action Plan

1. APEC EoDB Action Plan - Improving Ease of Doing Business and Implementing Structural Reform

At the 2009 APEC Annual Ministerial Meeting in Singapore, the Ministers agreed to adopt the APEC Ease of Doing Business (EoDB) Action Plan to improve the business environment in the Asia-Pacific region.[1] The Action Plan identified five priority areas for reform (Starting a Business, Getting Credit, Enforcing Contracts, Trading across Borders, and Dealing with Permits), set targets to measure improvements in these areas, and included capacity building work programmes to achieve the targets.[2] The EoDB Action Plan is managed through the APEC Economic Committee and the Committee reports directly to APEC's Senior Officials.

The Action Plan is designed to promote reforms in APEC economies so that it will become 25 percent cheaper, faster and easier to do business in the APEC region by 2015 as measured by the World Bank's Doing Business indicators, with an interim target of 5 percent improvement by 2011. The 25 percent target is for the APEC region as a whole (rather than for individual economies), and the focus is on improvements in absolute terms (e.g. the target in enforcing contracts is to remove nine procedures involved in settling a contract dispute).



To help APEC economies meet these targets, champion economies (or top performers) of the Doing Business indicators volunteered to lead work programmes in each of the five priority areas: New Zealand and the United

[1] See http://www.apec.org/Meeting-Papers/Ministerial-Statements/Annual/2009/2009_amm.aspx
[2] Action plan available at http://aimp.apec.org/Documents/2010/EC/WKSP1/10_ec_wksp1_003.pdf

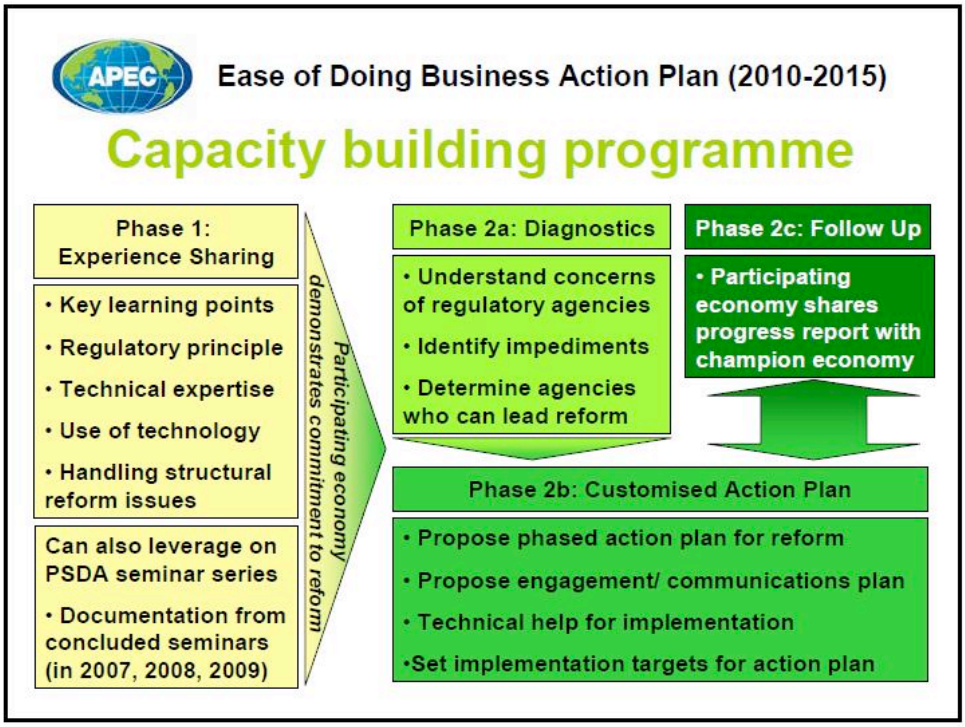
States – Starting a Business; Japan – Getting Credit; Republic of Korea – Enforcing Contracts; Hong Kong, China and Singapore - Trading across Borders; and Singapore – Dealing with Permits.

The capacity building programmes were to be carried out in two phases. During Phase 1, champion economies would conduct seminars and workshops to share experience and raise awareness of best practices with member economies. Through these workshops, participants, mainly practitioners from relevant government agencies, will gain a better understanding of the strategies to design and implement successful reforms.

In that context, a seminar on enforcing contracts was held on 21-22 June 2010 in Seoul, Korea. The event was attended by representatives from fifteen APEC economies. Majority of the participants came from the legal field, but there were also economists and policy experts from relevant ministries. On the first day of the workshop, there was a presentation by World Bank expert on the enforcing contracts indicator, as well as case studies of the reform experience in several APEC economies. On the second day, breakout sessions on three different topics were held for a more in-depth discussion. The topics were: 1) Doing Business indicator and relevant reform efforts, 2) social, economic and legal factors, and 3) the role of information technology in improving the judicial system.

It was reported that participants were quite satisfied with the workshop. While recognizing that judicial systems and reform activities could differ from region to region, it was noted that judicial reform played a key role in improving the business environment. Moreover, it was stressed that the overall direction for reform should aim at making procedures less costly, more accessible and more efficient. Although there will be challenges as well as objections

from various stakeholders at the initial stages of the reform, once the initial reform process is able to demonstrate some positive results, the reform activities will be able to proceed in a smoother manner.[3]



During the workshop, Indonesia and Peru had expressed strong interest in taking part in Phase 2 of the EoDB Action Plan so as to reform their judicial systems. As each APEC economy has unique regulatory challenges, Phase 2 was to involve a diagnostic study to highlight specific problems within each system and to identify opportunities for reform in the priority areas. With the customized action plans in place, participating economies will be empowered to implement reforms in the identified priority areas.

In preparing Phase 2 of its EoDB Action Plan, the Korean Ministry of Justice contacted the UNCITRAL Secretariat in December 2010 so as to request its participation in the project. UNCITRAL gladly decided to take part in the project with respect to enforcing contracts in Indonesia and Peru and the results of that study, "Making it easier to enforce contracts in Indonesia and Peru – Diagnostic study by the UNCITRAL Secretariat" was submitted to the Ministry of Justice in October 2011. Following the results of Phase 2 including the aforementioned study, Phase 3 was initiated for Indonesia whereby recommended reforms were implemented, including the revision of the civil procedure law.

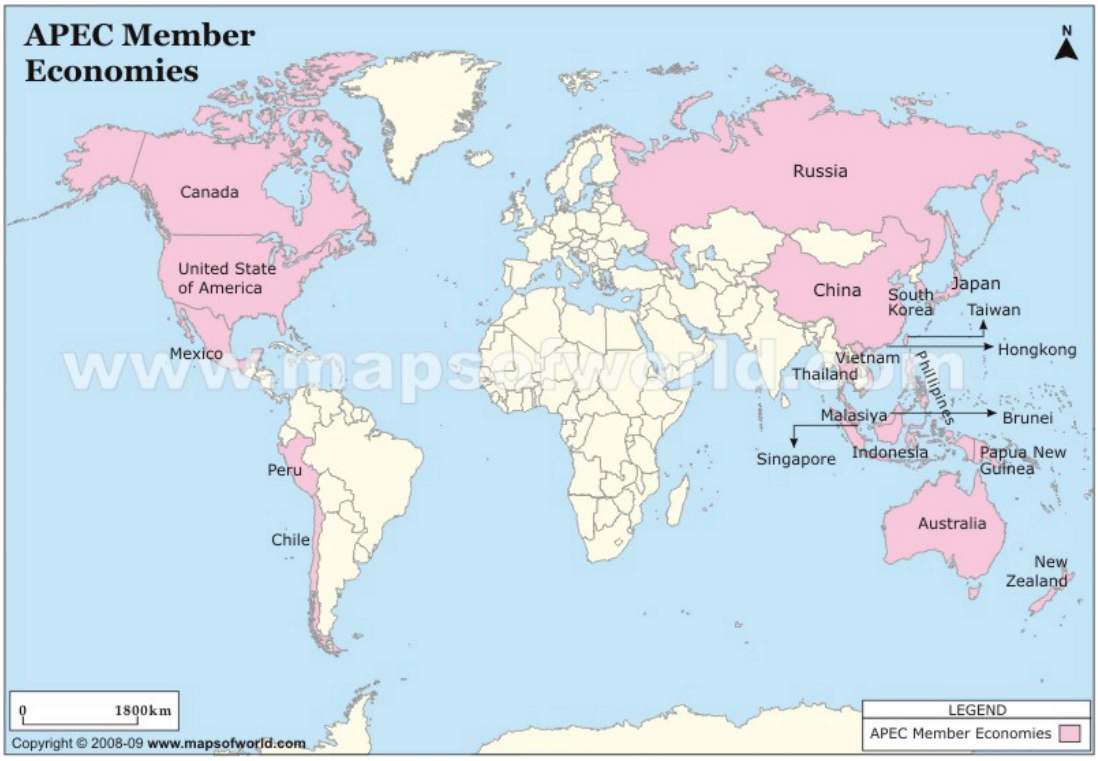
[3] See APEC Economic Policy Report, Attachment 4. Update of Ease of Doing Business (EoDB) Action Plan-Progress of Phase 1 Programmes and Phase 2 Diagnostics available at http://publications.apec.org/publication-detail.php?pub_id=1153

Furthermore, initiatives had been taken to revise its outdated arbitration act based on the UNCITRAL Model Arbitration Law.

Similarly, Thailand and Philippines were chosen by the Korean Ministry of Justice as partners for Phase 2 of the APEC EODB project in 2012, to which the UNCITRAL Secretariat provided a diagnostic study with concrete recommendations. In continuation of this coordination, the UNCITRAL Secretariat participated in this year's project with Mexico and Myanmar, which formed the basis of this study.

2. Asia-Pacific Economic Cooperation (APEC)

Asia-Pacific Economic Cooperation or APEC is the economic forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. Unlike the WTO or other multilateral trade bodies, APEC has no treaty obligations required of its participants. Decisions made within APEC are reached by consensus and commitments are undertaken on a voluntary basis.



APEC was established in 1989 to further enhance economic growth and prosperity for the region and to strengthen the Asia-Pacific community. Since its inception, APEC has worked to reduce tariffs and other trade barriers across the region, creating efficient domestic economies and dramatically increasing exports. APEC's vision are what are

referred to was reflected in the 'Bogor Goals', adopted in 1994 in Bogor, Indonesia, to achieve free and open trade and investment in the Asia-Pacific region by 2010 for industrialized economies and 2020 for developing economies.

It also helps to lower the costs of production and thus reduces the prices of goods and services - a direct benefit to all. APEC also works to create an environment for the safe and efficient movement of goods, services and people across borders in the region through policy alignment and economic and technical cooperation. Therefore, APEC shares its goals with UNCITRAL in many aspects.

APEC currently has 21 members, including most countries with a coastline on the Pacific Ocean. They account for approximately 40 percent of the world's population, approximately 54 percent of the world GDP and about 44 percent of world trade.

Member economy (name as used in APEC)	Date of accession
Australia, Malaysia	1989
Brunei, New Zealand	1989
Canada, Philippines	1989
Indonesia, Singapore	1989
Japan, Thailand	1989
Republic of Korea, United States	1989
Chinese Taipei	1991
Hong Kong, China	1991
People's Republic of China	1991
Mexico, Papua New Guinea	1993
Chile	1994
Peru, Russia, Vietnam	1998

APEC's members are referred to as member "economies" because the APEC cooperative process is predominantly concerned with trade and economic issues, with members engaging with one another as economic entities[4]. Therefore, the criterion for membership is that the member is a separate "economy", rather than a "state". As a result, membership includes not only the People's Republic of China but also Hong Kong, which is now a Special Administrative Region of China, and Chinese Taipei.

As this study mainly discusses the positive influence the adoption of UNCITRAL texts could have on enforcing contracts, some discrepancies may exist due to the fact that Chinese Taipei is not a member of the United Nations and Hong Kong, as indicated above, is a Special Administrative Region of China. An example would be the question

[4] See http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx.

of the applicability of the United Nations Convention on Contracts for the International Sale of Goods in Hong Kong and in Chinese Taipei.

3. World Bank's Doing Business indicators

In measuring improvements in regulatory reform, APEC decided to use the World Bank's Doing Business indicators, as they provide objective measures of business regulations and their enforcement across 185 economies.[5] The goal of the Doing Business project is to provide an objective basis for understanding and improving the regulatory environment for business around the world.

The Doing Business project, launched in 2002, measures the regulations applied to domestic small and medium-size companies. By gathering and analyzing comprehensive quantitative data to compare business regulation environments across economies and over time, Doing Business encourages countries to compete towards more efficient regulation; offers measurable benchmarks for reform; and serves as a resource for academics, journalists, private sector researchers and others interested in the business climate of each country.

First published in 2003, the Doing Business report identifies the burdens imposed by government requirements on business transactions, and provides quantitative measures of this burden. They track regulatory burdens affecting 10 stages of a company's business activities: starting a business, dealing with permits, registering property, accessing credit, employing workers, protecting investors, paying taxes, trading across borders, enforcing contracts, and resolving insolvency.

Economy	Ease of Doing Business Rank ▲	Starting a Business	Dealing with Construction Permits	Getting Electricity	Registering Property	Getting Credit	Protecting Investors	Paying Taxes	Trading Across Borders	Enforcing Contracts	Resolving Insolvency

The indicators measure business regulation and their effect on businesses, especially small and medium-size domestic firms. First, the indicators document the degree of regulation, such as the number of procedures to start a business or to register and transfer commercial property. Second, they gauge regulatory outcomes, such as the time and cost to enforce a contract, go through bankruptcy or trade across borders. Third, they measure the extent of legal protections of property, for example, the protections of investors against looting by company directors or the range of assets that can be used as collateral according to secured transactions laws. Fourth, a set of indicators documents the tax burden on businesses. Finally, a set of indicators measures different aspects of employment regulation.

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[5] General information about the World Bank's Doing Business indicators is available at http://www.doingbusiness.org. A more detailed explanation about the general methodology used for the indicators is available at http://www.doingbusiness.org/methodology/methodology-note.

Economies are ranked on their ease of doing business, from 1 to 185. A high ranking on the ease of doing business index means the regulatory environment is more conducive to the starting and operation of a local firm. A drawback of the ease of doing business ranking is that it can measure the regulatory performance of economies only relative to the performance of others. It does not provide information on how the absolute quality of the regulatory environment is improving over time. Nor does it provide information on how large the gaps are between economies at a single point in time.

To overcome certain drawbacks, "distance to frontier" measure was introduced to show the distance of each economy to the "frontier," which represents the highest performance observed on each of the indicators across all economies included in Doing Business since each indicator was included in Doing Business. An economy's distance to frontier is indicated on a scale from 0 to 100, where 0 represents the lowest performance and 100 the frontier. In this way the distance to frontier measure complements the yearly ease of doing business ranking, which compares economies with one another at a point in time.[6]

4. Indicators on enforcing contracts and methodology

Indicators on enforcing contracts measure the efficiency of the "judicial system" in resolving a commercial dispute. The data is based on a step-by-step evolution of a commercial sale dispute before local courts. The data are collected through study of the codes of civil procedure and other court regulations as well as surveys completed by local litigation lawyers and judges.[7] The ranking on the ease of enforcing contracts is the simple average of the percentile rankings on its component indicators.[8]

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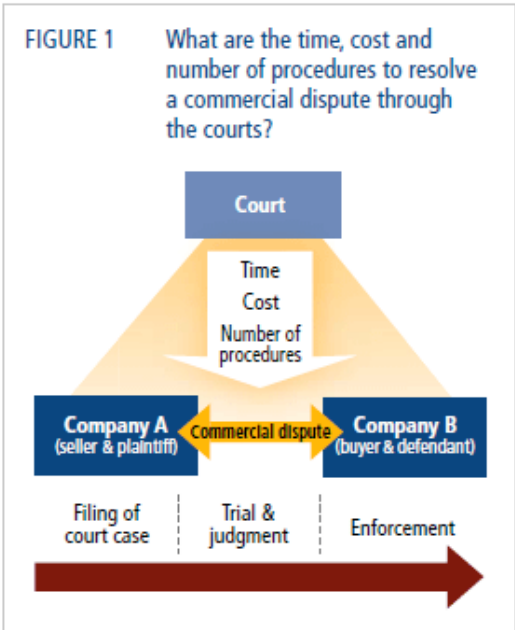
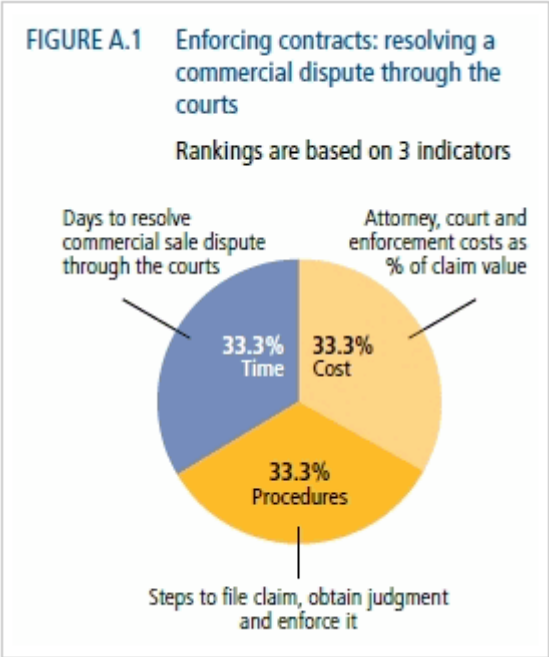
[6] For more information, see http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-Chapters/Ease-of-doing-business-and-distance-to-frontier.pdf.

[7] The 2013 survey for enforcing contracts is available at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Methodology/Survey-Instruments/DB2013/Enforcing_contracts_survey_en.pdf

[8] Information about the methodology is available at http://www.doingbusiness.org/methodology/enforcing-contracts.





4.1 Assumptions about the case

The indicator is drawn based on the following assumptions:

- The value of the claim equals 200% of the economy's income per capita. According to the 2013 Doing Business Report, this would amount to approximately $ 19,880 for Mexico and $ 5,000 for Myanmar.
- The dispute concerns a lawful sale transaction between parties located in the economy's largest business city, respectively Mexico City and Yangon [therefore is not an "international" sale].
- S sells goods worth 200% of the economy's income per capita to B, after which S delivers the goods to B. B refuses to pay on the grounds that the goods were not of adequate quality.
- S (the plaintiff) sues B (the defendant) to recover the sales price. B opposes stating that the quality of the goods is not adequate. The claim is disputed on the merits.
- A court in Mexico City and Yangon with jurisdiction over commercial cases worth 200% of income per capita decides the dispute.
- S attaches B's movable assets (for example, office equipment and vehicles) before obtaining a judgment because of the fear that B may become insolvent.
- An expert opinion is given on the quality of the delivered goods.
- The judge decides that the goods are of adequate quality. The judge rules 100% in favor of S and that B must pay the agreed price.
- B does not appeal and the judgment becomes final. S takes all required steps for prompt enforcement of the judgment. The money is successfully collected through a public sale of B's movable assets.

The list of procedural steps compiled for each economy traces the chronology of a commercial dispute before the relevant court. A procedure is defined as any interaction, required by law or commonly used in practice, between the parties or between them and the court. These include steps to file and serve the case, steps for trial and judgment and steps necessary to enforce the judgment.

The survey allows respondents to record procedures that exist in civil law but not common law jurisdictions and vice versa. For example, in civil law countries, the judge can appoint an independent expert, while in common law countries each party submits a list of expert witnesses to the court. To indicate overall efficiency, one procedure is subtracted from the total number for economies that have *specialized commercial courts*, and one procedure for economies that allow *electronic filing*. Some procedural steps that take place simultaneously with or are included in other procedural steps are not counted in the total number of procedures.

Time is recorded in calendar days, counted from the moment the plaintiff decides to file the lawsuit in court until payment. This includes both the days when actions take place and the waiting periods between. The average duration of different stages of dispute resolution is recorded: the completion of service of process (time to file and serve the case), the issuance of judgment (time for the trial and obtaining the judgment) and the moment of payment (time for enforcement of judgment).

Cost is recorded as a percentage of the claim (assumed to be equivalent to 200% of income per capita). No bribes are recorded. Three types of costs are recorded: court costs, enforcement costs and average attorney fees. Court costs include all court costs and expert fees that the plaintiff must advance to the court, regardless of the final cost to plaintiff. Expert fees, if required by law or commonly used in practice, are included in court costs. Enforcement costs are all costs that the plaintiff must advance to enforce the judgment through a public sale of the buyer's movable assets, regardless of the final cost to seller. Average attorney fees are the fees that the plaintiff must advance to a local attorney to represent the plaintiff in a certain case.

5. APEC Member Economies & Ease of Doing Business Ranking

The 2013 survey of the Ease of Doing Business ranking shows that 6 of the top 10 ranked economies are APEC members. Singapore ranks first followed by Hong Kong, New Zealand and the United States with Republic of Korea ranked 8th. Australia significantly improved its ranking from 15th in 2012 to 10th. Malaysia ranks 12th (improved from the 2102 ranking of 18th) followed by Chinese Taipei (16th), Canada (17th), Thailand (18th), and Japan (24th). Brunei ranks 79th and Vietnam 99th.

In enforcing contracts, which is the focus of this study, 3 of the top 10 ranked economies are APEC members. Luxembourg, a non-APEC economy ranks first followed by Republic of Korea (2nd), United States (6th) and Hong Kong (10th). Five additional APEC members (Russia, Singapore, Australia, New Zealand and China) are ranked in the top 20. Vietnam ranks 44th (12th among 21 APEC members) and Brunei Darussalam 158th (20th among 21

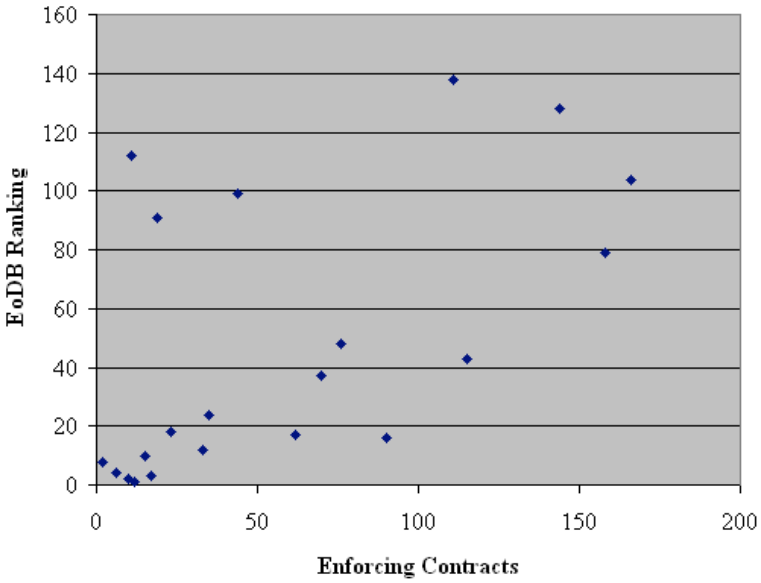
APEC members).The ranking generally shows that APEC members are ranked high on the list, while there is room for improvement for certain members, especially in the area of enforcing contracts.[9]

	EoDB Ranking
Singapore	1
Hong Kong	2
New Zealand	3
United States	4
Korea, Rep.	8
Australia	10
Malaysia	12
Chinese Taipei	16
Canada	17
Thailand	18
Japan	24
China	91
Chile	37
Peru	43
Mexico	48
Brunei Darussalam	**79**
Vietnam	**99**
Papua New Guinea	104
Russia	112
Indonesia	128
Philippines	138

	Enforcing Contracts
Luxembourg	*1*
Korea, Rep.	2
United States	6
Hong Kong	10
Russia	11
Singapore	12
Australia	15
New Zealand	17
China	19
Thailand	23
Malaysia	33
Japan	35
Vietnam	**44**
Canada	62
Chile	70
Mexico	76
Chinese Taipei	90
Philippines	111
Peru	115
Indonesia	144
Brunei Darussalam	**158**
Papua New Guinea	166

As the following table shows, although there is no direct correlation between the EoDB ranking and enforcing contracts ranking, it can be said that APEC members with a high ranking in the area of enforcing contracts are also ranked high on the EoDB ranking (the exceptions being Russia which ranked 11th in enforcing contracts, yet 112th overall and China which ranked 19th in enforcing contracts, yet 91st overall).

[9] This study was prepared based on the 2013 Doing Business Report and does not reflect the 2014 Report which was issued in late October. In the 2014 report Vietnam ranks 46th, Brunei 161st and Saudi Arabia 127th in enforcing contracts. This is mainly due to the fact that the number of economies being assessed increased from 185 to 189.



II. The relevance of UNCITRAL and its texts to enforcing contracts

1. UNCITRAL and enforcing contracts

Simply because the methodology used by the World Bank for indicators on enforcing contracts measures the efficiency of the "judicial system" in resolving commercial disputes, it does not necessarily mean that the only way to resolve commercial disputes is through the judicial system. Moreover, in the current global economy, disputes not only arise from domestic sales transactions but also from international sales transactions. This is why the work of the United Nations Commission on International Trade Law (UNCITRAL) is relevant to the EoDB Action Plan and why UNCITRAL was eager to cooperate with the Korean Ministry of Justice in this project. By taking into consideration the "international" aspects of sales transactions and alternative dispute resolution measures to resolve commercial disputes, States might be able to improve their business environment, particularly with regard to enforcing contracts.

Furthermore, UNCITRAL's work involves various other aspects of international transactions. Although not directly related to enforcing contracts, UNCITRAL texts allow States to harmonize their legislation in relevant areas, thus making it easier for companies to do business in foreign territory.

With respect to the substantive law on sales transactions, the 1980 United Nations Convention on Contracts for the International Sale of Goods is most relevant, but in the last seven years, UNCITRAL has also adopted other relevant texts, for example, the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts, the 2007 UNCITRAL Legislative Guide on Secured Transactions, and the 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as the Rotterdam Rules.

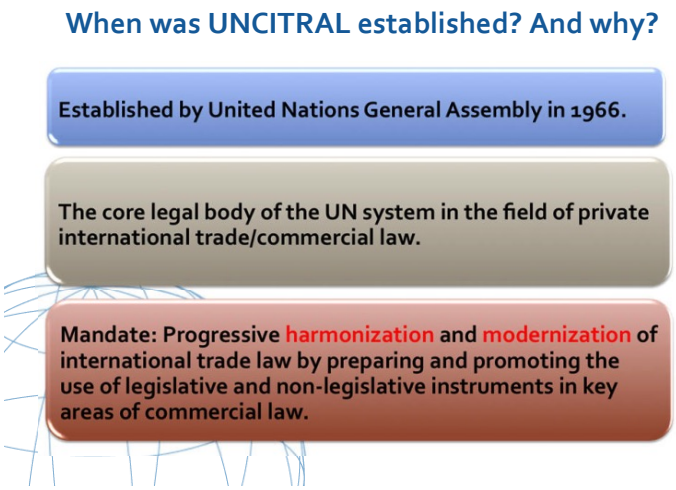
With respect to dispute resolution, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention and 1985 UNCITRAL Model Law on International Commercial Arbitration (amended in

2006) are most relevant but reference should also be made to the 2002 UNCITRAL Model Law on International Commercial Conciliation and the 2010 revised UNCITRAL Arbitration Rules.

2. Origin and mandate of UNCITRAL

As noted above, in an increasingly economically interdependent world, the importance of a legal framework for the facilitation of international trade and investment cannot be stressed too much. UNCITRAL was established by the United Nations General Assembly by its resolution 2205 (XXI) of 17 December 1966 with the mandate to further the progressive harmonization and modernization of international trade law.

This mandate is achieved by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law including dispute resolution, sale of goods, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, and procurement.



UNCITRAL texts are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, which represent different legal traditions and levels of economic development; non-member States which participate as observers; inter-governmental organizations; and non-governmental organizations. Therefore, these texts are widely acceptable as offering solutions appropriate to different legal traditions and to countries at different stages of economic development. That is why UNCITRAL has been recognized as the core legal body of the United Nations system in the field of private international trade law.

UNCITRAL gives effect to its mandate by: (a) promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws; (b) preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field; (c) promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade; (d) collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade; and (e) coordinating the work of organizations active in this field and encouraging cooperation among them.

3. Membership

UNCITRAL members are elected by the General Assembly from States Members of the United Nations. UNCITRAL's original membership comprised 29 States and was expanded in 1973 to 36 States and again in 2002 to 60 States. The expansion reflected the broader participation and contribution by States beyond the then existing member States and stimulated interest in UNCITRAL's expanding work programme.

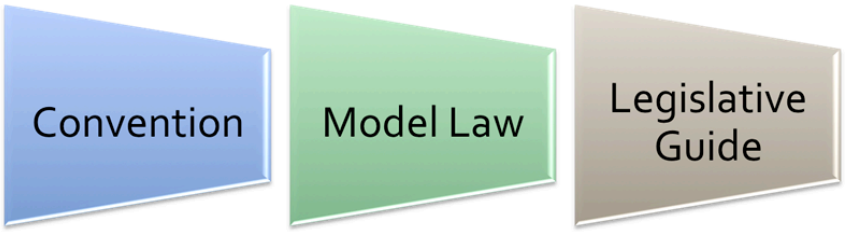
Structured to ensure that the various geographic regions and the principal economic and legal systems of the world are represented, the 60 member States include 14 African States, 14 Asian States, 8 Eastern European States, 10 Latin American and Caribbean States and 14 Western European and other States. The General Assembly elects members for terms of six years and every three years, the terms of half of the members expire.

At present, Mexico is an active member of UNCITRAL.

4. Techniques of modernization and harmonization

UNCITRAL adopts a flexible and functional approach with respect to the techniques used to perform its mandate to modernize and harmonize the law of international trade. These techniques operate at different levels and involve different types of compromise or acceptance of difference. To some extent, they also show the process of modernization and harmonization occurring at different stages of business development. While in most cases the process of modernization and harmonization works to bring long-established practices closer together, there are cases that might be seen as examples of "preventive" harmonization—establishing new principles and practices that will minimize divergence when national laws on new issues are developed. This has been typical in areas of commerce affected by new technology or new business practices, such as online dispute resolution and security rights in intellectual property.

UNCITRAL has produced several different types of legislative texts, but they generally fall under the category of conventions, model laws and legislative guides.



4.1 Conventions

A convention is designed to unify law by establishing binding legal obligations. States become a party to a convention by formally depositing a binding instrument of ratification or accession with the depositary, for example, the

Secretary-General of the United Nations. The entry into force of a convention is usually dependent upon the deposit of a minimum number of instruments of ratification or accession.

A convention is used when the objective is to achieve a high degree of harmonization of law in the participating States, almost removing the need for a party to undertake research of the law of another State party. The international obligation assumed by that State through adoption of the convention is intended to provide an assurance that the law in that State is in line with the terms of that convention. If a high degree of harmonization cannot be achieved or a greater degree of flexibility is desired and is appropriate to the subject matter under consideration, a different technique of harmonization is used. Except to the extent that they permit reservations or declarations, conventions afford little flexibility to adopting States. The conventions negotiated under the auspices of UNCITRAL generally do not allow reservations or declarations or allow them only to a very limited extent (for example, the United Nations Convention on Contracts for the International Sale of Goods, articles 92-96).

4.2 Model Laws

A model law is a legislative text that is recommended to States for enactment as part of their national law and is appropriate when it is expected that States will wish or need to make adjustments to the text to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary or desirable. It is precisely this flexibility that makes a model law potentially easier to negotiate than a text containing obligations that cannot be altered. This flexibility also promotes greater acceptance of a model law than of a convention dealing with the same subject matter. Notwithstanding this flexibility, in order to increase the likelihood of achieving a satisfactory degree of

unification and to provide certainty about the extent of unification, States are encouraged to make as few changes as possible when incorporating a model law into their legal system.

Model laws are generally finalized and adopted by UNCITRAL at its annual session, as opposed to the adoption of a convention, which requires the convening of a diplomatic conference, or an adoption by the General Assembly performing the function of a diplomatic conference. Recent model laws completed by UNCITRAL have been accompanied by a "guide to enactment" setting forth background and other explanatory information to assist Governments and legislators in using the text. The guides include information that would assist States in considering what provisions of the model law might have to be varied to take into account particular national circumstances, as well as information relating to discussions in the working group on policy options and considerations, and matters not addressed in the text of the model law that may nevertheless be relevant to the subject matter of the model law.

4.3 Legislative Guides

A legislative guide provides policy options, guidelines as well as rationale for issues to be considered in a legislative framework. For a number of reasons, it is not always possible to draft specific provisions in a discrete form, such as a convention or a model law. Disparate legislative techniques and approaches may be used for solving a given issue and States may not yet be ready to agree on a single approach or common rule. There may not be consensus on the need to find a uniform solution to a particular issue, or there may be different levels of consensus on the key issues of a particular subject and how they should be addressed. In such cases, a legislative guide which includes a set of principles or legislative recommendations is generally used.

Legislative Guides

In order to advance the objective of harmonization, a set of principles or recommendations would need to do more than simply state general objectives. A set of possible legislative solutions are provided but not necessarily a single set. In some cases, it may be appropriate to include various options, depending on applicable policy considerations. By discussing the advantages and disadvantages of different policy choices, a legislative guide assists the reader in evaluating different approaches and choosing the one most suitable in a particular national context. It could also be used to provide a standard against which States could review the adequacy of existing laws, regulations, decrees and similar legislative texts in a particular field and to update those laws or develop new laws.

In 2000, UNCITRAL adopted the Legislative Guide on Privately Financed Infrastructure Projects. It also adopted the Legislative Guide on Insolvency Law in 2004, the Legislative Guide on Secured Transactions in 2008 and a Supplement to that Guide on Security Rights in Intellectual Property in 2010.

Part III

UNCITRAL texts related to enforcing contracts

III. UNCITRAL texts related to enforcement of contracts

As noted above, cross-border transactions involve various kinds of contracts and thus, an efficient modern legislative framework encompassing those aspects would be useful (for example, relating to sale of goods, transport, financing and dispute resolution). The adoption of uniform or harmonized legislative texts by States would facilitate such transactions and that is what UNCITRAL texts aim at achieving.

1. United Nations Convention on Contracts for the International Sale of Goods

1.1 General

International sales of goods are done by contracts negotiated for commercial purposes, which require a number of supporting contracts to ensure its performance, with connections to various legal systems. A major achievement of UNCITRAL is the conclusion of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[10] Adopted at a diplomatic conference held in Vienna on 11 April 1980, the CISG provides for a set of modern, uniform, and fair rules applicable to international sales contracts. In the event that the CISG rules are applicable in accordance with its substantive, international and territorial standards of applicability, these rules would prevail over any recourse to a forum's private international law.[11]

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[10] Information on the CISG, including its updated status, is available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html .

[11] The CISG is generally viewed as representing the law for international sales as such directly, without any recourse to the private international law rules applicable as the *lex fori* in a particular country. In other words, a

The preamble of the CISG states that the "adoption of uniform rules which govern contracts for the international sale of goods and which take into account the different social, economic and legal systems, would contribute to the removal of legal barriers in international trade and promote the development of international trade." In essence, the aim is to provide a uniform set of rules so that parties involved in international sales transactions can be certain about the law to which their transaction is subject, thereby reducing an important barrier to cross-border trade.

The CISG is fundamental in several ways. By providing substantive rules to settle disputes relating to the international sale of goods, it introduces certainty in commercial trade and thus reduces transaction costs. The CISG also effectively facilitates international trade by avoiding recourse to rules on conflict of laws. As sales contracts are widely recognized as the backbone of international trade, the CISG is one of the core treaties in international trade which has achieved almost a universal adoption with major trading countries, with 79 States parties. Prompt adoption by those States that are not a party to the CISG would be particularly desirable.

Furthermore, it has gone beyond its original purpose of enhancing the predictability of the law applicable to international sale of goods and modernizing substantive rules in that area. It is increasingly used as a blueprint for domestic law reform, not limited to contracts for sale of goods. It also has an enabling effect on cross-border exchanges with respect to bilateral and regional free trade agreements.

1.2 Scope of application

The CISG governs international sales of goods between private business, excluding sales to consumers, sales of services, as well as sales of certain type of goods. It applies to contracts of sale of goods between parties whose places of business are in different contracting States, or when the rules of private international law lead to the application of the law of a contracting State. It may also apply by virtue of the parties' choice. Certain matters relating to the international sales of goods, for instance the validity of the contract and the effect of the contract on the property in the goods sold, fall outside the CISG.

In theory, the CISG only applies to contracts for "international" sales. The approach taken by the CISG to define "international" is quite simple. According to article 1, the CISG applies to contracts between parties whose places of business are in different States (regardless of their nationality or their civil or commercial character)[12], when the States are parties to the CISG (article 1(a)) or when the rule of private international law leads to the application of the

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court or arbitral tribunal dealing with the issue is asked to look into whether CISG is applicable by directly applying the CISG's own rules of application, since the uniform substantive law of the CISG is understood to prevail over any rules of private international law that might apply.

[12] Article 10 of the CISG, provides for a rule in the event that a party has multiple places of business (the place of business being that which has the close relationship to the contract and its performance) and in the event that a party does not have a place of business (in such case, reference is to be made to the habitual residence).

law of a State that is a party to the CISG (article 1(b)). In the latter instance, the CISG is applicable even when both parties do not have their places of business in a CISG State, provided that the rules of private international law lead to the application of the law of a CISG State, for example, when the law chosen by the parties or, in the absence of a choice of law, the law having the closest connection to the contract, is the law of a CISG State.

While it is obvious that the CISG applies to contracts for the "sale of goods", neither the term "sale" nor "goods" is defined.[13] However, in practice, a sales contract is generally defined as "a contract pursuant to which one party (the seller) is bound to deliver the goods and transfer the property in the goods sold and the other party (the buyer) is obliged to pay the price and accept the goods." Moreover, pursuant to article 7 (1), the terms "sale" and "goods" should be interpreted autonomously, in light of the international character of the CISG and the need to promote uniformity in its application, rather than by referring to domestic law for a definition.

Article 2 of the CISG lists the types of sales excluded from the scope of CISG, for example, sales for personal use, sales by auction, sales on execution or otherwise by authority of law, sales of stocks, shares, investment securities, negotiable instruments and money, sales of ships, vessels, hovercraft or aircraft and sales of electricity.

Several articles make clear that the subject matter of the CISG is restricted to formation of the contract, the required form of the contract, and the rights and duties of the buyer and seller arising from such a contract. As article 4 indicates, the CISG is not concerned with the validity of the contract, the effect which the contract may have on the property in the goods sold (transfer of property in the goods) or the liability of the seller for death or personal injury caused by the goods to any person. These issues are subject to applicable national rules.

The fact that the CISG does not cover each and every aspect of an international sales transaction may raise doubts. On the whole, however, these difficulties cannot detract from the fact that the CISG offers a full set of uniform rules on the formation and implementation of international sales contracts which provides a solid basis that the parties can rely on and which covers all the performance issues under a sales contract in an even-handed and generally acceptable way.

1.3 Structure of the CISG

[13] Article 3 (1) makes clear that the sale of goods to be manufactured or produced is as much subject to CISG as the sale of ready-made goods, unless the party ordering the goods undertakes to supply a substantial part of the materials necessary for the manufacture or production. Thus, the CISG encompasses contracts that include acts in addition to the supply of goods. This shows that the CISG is a law which is actually capable of dealing with the commercial realities of the evolving world of international trade, which extends to hybrid contracts involving the "sale" of both labour and services.

The text of the CISG is introduced by a preamble and concluded with an authentic text and witness clause. In between are the 101 substantive articles which are organized into four parts.

Part I deals with the scope of application and includes general provisions. Part II contains provisions on the formation of contract. Part III deals with the seller's obligation to deliver goods conforming in quantity and quality to the contractual stipulations and at the time and place stated therein, as well as to the hand-over of the relevant documents. The obligations of the buyer are also dealt with, which include payment and taking delivery of the goods. Furthermore, rules on the passing of risk, as well as a number of provisions common to the obligations of the seller and of the buyer, such as, anticipatory breach of contract, damages, and exemption from the obligation to perform the contract. Part IV includes the usual final clauses included in a multilateral treaty.

- Preamble

- Part I ("Sphere of application and general provisions") — articles 1-13
  - Chapter I ("Sphere of application") — articles 1-6
  - Chapter II ("General provisions") — articles 7-13
- Part II ("Formation of contract") — articles 14-24
- Part III ("Sale of goods") — articles 25-88
  - Chapter I ("General provisions") — articles 25-29
  - Chapter II ("Obligations of the seller") — articles 30-52

- Section I ("Delivery of goods and handing over of documents") — articles 31-34
- Section II ("Conformity of goods and third party claims") — articles 35-44
- Section III ("Remedies for breach of contract by the seller") — articles 45-52

♦ Chapter III ("Obligations of the buyer") — articles 53-65

- Section I ("Payment of the price") — articles 54-59
- Section II ("Taking delivery") — article 60
- Section III ("Remedies for breach of contract by the buyer") — articles 61-65

♦ Chapter IV ("Passing of risk") — articles 66-70

♦ Chapter V ("Provisions common to the obligations of the seller and of the buyer") — articles 71-88

- Section I ("Anticipatory breach and instalment contracts") — articles 71-73
- Section II ("Damages") — articles 74-77
- Section III ("Interest") — article 78
- Section IV ("Exemption") — article 79-80
- Section V ("Effects of avoidance") — articles 81-84
- Section VI ("Preservation of the goods") — articles 85-88

• Part IV ("Final provisions") — articles 89-101

• Authentic Text and Witness clause

1.4 Party autonomy

The fact that the CISG is effective in most major trading countries does not necessarily mean that it will always apply to every international sales transaction between parties having their business in these States. As the CISG itself provides in article 6, it is always possible for parties to exclude the application or 'opt-out' of the CISG. In such instances, the CISG does not apply, even though all requirements for its applicability are otherwise met.

This rule is generally interpreted as an expression of the principle of party autonomy. This implies that, with regard to large and complex deals, the parties retain the possibility of making their contract subject to an agreed municipal law or of choosing whatever other solution they deem appropriate without necessarily being bound to the rules of the CISG. The opt-out approach, on the other hand, ensures that the rules under which the transaction takes place are clear from the outset and do not imply any surprises for the parties, in particular small and medium-sized transactions where the parties may have neither the money nor the time to obtain professional legal advice.

While there is some debate as to what extent the applicability of the CISG can be excluded by implication, the prevailing opinion expressed in many court decisions and arbitral awards is that the mere reference to the domestic

law of a contracting State does not exclude the application of the CISG *per se* as the intention of the parties of implicitly excluding the CISG must be real and not just hypothetical.

1.5 Interpretation of the CISG

What has certainly helped the CISG gain almost universal acceptance is the principle of interpretation as contained article 7. It requires that regard be given to the international character of the CISG and to the need to promote uniformity in its application as well as the observance of good faith in international trade. This provision has been designed to secure the uniformity of law which the drafters of the CISG aimed at. Generally, it is viewed by legal commentators and in case law, to mean that the CISG is to be interpreted autonomously and not in the light of domestic law. National courts are expected not to have recourse to any domestic concepts in order to resolve problems of interpretation arising under the CISG.

Article 7 also deals with the issue of gap-filling, again with the aim of achieving uniformity in the application of the CISG. Questions concerning matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Application of the principle of autonomous interpretation works towards achieving uniformity. On the other hand, however, it also represents a challenge for courts and arbitral tribunals in gaining access to the case law. For this purpose, the Commission decided, in 1988, to establish CLOUT (Case Law on UNCITRAL Texts), a system for the collection and dissemination of court decisions and arbitral awards relating to UNCITRAL texts. The aim was to promote international awareness of legal texts formulated by UNCITRAL and to facilitate uniform interpretation and application of those texts. The system is intended to provide information for use by judges, arbitrators, lawyers, parties to commercial transactions, academics, students and other interested persons. CLOUT is the only multi-lingual compilation of cases focusing on UNCITRAL texts, now including over 1234 abstracts of case law from more than 50 jurisdictions. Information about CLOUT and the searchable database is available at http://www.uncitral.org/uncitral/en/case_law.html.

UNCITRAL also published the third version of digest of case law on the CISG, which provides for an analytical digest of court and arbitration cases, identifying trends in interpretation based on the case law collected by local correspondents. Although the digest does not provide critical comments on the cases material it reports about, it provides broad access to the case law from different geographical regions. A digest of case law on the Model Arbitration Law has also been prepared. The above-mentioned digests are available at http://www.uncitral.org/uncitral/case_law/digests.html.

1.6 The substantive parts of the CISG

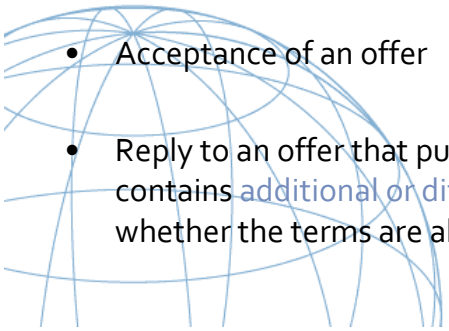
Part II of the CISG deals with a number of questions that arise in the formation of the contract by the exchange of an offer and an acceptance. In order for a proposal to constitute an offer, it must be addressed to one or more specific persons and it must be sufficiently definite. For the proposal to be sufficiently definite, it must indicate the goods and expressly or implicitly fix or make provisions for determining the quantity and the price.

The CISG takes a middle position between the doctrine of the revocability of the offer until acceptance and its general irrevocability for some period of time. The general rule is that an offer may be revoked. However, the revocation must reach the offeree before he has dispatched an acceptance. Moreover, an offer cannot be revoked if it indicates that it is irrevocable, which it may do by stating a fixed time for acceptance or otherwise. Furthermore, an offer may not be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has already acted in reliance.

Acceptance of an offer may be made by means of a statement or other conduct of the offeree indicating assent to the offer that is communicated to the offeror. However, in some cases the acceptance may consist of performing an act, such as dispatch of the goods or payment of the price. Such an act would normally be effective as an acceptance the moment the act was performed.

Part II. Formation of the Contract

- By the exchange of an offer and acceptance: contract concluded when the acceptance becomes effective
- Requirements for a proposal to constitute an offer
  - The doctrine of revocability of the offer until acceptance & its general irrevocability for some period of time
- Acceptance of an offer
- Reply to an offer that purports to be an acceptance but contains additional or different terms: depending on whether the terms are altered materially or not



A frequent problem in contract formation, perhaps especially with regard to contracts of sale of goods, arises out of a reply to an offer that purports to be an acceptance but contains additional or different terms. Under the CISG, if the additional or different terms do not materially alter the terms of the offer, the reply constitutes an acceptance, unless the offeror without undue delay objects to those terms. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. If the additional or different terms do materially alter the terms of the contract, the reply constitutes a counter-offer that must in turn be accepted for a contract to be concluded. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or settlement of disputes are considered to alter the terms of the offer materially.

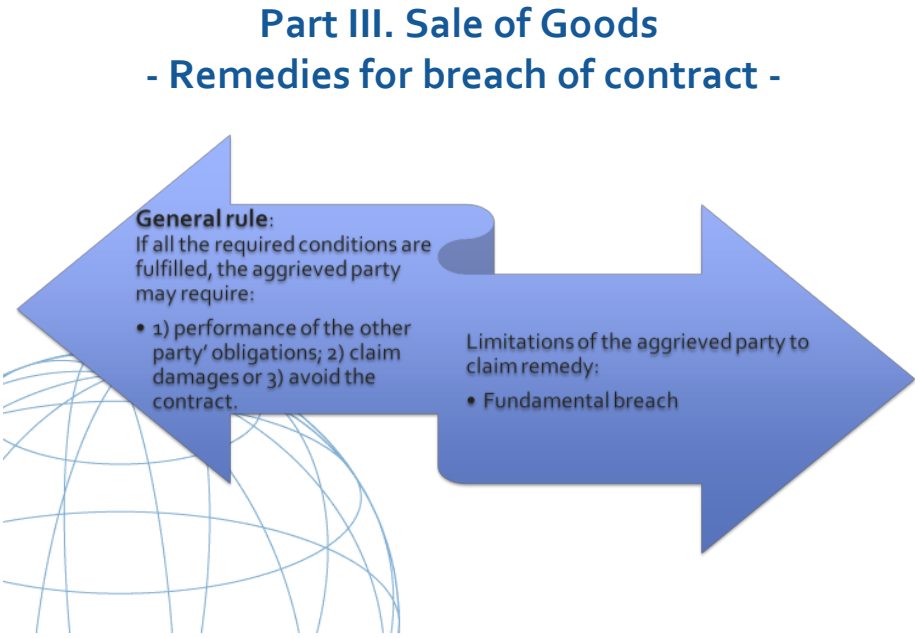
Part III of the CISG deals with the parties' obligation, remedies, passing of risks and other relevant issues. The general obligations of the seller are to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and the CISG. The CISG provides supplementary rules for use in the absence of contractual agreement as to when, where and how the seller must perform these obligations.

The CISG provides a number of rules that implement the seller's obligations in respect of the quality of the goods. In general, the seller must deliver goods that are of the quality and description required by the contract and that are contained or packaged in the manner required by the contract. One set of rules involves the seller's obligation to deliver goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property.

In connection with the seller's obligations with regard to the quality of the goods, the CISG contains provisions on the buyer's obligation to inspect the goods. The buyer must give notice of any lack of conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it and at the latest two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

The general obligations of the buyer are to pay the price for the goods and take delivery of them as required by the contract and the CISG. The CISG provides supplementary rules for use in the absence of contractual agreement as to how the price is to be determined and where and when the buyer should perform his obligations.

The remedies for breach of contract are set forth in connection with the obligations of the seller and the buyer. This makes it easier to use and understand the CISG. The general pattern of remedies is that if all the required conditions are fulfilled, the aggrieved party may require performance of the other party's obligations, claim damages, or avoid the contract. The buyer also has the right to reduce the price where the goods delivered do not conform to the contract.



Among the more important limitations on the right of an aggrieved party to claim a remedy is the concept of fundamental breach. For a breach of contract to be fundamental, it must result in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the result was neither foreseen by the party in breach, nor foreseeable by a reasonable person of the same kind in the same circumstances.

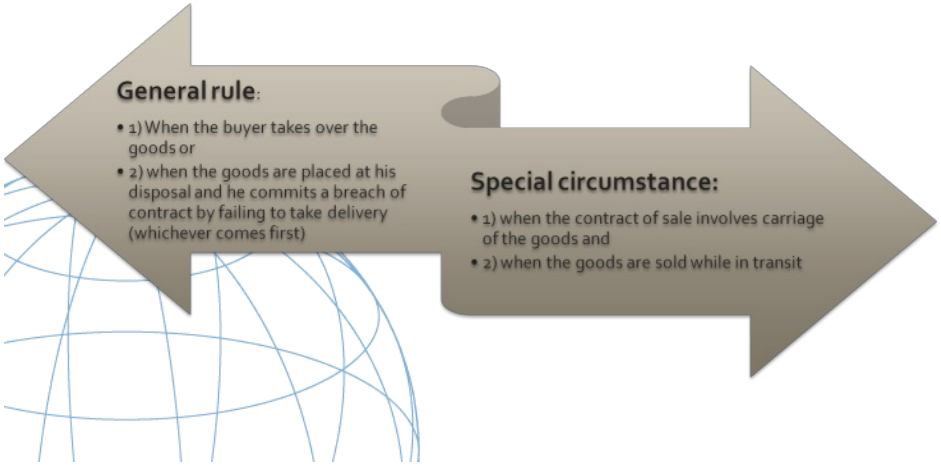
A buyer can require the delivery of substitute goods only if the goods delivered were not in conformity with the contract and the lack of conformity constituted a fundamental breach of contract. The existence of a fundamental

breach is one of the two circumstances that justifies a declaration of avoidance of a contract by the aggrieved party; the other being that, in the case of non-delivery of the goods by the seller or non-payment of the price or failure to take delivery by the buyer, the party in breach fails to perform within a reasonable period of time fixed by the aggrieved party.

Determining the exact moment when the risk of loss or damage to the goods passes from the seller to the buyer is of great importance in contracts for the international sale of goods. Parties may regulate the issue in their contract either by an express provision or by the use of other trade terms such as INCOTERMs. The effect of the choice of such a term would be to amend the corresponding provisions of the CISG accordingly. However, for the frequent case where the contract does not contain such a provision, the CISG sets forth a complete set of rules.

Part III. Sale of Goods – Passing of risk -

- Complete set of rules on when the risk of loss or damage to the goods passes from the seller to the buyer



The two special situations contemplated by the CISG are when the contract of sale involves carriage of the goods and when the goods are sold while in transit. In all other cases, the risk passes to the buyer when he takes over the goods or from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery, whichever comes first.

The CISG contains special rules for the situation in which, prior to the date on which performance is due, it becomes apparent that one of the parties will not perform a substantial part of his obligations or will commit a fundamental breach of contract. A distinction is drawn between those cases in which the other party may suspend his own performance of the contract but the contract remains in existence awaiting future events and those cases in which he may declare the contract avoided.

When a party fails to perform any of his obligations due to an impediment beyond his control that he could not reasonably have been expected to take into account at the time of the conclusion of the contract and that he could not have avoided or overcome, he is exempted from the consequences of his failure to perform, including the payment of damages. This exemption may also apply if the failure is due to the failure of a third person whom he has engaged to perform the whole or a part of the contract. However, he is subject to any other remedy, including reduction of the price, if the goods were defective in some way.

The CISG imposes on both parties the duty to preserve any goods in their possession belonging to the other party. Such a duty is of even greater importance in an international sale of goods where the other party is from a foreign country and may not have agents in the country where the goods are located. Under certain circumstances, the party in possession of the goods may sell them, or may even be required to sell them. A party selling the goods has the right to retain out of the proceeds of sale, an amount equal to the reasonable expenses of preserving the goods and of selling them and must account to the other party for the balance.

1.7 Implementation of the CISG

The CISG, as an international convention, can be implemented either through self-execution or by way of an enacting statute. Either way, the CISG has become part of the domestic law in 79 States that have become a party to the CISG, effectively providing a bridge between different legal systems, whether they are rooted in the civil law or in the common law tradition, and regardless of their levels of economic development. The universal nature of the CISG can be clearly seen.

The CISG permits a limited number of declarations. For example, a State may declare that it will not be bound by Part II or Part III. For a State that has two or more territorial units, thus different systems of law governing contracts of sale, it may declare that the CISG is to extend to all its territorial units or only to one or more of them (article 93). A State may also declare that it will not be bound by subparagraph (1) (b) of article 1 of allowing application of the CISG by virtue of the rules of private international law (article 95). In addition, a State whose legislation requires contracts of sale to be concluded in or evidenced by writing may, at any time, make a declaration in accordance with article 12 that any provision of article 11, article 29 or Part II of the CISG, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State (article 96).

It should be stressed that the CISG only applies to international sale contracts. Through the adoption of the CISG, resorting to conflict of laws rules to determine the law applicable to the sales contract is avoided. Domestic sale contracts are not affected by the CISG and they will continue to be regulated by domestic law (unless the rules in the CISG were implemented in the domestic context). It is also important to note that becoming party to the CISG has no

financial implications for member States. Its administration at the domestic level does not require any dedicated body. Furthermore, no mandatory reporting requirements arise from the adoption of the CISG.

The UNCITRAL Secretariat provides assistance in facilitating the uniform interpretation and application of the CISG. For instance, a large number of scholarly works and cases originating from developed and developing countries, which may help judges and other legal actors in the interpretation of the CISG is available. The UNCITRAL Secretariat has also prepared various tools on uniform interpretation, including CLOUT and a digest on the CISG (see 1.5 above). This tool may assist in improving the efficiency of dispute resolution in this area as it ensures adequate information on the main interpretative trends of the CISG and promotes its uniform interpretation.

1.8 Status of the CISG

<Status of the CISG>

The CISG has travelled a long way to obtain wide application. The idea sprouted from the continental part of Western Europe, and soon won the support of Socialist countries. It then consolidated its influence on the two sides of the Atlantic Ocean, gained support in Africa and Asia, regions where further expansion remains possible.

The number of CISG parties continues to grow; currently with 83 States parties, Brazil (date of accession: 4 March 2013) being the most recent. In addition to the 79 States parties Ghana signed the CISG in 1980 and Venezuela (Bolivarian Republic of) in 1981, but neither has yet ratified the CISG.[14]More importantly, as the table below shows, 16 of the 20 (and 21 of the 30) most active economies in international trade are parties to the CISG, which shows a clear correlation between engagement in commercial activity and the adoption of the CISG. This approximately relates to 70% of the world trade in goods.[15]

WTO 2009 Statistics for Merchandise Trade (2009, billion USD)	**CISG parties**

[14] The updated status of the CISG can be found at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

[15] See also I.Schwenzer & P. Hachem, The CISG – Successes and Pitfalls, 57 Am. J. Comp. L. 457 (2009) available at http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-hachem.html

	Export	Import	Total	%
United States	1056	1605	2661	10.57
China	1202	1006	2207	8.77
Germany	1126	938	2065	8.20
Japan	581	552	1133	4.50
France	485	560	1045	4.15
Netherlands	498	445	944	3.75
United Kingdom	352	482	834	3.31
Italy	406	413	818	3.25
Belgium	370	352	722	2.87
Korea, Republic of	364	323	687	2.73
Hong Kong, China	329	352	682	2.71
Canada	317	330	647	2.57
Singapore	270	246	516	2.05
Spain	219	288	506	2.01
Russian Federation	303	192	495	1.97
Mexico	230	242	471	1.87
India	163	250	412	1.64
Taipei, Chinese	204	174	378	1.50
Switzerland	173	156	329	1.31
Australia	154	165	320	1.27
UAE	175	140	315	1.25
Saudi Arabia	192	96	288	1.14
Brazil	153	134	287	1.14
Thailand	152	134	286	1.14
Malaysia	157	124	281	1.12
Poland	134	147	281	1.12
Austria	138	143	281	1.12
Sweden	131	120	251	1.00
Turkey	102	141	243	0.97
Czech Republic	113	105	219	0.87
Indonesia	119	92	211	0.84
Norway	121	69	190	0.76
Ireland	115	63	177	0.70
Denmark	93	83	176	0.70
Hungary	84	78	162	0.64
Iran, Islamic Rep. of	78	50	128	0.51
Viet Nam	57	70	127	0.50
Finland	63	61	124	0.49
Portugal	43	70	113	0.45
Slovak Republic	56	55	111	0.44
…	…	…	…	…
World	12490	12682	25172	100

APEC Economies	Enforcing Contracts	EoDB Ranking
Singapore	1	1
Republic of Korea	4	5
Hong Kong, China	6	3
New Zealand	9	2
Australia	12	10
Russia	14	62
Thailand	25	26
Japan	26	29
Malaysia	29	18
China	35	96
United States	41	7
Vietnam	47	78
Mexico	**57**	**39**
Chile	64	41
Canada	65	16
Chinese Taipei	93	19
Peru	100	35
Philippines	124	95
Brunei Darussalam	139	101
Indonesia	172	114
Papua New Guinea	181	133
Myanmar (non-APEC)	**185**	**177**
	CISG parties / Based on 2015 ranking	

Of the 19 APEC members, 12 are parties to the CISG and they rank significantly higher in the overall EoDB and enforcing contracts rankings compared to those that have not adopted the CISG. The top seven ranking economies in enforcing contracts (top five in EoDB ranking) are all parties to the CISG. Hong Kong and Chinese Taipei is not considered for this purpose as, apart from the issue whether the CISG applies to Hong Kong[16] , it is questionable whether Hong Kong, a Special Administrative Region of China and Chinese Taipei (or Taiwan, Province of China) can become parties to the CISG.

[16] Status of Hong Kong and CISG: Whether the CISG applies to Hong Kong is not clear. Effective 1 July 1997, Hong Kong became a "Special Administrative Region" of the People's Republic of China. In June 1997, the Chinese government deposited a diplomatic note with the Secretary-General of the United Nations referring to Hong Kong as a Special Administrative Region that "will enjoy a high degree of autonomy" and announcing that the 126 multilateral treaties contained in the annex to the diplomatic note will be applied to Hong Kong.
The CISG, contrary to the New York Convention, was not listed. It should also be noted certain conventions like the New York Convention applied to Hong Kong even prior to 1 July 1997, pursuant to declarations filed by the United Kingdom. With respect to the New York Convention, China also filed a notice with the Secretary-General of the United Nations, stating that "[this Arbitral Convention], to which the Government of the People's Republic of China acceded on 22 January 1987, will apply to the Hong Kong Special Administrative Region with effect from 1 July 1997 . . ." and that "[t]he Government of the People's Republic of China will assume responsibility for the international rights and obligations arising from the application to the Hong Kong Special Administrative Region."
Therefore the general view is that pending the filing with the Secretary-General of the United Nations of a suitable CISG-related depositary notification by China, the courts of China and Hong Kong are unlikely to regard the CISG as in effect in Hong Kong. Of course, there is a risk that courts of other jurisdictions may rule otherwise for Hong Kong as well as for Macao. For more in-depth discussion, refer to Ulrich Schroeter, "The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods" and Fan YANG "Hong Kong's Adoption of the CISG: Why do we need it now?"

The sum of the EODB rankings of the 12 States that have adopted the CISG is 397 with an average ranking of 33. The sum of the ranking of the remaining 7 States that have not adopted the CISG (excluding Hong Kong and Chinese Taipei) is 578 with an average ranking of 83. Similarly, the sum of the enforcing contracts rankings of 12 States that have adopted the CISG is 440 with an average ranking of 37. The sum of the ranking of the remaining 7 States that have not adopted the CISG (excluding Hong Kong and Chinese Taipei) is 679 with an average ranking of 97.

1.9 ASEAN and CISG (for Myanmar purposes)

The regional context has to be taken into consideration when discussing the trade environment. In that context, ASEAN, which Myanmar belongs to, adds a stronger reason for both to adopt the CISG. Given the diversity of legal systems among these countries, and the fact that many of these countries are either transition economies or economies in the process of developing their own legal infrastructure, the advantage of having one common sales law has become more attractive than ever. Joining the CISG would be a positive step towards dealing with the diversity.

As will be seen in Parts V, trade with ASEAN accounts for 22.9% of Brunei's trade and 8.9% of Vietnam's trade. ASEAN stands for the Association of Southeast Asian Nations and is composed of the following ten states: Brunei Darussalam, Cambodia, Thailand, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. Apart from the fact that its member States are located in the Southeast Asian region, it is a diverse group with various historical experiences and different legal systems. While there is an aspiration to form an ASEAN Economic Community (AEC) by 2015 based on the ASEAN Free Trade Area (AFTA), there is still little harmonization of law, mainly due to the different level of interest in formulating harmonized rules. Nonetheless, ASEAN has pursued trade law harmonization through various mechanisms.

For example, at the seventh ASEAN Law Ministers Meeting (ALAWMM) (Brunei, 2008), the Ministers endorsed the recommendations that all ASEAN member States accede to the New York Convention and to adopt the UNCITRAL Model Arbitration Law. And at the fifth ASEAN Law Forum on Harmonization of Trade Laws (Bangkok, 2008), there was considerable interest by ASEAN member states in adhering to the CISG; in a joint study of the UN Electronic Communications Convention; and in secured transactions work.

The ASEAN Trade in Goods Agreement (ATIGA) should also be taken into account.[17] The key objective of ATIGA is to achieve free flow of goods in ASEAN as one of the principal means to establish a single market and production base for the deeper economic integration of the region towards the realization of the AEC by 2015. The preamble of

[17] Information about ATIGA is available at http://www.aseansec.org/22223.pdf

ATIGA notes its desire "to provide a legal framework to realize free flow of goods in the region". Quite obviously, it hopes to do so by progressively liberalizing and facilitating trade in goods among the Parties through, *inter alia,* progressive elimination of tariff and non-tariff barriers in substantially all trade in goods.

It should also be noted that ASEAN has framework agreements on comprehensive economic co-operation with China[18], India[19], Japan[20] and the Republic of Korea[21]. Also of interest is the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA)[22], an agreement among the ten ASEAN Member States, Australia and New Zealand. AANZFTA entered into force for eight States (Brunei Darussalam, Malaysia Myanmar, Philippines, Singapore, Vietnam, Australia and New Zealand) on 1 January 2010. Subsequently, it entered into force in Thailand (12 March 2010), Laos DPR (1 January 2011) and Cambodia (4 January 2011).

In this context, the CISG may contribute to regional economic integration. Indeed, it may provide at no cost a modern legislative framework suitable for operation at the domestic, regional and global level. It is true that ASEAN countries have so far adopted the CISG only to a limited extent. However, the unification of the law governing the sale of goods among ASEAN States by them joining the CISG regime will undoubtedly contribute to the promotion of trade among the ASEAN countries and with their trading partners by providing more predictability. It should be noted that ASEAN's top five trade partners (China, EU, Japan, United States and Republic of Korea) are all parties to the CISG (including most of the EU member states). Moreover, Australia and New Zealand, parties to the AANZFTA, are also parties to the CISG. Given the diversity of legal systems among ASEAN countries, the advantage of having once common contract law is becoming more attractive than ever.[23] There is no need for ASEAN to reinvent the wheel by drafting a sales law that will work only in the ASEAN context. CISG is adaptable and not so difficult to implement in domestic systems, thus providing a uniform platform to regulate sales law in trading blocs like ASEAN.[24]

The various treaties amongst ASEAN member States and their neighbours have already assisted in achieving a harmonized regime. The only matter left is the achievement of a business-to-business legal environment. Therefore,

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[18] Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian nations and the People's Republic of China

[19] Agreement on Dispute settlement mechanism under the framework agreement on comprehensive economic cooperation between the Association of Southeast Asian Nations and the Republic of India

[20] Agreement on Comprehensive Economic Partnership among member states of the Association of Southeast Asian Nations and Japan

[21] Agreement on Disputes Settlement Mechanism Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the member Countries of the Association of Southeast Asian Nations and the Republic of Korea

[22] Information about AANZFTA is available at http://www.asean.fta.govt.nz/ The text is available at http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf

[23] Hiroo Sono, Japan's Accession to the CISG: The Asian Factor, 20 Pace International Law Review, 105 (2008)

[24] Bruno Zeller, Facilitating Regional Economic Integration: ASEAN, ATIGA and the CISG.

it is suggested that ASEAN member States should adopt the CISG in order to create an enabling legal environment for the implementation of ATIGA.

1.10 Complementary texts: Limitation Convention

Most legal systems limit or prescribe a claim from being asserted after the lapse of a specified period of time to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost and to protect against the uncertainty that would result if a party were to remain exposed to unasserted claims for an extensive period of time. However, numerous disparities exist among legal systems with respect to the conceptual basis for doing so, resulting in significant variations in the length of the limitation period and in the rules governing the claims after that period. Those differences may create difficulties in the enforcement of claims arising from international sales transactions.

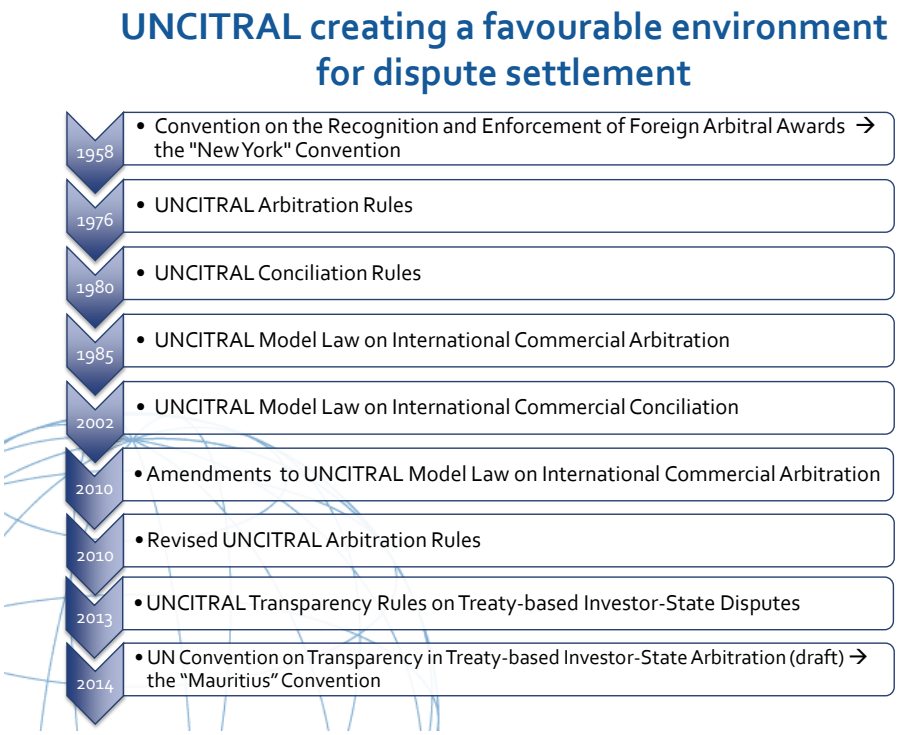
Therefore, the CISG is complemented by the Convention on the Limitation Period in the International Sale of Goods, 1980 (the Limitation Convention).[25] Concluded in 1974, the Limitation Convention establishes uniform rules governing the period of time within which legal proceedings arising from an international sales contract must be commenced. Indeed, the Limitation Convention may be functionally seen as a part of the CISG system. The Limitation Convention was amended by a Protocol adopted in 1980 in order to harmonize its text with that of the CISG. Adoption of the Limitation Convention in conjunction with the CISG would therefore provide States with a comprehensive uniform framework for international sale contracts. Mexico and Myanmar are not parties to the Limitation Convention, which has 22 parties (as amended in 1980) and 29 parties (as concluded in 1974).

[25] Information on the Limitation Convention, including its updated status, is available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html .

2. UNCITRAL texts on International Commercial Arbitration

The resolution of disputes in international trade by way of international commercial arbitration relies on domestic legislation being in existence recognizing the autonomous power of parties to agree to have their dispute decided by an arbitral tribunal, and also on international conventions assuring the recognition and enforcement of those foreign arbitral awards.

In cases where the domestic arbitration legislation is based on the UNCITRAL Model Law on International Commercial Arbitration ("Model Arbitration Law"), the approach taken is quite similar. At the international level, by far the most significant legal instrument is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") that provides for the recognition of arbitration agreements and the recognition and enforcement of foreign arbitral awards.



The function of international commercial arbitration as a procedural mechanism applicable to international sales contracts, particularly in enforcing those contracts, can be summarized as follows. By opting for arbitration, parties to a sales contract effectively waive their right to have any dispute arising out of their contractual relationship heard by a national court. Instead, they agree on an internationally accepted private system of dispute settlement not tied to any national judicial system as far as the decision on the merits is concerned, only requiring the minimal intervention of courts at the level of the enforcement of the arbitral award.

If the CISG can be viewed as representing global sales law, the existing worldwide system of international commercial arbitration, as practiced and supported by an interplay of national arbitration legislation and the New York Convention, may also be regarded as a global system of dispute resolution which, in combination with CISG, is suitable to form a uniform legal framework for international sales transactions, thus facilitating the enforcement of contracts.

As noted, international commercial arbitration is based on an agreement between the parties to subject their disputes to arbitration with the expectation that the arbitral award will be duly recognized and enforced. Parties to international sales contracts have the freedom to agree to any type of arbitration, administered by an institution or conducted by whomever the parties chose as arbitrators at any location in the world deemed suitable.

There is, in almost all legal systems, specific legislation on arbitration, sometimes inspired by the Model Arbitration Law, which allows parties to engage in domestic as well as international arbitration proceedings. The New York Convention provides for international recognition of arbitration agreements and of international enforceability of arbitral awards.

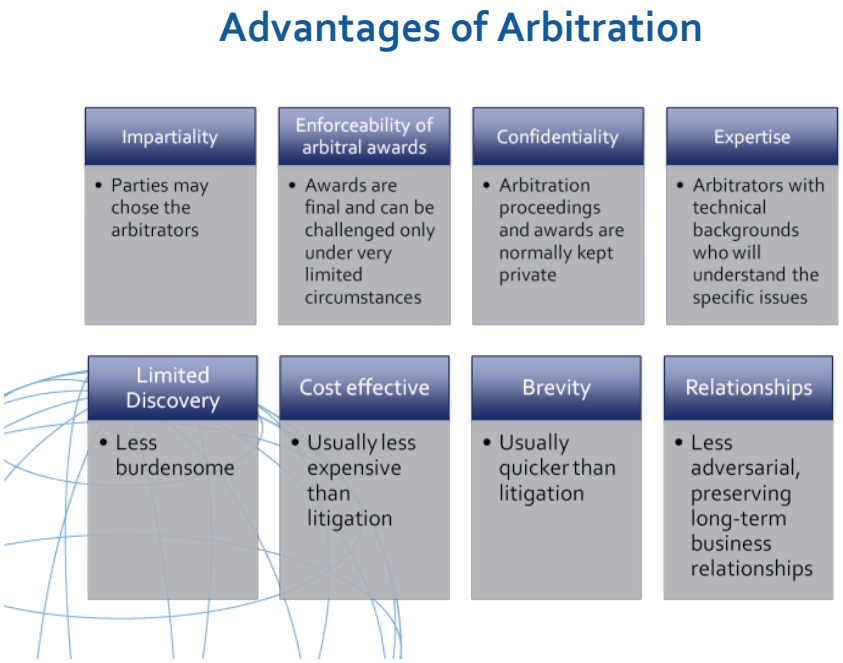
Due to the fact that international commercial arbitration is not tied to any pre-determined jurisdiction, it allows parties to locate their arbitration in places where they can find the necessary legislative and court support for the conduct of their arbitration. However, despite this considerable flexibility, parties would sometimes need to rely on a functioning system of commercial arbitration within the region. There is of course the need for business to be able to trust that, if arbitration is chosen as a neutral forum, the national legislation supports such choice and allows arbitration proceedings to be conducted in the way expected by the parties.

Arbitration as an alternative to national court jurisprudence

When considering whether to agree on arbitration, parties frequently ask about its advantages and disadvantages in comparison to national court proceedings. In view of the frequently noted deficiencies of the judicial system including those of Mexico and Myanmar, the question of the possible advantages and disadvantages of arbitration gains an additional dimension. It is therefore important to know whether arbitration can represent a true alternative to dispute resolution in national courts.

International commercial arbitration is sometimes criticized as a system which renders decisions not so strict in accordance with the applicable law and in line with established jurisprudence, but which is rather aimed at resolving disputes on a case-by-case basis only, often involving some type of compromise solution. There is some truth in this view. Indeed, an arbitral tribunal composed of arbitrators from various jurisdictions who are not professional judges cannot be expected to deliver decisions which are in line with the local jurisprudence. Not only can it not be expected for arbitral tribunals to develop a line of doctrinal jurisprudence like the courts, but it is also in most instances not

what the parties want from an arbitral tribunal. They are simply interested in obtaining a fair and reasonable solution, not so much in creating a precedent on which they might wish to be able to rely in other circumstances.



However, while it is true that arbitral tribunals do not produce jurisprudence, it is generally not appropriate to say that arbitral tribunals render decisions that are not based on law. Individual awards, like court decisions, may of course be occasionally *praeter legem*. However, when looking at published awards, it becomes apparent that they generally contain elaborated and sophisticated reasoning on issues of fact and law. The reputation of an arbitrator to render reasonable decisions is also a key element when parties choose an arbitrator over another. Therefore, arbitrators are not entirely free to render decisions contrary to the law or the jurisprudence.

It should also be noted that, in the current situation, parties to international sales transactions might find it more attractive to arbitrate rather than resort to the courts, not only because arbitration offers a neutral forum, but also for reasons of procedural efficiency. Arbitration offers the possibility for the parties to appoint experts in international trade matters or in the particular trade sector as arbitrators, a possibility which does not exist in the case of recurrence to the state courts. And, in view of the overload of cases in the state courts observed in Mexico and Myanmar, there can be little doubt that the average length of typical one-instance arbitration proceedings compares favourably with the length of proceedings before state courts.

2.1 The New York Convention

2.1.1 Introduction

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the New York Convention was adopted in 1958 to provide common legislative standards for the recognition of arbitration agreements and recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied.[26]

The principal aim of the New York Convention is that foreign and non-domestic arbitral awards will not be discriminated and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the New York Convention is to require courts to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

Core provisions

Article I	Scope of application
Article II	Recognition of arbitration agreement
Article III	Treatment of Arbitral Awards
Article IV	Application for Recognition and Enforcement
Article V	Refusal of Recognitions and Enforcement
Article VI	Set-aside procedure
Article VII	Relationship to other Laws

In 2006, the Recommendation regarding the interpretation of article II (2) and article VII (1) of the New York Convention was adopted. The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards.[27] The Recommendation encourages States to apply article II (2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". In addition, the

[26] Information about the New York Convention is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html and also at http://www.newyorkconvention1958.org/.

[27] Information about the Recommendation is available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2006recommendation.html .

Recommendation encourages States to adopt the revised article 7 of the UNCITRAL Model Arbitration Law, which establishes a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. The Recommendation clarifies that by virtue of the "more favourable law provision" contained in article VII (1) of the New York Convention, any interested party should be allowed to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

The first action contemplated by the New York Convention is the recognition and enforcement of foreign arbitral awards, i.e., arbitral awards made in the territory of another contracting State. This field of application is defined in Article I. The general obligation for the contracting States to recognize such awards as binding and to enforce them in accordance with their rules of procedure is laid down in Article III. A party seeking enforcement of a foreign award needs to supply to the court (a) the arbitral award and (b) the arbitration agreement (Article IV). The party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement which are listed in Article V (1). The court may on its own motion refuse enforcement for reasons of public policy as provided in Article V (2).

If the award is subject to an action for setting aside in the country in which, or under the law of which, it is made ("the country of origin"), the foreign court before which enforcement of the award is sought may adjourn its decision on enforcement (Article VI). Finally, if a party seeking enforcement prefers to base its request for enforcement on the court's domestic law on enforcement of foreign awards or bilateral or other multilateral treaties in force in the country where it seeks enforcement, it is allowed to do so by virtue of the so-called more-favourable-right provision of Article VII (1).

The second action contemplated by the New York Convention is the referral by a court to arbitration. Article II (3) provides that a court of a contracting State, when seized of a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer them to arbitration (unless the arbitration agreement is invalid). In both actions the arbitration agreement must satisfy the requirements of Article II (1) and (2) which include in particular that the agreement be in writing.

2.1.2 Status

The New York Convention has been adopted almost universally by 153 parties. It now has 153 States parties including Brunei Darussalam, Vietnam and Saudi Arabia, with Tajikistan [28] Sao Tome and Principe [29] and Myanmar being the most recent. Apart from Papua New Guinea, all APEC members are parties to the NYC.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the New York Convention

Interactive map at http://www.newyorkconvention.org/new-york-convention-countries/status-map.

Although Chinese Taipei is not a party to the New York Convention, under its Arbitration Law, a foreign arbitration award is enforceable once an application for recognition of the award is filed with the relevant local court and the court renders a favourable ruling. The applicant seeking recognition of the award has to submit a Chinese translation of the award; this must be notarized and authenticated by the consulate or representative office of Chinese Taipei. Generally, it takes at least six months to obtain the court's ruling on the recognition of a foreign arbitration award. In previous cases, the courts have recognized arbitration awards rendered by institutions in Hong Kong, Vietnam, the United Kingdom, Australia, the British Virgin Islands, Republic of Korea, Switzerland, South Africa, France and certain states of the United States.

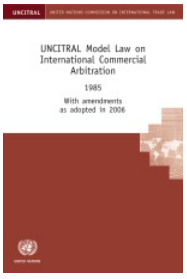
[28] Press release available at http://www.unis.unvienna.org/unis/pressrels/2012/unisl174.html.
[29] Press release available at http://www.unis.unvienna.org/unis/pressrels/2012/unisl178.html

APEC Economies	Enforcing Contracts	EoDB Ranking
Singapore	1	1
Republic of Korea	4	5
Hong Kong, China	6	3
New Zealand	9	2
Australia	12	10
Russia	14	62
Thailand	25	26
Japan	26	29
Malaysia	29	18
China	35	96
United States	41	7
Vietnam	47	78
Mexico	**57**	**39**
Chile	64	41
Canada	65	16
Chinese Taipei	93	19
Peru	100	35
Philippines	124	95
Brunei Darussalam	139	101
Indonesia	172	114
Papua New Guinea	181	133
Myanmar (non-APEC)	**185**	**177**
	NYC parties / Based on 2015 ranking	

2.2 UNCITRAL Model Law on Arbitration

UNCITRAL Model Law on International Commercial Arbitration

- Adopted in 1985, amendments adopted in 2006
- Establishes a unified legal framework for the fair and efficient settlement of international commercial disputes
- Covers all stages of the arbitral process
- Conforms to current practice in international trade and modern means of contracting with regard to the form of arbitration agreement and the granting of interim measures
- Takes the form of a "model law" which provides more flexibility for enacting states
- Prepared as a freestanding arbitration statute



2.2.1 Introduction

The UNCITRAL Model Law on International Commercial Arbitration ("the Model Arbitration Law") has been one of the most successful examples of an international legal text in the private law field. In view of the desirability of uniformity

of the law of arbitral procedures and the specific needs of international commercial arbitration practice, the Model Arbitration Law was adopted on 21 June 1985.

The Model Arbitration Law was amended on 7 July 2006, and the General Assembly recommended that all States give favourable consideration to the revised articles when they enact or revise their laws. The revision includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Arbitration Law. Other substantive amendments to the Model Arbitration Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version on the form of the arbitration agreement (article 7) was modeled on the language used in article II (2) of the New York Convention. The revision of article 7 was intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also included an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depended upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Arbitration Law on interim measures and preliminary orders (chapter IV A).

The Model Arbitration Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Arbitration Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on it.

Needless to say, the main purpose of the Model Arbitration Law is to reduce the discrepancies between domestic procedural laws affecting international commercial arbitration. The need for improvement and harmonization is based on findings that national laws were often particularly inappropriate for international cases.

Inadequacy of domestic laws: Recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

The expectations of the parties as expressed in a chosen set of arbitration rules or a “one-off” arbitration agreement may be frustrated, especially by mandatory provisions of applicable law. Unexpected and undesired restrictions

found in national laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Arbitration Law is intended to reduce the risk of such possible frustration, difficulties or surprise.

Disparity between national laws: Problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. Obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances often expensive, impractical or impossible.

Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate. The range of places of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Arbitration Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.

The Model Arbitration Law deals with the essential elements of a favorable legal framework for the conduct of arbitral proceedings. These include: the arbitration agreement; composition of the arbitral tribunal (including appointment, substitution and challenge of arbitrators); jurisdiction of the tribunal (including the competence to rule on its own jurisdiction and its power to order interim measures); the conduct of arbitral proceedings (including treatment of parties, determination of rules of procedure, hearings and written proceedings, party default, appointment of experts, and court assistance in taking evidence); other elements covered by the Model Law include: the making of the award and termination of proceedings (settlement, form and contents of award; its correction and interpretation); setting aside an arbitral award; and finally conditions for recognition and enforcement of awards and the grounds for refusing recognition or enforcement.

2.2.2 Features of the Model Arbitration Law

The principles and solutions adopted in the Model Arbitration Law aim at reducing or eliminating the above-mentioned concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model

Arbitration Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Arbitration Law. While the Model Arbitration Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Arbitration Law to cover also domestic disputes, as a number of enacting States already have.

Substantive and territorial scope of application

Article 1 defines the scope of application of the Model Arbitration Law by reference to the notion of "international commercial arbitration". The Model Arbitration Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of internationality so that the Model Arbitration Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Arbitration Law.

In respect of the term "commercial", the Model Arbitration Law provides no strict definition. The footnote to article 1 (1) calls for "a wide interpretation" and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, "whether contractual or not".

Another aspect of applicability is the territorial scope of application. The principle embodied in article 1 (2) is that the Model Arbitration Law as enacted in a given State applies only if the place of arbitration is in the territory of that State. However, article 1 (2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of arbitration is in the enacting State or elsewhere (or, as the case may be, even before the place of arbitration is determined).

The territorial criterion governing most of the provisions of the Model Arbitration Law was adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Arbitration Law reduces any need for the parties to choose a "foreign" law, since the Model Arbitration Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the

place of arbitration with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion legally triggered by the parties' choice regarding the place of arbitration does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by article 20 (2).

Minimal role of the court

A properly functioning system of arbitration requires a sound judicial system. Yet, recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

One of the basic concerns during the preparation of the Model Arbitration Law was to devise a system that safeguards as much as possible the parties' agreement to arbitrate - and the conduct of arbitration proceedings - from extraneous interference. Therefore, one of the most important features of the Model Law is article 5, which provides that "in matters governed by the Model Law, no court shall intervene except where so provided in this Law". Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Arbitration Law, except for matters not regulated by it. Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties). While this provision was adopted in most jurisdictions that have implemented the Model Arbitration Law, some countries apparently felt that the provision went too far and preferred not to adopt it.

In that context, the Model Arbitration Law envisages court involvement in the following instances. One group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce).

Another group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).

Arbitration agreement

Chapter II of the Model Arbitration Law deals with the arbitration agreement, including its recognition by courts.

Definition and form of arbitration agreement: The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York Convention, which requires that an arbitration agreement be in writing. However, it was pointed out by practitioners that, in a number of situations, the

drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute or a future dispute. It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing". The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Arbitration Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of "an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another". It also states that "the reference in a contract to any document" (for example, general conditions) "containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract". It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made "by reference". The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Arbitration Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

Arbitration agreement and the courts: Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modeled on article II (3) of the New York Convention, article 8 (1) of the Model Arbitration Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of the dispute. This provision, where adopted by a State enacting the Model Arbitration Law, is by its nature binding only on the courts of that State. However, since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.

Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law are compatible with an arbitration agreement. That provision is ultimately addressed to the courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a court, it may not be relied upon, under the Model Arbitration Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

Composition of arbitral tribunal

Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the general approach taken by the Model Arbitration Law in eliminating difficulties that arise from inappropriate or fragmentary laws or rules. First, the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue, the Model Arbitration Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively until the dispute is resolved.

Jurisdiction of arbitral tribunal

Competence to rule on own jurisdiction: Article 16 (1) adopts the two important principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause. "*Kompetenz-Kompetenz*" means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

The competence of the arbitral tribunal to rule on its own jurisdiction is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

Power to order interim measures and preliminary orders

Chapter IV A on interim measures and preliminary orders was adopted by the Commission in 2006. It replaces article 17 of the original 1985 version of the Model Arbitration Law. Section 1 provides a generic definition of interim measures and sets out the conditions for granting such measures. Section 2 of chapter IV A deals with the application for, and conditions for the granting of, preliminary orders. Section 3 sets out rules applicable to both preliminary orders and interim measures.

An important innovation of the revision lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modeled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Arbitration Law. Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that "a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts".

Conduct of arbitral proceedings

Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and article 19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Arbitration Law.

Fundamental procedural rights of a party: Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. Another illustration of those principles relates to evidence by an expert appointed by the arbitral tribunal. Article 26 (2) requires the expert, after delivering is or her written or oral report, to participate in a hearing where the parties may put questions to the expert and present expert witnesses to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal.

Determination of rules of procedure: Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise. The

supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Arbitration Law.

Default of a party: Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

The arbitral proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the respondent to communicate its statement of defence (article 25 (b)). The arbitral tribunal may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25 (c)). However, if the claimant fails to submit its statement of claim, the arbitral tribunal is obliged to terminate the proceedings (article 25 (a)).

Rules applicable to substance of dispute: Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of “rules of law” instead of “law”, the Model Arbitration Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the CISG as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to the CISG. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.

Making of award and other decisions

In its rules on the making of the award (articles 29-31), the Model Arbitration Law focuses on the situation where the arbitral tribunal consists of more than one arbitrator. In such a situation, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator.

The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is “on agreed terms” (i.e., an award that records the terms of an amicable

settlement by the parties). It may be added that the Model Arbitration Law neither requires nor prohibits "dissenting opinions".

Recourse against award

The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based.

That situation is greatly improved by the Model Arbitration Law, which provides uniform grounds upon which and clear time periods within which recourse against an arbitral award may be made.

Application for setting aside as exclusive recourse: The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating "recourse" (i.e., the means through which a party may actively "attack" the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

Grounds for setting aside: As a further measure of improvement, the Model Arbitration Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Arbitration Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-

arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

Recognition and enforcement of awards

The last chapter of the Model Arbitration Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

Towards uniform treatment of all awards irrespective of country of origin: By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Arbitration Law distinguishes between “international” and “non-international” awards instead of relying on the traditional distinction between “foreign” and “domestic” awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of “international” awards, whether “foreign” or “domestic”, should be governed by the same provisions. By modeling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Arbitration Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

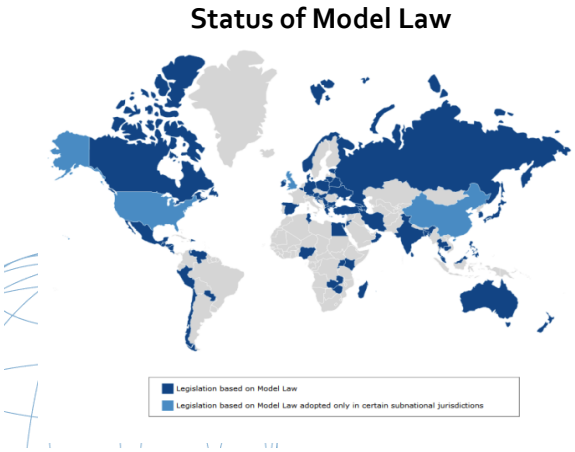
Procedural conditions of recognition and enforcement: Under article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

The procedural details of recognition and enforcement are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalize formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

Grounds for refusing recognition or enforcement: Although the grounds on which recognition or enforcement may be refused under the Model Arbitration Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Arbitration Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Arbitration Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention.

2.2.3 Status

The Model Arbitration Law has been enacted in some 80 jurisdictions around the world.[30] In enacting the Model Arbitration Law, States have in certain instances departed from the original text. Sometimes this is purely a question of style, but sometimes it has an impact on the substance of the enacted provision. Generally, domestic arbitration laws are considered to be enactments of the Model Arbitration Law when it is clear that the legislature took the Model Arbitration Law as a basis and made certain amendments and additions. This usually means also that the bulk of the provisions of the Model Arbitration Law have been enacted and that the domestic statute does not contain any provision incompatible with the basic philosophy of the Model Arbitration Law. Within those general parameters, a certain degree of adaptation is admissible and indeed necessary, in particular where they are intended to adjust the Model Law to the local context. As will be discussed in Parts IV, Mexico has enacted legislation based on the Model Arbitration Law, particularly with regard to international commercial arbitration. Vietnam and Saudi Arabia had revised their arbitration laws respectively in 2011 and 2012 and it remains to be seen whether the two laws are enactments of the Model Arbitration Law.



<Adoption of the Model Arbitration Law>

Of the 21 APEC members, 18 that have adopted the Model Arbitration Law rank significantly higher in the EoDB and enforcing contracts rankings compared to those that have not. The top eleven ranking APEC economies in enforcing contracts have arbitration laws based on the Model Arbitration Law.

As the table below will show, the sum of the ranking in enforcing contracts of 18 States that have adopted the Model Arbitration Law is 865 with an average ranking of 48.05. The sum of the ranking of the remaining 3 States is 354 with an average ranking of 118. This is indirect evidence that the adoption of the Model Arbitration Law facilitates the dispute resolution process, thus facilitating the enforcement of contracts.

This also applies to the overall EoDB ranking. The sum of 18 States that have adopted the Model Arbitration Law is 663 with an average ranking of 36.83. The sum of the ranking of the remaining 3 States that have not adopted the Model Arbitration Law is 331 with an average ranking of 110.

[30] See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

APEC Economies	Enforcing Contracts	EoDB Ranking
Singapore	1	1
Republic of Korea	4	5
Hong Kong, China	6	3
New Zealand	9	2
Australia	12	10
Russia	14	62
Thailand	25	26
Japan	26	29
Malaysia	29	18
China	35	96
United States	41	7
Vietnam	47	78
Mexico	**57**	**39**
Chile	64	41
Canada	65	16
Chinese Taipei	93	19
Peru	100	35
Philippines	124	95
Brunei Darussalam	139	101
Indonesia	172	114
Papua New Guinea	181	133
Myanmar	**185**	**77**
	Adopted MAL / Based on 2015 ranking	

2.3 Complementary texts

UNCITRAL Model Law on Commercial Conciliation (2002)

Adopted by UNCITRAL on 24 June 2002, the Model Law on Commercial Conciliation provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements.[31]

UNCITRAL Arbitration Rules (Revised in 2010)

The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

[31] Information about the UNCITRAL Model Law on International Commercial Conciliation is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html

The original UNCITRAL Arbitration Rules were adopted in 1976 and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. In 2006, the Commission decided that the UNCITRAL Arbitration Rules should be revised in order to meet changes in arbitral practice over the last thirty years. The revision is aimed at enhancing the efficiency of arbitration under the Rules and does not alter the original structure of the text, its spirit or drafting style.

The UNCITRAL Arbitration Rules, as revised in 2010, have been effective since 15 August 2010. They include provisions dealing with, amongst others, multiple-party arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal. A number of innovative features contained in the Rules aim to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs, and a review mechanism regarding the costs of arbitration. They also include more detailed provisions on interim measures. It is expected that the Rules, as revised, will continue to contribute to the development of harmonious international economic relations.[32]

In 2012, the Commission, recognising the potential of the Recommendations to significantly enhance the efficiency of arbitrations conducted under the 2010 Arbitration Rules, adopted the "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules". The Recommendations were originally adopted in 1982 to assist arbitral institutions administering arbitrations under the 1976 UNCITRAL Arbitration Rules. When the UNCITRAL Arbitration Rules were revised in 2010, it contained the above-mentioned changes. Accordingly, it was necessary to update the accompanying Recommendations. In 2010, the Secretariat was entrusted with the updating of the 1982 Recommendations and after two years of work, the revised Recommendations were presented to the Commission. The objective of the revised Recommendations is to promote the use of the 2010 Arbitration Rules, and to ensure that arbitral institutions will be more inclined to accept the role of acting as appointing authorities.[33]

[32] Information about the Arbitration Rules is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

[33] Information about the Recommendations is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2012Recommendations.html.

3. UNCITRAL texts on Electronic Commerce

The use of information and communications technology is essential for economic development especially for Mexico and Myanmar as both States are now trying to expand its trade sector. UNCITRAL has been a pioneer in developing legal standards on electronic commerce, and texts adopted by UNCITRAL have influenced a great number of jurisdictions. UNCITRAL has prepared widely-adopted legislative texts in the field of electronic commerce, thus paving the way to its wider use in support of trade worldwide. These texts include: the 1996 UNCITRAL Model Law on Electronic Commerce; the 2001 UNCITRAL Model Law on Electronic Signatures; and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. The Electronic Communications Convention is the only existing treaty on the use of electronic communications in international contracts. The adoption of legislation based on these three UNCITRAL texts could provide a state with a comprehensive framework for the use of electronic transactions in commercial operations.

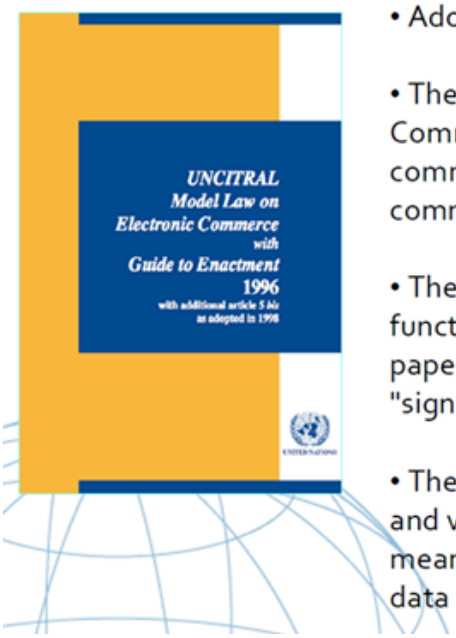
3.1 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996) – additional article 5 bis (1998)

The UNCITRAL Model Law on Electronic Commerce ("MLEC"), adopted on 12 June 1996 (additional article 5 bis adopted in 1998), purports to enable and facilitate commerce conducted using electronic means by providing national legislators with a set of internationally acceptable rules aimed at removing legal obstacles and increasing legal predictability for electronic commerce. In particular, it is intended to overcome obstacles arising from statutory provisions that may not be varied contractually by providing equal treatment to paper-based and electronic information. Such equal treatment is essential for enabling the use of paperless communication, thus fostering

efficiency in international trade.[34] The MLEC is accompanied by a Guide to Enactment, which provides background and explanatory information to assist States in preparing the necessary legislative provisions and may guide other users of the text.

The MLEC was the first legislative text to adopt the fundamental principles of non-discrimination, technological neutrality and functional equivalence that are widely regarded as the founding elements of modern electronic commerce law. The principle of non-discrimination ensures that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. The principle of technological neutrality mandates the adoption of provisions that are neutral with respect to technology used. In light of the rapid technological advances, neutral rules aim at accommodating any future development without further legislative work. The functional equivalence principle lays out criteria under which electronic communications may be considered equivalent to paper-based communications. In particular, it sets out the specific requirements that electronic communications need to meet in order to fulfil the same purposes and functions that certain notions in the traditional paper-based system - for example, "writing," "original," "signed," and "record"- seek to achieve.

UNCITRAL Model Law on E-commerce



- Adopted by UNCITRAL on 12 June 1996.
- The UNCITRAL Model Law on Electronic Commerce (MLEC) is intended to facilitate commerce via the use of modern means of communications and storage of information.
- The MLEC is based on the establishment of a functional equivalence in electronic media for paper-based concepts such as "writing", "signature" and "original".
- The MLEC established rules for the formation and validity of contracts concluded with electronic means and for the attribution and retention of data messages.

Besides formulating the legal notions of non-discrimination, technological neutrality and functional equivalence, the MLEC establishes rules for the formation and validity of contracts concluded by electronic means, for the attribution

[34] More information about the MLEC is available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html.

of data messages, for the acknowledgement of receipt and for determining the time and place of dispatch and receipt of data messages.

It should be noted that certain provisions of the MLEC were amended by the Electronic Communications Convention in light of recent electronic commerce practice. Moreover, part II of the MLEC, dealing with electronic commerce in connection with carriage of goods, has been complemented by other legislative texts, including the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules").

Mexico and Myanmar enacted legislation based on ..

3.2 UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (2001)

The Model Law on Electronic Signatures (MLES), adopted on 5 July 2001, aims to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and hand-written signatures. Thus, the MLES may assist States in establishing a modern, harmonized and fair legislative framework to address effectively the legal treatment of electronic signatures and give certainty to their status.[35]

The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of electronic means. In response to such needs, the MLES builds on the fundamental principle underlying article 7 of the MLEC with respect to the fulfilment of the signature function in an electronic environment by following a technology-neutral approach, which avoids favouring the use of any specific technology or process. This means in practice that legislation based on the MLES may recognize both digital signatures based on cryptography (such as public key infrastructure - PKI) and electronic signatures using other technologies.

The MLES is based on the fundamental principles common to all UNCITRAL texts relating to electronic commerce, namely non-discrimination, technological neutrality and functional equivalence. The MLES establishes criteria of technical reliability for the equivalence between electronic and hand-written signatures as well as basic rules of conduct that may serve as guidelines for assessing duties and liabilities for the signatory, the relying party and trusted third parties intervening in the signature process. Finally, the MLES contains provisions favouring the recognition of foreign certificates and electronic signatures based on a principle of substantive equivalence that disregards the place of origin of the foreign signature.

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[35] More information about the MLES is available at http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html .

Vietnam enacted legislation based on MLES in 2005 and Saudi Arabia in 2007.

3.3 UN Convention on the Use of Electronic Communications in International Contracts (2005)

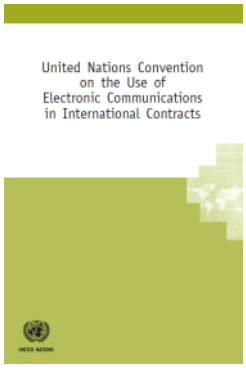
The UN Convention on the Use of Electronic Communications in International Contracts (**"**Electronic Communications Convention"), adopted on 23 November 2005, aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents.[36]

Certain formal requirements contained in widely adopted international trade law treaties, such as the New York Convention and the CISG may pose obstacles to the wide use of electronic communications. The Electronic Communications Convention is an enabling treaty whose effect is to remove those formal obstacles by establishing equivalence between electronic and written form. Moreover, the Electronic Communications Convention serves additional purposes further facilitating the use of electronic communications in international trade. Thus, the Convention is intended to strengthen the harmonization of the rules regarding electronic commerce and foster uniformity in the domestic enactment of UNCITRAL model laws relating to electronic commerce, as well as to update and complement certain provisions of those model laws in light of recent practice. Finally, the Convention may provide those countries not having yet adopted provisions on electronic commerce with modern, uniform and carefully drafted legislation.

[36] More information about the Electronic Communications Conventions is available at http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html.

Electronic Communications Convention in International Contracts (2005)

- ECC builds up and updates the Model Law provisions
- Aims at enhancing legal certainty and commercial predictability where electronic communications are used in relation to international contracts
  - Entry into force 1 March 2013
  - 6 States parties (Congo, Dominican Republic, Honduras, Montenegro, Russia, Singapore) & 14 other signatories (including China, Colombia, Panama, Paraguay, Philippines, Republic of Korea & Sri Lanka)
  - Australia, Thailand, Sri Lanka, US declared intention
  - Other States have adopted substantive provisions of the ECC domestically



The Electronic Communications Convention builds upon the MLEC and the MLES. These instruments are widely considered standard legislative texts setting forth the fundamental principles of electronic commerce legislation, which the Convention also incorporates.

First, the Electronic Communications Convention is built around the concept of non-discrimination of electronic communications. Thus, under the Convention, the mere fact that a document is presented or retained in electronic form does not of itself provide sufficient grounds for challenging its legal effect (Art. 8). Second, the Electronic Communications Convention embraces the notion of technological neutrality by covering all factual situations in which information is generated, stored, or transmitted in electronic form, irrespective of the technology used. In light of the rapid advances in technology, the Convention's neutral rules will thus accommodate any future developments. Third, the Electronic Communications Convention adopts the functional equivalence principle by laying out criteria under which electronic communications may be considered equivalent to paper-based communications. In particular, it sets out the specific requirements electronic communications need to meet in order to fulfill the same purposes and functions that certain notions in the traditional paper-based system—for example, "writing", "original", "signed" and "record"—seek to achieve. However, the Electronic Communications Convention does not touch upon general substantive legal rules, such as those relating to contract formation. It only contains legal provisions relevant in the context of electronic communications.

The Electronic Communications Convention applies to all electronic communications exchanged between parties whose places of business are in different States when at least one party has its place of business in a Contracting

State (Art. 1). It may also apply by virtue of the parties' choice. Contracts concluded for personal, family or household purposes, such as those relating to family law and the law of succession, as well as certain financial transactions, negotiable instruments, and documents of title, are excluded from the Convention's scope of application (Art. 2).

As noted above, the Electronic Communications Convention sets out criteria for establishing the functional equivalence between electronic communications and paper documents, as well as between electronic authentication methods and handwritten signatures (Art. 9). Similarly, the Electronic Communications Convention defines the time and place of dispatch and receipt of electronic communications, tailoring the traditional rules for these legal concepts to suit the electronic context and innovating with respect to the provisions of the MLEC (Art. 10).

Moreover, the Electronic Communications Convention establishes the general principle that communications are not to be denied legal validity solely on the grounds that they were made in electronic form (Art. 8). Specifically, given the proliferation of automated message systems, the Convention allows for the enforceability of contracts entered into by such systems, including when no natural person reviewed the individual actions carried out by them (Art. 12). The Electronic Communications Convention further clarifies that a proposal to conclude a contract made through electronic means and not addressed to specific parties amounts to an invitation to deal, rather than an offer whose acceptance binds the offering party, in line with the corresponding provision of the CISG (Art. 11). Moreover, the Electronic Communications Convention establishes remedies in case of input errors by natural persons entering information into automated message systems (Art. 14). Finally, the Electronic Communications Convention allows contractual parties to exclude its application or vary its terms within the limits allowed by otherwise applicable legislative provisions (Art. 3).

The Electronic Communications Convention allows for States to make certain declarations modifying its scope of application: a) a State may declare that it will apply the Convention only (1) if the States in which the place of business of the parties is located are Contracting States or (2) if the parties have agreed that the Convention applies (Art. 19(1)); b) a State may declare that certain matters are excluded from the scope of application of the Convention (Art. 19(2)); and c) a State may also declare that it will not apply the Convention to the use of communications in connection with the formation or performance of a contract to which certain other international conventions, to which it is or may become a party, apply (Art. 20).

Such declarations may be made at any time and are to be notified to the depository in writing. They take effect on the first day of the month following the expiration of six months after the date of receipt thereof by the depository and may be modified or withdrawn at any time (Art. 21).

Like the CISG, becoming a party to the Electronic Communications Convention has no financial implications and its administration at the domestic level does not require any dedicated body. Furthermore, no mandatory reporting requirement arises from the adoption of this treaty.

The adoption of the Convention would give ultimate legal certainty to cross-border trade conducted with electronic means when parties are not located in the same State. It would also provide modern electronic commerce legislation, introducing some new provisions and clarifying the operation of others. These are strong and valid arguments in favour of the adoption of the Electronic Communications Convention. However, additional important economic policy considerations may stem from the Convention's stated goal of providing uniform core electronic commerce legislation to countries. Anecdotal evidence indicates that about one-third of the world's States have no, or incomplete, electronic commerce legislation. These are mostly, but not only, developing countries that may enact modern electronic commerce legislation simply by adopting the Convention and extending its scope of application to domestic transactions, and are increasingly considering doing so.

On 1 March 2013, the Electronic Communications Convention came into force with Dominican Republic, Honduras and Singapore as States parties.[37] Sixteen other States have signed but not yet ratified the Convention. Saudi Arabia has also signed the Convention (12 November 2007) and to become a party to the Convention, Saudi Arabia would need to deposit its instrument of ratification. The Convention will enter into force with respect to Saudi Arabia on the first day of the month following the expiration of six months after the date of deposit (Art. 23).

Thailand had also indicated its intention to become a party to the Electronic Communications Convention[38] and Australia is also finalizing its adoption.

[37] Press release available at http://www.unis.unvienna.org/unis/pressrels/2012/unisl172.html.
[38] See http://www.nationmultimedia.com/technology/ICT-MINISTRY-AMENDING-ACT-30181289.html.

Part IV

Enforcing contracts

in Mexico

REPUBLIC OF THE UNION OF MYANMAR

Population	122,332,399*
Capital city	Mexico City
Currency	Peso (MXN)
GDP	$ 1.261 trillion**
GDP Growth	2.4 % (2014) **
GNI per capita	$ 9,940 *

< Country Overview>[39]

1. Mexico's economy

The economy of Mexico is the 14th largest in the world in nominal terms and the 10th largest by purchasing power parity, according to the IMF. Since the 1994 crisis, administrations have improved the country's macroeconomic fundamentals. Mexico was not significantly influenced by the recent 2002 South American crisis, and maintained positive, although low, rates of growth after a brief period of stagnation in 2001. However, Mexico was one of the Latin American nations most affected by the 2008 recession with its Gross Domestic Product contracting by more than 6%. In spite of its unprecedented macroeconomic stability, which has reduced inflation and interest rates to record lows and has increased per capita income, enormous gaps remain between the urban and the rural population, the northern and southern states, and the rich and the poor. Some of the government's challenges include the upgrade of infrastructure, the modernization of the tax system and labor laws, and the reduction of income inequality.

The economy contains rapidly developing modern industrial and service sectors, with increasing private ownership. Recent administrations have expanded competition in ports, railroads, telecommunications, electricity generation, natural gas distribution and airports, with the aim of upgrading infrastructure. As an export-oriented economy, more

[39]Based on information available at * World Bank Doing Business report and ** World Bank.

than 90% of Mexican trade is under free trade agreements (FTAs) with more than 40 countries, including the European Union, Japan, Israel, and much of Central and South America. The most influential FTA is the North American Free Trade Agreement (NAFTA), which came into effect in 1994, and was signed in 1992 by the governments of the United States, Canada and Mexico. In 2006, trade with Mexico's two northern partners accounted for almost 90% of its exports and 55% of its imports. Recently, the Congress of the Union approved important tax, pension and judicial reforms, and reform to the oil industry is currently being debated. Mexico had 16 companies in the Forbes Global 2000 list of the world's largest companies in 2008.

Mexico is an export-oriented economy. It is an important trade power as measured by the value of merchandise traded, and the country with the greatest number of free trade agreements. In 2005, Mexico was the world's fifteenth largest merchandise exporter and twelfth largest merchandise importer with a 12% annual percentage increase in overall trade. In fact, from 1991 to 2005 Mexican trade increased fivefold. Mexico is the biggest exporter and importer in Latin America; in 2005, Mexico alone exported US $213.7 billion, roughly equivalent to the sum of the exports of Brazil, Argentina, Venezuela, Uruguay, and Paraguay. By 2009 Mexico ranked once again number 15 on World's leading exporters with US $230 billion (And amongst the top ten excluding Intra-EU countries). However, Mexican trade is fully integrated with that of its North American partners: close to 90% of Mexican exports and 50% of its imports are traded with the United States and Canada. Nonetheless, NAFTA has not produced trade diversion. While trade with the United States increased 183% from 1993 to 2002, and that with Canada 165%, other trade agreements have shown even more impressive results: trade with Chile increased 285%, with Costa Rica 528% and Honduras 420%. Trade with the European Union increased 105% over the same time period.

Trade Statistics to be added

FTAs

Mexico joined the General Agreement on Tariffs and Trade (GATT) in 1986, and today is an active and constructive participant of the World Trade Organization. Fox's administration promoted the establishment of a Free Trade Area of the Americas; Puebla served as temporary headquarters for the negotiations, and several other cities are now candidates for its permanent headquarters if the agreement is reached and implemented.

Mexico has signed 12 free trade agreements with 44 countries:

the North American Free Trade Agreement (NAFTA) (1994) with the United States and Canada;

Grupo de los tres, Group of the three [countries], or G-3 (1995) with Colombia and Venezuela; the latter decided to terminate the agreement in 2006; Mexico announced its intention to invite Ecuador, Peru or Panama as a replacement; Free Trade Agreement with Costa Rica (1995); Free Trade Agreement with Bolivia (1995); Free Trade Agreement with Nicaragua (1998);

Countries with which Mexico has signed a FTA

Free Trade Agreement with Chile (1999); Free Trade Agreement with the European Union (2000);

Free Trade Agreement with Israel (2000); TN Free Trade Agreement (2001), with Guatemala, El Salvador and Honduras; Free Trade Agreement with the European Free Trade Association (EFTA), integrated by Iceland, Norway, Liechtenstein and Switzerland (2001); Free Trade Agreement with Uruguay (2004); and Free Trade Agreement with Japan (2005)

Mexico has shown interest in becoming an associate member of Mercosur. The Mexican government has also started negotiations with South Korea, Singapore and Peru, and also wishes to start negotiations with Australia for a trade agreement between the two countries.

The North American Trade Agreement (NAFTA) is by far the most important Trade Agreement Mexico has signed both in the magnitude of reciprocal trade with its partners as well as in its scope. Unlike the rest of the Free Trade Agreements that Mexico has signed, NAFTA is more comprehensive in its scope and was complemented by the North American Agreement for Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC).

The NAAEC agreement was a response to environmentalists' concerns that companies would relocate to Mexico or the United States would lower its standards if the three countries did not achieve a unanimous regulation on the environment. The NAAEC, in an aim to be more than a set of environmental regulations, established the North American Commission for Environmental Cooperation (NACEC), a mechanism for addressing trade and environmental issues, the North American Development Bank (NADBank) for assisting and financing investments in pollution reduction and the Border Environmental Cooperation Commission (BECC). The NADBank and the BECC have provided economic benefits to Mexico by financing 36 projects, mostly in the water sector. By complementing NAFTA with the NAAEC, it has been labeled the "greenest" trade agreement.

The NAALC supplement to NAFTA aimed to create a foundation for cooperation among the three members for the resolution of labor problems, as well as to promote greater cooperation among trade unions and social organizations in all three countries, in order to fight for the improvement of labor conditions. Though most economists agree that it is difficult to assess the direct impact of the NAALC, it is agreed that there has been a convergence of labor standards in North America. Given its limitations, however, NAALC has not produced (and in fact was not intended to achieve) convergence in employment, productivity and salary trend in North America.

The agreement fell short in liberalizing movement of people across the three countries. In a limited way, however, immigration of skilled Mexican and Canadian workers to the United States was permitted under the TN status. NAFTA allows for a wide list of professions, most of which require at least a Bachelor's degree, for which a Mexican or a Canadian citizen can request TN status and temporarily immigrate to the United States. Unlike the visas available to other countries, TN status requires no sponsorship, but simply a job offer letter.

The overall benefits of NAFTA have been quantified by several economists, whose findings have been reported in several publications like the World Bank's Lessons from NAFTA for LA and the Caribbean, NAFTA's Impact on North America, and NAFTA revisited by the Institute for International Economics. They assess that NAFTA has been positive for Mexico, whose poverty rates have fallen, and real income salaries have risen even after accounting for the 1994–1995 Economic Crisis. Nonetheless, they also state that it has not been enough, or fast enough, to produce an economic convergence nor to reduce the poverty rates substantially or to promote higher rates of growth. Beside this the textile industry gain hype with this agreement and the textile industry in Mexico gained open access to the American market, promoting exports to the United States. The value of Mexican cotton and apparel exports to the U.S. grew from $3 billion in 1995 to $8.4 billion in 2002, a record high of $9.4 billion in 2000. At the same time, the share of Mexico’s cotton textile market the U.S. has increased from 8 percent in 1995 to 13 percent in 2002.[citation needed] Some have suggested that in order to fully benefit from the agreement Mexico should invest in education and promote innovation as well as in infrastructure and agriculture.

Contrary to popular belief, the maquiladora program was in place far before NAFTA, in some sense dating all the way back to 1965. A maquiladora manufacturer operates by importing raw materials into Mexico either tariff free (NAFTA) or at a reduced rate on a temporary basis (18 months) and then using Mexico's relatively less expensive labor costs to produce finished goods for export. Prior to NAFTA maquiladora companies importing raw materials from anywhere in the world were given preferential tariff rates by the Mexican government so long as the finished good was for export. The US, prior to NAFTA, allowed Maquiladora manufactured goods to be imported into the US with the tariff rate only being applied to the value of non US raw materials used to produce the good, thus reducing the tariff relative to other countries. NAFTA has eliminated all tariffs on goods between the two countries, but for the maquiladora industry significantly increased the tariff rates for goods sourced outside of NAFTA.

Given the overall size of trade between Mexico and the United States, there are remarkably few trade disputes, involving relatively small dollar amounts. These disputes are generally settled in WTO or NAFTA panels or through negotiations between the two countries. The most significant areas of friction involve trucking, sugar, high fructose corn syrup, and a number of other agricultural products.

Mexican trade facilitation and competitiveness

A research brief published by the World Bank as part of its Trade Costs and Facilitation Project suggests that Mexico has the potential to substantially increase trade flows and economic growth through trade facilitation reform. The study examines the potential impacts of trade facilitation reforms in four areas: port efficiency, customs administration, information technology, and regulatory environment (including standards).

The study projects overall increments from domestic reforms to be on the order of $31.8 billion, equivalent to 22.4 percent of total Mexican manufacturing exports for 2000–03. On the imports side, the corresponding figures are $17.1 billion and 11.2 percent, respectively. Increases in exports, including textiles, would result primarily from improvements in port efficiency and the regulatory environment. Exports of transport equipment would be expected to increase by the greatest increment from improvements in port efficiency, whereas exports of food and machinery would largely be the result of improvements in the regulatory environment. On the imports side, Mexican improvements in port efficiency would appear to be the most important factor, although for imports of transport equipment, improvements in service sector infrastructure would also be of relative importance.[

2. Mexico's Doing Business (DB) Ranking

Overall, Mexico ranked 39th out of 189 economies. It ranked comparatively lower in dealing with construction permits (108), getting electricity (116), registering property (110) and paying taxes (105).

[insert table]

The Doing Business indicators on enforcing contracts measure the efficiency of the judicial system in resolving a commercial dispute.[40]The court in the largest business city with jurisdiction over commercial cases is used for this purposes and thus, Mexico City First Instance Oral Civil Court served as a basis for Mexico. As the methodology

[40] Information about the methodology (as well as the assumptions) in enforcing contracts can be found at http://www.doingbusiness.org/methodology/enforcing-contracts.

compares disputes worth 200% of income per capita of the economy, the survey was based on a dispute involving 255,849 MXN (approximately $19,880).[41]

As noted above, Myanmar ranked 57th in enforcing contracts among 189 economies. Currently, the three elements considered in the enforcing contract indicator are time, cost and number of procedures. According to the World Bank, a new indicator will be added to capture good practices in resolving commercial disputes. New data are being collected on such aspects as the existence of commercial and small claims courts, the publication of judgments, the availability of voluntary mediation, alternative dispute resolution mechanisms outside the formal court system, the availability of electronic filing and private bailiffs, the existence of electronic case management, the possibility of pre-attachment of defendants' movable assets, and whether losing parties are required to reimburse legal fees. If the quality of the data collected is sufficiently high, the new indicator will replace the number of procedures currently being considered to measure the complexity in resolving commercial disputes. [42]

[insert Enforcing Contract table]

According to the Doing Business report, enforcing a contract in Mexico takes 400 days. The cost is estimated at 31.9% of the claim with the process involving 37 procedures. This resulted in Myanmar being ranked 57th in enforcing contracts.

The duration of 400 days is similar to the average that it takes in APEC economies (422.8 days) but significantly lower compare to the Latin American and Caribbean average (736.9 days). The cost element (31.0% of the claim) is similar to the APEC average (33.4%) and the Latin American and Caribbean average (37.0%). The number of procedures requires in Mexico (37) is slightly higher than the average number required in the APEC region (35.1).

3. Mexico's legal system

The following excerpt is from

Francisco A. Avalos, The Introduction to The Mexican Legal System, 2d ed. (2000),

http://www.law.arizona.edu/Library/research/guides/mexicanlegalsystem.cfm?page=resea...

Legal System Overview, Section A, *at* http://www.mexonline.com/lawreview.htm. (check)

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[41] Information is available at http://www.doingbusiness.org/data/exploreeconomies/mexico-city/enforcing-contracts

[42] Forthcoming changes to the Doing Business report, available at http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Methodology/Survey-Instruments/DB15/Forthcoming-methodology-changes-to-the-Doing-Business-Report.pdf

Today's legal system of Mexico is the result of the dynamics of many unique social, racial, political, religious, and economic historical factors that gave birth to the Mexican nation and that have propelled it to the present.

The Mexican legal system has historical roots that go back to 16th century Spanish law and to Pre-Colombian indigenous law. Spain ruled Mexico for over 300 years and consequently left its mark on the legal system of Mexico. The link to Pre Colombian indigenous law is traced through the Aztec Empire which was the dominant political power in Mexico at the time of the arrival of the Spaniards. The Spanish conquistadores found an advanced indigenous legal system in place when they conquered the AztecEmpire. The Spanish Crown did not do away completely with the indigenous legal system. Instead the Crown kept the indigenous laws and legal institutions that did not go directly against established Spanish customs or against Church doctrine. The Spanish Crown also introduced its own laws and legal institutions to replace and/or supplement what was discarded, and the Crown passed laws and created legal institutions that were intended for Colonial Mexico, legislation that did not exist in Spain.

For the next three hundred years "Spanish law was the dominant feature in the Mexican legal" system. Spanish law was most dominant in the area of private law; in matters of commerce, property, family inheritance, and obligations, Spanish law was used almostexclusively. In the area of public law, indigenous law and the law that was passed exclusively for Colonial Mexico "was very comprehensive and it was the major source of the law for Colonial Mexico." There were several attempts made to place together in single code all of the laws pertaining to Colonial Mexico. The results of these efforts were the: "Cedula de Puga (1556, Decrees and Orders of Puga)," "Nueva Recopilacion(1567, New Compilation)," "CodigoOvandino (1571, Ovandino Code)," "Recopilacion deLeyes de lasIndias (1680, Compilation of the Laws of the Indies)," and "NovisimaRecopilacion (1805, Newest Compilation)." Another important compilation of laws ofthe period was the "Ordenanzas de Bilboa (1737, Statutes of Bilboa)." This code concerned private law matters and "became the commercial code and was used in Mexico even after Independence."

The movement towards Mexican Independence started in 1810. In 1814 the Constitution of Apatzingan was issued. Although this constitution never came into effect,many "ideas it expressed served as a model for future changes."11 The ApatzinganConstitution incorporated secular natural law and secular positive law which were theproduct of the revolutions that took place in the Western World in the 18th and 19thcenturies beginning with the American Revolution. The crux of secular natural law andsecular positive law is that all individuals are created equal with natural rights toproperty, to liberty, and to life. It is the responsibility of the government, which shouldbe divided into separate, independent powers, to recognize and secure these rights forthe individual.12 The American Declaration of Independence and the French Declarationof the Rights of Man and of the Citizen are prime examples of the new 18th and 19thcentury political philosophy. Nationalistic fervor also formed part of the new political philosophy.

Mexico achieved independence in 1821 and adopted its first constitution in 1824.13 The1824 Constitution provided for a Federal Republic consisting of 19 states, four territories, and a Federal District. The 1824 Constitution also provided for: recognition of self determination, division of power into the executive, the legislative, and the judiciary, the equality of all citizens before the law, the principle of innocent until proven guilty, freedom of expression and of the press, the protection of private property, the abolition of special privileges for the clergy and the military, and agrarian reform.

The 1824 Constitution was never applied strictly because of internal armed conflict between the conservative and liberal elements of the newly independent Mexican nation. In 1857 a new constitution was adopted which was drafted by the liberal elements who had ascended to power.14 The most important contribution of the 1857Constitution was the writ of "amparo" (see page 10 for an explanation of the writ of"amparo". The 1857 Constitution survived a civil war and the French intervention of1862. It was not until after the triumph of the 1910 Mexican Revolution that the 1857Constitution was replaced by the current Mexican Constitution of 1917.

The current Mexican Constitution is commonly referred to as the 1917 Constitution. The official name of the 1917 Constitution is the Political Constitution of the United Mexican States (ConstitucionPolitica de los EstadosUnidosMexicanos). The original name given to the 1917 Constitution was the Political Constitution of the United Mexican States, that Revises the One of February 5 of 1857 (ConstitucionPolitica de Los EstadosUnidosMexicanos, QueReforma la del 5 de Febrero de 1857).16 The 1917 Constitution adopted from the 1857 Constitution the chapters on territorial organization, civil liberties, democratic forms, anticlerical clauses, and anti monopoly clauses.

Although the 1857 Constitution served as a foundation for the 1917 Constitution, there are major, fundamental differences between them. They differ basically in approach. Both constitutions define and articulate democratic political rights and duties, but the1917 Constitution goes on to include economic, social, and cultural rights.17Theinclusion of these economic, social, and cultural rights in the 1917 Constitution was original and revolutionary at the time.18 A leading Mexican legal scholar has stated that, “the importance of the Mexican Constitution of 1917 is the systematic establishment of basic rights of economic and social integration."19

Another fundamental difference between the 1857 Constitution and the 1917Constitution is in the different philosophical approaches to governing the nation that the different constitutions embrace. The 1857 Constitution called for a politically neutral federal government, a federal government that would be passive in relation to economic and social matters, a federal government that respects the status quo.20The 1917Constitution, on the other hand, calls for a federal government that has a moral obligation to take an active role in promoting the social, economic, and cultural wellbeing of the people.21

The Federal Constitution is the most important political document in Mexico. It is the source and origin for all Mexican law. The hierarchy of sources of law in the civil law tradition to which Mexico's legal system belongs are, "constitution, legislation, regulation, and custom."22 The constitution will override all legislation, legislation will override all regulation, and regulation will override all custom.

The 1917 Mexican Constitution calls for a "federal, democratic, representative Republic composed of free and sovereign States."23All public power is derived from the people.24The country, whose official name is the United Mexican States (EstadosUnidosMexicanos), consists of 31 states and a Federal District.25Mexico City, the national capital, is located in the Federal District. There is a centralized federal government and individual state governments.26 The federal government governs the Federal District.27The Mexican Constitution is based on seven basic principles: a declaration of human rights; national sovereignty; division of powers; the representative system; a federal structure; constitutional remedy and the supremacy of the state over the Church.28It is seen as an instrument to be used to bring about social change. The government is very active in the national economy and promotes change through ownership, regulations and legislation.29

It is estimated that in 1910 almost 97 percent of the arable land in Mexico was in the hands of no more than 1,000 families, while 2 percent belonged to small land holders, and 1 percent belonged to municipalities.30Article 27, which consists of over 50paragraphs, was written with the intent of breaking up land, water, and other natural resource monopolies held by the privileged few.31The privileged few not only consisted of the 1,000 Mexican Families mentioned previously, but included the Church and foreign interests.

Another article of the 1917 Constitution that is important is Article 49 which established the organization and division of the powers of the federal government. The federal government is divided into executive, legislative, and judicial branches. Each branch is independent of the other, and "two or more of the powers shall never be united in one single person or corporation."41 The executive is empowered to assume sole control of the government in case of emergencies. The emergencies and procedures for the executive to assume sole control of the government are defined and articulated in Article 29.

Article 80 of the Constitution deals with the executive branch of government. The executive branch is the branch of government in Mexico with the most political power. The office of the presidency is "the most important political and constitutional office" inMexico.42 The president, elected to a 6yearterm with no reelection, has attained apposition of supreme power through "long standing practice, statutory, and constitutional provisions, and a well institutionalized tradition of near absolute political power." The constitutional powers of the president include "broad power of appointment and removal, fiscal powers, the power to initiate and veto legislation, and control of themilitary."44 Articles 81 through 93 of the 1917 Constitution delineate the president’s powers and responsibilities.

The legislative branch of the federal government is comprised of the Senate and the Chamber of Deputies. There are 2 senators per state and one deputy for every 250,000people in a state. Senators are elected by direct popular vote to a 6yearterm. Deputies are elected to a 3yearterm. Three fourths of the deputies are elected by direct popular vote, with the remaining one fourth selected in proportion to the votes received by each political party. Senators and deputies cannot be reelected for an immediately succeeding term.

Regular legislative sessions begin on September 1 and must end by December 31 of each year, although a special session may be called. The special session must be called by the Permanent Committee. The Permanent Committee is composed of 15 deputies and 14senators. The members of the Permanent Committee are elected by their respective chambers at the end of each regular legislative session. During adjournment the Permanent Committee remains to handle housekeeping chores.

The Mexican Constitution empowers both the executive and the legislative branches to initiate legislation, but only the Chamber of Deputies can initiate bills concerning loans, taxes, imposts, and the recruitment of troops. However, in practice the executive branch initiates almost all legislation and certainly all legislation of any consequence. Each new bill must pass both Chambers by a majority vote. The president has the power of the veto, which the legislative branch can override by a two thirds vote in each Chamber. Once a piece of legislation is passed by the Senate and Chamber of Deputies, the bill is sent to the president for promulgation of the bill. Promulgation consists of the president "recognizing the authenticity and regularity of the legislation."47 The president then has the new law published in the official government newspaper (Diario de laFederacion). The president also issues the "reglamento" for the new law the rules and regulations that give effect to the more general provisions of the new law. The"reglamento" has the same force as the new law to which it refers.48

The federal judiciary in Mexico is governed by Articles 94 through 107 of the Constitution and the Organic Law of the Federal Judiciary (Ley Organica del PoderJudicial de la Federacion). The Mexican Federal Judiciary is based on a three tier system similar to our own federal judiciary.49 There is a Supreme Court (Suprema Corte deJusticia de la Nacion) which has final appellate jurisdiction over all state and federal courts. There are circuit courts (Tribunales de Circuito) which are the federal appellate courts. The circuit courts are divided into single judge courts (TribunalesUnitarios deCircuito) and collegiate courts (TribunalesColegiados de Circuito). There are also districtcourts (Juzgados de Distrito) and jury courts (JuradosPopularesFederales) which are thefederal courts of first instance.50The Supreme Court is composed of 11 Justices and 1 Chief Justice. The Presidentnominates the candidates for the Supreme Court and the Senate can approve the nomination with a 2/3 majority. If the Senate does not act on the nominations within 30days the approval becomes automatic. There are no elected judges in Mexico. Supreme Court justices are appointed with life tenure. The president also has the power to remove a Supreme Court justice with the approval of the Senate and the Chamber ofDeputies.51 The Supreme Court meets in plenary session for cases involving jurisdictional issues, constitutional issues, and agrarian issues.52 The Supreme Court also divides

and meets in panels (salas). There are four panels: criminal panel, civil panel, administrative panel, and labor panel. Circuit judges and district judges are appointed by the Supreme Court to 4 year terms.

Circuit judges and district judges may be reappointed or promoted to a higher position at the end of the 4yearterm, but they may only be dismissed for bad conduct.

The Constitution (Article 94) gives federal courts jurisdiction over: controversies that arise out of laws or acts of state or federal authorities that violate individual guaranties, controversies between states or a state and federal authorities, all matters involving federal laws and treaties, all cases in which the federal government is a party, all matters involving maritime law, and all cases that involve members of the Diplomatic and Consular Corps.55 The federal judiciary, vis a vis state judiciaries, "have a much larger share of the judicial power," in Mexico.

One of the most important types of cases the federal courts hear in Mexico are "amparo" suits (juicio de amparo). The "amparo" suit is an original Mexican institution with no exact equivalent in the common law tradition. The word "amparo" literally means favor, aid, protection, or shelter. Legally the word encompasses elements of several legal actions of the common law tradition: writ of habeas corpus, injunction, error, mandamus, and certiorari. There are five types of "amparo" suits: 1) "amparo" as a defense of individual rights such as life, liberty, and personal dignity; 2) "amparo" against laws (defending the individual against unconstitutional laws); 3) "amparo" in judicial matters (examine the legality of judicial decisions); 4) administrative"amparo" (providing jurisdiction against administrative enactments affecting the individual); 5) "amparo" in agrarian matters. The "amparo" suit may be direct, initiated in the Supreme Court or collegiate circuit courts, or indirect, initiated in a district court and brought on appeal to the previously mentioned courts.

Mexico's legal system stems from the civil law tradition. This occurred as a result of Mexico’s long association with Spain. It is important to be aware of some of the most important concepts of the civil law tradition in order to formulate research strategies in conducting research into Mexican law. The civil law tradition is the oldest and most widely used legal tradition in the world today. Its foundations were developed in the Italian universities of the Renaissance when Roman law was rediscovered. Moderndaycivil law is based on Roman Law (Corpus Juris Civilis), canon Law (Roman CatholicChurch), medieval common commercial law, secular natural law, secular positive law, and to a lesser degree custom law. The civil law tradition divides the law into two major areas of law: private law and public law. Private law concerns the legal relationships between individuals. Public law concerns the legal relationships between individuals and the state.

The most important contributions of Roman Law, canon law, and medieval commercial law to the civil law tradition are found in the private law area. Roman law influenced “the law of persons, the family, inheritance, property, torts, unjust enrichment, and contracts." The influence of canon law is found mainly "in the area of family law and succession (both parts of the Roman Civil Law), criminal law and the law ofprocedures."66 The third historical

component, medieval common commercial law, is most evident in the commercial codes of the modern civil law tradition. The most important contributions of secular natural law and secular positive law are in the public law area They are most evident in constitutional law, administrative law, and thejudiciary.68The main tenets of the civil law tradition concern areas dealing with persons, things, and obligations, and their relationship. These legal tenets are found and expressed in the most important codes of the modern civil law states: the civil code, the commercial code, the criminal code, the code of civil procedures, and the code of criminal procedures.

Codes in the civil law tradition have been written through the years on the assumption that using a rational scholarly process, rules and laws can be formulated to apply to most all situations that may arise. As a result, codes tend to be very detailed and vast in size. The Mexican codes, like most Latin American codes, borrowed greatly from the European codes of the late 19th century.71Individual articles in the codes are not regarded as narrow rules. If no applicable article is found for a given situation, several articles may be viewed in combination, and a general rule may be deduced from the articles to reach a solution. Ideally, the code article or articles that are relevant are found and applied in an almost mechanical fashion to the given situation with no need for any legal interpretation. Of course, in practice in our modern complex world all situations of possible legal conflict cannot be foreseen and provided for. Many situations occur where legal interpretation is required. In these situations the fact that the civil law tradition had its origins in the universities and not in the courts is significant. The civil law tradition was developed by legal scholars and not by judges and lawyers, as is the case with the common law tradition. Thus, the "authorities" of the civil law tradition were, and continue to be, legal scholars and not judges and lawyers.

The legal scholars of the civil law tradition produce legal treaties that are referred to as doctrine ("doctrina" in Mexico). Civil law tradition judges, lawyers, and law students will refer to the doctrine of the leading legal scholars as common law tradition judges, lawyers, and law students will refer to case law.

The legal principle of "stare decisis," of the common law tradition is not recognized in the civil law tradition. There are several reasons for the rejection of the legal principle of “stare decisis" by the civil law tradition. One reason is the fact that the civil law tradition was developed by legal scholars in the universities and not by judges in the courtroom. Another reason is the post French Revolutionary influence on the civil law tradition. The post French Revolution legislature sought to reform the judiciary to prevent previousabuses.73The role of the judge was reduced "to that of a minor bureaucrat who had no power to go beyond the letter of the law."74Judicial review of legislation was not within the legal powers of judges.75No one but the elected legislature had the power to create law.

Although the principle of "stare decisis" is not recognized in the civil law tradition, the Mexican judiciary does create case law to some extent.76The Supreme Court and federal collegiate courts may establish formally binding precedent called "jurisprudencia."77"Jurisprudencia" is established by having five consecutive and consistent

decisions on appoint of law. "Jurisprudencia" is binding on the court that established it and on all lowerfederal and state courts. Many of the legal treatises listed in the guide have the word "jurisprudencia" in their title. It is important to remember that in these instances "jurisprudencia" means case law and not the general study of law. The starting point for nearly all Mexican legal research is a code. But, before going into the Mexican codes, it is important to mention some introductory material on the Mexican legal system. The starting point for nearly all Mexican legal research is a code.

The three steps in Mexican legal research are: finding the relevant article or articles in the appropriate code, finding the relevant "doctrina," and finding the relevant "jurisprudencia." The most important step is the first. The research process could stop atthis step if the researcher felt confident enough to assume that the correct article or articles had been found and their correct interpretation achieved. However, my own experience is that the majority of people who work with Mexican law do not stop after the first step; rather they go on to step two. Finding the appropriate "doctrina" is really essential to good Mexican legal research. Step three seems to vary in importance according to the researcher's legal background. Mexican trained lawyers do not consider step three essential; American trained lawyers do believe that step three is essential. Mexican lawyers are trained in the civil law tradition, and American lawyers are trained in the common law tradition. But also important is the fact that "jurisprudencia" research is so difficult because of the lack of finding tools. More and more finding tools are being published in Mexico to provide easier access to "jurisprudencia." The importance of step three will thus increase as more and more finding tools are published n Mexico.

Arbitration in Mexico

Claus von Wobeser, Arbitration Guide: MEXICO, IBA Arbitration Committee, May 2013

Claus Von Wobeser and Montserrat Manzano, Arbitration in Mexico, available at

http://latinlawyer.com/reference/topics/45/jurisdictions/16/mexico/

González de Cossío, Francisco. "Amendments to the Mexican arbitration statute." International Commercial Arbitration Brief 1, no. 2(2011): 6-7.

Over the past few decades, arbitration has been increasingly used in Mexico to settle large commercial disputes. The principal advantages seen in our jurisdiction of submitting a dispute to arbitration vary depending on whether the arbitration is national or international. Regarding national arbitrations, the principal advantage is seen to be that an arbitral tribunal has greater time availability to solve a dispute, in contrast to the local courts which normally have an excessive work load. Regarding international arbitrations, the principal advantages are generally considered to be

that in arbitration both parties have the possibility of solving their dispute in a neutral forum. It is also seen to be a great advantage that the dispute will be solved by a specialised tribunal with expertise in determining such cases.

Local courts are still however, used for commercial disputes as they can provide the following advantages over arbitration: (i) potentially less expense because no court fees need to be paid; (ii) the avoidance of delay in implementing interim remedies; and (iii) the avoidance of delay in the judicial enforcement of awards.

Most arbitrations are institutional and both domestic and international arbitrations are carried out involving Mexican parties. The nature of arbitration proceedings as domestic or international is regulated in Article 1416 of the Commerce Code, which states that the arbitration is international if the parties to an arbitration agreement have, at the time of the celebration of that agreement, their places of business in different states; or the place of the arbitration, the place where a substantial part of the obligations of the commercial relation are to be performed, or the place with which the subject matter of the dispute is most closely connected, is situated outside the state in which the parties have their places of business

With respect to international arbitrations, the most commonly used institutions and/or rules are those of the International Chamber of Commerce (ICC) and in domestic arbitrations, the most commonly used institutions and/or rules are those of the International Chamber of Commerce (ICC), the Mexico City National Chamber of Commerce (CANACO) and the Arbitration Center of Mexico (CAM).

Arbitration proceedings normally last a year plus the enforcement stage.

II. Arbitration Laws

The law governing arbitration proceedings is contained in Book 5, Title 4 of the Mexican Code of Commerce (the Commerce Code) which incorporates the UNCITRAL Model Law on International Commercial Arbitration (´Model Law´) with minor modifications, into the Mexican system for the resolution of commercial disputes. Certain provisions of the Model Law were first incorporated in the Commerce Code in 1989 and in 1993.

The Commerce Code has adopted the UNCITRAL Model Law with minor modifications. However, there are several differences regarding: Interim measures; in this regard, the Commerce Code establishes a special judicial proceeding to grant such measures. The number of arbitrators when there is no agreement of the parties; the Commerce Code establishes that there will be a single arbitrator while the Model Law states that there must be three.

In 2011 the Commerce Code was amended to incorporate the provisions of the Model Law, as amended in 2006, with minor modifications. This law applies to both domestic and international arbitrations with a seat in Mexico.

The development is significant. Not only is it the first since the adoption of the modern (1993) Mexican arbitration regime, but its goal and content are noteworthy: it addresses issues stemming from Mexican practice, removing questions and solving problems thus far extant.

The Revision adds a new Chapter (Chapter X) to the Mexican arbitration portion of the Commerce Code named "Court Assistance in Commercial Settlements and Arbitration," adding articles 1464 to 1480 to the Commerce Code. In essence, the Revision establishes new rules involving the following: 1. Referral to arbitration; 2. Procedural clarifications involving judicial assistance in arbitration, including setting aside and enforcement proceedings, and consolidation; 3. Enforcement of commercial settlements; 4. Interim measures. By and large, the Revision clarifies questions, plugs holes and irons-out wrinkles that stemmed from the practice extant. And — as seen from the lens of international arbitration — it does so in a superb fashion.

Questions existed involving the proper interpretation of the referral to arbitration regime, particularly given a Mexican Supreme Court decision involving competence-competence which distinguished between challenges to arbitration agreements and challenges to contracts as a whole. Whilst the latter were held to fall within the jurisdiction of arbitral tribunals, the former were held to fall within the purview of courts. The story has been set straight by the Revision. Henceforth, all challenges — be it solely to arbitration agreements or contracts as a whole — are encompassed by the duty upon courts to refer to arbitration, and hence are within the jurisdiction of arbitral tribunals. Additional steps are noteworthy. The Revision clarifies that the request to refer to arbitration must take place at the outset — a useful clarification, given that the current language of the domestic statute was the only regrettable departure by the Mexican lexarbitrifrom the UNCITRAL Model Law text. Importantly, the judicial standard of review for the validity of arbitration agreements when referral to arbitration is requested has been clarified to be prima facie: only "notorious" cases of arbitration agreements claimed to be null and void, inoperative or incapable of being performed will merit non-referral by courts. Finally, stay of the judicial proceedings and immediate referral has been textually established — a step in the right direction to expedite the enforcement of arbitration agreements.

Difference of opinion existed as to the applicable procedural regime when seeking: i) Court assistance in the constitution of the arbitral tribunal (for instance, absent designation by a party or failure to agree to the Chair); ii) Court assistance in taking evidence; iii) Court guidance for arbitral tribunal fee-determination in ad hoc cases. The Revision clarifies that an expedited non-contentious proceeding known as jurisdicciónvoluntariashall apply as the procedural route to follow. In doing so, the Revision requires that views from all parties and arbitration institutions be secured. Inter alia, it envisages the list-method of choosing arbitrators for purposes of assisting in the constitution of the arbitral tribunal.

As to award setting aside and enforcement proceedings, the Revision makes worthwhile clarifications. To begin with, a textual blemish that caused some mischief was removed. Importantly, the Revision provides that awards are

directly enforced without need of exequatur. The utility of said proviso stems from existing confusion and some (lower court) case law that had missed the mark on the matter.

Mexico has yet to adopt the UNCITRAL Model Law on International Commercial Conciliation. The ground has been honed to provide for the expedite enforcement of commercial settlements. A special and quick procedure has been canvassed for purposes of seeking enforcement of commercial settlements, which also applies to: Arbitrator challenges (in ad hoc cases); Challenges to positive jurisdictional awards; Court-issued interim measure requests and their enforcement; Setting aside of awards or commercial settlements. The new regime expedites the steps when judicial assistance is sought thereto.

Interim Measures

The most exciting changes occurred in the field of interim measures. To begin with, interim measures issued by arbitral tribunals are now judicially enforceable, irrespective of where issued.

The following regime mimics the UNCITRAL 2006 amendments to the Model Law (art. 17.I)

The only exceptions to this rule are:1. Where the party opposing enforcement proves that: a) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the interim measure was made; b) the party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; c) the deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the measure which contains decisions on matters submitted to arbitration may be recognized and enforced; d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; e) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; f) the interim measure has been terminated or suspended by the arbitral tribunal. 2. The Court finds that: a) The subject-matter of the dispute is not capable of settlement by arbitration; b) The recognition or enforcement of the interim measure would be contrary to public policy; c) The interim measure is incompatible with the powers conferred upon the court under its lexfori, in which case the Court may reformulate the measure so as to procure its enforceability (without altering its substance). In any event, the Revision gives the Court discretion to enforce measures unavailable under its lexfori; yet another area where uncertainty remained.

The recent amendments to Mexican arbitration law constitute an enthusiastic legislative endorsement of arbitration. The summarized regulatory overhaul fosters the efficiency and expediency of judicial proceedings involving

arbitrations seated in Mexico. Coupled with the (positive) judicial approach to arbitration and plausible experience extant, the Revision pushes Mexico up the scale of seats of preference to follow arbitration proceedings.

There are no distinctions between domestic and international arbitrations.

Mexico is not party to the Geneva Convention or to the Washington Convention. Mexico is party to the New York Convention of 1958, which was ratified in 1971. Mexico is also party to the Inter-American Convention on International Commercial Arbitration (the 'Panama Convention'), which was ratified on October 27, 1977. Mexico also ratified the Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention) in 1987.

III. Arbitration Agreements

Article 1423 of the Commerce Code states that the arbitration agreement shall be in writing and signed by the parties, or it may be in an exchange of letters, telexes, telegrams or faxes, or any other means of telecommunication that properly records the agreement. It may also be an exchange of a written complaint and a written answer from which the agreement can be affirmed by one party without being denied by the other. A reference made in an agreement to a document that contains a committing clause to arbitrate shall constitute an agreement to arbitrate as long as such agreement is in writing and the reference creates the implication that such clause is part of the agreement.

Furthermore, to be enforceable, the agreement must also meet the basic requirements of any contract (Article 1795, Federal Civil Code): (i) have a legal purpose; (ii) the parties' consent was not given by error, or obtained by fraud or under duress; and (iii) that the parties had full legal capacity to sign the agreement.

A judge hearing a matter that is subject to an arbitration agreement shall remit the parties to arbitration if either so petitions, unless it is shown that the agreement to arbitrate is null and void, ineffective or impossible to perform (Article 1424, Commerce Code).

IV. Arbitrability and Jurisdiction

Pursuant to Article 568 of the Federal Code of Civil Procedures, controversies arising from the following matters shall be exclusively settled by national courts: (i) land and water resources located within national territory; (ii) resources of the exclusive economic zone or resources related to any of the sovereign rights regarding such zone; (iii) acts of

authority or related to the internal regime of the State and of the federal entities; and (iv) the internal regime of Mexican embassies and consulates abroad and their official proceedings.

Additionally, all family and criminal matters correspond to the exclusive jurisdiction of national courts and are therefore not arbitrable.

Arbitrability is a matter regulated by Mexican law and it is the law, which expressly confers exclusive jurisdiction to national courts regarding the abovementioned matters. Therefore, based on the law, the courts and the arbitrators are capable to decide whether a matter can be submitted to arbitration, depending on the specific case. However, courts will have the final decision regarding the arbitrability of a dispute.

Lack of arbitrability is a matter of jurisdiction.

Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? Article 1432 Commerce Code provides that an arbitral tribunal has the authority to determine its own jurisdiction and rule on any challenges regarding the existence or validity of an arbitral agreement. For such purpose, the arbitration clause in a contract shall be deemed an agreement independent of all other stipulations in the contract. A determination by an arbitral tribunal declaring a contract null and void shall not void the arbitration clause.

Any challenge with respect to the jurisdiction of the arbitral tribunal must be raised in the filing of the answer, at the latest. The parties shall not be barred from making this challenge by virtue of having appointed an arbitrator or participated in his or her appointment. Any allegation that the tribunal exceeded its powers must be asserted as soon as the matter, which allegedly exceeds the tribunal's powers, is raised during the arbitration proceeding. The tribunal may, however, in either case admit such a challenge filed after the abovementioned term has expired, provided that such delay is justified.

The arbitral tribunal may resolve the abovementioned challenges a priori or in the final award on the merits. If prior to the issuance of its final award, the tribunal declares itself competent, either party may request a judge to review the foregoing within thirty days after receiving notice of the declaration, and this decision shall be non appealable. While such petition is pending, the arbitral tribunal may continue to act until an award is entered.

VI. Interim Measures

Unless otherwise agreed to by the parties, Article 1433 of the Commerce Code provides that the arbitral tribunal may, at the petition of either party, order provisional remedies which are required to protect the subject matter in dispute. In such event, the tribunal may also require a guarantee from the party requesting the measures.

There are no specific requirements regarding the form of the tribunal's decision.

Article 1479 of the Commerce Code further provides that all interim measures ordered by an arbitral tribunal shall be recognised as binding. Unless otherwise determined by the tribunal, such interim measures shall be enforceable upon request to the courts, regardless of the stage in which they have been ordered. The party who requested or obtained the recognition or the enforcement of an interim measure shall immediately inform the judge in the event of revocation, suspension or modification of such measure. The judge, to whom the recognition or enforcement of an interim measure has been requested, can, if appropriate, order the requesting party to give a guarantee whenever the arbitral tribunal has not issued a decision regarding such guarantee or if such is necessary to protect third party rights.

Courts will grant provisional relief in support of arbitrations. The parties may request the judge to grant provisional relief before or during the arbitration proceedings (Article 1425, Commerce Code). Upon such request, the judge has complete discretion to adopt any interim measures he may deem appropriate (Article 1478, Commerce Code). There is no specific provision which indicates that any court ordered provisional relief will cease to have effect following the constitution of the arbitral tribunal.

The arbitral tribunal or either party, with the arbitral tribunal's authorisation, may request the courts to grant evidentiary assistance (Article 1444, Commerce Code). Regarding provisional relief, courts may support arbitration in this regard as noted above (see response to question (ii) of section VI). There is no legal provision that requires the tribunal's consent regarding evidentiary assistance or provisional relief by courts.

VIII. Confidentiality

There is no specific provision in Mexican law regulating confidentiality specifically relating to arbitration proceedings. As the arbitration chapter contained in the Commerce Code adopts the UNCITRAL Model Law, it is silent on the issue of confidentiality of the arbitration proceeding. However, Article 1435 of the Commerce Code provides the parties with broad discretion to determine the arbitration proceedings, and therefore, the parties have the autonomy to determine the confidentiality of the arbitration. Accordingly, any confidentiality agreement included by the parties in their arbitration agreement, would be binding under Mexican law.

Under certain arbitration rules such as the arbitration rules of the Arbitration Center of Mexico (CAM) and the National Chamber of Commerce (CANACO), arbitration proceedings are confidential, unless otherwise agreed by the parties.

As a general practice, the parties will determine whether they agree on a confidential arbitration, but there are no legal provisions that contemplate any specific sanction in the event of breach of such confidentiality, other than those derived from breach of the parties' agreement.

When there is no agreement on confidentiality made by the parties or this confidentiality requirement is not made by the arbitral tribunal in a procedural order, the parties have no restriction to comment on the arbitration.

X. Awards

Pursuant to Article 1448 of the Commerce Code, the award must be in writing and signed by the arbitrators. If there is more than one arbitrator, the signatures of a majority shall be sufficient as long as the reasons why the remaining arbitrators failed to sign it are set forth in the award The award must be reasoned in a decision, unless the parties have agreed otherwise or have reached a settlement. The award must set forth the date in which it was issued and the place where the arbitration was held. After the issuance of the award, the tribunal shall give notice to the parties by delivering a copy of it signed by the arbitrators. Under Mexican law, damages are only compensatory. Punitive damages are not regulated and therefore, cannot be obtained. The arbitrators can award interest but only if it was requested by the parties during the proceedings.

XI. Costs Article 1455 of the Commerce Code states that the costs of arbitration shall be borne by the unsuccessful party. However, the arbitral tribunal may divide the elements of such costs on a pro rata basis if appropriate and considering the specific circumstances of the dispute. Article 1455 further provides that regarding the costs of representation and legal advice, the arbitral tribunal, considering the specific circumstances of the case, shall decide which party will pay such costs or if a pro rata division among the parties is reasonable. Pursuant to Article 1416, paragraph IV of the Commerce Code, the costs include the fees of the arbitral tribunal, the travel and other expenses incurred by the arbitrators, the fees for expert advice or any other assistance required by the tribunal, travel and other expenses incurred by the witnesses if approved by the arbitral tribunal, the costs and legal fees of the prevailing party if they are claimed during the arbitration and only in an amount approved by the arbitral tribunal as reasonable and the fees and expenses of the institution that designated the arbitrators .

Articles 1452 and 1454 of the Commerce Code provide that if the parties have not agreed on any rules, the tribunal is entitled to decide on the arbitrators' fees, which must be reasonable, bearing in mind the following: (i) the amount in dispute; (ii) the complexity of the matter; and (iii) the time spent by the arbitrators. The fees of each arbitrator must be indicated separately and shall be fixed by the arbitral tribunal. Notwithstanding the foregoing, upon the request of the parties, the arbitral tribunal shall fix its fees after consulting with the judge, who may intervene and make any observations and clarifications deemed appropriate. Article 1456 states that additionally, immediately after being constituted, the arbitral tribunal may request each party to deposit an equal amount, as an advance of the arbitral tribunal's fees, travel expenses and any other expenses of the arbitrators, as well as for the costs of expert evidence or for any other advice required by the tribunal. During the course of the proceedings, the arbitral tribunal may request the parties to make additional deposits. Upon the request of any of the parties, and provided that the judge

agrees to do so, the arbitral tribunal may only fix the amount of such deposits or of any additional deposits, after consulting with the judge, who may make any observations to the arbitral tribunal, as he or she may deem appropriate, regarding the amount of such deposits or additional deposits

XII. Challenges to Awards

Pursuant to Article 1457 of the Commerce Code, Arbitral awards may only be challenged and found to be void by the competent judge if: the party requesting it proves that: (i) one of the parties to the arbitration agreement was subject to a legal disability; the agreement is null and void pursuant to the laws chosen by the parties or pursuant to Mexican law if no other laws were chosen by the parties; (ii) such party was not given proper notice of the designation of one of the arbitrators or of the arbitration proceedings, or was unable to assert his or her rights for any other reasons; (iii) the award refers to a controversy not contemplated by the arbitration agreement or contains decisions, which exceed the terms of the arbitration agreement. However, if the provisions of the award, which refer to matters subject to the arbitration, can be separated from those, which are not, only the latter will be annulled; or (iv) the integration of the arbitral tribunal or the arbitration procedures were not performed in accordance with the agreement between the parties, unless such agreement contravenes any provision of the Commerce Code, which the parties cannot waive; or, in the absence of such an agreement, the proceedings were not performed in compliance with such provisions; or (v) the judge finds that in accordance with Mexican law, the subject matter of the controversy is not arbitrable or the award is contrary to public policy. The petition to challenge an award shall be filed within a period of three months from the date notice is given of the award. However, in the event that either party requests the tribunal to correct any errors in the award, to give an interpretation of such award or to enter an additional award regarding claims which were presented in the proceedings but omitted from consideration in the award, the abovementioned three month period shall begin on the date that the petition was ruled on by the arbitral tribunal. The average duration of challenge proceedings ranges from six months to one year. If any of the parties requests the annulment or suspension of an arbitral award before the judge of the country in which such award was issued or, according to the law to which the award is subject, the judge before whom the recognition or enforcement of the award is requested may, if appropriate, postpone his or her decision and, upon the request of the party who requested the recognition or enforcement of the award, order the other party to grant sufficient guarantees (Article 1463, Commerce Code).

XIII. Recognition and Enforcement of Awards

Regardless of the country in which an award has been issued, such award shall be deemed to be valid and binding and shall be enforced, upon written request to the judge. The party asserting an award or requesting its enforcement shall file the original award duly authenticated or a certified copy of it, as well as the original arbitration agreement or a certified copy of it. If the award or the agreement to arbitrate is not in Spanish, the party asserting it shall file a

translation made by a certified translation expert (Article 1461, Commerce Code). For the recognition and enforcement of awards no homologation procedure is needed. Pursuant to the Commerce Code, the recognition and enforcement of awards shall be conducted through a special procedure regarding commercial transactions and arbitration. Once the request has been filed, the judge shall summon the parties and provide them with a period of 15 days to submit an answer. Upon the expiration of such term, and if the parties do not offer any evidence and the judge does not deem it necessary, the parties shall be summoned to a pleadings hearing, which will take place within the following three days, with or without the parties presence. If the parties file evidence or if the court deems it necessary to present evidence, an evidentiary period of ten days shall be granted. Finally, the judge shall issue a final decision within five days from the hearing (Articles 1471 to 1476, Commerce Code). Article 1462 of the Commerce Code provides that the recognition or enforcement of an award shall only be denied on the following grounds: the party requesting it proves, before the competent judge of the country in which the recognition or enforcement is requested, that: (i) one of the parties to the arbitration agreement was subject to a legal disability; the agreement is null and void pursuant to the laws chosen by the parties or pursuant to the law of the country in which the award was issued, if no other laws were chosen by the parties; (ii) such party was not given proper notice of the designation of one of the arbitrators or of the arbitration proceedings, or was unable to assert his rights for any other reasons; (iii) the award refers to a controversy not contemplated by the arbitration agreement or contains decisions, which exceed the terms of the arbitration agreement. However, if the provisions of the award, which refer to matters subject to the arbitration, can be separated from those, which are not, only the latter will be annulled; (iv) the constitution of the arbitral tribunal or the arbitration procedures were not performed in accordance with the agreement between the parties, or that, in the absence of such agreement, they were not performed in accordance with the law of the country in which the arbitration was conducted; or (v) the award is not yet binding upon the parties or it was annulled or suspended by the judge of the country, in which such award was issued or to which laws it was subject to; or (vi) the judge finds that in accordance with Mexican law, the subject matter of the controversy is not arbitrable, or that the recognition or enforcement of the award is contrary to public policy. The competent court is the court of first instance in the place where the respondent is domiciled or where the assets are located. There is no provision in the Commerce Code regulating the stay of enforcement in the event of opposition. However, in practice such opposition stays the enforcement until a decision is issued by the competent court, but such stay does not prevent the parties from initiating a recognition and enforcement process in a different jurisdiction.

Generally the courts welcome and favour the enforcement of national or foreign awards. There have been no reported cases on enforcement of foreign awards set aside by the courts at the place of arbitration.

Articles 1473 to 1476 of the Commerce Code state that the defendant, after being served has 15 days in which to answer the complaint. After this time period, the parties will be summoned within three days or, if evidence is

submitted within ten days. There will be a hearing on closing arguments before the final decision is rendered. However, this decision may be challenged by the amparo proceeding.

The amparo proceeding is one of the particularities of the Mexican legal system. It is a constitutional remedy intended to protect constitutional rights and consists of the possibility of challenging any act of authority or law considered unconstitutional.

There are no specific provisions in the Commerce Code regarding time limits for seeking the enforcement of an award and as such, the general statutory time limits apply.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction? Practitioners can consult the following material in order to learn more about arbitration in Mexico:

· The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958;

· The Inter-American Convention on Commercial Arbitration (´Panama Convention´);

· The Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards (´Montevideo Convention´);

· The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules); and

· Book 5, Title 4 of the Mexican Code of Commerce, which is a Federal law regulating commercial arbitration in Mexico.

XVII. Trends and Developments

The practice of arbitration has been growing and spreading amongst all sectors of the economy and judiciary. The number of proceedings as well as the quality of such proceedings has increased over the years.

Other ADR methods, such as private mediation and conciliation, are not regulated by the Commerce Code, the Federal Civil Procedure Code or the State Civil Procedure Codes. However, there are arbitration centres (such as the National Chamber of Commerce of Mexico City) that provide the opportunity for parties to resolve their disputes through mediation. Also, there is an institute specialised in mediation, the InstitutoMexicano de la Mediación, A.C.

There have been two reforms to the provisions regulating arbitration contained in the Commerce Code. The first was published in the Federal Official Gazette, on 27 January 2011, and consisted of an important reform on commercial arbitration in order to regulate judicial intervention in arbitration, amongst other matters. The second reform was published on 6 June 2011 and consisted of adding a third paragraph to Article 1424. Among the noteworthy amendments, we highlight the following: the inclusion of a special procedure regarding the remittance of a dispute to

arbitration by a judge, as well as the grounds on which such remittance can be denied. Regarding the procedure for the submission to arbitration, the amendments provide that (i) the request shall be made in the first written motion filed by the requesting party, regarding the merits of the controversy; (ii) the judge shall issue a decision immediately, after giving the other party the opportunity to respond; (iii) if the judge remits the parties to arbitration, he or she shall also order the suspension of the judicial proceedings; (iv) once the controversy has been finally settled in arbitration, the judge shall terminate the judicial proceedings, upon the request of either party; and (v) if the arbitration agreement is declared to be null and void, if the arbitral tribunal is declared to be incompetent or if for any reason the controversy is not settled in arbitration, the suspension shall be lifted, upon the request of either party, provided that all parties involved must be given the opportunity to be heard; and (vi) no defense shall be available against the decision issued in the foregoing proceeding; · the inclusion of a special proceeding on commercial transactions and arbitration, regarding (i) challenge of arbitrators; (ii) competence of the arbitral tribunal; (iii) precautionary measures in arbitration; (iv) annulment of commercial transactions and arbitral awards; and (v) recognition and enforcement of an award requested as a defense in a proceeding or trial; and the inclusion of a provision regarding precautionary measures ordered by the tribunal, establishing that any precautionary measures ordered by the arbitral tribunal must be recognised and enforced as a general rule. In addition to the modifications to the Commerce Code, the Public Works Law and the Public Acquisitions Law also underwent important modifications.

Until May 2009, arbitration with the government was highly restricted, as the national framework allowed only two state-owned companies – the oil company PetróleosMexicanos(PEMEX) and the power company Comisión Federal de Electricidad(CFE) – to submit disputes to commercial arbitration.

In 2009, amendments to the Public Works Law and to the Public Acquisitions Law introduced international or domestic arbitration as a method of settling disputes arising from contracts between a private party (either Mexican or foreign) and a state entity, thereby increasing the number of arbitrations in which a Mexican state entity is a party. There are exceptions in this legislation to the arbitrability of certain matters, including administrative rescission for non-performance. Despite these exceptions, the 2009 reforms to the Public Works Law and Public Acquisitions Law represent important progress with respect to the opening of federal government contracts to alternative dispute resolution and arbitration.

Finally, it is noteworthy to mention another legislative recent change. The Public-Private Associations Law was published on January 2012, regulating public-private projects that establish long-term contractual relationships between public and private entities for rendering public services, with the infrastructure provided totally or partially by the private sector. Article 139 provides for arbitration of disputes arising under these types of agreements.

Moreover, in 201 there have been several precedents by courts related to the interpretation of the issue of public policy. A noteworthy precedent established that in order for a court to determine whether an arbitral award contravenes public policy, the judge must read it and conduct an analysis of its content to qualify it. However this

does not imply an analysis of its content in order to review whether its considerations are correct or not, which is clearly off limits to the judge. Indeed, this judgment is a favorable precedent to the enforcement of awards in Mexico.

Court's attitude to arbitration

Marco Tulio Venegas, The Mexican Courts and Arbitration: A New Partnership **in Arbitration Brief,** Volume 1 | Issue 1 Article 8 (2011)

Without the cooperation of Mexican courts and the proper interpretation of this law, the legal provisions of Title IV are useless.

Fortunately, Mexican courts have systematically adopted a friendly approach towards arbitration. They have understood that arbitration is not an enemy but rather a true ally. In doing so, they have closely monitored the basic principles of legality in arbitration.

The purpose of this article is to summarize the most relevant decisions issued by Mexican courts with respect to arbitration. The decisions rendered by Mexican courts have been the result of two types of disputes:

i Disputes arising from parallel litigation procedures in which the validity of arbitration clauses is questioned; and ii Disputes concerning the enforcement of arbitral awards or nullity procedures against arbitral awards.

Due to the special nature of the Mexican Judicial System, these types of disputes are ultimately decided through a constitutional procedure called "amparo." Therefore, all the decisions addressed here are contained in amparo rulings. Frequently addressed and relevant topics related to arbitration in the judicial decisions of the Mexican courts are:

a. The constitutionality of arbitration;

b. The intervention of the judicial authority in arbitral proceedings;

c. Remittance to arbitration;

d. The interpretation of the competence-competence principle;

e. Procedural matters in connection with the recognition and enforcement of the arbitral award;

f. Essential characteristics of the arbitral award; and

g. Causes of nullity of the arbitral award and procedural matters in connection with the setting aside of arbitral

awards.

A. The Constitutionality of Arbitration

The most important decision in connection with the relationship between arbitration and Mexican courts dealt with the constitutionality of the arbitration as a valid legal method to resolve disputes among private parties.2 This dispute was based on article 13 of the Political Constitution of the United Mexican States, which establishes that no one may be judged by a special court. Some were concerned that arbitration as a private means of dispute resolution constituted a special court, prohibited by the Mexican Constitution.

This question was finally addressed by the First Chamber of the Supreme Court of Justice which ruled that (i) the constitutional principle was limited to prohibiting the establishment of special judicial courts and (ii) that arbitral tribunals could not be considered judicial courts since they do not form part of the Mexican judicial branch. Rather, arbitral tribunals are composed of private persons who are expressly appointed by the parties to resolve a dispute between them; therefore, arbitrators do not have the jurisdiction, power and authority to enforce the awards they issue and must recur, as a complementary action, to a competent judge for the recognition and enforcement of the award issued.The conclusion then was that it is constitutionally permissible for private parties to submit their disputes to an arbitrator for resolution. The arbitral tribunal is not a special court, therefore article 13 of the Political Constitution of the United Mexican States is not violated.

With this decision, arbitration was deemed a valid method of dispute resolution by the Supreme Court of Justice, allowing for its healthy growth and development in the Mexican Judicial System.

B. The Intervention of Judicial Authorities in Arbitration

In 2007, the Third Collegiate Court in Civil Matters of the First Circuit detailed the circumstances before or after the filing of the arbitral proceeding, in which the involvement of the judicial authority in arbitral proceedings is legally permissible.3 In order for the courts to determine the validity of the arbitral agreement, the court must determine that the judicial role is enumerated in

the Commerce Code, in title IV of Book V. Permissible points of review are: (i) request for provisional precautionary measures, (ii) appointment, recusal or removal of the arbitrator, (iii) when a motion for the incompetence of the arbitral Tribunal is filed and is rejected, (iv) presentation of evidence, (v) observations with respect to the fees of the members of the tribunal, (vi) setting aside of final awards and (vii) recognition and enforcement of awards.

Although this precedent basically repeated what the Commerce Code established, it is useful since it implies ratification by Mexican courts of the limited cases in which judicial intervention is allowed.

C. Remittance to Arbitration

Article 1424 of the Mexican Commerce Code establishes that a dispute subject to an arbitration agreement submitted to a Mexican court must be remitted to arbitration as soon as one of the parties so requests. The exception to this occurs when it is established that such agreement is null and void, invalid or impossible to enforce. This is what is known in Mexico as the "*remittance to arbitration*." It is important to note, however, that this provision, unlike the UNCITRAL Model Law, does not set a time limit in which a party must ask the Court for remittance to arbitration.

In light of this rule, in 2005 there was a procedural dispute over the correct time for the remittance to arbitration. In this dispute, the Third Collegiate Court in Civil Matters of the First Circuit determined that the proper procedural moment for the judge to decide whether to remit the parties to a dispute to arbitration is when the judicial court hearing the matter receives the request for such remittance from the parties, and it has all the elements for making a decision for that purpose. 4 Therefore, a party can request the remittance to the arbitral proceeding at any time from answering the claim until before the decision on the merits is made, because with that, the jurisdiction of the judge is exhausted. In the same decision, it was established that if the requirements for the validity of the remittance were not present, an ancillary procedure should allow the parties the opportunity to present their respective cases in connection with this remittance and thereby guarantee due process and procedural equality to the parties.

D. The Interpretation of the Competence— Competence Principle

German jurisprudence is credited with the origin of the principle *Kompetenz-Kompetenz*, understood as the power enjoyed by the arbitrator or arbitral panel to rule on challenges to its jurisdiction. At the margin of the multiple critiques that have been made of such principle,5 Mexican courts generally give precedence to court decisions rather than decisions of the arbitral tribunals with respect to its own competence. It should be noted that Mexican courts initially held contradictory positions on this issue. The contradiction lay in the decisions made by the Sixth Collegiate Court in Civil Matters of the First Circuit, which held that the validity of the arbitral award is a decision of the arbitral tribunal, and by the Tenth Collegiate Court in Civil Matters of the First Circuit, which determined that such authority rests with the judge.6

The Supreme Court of Justice of the Nation resolved the matter and determined that when the validity of the arbitration clause is challenged, the power to rule on the competence of an arbitral tribunal is with the judge.7 The Supreme Court reasoned that the jurisdiction of the arbitrator arises from the free will of the parties. For example, if one of the parties is affected by legal incapacity, this defect in the free will of the parties invalidates

the arbitral agreement. For this reason, if the existence of a defect in the free will of the parties is argued, the validity of the arbitration agreement must be resolved by the judicial authority. Notwithstanding the above, it is important to note that in the case of a proceeding that challenges the validity of the arbitral agreement, the arbitrator is authorized to continue with the arbitral proceeding pursuant to article 1424 (2) of the Commerce Code, and therefore can minimize delaying tactics of one of the parties.

E. Procedural Matters in Connection with the Recognition and Enforcement of the Arbitral Award

The Mexican courts have favored speed in relation to the proceedings for recognition and enforcement of the arbitral award, as can be seen in the following court precedents:

a. In 1999, as the result of an amparo in review filed by the company Aceros San Luis, S.A. de C.V., the First Collegiate Court of the Ninth Circuit determined that prior to enforcing a commercial arbitral award issued abroad, it is necessary to produce its recognition, explaining that it would be illogical to proceed to the enforcement of the award without first deciding on its recognition. (*See* Amparo in Review 29/1999, Aceros San Luis, S.A. de C.V. (August 12, 1999), which ruling is contained in the decision: 1116, of the First Collegiate Court in Civil Matters of the First Circuit, Ninth Period.)

b. In 2001, as the result of an amparo in review filed by the company Jamil Textil, S.A. de C.V., the Second

Collegiate Court in Civil Matters found that the recognition and enforcement of the arbitral awards issued abroad must be done in accordance with articles 1461 — an arbitral award, whatever the country in which it has been issued, will be recognized as binding and, after the presentation of a written petition to the judge, will be enforced — and 1463 — the procedure for recognition or enforcement will be carried out as an ancillary

proceeding (in accordance with article 360 of the Federal Code of Civil Procedures). Since these articles

specifically and restrictively regulate these procedures and give different treatment to such awards, it is implied

that the proceedings for specialized matters can be carried out through incorrect procedures, which could affect the institution of international commercial arbitration.(*See* Amparo in Review 4422/2001, Jamil Textil, S.A. de C.V. (September 13, 2001), which ruling is contained in the decision: 1.2. C.15 C, of the Second Collegiate Court in Civil Matters of the First Circuit, Ninth Period)

c. In 2008, the Third Collegiate Court in Civil Matters resolved on appeal an amparo filed by Maquinaria Igsa, S.A. de C.V., declaring as valid the counterclaim of recognition and enforcement of an award filed in an ancillary proceeding to set aside the same arbitral award. For this judicial decision, the Court took into consideration the special regulation of arbitral proceedings that the possibility of the validity of the counterclaim governs as a general principle and in a second instance, in such special regulation there is no express rule that prohibits exercising the counterclaim in the ancillary setting aside proceeding. Furthermore, it made a harmonic interpretation of the Commerce Code in light of the statement of intent of the bill that included the Model Law as Mexican arbitral law. It also made a teleological analysis of the New York Convention and the Panama Convention. With this, it concluded that the counterclaim, being indicated as valid, would not threaten the purpose of the arbitral institution nor the ancillary proceeding; rather, two autonomous ancillary proceedings would be avoided, since the setting aside of the arbitral award and its recognition and enforcement would be decided in a single dispute. This results in an expedited administration of justice, thereby applying the principles of speed and effectiveness.(*See* Amparo in Review 274/2008, Maquinaria

Igsa, S.A. de C.V. (December 4, 2008), which ruling is contained in the decision: I.3.C.732 C, of the Third Collegiate Court in Civil Matters of the First Circuit, Ninth Period.)

F. Essential Characteristics of the Arbitral Award

Two relevant precedents have been issued in this regard: a. In 2001, the Third Collegiate Court in Civil Matters of the First Circuit issued a decision establishing that the arbitral award has the effect of *res judicata* and is unchallengeable, immutable and enforceable. Further, the

judge may only verify that the award is issued pursuant to the essential formalities of the proceeding. He cannot intervene on the substance of the dispute.11 Finally, the competent judge must provide the procedural means necessary to carry out the rulings in an award, since the judge's action will be necessary to achieve the enforcement and actual carrying out of the decisions in the award.

b. In 2002, the Fourth Collegiate Court in Civil Matters of the First Circuit confirmed the interpretation that final arbitral awards are *res judicata*. Even though they must be enforced before the judicial authority, they are immutable and therefore have the same effect as a decision that is final, conclusive and has been made available for execution.12 From the above judicial decisions, the characteristics that the Mexican courts attribute to the arbitral award are clear, and are consistent with the most advanced principles that the leading countries in this area currently bestow on it.

G. Causes of Invalidity of the Arbitral Award

In 2005, the Third Collegiate Court in Civil Matters resolved that the causes of invalidity of an arbitration agreement are based on the content of the agreement itself. In this decision, the court found that the judge must determine only whether there is an impediment to the enforcement of the arbitral agreement.13 Therefore, the court must demonstrate the impossibility of enforcing the arbitral award in order to declare it invalid. Futhermore, in connection with the causes of nullity of the arbitration agreement, it is important to mention the Radio Centro-Monitor case, which is a landmark in the history of arbitration in Mexico. 14 This litigation related to a procedure for setting aside an award in Mexico. The Mexican court of first instance set aside an arbitral award because it determined that it did not fulfill the requirements stipulated by the parties in the arbitral agreement. The arbitral agreement required that the arbitrators be experts in the radio broadcasting industry.

The Court of first instance adopted a restrictive interpretation of the requirements stipulated by the parties with respect to the qualities required of the arbitrator. However, this decision was reviewed by a superior court, which declared the arbitral award valid because the parties consented to the appointment and qualifications of the arbitrators during the arbitration procedure. Thus, the case is now a positive example of the enforcement of arbitral awards in Mexico.

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Conclusions

It is clear that despite the initial doubts and suspicions of Mexican courts towards arbitration, they have come to embrace it and now adopt a friendly attitude. The reasons for this change are numerous, but two of the most important ones are that Mexican courts now understand that arbitration helps to reduce their workload and that they can always verify that the arbitral awards are consistent with Mexican Public Policy and due process. There are challenges ahead. The role of the courts has not yet expanded in practice to encompass the reception of evidence or the issuance of preliminary measures in support of arbitration (both of which are in fact provided for in the Mexican Commerce Code). We are sure, however, that Mexican courts are prepared to assume these challenges and bring creative and technically correct solutions to this type of judicial intervention during the arbitration procedures.

Mexico and CISG

Hernany Veytia, The CISG and its Impact on National Legal Systems: Mexico, edited by Franco Ferrari

Alejandro Osuna-Gonzalez, The interpretation in Mexico of the CISG in Villanova Law Review (Vo. 58: pp.601-622)

See Alejandro Osuna-Gonz´alez, La Interpretaci´on Judicial en M´exicoRelativa a

laConvenci´on de lasNacionesUnidassobre los Contratos de Compraventa Internacional de Mercaderı´as, CONTRATACIO´ N Y ARBITRAJE INTERNACIONALES 91–129 (Universidad Nacional Aut ´onoma de M´exico, 2005).

Christopher Klein* **Mexican Contract Formalities and Interpretations: A Guide for the U.S. Legal Practitioner available at**

http://www.wcl.american.edu/journal/ilsp/v1/1/articles/klein.pdf

Mexico Contract Law

Mexico is a Federal Republic composed of thirty-one states and one Federal District that follow a civil law tradition.1 Its contract law is codified in the Federal and States' Civil Codes and the Commercial Code.2 The Federal Civil Code has been incorporated, nearly verbatim, in each of the thirty-one local Civil Codes of the Mexican States.3 Since all thirty-one of Mexico's States' Civil Codes closely mirror the Federal Civil Code, this article will limit its analysis to the

Federal Civil Code only. Such analysis will suffice in highlighting important provisions of Mexican contract law; nevertheless, the individual State's Civil Codes should always be consulted.

In addition to the Civil Code, contract law is also codified in the Commercial Code, which governs all contracts that are deemed to be commercial.4 In Mexico, commercial matters fall under federal jurisdiction; thus, the Mexican Commercial Code is Federal law.5 It is essential to note that the Commercial and Civil Codes are not mutually exclusive.6 For instance, the Commercial Code provides that the Civil Code shall be the controlling authority for issues not covered in the Commercial Code.7 Therefore, the Federal and States' Civil Code should always be referenced and used as gap fillers for areas of contract law that the Commercial Code does not address, such as contract validity.8

Article 1794 of the Federal Civil Code sets forth the only two required elements for creating an enforceable contract: consent and object.9 Consent occurs when there is an agreement of wills between the offeror and the offeree that is intended to produce legal consequences.10 Object can be defined in the following two manners: it may be an obligation that needs to be executed, or as an act that must be performed or must be abstained from being performed.11 A U.S. legal practitioner should note that consideration is not an element necessary for the creation of an enforceable contract under Mexican law.12

C. Formalities

At first blush, the Commercial and the Federal Civil Code appear to favor the general rule of freedom to contract, which seems to disregard form and formality. For example, Article 78 of the Commercial Code provides that "in commercial agreements each of the parties is obliged in whatever manner and under whatever terms it appears each party intended to be obliged."13 Likewise, Federal Civil Code Article 1832 states that "each party is bound in a way and by the terms to which each intended to be bound without specific formalities being required for the contract to be valid, except for certain instances that are expressly set forth by the law."14

However, Article 1833 of the Federal Civil Code "provides that when the law requires a specific form or formality for an agreement, and this formality is not given to it, the agreement will not be valid."15 Therefore, despite an apparent freedom to contract, Mexican law does require that specific formalities be fulfilled in various circumstances.

Mexican law provides for two different types of formalities: (1) the contract may be required to be in writing, and (2) it may also be required to be in the form of a public deed issued before a notary public or a public commercial broker. 16

The types of contracts that must be in written form, but are not required to be in the form of a public deed, are: "a lease, a short-term non-corporate joint venture or commercial partnership, a letter of credit, a chattel mortgage, a commission agency arrangement, a company loan, a letter of intent or promise to contract."17 In comparison, under the United States Statute of Frauds, only leases, letters of credit, or chattel mortgages must be in writing. 18

On the other hand, public deeds involve legal formalities that are more extensive than that of a mere writing requirement. For instance:

" ⋯[a]ll such documents [public deeds] must bear the signatures of the parties and the notary on each page and at the end of the document and must also bear the seal of the notary. In addition, the names of the parties involved, their nationality, date of birth, place of birth, marital status, occupation, and domicile have to be stated. Public deeds must be in Spanish."19

Examples of contracts that require the form of a public deed are: purchases and sales of real estate, incorporation documents of a business or organization, contracts that transfer or create rights in real estate, such as mortgages and general powers of attorney or more specific powers of attorney relating to matters that must be finalized by public deed.20

Although a contract properly complies with the writing and / or public deed requirements, it also may need to be recorded in a Mexican Public Registry to have effect against third parties.21 Examples of such contracts are, agreements for incorporation, dissolution, liquidation, contracts for the purchase and sale of real property for speculative purposes, powers of attorney, agreements related to maritime commerce ship mortgages according to Articles 25 and 26 of the Commercial Code, merger or acquisition of business organizations; and the purchase and sale of shares and obligations or the issuance or acquisition of the capital stock of companies.22

As a precaution, "many businesses and individuals choose to register commercial agreements in the Public Registry as a matter of course, simply to facilitate proof of the transaction in case of future disputes." 23 It is advisable that a U.S. legal practitioner register commercial agreements with a notary public, otherwise they may not be valid in Mexico.24

III. Notary Public

As stated, various types of contracts must involve the assistance of a notary public in order to have legal effect.26 In civil law countries such as Mexico, the role of the notary public is similar to that of a quasi-public official.27 Therefore, all contracts or other instruments performed by a notary public "would be accepted as full proof by any Mexican court or by any authority, without any other support."28 In other words, a document prepared by a notary public has a self-attesting presumption of authenticity. Therefore, before contracting in Mexico, it is imperative to review the types of contracts that require the involvement of a notary public, and if necessary, the US practitioner should always seek one's coveted assistance.

The basic principles for the interpretation of contracts are found in Articles 1851-1857 of the Federal Civil Code. For instance, Article 1851 provides that a "contract should be interpreted in accordance with the intention of the parties." Article 1853 states, "the court should favor an interpretation that will give validity to the contracts." And according to Article 1856, "Judges are to interpret contracts in accordance with the usages and customs of Mexico."38 The

language of these articles seems to indicate that courts will not be adverse to the introduction of extrinsic evidence to prove a contract under Mexican law.

However, to best predict how a contract will possibly be interpreted, it is essential to understand the intricacies of the Mexican court system. Unlike the United States, Mexico has no jury trials; no application of the principle of stare decisis; no discovery, no punitive damages; and the losing party pays the prevailing party's litigation costs, including attorney's fees.39 Moreover, the presentation of evidence in Mexican courts usually does not occur at one hearing, but at a series of hearings, meetings and written submissions. Also, Mexican judges have extensive powers in determining the admissibility of all evidence, with certain formal rules, such as the best evidence rule, being disregarded.40

In Mexico, courts of general jurisdiction are found at both the Federal and State level. Both court systems have appellate processes which have much broader scopes of review than comparable U.S. appellate courts. Also, the Federal Constitutions delegates to each state the authority to establish the structure and function of its courts; thus, the laws and procedures of State courts should be reviewed on a state by state basis.41

Therefore, considering the absence of stare decisis and the noted differences between U.S. and Mexican Civil Procedures and Rules of Evidence, a U.S. Legal Practitioner should approach interpretation issues on a case by case basis, rather than relying on a traditional Common Law analysis; namely, legal precedent.

Very active in the drafting of the CISG

Not many cases. Would like to see more applications

Article on CISG by Hernany Veytia to be added here

This section assesses the manner in which the CISG has been applied by the Mexican courts. Unfortunately, and despite that it has been more than twenty-four years during which international sales involving parties in Mexico have likely been governed by the CISG, very few cases applying the CISG have come to light.

Finding Mexican CISG cases is complicated. The Mexican judicial system poses the biggest obstacle, since state and federal decisions are generally not reported. Nevertheless, I have been able to obtain twenty-six decisions (at

the trial and appellate levels) derived from some nine court cases, but I am certain that there are more CISG cases out there.

The cases are: Peterman Lumber, Inc. v. EncinosRossy, S.A. de C.V., JuzgadoSexto de PrimeraInstancia del Partido de Estado de Baja California [Sixth Civil Court of First Instance of the State of Baja California], July 2001; Banks Hardwoods v. Jorge Angel KyriakidezGarc´ıa, Segunda Sala del Tribunal Superior de Justicia de Baja California [Second Court of the Superior Tribunal of Justice, Baja

California], Mar. 24, 2006; Georgia Pacific Resins, Inc. v. GrupoBajaplay, S.A. de C.V., Baja California, Cuarto Tribunal Colegiado del DecimoquintoCircuito [Baja California, Fourth Panel of the Fifteenth Circuit Court], Aug. 2007; Kolmar Petrochemicals Americas, Inc. v. IdesaPetroqu´ımica S.A. de C.V., Primer Tribunal Colegiado en Materia Civil del Primer Circuito [First Civil Court of the First Circuit], Mar. 2005; Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V., Quinto Tribunal Colegiado en Materia Civil del Primer Circuito [Fifth Civil Court of the First Circuit], May 2005; Barcel, S.A. v. Steve Kliff [Second Panel of the Superior Court of Justice], Mar. 2007; Wolf Metals, Inc. v. Fetasa de Mexicalia, S.A. Also, there are two cases where the CISG clearly applied, but the judges ignored its application: Texas CCC, Inc., v. A&J Cheese Co. de Mexico, S. de R.L. de C.V., decided by the Fifth Civil Court in Tijuana, Baja California; and Gerhard Deutsch

Most of the state court decisions were provided to me by acquaintances that are actively involved in litigating collection cases and know of my interest in CISG decisions. The federal CISG decisions were obtained through contacts in thefederal judiciary who assisted me in locating cases in the judiciary's intranet, which is not open to the public. There are three references to the CISG in the Supreme Court-administered JUS case law database, but two of them are derived from administrative cases applying customs legislation, while the other case is in reference to a cosigner of a debt, who secured a CISG governed transaction with real property.

The scope of this Article is limited to four cases that address the issues of contract formation, the standard of proof to show a contract exists, contract performance, and damages: Kolmar Petrochemicals Americas, Inc. v. GrupoIdesa; Georgia Pacific Resins, Inc. v. GrupoBajaplay, S.A. de C.V.; Banks Hardwoods Inc. v. Jorge Angel Kyriakidez; and Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.

MEXICAN CISG CASES

Kolmar Petrochemicals Americas, Inc. v. GrupoIdesa, S.A. de C.V.

See Kolmar Petrochemicals Americas, Inc. v. IdesaPetroqu´ımica S.A. de C.V., Quincuag´esimoJuzgado Civil de PrimeraInstanciadel Distrito Federal [Fiftieth Civil Court of First Instance in the Federal District], Oct. 2004.

1. Background

This case involves an American purchaser-plaintiff and a Mexican seller. A purchase representative at Kolmar, after ending a phone conversation with seller's agent, sent seller an email confirming their discussions, which included: that the contract was for 3,000 metric tons of MEG at $392.50 FOB/seller's terminal at Coatzacoalcos; payment as of thirty days from the date on the bill of lading; and goods to be delivered in January 2003. Seller then emailed confirming the purchase order, but stating that it needed to get confirmation that their loading terminal would be available in 2003. Seller further added that it would contact buyer by the following Monday.

Three days later (December 2, 2002), buyer sent another email requesting clarification of seller's comments regarding the availability of the terminal. On December 19, buyer sent another email designating the ship that would pick up the 3,000 tons of MEG, and requesting that seller confirm its nomination of the ship that afternoon. More than twenty days after buyer's last communication (January 10, 2003), Idesa's agent sent an email claiming that the situation had gotten complicated, that he was fighting to save the transaction, but that the 3,000 tons of MEG had already been reserved. Seller further indicated that it was under a lot of pressure so that its company did not lose money, and made a new offer to deliver to buyer at the same terminal but at a price of $400 per ton, or at $415 per ton delivered at an alternate terminal in the port of Altamira. Agent for Idesa acknowledged in his email that he was not honoring their original agreement. Agent for Kolmar refused to renegotiate the terms of what he believed was a closed deal, and considered the seller's conduct a breach of their agreement made in late November. Kolmar filed a lawsuit in Mexico City for damages suffered as a consequence of seller's refusal to deliver the goods at the agreed upon price. Idesa defended on the grounds that no contract had been formed because, according to their internal procedures, it was not in their own standard form. Idesa also defended by stating that their January 10th proposal had not been accepted by the buyer. In his ruling, the first-instance judge qualified Kolmar's November 2002 email as a proposal to Idesa to enter into a contract, and that Idesa's email of January 10, 2003 was a counteroffer per CISG Article 19.6 The judge also reasoned that Idesa never issued a final confirmation of all of the conditions established in Kolmar's "offer," because Kolmar's proposal not only concerned the price, goods, and quality, but it also referred to the time and manner of delivery, and that not all of these terms had been unconditionally accepted by seller. The judge further argued that seller never consented to delivering the goods at its terminal in Coatzacoalcos, nor did it agree that this delivery would take place in January 2003. In my opinion, the courts first mistake was qualifying Kolmar's agent's confirmatory email as an offer when it was merely putting in writing what was likely a verbal agreement that had been made over the phone. The court's decision should have included an analysis of CISG Article 8 (regarding interpretation of a party's intent), and CISG Article 14 (on what constitutes an offer) to see if buyer's email actually qualified as a proposal to make a contract, or if from reading its contents an alternate interpretation was possible. This did not take place.

See also Mar´ıadelPilar Perales Viscasillas, Modification and Termination of the Contract (Art. 29 CISG), 25 J.L. & COM. 167, 173 n.30 (2005).

It was only logical that after this initial snafu by the court, any other communication by Kolmar's agent would very likely be qualified as a counteroffer per CISG Article 19. But even this view is questionable. After rereading seller's email of January 10, 2003, agent for Idesa was in fact admitting to Kolmar that it would not be honoring the agreement it had originally made by phone, and recognized that this would surely cause problems. Idesa was now attempting to extract a higher price from Kolmar. Unfortunately, the court did a terrible job of using CISG Article 8to interpret the statements made by both buyer and seller. In my opinion, the parties agreed on all of the basic terms (goods, quantity, and quality), and only left pending the issue of confirming the availability of seller's terminal. Also, the fact that seller remained silent after buyer emailed seller twice—once to request clarification on issue of the terminal, and later to designate the ship that would pick up the goods—could have been interpreted to mean that seller was in agreement with buyer10—at least this is the only reasonable understanding that I can extract per CISG Article8 (2). If the contrary were true, Idesa would have immediately contacted Kolmar to clarify that no contract had yet been concluded after Kolmar's emails. Instead, Idesa's agent would not email until the second week of January 2003, and only to advise Kolmar that it wanted to increase the price and possibly change the place of delivery, aware that this would potentially cause problems. My opinion is further supported by the fact that Idesa never mentioned that there was an issue regarding the availability of the terminal; it was all about the price.

With regards to the interpretative mandates under CISG's Article 7(internationality, uniformity, and good faith) the judge used the civilian expression aceptaci´onlisa y llana (roughly full and unconditional acceptance), a phrase that has a clear local law connotation, although the decision does acknowledge that in matters governed by the CISG, there is no room forth Federal Civil Code to apply. With regard to the need to promote uniformity, the judge did not cite any case law interpreting the CISG, nor does it seem that buyer made any attempt to do so in an attempt to persuade the judge.11 It is also evident that no effort was made by the court to interpret the CISG in a manner that promotes the observance of good faith, although it is likely that the court assumed it was by not allowing Kolmar to go after Idesa, with whom (the court believed) it never concluded a contract.

2. Kolmar Appeals the Decision

See Kolmar Petrochemicals America, Inc. v. GrupoIdesa, S.A. de C.V., Sala Civil del Tribunal Superior de Justiciadel Distrito Federal [Superior Civil Court of Justice of the Federal District], Jan. 2005.

Kolmar appealed to Mexico City's Superior Court, claiming that the trial court had erred when analyzing the evidence and applying the CISG to the facts. According to buyer, the court should have found, by a proper interpretation of CISG Articles 7 and 8, which the parties had in fact made verbal agreement, and that seller failed to object to the emails sent after they negotiated the contract. Kolmar also claimed that the court misconstrued seller's lack of response to Idesa's email, designating the ship as anon-acceptance, and that in doing so, the trial court had also violated Article9 of the CISG.13 Kolmar further added that CISG Article 19(3) was not applicable.

In its decision, the Superior Court affirmed the ruling and reasoned that the trial court had given proper weight to the emails submitted by buyer-plaintiff, and that is was "evident" that:

The parties had not agreed on the price, payment, quality and quantity and place and time of delivery, thus triggering the proviso contained in paragraph 3 of article 19 of the United Nations'

Convention on Contracts for the International Sale of Goods (Vienna, nineteen eighty); therefore, it is incorrect to even talk about the existence of a contract.

Unfortunately, the Superior Court read CISG Article 19(3) as a checklist of items which the parties must fully satisfy for a contract to be concluded, an interpretation that is clearly wrong. The Appellate Court further reasoned that, because seller never responded to buyer's request for clarification on the issue of seller's terminal, nor to acceptance of the ship designated by buyer to pick up the goods, that this was a clear indication that buyer's offer had not been accepted. The Superior Court further argued that the parties had not agreed on the price and place of delivery, and in doing so, the Superior Court went back to Idesa's email in which it was attempting to renegotiate the price. Just like the trial court, the Superior Court failed to analyze this issue properly. As noted in my discussion of the trial court's decision, the parties had already agreed to the goods, the price, and date and place of delivery; the only thing that was pending was the availability of seller's terminal.

Echoing the view of the trial court, the Superior Court denied that the good faith principle provided for under Article 7 of the CISG had been violated in any way because the parties had never arrived at a consensus with regard to the price of the goods, nor regarding the place and time of delivery, making it improper for buyer to attempt to enforce a contract that was never legally concluded. In its view, the Superior Court probably thought it was in fact enforcing the mandate for the promotion of good faith.

The Superior Court dismissed the claim that the trial court had made wrongful interpretation of CISG Article 8, instead reasoning that the court had disposed of this issue correctly, and that the exchange of emails showed that the parties were merely negotiating. In my opinion, the Superior Court should have analyzed CISG Article 8 in tandem with Articles 14and 19, not in an isolated manner as it did.

The Superior Court did not include any citations to case law or treatises, nor does it appear that Kolmar's counsel attempted to sway the court by doing so. I believe a different result could have been achieved had this occurred.

3. The Decision at the Circuit Court Level

Kolmar Petrochemicals Americas, Inc. v. IdesaPetroqu´ımica, S.A. de C.V., Primer Tribunal Colegiado en Materia Civil del Primer Circuito [First Civil Court of the First Circuit], Mar. 2005.

Finally, buyer appealed before the Circuit Court (amparoproceeding),claiming that the trial and appellate courts had infringed Kolmar'sfundamental rights due to the lower courts' erroneous interpretation ofArticle 1853 of the Federal Civil Code and Articles 7, 8, and 9 of the CISG.

Unfortunately for buyer, the First Panel of the First Circuit found thatneither the trial nor the appellate courts had committed any violationswhen interpreting CISG Articles 7, 8, and 9, because seller never made anunconditional acceptance (aceptaci´onlisa y llana) of buyer's proposal toconclude a contract, and that therefore no violation of buyer's fundamentalrights had taken place.

B. Georgia Pacific Resins, Inc. v. GrupoBajaplay, S.A. de C.V.15

Georgia Pacific Resins, Inc. v. GrupoBajaplay, S.A. de C.V., JuzgadoPrimero Civil delPartido Judicial de Tijuana [Sixth Civil Court of Tijuana], Mar. 2006.

1. Background

In this case, Georgia Pacific Resins, Inc., (GPR), an American sellerplaintiff,filed a complaint in Tijuana against GrupoBajaplay, S.A. de C.V.(Bajaplay), a Mexican buyer demanding U.S. $139,696.98 for various shipmentsof resins. According to the facts as recited in the decision, the commercialrelationship began in 1997 when a corporate officer of buyer completed a sale on a credit application that was transmitted by fax toseller. This application for sale on credit contained a few standard clauseswith some general terms. During a period spanning a few years, buyerwould fax purchase orders to acquire the resins it would use in its industrialprocess. The goods would later be shipped from the United States tothe Mexican buyer by way of a carrier unrelated to the parties.

In their response, Bajaplay denied having completed the credit application,and also denied faxing any purchase orders to GPR. Buyer alsorefused to acknowledge it had received the resins seller had sold and delivered,even though evidence such as original invoices and shipping documentsissued by the trucking company had been submitted and indicatedBajaplay was the buyer and consignee.

In his decision, the judge agreed with Bajaplay's argument. Accordingto the court, GPR did not meet its burden of proving that it had deliveredthe goods to Bajaplay nor that Bajaplay had actually received them.The fax printouts, invoices, and shipping documents provided by sellerwere given no weight, which denied seller the right to receive the paymentit was due. Clearly, the judge made a bad decision by setting the evidentiarythreshold wrongfully high. In issuing his decision, the judge did notlook at the CISG as the law applicable to the merits (nor did he mentionany other law for that matter). A proper methodology applying the CISGwould have yielded a different result, and would have ultimately savedGPR a lot of time. The CISG's Article 11 provides that a contract's conclusionor evidence of its existence need not be reduced to a writing. In fact,its existence may be proved by witnesses, a minimum threshold that isclearly surpassed when a party is able to provide invoices, faxed purchaseorders, and evidence that the goods were placed in the hands of a carrierfor shipment to buyer.Also, commentary to the draft of CISG Article 11clearly

noted that this provision had been included because contracts forthe international sale of goods are often concluded by means of communicationthat do not always involve a written contract. The purpose was tofacilitate the showing that a contract exists.

Even from a procedural perspective, the judge contradicted the evidence, weighing rules that were already part of the Commerce Code at thetime the judgment was issued, which were heavily influenced by UNCITRAL's Model Law on Electronic Commerce.Another aspect that was evident was the judge's inability to distinguishbetween seller's obligation to deliver the goods and the arrival of thegoods at buyer's premises. Under both the CISG20 and the CommerceCode (enacted in 1889) goods can be deemed as delivered when theseller places them at a buyer's disposal, or in the hands of a carrier. Hadthe judge looked at the CISG, he could have easily avoided committingthis horrendous mistake.

2. The Judgment on Appeal

If the ruling by the trial level court was deficient, the decision renderedby the Second Chamber of the Superior Court of Baja Californiawas worse (See Georgia Pacific Resins, Inc. v. GrupoBajaplay, S.A. de C.V., Segunda Sala del Tribunal Superior de Justicia de Baja California [Second Panel of the Superior Court, Baja California], Jan. 2007).GPR argued that the trial level judge had failed to give dueregard to evidence such as the invoices, transport documents, and thepurchase orders that buyer had sent by fax. GPR also argued that the triallevel judge had erred by failing to apply the CISG.

In its decision, the Second Chamber considered that the invoices hadbeen unilaterally prepared by the GPR; thus, they lacked any evidentiaryvalue. With regard to the transport documents, the Second Chamber reasonedthat because these did not have a signature or a stamp indicatingreceipt by Bajaplay, the Second Chamber could not consider that thegoods had been received; therefore, the existence of the contract had notbeen proven. Evidently, the Second Chamber committed the same mistake,by refusing to recognize the existence of the contract, and by confusingthe delivery of the goods with buyer actually taking possession of them.The biggest blunder was the Second Chamber's wrong-headed conclusionthat, because Article 1 of the CISG provides that it applies to contractsfor the international sale of goods, and because seller had not shownthat a contract even existed, it was senseless to look into this body of law.This is equivalent to refusing to analyze the U.C.C. to determine whether acontract has been formed under its rules, when a reading of the statutewould be necessary in order to make such a determination.

In another part of its opinion, the Second Chamber stated that "fromthe record it is evident that none of the parties cited the CISG as beingapplicable." In my opinion, this represents an abdication of the court'sobligation to know the law—a duty that stems not just from a rule of procedure, but is a fundamental right specifically recognized under

theConstitution, that every person appearing before a Mexican court is entitledto receive a decision that is “reasoned in accordance with the letter of theLaw, its legal interpretation, or the general principles of law.”

3. The Decision at the Circuit Court Level (Amparo)

Quejoso [Complaint], Georgia Pacific Resins, Inc. AmparoDirecto 225/2007, Cuarto Tribunal ColegiadodelDecimoquintoCircuito [Fourth Court of the Fifteenth Circuit].

Seller then appeared before the Federal Circuit Court claiming thatthe decision rendered by the Baja California appellate court was in violationof its fundamental right to receive a judgment in accordance with thelaw because the trial and appellate courts had failed to apply the CISG tothe merits of the dispute. The Circuit Court agreed with seller, and orderedthe appellate court to issue a new judgment based on the CISG,after reiterating that a judge is under an obligation to apply the law basedon the legal principle of “da mihi factum, dabotibiius” (“give me the facts, Ishall give you the law”) and “iuranovit curia” (“the judge knows the law”).According to the Circuit Court, the parties were not required to requestthat the court of first instance or the Second Chamber apply the CISG,because it was not a foreign body of law, but rather a national law becauseof its status as a treaty ratified by the Mexican Senate (. Professor Alejandro Garro shed some light on the fact that in some legal systems the parties’ failure to cite the CISG could be interpreted as a tacit exclusion under CISG Article 6. The common law system does not follow the “juranovit curia” principle and a decision from the Oregon Court of Appeals found that it was extemporaneous for parties to cite the CISG if they did not do so at the trial level. The case is GPL Treatment, Ltd. v. Louisiana-Pacific Corporation, 914 P.2d 682 (Or. 1995)).

However, the Circuit Court was not exempt from committing its ownmistakes. It reasoned that when a contract is concluded abroad, but willhave effects in Mexico, a court must first look into the validity of the transactionprior to analyzing the application of the CISG. Clearly, the CircuitCourt confused the facts because the contract was not made abroad. Additionally,the invalidity of the contract was never raised as a defense bybuyer, but rather that the contract had never even existed, which are twovery distinct issues. The case would not end here. The Second Chamberlater issued a new decision claiming to apply the CISG, but once againfound for buyer on the same evidentiary grounds, refusing to acknowledgethe validity of faxed documents.

Seller would once again appeal to the Federal Circuit claiming thatthe Second Chamber Court was refusing to apply the law and acknowledgethe existence of the contract based on the evidence that GPR had submitted.Seller also argued that the CISG did not require that GPR show thatthe goods actually arrived in Tijuana, and that it would suffice to show thatthey were delivered to a carrier to deem that GPR had performed its obligations.The Circuit Court agreed with GPR. It would reason that sellerhad in fact submitted original invoices that were never properly objectedto by buyer; that seller performed its obligation to deliver the goods perCISG Article 31 by placing them with a carrier, and that the faxed documentsalong with parts of the testimony rendered by an officer of Bajaplaywere

sufficient to deem the contract as existing. The Circuit Court thenordered the Second Chamber to issue a new decision.

Finally, on April 29, 2008, the Second Chamber issued a second andfinal decision consistent with that of the Circuit Court. In that decision,the Second Chamber starts by acknowledging that the dispute is governedby the CISG because seller and buyer have their domiciles in contractingstates. Clearly, the Second Chamber's use of the word domicile was wrong,since the CISG intentionally left out this word and instead opted for themore neutral phrase "place of business."

The Second Chamber then went on to explain that seller had appearedto demand specific performance under CISG Article 61(b). Withregards to the existence of the contract, it cited CISG Article 11's stipulationthat the contract need not be evidenced by writing, and that notwithstanding,seller had submitted twenty invoices that proved its existence.

The Chamber also reasoned that seller had performed its obligations perCISG Articles 30 and 31, as evidenced by the shipping documents when itdelivered the goods to the trucking company for shipping. The SecondChamber also ruled that per CISG Article 59, payment was not conditionedon a formal request or compliance with any other formality. Wereit not for the fact that the Second Chamber was forced to issue the decision,I would have to acknowledge that it was not that the ruling was notbad in terms of its structure and reasoning. Of course, there were no citationsto foreign case law to promote uniform interpretation, but thenagain, is a court always to do so when the language of a CISG provision isclear, or should a judge only do so in what Dworkin would call hard cases?

C. Banks Hardwoods Inc. v. Jorge Angel Kyriakidez

Banks Hardwoods v. Jorge Angel KyriakidezGarc´ıa, JuzgadoSexto de lo Civil de la Ciudad de Tijuana [Sixth Civil Court of the City of Tijuana], Aug. 2005

This case was brought by an American plaintiff, Banks Hardwoods,Inc. (BHI), against a Mexican buyer, Jorge Angel Kyriakidez (JAK), whomade a verbal agreement to buy various shipments of timber. It went generallyundisputed that the parties had established the practice of enteringinto verbal agreements for the sale of timber, and that for each ordermade to BHI, JAK would issue a postdated check as a form security. BHIwould make the wood available at its place of business in San Diego, California,where JAK would appear to pick up the timber for its import toTijuana, Mexico. BHI claimed it was owed a total of U.S. $9,287.00 worthof goods. JAK raised a defense that is typically raised in such agreements:that they had not agreed on the date of payment and, thus, JAK's obligationwould not become due until BHI served JAK with a formal demandfor payment, as provided for under Article 2080 of the Federal Civil Code. That argument—as made by buyer—would make the complaintfiled by seller flounder.

The trial court found for BHI. In reaching its decision, however, thejudge considered that the documents submitted were of the kind contemplatedunder Articles 371, 372, and 373 of the Commerce Code, when infact none of these provisions were applicable because they were displacedby the CISG. With regard to the defense raised by buyer—

that no formaldemand had been previously made—the judge dismissed buyer's argumentciting CISG Article 58, ruled that payment became due when thegoods were placed at buyer's disposal in San Diego, California, and orderedJAK to pay the outstanding amount plus interest. In doing so, thetrial court did not discuss CISG Articles 61 and 62 (nor any other statute)to justify BHI's right to require that JAK pay the price, making the decisionincomplete and legally defective, because the relief granted was notreasoned in law. The same can be said about the court's order that JAKpay BHI interest at a rate of 6% per annum, because seller was unable toprove that they had agreed to a 2% monthly interest as claimed. Clearly,in spite of the fact that this could be a favorable decision from seller'sperspective, the methodology that was followed leaves much to be desired.

The Superior Court of Baja California continued this odd "mix 'n match"practice of internal and international rules, even though the CommerceCode is clearly inapplicable in cases involving international sales.On appeal, JAK argued that the trial level judge had failed to considerits argument that no formal demand had been made by BHI, and thattherefore BHI's complaint should not have succeeded.32 The SuperiorCourt dismissed this argument, and affirmed the judgment issued by thetrial court, but committed the same mistake of citing provisions from theCommerce Code. Regarding the issue of the prerequisite formal demandrequired under the Civil Code, the Superior Court found that this formalitywas not applicable, as this matter was governed by Articles 58 and 59 ofthe CISG, which provide that payment was not subject to the complianceof any type of formality. The Superior Court then went on to discuss theimportance of promoting the observance of good faith in internationaltrade, as provided for under Article 7 of the Convention, and even includeda passage from the CISG's preamble, when it stated that:

The United Nations Convention on Contracts for the InternationalSale of Goods, entered into on the eleventh day of April ofnineteen eighty, has as its primary objective the creation of commonprovisions to govern said legal act, based on the premisethat international trade must be based on principles of equalityand mutual benefit, which constitutes an important element toFoster friendly relations amongst member States, and therefore,taking into account the New International Economic Order, asthe Contracting States, by way of this Convention, adopted uniformrules, applicable to the international sale of goods, takinginto account different social, economic and legal backgrounds,to contribute to the removal of legal obstacles in internationaltrade.

In spite of its attempt to improve on the judgment issued by the trialcourt, the Superior Court's decision was just as flawed. It reiterated thepractice of issuing judgments citing provisions from the CISG and theCommerce Code that the CISG displaces, even though the Superior Courtacknowledged that the domestic statute was displaced. In another part ofits decision, the Superior Court said that the CISG includes its own rulesof interpretation, requiring that it be applied uniformly and in a mannerthat assures the observance of good faith in international trade. Clearly,in spite of the fact that the Superior Court referred to all of the interpretativecriteria, the reality is that it failed to observe at least two criteria: themandates to apply both an international and uniform interpretation ofthe CISG, which can only be achieved when judges (or arbitrators) takeinto account international case law in applying it.

D. Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.

1. Background

In this case, Agrofrut Rengo, S.A. (Rengo) a Chilean seller, filed anaction against Levadura Azteca, S.A. de C.V. (Azteca), a Mexican buyer ofeighty containers of canned peaches. After receiving the first twenty-twocontainers—and refusing to pay for them—Azteca cancelled the contractfor the remainder. The contract was evidenced by a purchase order thatwas sent in December of 2002, in which buyer requested eighty containersthat would each carry nine hundred boxes of canned peaches at a price of$15.65 per box, payable thirty days after each shipment's date of arrival.The parties agreed that seller would first send eleven containers per month starting in February and ending in July of 2003, and a final shipment of fourteen containers in August 2003, for a total price of $1,126,800.00.

The first shipment of eleven containers arrived on February 28, 2003, while a second shipment arrived a mere two weeks later, on April 17. Claiming late delivery of the second shipment, on May 5, 2003, Azteca advised Rengo that it was cancelling the contract for the remaining fifty eight containers, and additionally refused to pay for the twenty-two containers it had previously received. Rengo filed a complaint with the Twelfth Civil Court in Mexico City (Quejoso [Complaint], JuzgadoD´ecimo Segundo Civil del Distrito Federal [Tenth Civil Court of the Second Federal District], Expediente 30/2004.) demanding payment for the twentytwo containers and interest, as well as damages for the loss of profits from the balance of the cancelled shipment. In its response, Azteca raised as a defense that the parties had not agreed on a place and time for payment, per Articles 2080 and 2082 of the Federal Civil Code. Buyer also counterclaimed for specific performance for the fifty-eight containers due under the contract, as well as damages it claimed to have suffered as a result of the late delivery of the other two shipments. In its decision, the court ordered Azteca to pay seller $309,870.00 U.S. for the twenty-two containers it had received plus interest, but denied Rengo's claim for loss of profit damages. The court reasoned that buyer's acceptance of the two late deliveries, per Articles 374, 375, and 376 of the Commerce Code, had made the sale final,36 particularly because there was no dispute with regard to the quality of the goods. In spite of the apparent correctness of the result, it is clear that the trial court made a mistake by not applying the CISG to the case. This issue required an analysis of CISG Article 33 regarding the time of delivery37 to first determine if the contract provided that the goods were to be delivered on a fixed date or within a period of time, and then decide whether seller had breached. The next step in the analysis required that the judge assess whether the alleged delay in delivering the second shipment amounted to a fundamental breach per CISG Article 25 (which would have allowed buyer to avoid the contract),38 or if the delay would merely allow buyer to claim damages. Once this occurred, the judge should have ordered Azteca to pay per CISG Articles 61 and 62. Unfortunately, the judge seemed comfortable with applying a law that had already been displaced by the CISG some fifteen years earlier. With regard to the loss of profit damages claimed by Rengo, the judge considered these to be tantamount to interest and that an order to pay interest had already been made when it ordered Azteca to pay for the two shipments. Clearly, CISG Article 74 authorizes loss of profit damages,while CISG Article 78 provides that interest

does not prejudice the right to any other damages a party may have. However, the judge seems to have ignored the applicability of the CISG to this issue and made what was clearly a bad decision. The judge further reasoned that Rengo was barred from obtaining damages because no evidence had been submitted to show that these had actually been suffered. In addressing buyer's defenses (that the time and place for payment had not been fixed in the contract), the judge found this to be a matter governed by the CISG, and that absent an agreement, and per CISG Article 57, seller's place of business is the place to effect payment, while the obligation to pay arises once the seller delivers the goods to the buyer or delivers the documents as provided for under the contract and the CISG. Unfortunately, the judge did not explain why he decided that some issues should be disposed of based on the Commerce Code (i.e., time of delivery or finality of the sale), while other issues (i.e., right to receive payment even if no place or time have been fixed) were to be decided based on the CISG. The only answer is that the judge was unfamiliar with the scope of the CISG, and opted to travel down a road he was more familiar with, clearly violating not just the CISG, but also a constitutional mandate that judges are obligated to render their decisions based on the applicable law or its legal interpretation. Here, that clearly did not happen. 2. The Appeal Both Rengo and Azteca appealed the trial court's decision to Mexico City's Superior Court.

See Agrofrut Rengo, S.A. v. Levadura Azteca, S.A. de C.V.

In Rengo's appeal, it claimed that the trial court wrongfully applied the Federal Civil Code's Articles 1949, 2104, 2108, 2109, and 2110, and that the trial court did not provide a reasoned decision as to why seller was being denied loss of profit damages. Clearly, Rengo committed a major error in citing these provisions as the applicable law to the merits of the dispute, when these issues (i.e., rights of seller against a breaching buyer and the entitlement to damages) all fall within the CISG. Buyer made a similar error when it appealed arguing (based on the Civil Code) that the trial court had erred in ordering Azteca to pay seller, when neither the date nor the place of payment had been fixed in the contract, that prior to instituting its complaint, Rengo should have made a formal demand for payment, and that the matter was not yet ripe for a lawsuit. In its decision, the Superior Court made a grandiose statement that it would apply the CISG—an announcement that causes nothing but disappointment after reading it. Most of the issues raised on appeal were disposed of with the Superior Court relying on the Federal Civil Code—a body of law that was (for this case at least) irrelevant. Regarding Rengo's claim to loss of profit damages, the Superior Court affirmed the trial court's decision, restating that, when the trial court ordered Azteca to pay interest on the amounts due for the twenty-two containers, seller's request had been satisfied by the trial court. Clearly, the Superior Court repeated the same mistake of confusing such distinct items as damages and interests, and obviously failed to even look at the CISG, though it is not surprising, considering that not even the seller was claiming that it was the applicable law.

In its wrong-headed analysis, the Superior Court also reasoned that Rengo needed to prove there was a direct nexus between the breach and the damages it claimed to have suffered, and that Rengo had failed to show a deprivation of a profit as a direct result of the breach. The court further argued that Rengo did not even provide evidence showing

that it had purchased additional machinery to perform its obligations under the contract, nor that it had manufactured the goods. The court's reasoning is not only wrong, it is also blatantly absurd. Parties enter into sales contracts to make a profit. If breached, this will typically cause a loss to the non-breaching party. CISG Article 74 clearly authorizes a party to demand damages, including loss of profits, which, in the case of a seller, could be calculated by taking into account the seller's sales price minus its expenses in producing the goods. With regard to the issue that seller did not prove it had produced the goods pending delivery under the contract, it is evident that the Superior Court, showing absolute ignorance, failed to take into account that under CISG Article 77, a non-breaching party is required to take measures to mitigate its losses (including loss of profit), at the risk of having the other party claim a reduction. Because buyer had cancelled the contract, it is very likely that Rengo refrained from producing the canned fruit. Clearly, it was not under a duty to produce the goods, and had it acted otherwise, this would have increased damages.

Another mistake that is evident from the Superior Court's reasoning is its interpretation of what the limit for damages should be. It stated that a party may be entitled to damages that are an immediate and direct result of the breach—a rule that is provided for under the Civil Code that was superseded in cases governed by the CISG. It is not surprising, given the inconsistent application of the CISG, that the Superior Court would not understand that this matter was not governed by the Civil Code. The mistake is not trivial. The limits set forth under the Mexican Civil Code's Article 2110 and Article 74 of the CISG are different. While under the Civil Code damages are subject to an immediacy and directness requirement (which severely limits the amounts that a party may be entitled to receive), the CISG takes a more liberal approach. By allowing a party to claim damages that the breaching party knew would be a possible consequence of his or her breach of contract, the CISG includes a foreseeability requirement that considers what the contracting party knew at the time it was making the contract.

The Superior Court committed another error by violating the three CISG interpretativecommandments provided for under Article 7. First, it relied on case law interpreting the Federal Civil Code's Article 1949 in order to deny Rengo its claim to loss of profit damages, in a clear violation of the CISG's mandate to take into account its international character. It also failed to promote uniformity, because not a single case or treatise on the CISG was cited, which could have assisted the Superior Court in making a correct decision. Finally, it allowed Azteca to walk away without properly compensating Rengo after it had wrongfully terminated the contract (depriving Rengo of its profits), which clearly does not do much in terms of promoting the observance of good faith in international trade. With regard to Azteca's counterclaim for specific performance for the remainder of the fifty-eight containers, the Superior Court ruled against Azteca because it had not performed its part of the bargain, and in reaching this decision, it also mistakenly relied on Article 1949 of the Federal Civil Code.46 Even if there is an apparent soundness in the result, the reasoning is evidently flawed because this provision did not even apply. A correct methodology would have included a discussion of CISG Article 81, which relieved Rengo from any pending performance that was due under the contract

because of Azteca's notice that it was cancelling it. This decision once again shows a complete misunderstanding of the CISG and how it displaces the Commerce and Civil Codes. Of the few salvageable fragments from the decision on appeal is the confirmation that Article 57 of the CISG provides a gap filling rule for those cases where the parties do not agree on the place of payment.

3. Federal Court Review of the Superior Court's Decision

See Agrofrut Rengo, S.A., amparo No. 292/2005, and Levadura Azteca, S.A. de C.V., amparo No. 293/2005, both before el Quinto Tribunal Colegiado en Materia Civil del Primer Circuito.

As a consequence of the decision rendered by the Superior Court, both Rengo and Azteca appealed before the Fifth Panel of the First Circuit. In a nutshell, seller's issue was that its fundamental rights had been violated when the courts refused to grant Rengo's claim for damages, because it was being deprived of earnings it was rightfully entitled to receive from the cancelled contract. According to Rengo, neither the judge at the trial level nor the magistrates on appeal took into account that there was evidence on record showing Azteca's breach for failure to pay, as well as the cancellation of the contract, and that therefore, the courts should have ordered buyer to pay damages. The Panel from the Circuit Court did not agree.

In its decision, the Circuit Court made an interpretation of Articles 1949, 2108, 2109, and 2110 of the Federal Civil Code and refused to find for Rengo, claiming that no evidence had been submitted to allow the calculation to be made. As with the trial and Superior Court, this decision was wrong because it continued to apply the Federal Civil Code when it was not even applicable, as if it in some way superseded the CISG. The Circuit Court was also wrong in setting such a high standard for the proof of damages. According to an opinion of the CISG Advisory Council, it would suffice to show the facts in a reasonable manner, not with mathematic precision; otherwise, one of the purposes of the CISG—uniform application—would be undermined, because some countries may have varying standards to prove damages. Such varying standards would in turn invite breach of contracts, undermining the principle of full compensation on which the CISG is based. In this case, that is exactly what has happened. All the courts involved in this matter set the standard unreasonably high, and ruled in accordance with the local "immediate and direct consequence" standard, not the "possible consequence" standard provided for under Article 74 of the CISG.

The Circuit Court, parroting the trial and the Superior Court, opined that seller was not entitled to receive loss of profit damages, because seller had not shown that it had made the pending delivery of goods under the contract. However, buyer's notice that it would no longer receive seller's goods was wrongful avoidance, which freed seller from any pending obligation under the contract and also left its rights to claim damages intact. Furthermore, had seller manufactured the goods (as the court implied was a prerequisite), this would have constituted a violation of the duty to mitigate provided for under CISG Article 77, which I have already addressed. With regard to the claims asserted by

Azteca stemming from what it considered to be a flawed application of Article 375 of the Commerce Code, Rengo was entitled to obtain payment because it was under an obligation to show that it had complied with all of its obligations under the contract—namely, the production of the remaining fifty-eight containers of canned peaches. Buyer also insisted that its fundamental rights were being violated becuase Rengo had not served Azteca with a formal demand for payment, and that therefore the case was not ripe and should have been dismissed. The Circuit Court dismissed buyer's claim—but for the wrong reasons—and simply parroted the argument from the trial and appellate courts regarding the time of payment, but did not mention Article 59 of the CISG, which was also relevant.56

After this sampling of Mexican cases, one should wonder whether this uniform sales law endeavor makes any sense, at least from the Mexican perspective. All of the cases that I have found have been particularly bad examples of CISG application. There was an abundant use (and abuse) of expressions typical of Mexican contract law, as well as excessive court reliance on the Mexican Commercial and Civil Codes and case law interpreting them, even when issues were clearly governed by the CISG. Even in those cases where judges made a grandiose announcement that they would apply the CISG, it would all end in a hollow promise—judges continued to reason their cases based on domestic statutes. From this sample, it was also clear that the lawyers involved in these disputes were not citing the CISG properly, nor were they attempting to persuade judges with foreign case law interpreting the CISG or treatises discussing it. I believe that part of the problem may be cultural. As I have mentioned on other occasions, the responsibility for this abandonment of the CISG cannot be placed on the shoulders of judges alone; some of it must be shared by the Mexican bar and law schools. Law schools must teach the CISG and make it part of their mandatory curricula, and it must also be included by the publishers of commercial statutes in Mexico. Save for one publisher, none of them include the CISG as part of their commercial law compilations. The same problem the CISG faces has also affected other uniform laws that we have adopted. Take for example UNCITRAL's Model Law of Arbitration adopted in Mexico's Commerce Code in 1993. In 2006, the Mexican Supreme Court addressed the issue of Kompetenz-Kompetenz in a manner that caused more than a few eyebrows to rise.57 In a divided decision, the majority held that courts had jurisdiction to address the validity of arbitration clauses, and not arbitrators. The minority cited ample authority, including the Model Law, as well as various rules from major arbitration institutions showing how this was a uniform standard. Unfortunately, the majority was not swayed, and issued a judgment that is contrary to the international consensus that arbitrators have jurisdiction to rule on their own jurisdiction. In another example, Mexico adopted various rules on electronic commerce (clearly inspired by UNCITRAL's Model Law on Electronic Commerce), which were dispersedly included in various statutes such as the Federal and Civil and Commercial Codes and the Federal Code of Civil Procedures. To this date, courts still struggle with the proper weight to be given to electronic communications. In spite of my somewhat bleak assessment, I still believe there is hope. Recent

changes to Mexico's Constitution have incorporated by reference those rights afforded under human rights treaties that Mexico has ratified, which has caused an interesting effect: Mexican lawyers and judges are now becoming aware of the need to take into account these international instruments and now look at decisions from human rights courts. Thequestion is how to replicate this effect in the international commercial law field. I close with two suggestions. First, I propose that UNCITRAL prepare a practical handbook for judges to interpret the CISG and other uniform laws. This could be done in collaboration with other organizations such as UNIDROIT or the Hague Conference on Private International Law, which has published numerous handbooks on the international treaties it has promoted. Second, I propose that UNCITRAL promote training on the use and interpretation of its international treaties and uniform laws to reach the goal of promoting the uniform interpretation of international trade law.