COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW ON THE SECOND DRAFT OF THE “GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS” OF THE ORGANIZATION OF AMERICAN STATES

December 17, 2018

The views stated in this submission are presented on behalf of the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Section of International Law of the American Bar Association (“Section”) respectfully submits these Comments to the Organization of American States (OAS) on OAS’s Second Draft of THE GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS (“Draft”). The Section is grateful for the opportunity to review and comment on the Draft. It welcomes and looks forward to all opportunities to collaborate with OAS, pursuant to the parties’ mutual collaboration agreement.

The Draft was provided to the Section for comment by the Department of International Law, Secretariat of Legal Affairs, OAS, on November 15, 2018. OAS asked that the Section provide comments on or before December 15, 2018, so that the Second Draft could be circulated to the Inter-American Juridical Committee in time for its 94th session on February 18 – 22, 2019. Given the limited time frame in which to assemble a working group, review the Draft, collect draft comments, and prepare a final document, these comments are limited. Several Section members were not available to undertake the work at this time of year and within the allowable time. The Section has assembled a core group to review the Draft and to submit these comments. The Section hopes to expand that working group in the new year to include additional members currently unavailable and to conduct a more comprehensive review in early 2019 in order to generate more comprehensive comments prior to the Section’s Annual Meeting in April 2019.

The Section offers these Comments in the hope that they will assist OAS in finalizing the Draft and timely submitting the Draft to the Inter-American Juridical Committee. The Section is available to provide additional comments or to participate in consultations with OAS as OAS deems appropriate.

Introduction and General Comments

The Section compliments the Rapporteur, drafters, and other contributors, for their well written, well organized, and well researched work. The Draft represents a significant and potentially impactful document in the area of international commercial contracts.
These comments track and refer to the numbered Parts and paragraphs in the Draft. The Section did not read the Draft for style and grammar *per se*, but does note some such errors in an abundance of caution so they are not missed.

**Specific Comments**

**PART ONE**

**¶¶8-9**

The purpose and objectives identified in Paragraphs 8-9 are likely to be difficult to achieve broadly throughout the Americas. Yet harmonization of the law applicable to cross-border commercial contracts is desirable, insofar as it can help facilitate certainty and predictability and can reduce transaction costs. Given the history to date, it seems unlikely that very many more states in the Americas will ratify or accede to the Mexico Convention. Therefore, the approach contemplated here is more likely to get results than continued emphasis on ratification of the Mexico Convention. The stated objective in Paragraph 9 “to guide arbitrators” seems an especially worthwhile goal for the Guide, as international commercial arbitration gains momentum in the Americas, and given that international commercial arbitration is a forum where harmonization of the law can occur by means of decision-making.

**¶11**

The distinction that the Guide is a guide not to the Mexico Convention, but to the law applicable to international commercial contracts in the Americas, is an important distinction. But it also leaves open what the Guide fundamentally is, and it begs the question, is the Guide descriptive or prescriptive? In other words, is this a guide to the law as it is, or the law as it should be? Perhaps it is a little of both.

**PART TWO**

*General comment:* Those reviewing the Guide are not familiar enough with the details of the history of the development of the law in the Americas to provide detailed commentary to this Part Two. This approach provides useful context.

**¶15**

There is a typo in the third line of text: “complimentary” should be “complementary”.

**¶37**

There is a typo in the first line of text in footnote 16: “Members includes” should be either “Membership includes” or “Members include.”

**¶40**

Courts, as well as arbitrators and legislators, will find the OAS effort useful insofar as: 1) relevant law guides courts to respect the parties’ autonomy in selecting governing law as described by this OAS effort, 2) governing law incorporates customs and usages as evidenced by
the OAS effort, and 3) a relevant supranational court such as the InterAmerican Court for Human Rights may rely upon the OAS effort,

PART THREE

¶51

The description here of the drawbacks and limitations of international treaties as a means of securing unification or harmonization of the law is true in part, but fails to acknowledge that sometimes efforts are successful. Part Three offers an example of a relatively successful effort when it refers to the CISG. In addition, the OECD has had success with harmonization of the law in various areas (e.g., anti-bribery law). This should perhaps be acknowledged.

The important questions that are missing in Part Three are: why are some efforts at harmonization through international treaty successful, despite the challenges identified in Paragraph 51? And, importantly, why wasn’t the Mexico Convention successful, as an empirical matter? Paragraph 31 offers a brief possible explanation, but it isn’t empirical or comprehensive. Perhaps further discussion was deliberately omitted as outside of the scope of this Guide, but we are concerned that the matters that limited the success of the Mexico Convention could also pose risks to the broader effectiveness of this Guide.

¶52

Regarding the text of Paragraph 52, please consider revising along the following: “The international treaty may also poses limitations due to the relative inflexibility of this form in responding to changes in commercial practices, which often evolve quite rapidly, as this would require a cumbersome treaty modification process when the treaty has not been drafted to account for changes in commercial practices.”

Explanation: The statement here that international treaties pose limitations due to inflexibility in responding to changes in commercial practices is too strong. While this risk exists, there are ways to incorporate into treaties an ability to respond to changes in commercial practices. Article 9 of the CISG offers an example relating specifically to the role of usage. Articles 6 and 8 of the CISG also build into the CISG a flexibility that defers to party autonomy and party intent and provides courts with the means of using all available evidence to determine the same.

¶60

In the second line of text, change “summarizes” to one of the following: “provides”, “establishes” or “sets forth”. Making that change would lead to further editing of the sentence, for example, as follows:

“It is a uniform law that summarizes establishes the principles, and rules, and uses applicable to those contracts within its scope, reflecting the principles and rules most widely used in international commerce.”

Explanation: The CISG doesn’t merely “summarize” principles or rules. Using the term makes it seem as if the CISG is a restatement. Instead, the CISG operates like a code of its own force.
The United States, for example, has characterized the CISG as a self-executing treaty. And courts around the world apply the CISG directly.

¶64

In footnote 29, replace “See, e.g., Diário de Justiça do Estado de São Paulo (DJE), Appellate Court of São Paulo, case no. 379.981-4/0, 4th Civil Division, Justice Enio Zuliani, published on 21 May 2008” with “See, e.g., Diário de Justiça do Estado do Rio Grande do Sul (DJE), Appellate Court of Rio Grande do Sul, case no. 70072362940, 12th Chamber, Justice Umberto Guaspari Sudbrack, published on 16 February 2017”.

¶68

It is appropriate to express appreciation of the Unidroit Principles of International Commercial Contracts, a continuing effort with roots several decades back: [https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016](https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016). The OAS effort usefully draws on these principles as it addresses the specific needs of the jurisdictions in the Americas.

¶81

In the second line of the Paragraph, “some efforts have made” should be “some efforts have been made.”

¶83

The importance of certain standardized terms, such as Incoterms and UCP, is understated here. This paragraph characterizes such standardized terms as a “partial solution” only and as “limited in scope.” While those statements are not untrue, they fail to credit the effectiveness of these terms. Incoterms and UCP are highly successful, in part, because they are specialized and narrowly focused, and in part, because the organization that promulgates them has the ability to modify them in response to changed commercial circumstances, the very problem identified in paragraph 52 with respect to international treaties.

¶89

Two comments regarding the first sentence of Paragraph 89: Many jurisdictions consider that there are six continents as opposed to five continents; and, the comma following the parenthetical (“New York Convention”) is not needed.

**PART FOUR**

No comments.

**PART FIVE**

¶109

The reference in footnote 54 to the “Restatement of Contracts” should instead be to the “Restatement (Second) of Contracts.”
¶112
In the third line of the section, “domiciled are established” should be “domiciled or established.”

¶142
This paragraph discusses jurisdictions that have one set of rules for domestic arbitration and another set of rules (and in particular the UNCITRAL Model Law) for international arbitration. This sentence begins on the second line of the paragraph:

It is unlikely that in such states simply by means of a declaration made by the parties in accordance with the provisions of Article 1.3 of the UNCITRAL Model Law that they would be able to escape the domestic public policy rules.

Instead of drawing the general conclusion that “It is unlikely,” perhaps the Guide could recommend that care should be taken to review both the domestic and international arbitration rules to see if the parties are permitted to choose the international rules by agreement. It may be difficult to draw a general conclusion given the many different permutations that could arise from dual arbitration legislation.

¶145
Consider adding at the end of Paragraph 145: “Similarly, Article 4(a) of the CISG provides that the CISG does not govern the validity of the contract or of any of its provisions. It also does not govern the validity of any usage.”

¶151
Consider adding: “Article 2(d) of the CISG excludes from its scope sales of stocks, shares, investment securities, negotiable instruments or money.”

¶157
Consider adding at the end of Paragraph 157: “Similarly, Article 4(b) of the CISG provides that the CISG does not govern ‘the effect which the contract may have on the property in the goods sold.’”

PART SIX

¶168
In footnote 74, there is a reference to Incoterms that indicates that under the FOB term, responsibility for the goods passes when the goods “pass over the ship’s rail.” That reflects Incoterms 2000. The current version of Incoterms – Incoterms 2010 – does not refer to the ship’s rail. Instead, under FOB (Incoterms 2010), the risk of loss of or damage to the goods and the responsibility for cost of transport passes when the goods are “on board the vessel.”

¶170
In footnote 75, there should also be reference to Article 2651 of the Argentine Civil and Commercial Code.
Replace “Supreme Court of Rio Grande do Sul” with “Appellate Court of Rio Grande do Sul”.

Replace “The proposed Bill 4.905 remains at an impasse in the Congress.” with “The proposed Bill 4.905 was shelved by the Congress.”

Regarding the reference to the Inter-American Convention on International Commercial Arbitration, consider identifying this convention as (“Panama Convention”) as it is identified in Paragraph 246. This term might also be added to the list of Abbreviations.

**Part Seven**

In the fourth line from the bottom of Paragraph 223, replace “to the parties autonomy” with either “to party autonomy” or “to the parties’ autonomy.”

Replace “the latest proposal to amend the LINDB, Bill 4,905, is currently at an impasse in the Congress” with “the latest proposal to amend the LINDB, Bill 4,905, was shelved by the Congress”.

The discussion of US law in this paragraph focuses on the Restatements. That is appropriate. However, regarding sales of goods, if the transaction is not governed by the CISG (i.e., if the parties opt out of the CISG or the CISG does not apply by its terms), then the Uniform Commercial Code provides governing law in the United States and addresses the issue of party autonomy in Section 1-301.

Consider adding the following to the end of that paragraph: “In addition, for sales of goods not governed by the CISG, Article 2 of the Uniform Commercial Code (UCC), as supplemented by Article 1 of the UCC, will apply. Under the UCC, the parties are free to choose the U.S. state or sovereign nation whose laws will govern their transaction, as long as the transaction bears a reasonable relation to the state or country selected: “Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.” U.C.C. § 1-301(a).

**Part Eight**

No comments.
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Part Nine

No comments.

Part Ten

¶287

The statement at the end of this paragraph that the CISG incorporates an approach known as the Last Shot Rule (i.e., the last document submitted wins the battle of the forms) is subject to debate. While there are some law scholars who interpret the CISG this way, there are open questions regarding the best understanding of the battle of the forms under the CISG. Given the principles of party autonomy (Article 6); the absence of formal requirements (Article 11); and, the use of all available evidence to discern party intent (Article 8(3)), with a preference for subjective (or actual) party intent (Article 8(1)); it is unlikely that the drafters intended a bright-line last-shot rule. Since the Last Shot Rule does not account for the foregoing, it may not be the best way to interpret the formation provisions of the CISG.

The paragraph could be revised by simply deleting everything after “the CISG incorporates a contrasting approach” or by describing the debate over the interpretation of the CISG.

Part Eleven

No comments

Part Twelve

¶310

There is a typo in the final sentence of this paragraph. Because of the use of the negative term “without” before the verb “violating,” the verb should be followed by “either …, or”, rather than “neither …, nor”, which currently appears.

¶314

The approach in the United States varies by state and there are several different approaches. Paragraph 314 makes it seem as if there is one approach. The language should be revised accordingly. One way this could be done is as follows:

Current text:

“In the United States there is still a requirement that the law chosen must be substantially related to the parties or the transaction, or there must be another reasonable ground for the parties’ choice of law.”

Proposed revised text:

“In the United States, the requirement of a connection between the law chosen and either the parties or the contract is determined at the state level and varies from state to state. In those states that follow the Second Restatement, there is still a requirement that the law chosen must be
substantially related to the parties or the transaction, or that there must be another reasonable ground for the parties’ choice of law. However, some states have relaxed this requirement by statute. See, e.g., NY Gen. Oblig. Law § 5-1401(1). And in the context of international commercial contracts, some courts have recognized that a different approach that does not require a connection may be appropriate. See, e.g., M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S. Ct. 1907, 1916 (1972) (giving deference to a choice-of-forum clause choosing a jurisdiction where no connection existed (England) and assuming the English court would apply English law).”

Part Thirteen

¶343

As was the case in Paragraph 314, the final sentence of this Paragraph 343 does not capture the complexity of the state-by-state approach to conflict of laws analysis.

Current text:

“Along these same lines, the United States adopted the flexible formula of the closest connection or most significant relationship.”

Proposed revised text:

“Along these same lines U.S. states that follow the Second Restatement have adopted for non-sale of goods contracts the flexible formula of the closest connection or most significant relationship. For sales of goods not governed by the CISG, Section 1-301(b) of the UCC provides that when the parties have not made an effective choice, the UCC (as codified in that state) ‘applies to transactions bearing an appropriate relation to this state.’”

¶353

Replace “In both instances, the court applied the CISG (in one case even though the CISG had not yet entered into force in Brazil) together with the UNIDROIT Principles as an expression of the “new lex mercatoria.”” with “In both instances, the court applied the CISG together with the UNIDROIT Principles as an expression of the “new lex mercatoria.””

¶356

As was the case in Paragraphs 314 and 343, this Paragraph 356 does not capture the complexity of the state-by-state approach to conflicts analysis.

Current text:

“In the United States, in the absence of an effective choice of law, the court will examine the most significant relationship to determine the applicable law. Specific points of contact will be considered, which must be evaluated according to their relative importance with respect to a particular issue.”
Proposed revised text:

“In the United States, in the absence of an effective choice of law, the court in a state that follows the Second Restatement will examine the most significant relationship to determine the applicable law. Specific points of contact will be considered, which must be evaluated according to their relative importance with respect to a particular issue. For sales of goods not governed by the CISG, the court will apply the UCC as codified in that state if the transaction bears an appropriate relation to that state.”

Part Fourteen

¶435

Please replace the conjunctive term “neither …, nor” with “either …, or”. (The negative “not” prior to the verb “addressed” requires the use of “either/or”). Also, please insert either the word “it” or “dépeçage” after “According to scholarly doctrine,” in order to give the sentence a subject.

Part Fifteen

General comment: It would be appropriate to clarify in this Part Fifteen that flexibility described here relates to flexibility in applying principles of domestic law that are ill-suited for international transactions but does not contemplate the right of the judge or arbitrator to disregard the terms of the parties’ actual bargain.

This section advocates for the use of flexibility in interpreting general principles of law. Support for this proposal cites to the laws of several countries, including Brazil, Panama and Colombia.

A flexible approach is often a foundation of the laws of such countries given that they are code based. Flexibility and good faith accordingly take a central role in such countries given the reality of a code based system. While in the United States the outcome may be no different, the underlying principles are different. The United States, for example, has the principle of stare decisis, and “flexibility” principles, such as the theory of estoppel, are often applied through case law. Courts in the United States have also implied a duty of good faith in the performance of contracts outside the UCC, but good faith is limited to specific duties in the contract. Careful consideration should be given to the difference between code based and Common Law realities, particularly when dealing with the United States where “flexibility” principles take a secondary role the applicable rules of interpretation.

Part Sixteen

¶486

The last two sentences of the Paragraph commencing on line six, are redundant and can be stricken:

The HP Commentary states that this applies, for instance, to the standard of diligence, the place and time of performance or the extent to which the obligation can be performed by a person other than the party liable. The law chosen by the parties also governs matters related to non-performance, such as compensation and the
determination of its amount, specific performance, restitution, reduction for failure to mitigate a loss, or the validity of penalty clauses.

¶493

This Paragraph notes the “delicacy” of treating “burden of proof and legal presumptions” as part of the substantive law governing an international commercial contract due to the “divergences in different laws and in the consideration of them as either procedural or substantive.” Recommendation 16.0 states that the domestic legal regime “should address … burden of proof” in relation to the scope of the applicable law.

Instead of advocating that domestic legal regimes change, it may be more effective to identify the divergences between procedural and substantive laws in many jurisdictions and recommend strategies for addressing or mitigating those divergences. Parties can agree that certain presumptions should govern their contracts and agree to define procedural rules to govern their contractual rights and any dispute arising from those rights.

Part Seventeen

¶502

The Paragraph states:

It is essential for mandatory rules to be codified or legislated, rather than created by case law or developed as customary law. Mandatory rules are applied directly, whereas public policy as derived by case law or custom usually constitute that part of public policy that has a defensive function.

These sentences are not clear to us. There are jurisdictions where case law develops mandatory rules and is not limited to a defensive function. If the Draft aims to disapprove of such mandatory rules it should consider offering substantive reasons for the disapproval. Is the Guide advocating policy or attempting to restate the law in general?

¶503

The reference in Paragraph 503 to a “corrective function” seems to refer to or include the “defensive function” referred to in Paragraph 502, but the references are not clear to us. Perhaps the interrelationship between these two Paragraphs can be amplified.

¶533

The text in this paragraph states that the applicable Article of the Civil and Commercial Code is number 2561; we believe the Article intended is Article 2651, as Article 2651 deals with public policy in domestic law in Argentina.

Part Eighteen

No comments.
ANNEXES

No comments.

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