South Carolina Bar
Continuing Legal Education Division

Fundamentals of International Law: The SC Bar/ABA International Law Bootcamp

18-26

Friday, October 5, 2018

presented by
The South Carolina Bar
Continuing Legal Education Division

http://www.scbar.org/CLE

SC Supreme Court Commission on CLE Course No. 187140

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Fundamentals of International Law: The SC Bar/ABA International Law Bootcamp

Friday, October 5, 2018

This program qualifies for 6.5 MCLE Credit Hours, including up to .5 LEPR Credit Hour.
SC Supreme Commission on CLE Course #: 187140

Program Agenda

8:30 a.m. Registration & Continental Breakfast

8:55 a.m. Welcome and Opening Remarks
Chris M. Campbell
Willoughby & Hoefer, P.A.

9:00 a.m. Overview of Private International Law Practice
Doug W. Kim
Douglas Kim Law Firm, LLC

H. Scott Fairley
Cambridge LLP

9:15 a.m. Choice of Law and Forum
Chris Macleod
Cambridge LLP

Val H. Stieglitz, III
Nexsen Pruet, LLC

10 a.m. International Contracts: Including the CISG
Mica N. Worthy
Cranfill Sumner & Hartzog

10:45 a.m. Break

11 a.m. International Litigation (and what to watch for)
Chris Macleod
Cambridge LLP

H. Scott Fairley
Cambridge LLP

Henry M. Burwell
Nelson Mullins

11:45 a.m. The GDPR and yEU
Chris M. Campbell
Willoughby & Hoefer, P.A.

Doug W. Kim
Douglas Kim Law Firm, LLC

12:30 p.m. Lunch
Sponsored by the ABA

1:30 p.m. International Anti-Corruption
Chris Macleod
Cambridge LLP

Naana Frimpong
King & Spalding

2:15 p.m. Obtaining Evidence in Canada for Use in U.S. Proceedings
Chris Macleod
Cambridge LLP

3:30 p.m. Break

3:45 p.m. International Arbitration
H. Scott Fairley
Cambridge LLP

Sara Burns
King & Spalding

4:30 p.m. International Ethics & Cultural Issues
Prof. Aparna Polavarapu
University of South Carolina School of Law

5 p.m. Adjourn

Fundamentals of International Law: The SC Bar/ABA International Law Bootcamp

SPEAKER BIOGRAPHIES
(by order of presentation)

Chris M. Campbell
Willoughby & Hoefer, P.A.
Columbia, SC
(course planner)

A native of Columbia, South Carolina, Chris focused his academic training and experience in the field of international business law, particularly international commercial arbitration. Having studied and worked on multiple continents regarding these matters, Chris brings a global perspective in resolving disputes. Prior to joining Willoughby & Hoefer, Chris worked for law firms in Beijing as a member of those firms' cross-border mergers and acquisitions and international arbitration teams. Chris also studied comparative English Law and commercial arbitration at the Gray's Inn of Court in London.

In the spring of 2015, Chris was appointed as an observer-delegate to the United Nations Working Group on Electronic Commerce in New York, on behalf of the Willem C. Vis Moot Alumni Association. Chris competed in the Vis Moot Court Competition for Tsinghua University in 2015 and coached the team in 2016.

Upon returning to the United States, Chris served as the inaugural law clerk to the Honorable Jocelyn T. Newman of the Fifth Judicial Circuit of South Carolina. During his time as a judicial clerk, Chris observed both civil and criminal trials, corresponded with parties and assisted the judge in managing the courtroom and drafting orders. During his clerkship, Chris was appointed as an attorney-arbitrator for the South Carolina Judicial Department on Property Damage Liability Claims. As a result of his academic experience, and business consulting background, Chris aims to offer our clients practical business insights to resolving disputes and legal conflicts.

During his undergraduate studies, Chris was a member of the Gamecock Track & Field team and made several Southeastern Conference (SEC) championship appearances. He was also selected as a SEC Brad Davis Community Service Scholarship recipient in 2012.

Doug W. Kim

Douglas Kim Law Firm, LLC
Greenville, SC

Doug Kim is a Intellectual Property Attorney where he concentrates on counseling companies concerning the protection and enforcement of intellectual property rights as well as assisting in enhancing intellectual property portfolios to increase company worth. He advises clients as to the creation, management and protection of intellectual property and assets and assists in the development of an intellectual property protection plan to create intellectual property portfolios.

Doug's practice includes patent preparation and prosecution, particularly in software, method, and mechanical patents. He works in many industries including casino industry, slot machines, expert systems, Internet encryption systems, color processing, manufacturing, nuclear power, medical imaging, healthcare providers, automotive, automotive accessories, compute networking, color calibration, vehicle tires and the golf industry.

Doug's trademark and service mark preparation and prosecution practice includes the following industries: golfing, aviation, gaming, healthcare, color management, mattresses, nuclear waste processing, nuclear engineering, food service industry, retail and wholesale of a multitude of goods and services, manufacturing, photo film, security systems, encryption, power plant maintenance, property rental, software development, legal services and interior design.

Doug's copyrights practice includes applying for and securing copyright registrations in areas that include Geographical Information Systems (GIS), software, books, music, product packaging, and distribution.

H. Scott Fairley

Cambridge LLP
Toronto, ON, Canada

H. Scott Fairley is a partner at Cambridge LLP. He received his B.A. in 1974, and LL.B in 1977, from Queens University. He has also received his LL.M in International Legal Studies from New York University in 1979, and his S.J.D. in international and constitutional law from Harvard University in 1987. He has been a Fellow of the Chartered Institute of Arbitrators (FCI Arb) since 1999. Scott was called to the bar in 1982. In 2015, he received the Ontario Bar Association Award of Excellence in International Law.

Within the profession, he has been a leader in various organizational capacities: National Section Chair for both constitutional law (1991-93) and international law (1998-2000) in the Canadian Bar Association, past-president of the Canadian Council on International Law (1992-94), and Co-Chair (2006-08) and Senior Advisor (2010-) of the Canada Committee in the International Law Section of the American Bar Association.

Scott has represented numerous government and private entities at all levels of Canadian federal and provincial courts, with extensive experience in the Supreme Court of Canada. He has acted as

counsel and given expert evidence in the U.S. Federal Courts; and has served as counsel and as an arbitrator, respectively, in international and domestic arbitrations.

Dr. Fairley holds the highest rating by Martindale-Hubbell, an "AV" rating, which categorizes him a lawyer with, "very high to preeminent legal ability."

In addition to extensive litigation experience at all levels of court, including the Supreme Court of Canada, Dr. Fairley has arbitrated domestic disputes and received multiple appointments from the Canadian Transportation Agency. He has also served as counsel in institutionally administered international arbitration. Dr. Fairley is a founding director of the Canadian Branch of the Chartered Institute of Arbitrators, 2018.

A previous appointee of the Government of Ontario to the standing Panel and Appellate Body rosters under the AIT, Dr. Fairley was re-appointed to the equivalent rosters under the Canadian Free Trade Agreement, effective 1 July 2017.

Chris Macleod

Cambridge LLP
Toronto, ON, Canada

Chris MacLeod is a founding Partner of Cambridge LLP. His practice focuses on complex business litigation including cross-border dispute resolution, multi-jurisdictional litigation, and private international law. He is the chair of the firm's Chinese Services Group.

Chris is a frequent speaker and writer on topics relevant to cross-border litigation, conflict of laws and private international law. He has appeared before all levels of Court in the Province of Ontario, including the Ontario Court of Appeal. He has also appeared before the Supreme Court of Canada as co-counsel for an intervenor in Canada (Prime Minister) v. Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44

<u>Organizations & Activities</u>

- Director of OFELAS GROUP
- Chair, Toronto Chapter of the New York State Bar Association, International Section
- Ontario Bar Association (Elected to the Executive of the International Section)
- Co-Founder of the National Council for the Protection of Canadians Abroad (NCPCA)
- Hamilton Law Association (Member)
- Law Society of Upper Canada (Admitted)
- Canadian Bar Association
- American Bar Association (Member of the International Law Section and Canada Committee)
- Advocates' Society (Member)

Val H. Stieglitz, III

Nexsen Pruet, LLC
Columbia, SC

Val H. Steieglitz has practiced at Nexsen Pruet, LLC, since 1984, where he served for 15 years as Chair of the Litigation Practice Group and currently co-Chairs its International Group. He has been a longtime member of the International Association of Defense Counsel, an international group of litigation attorneys, where he has chaired the Business Litigation, Intellectual Property, and ADR Committees and has been a frequent presenter. He also served two terms on the Board of Directors of LA World, an international legal network. Mr. Stieglitz has undergraduate and graduate degrees in International Relations from the University of South Carolina. He has been recognized in *Best Lawyers in America* and *Super Lawyers*, as well as *Best Lawyers in the Midlands* in the area of International Law. He represents a wide range of Chinese and European companies in their US-related matters and has been a frequent speaker at legal seminars throughout China and Europe.

Mica N. Worthy

Cranfill Sumner & Hartzog LLP
Charlotte, NC

Mica serves as legal counsel to clients in the aviation and global supply chain industries, representing airports, general aviation companies, FBOs, and manufacturing, technology, and service companies. She has experience with assisting clients in defending claims involving products liability, aviation accidents, personal injury, and wrongful death claims, as well as providing analysis of issues involving aviation expert witness challenges, aircraft valuation and damages, and contract dispute resolution.

As a Certified Global Business Professional (NASBITE), Mica has a specific focus on assiting global clients with their international operations including trade issues, international contracts, trade credit payment disputes, interational arbitration, and dispute resolution. Mica is a founding Board Member of the Charlotte International Arbitration Society, and has served as Chair of the N.C. Bar Association's International Law & Practice Section. She is also currently a member of the Carolinas World Trade Association, and she has been accepted to join the International Association of Defense Counsel (IADC)

Mica is a graduate if Campbell University's Norman A. Wiggins School of Law and graduate of the 9th Cologne Academy on International Commercial Arbitration in Cologne, Germany. Her primary practices are in Aviation, Business Disputes & Litigation, and Construction.

Henry M. Burwell

Nelson Mullins
Greenville, SC

Buzz Burwell is a senior partner of the Corporate/Securities/Tax Division and co-leader of the International Practice Group and the Defense Industry Practice Group. He is a member of the additional firm practice groups to include Automotive, Aviation, Digital Blockchain Technology, Immigration and Government Contracts.

Education

University of North Carolina School of Law, JD (1976)

Founder and Editor in Chief, North Carolina Journal of International Law & Commercial Regulation (1976)

University of North Carolina at Chapel Hill, MBA (1976)

University of North Carolina at Chapel Hill, BA (1967)

Naana A. Frimpong

King & Spalding LLP
Atlanta, GA

Naana is counsel in King & Spalding's Special Matters and Government Investigations Practice. She has broad experience representing clients in white-collar criminal defense matters, internal corporate investigations and government enforcement actions (in particular with regard to the Foreign Corrupt Practices Act), international arbitration and international disputes generally. Prior to her time at King & Spalding, she was an Assistant United States Attorney in Chicago where she was the lead attorney on numerous federal felony investigations and successfully conducted multiple jury and bench trials and briefed and argued appellate briefs. Prior to her time as a federal prosecutor, Naana worked as a senior associate in the New York office of Debevoise & Plimpton LLP where her key representations included the Audit Committee of Siemens AG (a Munich based multinational in the second largest ever FCPA investigation), Toyota Motor Sales USA (in connection with state and federal investigations into the unintended acceleration of Toyota vehicles) and the Government of Ghana (in connection with a series of ICC arbitrations initiated by a Lichtenstein-based company).

She is originally from Ghana, though raised in Botswana. She obtained her law degree from Yale Law school and her undergraduate degree from Amherst College. She also received a master's degree in international criminal law and justice jointly offered by the University of Torino & the United Nations Interregional Crime and Justice Research Institute. She is on the Development Committee of the Women's White Collar Defense Association, a term member of the Council on Foreign Relations and a member of the American Society of International Law.

Sara Burns

King & Spalding LLP
Atlanta, GA

Sara Burns is a Senior Associate in King & Spalding's Atlanta office and a member of the firm's Contracts and Business Torts and International Arbitration practices.

Her practice focuses on dispute resolution, including investor-state arbitration, commercial arbitration, and commercial litigation. She has represented sovereign and corporate clients, in proceedings under the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank, the United Nations Commission on International Trade Law (UNCITRAL), the American Arbitration Association (AAA) and its International Centre for Dispute Resolution (ICDR), and before U.S. federal courts.

Sara practiced at the law firm of White & Case LLP before joining King & Spalding in February 2014.

Prof. Aparna Polavarapu

University of South Carolina School of Law
Columbia, SC

Aparna Polavarapu is a professor at the University of South Carolina School of Law, where she teaches courses in Transnational Law, Rule of Law, Comparative Law, and International Human Rights Skills. Professor Polavarapu has significant field experience in sub-Saharan Africa, which contributes to her scholarship. She researches issues pertaining to women's rights, indigenous rights, and the interaction between statutory and customary law in sub-Saharan Africa. Her expertise in local and informal legal systems affords her insight into how cultural mechanisms impact negotiations and project implementation. In addition to her academic work, she has lectured on rule of law issues for various government agencies, and prepared expert reports for various organizations with international focus, such as the United Nations Foundation. Prior to coming to the University of South Carolina, Professor Polavarapu was a teaching fellow at Georgetown Law, and prior to that, she practiced law in Boston, at a firm now known as Locke Lord LLP. She has a JD and LLM from Georgetown Law, a Masters in Law and Diplomacy from the Fletcher School at Tufts University, and a BS from the Massachusetts Institute of Technology.

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Overview of Private International Law Practice

Doug W. Kim
H. Scott Fairley

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Choice of Law and Forum

Chris Macleod
Val H. Stieglitz, III

Choice of Law and Forum

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Chris MacLeod
Partner, Cambridge LLP

Val H. Stieglitz
Member, Nexsen Pruet, LLC

CAMBRIDGE LLP

Why Does The Forum Matter?

- ***Different legal forums employ very different systems and structures for resolving disputes.***
- ***Costs and efficiency can vary markedly between different forums.***
- ***The forum can have an impact on another county's willingness to recognize a judgment from that forum.***

Choice of Forum Clause – Treatment in Canada & US

- ***Momentous.ca Corp. v Canadian American Assn. of Professional Baseball Ltd.***
  - The court retains discretion as to whether to enforce a forum selection clause
  - However, there must be "strong cause" for deviating from a properly drafted forum selection clause
- ***M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).**
  - Seminal case in the U.S. holding that a valid forum selection clause, even designating a foreign country, is presumptively enforceable.

Why Does Choice of Law Matter?

- *Significant differences in procedural and substantive laws*
- *Significant differences in remedies / damages*
- *Significant differences in administrative and case-management environments*

All of which can affect the outcome of the case

Security for Costs in Canada

R. 56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

(a) The plaintiff or applicant is ordinarily resident outside Ontario;

Security for Costs

To Make a Security for Costs Order Less Likely (remains discretionary):

- Insert a clause in Contract indicating that Canadian contracting party waives any claim to security for costs in the event of litigation in Canada
- (Ask our office for precedent clauses)

Historic Approach Re Enforcement of Foreign Injunctive Orders

CANADA:

- Foreign injunctive Orders were said to offend the traditional rules that required judgments to be:
  - for a ***fixed and ascertained sum*** and
  - to be ***final and conclusive***

Pro Swing Inc. v. Elta Gold Inc. at the Supreme Court

Pro Swing Inc. v. Elta Golf Inc 2006 SCC 52

- At a trial, Ohio Injunctive Order found to be enforceable in Ontario
  - *Morguard, Hunt, Beals* etc. principles apply to non-monetary judgments
  - Injunctive Order in this case final and conclusive

- On Appeal to the SCC, Ohio Injunctive Order found ***Not*** to be Enforceable in Ontario on its facts:
  - Ambiguous in respect of material matters

- SCC recognized that comity and liberalization of enforcement should allow the enforcement of injunctive relief cross-border in certain cases

Pro Swing Inc. v. Elta Gold Inc. Applied Successfully

Johnson & Johnson v Butt, (2007) CanLII 51527 (ONSC)

- New York Court's order freezing the assets of Ontario residents in Ontario bank accounts was enforceable in Canada

Bienstock v Adenyo Inc. (2014) CanLII 2014 ONSC 4997

- Cambridge LLP successful in having a constructive trust order enforced Cross-Border in a Multijurisdictional fraud case.

Enforcing Foreign Judgments in the U.S.

- The U.S. is not a signatory to any convention or treaty requiring the recognition and enforcement of foreign judgments.
- Therefore, recognition and enforcement is governed by individual State law (no Federal statute)
- A majority of states have adopted the Uniform Foreign-Country Money Judgments Recognition Act, which provides standard procedures for recognition and enforcement of foreign judgments.
  - Party seeking enforcement must show that the judgment is conclusive, final and enforceable in the country of origin
  - Will not be recognized if the court of origin was not impartial, does not recognize due process, or lacked subject matter jurisdiction or personal jurisdiction
- In States that have not adopted the uniform act, or where the act does not apply (i.e. non-monetary judgments such as injunctions), Courts generally apply principles of comity in recognizing foreign judgments.

Forum *Non Conveniens / Canada*

Where Jurisdiction Simpliciter exists, the jurisdiction may not be the most appropriate for the case.

The Test: Is there a clearly more appropriate forum? Factors:

1. The location where the contract in dispute is signed;
2. The applicable law of the contract;
3. The location of witnesses, especially key witnesses;
4. The location of the bulk of the evidence;
5. The jurisdiction in which factual matters arose;
6. The residence or place of business of the parties; and
7. The loss of legitimate juridical advantage.

Sullivan v. Four Seasons Hotels Ltd. 2013 ONSC 4622

Choice of Jurisdiction: Practical Considerations

Where More than One Jurisdiction is Possibly Legitimate

- Substantive Law Advantages + Disadvantages of Jurisdictions
- Procedural Law Advantages + Disadvantages of Jurisdictions
- Costs Advantages + Disadvantages of Jurisdictions

Choice of Jurisdiction: Practical Considerations

	Ontario Jurisdiction	Foreign Jurisdiction Example U.S.A.
Documentary Discovery	Limited – Proportionality No Subpoena right	Broad Discovery most states
Examinations/ Depositions	Limited – Proportionality 7 hours, 1 witness	Broad Depositions, Experts, Multiple witnesses
Substantive Law	Mareva Injunctions Anton Piller Orders	Broader range of causes of action
Judgment Enforcement cross-border	Foreign judgments readily enforceable, very limited defences	Varies across the country but CDN judgments readily enforceable
Costs/Fees Recovery	Partial or substantial indemnity/ rule 49 offers	Limited in most cases
Summary Judgment	Hryniak v Mauldin 2014 SCC 7 Advantageous to SJ	Exists but generally a “loose” standard

Choice of Jurisdiction: Practical Considerations

	Ontario Jurisdiction	Foreign Jurisdiction Example U.S.A.
Forum Selection Clause	Favoring Ont? Case law re "exclusivity"	Favoring U.S. jurisdiction?
Choice of Law Clause	Favoring Ont?	Favoring U.S. jurisdiction?
Witnesses	Location and Importance	Location and Importance
"Negligence Effect"	Canadian parties/lawyers are still occasionally failing to defend U.S. lawsuits	U.S. parties/lawyers are still occasionally failing to defend Canadian lawsuits
Damages Differences	Generally Less!	Damages for PI much higher; Treble Damages; Higher punitive

Arbitration As Alternate Forum

- The U.S. is a signatory to the New York Arbitration Convention, which provides that the U.S. will recognize foreign arbitral awards.
- Preeminent international arbitral institutions include:
  - The International Court of Arbitration of the International Chamber of Commerce ("ICC") – based in Paris
  - The London Court of International Arbitration ("LCIA") – based in London
  - The International Centre for Dispute Resolution ("ICDR") – a part of the American Arbitration Association; frequently used for arbitrations in the U.S. or by U.S.-based parties
  - The Hong Kong International Arbitration Centre ("HKIAC") – based in Hong Kong; one of the most well known international arbitration institutions in Asia
  - The Singapore International Arbitration Centre ("SIAC") – based in Singapore; well known in Asia and the Indian sub-continent
- However, there are approximately 175 arbitral institutions worldwide, many of which focus on a particular subject matter and/or geographic area

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International Contracts: Including the CISG

Mica N. Worthy

CRANFILL SUMNER & HARTZOG LLP

International Contracts Including the CISG

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Types of International Contracts

- Purchase Orders
- Distributor agreements
- Export documents (quotations, pro formas, commercial invoices)
- Focus today: **International Sales Contracts**

What is expected in international sales contracts?

- Identification of the parties
- Description of the goods: Quantity, Quality, any specific requirements of the goods (sample?)
- Price
- Terms of Delivery (INCOTERMS)
  - Packaging and labeling requirements
  - Address/location of delivery
- Terms of Payment (Letter of credit)
  - Documents required prior to payment
  - Timing (inspection period)
- Signature of representative with authority for each party

What is expected in international sales contracts?

- Contract "Terms and Conditions"
  - Warranties from the seller
  - No oral modification clause
  - Merger clause
  - Dispute resolution clause: Forum selection / **Arbitration clause**
  - Choice of Law clause
  - Severability clause
  - Terms for notice of breach/ non-conformity, and allowance for the party to cure

What is expected in international sales contracts?

- Arbitration clause:
  - *Ad hoc* or institutional
  - "Step clauses": prerequisite negotiations, mediation or other dispute resolution options
  - Seat/ Venue
  - Number of arbitrators
  - Language(s) of the proceedings
  - Confidentiality
  - Limitation or expectations in discovery

What is the CISG?

- United Nations **Convention** on the **International Sale** of **Goods (CISG)**
  - Sales law promulgated by UNCITRAL
  - Treaty – Ratified by the U.S. in 1986 (Effective 1/1/1988)
  - Supremacy Clause "Law of the Land"
  - 89 Contracting States

Text: http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf

Applicability of the CISG

- Is the contract **international**?
- Does it involve the **Sale of Goods**?
- Have the parties **opted out**?
- Is the subject matter at **issue governed** by the CISG?
  - If governed, is it "governed but not settled"

Applicability of the CISG- "Internationality"

CISG Art. 1(1)

a) "Place of business" of each party is in a different state that is a Contracting State;

b) Conflicts of laws /private international law lead to the law of a Contracting State.

Applicability of the CISG- "Sale of Goods"

- Transfer of a property right in a MOVEABLE thing
- Does not include Services
- CISG Art. 2: Does not apply to certain sales:
  - Personal, Family, Household use (consumer claims)
  - Auction
  - Stocks, Shares, Investment securities, Negotiable Instruments or Money
  - Ships, Vessels, Hovercraft, Aircraft*
  - Electricity

Applicability of the CISG- "Opting-Out"

- "Law of the State of S.C." may not be sufficient to opt out.
  - SC law is the US treaty law per the Supremacy Clause
  - *Asante Techs. Inc. v. PMC-Sierra, Inc.* "Laws of the State of California" was not enough to opt-out.
  - **The parties must expressly state that the CISG does not apply.** *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Tech. Fabrics Canada Ltd*.
  - **Merely designating a choice of law is insufficient, without more, to show a clear intent to opt-out**. **It preempts state common law and the UCC.** *Honey Holdings I, Ltd. v. Alfred L. Wolff, Inc.*
  - Similar case law in France, Germany, Austria, and Switzerland

Applicability of the CISG- "Subject matter governed"

- CISG Art. 4 – Formation of the contract, and the rights and obligations of the parties in the contract.
- Excludes:
  - Validity of the contract;
  - Effect which the contract may have on the property of the goods sold (title);
  - Personal injury or death caused by the goods. (CISG Art. 5)

Why might a client want the CISG to apply?

- Eliminates conflicts of laws dispute
- Takes the international nature of the transaction into consideration
- Provides for flexibility
- Provides more certainty potentially

CISG Part I - IV

- **Part I:** How and when to use the CISG (Sphere of applicability)
- **Part II:** Formation of international sales contracts
  - Offers generally revocable until acceptance is dispatched, unless the offeror indicated "irrevocability"
  - Generally applies the "mirror image" rule (Offer and acceptance must match) = battle of the forms

CISG Part I - IV

- **Part III:** Substantive rules for export and import of goods:
  - **Seller:** Right goods must be delivered at the right time and place; Must be fit for ordinary purposes and for any particular purpose made known to the seller
  - **Buyer:** Accept delivery, make timely payment.
  - Passage of Risk: Last "significant act" by the seller to complete delivery = risk passes to Buyer
  - Anticipatory Breach; Termination of Contract (Fundamental breach)
  - Remedies for breach
- **Part IV**: Final provisions – Signatures and ratification of the Convention; Reservations allowed (Art. 95 to exclude application of Art. 1(1)(b).)

CISG compared to the UCC

- **Statute of Frauds-** No $500 threshold for written contracts; Oral/Verbal contracts can be held binding.
- **SC Parol Evidence Rule:**

The parol evidence rule states that "where the terms of a written instrument are **unambiguous, clear and explicit,** extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary or explain its terms." *Ray v. South Carolina Nat'l. Bank*, 281 S.C. 170, 314 S.E.2d 359 (1984). In certain situations of **ambiguity of terms**, parol evidence may be used to explain the terms of the agreement.

Mica Worthy
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Comparison of the CISG and UCC

- Incorporation of “good faith” in both
- Concurrent remedies
- Acceptance- “Mail box” vs. “Receipt” rules; Late notice
- Breach of contract- Fundamental
- Specific Performance

Challenges to expect when applying the CISG

- No true “precedent” exists
- “Lex Mercatoria”- International Common Law (like an industry standard) are not binding on parties.
- Cultural differences
  - How contracts are perceived (matter of assurance vs. matter of trust)
  - How contracts are concluded (finalized in writing vs. ever changing)
  - How damages are to be assessed (planned-for damages vs. “cross the bridge when we come to it” mentality)
  - What is included in contracts (everything but what is excluded specifically vs. only what is written is allowed)

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Fundamentals of International Law: SC Bar/ABA International Law Bootcamp
International Contracts including the CISG

I. International Contracts

There are many types of contracts that global companies use in their international transactions. For this paper, we will focus on international sales contracts and the application of international sales law. The United Nations Convention on Contracts for the International Sale of Goods (CISG) is considered the substantive law of a contract, applicable to the merits of the case. Its usage in the parties' contract may be the result of the choice of law clause or the application of the Convention itself, as more fully described in this paper.

International contracts should also include provisions that address the procedural law of dispute resolution mechanisms, which will determine how the dispute resolution process will be initiated and concluded. For example, an international sales contract should include a forum selection clause, which would provide the jurisdiction to a specific court or require arbitration or some other dispute resolution mechanism. If there is an arbitration clause, this clause should also provide jurisdiction to a specific form of arbitration, either *ad hoc* or institutional. Even in arbitration, there may be ancillary proceedings that still need to take place before a court (e.g. Motion to Compel Arbitration, Motion to Confirm Arbitral Award, Motion for Interim Relief). The court that hears these matters is determined by the "seat" of the arbitration, as opposed to the venue, where the hearings may be heard. An arbitration can be "seated" in one country and have the hearings venued in another.

The seat of the arbitration actually determines the procedural law, the "lex arbitri." If the "seat" is in North Carolina, for example, the International Commercial Arbitration and Conciliation Act provides the rules by which the arbitration will be handled and will help address any issues related to procedure that are not explicitly dealt with in the contract.[1] If the "seat" is in South Carolina, the S.C. Uniform Arbitration Act may apply under certain circumstances, although it does not specifically address international contracts.[2] Generally, however, if the parties have elected for institutional arbitration (such as arbitration through AAA, ICDR, JAMS, etc.) then the procedures and rules of the specific institution will be used for the process of the arbitration. To the extent there is any gap in the rules, then the domestic law of the "seat" again will apply to the parties' arbitration.

In international sales contracts it is common to find that the parties prefer international arbitration over litigation for several reasons. A primary reason to resort to arbitration is to provide a "neutral forum" in which one party does not have a substantial advantage over the other. As an example, if one party is located in and has the language capability in China and the other is located far away with very little language capability, perhaps the U.S., it is often seen as undesirable to require litigation in China as a dispute resolution mechanism for the parties' contract. The parties may instead seek to select a neutral forum, for example Singapore, which would require both parties to travel and incur some costs should they have to pursue a dispute resolution mechanism.

[1] https://www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_1/Article_45B.html
[2] https://www.scstatehouse.gov/code/t15c048.php

Interestingly, the parties need not have any connection to or manner in which to establish jurisdiction in the courts of Singapore, but they would still be able to arbitrate there regardless of the nationality of the parties involved. Singapore also has a very effective institution that administers international arbitrations, the Singapore International Arbitration Center (SIAC). Consequently, the parties may seek to require in their contract that their disputes be administered in arbitration by SIAC, due to its reputation as being an efficient way for parties to resolve their disputes, as opposed to international litigation.

Additionally, and perhaps most importantly, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") would allow an award from an arbitration proceeding to be enforceable in either country, as opposed to a foreign judgment. Therefore, it is often more desirable for the parties to agree to international arbitration. Specifically, by agreeing to international arbitration with a party who is also signatory to the New York Convention, the parties should both understand that the likelihood of having an arbitral award set aside or refused by a court in either country is very unlikely, and as a consequence the percentage of voluntarily paid arbitration awards is much higher.

Another advantage of arbitration is the confidentiality of the proceedings. Many countries consider court proceedings open to the public, and absent a protective order in place, the details of a company's financial and business information may become known to third parties unrelated to the dispute. Most arbitrations require confidentiality either by the rules or by the parties' designation in the contract, such that a business' sensitive information remains undisclosed throughout the proceedings. There are some exceptions, with regard to investment treaty arbitration, but for international commercial arbitrations, the parties are generally able to keep their arbitration proceedings confidential.

Based on these factors, parties to international sales contracts generally prefer international arbitration as a dispute resolution mechanism. However, there are other dispute resolution mechanisms that can be considered in international business transactions, and which may be best suited for discussion with an attorney based on the client's needs.

II. Application of the CISG

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was promulgated by the United Nations Commission on International Commercial Law (UNCITRAL).[3] UNCITRAL examined the commercial laws of the various signatory countries and created the CISG in an effort to unify and harmonize the contract laws to facilitate international trade. UNCITRAL provides that the purpose of the CISG is "to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs."[4]

Historically, the CISG is a successor to two other international commercial treaties, the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Convention Relating to a Uniform Law for the International sale of Goods

[3] http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf
[4] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

(ULIS). Both of these predecessor treaties were promulgated under the International Institute for the Unification of Private Law (UNIDROIT).

The CISG is not a self-executing treaty, meaning that the signatory countries must not only sign the treaty, but they must also take the steps necessary under the domestic law to have the treaty ratified to become enforceable under its laws. Eleven contracting states signed the CISG on January 1, 1988, which was the effective date of the treaty. Currently, there are 89 countries that have become parties to the CISG, having signed and ratified the treaty. For these signatory States, this means that if a company is operating one CISG Country is doing business internationally with another company from another CISG County, then the default law that would apply to the parties' contract will be the CISG, unless the parties require an alternative substantive law and effectively "opt out" of the CISG. This result is irrespective of Conflicts of Laws analysis or the differing legal traditions or level of economic development between the parties.

The United States ratified the CISG treaty in 1986 and it became effective January 1, 1988. Under the Supremacy Clause of the Unites States Constitution, the CISG is therefore "the law of the land." Importantly, no further action by the individual states is required in order for the CISG to apply. Consequently, the CISG automatically applies to international contracts in all 50 states, including North and South Carolina.

In determining the applicability of the CISG to a particular contract, there are several considerations outlined in the Convention specifically. The first is whether the contract is considered "**International**." Additionally, it must be considered whether the contract actually involves the "**Sale of Goods**," and not a service contract. Furthermore, the contract must be viewed as to what substantive law the parties intended to be applied to the contract. If they have officially **"opted out" of the CISG** and applied some other sales law (such as the U.C.C.), then the CISG will not apply. Finally, the question of whether the **subject matter at issue is governed by the CISG** must also be taken into consideration. If the subject matter is governed but not settled, the CISG may still apply to the subject matter of the parties' dispute.

With regard to the "**internationality**" of the CISG, Article 1(1) states that the Convention applies between "parties whose places of businesses are in different [contracting] States," or the CISG may be applicable as a result of the application of the Conflicts of Laws/Private International Law leading to the law of a Contracting State.

The CISG does not actually define what constitutes a "place of business" of a company, but several courts have interpreted the phrase to mean, "the place from which a business activity is *de facto* carried out."[5] Despite the various interpretations of this phrase, it is understood that the

[5] http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf p. 4; Oberlandesgericht Hamm, Germany, 2 April 2009, at www.cisg-online.ch; CLOUT case No. 867 [Tribunale di Forlì, Italy, 11 December 2008]; CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005] ; CLOUT case No. 904 [Tribunal cantonal du Jura, Switzerland, 3 November 2004] ; CLOUT case No. 746 [Oberlandesgericht Graz, Austria, 29 July 2004] ;Tribunale di Padova, Italy, 25 February 2004, Oberlandesgericht Stuttgart, Germany, 28 February 2000, Internationales Handelsrecht, 2001, 66; CLOUT case No. 608 [Tribunale di Rimini, Italy, 26 November 2002] ; "Place of business" requires the parties to "really" do business out of that place, see CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].

Convention does not apply to parties with their "places of business" in the same County, even if they are of "different nationalities."[6]

Alternatively, if the laws of private international law lead to the application of a law of a Contracting State, then the CISG will apply. Under the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the standard is the law "most closely connected" to the contract.[7] However, under the 1955 Hague Convention, absent a choice of law in the contract, the law of the seller applies.[8] Importantly, the CISG also allows Signatory or Contracting States to opt out of this part of the "internationality" Article by making an "Article 95" reservation. A Signatory State that makes an Article 95 reservation limits the application of the CISG, absent a choice of law provision in the contract, to the first instance where both parties are Signatories to the CISG.

With regard to the "**Sale of Goods**" requirement, scholars generally define this term as "the transfer of a property right in any 'moveable' thing." Service contracts are specifically excluded. Mixed contracts are more difficult to interpret, but courts have generally applied the CISG in mixed contracts so long as the service component does not constitute a "preponderant part" of the seller's obligations.[9] Article 2 of the CISG also specifically excludes sales that contain: personal, family, household use (consumer claims); auction; stocks, shares, investment securities, negotiable instruments or money; ships, vessels, hovercrafts, aircraft; and electricity. Additionally, most courts have determined that the CISG does not apply to distribution agreements.[10] Goods are not necessarily tangible items, as some software, computer hardware and even data has been deemed a "good" under the Convention.[11] However, by way of examples, certain intangibles that have been

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[6] *Vision Systems, Inc. v EMC Corporation*, 1 Mass.L.Rptr. 139 (28 February 2005); 2005 WL 705107.

[7] CLOUT case No. 81 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994] ; Landgericht Düsseldorf, Germany, 25 August 1994, Unilex; Rechtbank Roermond, Netherlands, 6 May 1993, Unilex; CLOUT case No. 316 [Oberlandesgericht Koblenz, Germany, 27 September 1991] ; CLOUT case No. 1 [Oberlandesgericht Frankfurt a.M., Germany, 13 June 1991].

[8] Rechtbank Hasselt, Belgium, 9 October 1996, Unilex; Rechtbank Hasselt, Belgium, 8 November 1995, Unilex; CLOUT case No. 152 [Cour d'appel de Grenoble, France, 26 April 1995]; Rechtbank Hasselt, Belgium, 18 October 1995, Rechtskundig Weekblad 1995, 1378 f.; Tribunal commercial de Bruxelles, Belgium, 5 October 1994, Unilex; Tribunal cantonal de Vaud Wallis, Switzerland, 6 December 1993, Unilex; CLOUT case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993]; CLOUT case No. 56 [Canton of Ticino Pretore di Locarno-Campagna, Switzerland, 27 April 1992]

[9] Landgericht Landshut, Germany, 12 June 2008, at www.cisg.law.pace.edu; Cour d'appel de Colmar, France, 26 February 2008; Handelsgericht Zürich, Switzerland, 17 February 2000, ; Hof Arnhem, Netherlands, 27 April 1999, Nederlands Internationaal Privaatrecht, 1999, No. 245; CLOUT case No. 327 [Kantonsgericht Zug, Switzerland, 25 February 1999]; CLOUT case No. 287 [Oberlandesgericht München, Germany, 9 July 1997] ; CLOUT case No. 192 [Obergericht des Kantons Luzern, Switzerland, 8 January 1997]; CLOUT case No. 196 [Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995]; CLOUT case No. 152 [Cour d'appel de Grenoble, France, 26 April 1995]; CLOUT case No. 105 [Oberster Gerichtshof, Austria, 27 October 1994]

[10] *Adonia Holding GmbH v. Adonia Organics LLC*, 2014 WL 7178389 (D. Arizona, 16 December 2014); Cour d'appel de Reims, France, 30 April 2013, at www.cisg-france.org; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, Arbitral award of 28 January 2009, at www.cisg.law.pace.edu; High Commercial Court of Belgrade, Serbia, 22 April 2008, at www.cisg.law.pace.edu; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, Serbia, Arbitral award No. T-25/06 on 13 November 2007, ; CLOUT case No. 1492 [Cour de cassation, France, 20 February 2007]; CLOUT case No. 695 *[Amco Ukrservice v. American Meter Company*, 312 F.Supp.2d 681 (2004), *see also, Helen Kaminski Pty. Ltd. v. Marketing Australian Products, Inc.*, 1997 WL 414137 (S.D.N.Y. July 23, 1997)].

[11] See CLOUT case No. 281 [Oberlandesgericht Koblenz, Germany, 17 September 1993]

deemed excluded from the Convention include intellectual property rights, goodwill, and a membership interest in an LLC.[12]

With regard to Article 2, the Convention specifically excludes goods that are purchased only for personal use, and the actually intent of the buyer is relevant. Thus, the purchase of a camera for personal use would not necessarily subject the parties to the CISG, but the purchase of a camera for a photographer's business would potentially subject the parties to the CISG. Also importantly, under this exclusion, while sales of ships, vessels, hovercraft, and aircraft are excluded, the *parts* for these items may still governed by the CISG.[13]

With regard to the "**opting out**" requirement, the courts in the United States have indicated that a mere statement that "the law of the state of South Carolina," as an example, will *not* be sufficient to opt-out of the application of the CISG. South Carolina's law *is* U.S. treaty law per the Supremacy Clause of the Constitution. Thus, in international transactions, it would not be unreasonable for the parties to understand the phrase "law of the state of South Carolina" to mean the CISG. Indeed various courts in the United States have repeatedly indicated that the phrase the *"laws of the state of ____"* are not enough to opt-out of the application of the CISG. The parties must expressly state the CISG does not apply.[14] This is similar as well in other well in other countries including France, Germany, Austria, and Switzerland.

With regard to the "**subject matter governed**" by the CISG, Article 4 indicates that the Convention only governs the formation of the contract and the rights and obligations of the parties in the contract. Article 4 of the CISG specifically excludes subject matter issues regarding the *validity* of the contract and the effect which the contract may have on the property of the goods sold ("title"). These issues are left to the applicable national laws.[15] Pursuant to Article 5 of the CISG, another issue specifically not dealt with by the Convention includes the liability of the seller for personal injury or death caused by the goods. Such tort claims are left to the domestic courts.[16]

A client in South Carolina may want the CISG to apply, as opposed to the U.C.C. as adopted by South Carolina, for various reasons. As noted, the application of the CISG can eliminate "conflicts of laws" disputes. Before the CISG took effect, there was no assurance that the different conflict of laws rules would lead to the same sales law being applied by the various jurisdictions. In some examples, contracting parties both applied their countries' conflicts of laws rules and resulted in inconsistent applications of the seller's law or the buyer's law to the same contract. However, when the same countries became signatories to the CISG, this "conflicts of laws" issue is resolved.

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[12] Tribunal cantonal du Valais, Switzerland, 2 December 2002, at www.cisg.law.pace.edu; See CLOUT case No. 161 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 20 December 1993]

[13] See CLOUT case No. 53 [Legfelsóbb Bíróság, Hungary, 25 September 1992].

[14] https://www.linkedin.com/pulse/when-does-north-carolina-law-actually-mean-nguyen-worthy-jd-cgbp-1/

[15] *Beth Schiffer Fine Photographic Arts, Inc. v. Colex Imagining Inc.* 2012 WL 924380 (D.N.J.19 March 2012); See Amtsgericht Sursee, Switzerland, 12 September 2008, at www.cisg.law.pace.edu.

[16] CLOUT Case No. 579 [*Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, 386 F.3d 485 2004 WL 2334907 (S.D.N.Y. 10 May 2002)]; CLOUT case No. 420 [*Viva Vino Import Corporation v. Farnese Vini S.r.l.*, 2000 WL 1224903 (E.D.P.A. 29 August 2000)].

Additionally, the CISG takes the international nature of the transaction into consideration. Sales and contract laws that are familiar in common law countries such as Great Britain, the United States and Australia differ from and are sometimes incompatible with legal concepts in civil law countries such as Germany, France, or China. The CISG, however, takes in consideration the principles from both the common law and civil law countries and provides a "neutral" set of uniformed laws. The common underling basics of contract law including the implied obligation of "good faith and fair dealing," are maintained throughout.

The application of the CISG may also provide flexibility for the parties. Parties have the freedom to contract and choose whatever substantive law they want to apply to their sales contracts. When concluding a sales contract, the CISG may offer terms that are more favorable to a party than its own domestic law may allow, and the party has the flexibility to adopt the more beneficial substantive law instead. By not identifying a substantive law in the contract, the parties would have an opportunity at the time of the dispute to choose which of the applicable contract law regimes they can agree to have apply to their contract. However, generally, at the time of a dispute, the parties are ill-equipped to agree on anything, including in particular the sales law applicable to the contract due to the perceived advantage or bias that one party may receive over the other. By specifically identifying the CISG at the conclusion of the international sales contract, this issue is eliminated, while still preserving the parties' autonomy on their choice of law.

Finally, the client may want to apply the CISG because it potentially provides more certainty. There is a growing body of case law including arbitral awards on a global basis that have interpreted the CISG Articles, and those results are becoming more harmonized as a result of the accessibility of the cases online. For example, the Pace Law electronic library has collected cases on the CISG and maintains the database under their Institute of International Commercial Law.[17] The database can be accessed by the public and includes not only cases that have interpreted the CISG by various countries, but also scholarly materials used for better understanding of the intent of the Articles as well as the academia perspective. Most of the cases have been translated to English as well. Further, the CISG-Advisory Council has promulgated specific opinions on various CISG Articles, which are very persuasive interpretation.[18]

III. CISG Articles explained in relation to the U.C.C.

The CISG is divided into four parts. Part 1 contains the Articles that deal with how and when to use the CISG (the "sphere of applicability"), as previously discussed in this paper. Part 2 specifically deals with the formation of international sales contracts including offers, acceptances, and the specific requirements to conclude the contract. Importantly, the CISG generally applies the "mirror image" rule in that the offer and acceptance must match, and the "battle of the forms" is an applicable issue to the CISG.

Part 3 of the CISG includes the substantive rules for export and import of goods. This part also identifies the responsibilities of the seller and the buyer and describes the passage of risk. Part 3 also addresses the remedies for breach by either party. These Articles allow for anticipatory breach and the termination of an international sales contract (on the basis of a fundamental breach).

[17] http://www.cisg.law.pace.edu/cisg/guides.html
[18] http://www.cisg.law.pace.edu/cisg/CISG-AC-op.html

Part 4 of the CISG includes the final provisions, including the signature and ratification of the Convention. Additionally, there is specific reservations that signatory countries were allowed to adopt for example, Article 95 of the CISG allows a party to exclude application of article 1(1)(b), as previously noted.

There are several key differences and similarities between the CISG as compared to the U.C.C. Most notably, there is **no statute of frauds** under the CISG; there is no $500.00 threshold for written contracts and in fact oral/verbal contracts can be binding under the CISG. Thus, evidence of the terms of the contract may be taken from the negotiations and prior statements made contemporaneously with the execution of a contract, which is a significant deviation from the "parol evidence rule."

In South Carolina (and similarly in North Carolina), the parol evidence rule states that where the terms of an agreement are unambiguous, clear and explicit, then "extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary or explain its terms."[19] Consequently, when there is an argument as to the ambiguity of a specific term, the South Carolina courts would likely allow extrinsic evidence to support or refute a parties' interpretation of that term. However, if the term appears sufficiently unambiguous and explicit in the contract, South Carolina courts would likely refuse to consider extrinsic evidence. To the contrary, the CISG has adopted the principle that more information about the parties' negotiations is relevant to the parties' intent as to the terms concluded in the contract. This mentality takes into account that there may be cultural differences as well as language barriers that exist between the parties to an international sales contract that may not otherwise exist in a domestic sales contract.

An important similarity between the two sales laws is the incorporation of the **"good faith element."** Article 7 (1) the CISG specifically requires the observance of good faith in international trade. Countries such as Germany already recognized the implied obligation of "good faith" as an important aspect in international and domestic contract law; however, countries such as the U.K. do not recognize "good faith" as a governing principle to contracts.[20] Interestingly, although several countries have signed and ratified the CISG, a notable country that has not even signed the CISG is the United Kingdom. However, in the U.S., parties can rely on **U.C.C. §1-203** that affirmatively "imposes an obligation of good faith in its performance or enforcement." In this regard, the U.S. treats the "good faith" element as importantly as other civil law countries such as Germany, and is aligned with the CISG's interpretation of the principle of good faith in international sales contracts.

Another important comparison between the CISG and the U.C.C. is the applicability of **concurrent remedies**. Typically, as noted in the scope of applicability, the CISG does not apply to torts involving personal injury or property damage. However, there may be more than just contractual remedies that are afforded aggrieved parties in a country's legal system, and which may allow for both contractual and tort remedies. In the U.S., many states have adopted the

[19] *Ray v South Carolina Nat'l. Bank,* 281 S.C. 170, 314 S.E.2d 359 (1984)
[20] Hofmann, Nathalie. "Interpretation Rules and Good Faith as Obstacles to the UK's Ratification." Pace International Law Review 22. Winter (2010): 145-81, 165. CISG Database. Web. 10 Apr. 2016.

"economic loss doctrine,"[21] which essentially bars recovery in tort for strictly economic losses arising from a contract. It would appear that South Carolina courts have applied this doctrine sparingly and have held that if there is a legal duty owed to the plaintiff independent of any contract between the parties, a tort action may be pursued.[22] However, in 2009, the South Carolina Supreme Court affirmed that the buyer of a product could not recover in tort for purely economic damages.[23] While there may be instances where a concurrent remedy is available to a party in S.C., the CISG simply provides no such remedy outside of the contractual remedies of the Convention.

As noted, an important difference between the U.C.C. and the CISG has to do with the formation of the contract itself. Under **U.C.C. §2-204, the formation of a contract** for the sale of goods can be established in any manner, so long as there is a sufficient agreement between the parties that constitutes the existence of a contract. Some of the terms may not even need to be specified as long as the parties have shown clear intent to form a contract and have provided some reasonable measure for remedies. The U.C.C. then steps in to fill in the gaps where terms may be missing from the contract itself. However, under Article 14 of the CISG, if a proposal to conclude a contract is not sufficiently definite, it may not be considered proper for an offer to be accepted. An offer is considered sufficiently definite when it "indicates the goods" and fixes (or makes provision for determining) the quantity and the price. Article 14 of the CISG still does not require that the proposal include all the terms of the proposed contract. For example, if the parties have not agreed on the place or period of delivery or the mode of transportation, the Convention may fill in the gap.

With regard to **U.C.C. §2-206**, an offer to initiate a contract is viewed as an invitation open to acceptance in any manner that is deemed reasonable. Acceptance must also be construed reasonably at the beginning of performance, if the offeror does not receive sufficient notice of the acceptance, then the offeror can consider the offer to be expired before the acceptance. To compare, under Article 16 of the CISG, an offer can be revoked at any time before the contract is concluded as the offeror can inform the offeree of the revocation before the offeree accepts the offer. An offer cannot be revoked, however, if it indicates the contract is concluded and acceptance is acknowledged by the passing of a specific time or if it was reasonable for the offeree to rely on the irrevocable nature of the offer, and the offeree has shown reliance on this interpretation. Essentially, the U.C.C. appears to adopt the common law "mail box rule" and the Convention adopts a "receipt" rule for acceptances of offers.[24]

Furthermore, Article 18 of the CISG states that in certain circumstances, the offeree may accept the offer through partial performance, without delivering any other official notice to the offeror. While performance such as payment of goods is considered effective acceptance, generally speaking, silence cannot be sufficient to accept an offer under the CISG. There are also specific exceptions where "late acceptance" might be still considered valid, if the delay was caused by a third party, and the acceptance would have been delivered within the correct timeframe before the delay, per CISG Article 21. The U.C.C. does not have any comparable provision.

[21] https://www.mwl-law.com/wp-content/uploads/2013/03/economic-loss-doctrine-in-all-50-states.pdf
[22] *Koontz v. Thomas*, 511 S.E.2d 407 (S.C. App. 1999)
[23] *Sapp v. Ford Motor Co.*, 687 S.E.2d 47 (S.C. 2009)
[24] https://apps.americanbar.org/buslaw/blt/2008-09-10/nicholas.shtml

As to the **"battle of the forms," U.C.C. §2-207** indicates that additional terms in acceptance or confirmation must come with a definite expression of acceptance if sent within a reasonable time. Even if the acceptance changes the original offer, as long as there is no condition on ascent, the written confirmation is in force as an acceptance. To compare, under Article 19 of the CISG, any acceptance that contains limitations or modifications to the original terms of the offer does not constitute an acceptance, but *rather a rejection and a counteroffer*. An acceptance is observed when the reply to the offer has not changed any significant terms or the original intent of the offer. If there is no objection, the modified or additional terms of the offer constitute a new contract that legally binds both parties. Here, the concept of silence not being sufficient to constitute an acceptance is contradictory to the general principle of acceptance. Essentially, this means that the CISG is more consistent with the "mirror image rule" while the U.C.C. indicates that the penultimate form (not necessarily the "last shot") generally governs.[25] Thus, Article 19 of the CISG is relaxed compared to U.C.C. §2-207.

As to the **breach of a contract**, **U.C.C. §2-Part 6** regulates the breach, repudiation, and excuses applicable to a breach of contract. The U.C.C. permits rejection of non-conforming goods with no requirement of "fundamental breach," as compared to the CISG. This is often referred to this as the "perfect tender rule" under the U.C.C. which requires the seller provide "perfect tender" of the goods that the buyer has ordered or the buyer has legal remedies for the nonconforming goods. Under the U.C.C., if the buyer deems the goods nonconforming, they can reject them within a reasonable time and inform the seller of the rejection. To compare, under Article 25 of the CISG, a "**fundamental breach**" is required prior to any party being able to terminate the contract or seek a contractual remedy. A fundamental breach requires a "substantial deprivation of what is expected from a contract," unless the one causing the breach "could not have reasonably foreseen this breach." Also, the CISG does not strictly recognize rejection of goods, rather, it recognizes that a buyer may provide notice to a seller and allow for a reasonable period of time to cure any alleged nonconformity.

There are multiple conditions that need to be met under Article 25 in order to constitute a fundamental breach. The term "substantial," is ambiguous and has been interpreted in various cases depending on the facts to generally mean a significant impact to the non-breaching party. The next condition requires that this substantial deprivation be unforeseeable to the non-breaching party. In other words, the lack of foreseeability of the substantial detriment "is a ground of excuse, and, if proven, it will prevent the aggrieved party from being entitled to declare the contract avoided."[26] Article 79 of the CISG further allows for *force majeure* excuses to allow a party to be discharged of liability under the contract for conditions that were beyond the foreseeable expectations of one party and that were not the result of that party itself. The U.C.C. may be more clear and precise in what is expected of the buyer and seller, but the CISG favors performance and is therefore more vague, in an effort to be more flexible under the circumstances. Under the CISG, the only way to breach a contract is to breach it fundamentally, which makes it more difficult for the parties to breach under the CISG, as opposed to the U.C.C.

[25] https://apps.americanbar.org/buslaw/blt/2008-09-10/nicholas.shtml
[26] Graffi, Leonardo. *Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention* (2003). https://cisgw3.law.pace.edu/cisg/biblio/graffi.html

With regard to damages, the buyer is entitled to incidental and consequential damages that occur from the seller's breach of a contract under **U.C.C. §2-715**. These damages include costs incurred in inspection, receipt, transportation, care, and custody of the goods rightfully rejected. Consequential damages can include any loss resulting from a requirement essential to the terms of the contract, which the seller was aware of and which could not have easily been prevented or covered. To the contrary, Article 74 of the CISG states that damages incurred from a breach of contract are the **amount of the loss incurred**, including the loss of profit, by the other party, as proximately caused by the breach. The aggrieved party has the burden to prove and must provide substantial evidence that indicates the extent of the loss that is sufficiently definite.

With regard to remedies, under CISG Article 46, specific performance is allowed assuming that the domestic law of the other party's country would allow it. Article 48 also allows a right to cure the alleged defect or nonconformity. Article 49 allows for recision of a contract on the basis of a fundamental breach and Article 50 gives a right to a price reduction. To the contrary, the U.C.C. is much stricter on what circumstances it allows for specific performance as compared to the CISG. **U.C.C. §2-716** requires that **specific performance** be allowed only for a "unique goods" or "other proper circumstances." The CISG is more permissive in that regard and only requires that the specific performance not be inconsistent with the contract or domestic law.

IV. Conclusion

Depending on the differences of the CISG as compared to the U.C.C., there may be specific advantages for the client under one regime as compared to the other. In addition to the application of the substantive law, there are still some challenges even if it would be more advantageous and desirable for one party to apply the CISG where the other does not agree to its application.

First, there is no true "precedent" that interprets the CISG and establishes an authority on the interpretation of the Articles. At most, the database of the CISG opinions provides persuasive authority, but there is no "Supreme Court of the World" or of international business disputes, and thus there is no binding precedent on any of the arbitrators or courts in their interpretations of the CISG provisions. While there is a concept of "lex mercatoria," which is similar to an international "common law," these standards are also not binding on the parties absent a specific clause in the contract that applies a certain industry standard that may be interpreted as lex mercatoria.

There may also be cultural differences between the parties in the contract that make it a challenge to apply the CISG. Such differences may include how contracts are perceived (whether they are a matter of assurance versus a matter of trust), how contracts are concluded (finalized in writing versus ever changing living documents), how damages are to be assessed (planned-for damages versus cross the bridge when we come to it mentality), and what is included in contracts (everything but what is excluded versus only what is written is allowed mentality).

Fortunately, the application of the CISG in litigation or in arbitration has resulted in more enforcement of judgments and awards, and continues to gain popularity in international business transactions. As to international arbitration, many countries have also signed and ratified the New York Convention, which requires an arbitral award rendered in a signatory country be confirmed and enforced in another signatory country absent very narrow exceptions.

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- Canada/EU Free Trade Agreement – CETA (2016)
- Other Trade Agreements:
  - Korea (2015); Honduras (2014); Panama (2013); Jordan (2012); Columbia (2011); Peru (2009); Costa Rica (2002); Chile (1997); Israel (1997); NAFTA (1994).

Agenda

1) The “Revolution” in Enforcement of Foreign Judgments in Canada
   - 5 Key SCC Judgments

2) Choice of Jurisdiction:
   - Van Breda – the Revolution Continues

3) Choice of Jurisdiction:
   Practical Considerations, Canada/U.S. example

4) The Unique Power of :
   - *Mareva Injunctions*
   - *Anton Piller Orders*

The Revolution In Enforcement of Foreign Judgments in Canada

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Five Supreme Court of Canada Cases over 22 years build upon each other and form the basis of the "Revolution":

- *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077
- *Hunt v T&N PLC*, [1993] 4 S.C.R 289
- *Beals v Saldanha*, [2003] 3 S.C.R. 416
- *Pro Swing Inc. v Eta. Golf Inc*., [2006] 2 S.C.R. 612
- *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572

Canadian Law of Foreign Enforcement Pre-Morguard (1991)

Enforcing foreign Judgments in Canada used to practically depend on:

- The Canadian Defendant having some presence in the foreign jurisdiction at the time of the action; or
- The Canadian Defendant attorning to the foreign jurisdiction voluntarily

Canadian Law of Foreign Enforcement Pre-Morguard (1990)

Effects on Advice of U.S. and other Foreign Counsel to their clients:

- Sue in the foreign jurisdiction and hope to prove:
  a) presence in the jurisdiction; or
  b) attornment to the jurisdiction

- Litigate in Canada

- Limited and Dismal Options!

- Effects:
  1. Severely limited cross-border enforcement options
  2. Limited law suits in foreign countries against Canadian Entities

Morguard v. De Savoye (1991): Beginning of the Revolution

General Principal: **Canadian courts *should* enforce "foreign" judgments where:**

- the foreign court has exercised its jurisdiction legitimately;
- the foreign court has exercised due and fair process;
- the foreign judgment is "final;" and
- enforcement comports with "order and fairness."

Morguard v. De Savoye (1991): Real and Substantial Connection Test

The Most Important Development in *Morguard*:

Establishment of the "Real and Substantial Connection Test"
(RSC)

There must be a ***Real and Substantial Connection*** between the jurisdiction and the defendant *or* the subject matter of the action

Impact of *Morguard* and the Real and Substantial Connection Test

1. Set a new, much lower, "jurisdictional bar" for foreign plaintiffs for enforcement in Canada
   - UPSHOT: Very few judgments refused enforcement for failure to meet the RSC test
   - Test immediately applied by lower courts to truly foreign judgments (foreign countries)

2. Many more Foreign Judgments Enforced

3. Barriers to trade and the movement of goods and services reduced in the name of comity by SCC

Morguard + Beals: Very Limited Defences to Enforcement

Four main Defences:

1) Lack of Jurisdiction
2) Fraud
3) Public Policy
4) Natural Justice

- SCC Eviscerates Defences in *Beals*
- Defences May be Expanded but it Hasn't Happened Yet!

RSC Uncertainty Leads to Attempts to Simplify + Increase Objectivity

RSC test Criticized:

- Ever increasing list of “connections” cited
- Leads to unpredictability re jurisdiction both in enforcement cases and domestically

C.A. for Ontario develops an 8 point test for RSC

- Criticized for being unwieldy

RSC Clarified: *Van Breda*

Club Resorts Ltd. v. Van Breda 2012 SCC 17 (SCC) (April 2012)

1. There are certain factors which will lead to a presumption that there is a real and substantial connection (and therefore legitimate jurisdiction) (Plaintiff's onus of proof)

2. These presumptive factors are "rebuttable" by the party seeking to deny jurisdiction

3. The list of presumptive factors may be added to in the right circumstances

RSC Clarified: *Van Breda*

Club Resorts Ltd. v. Van Breda 2012 SCC 17 (SCC) (April 2012)

Presumptive factors in tort cases:

(a) the defendant is domiciled or resident in the province/state;

(b) the defendant carries on business in the province/state;

(c) the tort was committed in the province/state; and

(d) a contract connected with the dispute was made in the province/state.

Mareva Injunctions – Asset Freezing

Mareva Injunctions In Canada

- Pretrial Asset Freezing Injunctive Order
- Difficult to Obtain
- Powerful and Intrusive
- Execution Before judgment

Mareva Injunctions – Asset Freezing

Mareva Injunctions In Canada

The Test:

1. Strong *Prima Facie* Case
2. Real Risk that Defendant will remove assets from Jurisdiction or denude self of assets in jurisdiction

   - Duty to Reveal ALL the facts!

   - ***Aetna Financial Services v. Feigelman*** (SCC) [1985] 1 S.C.R.

Anton Piller Order – Civil Search Order

Anton Piller Orders In Canada

Court Order Providing the right to search Premises and seize evidence without prior warning

Purpose: To prevent Destruction *or* Removal of Evidence

Anton Piller Order – Civil Search Order

Anton Piller Orders In Canada

Order Obtained *Ex Parte*

The Test:

1. Extremely strong *prima facie* case
2. Potential Damage must be *very serious* for applicant
3. *Clear Evidence* of *Real Possibility* of destruction

Anton Piller Order – Civil Search Order

Anton Piller Orders In Canada

ISS Independent Supervising Solicitor must be retained to:

1. present the Anton Piller Order to the Defendant
2. oversee the search
3. record the evidence obtained supervise storage of evidence
4. report to the Court as necessary

Anton Piller K.G. v. Manufacturing Processes Ltd., [1976] 1 All E.R. 779

Anton Piller Order – Civil Search Order

Anton Piller Orders In Canada

- Plaintiff's Undertaking as to Damages
- Imperative for FULL disclosure of all material facts

Recent SCC decision: *British Columbia (Attorney General) v. Malik*, 2011 SCC 18.

THANK YOU!

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INTERNATIONAL LITIGATION: THRESHOLD QUESTIONS

Fundamentals of International Law:
The SC Bar/ABA International Law Bootcamp

Henry M. Burwell, Esq.
Nelson Mullins Law Firm
October 7, 2018

https://www.carolina.renfestinfo.com

IS LITIGATION AVOIDABLE?

1. What is the nature of the plaintiff's claims?
2. Is this dispute a matter of private or public international law?
3. Are the rights involved in contract or tort law?
4. What is the nature of the defenses?
5. Is there a legal v. equitable distinction in local jurisprudence?
6. Is there an underlying contract providing for mediation?
7. Is there an underlying contract which permits or compels arbitration?
8. Are you dealing with a multilateral or bilateral conventions?
9. Are there political or cultural solutions?
10. Have you exhausted administrative remedies?

DO NOT ASSUME SIMILARITY WITH THE U.S. LEGAL SYSTEM

HAVE YOU TRIED TO CALCULATE THE COST?

1. Will you be in a foreign or U.S. court? State or federal? Before an arbitrator?
2. Do you need local counsel support?
3. What is the experience level of local counsel in the subject matter, court and the key issues?
4. How long could it take to get to trial?
5. How long will it take to have an appeal concluded?
6. Will enforcement be in the same country?
7. How long will execution of the judgment take?

https://www.wealthmanagement.com

DOES ARBITRATION APPEAR TO A BETTER SOLUTION?

1. Is there a real difference between mediation and arbitration in the foreign jurisdiction?
2. Can you arbitrate and litigate at the same time?
   - How do you distinguish arbitral issues from legal or equitable (injunctive) issues not subject to arbitration?
   - How will you enforce the arbitrator's decision in the legal/equitable action?
   - Is the forum the same for arbitration and litigation?
   - Are you familiar with the arbitration association process, rules of selection, discovery, binding nature, official language, enforcement?

http://www.iticale.com/Jurisdiction

WHO HAS SUBJECT MATTER/PERSONAL JURISDICTION?

1. Is there a stipulated jurisdiction?
    1. Have you checked due process issues?
    2. Can you get personal service of process?
2. Is there a stipulated application of law?
3. Have you checked the federal and local law?
4. Is there a stipulated forum?
5. Is there an overriding United Nations Convention affecting substantive rights? [International Sale of Goods; Carriage of Goods by Sea]

HAVE YOU LOCATED LOCAL COUNSEL?

1. Have you interviewed attorney candidates to assist you who has:
   - local court experience
   - substantive industry experience
   - budget controls
   - accountability controls
2. Do you have a written engagement letter from foreign counsel?
3. Have you gotten approval from the client for your recommendation?
4. Do you need to make an appearance Pro hac Vice?

DO YOU UNDERSTAND THE LIMITATIONS OF APPLICABLE LAW?

1. Are you in a Code Law country where the Code or rules are unclear about your rights?
2. Are you in a common law jurisdiction where the statutes, rules or cases leave the issues to ones of first impression?
3. Do you information about the suitability of litigation versus arbitration in respect of the local legal system?
4. Will the nationality or citizenship of your client affect the judicial process?
5. Are your legal rights entangled with international law of human rights?
6. Will cultural/social issues affect the probable outcome of a judicial process?
7. Are you under a hybrid system such as Sharia or tribal law plus code law?

SERVICE OF PROCESS- U.N. CONVENTION ?

Does the Convention of ***Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*** apply?

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with -

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that -

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, …

LIMITATIONS ON DISCOVERY?

1. What are the legal standards of proof of facts in the foreign jurisdiction?
2. What can you do about a party that ignores a court order for production or testimony?
3. Can findings of fact developed in an arbitration be used in companion litigation?
4. Are the rules of evidence clear or lax in a foreign jurisdiction?
5. Can adverse inferences be drawn from failure to obey a court order or rule?
6. Is an agency finding or order enforceable in a court proceeding?
7. Is a Motion a quick way to settlement of the dispute?
8. How is subpoena power used in the local legal system?
9. Are you able to use an Apostille or verification for replies to court interrogatories?
10. Can you use Letters Rogatory?
11. Can you attend a deposition in a foreign country? Any visa issue?

CASE MANAGEMENT

1. Can you decide how long it may take to get to trial?
2. Is there a trial calendar?
3. What are the mandatory processes for case administration?
4. How do local judicial procedures differ from the court system in which you have experience?
5. How might the rules of evidence affect what you need to prove as fact?

TRIAL: MAKING MOTIONS/APPEAL

1. Pretrial motions?
2. Motions during trial?
3. Post trial motions?
4. Preparation of the Record
5. Exceptions
6. Error
7. Bond

http://euregex-blog.eu

ENFORCEMENT

1. Has the prosecution of the case in the U.S. comported with standards of the foreign jurisdiction where it may have to be enforced?
2. Are there any overriding policy or political considerations which may impact a foreign enforcement process?
3. Do you have access to assets in the U.S. which may be the object of enforcement?
4. What is the process of foreign enforcement when no U.S. assets are available?
5. U.N. Convention on Recognition and Enforcement of Arbitral Awards (NY)

U.N. CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Principal aim

- Avoid discrimination in recognition as a foreign based award
- Require courts to enforce arbitration agreements by denying the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal

Case law :

- newyorkconvention1958.org
- Case law on UNCITRAL Texts (CLOUT)

HENRY M. BURWELL, ESQ.

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Master's Degree in Business Administration and Juris Doctor degree from the University of North Carolina at Chapel Hill. Admitted to the bars of the District of Columbia, Oregon and South Carolina.

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Continuing Legal Education Division

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Friday, October 5, 2018

The GDPR and yEU

Chris M. Campbell
Doug W. Kim

South Carolina Lawyers are YOU Ready for the GDPR?

May 15, 2018

With the European Union's ("EU") General Data Protection Regulation ("GDPR") set to take effect on **May 25, 2018**, the time is **now**(yesterday really) to consider how this law will affect many aspects of your relationship with your clients and how your practice operates. Before discussing the major topics within the GDPR, it is important to define several terms that exists within the GDPR Framework. (Note: Article References are to the GDPR text[1])

Key Terms

Controller – As defined in Article 4(7) and described further in Article 26 a "Controller" is the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.

Data Subject – For the purpose of discussing the GDPR, a "Data Subject" is an individual that is a citizen of the EU, or that resides in an EU Member State.

There are **four key changes** that organizations subject to the GDPR need to be aware of:

1) Increased Territorial Scope. The GDPR greatly expands the scope of whom is responsible for data privacy protections.

2) Penalties. Organizations in breach of the GDPR can be fined up to 4% of annual global turnover or €20 million, whichever is greater. Although there is a tiered approach to the allocation of fines (Eg. 2% for an organization not maintaining proper records or notifying a supervising authority of a data breach or issuance of a warning or increased scrutiny for instances of minor non-compliance) the exposure to liability is momentous for organizations under the regulation's jurisdiction.

3) Consent. Lengthy disclaimers **are not permissible**under the GDPR. Qualifying disclaimers from organizations must:

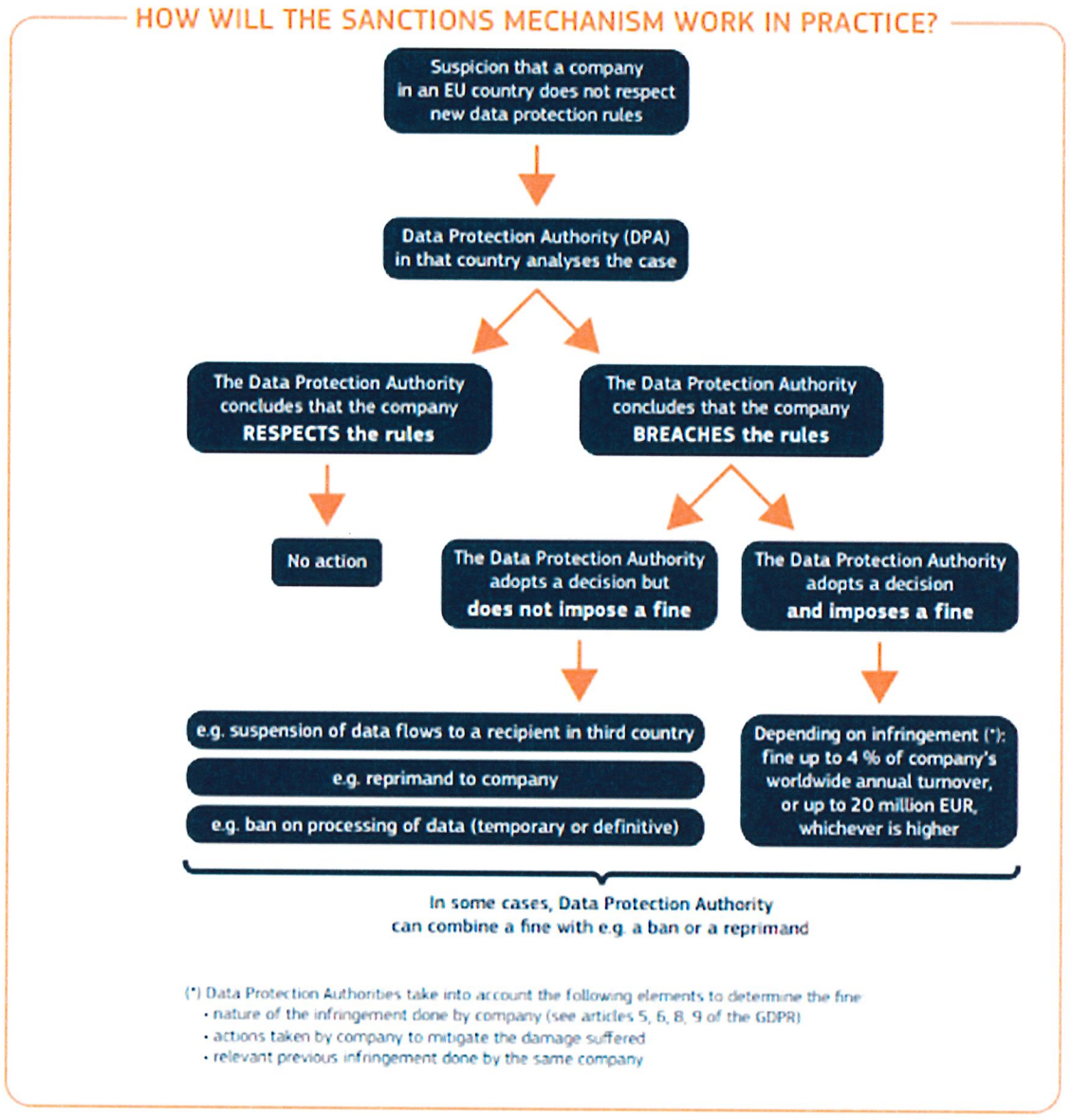
i) State the purpose for the data collection,
ii) Be clear and distinguishable from other matters,
iii) Be written in plain discernable language, and
iv) Provide a method of withdrawing this consent easily.

4) Data Subject's Rights

a. Breach Notification. Data breaches that may "result in a risk for the rights and freedoms of individuals" must be reported within **72 hours**of becoming aware of the breach. Those affected by such breaches must be notified without "undue delay".

b. Right to Access. This right enables Data Subjects to ask a Controller; i) if their data is being processed, ii) where their data is being processed, and iii) for what purpose is their data being processed. Furthermore, Controllers are required to provide a copy of the personal data, free of charge, in an electronic format.

c. Right to be Forgotten. Also known as Data Erasure, this right entitles Data Subjects to require Controllers to erase their personal data, cease further dissemination of the data, and potentially to have Third Parties halt processing their data. Typically, two conditions must apply for a Data Subject to demand Data Erasure: 1) the data maintained is no longer relevant to the reason it was originally processed, and 2) withdrawal of Consent by the Data Subject. For a more detailed explanation, please see Article 17 of the GDPR.



EU Data Protection Reform: ensuring its enforcement, European Commision Fact Sheet, January 2018. (Accessed April 26, 2018.)

Christopher Campbell is an associate at Willoughby & Hoefer, P.A. His practice areas include administrative law, business law, litigation, and international commercial arbitration.

[1]Full Text of GDPR: https://gdpr-info.eu

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Friday, October 5, 2018

International Anti-Corruption

Chris Macleod
Naana Frimpong

Recent Developments in Canadian Anticorruption Law

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Chris MacLeod

Founding Partner,

Cross-Border & Business Litigation Groups

CAMBRIDGE LLP

- Universal Jurisdiction (By Nationality, not Territory)
- Offence of Bribery and Accounting
- Broad scope – “Any Benefit”

Corruption of Foreign Public Officials Act, 1998

Bribery (def'n): s.3(1)

When a person directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official

(a) As consideration for an act or omission in connection with performing official duties or functions; or

(b) To induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization

Corruption of Foreign Public Officials Act, 1998

Bribery - Punishment: *CFPOA* s.3(2)

- Guilty of an indictable offence, and imprisonment of up to 14 years

Bribery - Exceptions: *CFPOA* s.3(3)

- If the loan, reward, advantage or benefit is permitted or required under the laws of the foreign state or public international organization.
- Are reasonable expenses incurred in good faith incurred by or on behalf of the foreign public official, as related to:
  (i) Promotion, demonstration or explanation of the person's products and services, or
  (ii) Execution or performance of a contract between the person and the foreign state itself

Corruption of Foreign Public Officials Act, 1998

Accounting (def'n): s.4(1) ~ "Books and Records Offence"

Actions taken that support bribery or conceal it:

a) establishing/maintaining accounts that are kept off the books in contravention of applicable accounting /auditing practices;
b) transactions not recorded in books and records or that are inadequately identified;
c) recording of non-existent expenditures;
d) liabilities with incorrect identification of their object;
e) knowing use of false documents;
f) intentional destruction of books and records earlier than permitted by law.

Corruption of Foreign Public Officials Act, 1998

Bribery - Punishment: *CFPOA* s.3(2)

- Guilty of an indictable offence, and imprisonment up to 14 years

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  - (ii) Execution or performance of a contract between the person and the foreign state itself

Accounting - Punishment: *CFPOA* s.4(2)

- Guilty of an indictable offence, and imprisonment up to 14 years

Recent Development:
R. v. Karigar [2017] O.J. No. 3530

Appeal on conviction (upheld) by *Ontario Court of Appeal*:

1. **Territorial Jurisdiction:** Where "universal" (Nationality) jurisdiction (*CFPOA* s.5) does not apply (conspiracy), real and substantial link between the offence and Canada (*R. v. Libman)*

2. The substantial link analysis presumes that both legitimate and illegitimate benefits run in parallel to benefit Canadian companies

3. **Agreements**: *CFPOA* applies to both direct and indirect agreements to give or offer any advantages to foreign public officials (*CFPOA* s.3)

Leave to appeal refused by Ontario Court of Appeal and Supreme Court of Canada

Recent Development:
Justice for Victims of Corrupt Foreign Officials Act, 2017
("Sergei Magnitsky Law")

Royal Assent: October 18, 2017

- Federal executive allowed to restrict activities of foreign nationals responsible for, or complicit in, extrajudicial killings, torture or other gross violations of IHRL in any foreign state.
- Also extends to individuals responsible directly or "materially assisting" the ordering, controlling or directing of bribery, misappropriation of assets, transfer of assets, or any act related to expropriation, government contractors or natural resource extraction.
- Restrictions include asset freezes, financial dealings, access to financial services
- Governor in Council publishes lists of individuals by way of Regulation (currently 53)
- Financial institutions: (monthly) ongoing duty to determine and disclose possession or control of property [JVCFOA, s.7]

Recent Development: *CFPOA* Amendment
Bill S-14: "An Act to Amend the Corruption of Foreign Public Officials Act"

- **Royal Assent: June 19, 2013; in force October 31, 2017**

1. **<u>Repeal of the "facilitation payments" exception, originally allowable under the 1998 version of the *CFPOA* (former) s. 3(4)</u>**

   Facilitation payments
   (4) …a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage [if] made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions

2. Specific contexts permitted under former s.3(4): issuance or processing of permits and documents, provision of government services, police protection, cargo handling, protection of perishables, or the scheduling of inspections.

Thank You

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Obtaining Evidence in Canada for Use in U.S. Proceedings

Chris Macleod

Obtaining Evidence in Canada for use in U.S. Proceedings

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Can Evidence be Obtained in Canada for use in Foreign Proceedings?

☑ Yes

☑ Evidence Given Voluntarily

☑ Evidence to be Obtained by Court Order

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Letters Rogatory

Letters Rogatory or Letters of Request (defn):

A request originating from an originating court (e.g. U.S.) to a foreign court (e.g. Canada) for assistance in gathering evidence (e.g. compelling disclosure of documents or obtaining oral evidence from a witness within the foreign court's jurisdiction)

"*Comity*" and Obtaining Evidence in Canada

- International Legal Assistance Between Courts rests on the Principle of "Comity"

- Principle of International Comity

"'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"

Morguard v. De Savoye [1990] 3 S.C.R. 1077 (SCC).
Quoting *Hilton* v. *Guyot* (1895) 159 U.S. 113 at 163-64

Comity: *Enforcing Letters Rogatory*

- Courts give assistance to each other across borders not as matter of obligation, but rather out of mutual respect and deference.

- A foreign request is given full force and effect unless:
  - contrary to public policy
  - prejudicial to sovereignty
  - prejudicial to citizens

Issuing Letters Rogatory in the United States

- **Letters rogatory must:**

  - Be addressed “To the Appropriate Authority in Canada” i.e. the proper court;
  - State who you wish to examine and why…or what documents you need and why;
  - Clearly state evidence the sought
  - State the relevance of the evidence sought

6 Factors Court will Consider in Exercising Discretion

1) Evidence sought is relevant
2) Evidence sought is necessary
3) Evidence is not otherwise obtainable
4) Order sought not contrary to Public Policy
5) Documents sought identified with reasonable specificity
6) Order not unduly burdensome

If you Get it Wrong Can you go Back?

***RE Friction Division Products, Inc. and E.I.Dupont de Nemours & Co. Inc. et al.* (No.2) (1986) 546 O.R. (2d)**

The Ontario Court of Appeal held that Letters Rogatory could be re-submitted by U.S. Court to conform with requirements

> *"If he was trying to take another bite at the apple, it was from a different apple."*

Maybe better said: "You can get another kick at the can….but it may be a very expensive kick!"

Limitation Period Re Enforcement of Judgments In Ontario

- *Independence Plaza 1 Associates, L.L.C. v. Figlioni* 2017 ONCA 44 (CanLII):
  - 2 year limitation period under the Limitations Act R.S.O. 1990 applies
  - The limitation period begins to run, at the earliest, when the time to appeal the foreign judgment has expired or, if an appeal is taken, the date of the appeal decision.

Security For Costs

Security for Costs:

R. 56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

(a) The plaintiff or applicant is ordinarily resident outside Ontario;

Security For Costs

Security for Costs:

- To Make a Security for Costs Order Less Likely (remains discretionary):
  - Insert a clause in Contract indicating that Canadian contracting party waives any claim to security for costs in the event of litigation in Canada
  - (Ask our office for precedent clauses)

Thank You

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International Arbitration

H. Scott Fairley
Sara Burns

International Arbitration

Fundamentals of International Law:
The SC Bar/ABA International Law Bootcamp

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Partner, Cambridge LLP
CAMBRIDGE LLP

The Canadian Legislative Framework

- The legislative framework governing international arbitration is governed primarily at the provincial and territorial level in Canada
- There is also federal legislation on point, but it only applies to narrow federal subject-matter jurisdiction on point.
  - See: Constitution Act, 1867, ss. 91, 92 via Federal division of powers
- Canada is party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York” Convention), the UNCITRAL Model Law on International Commercial Arbitration 1985 (the “UNCITRAL Model Law”), and the UN Convention on Transparency in Treaty-based Investor-State Arbitration 2015.
- In recognition and enforcement proceedings, Canadian courts treat the applicable provisions of the UNCITRAL Model Law and the New York Convention as being incorporated into the applicable domestic statute.

Framework Cont'd

- Governed by a number of different pieces of legislation, depending on the subject matter of the dispute and the award

- In Ontario, for example, there are at least 2 legislative enactments dealing with the arbitration process:
  - The Commercial Arbitration Act, S.O. 1991, c. 17
  - The International Commercial Arbitration Act , S.O. 2017, c.2 (ICAA)

- Here, I address the latter, which is a useful update and improvement on legislation which has been in place since the late 1980s, when Canada belatedly acceded to the New York Convention.

The *International Commercial Arbitration Act, 2017*, SO 2017, c 2

- Came into force on March 22, 2017
- Replaces the *International Commercial Arbitration Act*, RSO 1990, c I.9 with immediate effect
- When drafting agreements and acting as counsel in international arbitration proceedings, practitioners should be aware of this new legislation.

What is different?

- The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is expressly adopted in the new Act, and appended as a schedule

- If a foreign arbitral award is made in a jurisdiction that is a signatory to the New York Convention, an Ontario court will generally recognize and enforce a foreign arbitral award, barring narrowly constructed “impeachment” defences.

- Added to the ULCC Uniform Act on which the ICCA is modelled are provisions about interim measures and preliminary orders.

- The New Act changes the form in which an arbitration agreement can be made.
  - While the arbitration agreement must still be in writing in order for it to be enforceable, the new Act states that this requirement is met if the “content” of the agreement is *recorded* in written form.
  - The arbitration agreement can be *concluded* orally, by conduct, or by other means.

*Uniform Law Conference of Canada, Model Law on International Commercial Arbitration (2014), http://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0036.pdf

Differences - Continued

- Changes to the *Limitations Act, 2002*
- Limitation period :
  - on the enforcement of arbitral awards
  - Generally 10 years from the date the award was made. (formerly subject to a 2 year limitation period)
  - Equivalent amendments are also made in respect of domestic arbitration under the *Arbitration Act, 1991*.
- *Section 10* of the 2017 ICCA states:

"No application under the Convention or the Model Law for recognition or enforcement (or both) of an arbitral award shall be made after the later of December 31, 2018 and the tenth anniversary of:

a) the date on which the award was made; or

b) if proceedings at the place of arbitration to set aside the award were commenced, the date on which the proceedings concluded."

What is the same?

- The New Act applies to all international commercial arbitration agreements and awards, whether made before or after the coming into force of the New Act.

- The New Act will continue to govern commercial arbitration agreements between private parties of different countries (but not different provinces).

- This is in contrast to the Ontario domestic arbitration regime found under the *Arbitration Act, 1991*, SO 1991, c 17, which governs all arbitrations conducted under an arbitration agreement in Ontario, unless its application is excluded by law or the ICAA applies.

- Most of the procedural aspects about arbitrations under the New Act remain the same as the Old Act, both being based on the UNCITRAL Model Law.

Appeals re Preliminary Decision Declining Jurisdiction

Section 11 of the 2017 ICAA provides for an appeal to the Superior Court. It states:

1. If, pursuant to article 16 (2) of the Model Law, an arbitral tribunal rules on a plea that it does not have jurisdiction, any party may apply to the Superior Court of Justice to decide the matter.
2. The court's decision under subsection (1) is not subject to appeal.
3. If the arbitral tribunal rules on the plea as a preliminary question and an application is brought under this section, the proceedings of the arbitral tribunal are not stayed with respect to any other matters to which the arbitration relates and are within its jurisdiction. (emphasis added)

Article 16(3) of the Model Law states that if the arbitral tribunal "rules as a preliminary question that it has jurisdiction," there is an appeal to the court, and that there is no appeal from the court's decision. The Model Law does not expressly provide for an appeal in the event that the arbitral tribunal decides that it does not have jurisdiction. Section 11 of the 2017 ICAA now provides for an appeal in that situation, but (reflecting the Model Law on this point) there is no appeal from the Superior Court's decision

Type of Arbitration

- A major decision which should be reflected in all arbitration clauses is whether it will be administered by and/or according to the rules of a particular institution (ICC, CCA, ICRD(AAA)) or ad hoc with no formal administration agency, where the parties designate their own rules and procedures.

- In the absence of rules specified by the parties the UNCITRAL Model Law operates by default in Ontario.

- In Ontario, ad hoc arbitration has been more common than the institutional variety although organizations such as the International Chamber of Commerce (ICC) and the International Center for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) are increasing their Canadian presence.

What Prompted Changes

- The ULCC seeks to facilitate the harmonization of laws of the provinces and territories of Canada, and where appropriate the federals laws as well.
- The ULCC last considered domestic arbitration legislation over 25 years ago, at which time it developed a *Uniform Arbitration Act* (1990) which was subsequently implemented, with amendments in some cases, through provincial legislation in many provinces.
- Since then, changes in laws and practices made it necessary to update and modernize the *Uniform Act.*
- The new *Uniform Arbitration Act* is a substantial modernization of arbitration legislation in many respects.
- It will now be up to each of the remaining provinces and territories to follow Ontario's lead in considering and implementing the Act in their respective jurisdictions in Canada.

Overall Commentary

- Most large international businesses have already or will rely on arbitration as a preferred alternative dispute resolution method.

- The ICCA 2017 clarifies previous ambiguities by more clearly highlighting the minimum standards by which international commercial arbitrations will require to follow to be recognized and enforced by Ontario courts. For example:
  - The new Act expressly adopts the New York Convention into Ontario Law
  - Limitation period changes
  - The definition of Arbitration Agreement has been altered
  - The scope and availability of interim relief from a tribunal is now clearly expressed (i.e. power to grant injunctive relief and security for costs)

- These changes make Ontario a great forum for international arbitration

Challenges to and Recognition and Enforcement of the Award

Introduction

Two levels of challenges:

1) Challenges to the award as rendered
   In the jurisdiction of the seat of arbitration

2) Recognition and enforcement of the award
   In the jurisdiction where recovery is sought

Challenges to the Award

- An attack on the award at its source
  - If successful, the decision is a basis for challenging subsequent decisions at the recognition and enforcement stage
- The court may do any one of the following on a challenge:[1]
  - confirm the award
  - set the award aside
  - vary the award
  - send all or part of the award back to the arbitrator for reconsideration

[1] Nigel Blackaby & Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International* Arbitration, 5th ed (Oxford University Press: Oxford, 2009) at 10.89 [Redfern and Hunter].

Challenges to the Award cont'd

- Governed by the *UNCITRAL Model Law on International Commercial Arbitration* ("Model Law")[2]
  - The *United Nations Foreign Arbitral Awards Convention Act* incorporated the Model Law in Canada (federal) on August 10,1986[3]
  - All the provinces and territories have adopted the Model Law[4]

[2] *UNCITRAL Model Law on International Commercial Arbitration*, 40 UN GAOR, Annex 1, UN Doc A/40/17 (1985) [Model Law].
[3] *United Nations Foreign Arbitral Awards Convention Act*, SC 1985, c 17 (2d Supp), s 5 [FAACA].
[4] Alberta: *International Commercial Arbitration Act*, RSA 2000, c I-5; British Columbia: *International Commercial Arbitration Act*, RSBC 1996, c 233; Manitoba: *International Commercial Arbitration Act*, SM 1986, c 32, CCSM c 151; New Brunswick: *International Commercial Arbitration Act*, SNB 1986, c I-12.2; Newfoundland and Labrador: *International Commercial Arbitration Act*, RSN 1990, c I-15; Northwest Territories and Nunavut: *International Commercial Arbitration Act*, RSNWT 1988, c I-6; Nova Scotia: *International Commercial Arbitration Act*, RSNS 1989, c 234; Ontario: *International Commercial Arbitration Act*, RSO 1990, c I.9; Prince Edward Island: *International Commercial Arbitration Act*, RSPEI 1988, c I-5; Quebec: *An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration*, SQ 1986, c 73, *Code of Civil Procedure*, RSQ, c C-25; Saskatchewan: *International Commercial Arbitration Act,* SS 1988, c 1-10.2; Yukon: *International Commercial Arbitration Act*, SY 1987, c 14.

Grounds for Challenging the Award

1) Jurisdiction

Incapacity or invalid agreement

- A party to the arbitration agreement was under some incapacity, or the agreement is invalid under the law of the seat of arbitration[5]

Tribunal's excess of powers

- The award deals with aspects of a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission[6]

Arbitrability

- The dispute cannot be resolved by arbitration because it belongs exclusively in the domain of the courts[7] (e.g. public policy's prerogative active writs; injunctive relief)

[5] Model Law, *supra* note 2 at Article 34(2)(a)(i).
[6] *Ibid,* at Article 34(2)(a)(iii).
[7] *Ibid,* at Article 34(2)(b)(i).

Grounds for Challenging the Award cont'd

2) Procedural

- Whether there was a "fair hearing" (natural justice)
  - The party making the application was not given proper notice of the arbitrator's appointment or of the arbitral proceedings, or was otherwise unable to present his/her case[8]
  - The composition of the arbitral tribunal or the arbitral procedure did not conform with the agreement of the parties or with the Model Law[9]

3) Substantive

- Mistakes of law, fact or mixed fact and law
  - Not reviewable under the Model Law
  - Reviewable only if the arbitration agreement so provides[10]
- Public policy
  - The award is in conflict with the public policy of the seat of arbitration[11]

[8] Model Law, *supra* note 2 at Article 34(2)(a)(ii).
[9] *Ibid,* at Article 34(2)(a)(iv).
[10] *Xerox Canada Ltd v MPI Technologies Inc.*, 2006 ONSC 41006.
[11] Model Law, *supra* note 2 at Article 34(2)(b)(ii).

Recognition and Enforcement of the Award

- Recognition v Enforcement[12]
  - Recognition = giving legal effect to an award as valid and binding between the parties
  - Enforcement = ensuring an award is carried out with legal sanctions in place

[12] Redfern and Hunter, *supra* note 1 at 11.21 and 11.23.

Recognition and Enforcement of the Award cont'd

- Governed by the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("Convention")[13]
  - 140+ signatory states
  - Canada acceded on August 10, 1986
    - Reservation: the Convention applies only to commercial relationships (except in Quebec[14])
  - The *United Nations Foreign Arbitral Awards Convention Act* gave the Convention the force of law in Canada (federal)[15]
  - All the provinces and territories have incorporated or referenced the Convention in their respective laws[16]

[13] *New York Convention on the Recognition and Enforcement of Foreign Arbitral* Awards, 10 June 1958, 330 UNTS 38 (entered into force for Canada, 10 August 1986) [Convention].
[14] Quebec's implementing legislation (*Code of Civil Procedure*, RSQ, c C-25) applies to extraprovincial or international trade, with no distinction as to commercial or non-commercial relationships. For discussion, see: Henri C Alvarez, "The Implementation of the New York Convention in Canada" (2008) 25 J Int Arb 669 at 671.
[15] FAACA, *supra* note 3, s 3.
[16] Alberta: *International Commercial Arbitration Act*, RSA 2000, c 1-5, s 2(1); British Columbia: *Foreign Arbitral Awards Act*, RSBC 1996, c 154, s 2; Manitoba: *International Commercial Arbitration Act*, SM 1986, c 32, CCSM c 151, s 2(1); New Brunswick: *International Commercial Arbitration* Act, SNB 1986, c I-12.2, s 2(1); Newfoundland: *International Commercial Arbitration Act*, RSNL 1990, c I-15, s 3(1); Northwest Territories and Nunavut: *International Commercial Arbitration Act*, RSNWT 1988, c I-6, s 4(1); Nova Scotia: *International Commercial Arbitration Act*, RSNS 1989, c 234, s 3(1); Ontario: *International Commercial Arbitration Act*, RSO 1990, c 1.9, s 10 (Ontario incorporates the Model Law, which is seen to be substantially similar to the Convention); Prince Edward Island: *International Commercial Arbitration Act*, RSPEI 1988, c I-5, s 2(1); Quebec: *Code of Civil Procedure*, RSQ , c C-25, Article 948; Saskatchewan: *Enforcement of Foreign Arbitral Acts, 1996*, SS 1996, c E-9.12, s 4; Yukon: *Foreign Arbitral Awards Act*, RSY 2002, c 93, s 2.

Recognition and Enforcement (Procedure in Canada)

- Proceed by Notice of Application pursuant to local Rules of Civil Procedure in Province concerned (Model Law, Article 35)

- Articles 35 and 36 of the Model Law set out an essentially complete code for the recognition, enforcement or setting aside of an award, but there is disagreement on whether the “code” is mandatory or directory[17]

[17] See and compare *Sanokr – Moskva v Tradeoil Management Inc.*, 2010 ONSC 3073; *ACTIV Financial Systems Inc. v Orbixa Management Services Inc.* (2011), 109 OR (3d) 385 (SCJ).

Grounds for Refusing Recognition and Enforcement

- There are very limited grounds
  - No review on the merits of the award is permitted
  - The New York Convention sets out a *purportedly* exhaustive list of permissible grounds
  - The burden of proof (for the first 5 grounds) is on the party resisting recognition and enforcement
  - Even if a ground for non-recognition or non-enforcement is proven, the court is not obliged to refuse enforcement
  - The grounds are to be applied restrictively

Grounds for Refusing Recognition and Enforcement cont'd

1) Incapacity or invalid agreement

- A party to the arbitration agreement was under some incapacity, or the agreement is invalid under the law of the seat of arbitration or the law of the jurisdiction where recovery is available[18]

2) No proper notice or lack of due process

- The party against whom the award is sought to be enforced was not given proper notice of the arbitrator's appointment or of the arbitral proceedings, or was otherwise unable to present his/her case[19]

[18] *Convention*, *supra* note 13 at Article 5(1)(a).
[19] *Ibid* at Article 5(1)(b).

Grounds for Refusing Recognition and Enforcement cont'd

3) Tribunal's excess of powers

- The award deals with aspects of a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission[20]

4) Tribunal composition and procedure

- The composition of the arbitral authority or the arbitral procedure did not conform with the arbitration agreement or with the law of the seat of arbitration[21]

[20] *Convention*, *supra* 13 at Article 5(1)(c).
[21] *Ibid* at Article 5(1)(d).

Grounds for Refusing Recognition and Enforcement cont'd

5) Award not binding, suspended or set aside

- The award is not binding on the parties, or has been suspended or set aside by the jurisdiction of the seat of arbitration[22]

6) Arbitrability

- The dispute cannot be resolved by arbitration because it belongs exclusively in the domain of the courts[23] (e.g. injunctive relief)

[22] *Convention*, *supra* note 13 at Article 5(1)(e).
[23] *Ibid* at Article 5(2)(a).

Grounds for Refusing Recognition and Enforcement cont'd

7) Public policy

- The recognition or enforcement of the award is contrary to the public policy of the state where recognition or enforcement is being sought[24]
  (e.g. corruption, bribery, fraud)
- Ontario law
  - The public policy ground guards against the enforcement of an award which *"offends our local principles of justice and fairness in a fundamental way…"*[25]

[24] *Convention*, *supra* note 13 at Article 5(2)(b).
[25] *Schreter v Gasmac Inc.* (1992), 7 OR (3d) 608 (Gen Div) as cited in *Corporacion Transnacional de Inversiones, SA de CV et al v Stet International SpA* (2000), 45 OR (3d) 183 (CA); leave to appeal to SCC refused.

Additional Grounds at Large in the United States (Not without controversy) yet to be addressed by Canadian Courts

Arguably permitted by Article III of the New York Convention: "Each Contracting State shall recognize arbitral awards as binding and enforce them in *accordance with the rules of procedure of the territory where the award is relied upon*, under the conditions laid down in the following articles…"

[26] Emphasis added; no equivalent language appears in the UNCITRAL Model Law which is what the Ontario ICAA, *supra*, note 16, formally implements, not the language of the Convention. Article III has been considered and applied in Canada, confirming the applicability of provincial limitation periods on recognition/enforceability: *Yugraneft Corp v Rexx Management Corp* [2010], 1 SCR 649 [*Yugraneft Corp v Rexx Management Corp*] (notwithstanding otherwise exhaustive list of grounds on which recognition and enforcement may be revisited. Article III permits contracting States to apply different local procedural rules, have a provincially imposed limitation period; *id*, paras 17-34). On efforts at statutory harmonization in Canada, see: Uniform Law Conference of Canada Working Group on Arbitration Legislation, Discussion Paper, *Towards a New Uniform International Commercial Arbitration Act*, (January 2013).

Additional Grounds at Large in the United States (Not without controversy) yet to be addressed by Canadian Courts cont'd

8) Lack of Personal Jurisdiction (Jurisdiction *Simpliciter*)

- "minimum contacts": a constitutional requirement in the US: *International Shoe Co v Washington*, 326 US 310 (1945)
- for failure to establish as a ground for non-enforcement of an arbitral award

see e.g.: *First Investment Corporation of the Marshall Islands v Fujian Mawei Shipbuilding, Ltd*, Slip Opinion at 8,10, Case 12-30377 (5th Cir 21 Dec, 2012); cf *viz* domestic awards: *Glencore Grain Rotterdam BV v Shivnath Rai Harnarain Co*, 284 F 3d 1114 at 1122
(9th Cir 2002)

[27] *Cf, viz* Canadian enforcement of foreign judgments: pursuant to "substantial connections test" and Full faith and Credit (domestic with constitutional force), see: *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077; *Beals v Saldanha*, [2003] 3 SCR 416.

Additional Grounds At Large in the United States (Not without controversy) yet to be Addressed By Canadian Courts cont'd

***9) Forum Non Conveniens* (Discretionary)**

See: *Figueiredo Ferraz Engenharia De Projeto Ltda v Republic of Peru*, 665 F 3d 384, 392 (2d Cir 2011) (applying analogous language from Panama Convention, for non-enforcement); expressly disagreeing with *TMR Energy v State Property Fund of Ukraine*, 441 F 3d 304 (DC Cir 2005)

See also: *Monegasque de Reassurances v Nak Naftogaz of Ukraine and State of Ukraine*, 311
F 3d 488 (2d Cir 2002)

Recognition and Enforcement of the Award

- **Deference**
  - Courts apply a sliding scale depending on the ground for refusing recognition and enforcement, and the jurisdiction
  - Ontario law[28]
    - If the issue is a lack of jurisdiction → standard of correctness
    - If the issue is an excess of jurisdiction or procedural → standard is more deferential

- **Time limits**
  - The Convention provides that the time limits are determined by the laws of the jurisdiction where recognition and enforcement is being sought[29]
  - In Canada, the limitation period is determined by provincial legislation[30]

[28] *United Mexican States v Feldman Karpa* (2005), 74 OR (3d) 180 (CA); *Desputeaux v Editions Couette (1987) inc*, 2003 SCC 17.
[29] *Convention*, *supra* note 13 at Article 3.
[30] *Yugraneft Corp v Rexx Management Corp*, *supra* note 26.


ABA Section of
International Law
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International Bootcamp
Arbitration

What is International Arbitration?

1) An alternative to international litigation in local or foreign courts

2) Binding dispute resolution, before a privately-appointed tribunal, with party consent, with regulation and enforcement by the state

3) Rather than a judgment, the parties receive an "award"

4) In most countries, these awards can be enforced much more easily than foreign court judgments

International Arbitration is **NOT**:

Mediation (international arbitration is typically as hard-fought as litigation)

Necessarily less expensive or **faster** than litigation (although it can be)

Uniform (there are many different styles and "rules of the game")

Advantages of International Arbitration

1) Widespread enforceability of awards
2) Avoiding specific legal systems/national courts
3) Flexible and party-driven
4) Selection of arbitrators
5) No public hearings (except in investment arbitrations) – and can be (nearly) fully confidential
6) Neutrality of proceedings and arbitrators
7) Limited ability to appeal awards (finality)
8) Can be faster than litigation
9) Can be less expensive than litigation (but may be more, depending on the litigation venue, applicable rules, etc.)

Why Choose International Arbitration?

- Prevent giving one side a home-court advantage
- Avoid dysfunctional court systems
- Opportunity to choose the decision makers (e.g., with industry expertise)
- Greater party control of the process than in court litigation
- Avoid the need to translate evidence and oral testimony

The Four Phases of an Arbitration

Phase I:

- Contract Negotiation
- Agreement signed and arbitration clause created

Phase II:

- Dispute Arises
- Negotiations or mediation (if there is a multi-tiered dispute resolution clause)
- Request for Arbitration or Notice
  - State Arbitration agreement
  - Institution, if any
  - Appointment of Sole Arbitrator or Tribunal
  - Place of arbitration
- Response to the Notice
- Formation of the Tribunal (or Sole Arbitrator)

The Four Phases of an Arbitration (Cont.)

Phase III:

- Possible request for interim relief
- Statement of Claim
- Statement of Defense and Counterclaims
- Procedural Orders
- Disclosures
- Witness statements
- Hearing
- Arbitral Award issued

Phase IV:

- Parties decide to comply or not
- If not, Annulment or Enforcement Proceedings

Drafting the Arbitration Clause

Biggest danger: A "Pathological" Clause that is incapable of being enforced, e.g.:

1) Naming an arbitration institution or rules that do not exist;
2) Referring both to arbitration and to courts of a specific jurisdiction;
3) Naming a specific arbitrator who is now deceased or otherwise unavailable or requiring arbitrator attributes that are impossible to fulfill

Play it safe:

1) Specify the rules of a specific arbitration institution or UNCITRAL Rules;
2) Specify “seat” or “place” of arbitration
3) Check (online) the current version of the rules, name of the institution, etc.;
4) Use the sample clause recommended by that arbitral institution, adding or filling in optional details

Choice of Arbitration Rules

Many countries have arbitration laws which provide a legal framework for the conduct of arbitrations in their jurisdiction. **However**, parties are typically free to agree upon the procedure for their arbitration.

Ad Hoc	Institutional
Maximum flexibility Can be less costly BUT can be used to delay or block progress of arbitration, especially at the beginning	Harder to delay commencement of arbitration Default procedures where parties cannot agree Sometimes: quality control of arbitrators and awards

Sample Arbitration Clause

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. *[The Emergency Arbitrator Provisions shall not apply].* [*The Expedited Procedure Provisions shall not apply.]"* – International Chamber of Commerce Standard Clause

Clause Creation Formula

Also specify:

+ [**Number of arbitrators**]

+ [**Law Governing the Contract**]

+ [**Seat of Arbitration**]

+ [**Language of Proceedings**]

Sometimes included:

+ [**Confidentiality** (of the fact of the proceedings? of the submissions in the proceedings?)]

+ [**Restrictions on disclosures or document production**]

The Seat of Arbitration

Important considerations when choosing the seat of a potential arbitration:

- Signatory state of the New York Convention?
- Local arbitration laws
- Limited mandatory procedural rules?
- Absence of restrictions on choice of counsel & arbitrators?
- Good infrastructure & facilities, safe to appear at hearings?
- Limited judicial intervention?
- Judiciary comfortable with arbitration?
- Limited setting aside / appeal proceedings?
  - How many levels of review? Filing fees? Track record of local courts in upholding awards?

Governing Law & Language

Governing Law

Unless stated elsewhere, the governing law of the contract should be stated in the arbitration agreement. Under doctrine of separability, arbitration clause is a separate from the underlying contract. Law applicable to the arbitration clause is the law of the seat of arbitration. If there is a separate governing law clause, it is advisable to check that it does not also contain a submission to courts which would be inconsistent with the arbitration agreement.

Language

The language chosen should generally be that of the underlying contract and/or the majority of the documentation, to avoid extensive need to translate evidence.

Number / Selection of Arbitrators

One or Three?	If Three:
• One for less complicated contracts, smaller amounts in dispute, faster proceedings • Three to ensure that at least one arbitrator satisfies the appointing party with respect to, e.g., legal background, industry knowledge, language capability, cultural sensitivity	• For higher stakes and where speed is less important • Each side to nominate one arbitrator? • The third (Chair/President) to be nominated by the party-chosen arbitrators? By the parties? By the institution (always or only if the parties or their arbitrators cannot agree)?

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Also known as the "**New York Convention**“ – it is one of the key instruments in international arbitration. The New York Convention applies to the **recognition** and **enforcement** of foreign arbitral awards and the referral of a dispute by a court to arbitration. Presently, 157 States have signed the New York Convention

Article II – Requires courts to refer disputes to arbitration if the parties have signed an arbitration agreement.

Article III - Sets out the basic obligation undertaken by contracting states to recognize and enforce foreign arbitral awards.

Article V - Sets out the limited grounds upon which contracting states may refuse to recognize and enforce

Effect of States Implementing The New York Convention

A Signatory State:

- Requires the parties to honour their contractual obligation to arbitrate;
- Provides for limited judicial supervision of arbitral proceedings; and
- Supports the enforcement of arbitral awards issued in other signatory states in a manner similar to that for national court judgments.

This is usually implemented through domestic legislation, which defines the contours of the right to arbitration and the grounds to refuse enforcement.

Inter-American Convention on International Commercial Arbitration

Also known as the "**Panama Convention**". It regulates the **conduct** of international commercial arbitration and the **enforcement** of arbitral awards … Just like the …

The New York Convention

Quick Facts

- Modeled after the New York Convention
- 19 Nations have signed and ratified the treaty
- Created to address lack of access to commercial arbitration by many Latin American Countries

Both conventions share many similarities, but the Panama Convention departs in at least two key ways:

- Article III In the absence of express agreement between parties, the arbitral procedure is to be governed by the Rules of Procedure of the Inter-American Commercial Arbitration Commission (IACAC).

- Article V – Also addresses States ability to refuse to enforce arbitral awards, but **DOES NOT** require that State Courts stay their proceedings.

Enforcement in the United States

- Federal Arbitration Act ("FAA") (Title 9 of the U.S.C.).
- Chapter 2 of the FAA (9 U.S.C. § § 201-208) incorporates and implements New York Convention.
- Chapter 3 of the FAA (9 U.S.C. § § 301-307) incorporate and implements Panama Convention
- The Panama Convention applies if the majority of the parties are citizens of the states that are signatories to the Panama Convention. Otherwise, New York Convention applies. 9 U.S.C. § 305.

- Original jurisdiction in the federal district courts regardless the amount in controversy.
- The court may compel arbitration or stay court proceedings pending arbitration. 9. U.S.C. § 206
- Statute of limitation to enforce the award is three years!

Procedure for Enforcement

- Federal district court has original jurisdiction
- Personal jurisdiction is an open issue
- Some courts used the doctrine of forum non conveniens to dismiss a petition to enforce but their decisions have been heavily criticized
- Petition to enforce must include:
  - Certified copies of the arbitration agreement and the arbitral award. (art IV New York Convention)
  - certified translation of the agreement and the award if not in English.
- Service of Process pursuant to the FRCP
- Interim relief is available under FRCP and applicable state law (attachment and garnishment)

Grounds for Refusal to Enforce

- Refusal to Enforce – Grounds are listed in art. V of the New York Convention.
  - Exclusive grounds
  - The court may not review merits because mistake of law is not included as a ground (but consider manifest disregard argument)
  - The party against which enforcement is sought has burden to prove that grounds for non-enforcement exist
  - Even if grounds for non-enforcement exist, the court has discretion to enforce the award (pro-enforcement bias)("Recognition and enforcement of the award ***may*** be refused…")
- art V(1) Grounds must be proven by the party against which enforcement is sought.
  - Invalidity of the arbitration agreement
  - Absence of or insufficient notice; unable to present defense
  - Award is outside of the scope of agreement
  - Composition of the tribunal was not accordance with the agreement
  - The award is not yet binding or set aside
- Art V(2) grounds may be raised by the court:
  - Arbitrability of the dispute under the law of the country where enforcement is sought
  - Public policy of the country where enforcement is sought.

Investor State Dispute Settlement: ICSID

- The ICSID Convention created an arbitration institution and system under the umbrella of the World Bank.
- If both the home state of the investor and the host state are members of the ICSID Convention, the dispute may be submitted to ICSID arbitration under that treaty and the ICSID rules.
- An award in an ICSID arbitration cannot be challenged in a domestic court under the New York Convention, but can be annulled through the ICSID process.

Investor-State Arbitrations:
Investor State Dispute Settlement (ISDS)

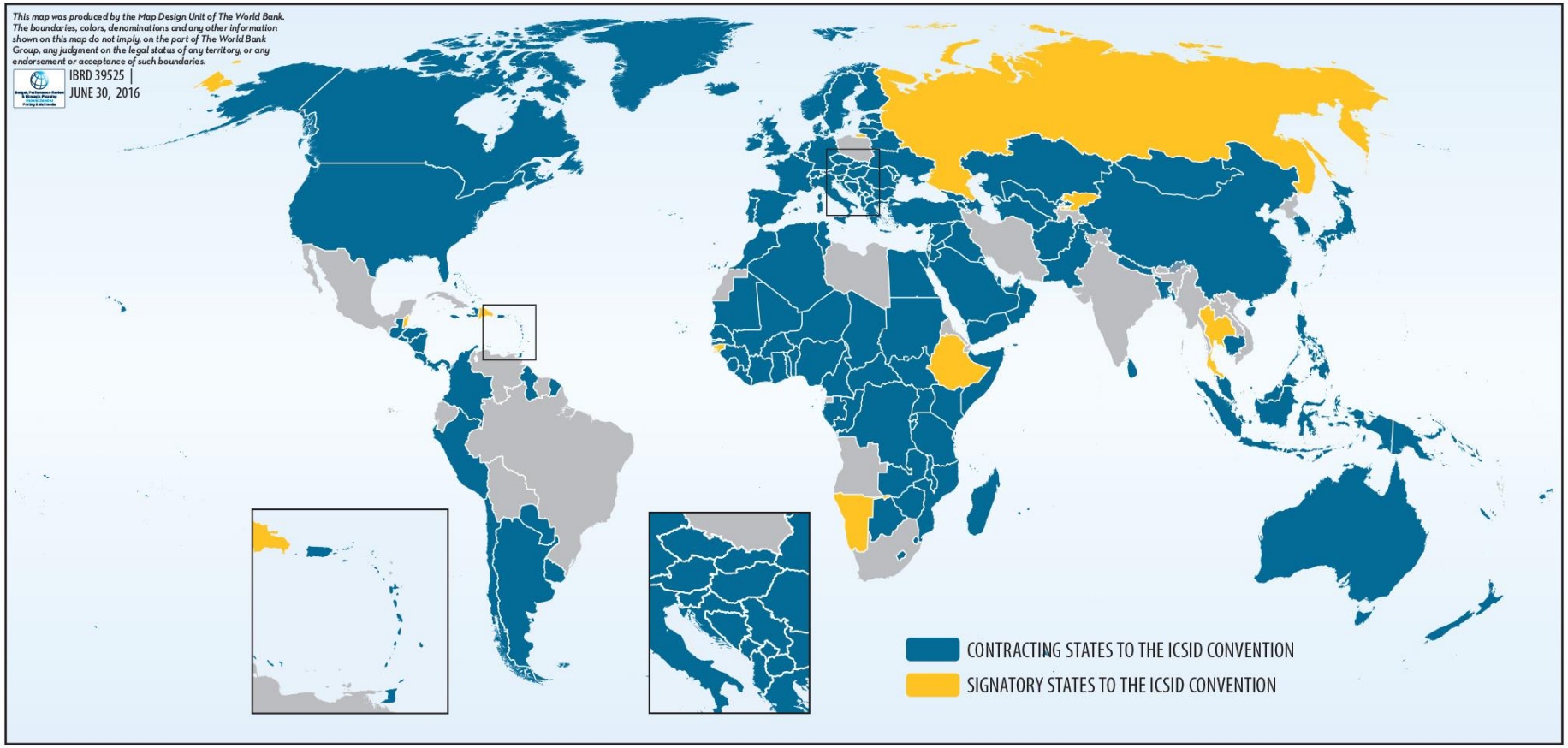
1) Allows foreign companies or persons to bring claims in arbitration against the governments of the states where they have invested.

2) The claims arise out of international treaties signed by the "**home**" state of the investor and the "**host**" state where the investment was made.

3) Relevant treaties include the ICSID Convention, the Energy Charter Treaty, and numerous bilateral investment treaties ("BITs").

4) May be administered by the International Centre for the Settlement of Investment Disputes (ICSID), through another institution, or in *ad hoc* proceedings.

Contracting and Signatory States to the ICSID Convention



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Friday, October 5, 2018

International Ethics & Cultural Issues

Prof. Aparna Polavarapu