

THE IMPACT OF UNIFORM LAW IN THE NATIONAL LAW. LIMITS AND POSSIBILITIES ARBITRATION

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Mexico D.F., November 2008

INTRODUCTION

This General Report is based on several National Reports submitted by distinguished colleagues listed in Annex 1 hereto. Such Reports have been prepared by responding to the questionnaire attached as Annex 2 hereto that I provided to the National Reporters to permit them to address the topic from a common approach.

Essentially, the questionnaire intends to establish the notion of Uniform Law accepted in each country subject to a National Report, the forces having an impact on the fashioning of Uniform Law from each such country's perspective, and the degree in which arbitral awards or determinations are recognized or enforced in such country. By elucidating such questions it will be hopefully possible to establish: (i) the national, international and a-national sources of Uniform Law from the perspective of each such country; and (ii) the degree of insertion and influence of arbitration within the context of the national legal order of the country being considered. On the basis of such information, this General Report will intend to visualize the actual or potential impact of arbitral awards or determinations based on Uniform Law on the acceptance by such country of Uniform Law and the correlated Uniform Law influence in the development of its national legal system.

It should be noted that both issues interact with each other. For example, if the notion of Uniform Law retained by the country being considered excludes a-national rules or principles, there may arise issues or problems regarding the effectiveness of arbitral awards or determinations premised on a-national legal sources of Uniform Law which, in the view of the arbitrator, provide generally accepted substantive rules relevant for the solution of the case.

Questions and answers thereto are not considered in this General Report in the order formulated or answered but, rather, by grouping together different although interconnected matters addressed by such questions or answers.

THE ANSWERS TO THE QUESTIONNAIRE

1. QUESTIONS 1, 2 AND 3

As a first approach based on the answers received, the different national legal orders being considered may be classified as:

those limiting the notion of Uniform Law to substantive law rules in force in such country as a result of its ratification of international conventions introducing Uniform Law into each of the member countries (such as the 1930 and 1931 Geneva Conventions on Letter of Exchange or Checks or the 1980 UN Convention on the International Sale of Goods) or its participation in a supra-national political and economic union (such as, within the context of the European Union, the regulations of the European Parliament and the Council of the European Union); and

those that extend the notion of Uniform Law to other sources, including international practices and usages, general principles of law enjoying wide international consensus, *lex mercatoria*, transnational law, certain standardized contract forms or commercial terms or principles of contract law, such as ICC's Incoterms or UCP 500 (Uniform Custom and Practice Rules for Documentary Credit Transactions) or URC (Uniform Rules for Collection) or UNIDROIT's Principles of International Commercial Contracts (2004).

The first category includes Germany, Mexico, Poland and Spain,

The second category includes: Argentina, Brazil, the Czech Republic, China, France, Greece, Japan, Norway, Paraguay, Sweden, Switzerland, Taiwan, Tunisia and U.S.A.

Colombia deserves separate consideration. The Colombian National Report indicates that the notion of Uniform Law as such does not exist in Colombia. For the purposes of responding to the questionnaire, Uniform Law is understood in such Report as a set of guidelines, established rules, conventions, model laws and codified usages that are intended to be

applicable and of recognized value worldwide. From that perspective, Colombia could be classified within the second category described above.

However, certain additional precisions are required.

a) All National Reports concur in that Uniform Law may be or is currently incorporated into the national legal orders through the ratification of international treaties and after going through the constitutional law procedures involved in treaty ratification (e.g., Sweden). In fact, a number of countries indicate that supra-national legislation or international conventions are not automatically a part of their national legal system and require for their admission going through legal processes often dictated by their national constitution (e.g., Sweden, the Czech Republic). In some countries, model laws – that if not by all considered a part of the notion of Uniform Law, may at least be deemed to be one of its possible sources - have influenced or are likely to influence the fashioning of national legislation. In the area of arbitration, both domestic and international, such has been the case of the UNCITRAL Model Law on International Arbitration in countries like Argentina (although its draft arbitration law was never approved by the Argentine Congress); Brazil ; Colombia; China; Germany; Japan; Mexico; Norway; Paraguay; Poland; Spain; several states of the U.S.A.: California, Connecticut, Florida, Hawaii, Illinois, Louisiana, North Carolina, Oregon, Texas. Beyond such example, National Reports have not pointed to relevant examples of non-national or a-national sources of Uniform Law playing a substantive role in fashioning procedural national law.

b) All National Reports also seem to concur in that Uniform Law in principle applies when it has been “nationalized”, i.e., when it has become a part of the national or foreign law governing the transaction pursuant to choice-of-law rules and principles, including the principle that a contract is governed by its proper law, however defined (e.g., Japan, Sweden). Nevertheless, this does not always prove true when it comes to Uniform Law belonging to a foreign national legal system designated as the proper law. Some countries having ratified the 1980 UN Vienna Convention on International Sales have made the express reservation directed against its Article 1(1) b so that they will not apply the Convention just because their conflict-of-laws rules point to the application of the law of another Convention country. For example, such is the case of China, but not of Poland or France. All Reports assign little or no relevance to Uniform Law in the area of tort.

c) A number of countries include in the notion of Uniform Law international conventions unifying private international law rules – i.e., not only those unifying substantive law – (for example, 1889 Montevideo Treaties on Civil and Commercial Law) and conventions unifying the legal regime corresponding to procedural law matters, such as the U.N.1958 New York Convention on the Recognition and Enforcement of Arbitral Awards or the 1975 Panama Convention on International Commercial Arbitration.

Such is, for example, the case of Brazil, Colombia, Germany and Paraguay.

d) Countries accepting that the notion of Uniform Law does not just cover the internal incorporation of uniform legal regimes as a result of the ratification of a treaty do not necessarily include within such notion the same range of non-national or a-national rules or principles or non-national or a-national sources.

Uniform Law, even if incorporated into treaties, is not necessarily a source of national law if the treaty has not been ratified by the incumbent country. For example, in Greece, Uniform Law not formally incorporated into the national legal order is not an autonomous legal source susceptible of direct application by Greek courts. In Sweden, although commercial practice and custom deemed binding on the Parties (i.e., INCOTERMS) may supersede Swedish sales law, general principles of contract law, such as the UNIDROIT Principles, *lex mercatoria* or the general rules of procedure are not a part of Swedish law. In the Czech Republic the national legal system does not include *lex mercatoria* or transnational law. In Greece, although Incoterms are accorded a higher legal status as commercial usages than contractual clauses, they do not preclude the need of determining the applicable national law the mandatory rules of which shall prevailingly govern. However, also in Greece, ICC's UCP 500 will not be accorded similar normative power and shall not be applied if not referred to by the parties in their stipulations. On the other hand, the French National Report states that French courts take into account Uniform Law and try to accommodate their decisions with international standards particularly in the field of international business law.

QUESTIONS 4 AND 6-7-8

These Questions essentially cover three areas:

(I) the degree in which the national legal system being considered recognizes the autonomy of: (a) the parties to choose the applicable law or legal rules to

transactions subject to arbitration; or (b) arbitrators to select the applicable law or legal rules should the parties have remained silent in such respect;

(II) the degree of review on the merits of arbitral awards by the courts of the country where they are rendered;

(III) the degree of review by the courts of the country under consideration of arbitral awards rendered abroad when brought for recognition or enforcement in such country; and

(IV) to what extent national legal systems allow arbitration to develop within an autonomous context isolated from the influence of national law or courts.

A number of National Reports indicate that international practices, usages or customs, *lex mercatoria*, transnational law, a-national or international legal sources can originate Uniform Law from the perspective of the corresponding national legal order when: (i) not conflicting with the mandatory rules or public policy of the applicable law, or (ii) to fill-in gaps in the applicable law or help interpreting norms or rules of the applicable law, or if rendered applicable through the will of the parties in derogation of supplemental legal rules belonging to the applicable law, or (iii) when such a-national sources are part and parcel of the applicable law (which may also mean that the direct and immediate unilateral application - *voie directe* - of uniform law originated in a-national legal legal sources is excluded.)

For example, such is the case of Argentina (in respect of a-national law, including *lex mercatoria*); Colombia, the Czech Republic (as to trade usages); China (as to international custom or usages of the trade); Greece (Uniform Law not introduced into Greece through treaties ratified by Greece is not recognized or accepted as an autonomous source of legal rights and obligations and applies only to the extent it is a part of Greek applicable law; it cannot prevail over contrary mandatory rules or supplemental rules of the applicable Greek law except, in the latter case, when the parties expressly refer to uniform law. However, in Greece, Uniform Law of a-national source may exceptionally serve the purpose of interpreting contractual terms, as is the case of ICC's INCOTERMS); Japan (custom and general principles of law are Uniform Law but cannot supersede treaties or national legislation); Switzerland (parties are only free to choose a state law and non-national law only applies within the limits allowed by the applicable state law). In France, the express selection of a national law would in principle exclude the application of *lex mercatoria*. In Spain usages of the trade, customs and general principles of law are part of Spanish law and become applicable when Spanish law governs.

In countries in which the choice-of-law applied or considered by a national court is limited to a national law (e.g. Argentina, the Czech Republic, Greece, Spain, Switzerland, Tunisia) transnational or a-national legal principles, or rules or principles encompassed by the notion of Uniform Law are only applicable to the extent that they are incorporated into the national applicable law or when their application has been stipulated by the parties within the boundaries allowed by the mandatory rules of the applicable national juristic order.

In any case, according to the legal systems of such countries, it is clear, or at least it does not appear to be excluded, that international arbitrators are not bound by such limitations, so that they may directly apply transnational legal principles and substantive rules, either chosen by the parties or selected by the arbitrators absent, such choice on the basis of choice-of-law considerations or criteria that are not the same to or are not influenced by conflict-of-laws rules observed by courts of law.

Nevertheless, there may be different views as to the scope or meaning of the applicable transnational legal principles or rules. For example, in Switzerland, international conventions for the unification of commercial law, model contract and clauses, trade usages and customs qualify among the a-national or international rules that may be applied by international arbitrators, but not (arguably) *lex mercatoria* or rules not originating in organizations that are not direct participants in international commerce, such as the UNIDROIT Principles, except if incorporated by reference into the contract by the parties thereto or if the arbitrators decide *ex aequo et bono*. However, the Swiss National Report points out that many arbitral awards deciding the merits of the dispute under Swiss law have applied Uniform Law including the UNIDROIT Principles.

Be it as it may, the above does not necessarily exclude the influence on arbitral choice-of-law decision making of the conflict-of-laws rules expressly applicable to international arbitrations belonging to the national jurisdiction that is also the seat of the arbitration. This includes substantive rules specially adapted to international arbitrations localized in the forum that are directly applicable to such arbitrations.

In general, the seat of the arbitration does not seem to determine the proper law or the law governing the substance of the dispute, although it may be considered an element or relevant contact to determine the proper law (Taiwan) or is excluded as having any influence in such respect (France).

However, it must be noted that the seat of arbitration commands the application of the arbitration law of the seat, as made clear in the Spanish National Report. In the case of certain countries, this may influence the law governing the merits of the dispute being arbitrated. For example, in accordance with Swiss arbitration law, arbitrators sitting in international arbitrations in Switzerland have to take into account Swiss conflict rules specifically addressing choice-of-law issues arising in the course of international arbitrations in Switzerland. They are also bound to apply certain substantive rules found in Swiss law that unilaterally and necessarily apply to international arbitrations localized in Switzerland. To the extent that arbitral tribunals are bound by or may not ignore conflict-of-laws rules or substantive mandatory rules of the seat of arbitration, they must apply or consider applying such substantive rules or the legal rules or juristic system designated by such conflict-of-laws rules, including Uniform Law covered or designated by such rules or system. Nevertheless, the conflict-of-law rules in matter of international arbitration in Switzerland are so flexible as to be compatible with the freedom parties and international arbitrators enjoy in practice in the process of determining the law or rules to be applied to decide a dispute on the merits.

Several National Reports also point out that, to the extent that arbitration law in the seat of arbitration allows *ex aequo et bono* or amiable composition arbitration, this may open up further possibilities to take into account Uniform Law as guidelines for deciding the dispute on the merits without constraints (or with reduced constraints) derived from private international law. This will depend in practice on how often this form of arbitration will be used; the international arbitral practice seems to show that such use is extremely limited.

On the other hand, considerations raised by issues (II) and (III) mentioned above may throw light on the extent conflict-of-laws principles or notions of the forum play any real or practical role in controlling the choice-of-law process or method explicitly or implicitly observed by international arbitrators and, particularly, the role played by the forum's public policy or inarbitrability reservations in, as the case may be, annulling or setting aside awards rendered in the forum or rejecting the recognition or enforcement of foreign awards.

For example, if, under the national legal system, being considered courts of law may not review the choice-of-law process observed by the parties to an arbitration or the arbitrators deciding the case in selecting the applicable law or rules of law or the outcome of such process, or if they allow only limited

interference of the forum's public policy in the substantive decisions contained by arbitral awards, arbitrators will in fact enjoy considerable freedom in applying or selecting substantive rules or principles of national or a-national origin covered by the notion of Uniform Law.

In general, the National Reports show (with some nuances pointed out below) that: (i) countries do not include, within the means for reviewing arbitral awards rendered in their jurisdiction on international disputes, a review on the merits or on the private international law reasoning on the basis of which the award was rendered; (ii) if such review is permitted, the parties may waive it; and (iii) the means for setting aside international arbitration awards rendered in the forum are less in number and less stringent than the means to attack domestic awards also rendered in such forum (e.g., China, France, Norway, Switzerland and, more generally, countries having enacted the UNCITRAL Model Law for international arbitrations only). The same may be said in connection with awards rendered abroad and brought for recognition or enforcement in the forum. Practically all countries subject to National Reports are member countries of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which excludes the review on the merits of foreign awards by the courts of the forum where their enforcement is sought. Further, it should be noted that Swiss law allows the parties to waive all means for setting aside an award available under Swiss law in respect of international arbitrations held in Switzerland.

The Czech Republic seems to be the only salient exception. A case arbitrated in that country – domestic or international – may have to be “resumed” (and the award rendered annulled) either in case of decisions, evidence or facts that could not be used in the arbitration at no fault of the party claiming the resumption if such absent elements would lead to an outcome more favorable to such party or if it was not possible to produce during the arbitration certain evidence favorable to the party invoking such ground. On the other hand, courts of countries having enacted the UNCITRAL Model Law both for national and international arbitrations held in the forum (like Mexico) are expected, at least according to the letter of the law, to uniformly apply the same liberal criteria favorable to the validity and effectiveness of arbitral awards when it comes to considering the annulment of an award in connection with both domestic and international arbitrations held in the forum.

Furthermore, in countries like Germany, a court of law hearing a means of recourse against an arbitral award or an objection to its enforcement based

on an infringement of public policy or attacking the validity or scope of the underlying arbitral agreement is not bound by the factual findings of the arbitrators and may revisit them, a characteristic that may, at least potentially, lead to a covert review on the merits of the award at stake.

It is also relevant to point out that certain national jurisdictions (France) are willing to enforce awards rendered abroad although annulled or suspended in the country where they are made, which would certainly limit the effects in France of the annulment of foreign awards for reasons going to the substance of the arbitral decision, the reasoning of the arbitrators or because of incompatibility of the award with public policy of the country where the foreign award was rendered.

Some National Reports (France, Greece, Japan, Poland) expressly indicate that it is difficult to envisage a scenario in which public policy would prevent the application of Uniform Law incorporated into foreign substantive or procedural law, or that Uniform Law will be accepted in the forum either when incorporated in the applicable law or if the parties agreed to it so long as it does not contravene the forum's public policy (Colombia) or that there is no evidence of any case where a foreign judgement or award has been annulled or not enforced because of application of Uniform Law, including *lex mercatoria* (France).

Certain additional precisions are however needed.

Some countries allow a review on the merits of domestic awards rendered locally, but not in respect of "foreign-related" or "international" awards rendered in the forum, or awards rendered abroad and brought for enforcement/recognition in the forum (China). In other countries, like Argentina, an award rendered locally may be reviewed if found to be "illegal" or "irrational" (which opens the possibility of a review on the merits if the reviewing court considers that the arbitrators have not properly applied the law), although it is not yet clear whether such criterion applies only to domestic awards rendered in Argentina. Also, under the "manifest disregard of the law" doctrine, courts in the USA may set aside an arbitral award rendered in such country if found to be "irrational", "completely capricious or arbitrary", or as "having ignored the law" or "caused significant injustice". In Mexico, Mexican federal courts have sometimes reviewed the award *de novo* although this is not permissible under applicable Mexican federal law on arbitration; further, the laws of some Mexican states foresee the possibility of reviewing arbitral awards on the merits. However, it seems that such court decisions predate the enactment of

the UNCITRAL Model Law though the modification of the Mexican Commercial Code and that the review of arbitral awards on the merits allowed under local procedural laws of Mexican states are limited to civil law (or non-commercial) arbitrations. More generally for all national jurisdictions, it may be contended that an arbitral award ignoring the applicable law expressly selected by the parties to govern the dispute may be set aside because of a finding that by not applying such law the arbitrators acted beyond the scope of their authority.

On the other hand, the scope of matters considered non-arbitrable by a national forum naturally limits the questions or issues that may be arbitrated and the potential influence of arbitral determinations in fashioning or applying rules or principles –national or a-national – in respect of such questions or issues.

Particularly the lesser or more lax such review or notions of inarbitrability or public policy upheld or observed in such country, the lesser being the probability that arbitral awards are based on Uniform Law notions, will be that principles or rules will be challenged before a national court, and the greater will be the influence of such awards in advancing the application of Uniform Law to transactions or relationships bearing some degree of contact with such country.

All National Reports coincide in pointing out that public policy notions as understood in the forum may bar the validity (or lead to the annulment) of an award rendered in the forum contrary to such notions or the recognition of a foreign award equally infringing such notions. Those public policy notions are generally limited to *ordre public international*, i.e., as not including all the mandatory rules and principles of the relevant national legal order and only extending to general principles of morality and justice adhered to by the country in question or constituting the basis on which such country's social or economic organization and existence is formed. Public policy, as understood, includes *lois de police*, international mandatory rules or peremptory or overriding substantive rules of the forum; i.e., substantive rules unilaterally extending or seeking their extraterritorial application or their application to cases with an international element because of the underlying policies, social or economic interests or purposes they intend to protect.

Arbitral awards premised on Uniform Law are not an exception to the public policy or inarbitrability limitations prevailing in the country in which the award is rendered or is subject to enforcement. In most countries, only

general public policy principles (ordre public international) come into play for setting aside or barring enforcement of international awards rendered in the forum or foreign awards. In countries like France or Switzerland, international public policy only applies when the solution advanced by the arbitral decision is “intolerable” from the perspective of ordre public international or violates it “flagrantly”. The French legal system further includes substantive and permissive norms unilaterally applicable to international transactions or arbitrations which tend to reflect the French vision of international legal standards or rules, and which invariably favor the autonomous development of international commercial arbitration or emphasize its detachment of national legal systems. Generally, such norms have almost invariably been created or developed through French court decisions, and include the affirmation of the principle that the arbitration agreement is legally autonomous from the contract or legal transaction including it or to which it refers.

However, in some countries, awards rendered in the forum – domestic or international – might, in practice, be subject to domestic public policy. Some National Reports (e.g., Brazil, Greece) suggest that national courts are not always consistent in refusing to apply domestic public policy notions with respect to international cases or arbitrations. In Argentina, the situation seems to be the same.

Furthermore, although some National Reports generally indicate that forum public policy notions applied to international arbitration procedures and awards rendered in the forum or brought for enforcement in the forum are detached from domestic mandatory rules, this is not always the case when determining whether a dispute is arbitrable or not.

In Colombia, for example, arbitrability is defined in accordance with criteria apparently uniformly applied to international and domestic cases. In some countries, like Germany, certain public or administrative contracts are not arbitrable. In others, inarbitrability only extends to consumer and labor disputes, validity of patents, personal status (Japan) or matters governed by tax or penal laws (France). In France, there still remain limitations on the arbitrability of disputes in the realm governed by French administrative law or when French public entities are involved in the transaction.

Nevertheless, countries like Greece, France, Switzerland or the USA also advance arbitrability rules that vary from domestic to international cases irrespective of whether the award is rendered in the forum or not and that are less stringent in connection with international cases than those prevailing in

respect of domestic ones. Particularly in France and the USA, the arbitrability of international disputes is subject to a very liberal regime, including when a foreign state or public body is a party to the dispute. According to the Tunisian National Report, the Tunisian State and public bodies may agree to arbitration in connection with international transactions to which they become a party. The Tunisian State can also agree to arbitrate foreign investment disputes provided arbitration is expressly stipulated in connection with a specified investment dispute. Consequently, in such countries, international transactions and arbitrations are or may be subject to rules and principles departing from local mandatory rules and principles. Often, the arbitrability of disputes in the international plane is transported to the domestic plane with the result of expanding the arbitrability of domestic transactions or relationships, as has been the case in the USA.

QUESTIONS 5, 9-11

Although – except perhaps for certain references to local court decisions in the National Report of Argentina – no National Reporter has suggested that its national jurisdiction is not arbitration friendly, National Reports are, in general, either skeptical about the insertion or influence of arbitration awards in the respective national legal order or non-conclusive in such respect. The bottom line of the answers seem to indicate that, although arbitral awards are generally recognized to have *res iudicata* effects and are binding on the parties to the dispute¹, they are seldom published, or when they are published they are only published in a sanitized form. It is also stated that arbitral awards are deprived of precedential value or are not deemed to play any important direct role as a source of law, or are considered private acts without legal value, or not automatically a part of the national legal system, or have little influence in the fashioning of national court decisions (e.g. Brazil, Czech Republic, Germany, Greece, Mexico, Sweden), all circumstances tend to minimize their impact on the evolution of national law. In some countries, like Japan, Paraguay or Uruguay, no answers are readily available because arbitration is scarcely used. The French National Report states that the relationship between the operation of the arbitral legal order and the national juristic systems is more one of mutual coordination than of reciprocal influence. More drastically, the Spanish National Report asserts that there is no inter-connection between the world of state courts and

¹ The only country responding to the questionnaire that is both a *stare decisis* jurisdiction and accepts issue preclusion or collateral estoppel is the USA. However, such characteristics seem to be of no importance for determining the impact of commercial arbitration on the introduction or fashioning of Uniform Law in that country.

the world of arbitration. The French National Report also points out that, rather than arbitral awards influencing national law, it is national legislation, court decisions and, in the ambit of the European Union, European Law and the decisions of the European Court of Justice, that have impacted on the evolution of international arbitration and arbitral decisions.

Most National Reports do not register any apparent influence of the action of international arbitral institutions in the fashioning of national law, perhaps in part because of the non-jurisdictional and only administrative nature of the functions performed by such institutions. Only the work of institutions such as UNCITRAL or UNIDROIT play a role in fashioning Uniform Law likely to be incorporated into national legal system after going through the national legal procedures permitting such incorporation (as highlighted, for example, in the Greek, Czech and Swiss National Reports).

Nevertheless, as indicated in the French National Report and other National Reports (e.g., Norway), national laws evolve within an international and often regional environment in a globalized world and international arbitration is a part of such environment necessarily influencing national legal systems. International arbitration may then play a more general, although less easily perceptible, role in the national incorporation of Uniform Law in the broad sense of the term or in the development and interpretation of Uniform Law already incorporated into national legal systems or in the interpretation and construction of national law provisions particularly regarding international commercial or business transactions. This may certainly be facilitated by the fact that there is normally no national court control on the law or rules of law applied by international arbitrators or the legal process whereby the governing law or rules of law are identified.

Such development is particularly noticeable in respect of legal areas giving rise to disputes mostly, or not infrequently, submitted to arbitration, as happens with disputes arising under the Vienna 1980 United Nations Sales Convention (e.g., Germany) or where arbitral awards are regularly published such as, according to the Norwegian National Report, maritime law. The Brazilian National Report in turn points out that the fact that more and more arbitral awards referring to international usages and practices or a-national rules that may be considered as being a part of Uniform Law are benefiting from leave of enforcement granted by the Brazilian Supreme Justice Tribunal, may possibly influence future acceptance of Uniform Law in Brazil. Finally, the Chinese National Report notes that arbitral decisions under the CIETAC, the leading Chinese arbitral body, may influence the

Chinese People's court decisions regarding the validity of arbitration agreements and, further, that in view of the growing reference by arbitral awards rendered within the context of Chinese arbitration commissions to international practices and usages included in the broad notion of Uniform Law, it will become much easier for Chinese courts and legislators to accept them if they are not contrary to Chinese public policy or mandatory rules.

CLOSING REMARK

Arbitration – and more specifically, international commercial arbitration – is recognized a largely autonomous role in the adjudication of international commercial disputes both by limiting the means of recourse against arbitral awards rendered locally and facilitating the recognition and enforcement of foreign arbitral awards in the national forum. It is to be highlighted once more that most countries subject to National Reports presented for this survey are UN 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards member countries. Such circumstances certainly contribute to the national insertion of arbitral awards based on Uniform Law and their ability to play a growing role in fashioning or implementing a legal framework not necessarily or exclusively rooted in national law for business, economic and commercial relationships falling under the sphere of influence of one or more national legal systems or jurisdictions.

Although a considerable number of National Reports have underlined that arbitral awards have little or no influence in the evolution of the national law or in the decisions of national courts, one cannot rule out future developments showing that because of the growing importance of international commercial arbitration as the natural international mechanism for resolving international economic disputes in respect of a vast array of industries and productive activities, arbitral awards may influence *de facto* the legal rules and principles governing transactions relating to such industries or activities or the interpretation of such principles or rules, even when such transactions show prevailing roots in national legal systems.

Within such context, the possible influence of Uniform Law applied or taken into account by international arbitral tribunals in their decisions regarding business or commercial transactions also falling within the purview of national laws, is perhaps with the effect of shaping the evolution of national law equally covering such transactions and cannot be excluded.

Washington D.C., November 2008

ANNEX 1**NATIONAL REPORTERS****Argentina**

Julio César Rivera

Brazil

Lauro Gama Jr.

China

ZHAO Jian and XIAO Fang

Colombia

Fernando Mantilla Serrano

Czech Republic

Alexander Bělohávek

France

Jean-Baptiste Racine

Germany

Karsten Thorn

Greece

Stavros Brekoulakis

Japan

Shusuke Kakiuchi

Mexico

James A. Graham

Norway

Giuditta Cordero Moss

Paraguay

José Antonio Moreno Rodríguez

Poland

Maciej Tomaszewski

Spain

Francisco López Simó y José
Angel Torres Lana

Sweden

Sigvard Jarvin

Switzerland

Markus Müller-Chen

Taiwan

Lo Chang-fa and Wang Wen-yeu

Tunisia

Kalthoum Meziou

United States of America

Joel H. Samuels and Jan
Kleinheisterkamp

Uruguay

Paul Arrighi

ANNEX 2

1ST INTERMEDIATE CONGRESS OF THE INTERNATIONAL ACADEMY OF INTERNATIONAL LAW

THE IMPACT OF UNIFORM LAW ON NATIONAL LAW: LIMITS AND POSSIBILITIES

COMMERCIAL ARBITRATION

Questionnaire Addressed to the National Reporters

From your national law perspective, would it be proper to include within the notion of “Uniform Law” usages of the trade or “customs”, general principles of law, general principles of contract law or of the law of obligations, transnational law, *lex mercatoria*, general rules of procedure? Uniform Law below shall mean Uniform Law according to the meaning assigned to this expression in your reply to this Question 1.

To what extent has your country incorporated Uniform Law as national law through treaty ratification, other enactments or court decisions?

To what extent should your national law be considered as including Uniform Law when designated as proper law of the contract? the law governing the tort? When your country is designated as place (seat) of the arbitration?

To what extent will legal notions in your country applicable in the process of deciding a dispute by courts or arbitrators (including public policy and international mandatory rules or *lois de police* (national or foreign)) accept Uniform Law incorporated in the foreign law (substantive or procedural) applicable, as the case may be, to the contract giving rise to the dispute/at the foreign arbitral place or seat?

To what extent are arbitral awards officially published or informally disseminated in business and legal circles in your country? Is your country a *stare decisis* country? If so, to what extent does *stare decisis* apply to arbitral determinations/awards? To what extent is issue preclusion or collateral estoppel (if accepted in your legal system) applicable in arbitration (from court of law to arbitral tribunal and viceversa / between arbitral tribunals)?

To what extent are national laws and state courts in your country “arbitration friendly”? Does your answer change depending on whether a state party or a

state interest are directly involved in or affected by the resolution of the dispute or the contract may be labeled as “a public” or as an “administrative” contract under your legal system? Whether the arbitration is “international or domestic”? Whether its seat/place is within/outside your country?

To what extent are arbitral awards subject to control on the merits (including from the outlook of private international law or choice-of-law methodologies, rules or principles applicable or accepted in your country) or in respect of procedural notions or matters (e.g., due process) when rendered in your country or (if rendered abroad) when brought for enforcement/recognition in your country?

What is the notion of and role played by public policy in the recognition or enforcement of arbitral awards rendered abroad? Of lack of arbitrability? international mandatory rules or lois de police (national or foreign)? To what extent do any of these reservations/notions serve the purpose of advancing primarily local or domestic notions regarding both substantive law and procedural law matters?

Bearing in mind your answers to questions 3-8 above, to which extent arbitral awards or determinations influence, or may be considered as possibly influencing state court decisions or legislative change in your country? To what extent do courts of law in your country defer to determinations made by local or international arbitral institutions in charge of administering arbitrations? If no experience at hand, what would be the prospective answer to these questions? Please differentiate the areas of the law in which this influence exists or may potentially exist in the future.

Bearing in mind your answers to questions 1-9 above, to what extent do arbitral awards rendered in your country, enforced or enforceable in your country or concerning nationals of or residents in your country apply or may be deemed as based on Uniform Law? If no experience at hand, what would be your prospective answer to this question?

Bearing in mind your answers to questions 1-10 above), what has been the impact of arbitral awards and determinations in introducing, firming up or applying Uniform Law, including through legislative change or the action of the courts, in your country? Of foreign court decisions regarding arbitral awards or determinations referring to or based on Uniform Law? If no experience at hand, what would be the prospective answers to these questions?

Bearing in mind your answers to questions 1-9 above, what has been the impact on the fashioning of your national legislation on arbitration – domestic or international – or on arbitral awards rendered in your country or concerning nationals of or residents in your country of: (a) the action and rules of international arbitral institutions (e.g. the International Court of Arbitration of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and its International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA)); (b) the works of international organizations (e.g., UNCITRAL, UNIDROIT, the European Union, NAFTA, the Organization of American States); and (c) foreign court decisions or legislation reflecting the influence of the action or works of institutions or organizations like the ones mentioned in subparagraphs (a) or (b) above? If no experience at hand, what would be your prospective answers to these questions?

Washington D.C. 5 November 2007.

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