Making It Easier to Enforce Contracts: Relevance of UNCITRAL and Its Texts

Submitted by: UNCITRAL Secretariat
LEGAL FRAMEWORK IS IMPORTANT FOR DOING BUSINESS, IN PARTICULAR, AS A BASIS FOR FACILITATING TRADE

UNCITRAL TEXTS ARE WIDELY RECOGNIZED AS PROVIDING THE BASIC LEGAL FRAMEWORK FOR INTERNATIONAL TRADE AND RELATED ACTIVITIES

THE COMMISSION EXPRESSED SUPPORT FOR MORE CLOSER COOPERATION WITH APEC AND ITS MEMBER ECONOMIES BUILDING UP ON THE CURRENT ACTIVITIES WITH KOREA ON THE APEC EODB PROJECT IN ENFORCING CONTRACTS (JULY 2014)
When was UNCITRAL established? And why?


The core legal body of the UN system in the field of private international trade/commercial law.

Mandate: Progressive harmonization and modernization of international trade law by preparing and promoting the use of legislative and non-legislative instruments in key areas of commercial law.

Composition of UNCITRAL

- 60 member States elected by the United Nations General Assembly considering geographical regions and levels of economic development
- Non-member States participate as observer States and no difference in deliberation
- Intergovernmental organizations as well as international non-governmental organizations participate as observers
- 15 of the 21 APEC economies are represented in UNCITRAL
The Commission
Working Groups
The Secretariat

Working Groups

I. Micro, medium & small-sized enterprises
II. Arbitration
III. Online Dispute Resolution
IV. Electronic Commerce
V. Insolvency Law
VI. Security Interests

Two sessions per year alternating between New York (spring) and Vienna (fall)
UNCITRAL Texts

- Negotiated with universal participation and reflect balance of member’s, regional, economic, legal and other interest
- Drafted with a view to ensure compatibility with the various legal traditions
- Not necessarily international, texts implemented domestically

Cooperation between Republic of Korea and UNCITRAL on enforcing contracts
Joint activities 2011-2014

2011: Peru & Indonesia

2012: Thailand & the Philippines

2013: Viet Nam & Brunei Darussalam (Saudi Arabia)

2014: Mexico (Myanmar)

Method and timeline of cooperation

1) Preliminary research (Spring)
2) Visits to target economies to gather and verify information as well as to identify resource persons
3) Workshop in target economies involving local stakeholders (government officials, judges, legal practitioners & academia)
4) In-depth survey with concrete recommendations
5) Wrap-up seminar in Seoul (Fall)
6) Diagnostic study submitted to the Ministry of Justice at the end of the year

✓ UNCITRAL participation made possible through contribution from the Korean Ministry of Justice
2011: Peru and Indonesia

2012: Thailand and the Philippines
2013: Viet Nam & Brunei Darussalam

2014: Mexico
DB assumption on enforcing contracts

- The value of the claim equals 200% of the economy’s income per capita
- The dispute concerns a lawful sale transaction between parties located in the economy’s largest business city

→ Methodology uses very limited sample
→ Does not consider international trade
→ Does not consider arbitration and other forms of ADR (possibly to change in 2015)

International case scenario

- For international sales contracts:
  ✓ Value of claim will be a lot higher
  ✓ Parties are located in different jurisdictions
  ✓ Disputes will generally not end up in courts
- Most contracts will NOT necessarily be enforced
- In the more untypical case when enforcement is needed, two significant issues arise:
  ✓ Applicable (substantive) law
  ✓ Procedure: prior to the dispute and upon decision

UNCITRAL texts provide guidance on how to resolve these issues.
UNCITRAL texts related to enforcing contracts

Practical importance of the CISG

- A uniform instrument largely accepted in various legal systems
- Provides substantive rules to settle disputes related to international sale of goods
- CISG States account for more than 75% of international trade in goods
- Allows for party autonomy to opt-out of CISG
- Complemented by the Limitation Convention and Electronic Communications Convention
- CLOUT and CISG Digest for assistance in its interpretation

CISG: 4 main parts

- Part I: Sphere of Application, General Provision
- Part II: Formation of the Contract
- Part III: Parties' Obligations, Remedies, Passing of risk, Other issues
- Part IV: Final clauses
81 state parties: More than 75% of world trade

<table>
<thead>
<tr>
<th>APEC Economies</th>
<th>Enforcing Contracts</th>
<th>EoDB Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Republic of Korea</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Hong Kong, China</td>
<td>9</td>
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</tr>
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<td>36</td>
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</tr>
<tr>
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<td>46</td>
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</tr>
<tr>
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<td>58</td>
<td>19</td>
</tr>
<tr>
<td>Chile</td>
<td>64</td>
<td>34</td>
</tr>
<tr>
<td>Mexico</td>
<td>71</td>
<td>53</td>
</tr>
<tr>
<td>Chinese Taipei</td>
<td>84</td>
<td>16</td>
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</tr>
<tr>
<td>The Philippines</td>
<td>114</td>
<td>108</td>
</tr>
<tr>
<td>Indonesia</td>
<td>147</td>
<td>120</td>
</tr>
<tr>
<td>Brunei Darussalam</td>
<td>161</td>
<td>59</td>
</tr>
<tr>
<td>Papua New Guinea</td>
<td>168</td>
<td>113</td>
</tr>
</tbody>
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UNCITRAL Model Law on E-commerce

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

Electronic Communications Convention

- Adopted by the General Assembly on 23 November 2005.
- ECC builds up and, in certain cases, updates the provisions of the Model Laws on electronic commerce and electronic signatures.
- ECC aims at enhancing legal certainty and commercial predictability where electronic communications are used in relation to international contracts.
Entry into force of the ECC

- Entry into force on 1 March 2013
- States parties: Congo, Dominican Republic, Honduras, Russia & Singapore.
- 15 other signatories (Central African Republic, China, Colombia, Iran, Lebanon, Madagascar, Montenegro, Panama, Paraguay, the Philippines, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Sri Lanka)
- Australia, Thailand and the United States have declared intent to adopt
- Other States have adopted substantive provisions of the ECC domestically

General Recommendations

- As most APEC member economies as well as their trading partners have adopted the CISG, those who have not should seriously consider accession to the CISG.
- With the increase of e-commerce, a basic legal framework for e-transactions should be prepared on the basis of UNCITRAL texts on e-commerce, which is also the recommendation by UNESCAP and APEC E-commerce Steering Group.
- UNCITRAL Secretariat is prepared to provide technical assistance to law reform activities.
UNCITRAL texts on arbitration

**EoDB Ranking on Enforcing Contracts**

- Low ranking is due to the fact that:
  - It requires too many procedures
  - It takes too long
  - It costs too much

- Ranking is based on resolution of commercial disputes via judicial means and only evaluates “judicial efficiency”

- Need to consider alternative dispute resolution (ADR), which provide significant economic benefits
The need to resolve disputes *efficiently*

- Increasing need for businesses to resolve disputes quickly, efficiently and constructively
- Sometimes privately and informally to maintain their business relationship
- **Unpredictability** leads to increase in short-term costs
- **Backlogs** and **delays** in court proceedings leading excessive costs
- **Uncertainty** about local law and disparities in domestic legislation
- Domestic courts not always perceived as **impartial** when **foreign parties** are involved

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**Convention on the Recognition and Enforcement of Foreign Arbitral Awards - “New York Convention”**
1958 New York Convention

- Gives effect to arbitration clause
- Arbitral award in one Convention economy to be recognized and enforced in another Convention economy (Article II-IV, cf. court award)
- Limited grounds for denial of enforcement (Article V)
- Nearly universal acceptance (150 parties), most recently by Myanmar and Burundi
Almost all APEC member economies are parties to the New York Convention. Respective courts need to ensure that:
- arbitral agreements are recognized;
- foreign arbitral awards are recognized and enforced (time and cost effectively); and
- reasons for refusing recognition and enforcement are limited.

Contribution of case law to the newyorkconvention1958.org database.

UNCITRAL Model Law on International Commercial Arbitration

Overview

- Origin: The New York Convention (Article III)
- Adopted in 1985, amendments adopted in 2006
- Establishes a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations
- Covers all stages of the arbitral process
- Conforms to current practice in international trade and modern means of contracting with regard to the form of arbitration agreement and the granting of interim measures
- Takes the form of a “model law” which provides more flexibility for enacting states
- Prepared as a freestanding arbitration statute
1. Scope of Application
2. Role of Court or other Authority
3. Arbitration Agreement
4. Composition of Arbitral Tribunals
5. Jurisdiction of Arbitral Tribunal
6. Interim Measures and Preliminary Orders
7. Conduct of Arbitral Proceedings
8. Making of award
9. Recourse against award
10. Recognition and enforcement of awards

Status of Model Law
### Arbitration Laws

**Indonesia:** Law No. 30/1999 on Arbitration and Alternative Dispute Resolution (12 August 1999)

**Peru:** 1996 Arbitration Law revised in 2008 (Decreto Legislativo Que Norma El Arbitraje) to reflect the 2006 revisions of the Model Arbitration Law

**Thailand:** Arbitration Act BE 2545(2002); Thai Cabinet Resolution (2009) requiring approval of Cabinet for inclusion of arbitration clauses in all types of contract involving government organization

**Viet Nam:** Law on Commercial Arbitration (No. 54-2010-QH12) - Provides more improved and detailed provisions compared to the previous arbitration law; Civil Procedure Code applies with respect to enforcement of arbitral awards
Arbitration Laws

The Philippines: Articles 2028 to 2046 of the Civil Code (Republic Act No. 386 of 1949); Arbitration Act (Republic Act No. 876 of 1953); Alternative Dispute Resolution Act (Republic Act No. 9285 of 2004); Implementing Rules and Regulations of the ADR Act of 2004 (2009); Special Rules of Court on Alternative Dispute Resolution (2009)

Brunei Darussalam: Arbitration Order of 2009; International Arbitration Order of 2009 - IAO is a direct enactment of the UNCITRAL Model Arbitration Law (First Schedule of the IAO)

Mexico: Book 5, Title 4 of the Mexican Code of Commerce: Amended in 2011 to reflect the 2006 revisions of the Model Arbitration Law

General Recommendations

✓ The legal framework should provide a basis for fostering arbitration and other ADR efforts to resolve disputes effectively.

✓ Efforts should be made to promote arbitration in the commercial field and to foster a more arbitration-friendly environment.

✓ Confidence that arbitration is an efficient mechanism to enforce contracts should be built by training arbitrators and further developing arbitration institutions.
Specific Recommendations

- Revision or update of the arbitration law based on the UNCITRAL Model Law providing for interim measures and preliminary orders
- Clarifying court authority with regard to arbitration and jurisdiction of the arbitral panels
- Providing a simpler and single regime governing both domestic and international arbitration
- Streamlining the recognition and enforcement procedure

UNCITRAL United Nations Commission on International Trade Law

UNCITRAL texts and other APEC EoDB initiatives
UNCITRAL texts related to “access to credit” and “resolving insolvency”

Relevant UNCITRAL texts

- UNCITRAL Legislative Guide on Secured Transactions (2007)
- UNCITRAL, Hague Conference and Unidroit Texts on Security Interests
- Currently preparing a Model Law on Secured Transactions
DB indicator on Resolving Insolvency

- Assessment based on the time, cost and outcome of insolvency proceedings involving domestic entities: the efficiency of insolvency proceedings (including foreclosure proceedings)

Relevant UNCITRAL texts

- Part Three: Treatment of enterprise groups in insolvency (2010)
- Part Four: Directors' obligations in the period approaching insolvency (2013)

- UNCITRAL Model Law on Cross-Border Insolvency (1997) and Guide to Enactment and Interpretation (2013)
DB indicator on Trading Across Borders

- Assessment based on time and costs (excluding tariffs) associated with exporting and importing by sea transport, and the number of documents necessary to complete the transaction.
Relevant UNCITRAL texts

- UNCITRAL Model Law on Electronic Signature (2001)
- WG IV’s work on draft provisions on electronic transferable records, which include electronic bills of lading, promissory notes, letters of credit ...
- Work being followed in single windows

**DB indicator on Starting a Business**

- Assessment based on the number of procedures, time and cost for a small and medium-size limited liability company to start up and operate formally.
- Doing Business measures the main stages of starting a business: preregistration, registration and post-registration.

**Relevant UNCITRAL work**

- Working Group I entrusted with work to reduce the legal obstacles encountered by micro-, small- and medium-sized enterprises (MSMEs) throughout their life cycle, in particular, in developing economies.
- The work focuses on the establishment of an enabling legal environment beginning with the implementation of simplified rules of registration, incorporation and operation of such enterprises.
- Financial inclusion, including mobile payments, access to credit, alternative dispute resolution and simplified insolvency rules will also be considered.
Main Features

- The first regional office of UNCITRAL, opened on 10 January 2012
- Located in Incheon, Republic of Korea
- Covers approximately 55 States of the Asia-Pacific region including Australia and New Zealand
Objectives and Functions

• To enhance international trade and development in the region by promoting certainty in international commercial transactions
• To provide bilateral and multilateral technical assistance to States
• To engage in coordination activities with international and regional organizations, academic institutes
• To function as a channel of communication between States in the region and UNCITRAL


Thank You!

For more information on the work of UNCITRAL, please visit our web site
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