



**Asia-Pacific
Economic Cooperation**

2017/SOM1/EC/SEM/006
Session 2

International Legal Standards Relevant to Contract Enforcement and Supply Chain Finance

Submitted by: UNCITRAL



**Seminar on Use of International Instruments to
Strengthen Contract Enforcement in Supply Chain
Finance for Global Businesses Including Micro,
Small, and Medium Enterprises**
Nha Trang, Viet Nam
24-25 February 2017

Keynote speech [check against delivery]

***International legal standards relevant to
contract enforcement and supply chain finance***

Renaud Sorieul
(The Secretary, UNCITRAL)

Mr. McLeod (Chair of the APEC Economic Committee), Mr. Ding (Principal Government Counsel of Hong Kong and convenor of SELI), distinguished panellists, APEC representatives, guests, ladies and gentlemen,

It is a great pleasure for me to stand before you today here in Nha Trang to give the keynote speech. I would like to take to this opportunity to first thank APEC, its Economic Committee (long chaired by Mr. McLeod) and the Department of Justice of Hong Kong (Mr. James Ding and his team) for organizing this Seminar, pulling together the experience of three key inter-governmental organizations in the field of private international law in a location quite far from where we usually conduct our work. For those who might be interested, Vienna, where the UNCITRAL Secretariat is located, is the closest to Nha Trang but still 9,179 kilometres away (9,640 km from Rome and 9,920 km from the Hague). While I note the presence of representatives from the Hague Conference and Unidroit in this room, I can assure you that the appreciation is not only mine but also that of Christophe and Angelo, who unfortunately were unable to make it here.

Introduction

Having attended a number of conferences and seminars during my thirty years or so working at the United Nations, I've seen keynote speakers who made the audience regret that they left their beds early in the morning and others who

woke the audience up like strong Vietnamese coffee you have here in Nha Trang. Speeches by the latter tended to be clear, short and straightforward. That is what I hope to achieve this morning.

Therefore, I hesitated a bit when I started preparing my speech. According to the invitation I got from James, the purpose of this Seminar is “to introduce and demonstrate how the relevant international instruments may complement APEC’s Ease of Doing Business initiative by strengthening contract enforcement in supply chain finance for global businesses (with a particular focus on MSMEs) which may also form part of the structural reforms of an APEC economy to strengthen its economic and legal infrastructure.” From a policy perspective, the objective is clear but as a lawyer, I began to wonder what I should say.

International instruments, yes, I know well. That is the day-to-day business of UNCITRAL, established in 1966 with a mandate to further the progressive harmonization and modernization of international trade law. To that end, UNCITRAL aims to remove and reduce legal obstacles to international trade, facilitating diverse types of transactions and reducing associated costs.

APEC Ease of Doing Business initiative, yes, you and I know well. It is based on the APEC Action Plan to improve and reform the business environment in the Asia-Pacific region in five priority areas (starting a business, getting credit, enforcing contracts, trading across borders and dealing with permits).

UNCITRAL has been fortunate to take part in that initiative for some time and joint efforts between APEC and UNCITRAL have received positive responses. In Beijing in November 2014, APEC Ministers welcomed the joint efforts to build awareness of private international law instruments to facilitate cross-border trade and investment, enhance ease of doing business and foster effective enforcement of contracts and efficient settlement of business. During the 2015 Structural Reform Ministerial Meeting in Cebu, APEC Ministers recognized the importance of work to develop model legal instruments and commended APEC

work in this area in collaboration with UNCITRAL and the Hague Conference. Our Commission, most recently in July 2016, expressed support for cooperating more closely with APEC and its member economies to improve the business environment in the Asia-Pacific region.

And it is from that experience that we know that the notion of “contract enforcement” can be understood differently, as it encompasses a wide range of issues. While the Doing Business enforcing contract indicator mainly focuses on enforcement through courts, that notion touches upon, for example, on the underlying substantive law giving effect to a contract, the various mechanisms available to resolve disputes arising from contracts, and the means to enforce the contract directly or to implement the results of the dispute resolution process.

The same can be said of “supply chain finance”. We hear that it is of growing importance, but it is not a clearly defined legal term. In essence, it refers to a wide range of different financing practices throughout the supply chain, for example, import/export finance, receivables financing, factoring, forfeiting and warehouse receipt financing. It involves diverse and complex transactions, contracts as well as trade documents.

If one asks me whether UNCITRAL has done any work on supply chains, my immediate answer would be in the negative. Furthermore, the term rarely appears on official documents of UNCITRAL.

The term "supply chain" generally refers to the supply of materials to a manufacturer, the manufacturing process and the distribution of goods through a network of distributors and retailers to the consumer. A wide range of businesses are involved in various stages of this process and they are linked with each other forming a network. Information is shared up and down the supply chain to maximize the efficiency.

“Supply chain management” means the planning and management of all such activities including logistics management activities. It links key business functions

and processes within and across companies into a cohesive business model, which includes coordination of activities dealing with marketing, sales, product design, finance and information technology.

In short, the term “supply chain” is a very broad concept. It refers to a phenomenon in the business world, an innovative response to the challenging trading environment. In a globalized economy, most supply chains include a cross-border component. And they consist of a number of legal acts or transactions, which we often refer to as commercial transactions or more simply “trade”.

As a lawyer, I should note that there is no single legislative framework that covers the entire supply chain. With globalization, supply chains are growing ever more complex and it would be impossible to formulate such a legal framework. In that sense, the more appropriate question would be whether the work of UNCITRAL is relevant to supply chains. If asked that question instead, my answer would be “Yes, every bit of it.”

The relevance of UNCITRAL’s work to supply chain

Let me elaborate by illustrating how the work of UNCITRAL and international instruments formulated by UNCITRAL relate to both the APEC Doing Business initiative and supply chains.

As mentioned, a supply chain is a network of businesses. Starting a business, one area of the EoDB initiative, may not be as easy as it sounds. There are certain rules and regulations to follow. According to the World Bank Doing Business report, it takes on average 24 days and 19% of income per capita to start a business in East Asia and the Pacific. In comparison, it takes half a day and 0.3% of income per capita in New Zealand.

How would one go about with business registration? In this aspect, UNCITRAL's current work on MSMEs (micro, small and medium-sized enterprises) aims at reducing legal obstacles that MSMEs face throughout their lifecycle. This is particularly relevant in developing economies, where such enterprises play a key role in the economy.

With the business set to go, it might need to obtain financing from a bank or within the supply chain to cover operation costs. This is an area related to "getting credit" in the EoDB initiative. MSMEs usually don't have immovable property to provide as collateral, which banks prefer. This results in higher interest rates and translates into additional transaction costs for MSMEs. However, MSMEs could utilize their inventory, machinery or receivables as collateral. For a tech start-up, intellectual property, such as a patent, could be used as collateral to obtain a loan.

A sound legislative framework on secured transactions will provide answers to questions like: (i) how do you create a security right over such collateral; (ii) who has priority if inventory is sold during the ordinary course of business; and (iii) how do you enforce a security right upon default by the grantor. These questions are addressed by Working Group VI, which recently finalized its work on the UNCITRAL Model Law on Secured Transactions.

With the loan, the business begins to flourish purchasing material from a company in economy A, manufacturing in economy B and supplying it to a company in economy C. Even in this very simple structure, supply contracts for goods are concluded between a seller and a buyer located in different economies. Thus the following questions arise: (i) what would happen if there is a breach of the contract; (ii) who takes the risk if the goods are lost; and (iii) which law would apply. These questions lead to uncertainties, which in business term, translate to added costs.

The 1980 United Nations Convention on Contracts for the International Sale of Goods or the “CISG” addresses those questions. It provides a modern, uniform and fair regime for international contracts. The CISG is of particular benefit to MSMEs, which often do not enjoy the same level of access to legal resources when negotiating a contract. Accordingly, CISG has been hugely successful with 85 State parties. More importantly, thirteen of the fifteen leading economies in merchandise trade are parties to the CISG.

If the business conducts any of its transactions on-line, UNCITRAL’s texts on electronic commerce become relevant. This is an area covered by the EoDB initiative on “trading across borders”. For example, can an e-mail with a signature block on the bottom be considered an acceptance of the contract? Can a PDF-version of the contract be considered an “original”? These are issues dealt with in the UNCITRAL Model Law on Electronic Commerce and the UN Electronic Communications Convention. But let’s go a bit further. Could the buyer make payment using an electronic check or promissory note? How would one transfer control over an electronic bill of lading? These questions on electronic transferable records (negotiable instruments and transferable documents) are currently being tackled by Working Group IV. It is expected that a Model Law will be adopted this summer. In addition, the Secretariat is closely monitoring developments with regard to single windows, another important aspect of the supply chain.

In some economies, the public sector is the largest and the most important customer at the end of the supply chain. Governments are also starting to recognize the importance of supply chain management themselves in delivering certain policies. For such purposes, an objective, fair and transparent procurement framework is required. UNCITRAL’s Model Law on Public Procurement, which will be featured at the EC policy discussion on 26 February, provides the necessary legislative framework. It also encourages the participation of MSMEs in the procedure by providing for simplified procedure, removing unnecessary requirements and encouraging MSME-friendly implementations.

Logistics is another important aspect of the supply chain. The Rotterdam Rules, prepared by UNCITRAL in 2008, establishes a uniform and modern legal regime governing the rights and obligations of shippers, carriers and consignees under a contract for door-to-door carriage that includes an international sea leg. The Rotterdam Rules took into account many technological and commercial developments that have occurred in maritime transport, including the growth of containerization, the desire for door-to-door carriage under a single contract, and the development of electronic transport documents.

And, of course, disputes inevitably arise in the supply chain. While disputes may relate to the underlying contract and its enforcement, it may relate to liability claims (for example, due to business interruptions) or an investment claim under a treaty.

How long and how much would it take a business to enforce a contract through a court in the respective economy? This is the question posed by the EoDB initiative on “enforcing contracts”. It takes an average of 427 days and costs 33.7% of the claim to enforce a contract in APEC. Such long procedure at courts and added costs would likely disrupt a supply chain. Moreover, going to courts may not be the best option to maintain business relationships within a supply chain. In this area, the work of UNCITRAL facilitates the use of arbitration, mediation and other mechanisms to resolve commercial disputes in an effective manner. Our recent work also introduces transparency to investment disputes between investors and economies. Dispute resolution can also take place online. The UNCITRAL Technical Notes on Online Dispute Resolution, which will be discussed in detail tomorrow, provide guidance on some key aspects. The Technical Notes are particularly significant for low-value, high-volume transactions.

And finally, let's consider an admittedly unfortunate situation—when a business goes under. Bankruptcy of Hanjin Shipping caused turmoil in global sea freight last year. Container ships were stranded out in the sea. Vessels were seized at

ports. However, in light of that incident, the usefulness of the UNCITRAL Model Law on Cross-Border Insolvency was highlighted.

Can creditors of the insolvent company still get paid even if they are located in different jurisdictions? What if the assets of the company are located elsewhere? In the case of multinational enterprise groups, what happens if one of the subsidiaries becomes insolvent? UNCITRAL is currently engaged in developing relevant international legal standards on the facilitation of cross-border insolvency of multinational enterprise groups and the recognition and enforcement of insolvency-related judgments.

I have given you a short outline of how UNCITRAL's current and past work relates to supply chain. So, let me reiterate: "UNCITRAL has not done any work on supply chain *per se*". However, by assisting economies to establish a fair, stable and predictable legal framework for commercial transactions, instruments prepared by UNCITRAL will provide the necessary legal platform for organizing efficient supply chains. The same can be said of relevant instruments prepared by the Hague Conference and Unidroit.

UNCITRAL texts, their implementation and coordination

I would like to emphasize the ever-increasing importance of a robust legislative framework for fostering cross-border trade and investment. Without it, economies would not be able to tackle challenges in fostering sustainable development. Commercial law is a powerful player in addressing such challenges. However, it is often neglected. As a result, the capacity of the economies to continuously engage in commercial law reforms based on international instruments is slowly deteriorating. The world has become so globalized that no economy or business stands on its own. It is practically impossible to make an economy strong again without the support of its trading partners. Business practices also evolve constantly and affect the entire globe. An outdated commercial law framework is

a major impediment to integration into global economy and to innovation. In turn, it makes it difficult for economies to efficiently mobilize their resources for sustainable development, whether they be from tax revenues, private investment or development assistance. Thus, economies need to continuously monitor the legal framework for commercial activities to assess their economic and social impact and to react appropriately.

As mentioned, a key component of UNCITRAL's work involves the preparation of international legal standards, some legislative and some non-legislative, in a wide range of commercial law areas. They take the form of conventions, model laws, legislative guides and contractual guides and are negotiated through an inter-governmental process involving a variety of participants including inter-governmental and non-governmental organizations. Private sector representatives with relevant expertise also participate, as discussions are often very technical and highly specialized. This contributes to the transparency and inclusiveness of the standard-making process and ensures due process that gives legitimacy to UNCITRAL texts as internationally accepted standards. As such, texts by UNCITRAL have been widely accepted as offering solutions appropriate to different legal traditions and to economies in all regions and at different stages of economic development.

Our work does not end with the adoption of the texts. Indeed, support activities to ensure the effective implementation and use of UNCITRAL texts constitute an important pillar of UNCITRAL's work. To this end, UNCITRAL engages in various technical assistance and capacity-building activities. To facilitate the provision of technical assistance in this region, UNCITRAL established the UNCITRAL Regional Centre for Asia and the Pacific in 2012. The Regional Centre further functions as a channel of communication between economies in the region and UNCITRAL. We are most grateful for the generous support provided by the governments of Korea and of Hong Kong, China to the Regional Centre.

In order to encourage cooperation, to avoid duplication of effort, to promote efficiency, consistency and coherence in the modernization and harmonization of international trade law, another important aspect of our mandate is to coordinate the work of organizations active in the field of international trade law. For that purposes, the secretariats of the Hague Conference, Unidroit and UNCITRAL hold regular meetings and communicate frequently. As mentioned, in the Asia Pacific region, we have benefited greatly from our collaboration with APEC. We have a close relationship with the APEC Economic Committee and its FotC Group on Strengthening Economic and Legal Infrastructure (“SELI”) and have participated in previous workshops on dispute resolution and supply chain financing. We are also collaborating with the APEC-Financial Infrastructure Development Network (FIDN) in the area of secured transaction and closely following developments in the APEC Business Advisory Council (ABAC) and Asia-Pacific Financial Forum (APFF). We also hope to engage more closely with the Committee on Trade and Investment.

Future developments

At this stage, I hope all of you are persuaded that when discussing contract enforcement and supply chain finance, there are some significant international legal standards, which provide a reference point. But once again, let’s look a bit further.

Global trade is constantly evolving and so are supply chains. Whereas the international instruments I mentioned earlier aim at facilitating transactions, new rules and measures (compliance requirements) are being put in place to regulate business behaviour and to make it more transparent (sanctions, money laundering and so forth – reporting requirements). The same can be said of financing regulations on commodities and derivatives trading. In response, alternatives financing techniques, as will be discussed, are being developed,

warehouse receipt financing being one example. Technological developments are also transforming supply chains. For example, cloud computing and blockchain technology are being directly applied. With supply chains focusing more and more on “just-in-time delivery”, manufacturing, storage and delivery methods are evolving rapidly with increasing automation. Technological advances have also impacted logistics and distribution (drones, unmanned ships)

With these growing challenges, innovation is gathering pace. Businesses are looking to sharpen their competitive edge and minimise risk through their supply chains. There will be many practical issues to address and hurdles to overcome. And there will also be legal issues. If economies take different legislative approaches to address those issues, they could hinder innovation. As it did in the field of electronic commerce, UNCITRAL is capable of pioneering into new fields of law where relevant practice is beginning to develop, and new legislation is needed. I emphasize this because I have witnessed the benefit of using a harmonized legislative framework for cross-border transactions. It facilitates trade, reduces costs and provides for heightened legal certainty. In other words, it would also benefit supply chains.

Concluding remarks

Distinguished guests, ladies and gentlemen,

This year marks the fiftieth anniversary of UNCITRAL. For the past 50 years, UNCITRAL has been committed to pursuing its mandate of progressively harmonizing and modernizing international trade law. We have been working in furtherance of the cause of the rule of law in commercial relations. In so doing, we have contributed to a degree of peace and security, the promotion of friendly relations and made some progress towards the realization of the policy currently embodied in the UN Sustainable Development Goals.

Regional cooperation and integration, including in the Asia-Pacific region, are certainly conducive and beneficial to the promotion of cross-border trade. It is nonetheless imperative also to bear in mind the importance of cooperation and coordination at the global level. Not only is UNCITRAL structured to ensure that the various geographic regions and the principal economic and legal systems of the world are represented, but its texts have also been designed for all regions, all legal traditions, and all economies at different stages of their development. Having said that, active engagement with different regions, including Asia and the Pacific, is an indispensable element of UNCITRAL's work. The continued success of UNCITRAL, in formulating international instruments, depends on economies like yours. Thus, I ask for your continued participation in and support for UNCITRAL and its activities. While the Asia-Pacific region is well represented in the UNCITRAL forum, we look forward to more active participation in the international standard making process.

For example, the UNCITRAL secretariat will be organizing the Fourth International Colloquium on Secured Transactions, from 15 to 17 March 2017 in Vienna. The purpose of the Colloquium is to discuss possible future legislative and technical assistance work in the area of secured transactions, which will obviously touch upon issues related to supply chain finance. I would also invite you to our 50th Anniversary Congress, a three-day event to celebrate the 50th session of UNCITRAL and explore new directions in cross-border commerce. The Congress is scheduled to take place in Vienna from 4 to 6 July 2017, in conjunction with our annual session.

Now, for a day and a half, we will be discussing topics in an area where business meets law, practice overlaps with regulations and efficiency collides with regulatory policies. I already know it will be an interesting discussion and a timely one.

With that, distinguished guests, ladies and gentlemen, I would like to conclude my keynote address. Thank you for your attention.