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<table>
<thead>
<tr>
<th>Publication</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Seat of Mediation under the Singapore Convention</td>
<td>1-3</td>
</tr>
<tr>
<td>Juan Pablo Hernández</td>
<td></td>
</tr>
<tr>
<td>COVID-19: The Legality of Travel Restrictions under International Law</td>
<td>4-8</td>
</tr>
<tr>
<td>Juan Pablo Hernández</td>
<td></td>
</tr>
<tr>
<td>The Probative Effect of the Apostille</td>
<td>9-12</td>
</tr>
<tr>
<td>Juan Pablo Hernández</td>
<td></td>
</tr>
<tr>
<td>COVID-19: The Obligation of States to Rescue Vessels at Sea</td>
<td>13-17</td>
</tr>
<tr>
<td>Juan Pablo Hernández</td>
<td></td>
</tr>
<tr>
<td>The Power of Arbitrators to Adapt Contracts</td>
<td>18-23</td>
</tr>
<tr>
<td>Juan Pablo Hernández</td>
<td></td>
</tr>
<tr>
<td>Arbitration Agreements under the CISG</td>
<td>24-30</td>
</tr>
<tr>
<td>Juan Pablo Hernández</td>
<td></td>
</tr>
<tr>
<td>The Legality of Espionage under International Law</td>
<td>31-38</td>
</tr>
<tr>
<td>Juan Pablo Hernández</td>
<td></td>
</tr>
</tbody>
</table>
CONTRIBUTORS

JUAN PABLO HERNÁNDEZ: Founder and editor-in-chief of The Treaty Examiner and Moot coach at Universidad Francisco Marroquín (Guatemala) (Contact)
Those familiar with international arbitration are aware of the concept of ‘seat of arbitration’ and the important role it plays. The arbitral seat is the juridical domicile of the arbitration. It determines which courts can exercise supervisory jurisdiction over the proceedings. Its arbitration law normally governs the arbitration itself (lex arbitri). Absent a choice of law, its substantive law governs the interpretation of the arbitration agreement. Under Article I of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the seat normally gives the award its nationality for enforcement purposes. This last detail is essential, as the New York Convention applies only to awards made in a country other than the place of enforcement (foreign) or that the place of enforcement does not consider domestic (non-domestic). This element of territoriality permeates the New York Convention, which mentions the arbitral seat (‘the country where the award is made’) in Articles I, V and VI.

In contrast, the 2019 Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), a treaty analogous to the New York Convention, does not mention the place where mediation takes place or where the settlement agreement is made. Why is that?

*Juan Pablo Hernández is the founder and editor-in-chief of The Treaty Examiner and a Moot coach at Universidad Francisco Marroquín (Guatemala).
While both are private dispute settlement mechanisms, arbitration and mediation are radically different. In arbitration, the third party has decision-making power to settle the dispute in a final and binding award. Arbitration is judicial in nature, and it is in judicial processes that one can usually speak of a ‘forum’ or seat.\(^1\) Moreover, as the arbitrator substitutes the State judge, the country where that process legally takes place is interested in ensuring that the arbitration respects basic judicial standards. Due to supervisory jurisdiction, the arbitration derives part of its effects and validity from the legal system of the seat (although not exclusively). A breach of that law could result in the award being set aside at the seat.

In contrast, the mediator lacks decision-making power.\(^2\) Mediation is not judicial, but contractual. The parties negotiate an amicable settlement themselves, albeit with the mediator’s assistance. Consider that the solution that results from mediation, according to the Singapore Convention, is a mediated settlement \textit{agreement} – a contract.\(^3\) Unlike judicial processes, commercial negotiations do not have a ‘forum’. State supervision applies in the same way it would for any other person or activity within that State’s territory. A breach of the laws of the place of negotiation only leads to the contract’s nullity if that law governs the agreement or if the applicable law recognizes the

\(^1\) As a mainstream example, see the legal definition of ‘forum’ in the Free Legal Dictionary: ‘A court of justice where disputes are heard and decided; a judicial tribunal that hears and decides disputes; a place of jurisdiction where remedies afforded by the law are pursued.’ Available at: https://legal-dictionary.thefreedictionary.com/forum

\(^2\) See Article 2(2) of the Singapore Convention: “Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute.’ (emphasis added)

\(^3\) The Singapore Convention excludes settlements that are recorded in the form of third-party decisions. Article 1(3)(a) excludes settlements made before a court and Article 1(3)(b) excludes settlements recorded and enforceable as arbitral awards.
cause of nullity. Otherwise, the contract can be enforced regardless of the laws of the place where it is negotiated.

Note that while the New York Convention speaks of foreign arbitral awards, the Singapore Convention speaks of international settlement agreements. It appears that the Convention does not assign a nationality to the settlement contract and only subjects its enforceability to its applicable law and to the laws of the place where relief is sought (see Article 5(1)(b)). In that respect, it is notable that the concept of internationality in Article 1 matches the ones espoused by the 1980 Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (PICC).

The Singapore Convention, then, does away with the concept of a ‘seat of mediation’ because it is not necessary from an enforcement perspective. The approach is also sound from the policy perspective. Mediation tends to take place in multiple countries and even online. Sometimes, a single seat of mediation is difficult or impossible to identify – thus, requiring one would be as burdensome as it is unnecessary. Lastly, the elimination of a ‘seat of mediation’ frees the settlement agreement from the laws of that country (if identifiable). The courts of that place do not have the power to annul the settlement agreement, thereby preventing a system of double review as the one that exists in international commercial arbitration.
COVID-19: THE LEGALITY OF TRAVEL RESTRICTIONS UNDER INTERNATIONAL LAW

Juan Pablo Hernández*

COVID-19, the respiratory disease discovered in Wuhan, China, in November 2019, has attacked the most fundamental aspects of human interaction. It is highly contagious,¹ has infected almost two million victims² and has demonstrated its capacity to overwhelm health systems.³ Seeking to reduce the rate of contagion and ‘flatten the curve’, many States have imposed restrictions on freedom of movement across borders.⁴ Do these restrictions conform with international law?

* Juan Pablo Hernández is the founder and editor-in-chief of The Treaty Examiner and a Moot coach at Universidad Francisco Marroquín (Guatemala).


² Data obtained from https://www.covidvisualizer.com/, as of 14 April 2020.


The two areas where restrictions to movement are most relevant in the current crisis are international human rights law (HRL) and international health law. Under HRL, the 1966 International Covenant on Civil and Political Rights (ICCPR) protects freedom of movement in Article 12. In the case of travels and movement restrictions, paragraphs 2 and 3 state:

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Article 12, paragraphs 2 and 3 of the ICCPR.

The ICCPR recognizes that travel restrictions may be imposed if necessary to protect public health. To assess necessity, international health law may provide a *lex specialis*. The most relevant provision in this regard is Article 43(1) of the 2005 International Health Regulations (Regulations), imposed by the World Health Organization (WHO) on all its Member States. This provision states as follows:

1. These Regulations shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health

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risks or public health emergencies of international concern, which:

(a) achieve the same or greater level of health protection than WHO recommendations; or

(b) are otherwise prohibited under Article 25, Article 26, paragraphs 1 and 2 of Article 28, Article 30, paragraph 1(c) of Article 31 and Article 33,

provided such measures are otherwise consistent with these Regulations.

Such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.

Article 43(1) of the Regulations (emphasis added)

Therefore, under international law, a limitation to movement and travel must be necessary to protect a public objective, including health. Article 43(1) of the Regulations gives us a yardstick to assess necessity: the existence of less invasive or intrusive alternatives. An intrusiveness criterion is also used by the UN Human Rights Committee in the context of freedom of movement. In interpreting similar necessity requirements, the World Trade Organization (WTO) Appellate Body has stated that alternative measures must achieve equivalent levels of protection of the legitimate objective pursued.


6 See, for example, the WTO Appellate Body Report in Brazil—Measures Affecting Imports of Retreaded Tyres at paragraph 156.
complementary (rather than alternative) measure fails to demonstrate lack of necessity, especially when the challenged measure is part of a larger, more comprehensive scheme. In reaching those findings, the Appellate Body dealt with government measures aimed at protecting health and the environment.

The main purpose to impose restrictions is to prevent human contact. Measures other than travel restrictions exist to achieve that purpose, including social distancing, strict quarantines, contact tracing and lockdowns. Despite pursuing the same objective, however, I believe that these measures are complementary, not alternative. One could argue that social distancing, quarantines and lockdowns that impede contact within State borders but do not restrict cross-border movement are incomplete. Unrestricted travel could bring the disease to new territories or bring new cases to already struggling States, without mentioning that it may expose the traveler to the virus. When there is a risk of contagion for the traveler, or for the populations of the concerned States, there is ground to argue that tailored and precise travel restrictions are necessary.

Even if social distancing, lockdowns and comparable measures are more effective, that does not mean that this is an either-or situation. A research article published on 6 March 2020 reveals that travel restrictions contribute little to COVID-19 containment unless paired with measures preventing human contact and incentivizing behavioral change in the population. The combination of the measures, therefore, makes COVID-19

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7 See, supra note 6, at paragraph 172.
prevention more robust. On the other hand, only imposing travel restrictions without additional safeguards is ineffective and violates international law.

It is undeniable that these measures are intrusive to human self-determination. However, so is COVID-19 – except COVID-19 is also invasive to the rights to life and health. Imposing a comprehensive plan of isolation may not fully stop the disease, but it significantly slows down its spread. Most importantly, it gives invaluable time to scientists researching cures and health workers risking their lives to treat infected persons. We owe it to them and infected persons to flatten the curve. These measures may create further territorial division, but in times when a disease makes the most basic forms of social interaction dangerous, I believe it is according to international law to self-isolate to the necessary extent.

That is not to say, of course, that any travel restriction conforms with international law. The apparent necessity of travel restrictions when there is a risk of contagion must be balanced against the whole corpus of HRL. The laws establishing the restriction must use precise criteria and must not confer unfettered discretion to the executing authority.9 The application of the restriction by authorities must also be proportional to the aims pursued10 and not result in discrimination.11 Conversely, when carefully tailored, correctly applied and combined with internal measures preventing human contact, travel restrictions appear to be consistent with international law.

9 See supra note 5, at paragraph 13.
10 See supra note 5, at paragraphs 14, 15.
11 See supra note 5, at paragraph 18.
THE PROBATIVE EFFECTS OF THE APOSTILLE
Juan Pablo Hernández*

The 1961 Convention Abolishing the Requirements of Legalization for Foreign Public Documents (Apostille Convention) is a triumph for uniformity in the context of international transactions. The Convention exempts public documents made in a Contracting State from the requirement of legalization in all other Contracting States. The onerous legalization requirements are replaced by a certificate named apostille (French for ‘marginal note’) issued by the country where the public document is drawn up and that all other State Parties are under an obligation to recognize. At the time of writing, 118 States have become Parties to the Apostille Convention.¹

This article explores three issues regarding the probative effect of the apostille.

I. THE EFFECTS OF THE APOSTILLE ON THE CONTENTS OF THE PUBLIC DOCUMENT

The apostille only has the purpose of authenticating the origin of the public document and not the veracity or probative

* Juan Pablo Hernández is the founder and editor-in-chief of The Treaty Examiner and a Moot coach at Universidad Francisco Marroquín (Guatemala).


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value of its contents.\textsuperscript{2} Even if the public nature of the document may imply the veracity of its content, the apostille does not intensify or otherwise modify that veracity.\textsuperscript{3} Using the apostille as a justification for the veracity of the document’s contents undermines the confidence in the apostille process.\textsuperscript{4} Article 5 of the Apostille Convention states:

\begin{quote}
When properly filled in, [the apostille] will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.
\end{quote}

Article 5 of the Apostille Convention, in relevant part.

When issuing the apostille, the Apostille Convention only obligates States to verify the origin of the public document by authenticating the signature and any stamp or seal. The competent authorities are not under an obligation to verify the contents of the public document. In practice, most States do not verify the contents of the apostilled document.\textsuperscript{5} States are still entitled to revise the veracity of the public document’s stipulations outside the apostille-issuing process, if mandated by domestic rules on fraud or illegality.\textsuperscript{6} Moreover, in some jurisdictions, the public character of the document depends on


\textsuperscript{4} See supra note 3, p. 17.


the veracity of its contents – to determine public nature, then, the origin State may need to assess whether the document has been forged or altered.\(^7\)

On a related note, the probative value of the underlying public document is governed by the law where the document is sought to be used.\(^8\)

II. THE EFFECTS OF AFFIXING AN APOSTILLE TO A PRIVATE DOCUMENT

What happens if the apostille was erroneously affixed to a private document? Would the affixing of the apostille on a private document give it the character of ‘public’ or certify its origin and authenticity? The drafters answered these questions in the negative. The apostille does not make the document public, it merely certifies its origin.\(^9\) Therefore, one cannot rely on the fact that the document bears an apostille to prove that it is a public document. The Apostille Convention only applies to public documents as defined under the laws of the document’s country of origin, including those defined in Article 1, and does not apply to documents signed by persons in their private capacity (sous seing privé).\(^10\)

III. IS IT NECESSARY TO AUTHENTICATE THE SIGNATURE, SEAL OR STAMP APPEARING ON THE APOSTILLE?

The plain answer is no. The very purpose of the Apostille Convention is to abolish the requirements of legalization for the validity of foreign documents. It would be at odds with the object

\(^7\) See supra note 3.

\(^8\) See supra note 2, Comment No 14.

\(^9\) See supra note 6, Comment No. 72.

\(^10\) See supra note 9.
and purpose of the Convention to subject the apostille to further authentication requirements. To prevent an issue regarding such an authentication, Article 5 of the Apostille Convention states that ‘[t]he signature, seal and stamp on the [apostille] are exempt from all certification.’ This is consistent with the principle of *acta publica probant se ipsa* (public documents prove themselves).
COVID-19: THE OBLIGATION OF STATES TO RESCUE VESSELS AT SEA

Juan Pablo Hernández*

Since the COVID-19 crisis erupted, many cruise ships have become breeding ground for new cases of infection. The most publicized example is the *Diamond Princess*, a cruise ship scheduled to tour throughout Southeast Asia.¹ On 2 February 2020, the Japanese ministry of health announced that the cruise ship had been quarantined at sea with 10 COVID-19 positive cases.² Similar horror stories were announced as time went on. Australia’s case has garnered attention recently: about 18 cruise ships haunt its coasts like ghostly apparitions, carrying potential COVID-19 cases.³ Does Australia (or any other State, for that matter) have the obligation under international law to allow such ships to dock?

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* Juan Pablo Hernández is the founder and editor-in-chief of *The Treaty Examiner* and a Moot coach at Universidad Francisco Marroquin (Guatemala).


I. THE DUTY TO RESCUE VESSELS IN DISTRESS

This question is mainly governed by the international law of the sea, composed of international custom and codified in a number of treaties including the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on Maritime Search and Rescue (SAR Convention).

Under international maritime law, States have an obligation to rescue ships and vessels at sea if they are ‘in distress’. This obligation is recognized by regulation 33 of SOLAS, Article 98 of UNCLOS and Article 2.1.1 of the SAR Convention, as well as the customary international law of the sea.\(^4\)

II. ‘IN DISTRESS’

A central question is whether being infected with COVID-19 qualifies as being in distress. The SAR Convention defines ‘distress’ in Article 1.3.13 as a ‘situation wherein there is a reasonable certainty that a vessel or person is threatened by grave or imminent danger and requires immediate assistance.’ It must be a situation that causes well-founded fear that the vessel or the lives of the crew may be imminently lost.\(^5\)

COVID-19 can cause justified fear for the wellness or even life of the crew. There is always the statistical risk that an infected person develops severe disease, which usually involves


respiratory distress that requires immediate hospitalization.\textsuperscript{6} One could argue that the ‘distress’ status attaches once severe cases arise on the vessel. On the other hand, the statistical probability of developing severe illness may satisfy the definition. The SAR Convention merely requires ‘reasonable certainty’ that the person onboard the vessel is ‘threatened by grave or imminent danger’ and that ‘immediate assistance’ is required. Once a person onboard develops severe COVID-19, the ‘grave danger’ prong is satisfied. Any latent case has the risk of being severe, possibly satisfying the ‘imminent danger’ prong – although such determination needs to be made on a case-by-case basis (see below the relevant factors to grant exception). In both cases, there is ‘reasonable certainty’ that the danger could require immediate assistance.

III. ‘Rescue’

The duty to rescue vessels in distress is based on the duty to save life at sea.\textsuperscript{7} The SAR Convention defines ‘rescue’ as ‘[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety’.\textsuperscript{8} This duty applies without distinction, including nationality.

Therefore, States have the obligation to assist the people on board and take them to a safe place – presumably, the shore. However, the hesitation to allow cruises to dock is precisely due to the risk of contagion presented by allowing the passengers of


\textsuperscript{7} See \textit{supra} note 4.

\textsuperscript{8} Article 1.3.2 of the SAR Convention.
the cruise (possible COVID-19 carriers) to roam freely in the State’s territory. Does the international law of the sea obligate States to bring possible COVID-19 carriers to shore?

IV. IMPLICATIONS FOR COVID-19

Assuming that COVID-19 infection on board qualifies as ‘distress’, Australia may be under an obligation to rescue the distressed vessels around its coasts and provide them the assistance mandated by international law. The same applies for any State facing similar odds. The COVID-19 pandemic, however, may give States a cause for exception.

Under Article 98 of UNCLOS, an exception is made if the rescue mission would endanger the rescuing vessel, its crew or its passengers. Regulation 33.1 of SOLAS provides exception if the rescuing ship considers it ‘unreasonable’ to assist – in other words, if under special circumstances it cannot be expected of the rescuing ship to fulfil the duty, even if objectively possible. COVID-19’s contagious behavior could endanger crew and passengers if rescue is undertaken. If being infected with COVID-19 is cause for ‘distress’ under customary or treaty law of the sea, then exposing the crew to infection should also trigger the exception. Some factors to consider to determine ‘distress’ or the applicability of the exception are as follows:

- the degree of certainty that the cruise ships’ passengers are COVID-19 positive,
- the demographics of the crew and passengers (both rescuing and rescued ships),
- the possibility of implementing sanitary measures to prevent infection in the rescuing ship,

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9 See supra note 4, p. 497.
• the statistical probability that the crew may develop severe cases of COVID-19 or infect others in Australian territory,
• etc.

This should be balanced against the rights of the people on board the vessels and considerations of international human rights law and international health law. In protecting the rights of people on board the quarantined cruises, States may opt for alternative measures, such as bringing the necessary medical attention and relief to the cruise, without risking the possibility of contagion on land. Depending on the arguments wielded, the resources available and the severity of illness, this could even satisfy the rescue duty under maritime law.

It appears that the issue of allowing people on shore during a pandemic of this magnitude, and the concerns involving spread of the disease, are a somewhat novel issue not extensively dealt with in case law and legal literature. In the end, whether denying assistance or rescue is justified may have to be determined by a court of law (such as the International Court of Justice) once this crisis ends.
As circumstances continue to change around us, doctrines such as hardship and *force majeure* are starting to become indispensable in legal discussions about contracts. Many domestic legal systems¹ and uniform texts² state that, when circumstances fundamentally change and performance becomes too difficult, the affected party may be entitled to claim a modification of the contract to ‘adapt’ it to the new circumstances. Whether this threshold is met as a result of the COVID-19 pandemic has been extensively discussed in recent weeks. As arbitration becomes more and more prevalent, discussions on hardship-based adaptation must now address a different question: in contracts providing for arbitration as a dispute resolution mechanism, are the arbitrators able to adapt the terms of the contract based on hardship?

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² See Article 6.2.3(4)(b) of the UNIDROIT *Principles of International Commercial Contracts*; Article 6:111 of the *Principles of European Contract Law*; Principle VIII:2 of the *Translex Principles*, etc.
I. **Arbitration as a Creature of Contract**

Unlike courts, which derive their power from the State, arbitral tribunals are created and empowered through consent. By concluding an agreement to arbitrate, the parties consent to submitting existing or future disputes to an arbitrator or a panel of arbitrators that will resolve those disputes in a final and binding award. This consent gives rise to the arbitration and confers on the arbitrators the power to adjudicate, replacing otherwise competent national courts.\(^3\) In that sense, arbitration is a creature of contract. In discerning the existence of a power, the arbitrators must start with interpreting the parties’ arbitration agreement. Only then can they analyze whether the power is granted by the applicable law (if not excluded by party agreement), and how the exercise of that power is supported, restricted or prohibited by those laws.

II. **The Power to Adapt**

The ordinary task of an arbitrator is to settle a dispute judicially. It is a judge created by contract. To fulfil that task, the arbitrator should normally look into the parties’ contract and determine, through interpretation, what are their rights and obligations.

The task of adapting a contract, however, is fundamentally different. When adapting the contract, the arbitrators do not look at the parties’ existing rights and obligations but rather undertake to change them. Adaptation is a ‘creative’ rather than a ‘judicial’ task. The creative task of regulating future contractual relationships is usually given to the parties themselves, who are in the best position to do so. Through

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\(^3\) This is reflected in Article II(3) of the New York Convention, which imposes on State courts the duty to refer the parties to arbitration if an agreement to arbitrate is invoked.
adaptation, the arbitrator *imposes* a contractual modification based on a legal rule providing for that change.

Arbitration agreements usually grant arbitrators jurisdiction to decide disputes that ‘arise out of’, ‘relate to’, are ‘in connection with’, etc., the contract where the arbitration agreement is contained. An adaptation claim usually does not arise from the original contract but from the *adapted* contract as determined by the arbitrator. Therefore, it is questionable whether an ordinary arbitration agreement is sufficiently broad to fit an adaptation dispute. The consensus is that adaptation usually requires an express authorization by the parties.4

### III. JURISDICTION OR POWER?

Adaptation is, as one would say, a ‘the egg or the chicken’ kind of question. Because the creative power of adaptation entails changing the terms of the contract that created the arbitrators in the first place, it is questionable whether an empowerment to adapt can be derived from the contract absent an express stipulation. The question that comes up is whether adaptation is a matter of *jurisdiction* or a matter of *power*.

The distinction may appear hairsplitting, but it is fundamental. While jurisdiction refers to the categories of disputes that the arbitrators can validly decide upon, power refers to the ability of the arbitrators to carry out the tasks within their jurisdiction and validly to compel the parties to abide by the solution to the dispute.5 An arbitrator can have jurisdiction over evidentiary issues but lack the power to order document production. In other words, to exercise proper

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authority over a dispute, the arbitrator must have the jurisdiction to hear the dispute and the power to materialize the solution to that dispute once reached. Usually, that is the case.

The distinction is important because a matter that falls within the arbitrator’s jurisdiction cannot be litigated before a court.\(^6\) If the tribunal can hear the dispute but lacks the power to order the remedy requested by the party, then that party will be bound to find an alternative within the arbitration – an arbitrator with jurisdiction but without power is a dull knife for the claimant. In contrast, if the tribunal lacks jurisdiction, the party can claim relief before national courts.

Adaptation, in a way, is a matter of both jurisdiction and power. As a matter of jurisdiction, the arbitrator can hear an adaptation claim (for instance, whether hardship has ensued). As a matter of power, the arbitrator can grant the adaptation claim, issuing an order to that effect. The distinction has practical importance:

In the context of hardship, an arbitrator with jurisdiction to hear a changed circumstances claim but without the authority to adapt is not a chimaera. Not all hardship definitions provide for adaptation as the remedy.\(^7\) The parties can decide that adaptation is off the table and that the remedy to hardship should be termination. In those cases, however, the claim is not for adaptation, but for the parties’ chosen remedy. Therefore, if a party were to raise an adaptation claim based on a contract that does not provide for adaptation, the tribunal would lack jurisdiction over the claim – and, consequently, the power to

\(^6\) See supra note 5, p. 14.

\(^7\) See, for example, the 2003 model hardship clause of the International Chamber of Commerce (ICC). Note that a 2020 version of the ICC clause exists giving the parties the opportunity to choose adaptation as the remedy.
adapt. Conversely, a claim of hardship requesting termination would easily fall within the tribunal’s jurisdiction.

A situation where the tribunal lacks adaptation jurisdiction but theoretically has adaptation powers is the case where the *lex arbitri* empowers the arbitrators to adapt but the parties did not authorize the tribunal. A reverse situation would be when the parties authorized the tribunal to adapt, but a requirement imposed by the *lex arbitri* is not met – in that case, the tribunal has jurisdiction over the adaptation claim, but lacks the power to adapt. In both cases, the tribunal would not have the authority to issue an award adapting the contract, albeit for different reasons.

**IV. WHEN SHOULD ARBITRATORS BE ALLOWED TO ADAPT?**

If arbitration is a creature of contract, then the starting point should be finding an authorization by the parties to adapt. This is due to the principle of *pacta sunt servanda*, mandating that the contract be performed as agreed, and the intangibility of contract, stating that the arbitrators normally lack the power to change the contract of the parties. The authorization may be oral or written and its validity in either case will depend on the law governing the arbitration agreement and *lex arbitri*.

Once an agreement to adapt is established, the arbitrator must determine whether that power is supported by the *lex arbitri*. If an adaptation claim is non-arbitrable, the arbitrator is deprived of authority. Likewise, if the *lex arbitri* imposes additional requirements on adaptation, they should be observed.

Finally, the arbitrator should determine to which extent the remedy of adaptation exists in the contract (for instance, a hardship clause) or the applicable law, and its requirements. If so, the trigger for adaptation would be the criteria for hardship.
recognized by the contract or the law. The existence of an adaptation remedy in the contract or the applicable substantive law is also relevant to determine whether the parties agreed that the tribunal would be empowered to adapt.
International sales contracts increasingly include arbitration agreements as the default dispute settlement mechanism. The interplay between the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG or Convention) and arbitration is the basis for the annual Willem C. Vis Commercial Arbitration Moot and a fertile source of academic discussion. In international sales contracts providing for arbitration, does the CISG apply to the arbitration agreement?

I. Validity of the Arbitration Agreement

International arbitration has a lot of moving parts. One of the most complex, and the one that relates directly to the law applicable to the arbitration agreement, is the matter of the arbitration agreement’s validity. The validity of the arbitration agreement is composed of multiple elements: formal validity, substantive validity, arbitrability, capacity, authority. Each element can potentially be governed by a different law.¹ This article will focus on the substantive validity element, since Article 4 of the CISG excludes from the Convention questions of

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capacity or authority; and arbitrability and formal validity are generally not considered as being governed by the CISG.

The substantive validity of the arbitration agreement normally includes questions of formation, interpretation, and its effects – matters governed by contract law generally. These questions play a crucial role in determining the amplitude of the arbitral tribunal’s jurisdiction and powers. Generally, the parties are free to choose the law that governs the substantive validity of the arbitration agreement (lex compromissi). The problem arises when no choice has been made. Two main competing theories exist.

The first theory states that, in absence of a choice, the lex compromissi is the law applicable at the seat of arbitration (lex loci arbitri). This theory points out the closeness between the arbitral procedure and the seat – arguing that the arbitral seat is the ‘center of gravity’ of the arbitration. The second theory states that the proper law of the arbitration agreement is the law that the parties chose to govern the underlying contract (lex contractus). This theory argues that the selection of lex contractus is an indication of an implicit choice by the parties of

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4 See, for example, the model arbitration clause suggested by the Hong Kong International Arbitration Centre (HKIAC), which expressly allows the parties to designate the lex compromissi: ‘The law of this arbitration clause shall be...’. HKIAC, Administered Arbitration Rules 2018, p. 2.

5 See Principle XIV.1(a) of the Translex Principles, comments 1-5.
the *lex compromissi*. Other (less accepted) theories exist, including a French theory stating that the arbitration agreement needs no ‘proper law’ and that the parties’ intentions are enough, but I digress.

In a way, the *lex compromissi* mirrors the *lex contractus* – just like the latter is the ‘proper law’ of the underlying contract, the former is the ‘proper law’ of the arbitration agreement. The division is justified (or necessary, depending on the theory adopted) due to the separability doctrine. The separability doctrine states that the invalidity of the contract does not affect the arbitration agreement. This doctrine generally seeks to preserve the jurisdiction of the arbitral tribunal when deciding on claims that the contract is null. The effect of the doctrine on the applicable law depends on how extensively one interprets it. If one interprets that the separability doctrine only applies when the contract’s validity is challenged, for all other purposes the arbitration agreement is nothing more than another clause, subject to the same law. If one interprets that the arbitration agreement’s validity is always independent, then the contract’s choice of law does not extend to the arbitration agreement. In the end, the separability doctrine merely causes that the choice of law in the contract may or may not be the same in the arbitration agreement. Concluding the same law applies would need evidence that the parties impliedly intended for the *lex contractus* to be also the *lex compromissi*.

The *Sulamérica* case decided by the England and Wales Court of Appeal has provided a three-step analysis to determine

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7 See Principle XIII.2.4(c) of the Translex Principles: ‘The invalidity of the main contract does not automatically extend to the arbitration clause contained therein unless it is proven that the arbitration agreement itself is vitiated by fraud, or initial lack of consent (Principle of Separability).’

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the \textit{lex compromissi}, which is useful in practice. The arbitrators should start by determining whether the parties made an express choice. Then, the arbitrators should determine whether the parties made an implied choice. Finally, if no express or implied choice was made, the arbitrators should select the law that has the ‘closest and most real connection’ to the arbitration agreement. The \textit{lex contractus} selected by the parties could be an indication of an implied choice; if no implied choice exists, the law most closely connected to the arbitration agreement is generally regarded to be the law of the arbitral seat.\footnote{For more detail on the \textit{Sulamérica} case, see Harry Ormsby, \textit{Governing Law of the Arbitration Agreement: Importance of Sulamérica case Reaffirmed where Choice of Seat was Agreed without Actual Authority}, Kluwer Arbitration Blog, 29 January 2014, available at: \url{http://arbitrationblog.kluwerarbitration.com/2014/01/29/governing-law-of-the-arbitration-agreement-importance-of-sulamerica-case-reaffirmed-where-choice-of-seat-was-agreed-without-actual-authority/}.}

\section{General Applicability of the CISG}

As with the arbitration agreement, the law governing a contract can be chosen by the parties. The parties can expressly opt into the CISG. In absence of a choice, one must determine the applicability of the CISG. According to Article 1(1), the CISG applies when the parties to the contract are based in different Contracting States (say, Germany and Switzerland) or when the rules of private international law lead to the laws of a Contracting State.

Since the CISG is an international treaty, public international law mandates Contracting States and its organs to obey it. Article 1(1) obligates the courts of Contracting States to apply the CISG whenever one of the alternatives is met. However, arbitral tribunals are not bound by such rules of public international law. Modern arbitration law tends to favor the arbitrators’ discretion in selecting the law that applies to the
merits when none was selected by the parties.\textsuperscript{9} Frequently, in international sales contracts, arbitrators opt to apply the CISG.\textsuperscript{10}

III. ARBITRATION AGREEMENTS UNDER THE CISG

The CISG, of course, was not designed to govern arbitration agreements. By its name and structure, it governs international sales contracts, and arbitration agreements are clearly not that. However, the CISG governs basic concepts of contract law that are relevant for substantive validity of arbitration agreements, such as formation (Articles 14-24), interpretation (Article 8) and remedies for breach. Moreover, as stated above on the theories of substantive validity, the \textit{lex contractus} can govern the substantive validity of the arbitration agreement under specific circumstances.

The CISG thus becomes relevant when it governs a sales contract that itself has an arbitration clause. Majority opinion appears to accept the CISG’s applicability as \textit{lex compromissi} in those cases.\textsuperscript{11} This is consistent with the CISG’s provisions: Article 19(3) states that introduction of a dispute resolution clause is considered a ‘material alteration’. Article 81(1) states that dispute resolution clauses survive the avoidance of the sales contract. This suggests that the CISG treats arbitration clauses

\textsuperscript{9} Modern arbitration law permits the arbitrators to select the law that appears more appropriate, in absence of party choice. See Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration (Model Law); Article 35(1) of the UNCITRAL Arbitration Rules; Article 21(1) of the ICC Rules of Arbitration; Article 36.1 of the HKIAC Arbitration Rules 2018; Article 27(2) of the Vienna International Arbitration Center Arbitration Rules; Rule 31.1 of the Singapore International Arbitration Center Arbitration Rules; etc.

\textsuperscript{10} See Schwenzer and Jaeger \textit{supra} at note 3, pp. 316, 317.

\textsuperscript{11} The following cases have recognized this approach: CISG-online 45 (arbitration agreements); CISG-online 1476 (arbitration agreements); CISG-online 344 (choce of forum clauses); CISG-online 767 (choice of forum clauses); CISG-online 1232 (choice of forum clauses).

However, the same could apply if the \textit{lex loci arbitri} theory is adopted and the arbitral seat is a Contracting State: the arbitrators retain discretion to determine whether to choose uniform or non-uniform law applicable at the seat.\footnote{13}{See Schwenzer and Jaeger \textit{supra} at note 3, p. 323.} To avoid the problems of compatibility, parties are advised to agree expressly that their arbitration agreement will be governed by the CISG to the extent that it is applicable.

\section*{IV. Why Should the CISG Apply to the Arbitration Agreement?}

The CISG is one of the biggest triumphs for uniformity. It provides a middle ground between common law and civil law approaches and embodies a theory of contract that is unified and internationalized. It was the basis to develop later uniform instruments governing a broader group of commercial transactions, such as the UNIDROIT \textit{Principles of International Commercial Contracts}.

As a matter of neutrality, the CISG is more likely to provide a contractual \textit{lingua franca} for parties involved in international sales. Moreover, as the law that governs the contract, applying the CISG to the arbitration agreement safeguards the expectations of the parties, who rarely conceive of a part of their contract having a different applicable law from the rest. Most importantly, considering the transnational character of commercial arbitration in such cases, the CISG is better
equipped to address transnational problems of contract law, as it was designed to do so.
THE LEGALITY OF ESPIONAGE UNDER INTERNATIONAL LAW

Juan Pablo Hernández*

Table of Contents

I. Espionage during Wartime ................................................................. 32
II. Espionage during Peacetime............................................................... 32
   A. A Breach of the UN Charter? ......................................................... 33
   B. Diplomat or Spy: Diplomatic Law ................................................. 34
   C. Breach of Customary International Law? ....................................... 36
   D. Estoppel and Persona non Grata Declarations ................................ 36
   E. Cyberespionage ........................................................................... 37
III. Conclusions ..................................................................................... 38

The issue of espionage is an important aspect of international relations that is usually overlooked by legal literature. It is a sensitive issue, normally measured against situational ethics or political convenience, rather than the yardstick of international law. As a result, the legal status of espionage is mired with uncertainty and ambiguity, as this article will show.

* Juan Pablo Hernández is the founder and editor-in-chief of The Treaty Examiner and a Moot coach at Universidad Francisco Marroquín (Guatemala).
I. Espionage during Wartime

The legal effects of espionage are clear during wartime. A ‘spy’ is an agent of one belligerent that gathers information of the opponent clandestinely, under false pretense or in disguise, with the intention to communicate it to the first belligerent.\(^1\) Under treaty and customary humanitarian law, spies do not enjoy prisoner-of-war protection. A spy captured during an espionage operation can be convicted for his or her acts – although convictions cannot be handed down without a prior, regular trial in accordance with basic rules of due process.\(^2\) The legal status of wartime espionage, on the other hand, is less certain. International humanitarian law (IHL) does not declare espionage outright illegal. However, as with any war practice, it does not condone it either. IHL places great importance on transparency of the affiliation of combatants and the status of other participants in war. As irregular agents that undertake covert operations, spies are considered unlawful combatants.

II. Espionage during Peacetime

During peacetime, the position of espionage is more ambiguous. No treaty exists regulating the use of covert agents for the purposes of gathering intelligence. It is even difficult to determine the proper scope of what constitutes ‘espionage’ for the purposes of international law – for instance, whether espionage covers also diplomats that attempt to uncover sensitive information of the receiving State to disclose it, or even journalists that clandestinely leak information to a foreign

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\(^1\) See Article 46 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I).

\(^2\) See rule 107 of the Database of Customary IHL hosted by the International Committee of the Red Cross.
State. The legality of espionage must be measured against
general international law and existing instruments.

A. A Breach of the UN Charter?

The 1945 *Charter of the United Nations* (UN Charter)
establishes some of the most basic principles that govern
modern international law. Article 2(4) of the UN Charter,
establishing the principle of non-intervention, states as follows:

*All Members shall refrain in their international
relations from the threat or use of force against the
territorial integrity or political independence of any
state, or in any other manner inconsistent with the
Purposes of the United Nations.*

Some authors take a hard line on espionage. They argue
that espionage, which involves the presence of clandestine
agents in the territory of another State, violates the general duty
of non-intervention mandated by the UN Charter.³ Those
opinions fall short of considering espionage an international
crime.⁴

It is doubtful that espionage breaches the non-intervention
principle of Article 2(4). The deployment of covert agents into
the territory of other States normally seeks to influence or
collect information of internal affairs of another State.⁵ The

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⁵ See, for the sake of example, *US Code*, Title 50, Chapter 15, Subchapter III, Section 413b(e) (by reference to the 1947 *National Security Act*), which defines ‘covert action’ as ‘activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly...’
purpose of collecting information per se could hardly constitute intervention (see infra on diplomatic law). Seeking to influence internal affairs, conversely, is far less benign – however, whether mere interference violates the non-intervention principle is debatable.⁶

On the other hand, some authors claim the legality of espionage stating that it is a form of ‘pre-emptive’ or ‘anticipatory’ self-defense.⁷ However, the existence of a right to pre-emptive self-defense is in itself doubtful under the UN Charter framework.⁸

**B. Diplomat or Spy: Diplomatic Law**

The main purpose of espionage is to collect information of the host State and communicate it to the sending State. This purpose is not unheard of in international law. Diplomatic law states it as one of the tasks entrusted on diplomatic missions.⁹ Spies and diplomats are different in four respects. First, spies do not disclose their status to the receiving State, as their operation is covert. Second, unlike diplomats, spies do not only seek to ascertain ‘conditions and developments’ in the receiving State, but also to uncover confidential and highly sensitive information that the receiving State does not make readily available (for instance, national security information). Third, unlike diplomats, spies do not necessarily employ lawful means in that endeavor. Finally, diplomats have multiple functions aside from information collection: the 1961 Vienna Convention

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⁹ See Article 3(1)(d) of the VCDR.
on Diplomatic Relations (VCDR) states that the other functions of diplomats are to represent their sending State, to protect its interests and its nationals abroad, to negotiate and to promote friendly relations (see Article 3(1)). The similarity of the roles creates a significant risk of overlap, which has led States to expel diplomats on accusations of espionage. Some authors consider that sending spies under the guise of diplomats is an abuse of diplomatic immunity and privileges.10

The VCDR does not regulate the scenario of sending covert agents to collect sensitive information or influence internal affairs. Something that can be pointed out is that one of the purposes of the VCDR is to facilitate friendly relations between States; whether espionage is conducive to friendly inter-State relations appears to be a matter of situational analysis. However, interpreting the legality of espionage from the VCDR’s silence would be repugnant to the object and purpose of that treaty.11 As clarified by the preamble of the VCDR, non-regulated issues should continue to be regulated by international custom.


11 Compare this situation to the 1951 Haya de la Torre (Colombia v. Peru) case before the International Court of Justice (ICJ). The case concerned the granting of asylum by the Colombian Embassy at Lima to Victor Haya de la Torre (a Peruvian national). In the 1950 Asylum case, the ICJ found that the asylum was not granted regularly and that it needed to be terminated as soon as possible. Colombia initiated proceedings again inquiring whether there was an obligation to surrender Haya de la Torre. The ICJ indicated that the 1928 Convention on Asylum (Havana Convention) did not regulate cases of irregular asylum where the territorial State had not asked for the person to be sent out. The ICJ concluded that it would be ‘repugnant’ to the object and purpose of the Havana Convention to interpret that this silence implies an obligation to surrender the refugee. As with the manner of termination of irregular asylum under the Havana Convention, it appears that the issue of espionage has mostly been left to political expediency.
C. Breach of Customary International Law?

Customary international law refers to the practice of States accepted by them as mandated by law.\textsuperscript{12} Treaty law sometimes codifies such custom, but the latter remains a main and independent source of international law. To establish international custom, there must be uniform and constant practice by States denoting a sense of legal obligation.\textsuperscript{13} Acts taken for mere political convenience or courtesy fall short of custom.

It is highly questionable that there is a customary norm prohibiting espionage. Even if espionage could be considered immoral or unfriendly in international relations, that is not enough to crystallize custom. More than that, State practice is inconsistent. States are less tolerant of espionage against them than of their own espionage. The widespread use of espionage by States is usually invoked to demonstrate a lack of customary prohibition.\textsuperscript{14} That is not to say that there is State practice to the contrary – permission is also not supported by custom. Espionage appears to be a blind spot in customary international law.

D. Estoppel and Persona non Grata Declarations

It is a well-established principle of international law that States cannot go back on their previous statements or conduct if such practice was detrimentally relied upon by another State

\textsuperscript{12} See Article 38(1)(b) of the Statute of the International Court of Justice.


\textsuperscript{14} Arbër Ahmeti, \textit{Question on Legality of Espionage Carried Out Through Diplomatic Missions}, International Association for Political Science Students, 16 February 2015, available at: https://www.iapss.org/2015/02/16/question-on-legality-of-espionage-carried-out-through-diplomatic-missions/.
The estoppel principle could prevent States from challenging the legality of espionage operations on the basis that the practice of espionage is widespread in the accusing States, presumably inducing reliance on the challenged State.

On the other hand, considering the (claimed) widespread use of espionage in international relations, it is unlikely that States will attempt to challenge another State’s espionage operations before a court of law. Diplomatic law gives States a far more effective power: to unilaterally declare diplomatic agents *personae non gratae* for interfering in internal affairs. The expulsion of diplomatic agents claimed to be intelligence gatherers undercover is not rare. This is a possible tool if a diplomatic agent is discovered to be engaging in espionage.

**E. Cyberespionage**

Not all espionage is done through the sending of covert agents. Espionage through surveillance programs or remote monitoring systems is also possible with today’s technology. According to the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Tallinn Manual), the principle of non-intervention applies to war initiated or conducted through cyber-attacks. In the context of remote espionage through surveillance systems, the same rules on non-intervention,

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16 See Article 9 of the VCDR.

17 See Article 41(1) of the VCDR.


19 See *supra* note 6, rule 10.
sovereign equality and political independence should continue to apply. The commentary to the Tallinn Manual states that cyberespionage operations lacking coercive elements do not *per se* violate the non-intervention principle, including when the intervention requires breaching protective virtual barriers.\(^{20}\)

Another central issue is whether a cyberattack or operation can be attributed to a State, which should follow ordinary norms of State attribution.\(^{21}\)

III. CONCLUSIONS

State practice and treaty law are highly ambiguous on the issue of espionage. The better view is that current international law neither prohibits nor condones it – an uneasy permission of sorts. To the extent that a situation of espionage escapes rules on non-intervention, diplomatic relations and IHL, it appears that States are reluctant to impose a standard of legality to this issue. Given the covert nature of espionage, this hesitation is coherent. In the end, an overview of the legal norms at play reveals that espionage is an issue often left to considerations of political convenience rather than the scrutiny of international law.

\(^{20}\) See *supra* note 6.

\(^{21}\) See *supra* note 6, rule 6.
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